No. _____

In The
Supreme Court of the United States

KRISTA ANN MUCCIO,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Several states have enacted statutes that criminalize sharing sexually related (but not necessarily obscene) speech when the exchange occurs electronically, is between an adult and a minor, and is communicated with the intent to arouse sexual desire. The Ninth Circuit and Texas's highest criminal court have held that these types of statutes prohibit a substantial amount of protected speech and are unconstitutionally overbroad. In contrast, the highest courts of Georgia and Minnesota have held that such statutes are permissible content-based restrictions on speech.

The question presented is: Do statutes of this kind, which criminalize any sexually related speech sent to a minor electronically with the intent to arouse, satisfy First Amendment scrutiny?

PARTIES TO THE PROCEEDINGS

Petitioner Krista Ann Muccio was the defendant in the Minnesota trial court, the respondent in the Minnesota Court of Appeals, and the respondent in the Minnesota Supreme Court.

The State of Minnesota was the plaintiff in the Minnesota District Court, the appellant in the Minnesota Court of Appeals, and the appellant in the Minnesota Supreme Court.

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Krista Ann Muccio respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota.

INTRODUCTION

This Court should grant the petition to resolve a square and irreconcilable conflict on an important issue of First Amendment doctrine: whether states can criminalize an adult's electronic sharing of sexually related, but not necessarily obscene, speech with a minor, based solely on the speaker's intent to arouse sexual desire.

Every state already criminalizes electronic solicitation of children, and almost every state prohibits distributing material that is obscene or harmful to minors. Nonetheless, over a decade ago, states began experimenting with additional ways to criminalize electronic communication of sexually related speech to minors based on a novel intent requirement: whether the speaker intends the speech to cause sexual arousal.

The decision below, deepening an entrenched conflict on whether those types of statutes survive First Amendment scrutiny, creates a 2-2 split among state courts of last resort and a federal court of appeals. The Ninth Circuit and Texas's highest criminal court have held that these types of statutes prohibit a substantial amount of protected speech and are unconstitutionally overbroad. In sharp contrast, the Georgia and Minnesota high courts have upheld virtually identical

statutes. As a result, the same speech concerning the same content spoken with the same intent is protected in Texas and states within the Ninth Circuit but could make the speaker a felon in Georgia or Minnesota. In fact, speech sent from Texas or a state within the Ninth Circuit, which would be protected within those regions, could result in prosecution if received in Minnesota.

This case provides an ideal vehicle to resolve this critical constitutional question. The Minnesota courts below squarely addressed the validity of the statute under the First Amendment. Moreover, petitioner raises a facial challenge, so no facts are in dispute; and all aspects of her challenge were thoroughly briefed and argued below.

Rejecting a well-reasoned decision by the Minnesota Court of Appeals, the Minnesota Supreme Court followed Georgia's high court in dismissing the significance of the constitutionally protected speech covered by the statute. As the Ninth Circuit and the Texas high court held, however, these types of statutes reach a wide array of electronic communications that have serious literary, educational, or cultural value. Covered speech could range from electronically shared song lyrics from the *Billboard* Top Ten, to passages from classic novels, to counseling advice on sexual identity, or even to religious leaders' advocacy of abstinence by extolling the virtues of conjugal relations. The speaker's intent to arouse, standing alone, is too blunt a tool to distinguish predatory adults from protected artists, educators, and counselors. The statutes at issue here criminalize a substantial amount of protected

speech and are not narrowly tailored to cure their unconstitutional overbreadth.

Confusion and uncertainty over the scope of First Amendment protections extend beyond the jurisdictions directly involved in the conflict. Other states need guidance from the Court to find the constitutional line between protecting minors from harmful material and silencing protected speech. If those states reach beyond constitutional limits in their attempts to protect minors, even innocent speakers will feel compelled to "hedge and trim" their online communications, *see Buckley v. Valeo*, 424 U.S. 1, 43 (1976), fearful that some jurisdiction will ascribe criminal consequences to noncriminal intent. Moreover, this chilling effect impacts the "most important" place in today's society for "the exchange of views," namely "cyberspace—the 'vast democratic forums of the Internet.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)). This Court's guidance is essential to ensure that the First Amendment's meaning does not depend on the speaker's or recipient's residence.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota (Pet. App. 1-29) is reported at 890 N.W.2d 914. The opinion of the Minnesota Court of Appeals (Pet. App. 30-50) is reported at 881 N.W.2d 149. The opinion of

the Dakota County District Court (Pet. App. 51-68) is unreported.

JURISDICTION

The Supreme Court of Minnesota entered its judgment on March 8, 2017. On May 24, 2017, Justice Alito extended the time to file a petition for a writ of certiorari to and including July 7, 2017. Pet. App. 82. On June 28, 2017, Justice Gorsuch further extended the time to file a petition for a writ of certiorari to and including August 4, 2017. Pet. App. 81. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

The Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

Subdivision 2a of Minnesota Statutes § 609.352, under which petitioner was charged, states:

> A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony . . .
>
> . . . .
>
> (2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct . . . .

Minn. Stat. § 609.352 subd. 2a(2) ("subdivision 2a(2)"). The text of § 609.352 in its entirety is set forth in the Appendix (Pet. App. 69-71), along with related Minnesota statutes (Pet. App. 69, 71-72). Also set forth in the Appendix are statutes from Georgia (Pet. App. 72-75), Oregon (Pet. App. 75-76), and Texas (Pet. App. 77-80) that are virtually identical to subdivision 2a(2).

STATEMENT

I. STATUTORY BACKGROUND

Minnesota has long-standing restrictions on obscenity. At least since the 1960s, Minnesota has prohibited furnishing obscene material, Minn. Stat. § 617.241 subd. 2(a) (1961) (amended 1988), and commercial furnishing of harmful material to children, *id*. § 617.293 subd. 1 (1969). Minnesota also criminalizes soliciting a child to engage in sexual conduct. *Id*. § 609.352 subd. 2 (1986).

In addition to its laws banning obscene, harmful, or solicitous communications with children, Minnesota created a new restriction in 2007 that criminalized electronic "communication with a child . . . relating to or describing sexual conduct" if the speaker has "the intent to arouse the sexual desire of any person." *Id*. § 609.352 subd. 2a (2007) (amended 2009).[1] The prohibition applies to any communication that either originates within the state or is received in the state. *Id*. § 609.352 subd. 2b. The announced intention of this added restriction was to prohibit "grooming" of children for future sexual contact. Pet. App. 61 (citing minutes from Minnesota House and Senate). The Minnesota Attorney General noted that the statute followed the model of statutes in Washington, Texas, and Georgia that made that type of communication a crime.

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[1] The original statute applied specifically to computer-based communications, but in 2009 the legislature amended subdivision 2a(2) to apply to electronic communications broadly. Minn. Stat. § 609.352 subd. 2a(2).

Brief of Amicus Curiae Minnesota Coalition Against Sexual Assault at 6, *State v. Muccio*, 890 N.W.2d 914 (Minn. 2017) (No. A15-1951).

II. FACTUAL AND PROCEDURAL HISTORY

This case presents a facial challenge to subdivision 2a(2). *See* Pet. App. 51. Minnesota charged petitioner under subdivision 2a(2) for allegedly exchanging sexually explicit messages and images with a fifteen-year-old male through Instagram's direct-messenging service.[2] Pet. App. 32. In a pre-trial motion, petitioner argued that subdivision 2a(2) violated the First Amendment. Pet. App. 51. Agreeing, the district court held that subdivision 2a(2) was "facially overbroad and not narrowly drawn to promote the State's compelling interest in protecting children from sexual predators online." Pet. App. 57. The court therefore dismissed the charge under subdivision 2a(2). *Id.*

In an accompanying memorandum, the district court detailed its reasons for holding subdivision 2a(2) unconstitutional. It noted that subdivision 2a(2) "does not confine prohibited communications to those subject matters considered obscene, pornographic, or harmful to minors by any standard." Pet. App. 63. Instead, subdivision 2a(2) "broadly prohibits adult-to-child

[2] Petitioner was also charged with possession of a pornographic work, Minn. Stat. § 617.247 subd. 4(a), related to the same incident. Pet. App. 51, 58. The district court denied her motion on probable-cause grounds to dismiss that count, Pet. App. 58, 67, but stayed the trial proceedings pending the state's appeal of the decision regarding subdivision 2a(2). Pet. App. 4 n.1.

communications about subjects merely 'relating to' sexual conduct." *Id.* Thus, prohibited communications could include socially important, but sexually related, topics like contraception. *Id.* Moreover, the court noted, arousing someone else's sexual desire is not unlawful. *Id.* Because subdivision 2a(2)'s intent requirement was not an intent to engage in illegal conduct, the district court found that subdivision 2a(2) "punishes speech simply because that speech increases the chance that a pedophile might use it to commit an illegal act 'at some indefinite future time.'" Pet. App. 66 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002)). The court concluded that the statute was both facially overbroad and not narrowly tailored to a compelling government interest given the existence of Minnesota's harmful-to-minor and solicitation statutes. *Id.*

In its initial appeal, respondent conceded that subdivision 2a(2) is a content-based speech regulation, but argued that the statute is nevertheless constitutional because it criminalizes "only unprotected speech." Pet. App. 34, 36. The Minnesota Court of Appeals, rejecting that argument and affirming the district court, determined that subdivision 2a(2) "is not limited to speech integral to criminal conduct or obscenity, nor can . . . [it be] deem[ed] . . . permissible by analogizing it to child pornography." Pet. App. 42. Instead, subdivision 2a(2) criminalizes protected speech. *Id.*

The court of appeals reasoned that subdivision 2a(2) is constitutionally overbroad because it prohibits communication with an intent to arouse the sexual

desires of "*any person*" even if the communication is only "*relating to*" sexual conduct. Pet. App. 44. The court rejected respondent's argument that the statute's specific-intent requirement cures its overbreadth, noting that respondent "cites no authority for the proposition that expression made with the specific intent to arouse the sexual desire of any person . . . is speech unprotected by the First Amendment." Pet. App. 44-45. The court also reasoned that the limiting constructions respondent proposed "require . . . add[ing] language" to the statute. Pet. App. 46-47. Thus, the court found subdivision 2a(2) "not readily subject to a narrowing construction to save it from overbreadth." Pet. App. 48.

Respondent, seeking review in the Minnesota Supreme Court, advocated three limiting constructions of subdivision 2a(2). *See* Pet. App. 8-14. First, respondent argued that the statute "requires the communication to be directed at a child." Pet. App. 8. Second, respondent urged the court to interpret "the intent to arouse the sexual desire of any person" as an intent to arouse only the adult or the child engaged in the communication. Pet. App. 10. Third, respondent "argue[d] that the term 'sexual conduct' is limited to communications that describe or relate to sexual conduct involving only the adult or the child involved in the communication." Pet. App. 12.

The Minnesota Supreme Court accepted the first limiting construction—holding that the statute "does not proscribe non-targeted mass electronic communications"—but rejected the other two limiting constructions. Pet. App. 8-14. It interpreted subdivision 2a(2) as

"prohibit[ing] an adult from participating in the electronic transmission of information relating to or describing the sexual conduct of any person, if the communication was directed at a child, and the adult sending the communication acted with the specific intent to arouse the sexual desire of any person." Pet. App. 14. The court acknowledged that under that construction "it is possible for an adult to engage in communications with a child while also having the intent to arouse someone who is not directly involved in the communication." Pet. App. 12.

Even so, the Minnesota Supreme Court upheld subdivision 2a(2) as constitutional. Pet. App. 29. The court did so despite holding that subdivision 2a(2) was not limited—as respondents had further urged, Pet. App. 14—to obscenity and speech integral to criminal conduct. Instead, the court acknowledged that subdivision 2a(2) "regulates some speech that the First Amendment protects." Pet. App. 24. Nonetheless, it dismissed the court of appeals's concern that subdivision 2a(2) criminalizes a wide array of speech with literary, artistic, political, or scientific value. Pet. App. 22. The court assumed that distributors of those types of mass-communication speech would "likely not act with the requisite intent," Pet. App. 23, and that violations of subdivision 2a(2) are "unlikely" to occur unless the adult involved intended to commit future illegal acts with the child. Pet. App. 27. Having made those assumptions, the court concluded that subdivision 2a(2)

is constitutional because it is not substantially overbroad in relation to its plainly legitimate sweep. Pet. App. 28.

REASONS FOR GRANTING THE PETITION

I. STATE HIGH COURTS AND A FEDERAL COURT OF APPEALS CONFLICT ON THE FIRST AMENDMENT VALIDITY OF STATUTES CRIMINALIZING SEXUALLY RELATED SPEECH SHARED ELECTRONICALLY WITH MINORS.

The decision below deepens an entrenched conflict on a matter of fundamental importance: the scope of First Amendment protections of electronic speech. Texas's highest criminal court and the Ninth Circuit have invalidated statutes criminalizing non-obscene sexually related electronic communications with minors made with an intent to arouse. Those courts reasoned that the statutes before them proscribed a substantial amount of protected speech under the First Amendment and were thus unconstitutional. By contrast, Georgia's highest court and the court below held that virtually identical statutes pass constitutional muster. They acknowledged that the statutes prohibited protected speech but nevertheless deemed the laws sufficiently limited to prevent substantial overbreadth. This Court should grant the petition to resolve the conflict and eliminate uncertainty over the scope of First Amendment protections in the burgeoning arena of electronic communications.

A. The Decision Below Conflicts With The Decision Of Texas's Highest Criminal Court In *Ex Parte Lo*.

The Texas statute at issue in *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), was virtually identical to the Minnesota statute at issue here, and the opinion below directly conflicts with the Texas court's First Amendment analysis. Like the Minnesota statute, the Texas statute prohibited contacting a minor via the internet, Minn. Stat. Ann. § 609.352 subd. 2a(2); Tex. Penal Code Ann. § 33.021 (2007) (amended 2015), with a sexually related communication.[3] With only slight wording differences, the sexual conduct to which the speech must relate was the same. *See* Minn. Stat. Ann. § 609.352 subd. 1(b); Tex. Penal Code Ann. § 43.25(a)(2). And, again like the Minnesota statute, the Texas statute prohibited communications made with the intent to arouse sexual desire. Minn. Stat. Ann. § 609.352 subd. 2a; Tex. Penal Code Ann. § 33.021(b) (2007) (amended 2015).

Both the Minnesota and Texas statutes criminalized sexually related electronic speech to minors. *See* Minn. Stat. § 609.352 subd. 2a(2); Tex. Penal Code Ann. § 33.021(b)(1) (2007) (amended 2015). But the Texas Court of Criminal Appeals and the Minnesota Supreme

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[3] The Minnesota statute prohibits "engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct." Minn. Stat. § 609.352 subd. 2a(2). The invalidated Texas statute prohibited "(1) communicat[ing] in a sexually explicit manner with a minor; or (2) distribut[ing] sexually explicit material to a minor." Tex. Penal Code Ann. § 33.021(b)(1)-(2) (2007) (amended 2015).

Court reached different conclusions on whether that prohibition included a substantial amount of protected speech. The Texas court observed that "[the] bar would encompass many modern movies, television shows, and 'young adult' books, as well as outright obscenity, material harmful to a minor, and child pornography." 424 S.W.3d at 17. The Minnesota court, by contrast, said that the statute did not cover a substantial amount of protected speech and therefore was not overbroad. Pet. App. 2-3, 28.

The Minnesota Supreme Court disagreed sharply with the Texas Court of Criminal Appeals in determining that speech targeted by the statute is integral to criminal conduct. Pet. App. 18-19. The Texas court observed that its statute did not speak to "an actor soliciting a child, meeting a child, intending to meet a child, or any other predatory conduct." 424 S.W.3d at 26. It noted that the statute would criminalize communications between an adult in Texas and a minor in "Outer Mongolia"—communications that could never lead to criminal contact. *See id.* The statute thus reached beyond speech integral to criminal conduct, because "consistent with the First Amendment, it is conduct designed to induce a minor to commit an illegal sex act with titillating talk that may be proscribed, not the titillating talk itself." *Id.* In contrast, the Minnesota court asserted that almost all of the speech covered by the statute was "grooming" and thus "integral to criminal conduct." Pet. App. 18-19.

In addition to holding that most of the speech covered by the statute was integral to criminal conduct,

the Minnesota Supreme Court also stated that the specific-intent requirement ensured that the speech suppressed would "often" be obscene because sexually related adult-to-child communications would in many cases be "patently offensive" and "appeal to prurient interests." Pet. App. 20-22. The Texas court, by contrast, disagreed that the specific-intent requirement would limit the broad reach of the statute to materials that were either obscene or harmful to minors. 424 S.W.3d at 20. By its terms, the Texas court noted, the statute covers "sexually explicit literature . . . television shows, movies, and performances." *Id.* It further noted that "[c]ommunications and materials that, in some manner, 'relate to' sexual conduct comprise much of the art, literature, and entertainment of the world from the time of the Greek myths extolling Zeus's sexual prowess, through the ribald plays of the Renaissance, to today's Hollywood movies and cable TV shows." *Id.*

The Minnesota and Texas statutes were strikingly similar, and yet the Texas Court of Criminal Appeals and the Minnesota Supreme Court reached opposite conclusions as to their constitutionality. As a result, one jurisdiction is permitted to criminalize speech that is constitutionally protected in the other. In addition, because the Minnesota statute extends to any communication received in the state, *see* Minn. Stat. Ann. § 609.352 subd. 2b, the constitutional protection of a communication sent from Texas would depend on whether the recipient resided in Minnesota or in Texas.

B. The Decision Below Conflicts With The Ninth Circuit's Decision In *Powell's Books*.

The Oregon statute invalidated by *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010), was also identical to the Minnesota statute in all relevant respects. Like the Texas and Minnesota statutes, the Oregon statute prohibited sexually related communications with a minor made with an intent to arouse. *See* Or. Rev. Stat. § 167.057(1) (2008) (amended 2011, 2015). The definition of "sexual conduct" included in the Oregon statute is substantially the same as the definitions in the Texas and Minnesota statutes. *See* Or. Rev. Stat. § 167.051(4) (2008); Minn. Stat. § 609.352 subd. 1(b); Tex. Penal Code Ann. § 43.25(a)(2). In addition, the relevant statute held unconstitutional by the Ninth Circuit included a very similar specific-intent provision: that the person communicate "for the purpose of . . . [a]rousing or satisfying the sexual desires of the person or the minor," Or. Rev. Stat. § 167.057(1)(b)(A) (2008) (amended 2011); *see* Minn. Stat. § 609.352 subd. 2a; Tex. Penal Code Ann. § 33.021(b) (2007) (amended 2015). Indeed, the Oregon statute found unconstitutional was narrower than the Minnesota statute in that it prohibited arousing the sexual desire of only "the person or the minor" rather than the "intent to arouse the sexual desire of any person." *Compare* Or. Rev. Stat. § 167.057(1)(b)(A) (2008) (amended 2011), *with* Minn. Stat. § 609.352 subd. 2a(2).

The Ninth Circuit held that the Oregon statute's definition of "sexual conduct" was overbroad because it "reaches representations of activity, including the

touching of breasts or buttocks, that are commonly seen or read outside of pornographic materials, hard-core or otherwise." 622 F.3d at 1210. It did not find that the intent provision provided any limitation that would render the Oregon statute constitutional. *Id.*

Like the Texas court in *Lo*, the Ninth Circuit distinguished the section of the statute that prohibited communications for the purpose of inducing victims to engage in sexual activity from the section that prohibited communications for the purpose of arousal: "Whereas inducing a minor to engage in sexual activity is independently criminal, arousing oneself or a minor is not." *Id.* As noted above, *supra* at 13, that is in sharp contrast to the Minnesota Supreme Court, which accepted the state's assertion that most communication falling within the statute is "part of a process called 'grooming,'" Pet. App. 17-18, that "is integral to criminal conduct," Pet. App. 19, and therefore falls outside the protection of the First Amendment.

Again, speech that is protected in one region (states within the Ninth Circuit) can be criminalized if sent or received in another jurisdiction (Minnesota).

C. The Decision Below Accords With The Supreme Court Of Georgia's Decision In *Scott*.

The statute at issue in *Scott v. State*, 788 S.E.2d 468 (Ga. 2016), *cert. denied*, 137 S. Ct. 1328 (2017), is also virtually identical to the Minnesota statute. Both statutes, like the Texas and Oregon statutes at issue in

Lo and *Powell's Books*, criminalize sexually related electronic speech between adults and minors made with the intent to arouse. Ga. Code Ann. § 16-12-100.2; Minn. Stat. § 609.352 subd. 2a(2); *see also* Or. Rev. Stat. § 167.057(1) (2008) (amended 2011); Tex. Penal Code Ann. § 33.021(b) (2007) (amended 2015). Both the Supreme Court of Georgia and the Minnesota Supreme Court determined that the statutes' specific-intent requirements narrowed the statutes sufficiently to defeat First Amendment overbreadth challenges. 788 S.E.2d at 476; Pet. App. 27. Both courts also concluded that the intent requirement would conform the statutes—usually, but not always—to the obscenity standards set forth in *Miller v. California*, 413 U.S. 15 (1973). The Georgia court characterized the elements of the statute as "to some degree" a "proxy" for the *Miller* standard, 788 S.E.2d. at 476, whereas the Minnesota court determined that the elements ensured the speech criminalized would "often" be obscene under *Miller*. Pet. App. 20-21.

II. SUBDIVISION 2A(2) IS INVALID UNDER THE FIRST AMENDMENT.

A. Subdivision 2a(2) Is Facially Overbroad Because It Reaches a Substantial Amount of Non-Obscene Speech That Is Not Integral to Criminal Conduct.

Subdivision 2a(2) prohibits a substantial amount of constitutionally protected speech, and is therefore overbroad. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a

substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft*, 535 U.S. at 255. A court determines whether a statute's overbreadth is "*substantial*, not only in an absolute sense, but also relative to [its] plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). Because subdivision 2a(2) prohibits a substantial amount of protected speech relative to its plainly legitimate sweep, it cannot withstand First Amendment scrutiny. *See id.* at 292, 297-304.

The Minnesota Supreme Court acknowledged that subdivision 2a(2) "regulates some speech that the First Amendment protects," insofar as it regulates speech not integral to criminal conduct, not obscene, and not within another category of unprotected speech. Pet. App. 24. But the court dismissed that overreach as sufficiently cabined by the statute's requirements that the communication be intended to arouse sexual desire in any person and that it be targeted at a specific child. Pet. App. 26-28. Intent to arouse, however, is often unrelated to soliciting or luring a minor for sexual activity, and targeted, individualized marketing strategies are commonplace today in an array of electronic-communication platforms that minors frequent. The court, therefore, underestimated subdivision 2a(2)'s impact on protected speech.

Two aspects of the statute ensure that its application to protected speech will be substantial. First, subdivision 2a(2) requires only that the communication "relat[e] to . . . sexual conduct." Minn. Stat. § 609.352

subd. 2a(2). By its plain terms, any message referencing sexual orientation, sexual activity, or even the word "sex" itself, may be construed as "relating to . . . sexual conduct." A broad range of speech "relat[es] to . . . sexual conduct" without being obscene or solicitous.

Second, the statute requires that the communication be intended to "arouse the sexual desire of *any* person." Minn. Stat. § 609.352 subd. 2a (emphasis added). By its plain language, "arous[ing] the sexual desire of any person" could simply mean to stimulate any person's desire for sex. The statute does not require that sexual arousal be directed toward the parties to the communication or even toward any specific person at all.

The broad scope of those two elements allows the statute to encompass a great deal of protected speech. A text message from an older sister to her younger sister that, "your boyfriend is really cute—you should totally sleep with him," relates to sexual conduct and is intended to arouse the sexual desire of the younger sister for her boyfriend. Indeed, even a message from a youth minister that says, "in marital sex, spouses participate in the very love of God," may be intended to arouse the sexual desires of young teens toward their future spouses while extolling the virtues of abstinence until marriage.[4] And an e-mail from a counselor to a

[4] *See* JOHN PAUL II, FAMILIARIS CONSORTIO para. 13, http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html ("Conjugal love reaches that fullness to which it is interiorly ordained, conjugal charity, which is the proper and specific way in which the spouses

teen questioning sexual orientation could also fall within subdivision 2a(2)'s scope if it encourages the teen to acknowledge and accept his or her sexual desires.

Subdivision 2a(2)'s overbreadth is further demonstrated by the wide array of constitutionally protected literary, artistic, and musical works that would fall within its ambit if shared electronically with a minor. Applying the statutory definitions, subdivision 2a(2) would prohibit sharing literary works like *Lady Chatterley's Lover*, *The Handmaid's Tale*, *Lolita*, and *Fifty Shades of Grey* if the works were shared with an intent to arouse. It would similarly prohibit a just-turned-eighteen-year-old high-school senior from sharing, with intent to arouse his just-shy-of-sixteen-year-old girlfriend, the lyrics to Beyoncé's double-Grammy-winning *Drunk in Love*[5] or at least 50% of the current top-ten *Billboard* songs.[6] It would prohibit sharing dialogue

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participate in and are called to live the very charity of Christ who gave Himself on the Cross."). Saint John Paul II's Theology of the Body, which focuses on the centrality and importance of sex in God's plan for humanity, is frequently taught to middle-school and high-school students and could be shared electronically by a teacher in a manner that violates subdivision 2a(2). *See Theology of the Body for Teens*, THEOLOGY OF THE BODY, http://the theologyofthebody.com/information/teens.html (last visited July 25, 2017).

[5] Lyrics at http://www.azlyrics.com/lyrics/beyonceknowles/drunkinlove.html (last visited July 25, 2017).

[6] *See The Hot 100: The Week of July 29, 2017*, BILLBOARD, http://www.billboard.com/charts/hot-100/2017-07-29 (referencing BRUNO MARS, *That's What I Like*, *on* 24K MAGIC (Atlantic Records 2017) (lyrics at http://www.azlyrics.com/lyrics/brunomars/thatswhatilike.html (last visited July 25, 2017)); DJ KHALED, *Wild Thoughts,*

featured in hit television shows like *Sex and the City*, *Girls*, and *Entourage*. Other courts have held that functionally identical statutes could sweep in those types of protected works. *See*, *e.g.*, *Powell's Books*, 622 F.3d at 1210; *Ex Parte Lo*, 424 S.W.3d at 20.

Moreover, arousing speech may be communicated for many reasons other than to solicit sexual activity, and therefore is often used in ways that are not obscene or integral to criminal conduct. Marketers long ago realized that "sex sells" and have since used sexual arousal to market everything from video games[7] to hamburgers.[8] Subdivision 2a(2) would criminalize a

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on GRATEFUL (We the Best Music Group and Epic Records 2017) (lyrics at http://www.azlyrics.com/lyrics/djkhaled/wildthoughts.html (last visited July 25, 2017)); LUIS FONSI & DADDY YANKEE, *Despacito Remix* (Universal Music Latin Entertainment, Republic Records, Def Jam Recordings, RGMB Records, and School Boy Records 2017) (lyrics at http://www.azlyrics.com/lyrics/luisfonsi/despacitoremix.html (last visited July 25, 2017)); FRENCH MONTANA, *Unforgettable*, *on* JUNGLE RULES (Epic Records and Bad Boy Records 2017) (lyrics at http://www.azlyrics.com/lyrics/frenchmontana/unforgettable.html (last visited July 25, 2017)); KENDRICK LAMAR, *HUMBLE.*, *on* DAMN. (Top Dawg Entertainment, Aftermath Entertainment, and Interscope Records 2017) (lyrics at http://www.azlyrics.com/lyrics/kendricklamar/humble.html (last visited July 25, 2017))).

[7] Stacy L. Smith & Emily Moyer-Gusé, *Voluptuous Vixens and Macho Males: A Look at the Portrayal of Gender and Sexuality in Video Games*, *in* SEX IN CONSUMER CULTURE: THE EROTIC CONTENT OF MEDIA AND MARKETING 51 (Eds. Tom Reichert & Jacqueline Lambiase 2006).

[8] Joyce Chen, *Kate Upton Hot and Bothered? In Carl's Jr. Spicy Burger Commercial, Model Strips Down & Heats Up*, N.Y. DAILY NEWS (Mar. 1, 2012), http://www.nydailynews.com/entertainment/gossip/kate-upton-hot-bothered-carl-jr-spicy-burger-commercial-model-strips-heats-screen-article-1.1031181.

college-aged boy sending Kate Upton's Carl's Jr. commercial to his high-school-aged younger brother with the intent that the brother be aroused by it. The statute also would criminalize an eighteen-year-old girl's sending an electronic copy of *Twilight* to her fifteen-year-old cousin to excite her about the romantic prospects of moving to a new school.[9] Those constitutionally protected communications could result in felony convictions, even if done with the consent of the minor's parent. *See Reno*, 521 U.S. at 865 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)) ("[W]e noted in *Ginsberg* that 'the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.' Under the [Communications Decency Act], by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute." (citation omitted)).

Subdivision 2a(2)'s sweep is not sufficiently cabined by the Minnesota court's determination that the statute does not bar non-targeted, mass communications

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[9] One reviewer observed that Stephenie Meyer's *Twilight* book series, which opens with a teen's uneasy relocation to a small town, "encapsulates perfectly the teenage feeling of sexual tension and alienation." Amanda Craig, *New Age Vampires Stake Their Claim*, THE TIMES (Jan. 14, 2006), https://www.thetimes.co.uk/article/new-age-vampires-stake-their-claim-qqqrz6w03mz. The *Twilight* series collectively spent over 235 weeks on the New York Times Best Seller list for Children's Series Books. Lev Grossman, *It's Twilight in America: The Vampire Saga*, TIME (Nov. 23, 2011), http://content.time.com/time/magazine/article/0,9171,1938712-1,00.html.

but only those directed at a child. Pet. App. 8-9. Today's technology-driven marketing techniques are designed to target specific ads at specific viewers. Personalized marketing, also called "one-to-one marketing," allows marketers to tailor their approach "differently for each and every customer." Ronald E. Goldsmith & Jon B. Freiden, *Have It Your Way: Consumer Attitudes Toward Personalized Marketing*, 22 MARKETING INTELLIGENCE & PLAN. 228, 228 (2004). In particular, Facebook—a social-media platform frequented by teens—allows advertisers on the platform to "[s]elect [their] audience manually based on characteristics, like age and location." Facebook Business, *Choose Your Audience: Connect With People Who Will Love Your Business*, FACEBOOK, https://www.facebook.com/business/products/ads/ad-targeting (last visited July 25, 2017). Accordingly, electronic communications by Carl's Jr., Stephenie Meyer, Beyoncé, and others who create and market sexually related material may fall within subdivision 2a(2)'s terms depending on the techniques used to attract minors as consumers.

B. Subdivision 2a(2) Cannot Survive Strict Scrutiny.

Because subdivision 2a(2) regulates protected speech based on its content, it is "presumptively unconstitutional." *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). That "traditional limitation[]" is rebuttable only by a showing of a "high degree of necessity" toward serving a "compelling state

interest." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804 (2011). But even "the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.'" *Packingham*, 137 S. Ct. at 1736 (quoting *Stanley v. Georgia*, 394 U.S. 557, 563 (1969)). "It is well-established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.'" *Id.* at 1738 (quoting *Ashcroft*, 535 U.S. at 255). "Even where the protection of children is the object, the constitutional limits on governmental action apply." *Brown*, 564 U.S. at 805. Because subdivision 2a(2) unnecessarily suppresses a substantial amount of lawful speech, it fails to satisfy strict scrutiny and therefore violates the First Amendment.

The state has a compelling interest in preventing the sexual abuse of children, but subdivision 2a(2) is not narrowly tailored to that interest. Minnesota already has other statutes that prohibit the furnishing of obscene materials, Minn. Stat. § 617.241 subd. 2(a), commercial furnishing of harmful material to children, *id.* § 617.293 subd. 1, and "solicit[ing] a child . . . to engage in sexual conduct with intent to engage in sexual conduct." *Id*. § 609.352 subd. 2. Indeed, Minnesota has passed a statute independently criminalizing the use of the Internet or other electronic devices for the purpose of soliciting a child by communicating sexually explicit content to the child. *Id.* subd. 2a(1).

The Minnesota Supreme Court accepted respondent's contention that "much" of the speech proscribed by subdivision 2a(2) is integral to criminal conduct

because it is a tool used to "groom" minors in preparation for solicitation. Pet. App. 17. But this Court has held that the possibility that speech "increases the chance an unlawful act will be committed 'at some indefinite future time' " is not a sufficient justification for the restriction of otherwise protected speech in the absence of "attempt, incitement, solicitation, or conspiracy." *Ashcroft*, 535 U.S. at 253. Minnesota has a compelling interest in protecting children from sexual abuse, and that interest is already served by its online solicitation statute, which prohibits all online speech "intrinsically related" to child abuse. *See New York v. Ferber*, 458 U.S. 747, 759 (1982).

III. THE APPLICATION OF THE FIRST AMENDMENT TO STATUTES CRIMINALIZING SEXUALLY RELATED SPEECH IS AN ISSUE OF PRESSING NATIONAL IMPORTANCE ON WHICH THE STATES AND LOWER COURTS NEED GUIDANCE.

This Court has described leaving questions of First Amendment protections in an "uneasy and unsettled constitutional posture" as "intolerable." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 246 n.6 (1974). Yet that is the state of the law regarding the protection of non-obscene, non-solicitous, sexually related electronic speech. The unsettled constitutionality of statutes like subdivision 2a(2) compels speakers to "hedge and trim" protected speech, fearful that innocent intentions could be misconstrued as falling within those statutes' criminal scope. *See Buckley*, 424 U.S. at 43.

"First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and leaving in place conflicting parameters of First Amendment protection removes that breathing space, chilling protected speech that may fall near the statutes' ambit—including, as previously discussed, a youth minister's electronically shared counseling on teen sexuality, an older sibling's text with high-school dating advice, and a Grammy Award winner's social-media advertising of a sexually related new song, targeted to a minor who purchased the singer's previous album.

To be sure, states have a strong interest in protecting children from sexual abuse. But states can pursue that interest without implicating First Amendment concerns, including by enacting statutes that prohibit solicitation of minors[10] and statutes that criminalize selling or disseminating material that is harmful to minors.[11]

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[10] *See, e.g.*, Haw. Rev. Stat. § 707-756 (criminalizing online solicitation of minors); Minn. Stat. § 609.352 subd. 2a(1) (same); Miss. Code Ann. § 97-5-27(3)(a) (same); N.Y. Penal Law § 235.22; S.C. Code Ann. § 16-15-342 (same).

[11] *See Ginsberg*, 390 U.S. at 633 (upholding a New York statute criminalizing the sale of material "harmful to minors," defined as material that "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors"); *see also*, *e.g.*, Minn. Stat. §§ 617.292 subd. 7(3), 617.293 subd. 1 (criminalizing commercial furnishing of material "harmful to minors," tracking the definition of that same term in the statute upheld in *Ginsberg*); N.M. Stat. Ann. §§ 30-37-1(F), 30-37-2 (criminalizing selling or otherwise providing sexually oriented materials "harmful to minors," defined consistently with the same term in *Ginsberg*); Tex. Penal Code Ann. § 43.24(a)(2), (b) (same).

In addition to these traditional provisions, some states want to do more to prevent "grooming" that leads to sexual abuse. And, like Minnesota, many states will look to other states' statutes in crafting legislation. *See* Brief of Amicus Curiae Minnesota Coalition Against Sexual Assault at 6, *State v. Muccio*, 890 N.W.2d 914 (Minn. 2017) (No. A15-1951) (noting Minnesota's review of statutory models from Georgia, Texas, and Washington). But the entrenched conflict among the state high courts and the Ninth Circuit means that states cannot survey the legal landscape to discern where to draw the line in a constitutionally permissible way. Lower courts, too, require guidance as they adjudicate challenges to similar laws in other jurisdictions.[12] The "uneasy and unsettled constitutional posture," *Miami Herald*, 418 U.S. at 246 n.6, leaves states in limbo as they grapple with efforts to shield minors from harmful communications without silencing protected speech. And this uncertainty is particularly concerning because it impacts the "most important" place in today's society for "the exchange of views," namely

[12] Lower courts in Louisiana have already considered one such challenge. *State v. Whitmore*, 58 So.3d 583, 590-93 (La. Ct. App. 2011), *writ denied*, 75 So.3d 937 (La. 2011), *cert. denied*, 132 S. Ct. 2434 (2012). And the Washington statute that Minnesota reviewed when crafting subdivision 2a(2) also has faced First Amendment scrutiny. That law, which criminalizes "[c]ommunicat[ing] with a minor for immoral purposes," Wash. Rev. Code § 9.68A.090, survived a facial overbreadth challenge only after the Washington Supreme Court provided a narrowing construction that limited "immoral purposes" to "the predatory purpose of promoting [a minor's] exposure to and involvement in sexual misconduct." *Schoening v. McKenna*, 636 F. Supp. 2d 1154, 1157 (W.D. Wash. 2009) (citing *Washington v. McNallie*, 120 Wash.2d 925, 931-32 (Wash. 1993)) (internal quotations omitted).

"cyberspace—the 'vast democratic forums of the Internet.'" *Packingham*, 137 S. Ct. at 1735 (quoting *Reno*, 521 U.S. at 868). By resolving the conflict, this Court can provide much-needed guidance and prevent the First Amendment from morphing at state borders.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT OVER AN IMPORTANT ISSUE OF FIRST AMENDMENT DOCTRINE.

This case provides an excellent vehicle to resolve a fundamental First Amendment question. First, the three courts below all squarely addressed the constitutionality of subdivision 2a(2) under the First Amendment. Pet. App. 2 ("The question presented in this case is whether [subdivision 2a(2)] violates the First Amendment to the United States Constitution."); *see also* Pet. App. 32; Pet. App. 51. Second, because petitioner raises a facial challenge to the Minnesota statute, there are no material facts in dispute. Third, all aspects of petitioner's First Amendment challenge were thoroughly briefed and argued in the courts below, and the Minnesota Supreme Court reversed the decisions of both the trial and intermediate courts, definitively resolving the only federal issue in the case against petitioner. Finally, the Minnesota Supreme Court's ruling was "plainly final on the federal issue." *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-86 (1975) (exercising jurisdiction where the state supreme court's ruling on a federal issue raised an important First Amendment question).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 4, 2017

STATE OF MINNESOTA

IN SUPREME COURT

A15-1951

Court of Appeals — Gildea, C.J.

State of Minnesota,

Appellant,

vs.

Filed: March 8, 2017
Office of Appellate Courts

Krista Ann Muccio,

Respondent.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Jennifer S. Bovitz, Assistant County Attorney, Hastings, Minnesota, for appellant.

John G. Westrick, Westrick & McDowall-Nix, PLLP, Saint Paul, Minnesota, for respondent.

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, Saint Paul, Minnesota, for amicus curiae Minnesota Attorney General.

Caroline S. Palmer, Saint Paul, Minnesota, for amicus curiae Minnesota Coalition Against Sexual Assault.

SYLLABUS

1. Minnesota Statutes § 609.352, subd. 2a(2) (2016), prohibits an adult from participating in the electronic transmission of information relating to or describing the sexual conduct of any person, if the communication is directed at a child and the adult acts with the specific intent to arouse the sexual desire of any person.

2. Minnesota Statutes § 609.352, subd. 2a(2), has a legitimate sweep because much of the speech it regulates is not protected by the First Amendment, but rather falls under the speech integral to criminal conduct and obscenity exceptions.

3. Although Minn. Stat. § 609.352, subd. 2a(2), regulates some speech protected by the First Amendment, it is not substantially overbroad in relation to its plainly legitimate sweep and therefore does not on its face violate the First Amendment.

Reversed.

OPINION

GILDEA, Chief Justice.

The question presented in this case is whether Minn. Stat. § 609.352, subd. 2a(2) (2016), violates the First Amendment to the United States Constitution. The State charged respondent Krista Muccio under Minn. Stat. § 609.352, subd. 2a(2), with felony communication with a child describing sexual conduct after

she sent sexually explicit images and messages to a 15-year-old boy. Muccio moved to dismiss the charge, arguing that the statute facially violates the First Amendment because it proscribes a substantial amount of speech that the First Amendment protects. The district court agreed with Muccio and the court of appeals affirmed. Because we conclude that Minn. Stat. § 609.352, subd. 2a(2), is not substantially overbroad in relation to its plainly legitimate sweep, we reverse.

FACTS

In November 2014, a father reported to law enforcement that he found inappropriate photos on his 15-year-old son's iPad. The photographs depicted a female's bare genitals, a female naked from the neck to below the waist, and a female's buttocks covered by a thong. These photos were sent to the 15-year-old through respondent Krista Muccio's Instagram account via a direct message. At the time, Muccio was 41 years old. In a statement to the police, the 15-year-old said that, after he received these pictures from Muccio, he sent her a picture of his genitals. Additionally, Muccio and the 15-year-old exchanged sexually explicit text messages. In these messages, Muccio and the 15-year-old detailed the sexual acts they wanted to engage in with each other, including fellatio and anal sex.

Based on the photos and messages described above, the State of Minnesota charged Muccio in count one with felony communication with a child describing sexual conduct, in violation of Minn. Stat. § 609.352, subd. 2a(2), and in count two with felony possession of child pornography, in violation of Minn. Stat. § 617.247, subd. 4(a) (2016). The district court dismissed count one, concluding that Minn. Stat. § 609.352, subd. 2a(2), is facially overbroad under the First Amendment and therefore unconstitutional.[1] The court of appeals affirmed. *State v. Muccio*, 881 N.W.2d 149, 153 (Minn. App. 2016). We granted the State's petition for review.

ANALYSIS

We are asked to decide whether Minn. Stat. § 609.352, subd. 2a(2), is unconstitutionally overbroad under the First Amendment. This statute prohibits "[a] person 18 years of age or older" from "us[ing] the Internet, a computer, . . . or other electronic device capable of electronic data storage or transmission" to "engag[e] in communication with a child or someone

[1] The district court concluded that there was sufficient evidence to establish probable cause for trial on count two, but stayed Muccio's trial proceedings pending the State's appeal of the district court's ruling on count one.

the person reasonably believes is a child, relating to or describing sexual conduct."[2] *Id.* To violate the statute, the adult must act "with the intent to arouse the sexual desire of any person." *Id.*, subd. 2a.

The statute's definitions help determine its sweep. A "child" is "a person 15 years of age or younger." Minn. Stat. § 609.352, subd. 1(a) (2016).[3] "Sexual conduct" is "sexual contact of the individual's primary genital area, sexual penetration . . . , or sexual performance." *Id.*, subd. 1(b) (2016). "Sexual penetration" and "sexual performance" are further defined in Minn. Stat. §§ 609.341 and 617.246 (2016), respectively.[4]

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[2] Throughout this opinion, we use the term "adult" to refer to "[a] person 18 years of age or older." Minn. Stat. § 609.352, subd. 2a (2016).

[3] Throughout this opinion, we use the term "child" to refer to "a person 15 years of age or younger," Minn. Stat. § 609.352, subd. 1(a), or someone the adult "reasonably believes" to be that age, *id.*, subd. 2a(2).

[4] "Sexual penetration" is defined as follows:

> any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:
>
> (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
>
> (2) any intrusion however slight into the genital or anal openings:
>
> (i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose;
>
> (ii) of the complainant's body by any part of the body of the complainant, by any part of the body

On appeal, the State argues that Minn. Stat. § 609.352, subd. 2a(2), is constitutional because it targets only unprotected speech, that any overbreadth is insubstantial, and that the statute is subject to a limiting interpretation that would preserve its constitutionality. In the alternative, the State contends that the statute is narrowly tailored to achieve a compelling government interest. For her part, Muccio argues that Minn. Stat. § 609.352, subd. 2a(2), burdens a substantial amount of constitutionally protected speech and is therefore unconstitutional on its face. The parties' arguments require us to address the constitutionality of Minn. Stat. § 609.352, subd. 2a(2). We review constitutional challenges de novo. *State v. Washington-Davis*, 881 N.W.2d 531, 537 (Minn. 2016).

> of another person, or by any object used by the complainant or another person for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired; or
>
> (iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired.

Minn. Stat. § 609.341, subd. 12.

"Sexual performance" is defined as "any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that uses [any person under the age of 18] to depict actual or simulated sexual conduct." Minn. Stat. § 617.246, subd. 1.

We begin by interpreting the statute to determine its meaning. We then address whether the statute prohibits speech that the First Amendment protects. We conclude that the statute is overbroad because it regulates some protected speech, and so we analyze whether that overbreadth is substantial. For the reasons discussed below, we hold that the statute's regulation of protected speech is not substantial and therefore the statute does not violate the First Amendment on its face.

I.

The first step in determining whether a statute is unconstitutionally overbroad is to interpret the statute. *United States v. Williams*, 553 U.S. 285, 293 (2008); *Washington-Davis*, 881 N.W.2d at 537. Our primary purpose in interpreting a statute is to "give effect to the legislature's intent." *State v. Crawley*, 819 N.W.2d 94, 102 (Minn. 2012). When determining the meaning of a statute, we interpret words "according to their common and approved usage." Minn. Stat. § 645.08(1) (2016). If the statute regulates only unprotected speech, the statute is constitutional unless it results in "'content discrimination unrelated to [its] distinctively proscribable content.'" *Washington-Davis*, 881 N.W.2d at 537 (alteration in original) (quoting *Crawley*, 819 N.W.2d at 109). If, however, the statute proscribes some amount of protected speech, then the statute is constitutional unless it is substantially overbroad "in relation to the statute's plainly legitimate sweep."

Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *accord Washington-Davis*, 881 N.W.2d at 537.

We turn then to interpret the statute to determine its meaning. *See Williams*, 553 U.S. at 293; *Washington-Davis*, 881 N.W.2d at 537. The parties disagree about whether Minn. Stat. § 609.352, subd. 2a(2), implicates speech that the First Amendment protects. The parties' disagreement focuses on three different phrases within the statute: "engaging in communication," "intent to arouse," and "relating to or describing sexual conduct." Minn. Stat. § 609.352, subd. 2a (2016). We examine each disputed phrase in turn.

A.

First, the parties dispute the interpretation of the phrase "engaging in communication with a child." Minn. Stat. § 609.352, subd. 2a(2). Muccio contends that this phrase, when properly interpreted, proscribes non-targeted mass electronic communications, including advertisements and public social-media posts, that a child happens to see even though the communication was not directed at the child. The State and the Minnesota Attorney General, as amicus curiae in support of the State, argue that the phrase "engaging in communication with a child" requires the communication to be directed at a child. We agree with the State and the Attorney General.

The phrase "engaging in communication with a child" requires the adult to direct the prohibited content at a child. The term "engage," used as an active verb in the statute, means "to take part: participate." *Merriam Webster's Collegiate Dictionary* 383 (10th ed. 2001). "Communication" means "an act or instance of transmitting." *Id.* at 232. Finally, in the context of the statute, the term "with" is used as "a function word to indicate the object of attention, behavior, or feeling." *Id.* at 1354. Applying these definitions, we conclude that the statute prohibits an adult from participating in the electronic transmission of information relating to or describing sexual conduct if the intended target or object of the transmission is a child.

Contrary to Muccio's argument, therefore, the statute does not proscribe non-targeted mass electronic communications, such as posting non-targeted social-media posts that a child happens to view. Similarly, Internet social-media posts with a more limited audience, such as a post that can only be viewed by a person's Facebook friends or a message posted on an Internet message board, are not directed at a child simply because the people who could possibly view such a post include children. Instead, for a transmission to be directed at a child, the child must be the object of the adult's attention. In other words, to engage in communication with a child, the adult must take some affirmative act to specifically select or designate the child as a recipient of the transmission.

B.

We turn next to the parties' second interpretive disagreement, which involves the statute's intent requirement. This part of the statute prohibits electronic communications if the adult acts "with the intent to arouse the sexual desire of any person." Minn. Stat. § 609.352, subd. 2a. Muccio contends that when the statute requires an "intent to arouse any person," the object of that intent is not restricted to the child or the adult involved in the communication. The State and the Attorney General respond by arguing that the phrase "any person" can be limited to "any person involved in the communication." According to the Attorney General, this interpretation is consistent with the Legislature's purpose in enacting the statute and the structure of the statute. We agree with Muccio.

The phrase "'[w]ith intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2016). The statute requires that the adult's specific intent to sexually arouse must be directed toward "any person." Minn. Stat. § 609.352, subd. 2a. The plain meaning of "any person" includes anyone, not just those individuals directly involved in the communication. *See Merriam Webster's Collegiate Dictionary*, *supra*, at 53 (defining "any" as "one or some indiscriminately of whatever kind"). The Attorney General's interpretation therefore is contrary to the statute's plain meaning.

The Attorney General's reliance on the statute's structure to support its interpretation is also misplaced. Section 609.352, subdivision 2a, is divided into four parts. The first part identifies the methods of communication the subdivision covers and contains the requirement that the adult act with the specific intent to sexually arouse "any person." Minn. Stat. § 609.352, subd. 2a. The following three parts identify specific actions the statute prohibits. Specifically, in addition to the prohibition in Minn. Stat. § 609.352, subd. 2a(2), the other two parts prohibit the solicitation of a child to engage in sexual conduct and the distribution of sexually explicit material to a child, Minn. Stat. § 609.352, subd. 2a(1), (3).

The Attorney General argues that the first part of subdivision 2a uses the phrase "any person" as a kind of placeholder for the object of the required intent. Because subdivision 2a, in clauses (1) to (3), goes on to prohibit specific actions the adult directs at a child, the Attorney General argues that the intent to arouse must be directed at the child as well. Based on this interpretation, the Attorney General concludes that "any person" refers only to the specific people (i.e., the adult and the child) mentioned in Minn. Stat. § 609.352, subd. 2a(1)-(3), which contains the three prohibited actions.

The Attorney General's argument incorrectly interprets clauses (1) to (3) in subdivision 2a to modify the intent required by the statute. The statute contains no language that suggests that the clauses act to

change the intent requirement of the statute. Furthermore, it is possible for an adult to engage in communication with a child while also having the intent to arouse someone who is not directly involved in the communication. In sum, the plain language of the statute compels the conclusion that the "intent to arouse" requirement applies to any person, not just the adult and child engaging in the communication.

C.

The third interpretive disagreement concerns the meaning of the phrase "relating to or describing sexual conduct." Minn. Stat. § 609.352, subd. 2a(2). The statute defines "sexual conduct" to include "sexual contact of the individual's primary genital area" and "sexual penetration as defined in section 609.341." Minn. Stat. § 609.352, subd. 1(b). The term "sexual penetration" is defined as including sexual intercourse, oral sex, or anal intercourse when "committed without the complainant's consent," unless consent is not a defense. Minn. Stat. § 609.341, subd. 12.

Based on the phrase "relating to or describing sexual conduct," Minn. Stat. § 609.352, subd. 2a(2), Muccio argues that the statute proscribes all communications that reference sexual conduct involving anyone. The State argues that the term "sexual conduct" is limited to communications that describe or relate to sexual conduct involving only the adult or the child involved in the communication. The State bases this argument on the fact that the definition of "sexual conduct" refers

to the "*individual*'s primary genital area," Minn. Stat. § 609.352, subd. 1(b) (emphasis added), and encompasses sexual penetration committed "without the *complainant*'s consent," Minn. Stat. § 609.341, subd. 12 (emphasis added). The State reads the terms "individual" and "complainant" to mean only the specific adult or child. On this interpretive issue, Muccio has the better argument.

The use of the terms "individual" and "complainant" does not limit the definition of "sexual conduct" to actions involving the specific adult or child. Nothing in section 609.352, subdivision 2a, suggests that the individual referenced is limited to the adult or the child involved in the communication. "Individual" is a more generic term than the specific references to an adult and child in the statute.

Likewise, the term "complainant" as used in the definition of "sexual penetration" in Minn. Stat. § 609.341, subd. 12, is not necessarily limited to the child involved in the communication, contrary to what the State argues. The term "complainant" means the "person alleged to have been subjected to criminal sexual conduct." Minn. Stat. § 609.341, subd. 13. But nothing in the statute at issue here—Minn. Stat. § 609.352, subd. 2a—suggests that the child involved in the communication must be the person subjected to criminal sexual conduct. Instead, when Minn. Stat. § 609.352, subd. 1(b), references the definition of "sexual penetration" from Minn. Stat. § 609.341, it serves to identify specific types of actions that would constitute "sexual

conduct," regardless of the persons engaged in the actions. As a result, the prohibited communication need not describe or relate to sexual conduct involving either the child or the adult involved in the communication.

In sum, Minn. Stat. § 609.352, subd. 2a(2), prohibits an adult from participating in the electronic transmission of information relating to or describing the sexual conduct of any person, if the communication was directed at a child, and the adult sending the communication acted with the specific intent to arouse the sexual desire of any person.

II.

Having determined the meaning of Minn. Stat. § 609.352, subd. 2a(2), we next examine whether the statute prohibits speech that the First Amendment protects. The State argues that the statute regulates only speech integral to criminal conduct and speech that is obscene, which are categories of speech that the First Amendment does not protect. *See United States v. Stevens*, 559 U.S. 460, 468 (2010). Muccio counters that the prohibited speech is not necessarily integral to criminal conduct or obscene and therefore she contends that the statute regulates protected First Amendment speech. We address these issues in turn.

A.

We turn first to the State's argument that the statute does not violate the First Amendment because the speech the statute prohibits is integral to criminal conduct. First Amendment protections do not extend to speech used "'as an integral part of conduct in violation of a valid criminal statute.'" *State v. Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Speech is integral to criminal conduct when it "is intended to induce or commence illegal activities," such as "conspiracy, incitement, and solicitation." *United States v. Williams*, 553 U.S. 285, 298 (2008). Both the Supreme Court and our court have addressed this category of unprotected speech.

In *Williams*, the Supreme Court rejected a First Amendment challenge to a federal statute criminalizing "offers to provide or requests to obtain" child pornography, concluding that the statute was constitutional because it regulated speech integral to criminal conduct. 553 U.S. at 297-98. The Court held that the statute prohibited speech integral to criminal conduct because the statute proscribed offers to provide or obtain material that was illegal. *Id.* at 297. In reaching its decision, the Court noted that "there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality." *Id.* at 298-99; *see also Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding that a law was unconstitutional because it prohibited the abstract advocacy of criminal acts). The Court concluded that the statute at

issue in *Williams* confined its regulation to speech integral to criminal conduct because it did not "prohibit advocacy of child pornography." 553 U.S. at 299.

Similarly, in *Washington-Davis*, we rejected a facial challenge to a statute prohibiting the promotion of prostitution, holding that the statute is constitutional because the statute's regulation of speech is tightly focused on speech integral to criminal conduct. 881 N.W.2d at 538. The statute at issue prohibits "solicit[ing] or induc[ing] an individual to practice prostitution" and "promot[ing] the prostitution of an individual." Minn. Stat. § 609.322, subd. la(1)-(2) (2016). We concluded that the speech at issue is "directly linked to and designed to facilitate the commission of a crime." *Washington-Davis*, 881 N.W.2d at 538. In concluding that the statute prohibits speech integral to criminal conduct, we observed that the statute "does not reach abstract advocacy of prostitution or general discussions about prostitution untethered to actual criminal behavior." *Id.*

In contrast to *Williams* and *Washington-Davis*, the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239, 256 (2002), struck down a law that extended the federal prohibition against child pornography to "sexually explicit images that appear to depict minors but were produced without using any real children." There, the Court concluded that although the images proscribed by the statute "can lead to actual instances of child abuse, . . . the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some

unqualified potential for subsequent criminal acts." *Id.* at 250.

Much of the speech that Minn. Stat. § 609.352, subd. 2a(2), prohibits is similar to the prohibited speech in *Williams* and *Washington-Davis*. The statute requires the adult to direct a communication relating to or describing sexual conduct at a child with the intent to arouse sexual desire. The State argues that in most of these instances, communications falling within the purview of the statute are part of a process called "grooming." "Grooming" is a process sexual predators use to shape a child's perspective and lower the child's inhibitions with respect to later criminal sexual acts. *See* Daniel Pollack & Andrea Maclver, *Understanding Sexual Grooming in Child Abuse Cases*, 34 Child L. Prac. 161, 161 (2015). As part of the grooming process, the offender typically desensitizes the child to sexual conduct by exposing the child to sexual content. *See id.* at 166. Through the grooming process, the offender increases the likelihood that the child will cooperate with the adult and reduces the likelihood that the child will disclose the adult's wrongful acts. *See id.* at 161, 166. After desensitizing the child to sexual content, the offender typically solicits the child to engage in some type of sexual conduct that may include sexual intercourse, sex trafficking, or child pornography. *See id.* at 166. Although communications made during the grooming process occur before the criminal acts of criminal sexual conduct, sex trafficking, or the creation

of child pornography, the adult communicates the sexual content with the purpose of having the child engage in later criminal activity. *See id.* In this context, the communication is both linked to and designed to facilitate the commission of the later crime. *See Washington-Davis*, 881 N.W.2d at 538 (concluding that a statute criminalizing speech that was "directly linked to and designed to facilitate the commission of a crime" prohibited speech that was integral to criminal conduct). We agree with the State that when grooming is done for the purpose of later using the child in sexual conduct, it resembles solicitation of the child, and under *Williams*, such solicitation falls outside First Amendment protections. 553 U.S. at 298.

And unlike the speech at issue in *Free Speech Coalition*, in which the government argued that the speech was connected to enticing a child to later engage in criminal activity, *see* 535 U.S. at 251-53, in this case the later criminal activity is the goal of the speech. Specifically, in *Free Speech Coalition*, the government argued that the statute was linked to preventing later crime because the virtual child pornography prohibited by the statute could arouse the interests of a sexual predator, who may later abuse children. 535 U.S. at 253. The Court determined that the causal link between the virtual child pornography and the later criminal activity or harm to children was "contingent and indirect." *Id.* at 250. Unlike the speech prohibited in *Free Speech Coalition*, the grooming behavior prohibited by Minn. Stat. § 609.352, subd. 2a(2), is targeted at a specific child with the goal of enticing the

child to engage in later criminal acts. In this way, grooming is integral to criminal conduct, unlike the speech prohibited by the statute at issue in *Free Speech Coalition*.

Even though much of the conduct prohibited by the statute, including grooming, is integral to criminal conduct, the statute also prohibits conduct that is not necessarily tied directly to criminal conduct. For example, an adult could communicate with a child about the adult's sexual practices or about sexual practices in general with the intent to arouse herself but without the intent to take further criminal action toward or involving the child. Because the statute prohibits this communication, even without an intent to solicit the child, the statute purports to regulate activity that is one step removed from criminal conduct. As this example illustrates, in some instances, the sweep of Minn. Stat. § 609.352, subd. 2a(2), bears some similarity to the statute at issue in *Free Speech Coalition*.

Thus, although much of the speech that falls within the scope of Minn. Stat. § 609.352, subd. 2a(2), is integral to criminal conduct because it involves grooming aimed at soliciting a specific child, and therefore falls outside First Amendment protections, we acknowledge that the statute also covers some speech that may not be integral to criminal conduct.

B.

We next turn to the State's contention that Minn. Stat. § 609.352, subd. 2a(2), regulates obscene speech. Similar to speech integral to criminal conduct, First Amendment protections do not extend to obscenity. *Miller v. California*, 413 U.S. 15, 23 (1973). A work is generally obscene if:

> (a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted) (internal quotation marks omitted). When applying this test to speech directed toward children, the Court has held that statutes may protect "minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).[5]

Applying the *Miller* standard of obscenity, we conclude that the speech Minn. Stat. § 609.352, subd.

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[5] In addition to obscene speech, some communications Minn. Stat. § 609.352, subd. 2a(2), regulates will include child pornography, as is charged in this case. To the extent that these communications include child pornography, they are also not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982) (holding that child pornography is not protected speech).

2a(2), proscribes will often be obscene. The statute is directed at prohibiting works that appeal to prurient interests. We have noted that the Supreme Court has defined a "prurient interest" in sex as a "morbid, shameful interest in sex." *State v. Davidson*, 481 N.W.2d 51, 59 (Minn. 1992) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985)). Minnesota Statutes § 609.352, subd. 2a(2), prohibits communications an adult directs at a child relating to sexual conduct that are made with the intent to arouse sexual desire. Communications of the sort proscribed by Minn. Stat. § 609.352, subd. 2a(2), are likely designed by the adult to arouse the child's sexual desire for the adult, or the adult's sexual desire for the child. Sexual desire between an adult and a child is clearly a "shameful interest in sex." *Davidson*, 481 N.W.2d at 59. The statute's intent requirement—mandating the intent to arouse—indicates that many communications falling within its scope will appeal to prurient interests.

The second prong of the *Miller* test, 413 U.S. at 24, is also often met because many of the communications Minn. Stat. § 609.352, subd. 2a(2), covers will depict sexual acts in a patently offensive way. As stated above, what is offensive is examined differently when, as in this case, the speech is aimed at children. *See Ginsberg v. New York*, 390 U.S. 629, 632, 634-35 (1968) (upholding a ban on the sale of magazines depicting nudity to persons under the age of 17, even though the magazines regulated by that statute were not obscene for adults); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234,

251-52 (2002) ("The Government, of course, may punish adults who provide unsuitable materials to children . . . ."). Here, the communication must relate to or describe sexual conduct, and the communication must be made with the intent to arouse sexual desire. It is a crime for an adult to engage in any sexual conduct with a child. *See* Minn. Stat. §§ 609.342-.345 (2016). And such sexually explicit speech that is designed to cause sexual arousal is patently offensive when an adult aims the speech at a child. *Cf. FCC v. Pacifica Found*, 438 U.S. 726, 747 (1978) (plurality opinion) ("It is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances. Words that are commonplace in one setting are shocking in another."); *Free Speech Coal.*, 535 U.S. at 251-52.

Finally, speech subject to Minn. Stat. § 609.352, subd. 2a(2), will often meet the final prong of the *Miller* test: that the communication be without literary, artistic, political, or scientific merit. 413 U.S. at 24. Because the communication must be made with the specific intent to arouse, Minn. Stat. § 609.352, subd. 2a, many communications falling within the statute will lack literary, artistic, political, or scientific merit. *See Scott v. State*, 788 S.E.2d 468, 476 (Ga. 2016) ("[I]t is difficult to envision a scenario in which an adult's sexually explicit online communication with a child younger than 16, made with the intent to arouse or satisfy either party's sexual desire, would ever be found to have redeeming social value."). Muccio argues, and the court of appeals concluded, however, that Minn. Stat.

§ 609.352, subd. 2a(2), would prohibit large swaths of speech with literary, artistic, political, or scientific value. *Muccio*, 881 N.W.2d at 157. Muccio argues that the statute encompasses literary works like *Lolita* and *Lady Chatterly's Lover*, famous paintings like *Girl Diver and Octopi*, scenes from television series like *True Blood* and *Game of Thrones*, and music and music videos like *Raspberry Beret* by Prince and Miley Cyrus's *BB Talk* that are widely distributed on the Internet and could be seen by children.

Two provisions in the statute prevent such a sweeping prohibition. First, the statute requires the adult to direct the communication *at* a child. Minn. Stat. § 609.352, subd. 2a(2). Non-targeted mass Internet communications, such as music videos, advertisements, and television series, therefore, would not fall within the purview of the statute. Second, the statute requires the adult to act with the specific intent to arouse the sexual desire of any person. Minn. Stat. § 609.352, subd. 2a. Those creating and distributing the mass communications of the sort Muccio outlines would likely not act with the requisite intent. But we acknowledge that the statute does not specifically require that the content of the communication lack literary, artistic, political, or scientific value. Because communications the statute prohibits are not necessarily limited to those without literary, artistic, political, or scientific value, the statute regulates some speech that is not obscene. To the extent that this non-obscene speech does not fall within another category of unprotected speech, like speech integral to criminal

conduct or child pornography, it is protected by the First Amendment.

In summary, we hold that Minn. Stat. § 609.352, subd. 2a(2), regulates some speech that the First Amendment protects. But this regulation of protected speech occurs only if the prohibited speech is not integral to criminal conduct, is not obscene, and does not fall within another category of unprotected speech like child pornography.

III.

Having concluded that Minn. Stat. § 609.352, subd. 2a(2), regulates some speech that the First Amendment protects, we must next determine whether the statute regulates a substantial amount of protected speech. The requirement that the overbreadth be substantial "stems from the underlying justification for the overbreadth exception itself—the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). Additionally, the "law's application to protected speech [must] be 'substantial,' not only in an absolute sense, but also relative to the scope of the

law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003) (citation omitted).

In conducting our overbreadth analysis, the Supreme Court's consideration of First Amendment overbreadth challenges to federal statutes intended to protect children is helpful. In *United States v. Williams*, the Supreme Court held that a law restricting offers to provide or requests to obtain child pornography might apply to constitutionally protected speech. 553 U.S. 285, 302-03 (2008). The example the Court discussed was that the statute may have applied to "documentary footage of atrocities being committed in foreign countries, such as soldiers raping young children." *Id.* at 302. But because "the vast majority of [the statute's] applications" were constitutional restrictions on speech integral to criminal conduct, the Court concluded that the statute was not facially invalid. *Id.* at 303. To the extent protected speech was shown to fall within the statute's sweep, the Court determined that such challenges should go forward on an as-applied basis. *Id.* at 302.

On the other hand, in *Reno v. American Civil Liberties Union*, the Supreme Court held that a statute was overbroad in its prohibition of a "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" as well as the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." 521 U.S. 844, 859 (1997). The Court concluded that this regulation was substantially overbroad because it prohibited "discussions about prison rape or

safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Id.* at 878.

With the principles from *Williams* and *Reno* in mind, we turn to the statute at issue here. The legitimate sweep of Minn. Stat. § 609.352, subd. 2a(2), is to protect children from sexual abuse and exploitation and from exposure to harmful sexual material. *See Free Speech Coal.*, 535 U.S. at 244 ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people."); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."). And because of its specific-intent requirement, *see State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012), the statute does not target broad categories of speech.

Rather, the statute intrudes upon constitutionally protected speech only in a narrow set of circumstances —only insofar as the prohibited communication is not integral to criminal conduct, is not obscene, and does not fall within another category of unprotected speech. *Cf. United States v. Dean*, 635 F.3d 1200, 1205-06 (11th Cir. 2011) (concluding that a statute was not substantially overbroad because it regulated speech that was obscene or child pornography and the material outside the scope of those categories of unprotected speech was insubstantial). For example, the plain terms of Minn.

Stat. § 609.352, subd. 2a(2), prohibit an adult from using the Internet to send a child sexually graphic, but artistic, pictures with the specific intent to sexually arouse any person even if the adult does not also plan to pursue further criminal actions with the child. Such communications seem unlikely, however, given the statute's requirement that the adult target a specific child with the communication relating to sexual conduct. *See id.* And "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Williams*, 553 U.S. at 303 (quoting *Taxpayers for Vincent*, 466 U.S. at 800).

The specific intent requirement also makes this case factually distinguishable from *Reno.* The federal statute in *Reno* contained no requirement that the indecent or offensive messages be transmitted with the intent to arouse sexual desires. *See* 521 U.S. at 859-60. Here, the specific intent requirement ensures that Minn. Stat. § 609.352, subd. 2a(2), would not prohibit discussions about safe sexual practices, artistic images that include nude subjects, or library card catalogues, except in the unlikely circumstance in which the adult acts with the intent to arouse sexual desires.

In our view, there will be some, but relatively few, communications prohibited under the statute that would be entitled to First Amendment protection. *See Osborne v. Ohio*, 495 U.S. 103, 112 (1990) ("Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the "remainder of the statute . . . covers a whole range of

easily identifiable and constitutionally proscribable . . . conduct . . . ."'" (quoting *New York v. Ferber*, 458 U.S. 747, 770 n.25 (1982))). Those communications that fall within this narrow sliver of speech will be sufficiently limited that they may be protected through as-applied challenges. *See Washington-Davis*, 881 N.W.2d at 540 (refusing to strike down a promotion of prostitution statute on the grounds that it could be applied to people working in the adult film industry and explaining that "the statute's application to those involved in the making of pornography should be resolved, if it ever arises, through an as-applied challenge"). Invalidation of a statute for substantial overbreadth is "strong medicine" that should be used "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also Williams*, 553 U.S. at 292 ("[W]e have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."). Given the relatively few protected communications that the statute regulates, we hold that Minn. Stat. § 609.352, subd. 2a(2), is not substantially overbroad.[6]

[6] Because we have concluded that Minn. Stat. § 609.352, subd. 2a(2), is not substantially overbroad, we have no need to determine whether the statute is narrowly tailored to achieve a compelling government interest or whether a limiting interpretation would preserve the statute's constitutionality.

CONCLUSION

Based on our analysis, we hold that Minn. Stat. § 609.352, subd. 2a(2), is not facially unconstitutional under the First Amendment. Accordingly, we reverse the decision of the court of appeals.

Reversed.

STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1951

State of Minnesota,
Appellant,

vs.

Krista Ann Muccio,
Respondent.

Filed June 20, 2016
Affirmed
Reyes, Judge

Dakota County District Court
File No. 19HACR151022

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Jennifer S. Bovitz, Assistant County Attorney, Hastings, Minnesota (for appellant)

John G. Westrick, Westrick & McDowall-Nix, P.L.L.P., St. Paul, Minnesota (for respondent)

Caroline S. Palmer, Minnesota Coalition Against Sexual Assault, St. Paul, Minnesota (for amicus curiae Minnesota Coalition Against Sexual Assault)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Tracy Smith, Judge.

SYLLABUS

I. Minn. Stat. § 609.352, subd. 2a(2) (2014), implicates the First Amendment because its reach is not limited to unprotected speech.

II. Minn. Stat. § 609.352, subd. 2a(2), is facially overbroad in violation of the First Amendment because it prohibits a substantial amount of protected speech.

III. Minn. Stat. § 609.352, subd. 2a(2), cannot be saved by employing a narrowing construction because it is not readily susceptible to such a construction.

IV. Minn. Stat. § 609.352, subd. 2a(2), is an unconstitutional content-based regulation of speech.

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Considered and decided by *REYES*, Presiding Judge; *ROSS*, Judge; and *TRACY SMITH*, Judge.

OPINION

REYES, Judge.

Appellant challenges the district court's order determining that Minn. Stat. § 609.352, subd. 2a(2), is unconstitutionally overbroad on its face and dismissing charge against respondent under the statute. Appellant also argues that the statute is a permissible content-based regulation of speech. Because we conclude that the statute implicates both protected and unprotected speech, is unconstitutionally overbroad on its face, is not readily susceptible to a narrowing construction, and is not narrowly tailored to achieve the state's compelling interest of protecting minors from sexual predators on the Internet, we affirm.

FACTS

On November 29, 2014, a father reported to law enforcement that he found inappropriate images on his 15-year-old child's iPad. The photographs depicted a close-up of a female's genitals, a close-up of a female's buttocks covered by a thong, and a female naked from the waist to the neck. The photographs were sent from respondent Krista Ann Muccio's Instagram account via direct message. A search warrant was obtained and served on Instagram. The search revealed that Muccio and the child had sexually explicit conversations and had exchanged sexually explicit photographs.

Appellant State of Minnesota charged Muccio with one count of felony communication with a minor

describing sexual conduct in violation of Minn. Stat. § 609.352, subd. 2a(2), and a second count of felony possession of pornographic work involving minors in violation of Minn. Stat. § 617.247, subd. 4(a) (2014). Muccio filed a motion requesting that the district court declare Minn. Stat. § 609.352, subd. 2a(2), unconstitutional, and requesting that the court dismiss the second count. The state opposed the motion.

The district court concluded that Minn. Stat. § 609.352, subd. 2a(2), is facially overbroad and unconstitutional under the First Amendment and dismissed count one. The district court concluded that there was sufficient evidence to establish probable cause for trial on the second count.[1] The state appeals.

ISSUES

I. Does Minn. Stat. § 609.352, subd. 2a(2), proscribe only unprotected speech?

II. If Minn. Stat. § 609.352, subd. 2a(2), proscribes protected speech, is it unconstitutionally overbroad on its face because it prohibits a substantial amount of protected speech?

III. If Minn. Stat. § 609.352, subd. 2a(2), is unconstitutionally overbroad, can the statute be narrowly construed to save it from overbreadth?

IV. Is Minn. Stat. § 609.352, subd. 2a(2), narrowly tailored to serve a compelling government interest?

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[1] The district court stayed Muccio's trial proceedings pending the state's appeal.

ANALYSIS

The state argues that the district court erred by concluding that Minn. Stat. § 609.352, subd. 2a(2), violates the First Amendment to the United States Constitution and article I, section 3, of the Minnesota Constitution because it is unconstitutionally overbroad on its face.[2] In addition, the state argues that Minn. Stat. § 609.352, subd. 2a(2), is a constitutional content-based regulation of speech. The state asks this court to reverse the district court and reinstate the charges against Muccio under the statute.

The constitutionality of Minn. Stat. § 609.352, subd. 2a(2), is an issue of first impression. "We review the constitutionality of statutes de novo." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014). The state does not dispute that Minn. Stat. § 609.352, subd. 2a(2), is a content-based restriction on speech. Content-based regulations are presumptively unconstitutional under the First Amendment. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816–17, 120 S. Ct. 1878, 1888 (2000). "The [s]tate bears the burden of showing that a content-based restriction on speech does not violate the First Amendment." *Melchert-Dinkel*, 844 N.W.2d at 18.

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech. . . ."

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[2] Muccio did not assert an as-applied challenge to the statute.

U.S. Const. amend. I; Minn. Const. art. I, § 3 ("[A]ll persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."). "As a general matter, the [First Amendment] establishes that, above all else, the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Melchert-Dinkel*, 844 N.W.2d at 18 (quotations omitted). "It is . . . well established that speech may not be prohibited because it concerns subjects offending our sensibilities." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245, 122 S. Ct. 1389, 1399 (2002). "In evaluating the free speech rights of adults, [the Supreme Court has] made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 2346 (1997) (second alteration in original) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989)).

Minn. Stat. § 609.352, subd. 2a(2), provides:

> A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony . . . : engaging in communication with a child or someone the person

> reasonably believes is a child, relating to or describing sexual conduct.

"Child" is defined as "a person 15 years of age or younger." *Id.*, subd. 1(a). "Sexual conduct" is defined as "sexual contact of the individual's primary genital area, sexual penetration as defined in section 609.341, or sexual performance as defined in section 617.246." *Id.*, subd. 1(b). The statute criminalizes what is referred to as "grooming," the process whereby sexual predators engage in sexually explicit conversations with a child and expose the child to pornographic material in an attempt to lower the child's inhibitions and acclimate the child toward a sexual encounter. M. Megan McCune, *Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws*, 14 CommLaw Conspectus 503, 506 n. 19 (2006).

I. Minn. Stat. § 609.352, subd. 2a(2), implicates both protected and unprotected speech.

The state argues that Minn. Stat. § 609.352, subd. 2a(2), proscribes only unprotected speech and therefore is permissible under the First Amendment. We disagree.

"The freedom of speech has its limits; it does not embrace certain categories of speech. . . ." *Free Speech Coal.*, 535 U.S. at 245–46, 122 S. Ct. at 1399. "[T]he Supreme Court has long permitted some content-based restrictions in a few limited areas, in which speech is of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."

Melchert-Dinkel, 844 N.W.2d at 19 (second alteration in original). Among the traditional exceptions to the First Amendment are speech integral to criminal conduct, obscenity, and child pornography. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion). The state asserts that the speech at issue is unprotected because it falls within or may be analogized to these three exceptions. We address each exception in turn.

A. Speech integral to criminal conduct

The state first argues that the speech prohibited under Minn. Stat. § 609.352, subd. 2a(2), is not entitled to First Amendment protection because it is speech integral to criminal conduct. "Offers to engage in illegal transactions are categorically excluded from First Amendment protection." *United States v. Williams*, 553 U.S. 285, 297, 128 S. Ct. 1830, 1841 (2008). "[T]he First Amendment's protections do not extend to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Melchert-Dinkel*, 844 N.W.2d at 19 (quotation omitted). Speech "intended to induce or commence illegal activities" such as conspiracy, incitement, and solicitation, is not protected. *Williams*, 553 U.S. at 298, 128 S. Ct. at 1842.

Sexual contact between an adult and a child is criminal conduct which varies in severity depending on the age of the child and the offender. Minn. Stat. §§ 609.342, .343, .344, .345 (2014). Soliciting sex from a child is speech integral to criminal conduct if made with the intent to induce or commence illegal activity. *Williams*, 553 U.S. at 298, 128 S. Ct. at 1842. The

connection between the speech and the illegal act must be direct and unmistakable.

But Minn. Stat. § 609.325, subd. 2a(2), sweeps more broadly and prohibits "engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct" "with the intent to arouse the sexual desire of *any person.*" (Emphasis added.) The state concedes that the statute prohibits speech which precedes the solicitation of criminal sexual conduct by sexual predators. Therefore, the prohibited speech is one step removed from speech which has, thus far, been recognized as speech which is integral to criminal conduct. "The prospect of crime, however, by itself does not justify laws suppressing protected speech." *Free Speech Coal.*, 535 U.S. at 245, 122 S. Ct. at 1399. As with the statute invalidated in *Free Speech Coalition*, although the communication proscribed by the statute here "can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.* at 250, 122 S. Ct. at 1402 (striking down two provisions of the Child Pornography Prevention Act) (citations omitted).[3]

The state mistakenly relies on *State v. Washington-Davis* to support its position. 867 N.W.2d 222, 232

[3] We further note that Minn. Stat. § 609.325, subd. 2a(2), itself cannot be used as a basis for concluding that the speech-integral-to-criminal-conduct exception applies. *See Melchert-Dinkel*, 844 N.W.2d at 20 (rejecting the state's proposed "circular" analysis of upholding the challenged statute because the speech was prohibited by that same statute).

(Minn. App. 2015), *review granted* (Minn. Sept. 29, 2015). The statute at issue in *Washington-Davis* prohibits the "solicitation, inducement, and promotion of prostitution." Minn. Stat. § 609.322, subd. 1a(1)-(2) (2014). Prostitution is illegal. Minn. Stat. § 609.324 (2014 & Supp. 2015). The causal link between the speech and criminal conduct is direct and unmistakable. The speech is "intended to induce or commence illegal activit[y]." *Williams*, 553 U.S. at 298, 128 S. Ct. at 1842. In contrast, Minn. Stat. § 609.325, subd. 2a(2), does not prohibit speech with a direct causal connection to criminal conduct.

"To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality." *Id.* at 298–99, 128 S. Ct. at 1842. The Supreme Court has held, "The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Free Speech Coal.*, 535 U.S. at 253, 122 S. Ct. at 1403 (quoting *Hess v. Indiana*, 414 U.S. 105, 108, 94 S. Ct. 326, 328 (1973)). Similarly, the Minnesota Supreme Court has noted that "[a]pplying the 'speech integral to criminal conduct' exception to harmful conduct would be an expansion of the exception," and that, in light of recent Supreme Court precedent, it was "wary of declaring any new categories of speech that fall outside of the First Amendment's umbrella protections." *Melchert-Dinkel*, 844 N.W.2d at 20.

The state "has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.

Without a significantly stronger, more direct connection, the [g]overnment may not prohibit speech on the ground that it may encourage [sexual predators] to engage in illegal conduct." *Free Speech Coal.*, 535 U.S. at 253–54, 122 S. Ct. at 1403. Interpreting the speech prohibited by Minn. Stat. § 609.325, subd. 2a(2), as falling within the speech-integral-to-criminal-conduct exception would require that we expand the application of the exception. We thus conclude that the speech-integral-to-criminal-conduct exception, as currently interpreted, is inapplicable.

B. Obscenity

The state next argues that Minn. Stat. § 609.352, subd. 2a(2), prohibits speech which is obscene and therefore is not entitled to First Amendment protection. In *Miller v. California*, the Supreme Court

> set forth the governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment: "(a) [W]hether the 'average person, *applying contemporary community standards*' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 574, 122 S. Ct. 1700, 1707 (2002) (alteration in original) (quoting *Miller v. California* 413 U.S. 15, 24, 93 S. Ct. 2607, 2615 (1973)). The state argues that the requirements of Minn. Stat. § 609.352, subd. 2a(2), satisfy the three prongs of the *Miller* obscenity test. Specifically, the state argues that the requirement that the communication be made with the intent to arouse the sexual desire of any person in conjunction with the requirement that the communication be with a child or someone the person reasonably believes is a child satisfies the first and third prongs of the *Miller* test. But these elements of Minn. Stat. § 609.352, subd. 2a(2), do not narrowly limit the statute's reach to communications which appeal to the prurient interest under contemporary community standards, nor do they exclude from the statute's ambit speech which has social value. *Cf. Am. Civil Liberties Union*, 535 U.S. at 578, 122 S. Ct. at 1709 (concluding that statute regulating matters consistent with the *Miller* obscenity requirements was not substantially overbroad). We therefore conclude that, because the speech proscribed by the statute is not limited to obscene speech under *Miller*, the obscenity exception is inapplicable.

C. Child pornography

Lastly, the state argues that Minn. Stat. § 609.352, subd. 2a(2), though not prohibiting child pornography, may be analogized to the statutes prohibiting child pornography, and the prohibited speech therefore is

unprotected under the First Amendment. In *New York v. Ferber*, the Supreme Court concluded that child pornography is unprotected speech and upheld a New York state law banning the sale or promotion of child pornography. 458 U.S. 747, 102 S. Ct. 3348 (1982). The Court reached this conclusion by "distinguish[ing] child pornography from other sexually explicit speech because of the [s]tate's interest in protecting the children exploited by the production process." *Free Speech Coal.*, 535 U.S. at 240, 122 S. Ct. at 1396 (citing *Ferber*, 458 U.S. at 758, 102 S. Ct. at 3355).

The policy justifications supporting the child pornography category of unprotected speech are inapplicable here because children need not be exploited by or even involved in the process of producing the speech prohibited by Minn. Stat. § 609.352, subd. 2a(2). Indeed, children need not be depicted, nor is any imagery required. *Id.* There need only be a "communication . . . relating to or describing sexual conduct." *Id.* Accordingly, this unprotected-speech category is inapplicable, and we cannot expand its application.

In sum, the speech prohibited by Minn. Stat. § 609.352, subd. 2a(2), is not limited to speech integral to criminal conduct or obscenity, nor can we deem the proscription permissible by analogizing it to child pornography. We therefore conclude that the statute proscribes protected speech and implicates the First Amendment.

II. Minn. Stat. § 609.352, subd. 2a(2), is facially overbroad in violation of the First Amendment.

The state asserts that the district court erroneously concluded that Minn. Stat. § 609.352, subd. 2a(2), is unconstitutionally overbroad on its face because any potentially overbroad applications of the statute are not substantial. We are not persuaded.

"A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). "The overbreadth doctrine prohibits the [g]overnment from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Free Speech Coal.*, 535 U.S. at 255, 122 S. Ct. at 1404. The overbreadth must be substantial "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292, 128 S. Ct. at 1838. Applying the overbreadth doctrine to invalidate a statute is "'strong medicine' that is used 'sparingly and only as a last resort.'" *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234 (1988) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973)).

We conclude that Minn. Stat. § 609.352, subd. 2a(2), "suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Am. Civil Liberties Union*, 521 U.S. at

874, 117 S. Ct. at 2346. Several facets of the statute give rise to its substantial overbreadth. First, the statute's intent requirement is satisfied if the adult has "the intent to arouse the sexual desire of *any person*." Minn. Stat. § 609.352, subd. 2a(2) (emphasis added). Second, the communication need only be "*relating to* or describing sexual conduct." *Id.* (emphasis added). Third, "engage" is not defined, so it is unclear whether a one-way communication would be sufficient. *Id.* Finally, the communication need not be direct, exclusively between the adult and the child, or concerning sexual conduct between the adult and the child. *Id.*

The district court gave several examples that illustrate the statute's overbreadth which we find persuasive and reiterate here. A music video producer creates a video with sexually explicit depictions or lyrics, with the intent to arouse the sexual desire of some person who views or listens to the video, places that video on social media, and a child age 15 or younger sees or hears it. A film producer produces a movie with sex scenes, with the intent to arouse the sexual desire of some person who views the film, makes that movie available on an Internet streaming service, and a child age 15 or younger sees it. A writer of young-adult fiction electronically publishes a book describing a sex scene, with the intent to arouse the sexual desire of any one of the book's readers, and a child age 15 or younger reads it. All of these acts are criminalized under Minn. Stat. § 609.352, subd. 2a(2).

The state argues that the statute is not overbroad because it includes a specific intent requirement. But

the state cites no authority for the proposition that expression made with the specific intent to arouse the sexual desire of any person, even in the context of a communication with a child, is speech unprotected by the First Amendment. Additionally, the state argues that the statute is not overbroad by suggesting that the statutory definition of sexual conduct is limited to sexual conduct between the adult and the child. But the applicable definition of sexual conduct contains no such limitation. Sexual conduct is defined to include "sexual contact of *the individual's* primary genital area." *Id.*, subd. 1(b) (emphasis added). "The individual" is not further restricted to the adult subject to the statute or the child whom the adult is grooming. The statute thus covers communications relating to or describing the sexual conduct of any person, further contributing to its overbreadth.

Finally, at oral argument, the state urged this court to conclude that the statute is constitutional because prosecutorial discretion will save the statute from absurd applications. But as the Supreme Court has stated, "[T]he First Amendment protects against the [g]overnment; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statue [sic] merely because the [g]overnment promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 1591 (2010). Moreover, the state's argument that prosecutors will, in their discretion, exercise their authority under the

statute only as it was intended is "an implicit acknowledgement of the potential constitutional problems with a more natural reading." *Id.*

The state is undoubtedly attempting to prohibit speech which poses a risk to vulnerable children. "The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Free Speech Coal.*, 535 U.S. at 252, 122 S. Ct. at 1402. "The [g]overnment cannot ban speech fit for adults simply because it may fall into the hands of children." *Id.* at 252, 122 S. Ct. at 1403. Therefore, though the statute's aim is laudable, the law is unconstitutionally overbroad because the "restriction goes well beyond that interest by restricting the speech available to law-abiding adults." *Id.* at 252–53, 122 S. Ct. at 1403.

III. Minn. Stat. § 609.352, subd. 2a(2), cannot be narrowly construed.

The state argues that, if Minn. Stat. § 609.352, subd. 2a(2), is unconstitutionally overbroad on its face, the court should apply a limiting construction to uphold the law's constitutionality. We are unable to do so.

If at all possible, we are to interpret a statute to "preserve its constitutionality." *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005); *see also* Minn. Stat. § 645.17(3) (2014) ("[T]he legislature does not intend to violate the Constitution of the United States or of this state."). But a limiting construction should be imposed only if a statute is "readily

susceptible to such a construction."[4] *Stevens*, 559 U.S. at 481, 130 S. Ct. at 1591–92 (quotation omitted). A statute is invalid if its terms leave no room for a narrowing construction. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575–77, 107 S. Ct. 2568, 2572–73 (1987).

The state proposes several statutory revisions. First, the state proposes that we limit the "intent to arouse the sexual desire of *any person*" to the intent to arouse the sexual desire of the adult or child engaging in the communication. Second, the state proposes that we limit the definition of "sexual conduct" to sexual contact, penetration, or performance "between the adult and the child." Third, the state argues that the statute should be construed to require a "direct communication from adult to child."[5]

All of the state's proposed limiting constructions require that we add language to Minn. Stat. § 609.352, subd. 2a(2). Adding language requires a rewrite of the statute and "would constitute a serious invasion of the

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[4] While the state argues that the statute is unambiguous, it nevertheless requests that we apply a limiting construction to save the statute, invoking the canon of constitutional avoidance. But the canon of constitutional avoidance only applies to "ambiguous statutory language." *Stevens*, 559 U.S. at 481, 130 S. Ct. at 1591–92 (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516, 129 S. Ct. 1800, 1811 (2009)).

[5] The state does not propose a limiting construction for the "*relating to* . . . sexual conduct" language, nor does the state address the ambiguity surrounding the definition of "engage." Minn. Stat. § 609.352, subd. 2a(2) (emphasis added).

legislative domain and sharply diminish [the legislature's] incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481, 130 S. Ct. at 1592 (quotations omitted). We therefore conclude that the statute is not readily subject to a narrowing construction to save it from overbreadth.

IV. Minn. Stat. § 609.352, subd. 2a(2), is an unconstitutional content-based regulation of speech.

Finally, the state contends that, if we determine Minn. Stat. § 609.352, subd. 2a(2), applies to protected expression, the statute is nevertheless a constitutional content-based restriction on speech. We disagree.

A statute that regulates speech based on content is unconstitutional unless it satisfies strict scrutiny. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813, 120 S. Ct. at 1886. To satisfy strict scrutiny, the state must show that the statute

> (1) is justified by a compelling government interest and (2) is narrowly drawn to serve that interest. The [s]tate must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution. In other words, [t]here must be a direct causal link between the restriction imposed and the injury to be prevented.

Melchert-Dinkel, 844 N.W.2d at 21–22 (second alteration in original) (quotations and citations omitted).

As previously noted, Minn. Stat. § 609.352, subd. 2a(2), prohibits "grooming," the process whereby sexual predators "use pictures and conversations to [i]nterest a victim in or overcome inhibitions about sexual activity." McCune, *supra*, at 506 n.19 (alteration in original) (quotation omitted). We agree, and the parties do not dispute, that the state has a compelling interest in prohibiting this conduct. "The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Free Speech Coal.*, 535 U.S. at 244, 122 S. Ct. at 1399. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757, 102 S. Ct. at 3355. Therefore, the question is whether the statute is sufficiently narrowly tailored to serve this compelling interest.

> Under the narrowly tailored inquiry,
>
> > a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.

Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666, 124 S. Ct. 2783, 2791 (2004). Minn. Stat. § 609.352, subd. 2a(2), restricts significantly more speech than is necessary to achieve the state's compelling interest

of protecting children from sexual predators on the Internet. Thus, for the same reasons we concluded that the statute is infirm under the overbreadth doctrine, we conclude that the statute is not sufficiently narrowly tailored to serve the state's compelling interest.

DECISION

Minn. Stat. § 609.352, subd. 2a(2), proscribes protected speech and is facially overbroad in violation of the First Amendment. Further, because any attempt to construe the statute constitutionally would require that we rewrite the statute, which would constitute an invasion of the legislative domain and discourage the legislature from drafting a narrowly tailored law, we decline to do so. Finally, the statute is not narrowly drawn to serve the state's compelling interest in protecting children from sexual abuse and exploitation on the Internet and therefore is an unconstitutional content-based regulation of speech.

Affirmed.

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF DAKOTA	FIRST JUDICIAL DISTRICT
State of Minnesota, Plaintiff, vs. Krista Ann Muccio, Defendant.	Court File No. 19HA-CR-15-1022 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING COUNT I (Filed Nov. 25, 2015)

This matter came before the Court for a contested omnibus/*Florence* hearing on October 2, 2015, at the Dakota County Judicial Center, Hastings, Minnesota.

Jennifer Bovitz, Assistant Dakota County Attorney, appeared on behalf of the State. John Westrick, Esq., appeared with and on behalf of Defendant Krista Ann Muccio.

Defendant is charged with the following two felony counts: Count I, Engage in Electronic Communication Relating or Describing Sexual Conduct with Child, and Count II, Possess Pornographic Work—Computer/Electronic/Magnetic/Optical Image.

Defendant asserts that Count I must be dismissed because the charging statute is facially unconstitutional as overbroad and not narrowly drawn, in violation of the First Amendment. Defendant further asserts that Count II must also be dismissed because the alleged pornographic work no longer exists.

The contested issues were submitted to the Court for determination based upon the following exhibits. State's Exhibit 1 is a compact disc containing, in relevant part, copies of the police reports and transcripts of the Defendant's and the alleged victim's statements to police. Defense Exhibits 1 to 14 consist of illustrative photographs and a transcript of the legislative history for the charging statute underlying Count I.

The record remained open through October 28, 2015, for post-hearing submission of additional memoranda by counsel.

Based upon the exhibits received and the written arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. In November 2014, Inver Grove Heights police commenced an investigation regarding a report by "J.P." about "inappropriate" photographs J.P. found on his 15-year-old-son "D.P.'s" iPad. Police reviewed D.P.'s iPad and located three photographs in a file folder labeled "recently deleted."

2. The first photograph consisted of a close-up image of a female's bare genitals. The second photograph showed a female from the neck to below the waste [sic], with her bare breasts exposed. The third photograph depicted an image of the backside of a female who was wearing thong-type underwear. An investigator determined that D.P. received the three photographs via "Instagram Direct" during

the evening of November 25, 2014. The "recently deleted" folder also contained photographs of D.P.'s bare chest and stomach.

3. D.P. provided a recorded statement to police. D.P. stated he received the above-described photographs via Instagram Direct from an adult female he knew as "Mrs. Muccio." This female was later identified as Krista Ann Muccio ("Defendant"). D.P. did not know whether any of the photographs were of Defendant.

4. D.P. relayed that he met Defendant at the middle school he attended during the eighth grade. He said Defendant worked as a lunch lady at the middle school. At the time of D.P.'s statement, he was attending the ninth grade at a different school.

5. D.P. stated he began communicating electronically with Defendant via Instagram Direct in June of 2014. D.P. used his iPad for those communications. The communications ceased just days before the police began investigating the matter.

6. D.P. described his communications with D.P. [sic] as including the sharing of digital images and sexually-explicit text messages. He stated their conversations did not become sexual in nature until a week ago. During those conversations, D.P. and Defendant detailed sexual acts they wanted to perform on each other, including fellatio and anal sex. D.P. stated that Defendant told him they could not "do anything right now" because D.P. was "too young"

and they could "start doing stuff" when D.P. turned "18."

7. According to D.P., on November 25, 2014, after Defendant sent him the three photographs showing females in various stages of undress, she told him she wanted something in return. D.P. said he took a photograph of his bare genitals and sent it to Defendant about 30 minutes later. D.P. described this photograph as showing only his genitals. He did not provide any further details about this photograph. D.P. stated that after he sent the photograph to Defendant, Defendant messaged him stating "that was really worth the wait."

8. Defendant provided a mirandized and recorded statement to police. She admitted communicating with D.P. via Instagram Direct. She said she used only her cell phone and Instagram Direct to do so.

9. Defendant described her electronic conversations with D.P. as being "a little bit" sexually explicit at times. Defendant further admitted that she sent D.P. photographs of females in various stages of undress. Defendant stated that none of the photographs were of her and that she retrieved them from the internet. Defendant also admitted receiving the photograph of D.P.'s genitals. She said D.P. sent her that photograph about a week earlier.

10. Defendant stated the photograph of D.P.'s genitals no longer exists because she deleted it. More precisely, however, Defendant only

had the capability to "hide" the image from being displayed on her cell phone. It is a function of Instagram Direct that the recipient of a digital image does not have the capability to delete the image. Only the sender of an image can delete the image. Furthermore, a recipient of an image cannot forward the image or save a copy of the image.

11. Soon after an image is deleted from Instagram Direct, it can no longer be retrieved. Such is the case here. The image allegedly depicting D.P.'s bare genitals was deleted by D.P. a few days after he sent it to Defendant. This image no longer exists and cannot be retrieved.

12. Investigators submitted data requests to Instagram. Instagram confirmed that the alleged image depicting D.P.'s genitals was no longer retrievable. Instagram was able to provide transcripts of text messages between Defendant and D.P. Those messages included the following communications. On November 25, 2014, D.P. sent Defendant a message in which he recalled looking at Defendant's "boobs" during a previous encounter. Defendant indicated she was blushing in response. D.P. replied, "cuz you want me to fuck you." D.P. later requested a picture from Defendant and Defendant answered she is going to "hell" but would "manage something." D.P. stated he would also manage something for Defendant, to which Defendant remarked, "Deal!"

13. Shortly after 3:00 a.m. on the following day, D.P. sent Defendant a picture and stated "Hey sexy;)". During the ensuing conversation, Defendant acknowledged she should not be engaging in this behavior with D.P. because of the criminal penalties. At one point, Defendant messaged D.P. stating, "You want to fuck me" and D.P. responded, " "I want to fuck the shit out of you." At approximately 4:16 a.m., Defendant sent D.P. a picture at his request and Defendant stated, "I can't believe I'm doing this! And this is tame lol". D.P. replied that he needed to send Defendant something and Defendant remarked, "I['d] say you owe me;)". At about 4:40 a.m., D.P. sent Defendant a picture and Defendant replied, "Ahhh . . . ummm, yeah seriously worth the 15 min wait! All I can say is wow . . . " and "Totally trying to not be turned on, it's not working lol". D.P. asked Defendant, "Does it look like something you would play with[?]" Defendant responded "Absofuckinlutely lol[.]" Defendant and D.P. continued to engage in graphic conversations detailing specific sexual acts they wanted to perform on each other, including oral and vaginal sex. D.P. asked Defendant to send him a picture of her vagina. At approximately 5:20 a.m., Defendant sent D.P. a photograph. D.P. then requested that Defendant send him a picture of her "ass" and her "'fingering" herself. About 20 minutes later, Defendant messaged D.P. a picture and stated that she "had to stay clothed just in case." The Court notes that Instagram was unable to provide any of

the photographs mentioned in these conversations.

14. The Court notes that both Defendant and D.P. minimized their involvement in the above-described activities in their statements to police.

15. Count I of the Complaint charges Defendant with Engaging in Electronic Communication Relating or Describing Sexual Conduct with a Child, in violation of Minn. Stat. § 609.352, subd. 2(a)(2). Defendant seeks dismissal of this charge, asserting that the charging statute is facially unconstitutional in that it is overbroad in violation of the First Amendment. Count II of the Complaint charges Defendant with Possession of a Pornographic Work, in violation of Minn. Stat. § 617.247, subd. 4(a). Defendant also seeks dismissal of this charge. She argues there is not probable cause to believe she possessed a pornographic work, especially given that the alleged pornographic work does not exist.

CONCLUSIONS OF LAW

1. Minn. Stat. § 609.352, subd. 2(a)(2) is facially overbroad and not narrowly drawn to promote the State's compelling interest in protecting children from sexual predators online. Accordingly, this provision is unconstitutional under the First Amendment and Count I must be dismissed.

2. The State has presented sufficient evidence to establish probable cause for trial on Count II.

ORDER

1. Count I, Engaging in Electronic Communication Relating or Describing Sexual Conduct with a Child, in violation of Minn. Stat. § 609.352, subd. 2(a)(2), is hereby DISMISSED.

2. This matter shall proceed to trial on Count II, Possession of a Pornographic Work, in violation of Minn. Stat. § 617.247, subd. 4(a).

3. The attached Memorandum is incorporated herein by reference.

Dated: November 25, 2015 BY THE COURT:

/s/ Pat Sutherland
Patrice K Sutherland
JUDGE OF
DISTRICT COURT

MEMORANDUM

Overbreadth Challenge to Count I

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., Amend. 1. "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 1547 (2003) (citations

omitted). However, "[t]he protections afforded by the First Amendment . . . are not absolute[.]" *Id.* It is well established "that the government may regulate certain categories of expression consistent with the Constitution." *Id.* (citation omitted). But where the government enacts a law that "prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights[,]" then the law "is overbroad on its face" and violates the First Amendment. *State v. Macholz*, 574 N.W.2d 415, 419 (Minn. 1998). "The overbreadth doctrine departs from traditional rules of standing to permit, in the First Amendment area, a challenge to a statute both on its face and as applied to the defendant." *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

Defendant raises an overbreadth challenge to Minn. Stat. § 609.352, subd. 2(a)(2), which states in relevant part:

> **Electronic solicitation of children.** A person 18 years of age or older who uses the Internet, . . . or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony and may be sentenced as provided in subdivision 4:
>
> ... engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct[.]

Minn. Stat. § 609.352, subd. 2(a)(2). The following definitions apply to this provision. A "child" is "a person 15 years of age or younger[.]" *Id.*, subd. 1(a). "Sexual conduct" is defined to include "sexual contact of the individuals primary genital area[or] sexual penetration as defined in section 609.341," *Id.*, subd. 1(b). "Sexual penetration" means: (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or (2) any intrusion however slight into the genital or anal openings: (i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose; (ii) of the complainant's body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose ... ; or (iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose. . . . Minn. Stat. § 609.341, subd. 12.

Minn. [sic] § 609.352, subd. 2(a)(2) prohibits and punishes speech based upon its content and is therefore a content-based regulation. *Turner Broadcasting System, Inc.*, 512 U.S. 622, 642 (1994) (a content-based regulation "suppress[es], disadvantage[s], or impose[s] differential burdens upon speech because of its content"). Content-based regulations are presumptively unconstitutional under the First Amendment. *United States v. Playboy Entm 't Grp., Inc.*, 529 U.S. 803, 813 (2000). The State bears the burden to rebut this presumption. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *Turner Broadcasting Sys., Inc.*, 512 U.S. at 643. The United States Supreme Court requires the "most

exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting*, 512 U.S. at 642. To satisfy strict-scrutiny review, a law that regulates speech must be necessary to serve a compelling state interest and must be narrowly drawn. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

The legislative intent behind Minn. Stat. § 609.352, subd. 2(a)(2) is the protection of children from sexual predators encountered online. *See* Exhibit 1 (Unofficial Transcript of Minutes of House File 503 (2007) and Senate File 643 (2007), H.F. No. 829, ch. 54, art. 2 §7 (2007) ("unofficial legislative history transcript")). The provision is geared towards prohibiting sexual predators from "grooming" children. *See id.*, p. 2. "Grooming" is a common practice of pedophiles, whereby the pedophile engages in sexually-explicit conversations with the child and/or exposes the child to pornographic material, to attempt to lower the child's inhibitions to future sexual contact.

Without any doubt, the State has a "compelling interest" to protect the physical and psychological well-being of children from the harms posed by online pedophiles. *See Sable Communications of California, Inc. v.* FCC, 492 U.S. 115, 126 (1989); *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110-11, 110 S.Ct. 1691 (1990). Nonetheless, the State must narrowly draw any law enacted in furtherance of its interest. *R.A.V.*, 505 U.S. at 382.

A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755–56, 116 S.Ct. 2374 (1996). According to the Supreme Court,

> The purpose of the [least restrictive means] test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Ashcroft v. A.C.L.U., 542 U.S. 656, 666, 124 S.Ct. 2783 (2004) (*Ashcroft II*). If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. *See Reno v. A.C.L.U.*, 521 U.S. 844, 874, 117 S.Ct. 2329 (1997). Furthermore, when the content of speech is the crime, scrutiny is strict because, "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject

matter, or its content." *Ashcroft v. A.C.L.U.*, 535 U.S. 564, 573, 122 S.Ct. 1700 (2002) (*Ashcroft I*) (quotation marks omitted).

Minn. Stat. § 609.352 subd. 2a(2) is facially overbroad and not narrowly drawn to achieve the State's compelling interest in protecting children from sexual predators on the internet. This provision prohibits a "substantial" amount of constitutionally protected speech "judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191 (2003). The law raises numerous concerns of constitutional magnitude. It does not confine prohibited communications to those subject matters considered obscene, pornographic, or harmful to minors by any standard. Such a limitation would serve to remove from the law's ambit material having scientific, educational, or other redeeming social value. Thus, the law broadly prohibits adult-to-child communications about subjects merely "relating to" sexual conduct, which would conceivably include such socially important subject matters as contraception. Significantly, the law does not require that an adult have any intent to seduce, lure, or engage in sexual conduct with a child. The intent requirement of Minn. Stat. § 609.352 subd. 2a(2) is an intent to arouse any person's sexual desire. This is not unlawful if accomplished. "Sexual expression which is indecent but not obscene is protected by the First Amendment[.]" *Sable Communications of California v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829 (1989); *Reno v. ACLU*, 521 U.S. 844, 874, 117 S.Ct. 2329 (1997). The law accordingly ensnares protected

speech between adults. For example, an adult would be subject to prosecution and severe criminal penalties for publishing materials relating to sexual conduct in a forum or chat room intending such materials be viewed by other adults and arouse their sexual desire, so long as a child accesses the material and there is some indication that the adult should have known the child was a forum or chat-room member. It is worth noting the United States Supreme Court's opinion in *Reno v. A.C.L.U*,:

> In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100–person chat group will be a minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.
>
> . . . .
>
> It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this

broad statute. Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. See 47 U.S.C. § 223(a)(2) (1994 ed., Supp. II). Similarly, a parent who sent his 17–year–old college freshman information on birth control via email could be incarcerated even though neither he, his child, nor anyone in their home community found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

The Government also asserts that the "knowledge" requirement of both §§ 223(a) and (d), especially when coupled with the "specific child" element found in § 223(d), saves the CDA from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to "refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18." Brief for Appellants 24. This argument ignores the fact that most Internet forums—including chat rooms, newsgroups, mail exploders, and the Web—are open to all corners. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in

> the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child—a "specific person . . . under 18 years of age," 47 U.S.C.A. § 223(d)(1)(A) (Supp.1997)—would be present.

521 U.S. 844, 876, 117 S.Ct. 2329 (1997).

Minn. Stat. § 609.352 subd. 2a(2) punishes speech simply because that speech increases the chance that a pedophile might use it to commit an illegal act "at some indefinite future time." *Free Speech Coalition*, 535 U.S. at 253. In doing so, it ensnares a vast universe of protected speech, including many modern movies, television shows, painting masterpieces, classic books, and advertisements as well as outright obscenity, material harmful to a child, and child pornography. In comparison to its overbreadth, the provision does not serve any compelling interest that is not already served by separate, more narrowly-drawn, and constitutional statutory provisions. *See* Minn. Stat. § 609.352, subd. 2 (prohibiting solicitation of children); *see also* Minn. Stat. § 617.293, subd. 1 (prohibiting the dissemination to children of material that is "harmful" to children).

The Court concludes that Minn. Stat. § 609.352 subd. 2a(2) is facially overbroad and not narrowly drawn and is therefore unconstitutional under the First Amendment.

Probable Cause Challenge to Count II

The purpose of a *Florence* hearing is to determine whether there are sufficient grounds to establish probable cause to believe that the defendant is guilty of a charged offense, not to decide his guilt in the matter. *See State v. Schwartz*, 266 Minn. 104, 108, 122 N.W.2d 769, 772 (Minn. 1963). The district court should deny a motion to dismiss for lack of probable cause if there are facts on the record that present a question for a jury. *State v. Lopez*, 778 N.W.2d 700, 703, 703-04 (Minn. 2010).

Defendant argues that D.P. is an uncharged co-conspirator to the crime of Possession of Child Pornography and that D.P. cannot therefore be permitted to corroborate evidence regarding Defendant's receipt of the image at issue or the contents of that image. It is true that a *conviction* cannot be based on the uncorroborated testimony of an accomplice. *See* Minn. Stat. § 634.04; *State v. Henderson*, 620 N.W.2d 688, 700 (Minn. 2001). However, even assuming that D.P. is an accomplice, "a finding of probable cause . . . [can] be based on testimony which would not support a conviction, i.e., the testimony of an uncorroborated accomplice." *Florence*, 306 Minn. 442, 448, 239 N.W.2d 892, 897 (Minn. 1976) (citing *State ex rel. Jeffrey v. Tessmer*, 211 Minn. 55, 300 N.W. 7 (Minn. 1941)).

With some reluctance, the Court finds that the State possesses sufficient evidence to establish probable cause for trial on Count II, Possession of Child Pornography. That evidence consists of D.P.'s statement

that Defendant sent him at least one sexually explicit photograph while the two of them were engaged in a sexually-explicit conversation; Defendant thereafter stated she wanted something in return from D.P.; and D.P. responded by taking a photograph of his bare genitals and sending it to Defendant. The evidence also consists of Defendant's statement in which she admits she engaged in sexually explicit conversations with D.P.; sent D.P. the three photographs of females in various stages of undress; and received, viewed, and then hid the photograph showing D.P.'s bare genitals. The State also has evidence of the sexually-explicit text messages between D.P. and Defendant, which evidence shows the text messages were sent near the time D.P. and Defendant shared the aforementioned photographs. It will be up to the jury to determine whether D.P. can provide an adequate description of the purported pornographic work that, when together with other corroborative and circumstantial evidence, meets the statutory definition of child pornography beyond a reasonable doubt. See Minn. Stat. § 617.527, subd. 4 (prohibiting the possession of a "lewd" (i.e., "obscene") image of a minor's genitalia). Of course, the State will also be required to prove that Defendant in fact possessed the image in question and had the requisite knowledge of its child-pornographic contents. Although the Court is of the opinion that the State will face difficulties establishing Defendant's guilt beyond a reasonable doubt, the weight and credibility of the evidence are issues properly left to a jury.

Minnesota Statutes

Minn. Stat. § 617.241 subd. 2(a)

It is unlawful for a person, knowing or with reason to know its content and character, to:

(a) exhibit, sell, print, offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene material . . . .

Minn. Stat. § 617.293 subd. 1

It is unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in clause (a), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse which, taken as a whole, is harmful to minors.

Minn. Stat. Ann. § 609.352

Subd. 1. Definitions. As used in this section:

(a) "child" means a person 15 years of age or younger;

(b) "sexual conduct" means sexual contact of the individual's primary genital area, sexual penetration as defined in section 609.341, or sexual performance as defined in section 617.246; and

(c) "solicit" means commanding, entreating, or attempting to persuade a specific person in person, by telephone, by letter, or by computerized or other electronic means.

Subd. 2. Prohibited act. A person 18 years of age or older who solicits a child or someone the person reasonably believes is a child to engage in sexual conduct with intent to engage in sexual conduct is guilty of a felony and may be sentenced as provided in subdivision 4.

Subd. 2a. Electronic solicitation of children. A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony and may be sentenced as provided in subdivision 4:

(1) soliciting a child or someone the person reasonably believes is a child to engage in sexual conduct;

(2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct; or

(3) distributing any material, language, or communication, including a photographic or video image, that relates to or describes sexual conduct to a child or someone the person reasonably believes is a child.

Subd. 2b. Jurisdiction. A person may be convicted of an offense under subdivision 2a if the transmission that constitutes the offense either originates within this state or is received within this state.

Subd. 3. Defenses. (a) Mistake as to age is not a defense to a prosecution under this section.

(b) The fact that an undercover operative or law enforcement officer was involved in the detection or investigation of an offense under this section does not constitute a defense to a prosecution under this section.

Subd. 4. Penalty. A person convicted under subdivision 2 or 2a is guilty of a felony and may be sentenced to imprisonment for not more than three years, or to payment of a fine of not more than $5,000, or both.

Minn. Stat. § 617.247 subd. 4(a)

(a) A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than five years and a fine of not more than $5,000 for a first offense and for not more

than ten years and a fine of not more than $10,000 for a second or subsequent offense.

Georgia Statutes

Ga. Code Ann. § 16-12-100.1(a)(6)-(8)

(6) "Sadomasochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(7) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas, or buttocks of the human male or female or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(8) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation.

Ga. Code Ann. § 16-12-100.2(b)

(b) As used in this Code section, the term:

(1) "Child" means any person under the age of 16 years.

(2) "Electronic device" means any device used for the purpose of communicating with a child for sexual purposes or any device used to visually depict a child engaged in sexually explicit conduct, store any image or audio of a child engaged in sexually explicit conduct, or transmit any audio or visual image of a child for sexual purposes. Such term may include, but shall not be limited to, a computer, cellular phone, thumb drive, video game system, or any other electronic device that can be used in furtherance of exploiting a child for sexual purposes;

(3) "Identifiable child" means a person:

(A) Who was a child at the time the visual depiction was created, adapted, or modified or whose image as a child was used in creating, adapting, or modifying the visual depiction; and

(B) Who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature or by electronic or scientific means as may be available.

The term shall not be construed to require proof of the actual identity of the child.

(4) "Sadomasochistic abuse" has the same meaning as provided in Code Section 16-12-100.1.

(5) "Sexual conduct" has the same meaning as provided in Code Section 16-12-100.1.

(6) "Sexual excitement" has the same meaning as provided in Code Section 16-12-100.1.

(7) "Sexually explicit nudity" has the same meaning as provided in Code Section 16-12-102.

(8) "Visual depiction" means any image and includes undeveloped film and video tape and data stored on computer disk or by electronic means which is capable of conversion into a visual image or which has been created, adapted, or modified to show an identifiable child engaged in sexually explicit conduct.

Ga. Code Ann. § 16-12-100.2(e)

(e)(1) A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, or instant messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less

than one nor more than ten years or by a fine of not more than $10,000.00; provided, however, that if at the time of the offense the victim was at least 14 years of age and the defendant was 18 years of age or younger, then the defendant shall be guilty of a misdemeanor.

Ga. Code Ann. § 16-12-102(7)

(7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Oregon Statutes in Effect at the Time of *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010)

Or. Rev. Stat. § 167.054(1) (2008)

A person commits the crime of furnishing sexually explicit material to a child if the person intentionally furnishes a child, or intentionally permits a child to view, sexually explicit material and the person knows that the material is sexually explicit material.

Or. Rev. Stat. § 167.051(4) (2008)

(4) "Sexual conduct" means: (a) Human masturbation or sexual intercourse; (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; (c) Penetration of the vagina or rectum by any object other than as part of a medical diagnosis or as part of a personal hygiene practice; or (d) Touching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female.

Or. Rev. Stat. § 167.057(1)-(2) (2008)

(1) A person commits the crime of luring a minor if the person: (a) Furnishes to, or uses with, a minor a visual representation or explicit verbal description or narrative account of sexual conduct; and (b) Furnishes or uses the representation, description or account for the purpose of: (A) Arousing or satisfying the sexual desires of the person or the minor; or (B) Inducing the minor to engage in sexual conduct.

(2) A person is not liable to prosecution for violating subsection (1) of this section if the person furnishes or uses a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation.

Texas Statutes in Effect at the Time of
***Ex Parte Lo*, 424 S.W.3d 10**
(Tex. Crim. App. 2013)

Tex. Penal Code Ann. § 21.01(1)-(3)

(1) "Deviate sexual intercourse" means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(B) the penetration of the genitals or the anus of another person with an object.

(2) "Sexual contact" means, except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

(3) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

Tex. Penal Code Ann. § 33.021 (2007)

(a) In this section:

(1) "Minor" means:

(A) an individual who represents himself or herself to be younger than 17 years of age; or

(B) an individual whom the actor believes to be younger than 17 years of age.

(2) "Sexual contact," "sexual intercourse," and "deviate sexual intercourse" have the meanings assigned by Section 21.01.

(3) "Sexually explicit" means any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct, as defined by Section 43.25.

(b) A person who is 17 years of age or older commits an offense if, with the intent to arouse or gratify the sexual desire of any person, the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:

(1) communicates in a sexually explicit manner with a minor; or

(2) distributes sexually explicit material to a minor.

(c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.

(d) It is not a defense to prosecution under Subsection (c) that:

(1) the meeting did not occur;

(2) the actor did not intend for the meeting to occur; or

(3) the actor was engaged in a fantasy at the time of commission of the offense.

(e) It is a defense to prosecution under this section that at the time conduct described by Subsection (b) or (c) was committed:

(1) the actor was married to the minor; or

(2) the actor was not more than three years older than the minor and the minor consented to the conduct.

(f) An offense under Subsection (b) is a felony of the third degree, except that the offense is a felony of the second degree if the minor is younger than 14 years of age or is an individual whom the actor believes to be younger than 14 years of age at the time of the commission of the offense. An offense under Subsection (c) is a felony of the second degree.

(g) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

Tex. Penal Code Ann. § 43.25(a)(2)

"Sexual conduct" means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse,

or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 28, 2017

Mr. Mark William Bennett
Bennett & Bennett
917 Franklin Street
Fourth Floor
Houston, TX 77002

Re: Krista Ann Muccio
v. Minnesota
Application No. 16A1144

Dear Mr. Bennett:

The application for a further extension of time in the above-entitled case has been presented to Justice Gorsuch, who on June 28, 2017, extended the time to and including August 4, 2017.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by [/s/]
Redmond K. Barnes
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 24, 2017

Mr. Mark William Bennett
Bennett & Bennett
917 Franklin Street
Fourth Floor
Houston, TX 77002

Re: Krista Ann Muccio
v. Minnesota
Application No. 16A1144

Dear Mr. Bennett:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on May 24, 2017, extended the time to and including July 7, 2017.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by [/s/]
Redmond K. Barnes
Case Analyst

[attached notification list omitted]