No. 17-209

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

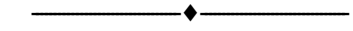
Respondent's sole argument for denying the petition rests on a fundamental misrepresentation of the opinion below. Respondent posits that the Minnesota Supreme Court applied a limiting construction to convert Minnesota Statutes § 609.352 subdivision 2a(2) into a law that prohibits only speech directly linked and designed to facilitate criminal conduct. Opp. 10-11. Only by assuming the existence of this new element requiring that a speaker's intent to arouse be linked with an intent to engage in criminal conduct does Respondent contend that no circuit split warrants this Court's attention. Opp. 5, 10, 12. But subdivision 2a(2), as actually interpreted and upheld by the court below, is identical in all relevant respects to the statutes struck down by the Ninth Circuit and Texas's highest criminal court. Respondent's additional intent requirement was never adopted by the Minnesota Supreme Court, is therefore not the law in Minnesota, and accordingly offers no basis to deny review.[1]

This Court's guidance is needed to resolve the entrenched conflict deepened by the Minnesota Supreme Court's decision. Today, the same speech by the same speaker would be protected in Texas or states within the Ninth Circuit but prohibited in Minnesota or Georgia, which also recently upheld a similar statute. *Scott*

[1] Respondent's Brief in Opposition opens with an extended description of the alleged facts of the case below. That discussion is irrelevant because, as all of the courts below recognized, Petitioner raises a facial challenge to the statute. *See* Pet. App. 6, 32, 51.

v. State, 788 S.E.2d 468 (Ga. 2016), *cert. denied*, 137 S. Ct. 1328 (2017). Indeed, communications sent from Texas, from states within the Ninth Circuit, or from any number of other states currently lacking statutes like those in Minnesota and Georgia, could be protected in the speaker's jurisdiction yet could expose the speaker to felony prosecution if *received* in Minnesota. *See* Minn. Stat. § 609.352 subd. 2b (applying the statute to communications sent or received in Minnesota).

Moreover, as additional states struggle to draw a constitutional line between shielding minors from harmful electronic communications and impermissibly criminalizing protected speech, uncertainty over the parameters of First Amendment protections will have a chilling effect that threatens not only innocent speakers' rights, but also the societal benefits of a robust "marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). The Court should grant the petition to provide states the essential guidance they need to police harmful online communications with minors without offending the First Amendment.



ARGUMENT

I. THE BRIEF IN OPPOSITION MISREPRESENTS THE HOLDING OF THE MINNESOTA SUPREME COURT.

Respondent's sole argument for denying the petition rests on a fictional premise. Respondent asserts

that the Minnesota Supreme Court's interpretation of subdivision 2a(2) in *Muccio* requires:

> (1) the adult to direct the prohibited content at a child and the child must be the object of the adult's attention; (2) the adult sending the [electronic] communication must act with the specific intent to arouse the sexual desire of any person; and (3) *the communication must be linked and designed to facilitate the commission of a later crime with that child . . . .*

Opp. 10-11 (emphasis added). According to Respondent, it is this third requirement that differentiates subdivision 2a(2) from the statutes at issue in *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), and *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). *See* Opp. 10-13. Respondent's characterization of the statute, however, is contradicted by the court's own description of what subdivision 2a(2) requires:

> 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.

Pet. App. 14. In no terms, explicit or implicit, does the court below require that the communication be "linked and designed to facilitate the commission of a later crime with that child," as Respondent claims. *Compare id., with* Opp. 10-11. There is simply no support for the

assertion that the court applied this "limiting construction," Opp. 10, 12, to the statute.[2]

In a further effort to blur the reality of the opinion below and engraft a supplemental-intent element to narrow subdivision 2a(2)'s broad reach, Respondent states that subdivision 2a(2) "proscribes grooming behavior 'targeted at a specific child with the goal of enticing the child to engage in later criminal acts.' " Opp. 7 (quoting Pet. App. 18-19). But this blanket characterization, with its out-of-context quote, is belied by the next paragraph of the Minnesota Supreme Court's opinion: "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." Pet. App. 19. Indeed, the court below repeatedly acknowledges that the statute covers protected speech that does not constitute "grooming." *Id.* at 19, 24, 26-28.

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[2] Although Respondent does not cite to the relevant section of the opinion, it seems possible that Respondent bases its assertion that the Minnesota Supreme Court applied a "limiting construction," Opp. 10, 12, on the court's statement that speech that is covered by the statute but not integral to criminal conduct "may be protected through as-applied challenges." Pet. App. 28. But a limiting construction must limit the application of the statute, not merely invite challenges to its application. *See*, *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380-81 (1992) (following the Minnesota Supreme Court's limiting construction of a statute prohibiting an action that "arouses anger, alarm or resentment in others" as applying only to unprotected "fighting words"). In the opinion below, by contrast, the Minnesota Supreme Court acknowledged that the statute's reach was not limited to unprotected speech. Pet. App. 19, 24, 26-28.

The face of the opinion, therefore, negates Respondent's efforts to differentiate subdivision 2a(2) from the functionally identical statutes invalidated by the Texas Court of Criminal Appeals and the Ninth Circuit.

II. THE HOLDING OF THE MINNESOTA SUPREME COURT CONFLICTS WITH DECISIONS OF THE TEXAS COURT OF CRIMINAL APPEALS AND THE NINTH CIRCUIT.

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

The only basis Respondent gives for arguing that the decision below is not in conflict with the decision of the Texas Court of Criminal Appeals in *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), is Respondent's statement that the Minnesota Supreme Court added a requirement to subdivision 2a(2) that "the communication must be linked and designed to facilitate the commission of a later crime" with the minor recipient. Opp. 10-11. But, as discussed above, the Minnesota Supreme Court added no such requirement. The only intent required to violate subdivision 2a(2) is the intent "to arouse the sexual desire of any person." Minn. Stat. § 609.352 subd. 2a. Similarly, the Texas statute struck down in *Ex Parte Lo* required intent "to arouse or gratify the sexual desire of any person." Tex. Penal Code Ann. § 33.021(b) (2007) (amended 2015). One statute was struck down as unconstitutional by the Texas Court of Criminal Appeals, while

the other, functionally identical, statute was upheld by the Minnesota Supreme Court.

Respondent dwells on the Texas Legislature's amendment of section 33.021(b) in response to *Ex Parte Lo*, Opp. 9-10, but that merely underscores the conflicting treatment Minnesota and Texas give to the same speech. The Texas Legislature specified in the new statute that communications would be prohibited only if made with the intent to commit a sex crime. Tex. Penal Code Ann. § 33.021(b). In contrast, the only intent required for subdivision 2a(2) is intent to arouse *any person*, Pet. App. 12, a vastly different requirement than communicating with an intent to commit a criminal act with the recipient. When speech is integral to criminal conduct, it loses its protection. *See*, *e.g.*, *United States v. Alvarez*, 567 U.S. 709, 717 (2012). But in Minnesota, unlike in Texas, the speech encompassed by subdivision 2a(2) may be entirely unrelated to criminal conduct—even when spoken with intent to arouse.

As both the Texas Court of Criminal Appeals and the Ninth Circuit noted, prohibitions against sexually explicit speech communicated with an intent to arouse could sweep in a wide array of protected works, including classic literature and popular movies and television shows. *See Ex Parte Lo*, 424 S.W.3d at 20; *Powell's Books*, 622 F.3d at 1210, 1214. And even if, as in Minnesota, the speech must be directed at a minor, Pet. App. 9, the types of exchanges proscribed by subdivision 2a(2) could encompass, for example, a youth minister's electronically shared counseling on teen sexuality, an older sibling's text with sexually oriented,

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. *See* Pet. 19-23, 26. Such speech is protected in Texas, but fodder for a felony prosecution in Minnesota, underscoring the conflict between the opinion below and that of the Texas Court of Criminal Appeals in *Ex Parte Lo*.

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

In attempting to reconcile the Minnesota Supreme Court's upholding of subdivision 2a(2) with the Ninth Circuit's invalidation of a nearly identical Oregon statute in *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010), Respondent analogizes subdivision 2a(2) to a portion of the Oregon statute that was not at issue in *Powell's Books*. *See* Opp. 11-13; 622 F.3d at 1208 n.5, 1209. Subdivision 2a(2) is, however, functionally identical to the portion of the Oregon statute that *was* at issue in *Powell's Books* and that did *not* survive First Amendment scrutiny. *See* 622 F.3d at 1209.

Both the Minnesota statute and the former Oregon statute have separate prongs that prohibit two actions: first, sending a sexually related communication with the intent to arouse, *see* Minn. Stat. § 609.352 subd. 2a(2), Or. Rev. Stat. § 167.057(1)(b)(A) (2008) (amended 2011); and second, sending a sexually related communication for the purpose of inducing a

minor to engage in sexual conduct, *see* Minn. Stat. § 609.352 subd. 2a(1), Or. Rev. Stat. § 167.057(1)(b)(B) (2008) (amended 2011).[3] No challenge to the second, "inducing" prohibition was brought in either case. Only the first of these prohibitions was at issue in the case below and in *Powell's Books*.

In an attempt to avoid the conflict between *Powell's Books* and the opinion below, Respondent again relies on its phantom, additional intent element to contend that subdivision 2a(2) is more like the "inducing prong" of the Oregon statute because both sections require an intent to engage in further criminal conduct. *See* Opp. 12-13. But, as noted above, the Minnesota Supreme Court never engrafted Respondent's additional intent requirement on the statute, so nothing in the opinion transforms subdivision 2a(2) into an inducement or solicitation provision, as Respondent misleadingly suggests. *See id.* Indeed, such a transformation would make no sense, because subdivision 2a already has an "inducing prong" analog in a different subsection. *See* Minn. Stat. § 609.352 subd. 2a(1) (prohibiting the use of electronic communication for "soliciting a child or someone the person reasonably believes is a child to engage in sexual conduct").

[3] The current version of the "inducing prong" of former § 167.057(1)(b)(B) is available at Oregon Revised Statutes § 167.057(1).

By repeatedly focusing on what is not at issue in the opinion below, Respondent dodges the actual scope of the statutory provision at issue and the square conflict created by the Minnesota Supreme Court's holding. The Ninth Circuit struck down a statute as unconstitutionally overbroad, while the Minnesota Supreme Court upheld a functionally identical statute.

III. THE MINNESOTA SUPREME COURT'S INTERPRETATION OF SUBDIVISION 2A(2) DID NOT CURE ITS SUBSTANTIAL OVERBREADTH.

As discussed above, there is no basis for concluding that the Minnesota statute covers only speech "linked and designed to facilitate the commission of a later crime with that child." Opp. 13. Instead, the Minnesota Supreme Court's interpretation of the statute was that it "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." Pet. App. 14. This prohibition covers a substantial amount of protected speech and is therefore unconstitutionally overbroad. *See* Pet. 17-23; *see also*, *e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

The court below admitted that there would be cases where communication that is "not integral to criminal conduct, is not obscene, and does not fall

within another category of unprotected speech" would fall within the statute's reach. Pet. App. 26. Although the court suggested that threats to protected speech could be remedied through as-applied challenges to subdivision 2a(2), that approach offers little consolation to innocent speakers and is insufficient to cure the statute's overbreadth. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758-59 (1988) (noting that the risk that protected speech will be chilled is particularly acute with as-applied challenges because of the difficulty and delay inherent in litigating them). The First Amendment requires that statutes regulating speech be drawn narrowly enough that speakers need not depend on the varying and unpredictable discretion of government officials. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Nor does Minnesota's interest in protecting minors from the damage of "grooming" by sexual predators justify the statute's reach. The idea "that protected speech may be banned as a means to ban unprotected speech . . . . turns the First Amendment upside down." *Ashcroft*, 535 U.S. at 255. Even when the legitimate interest of protecting children is the goal, the "possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

IV. 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.

The Court should address the entrenched split regarding the constitutionality of statutes like the Minnesota statute at issue here. In addition to the state highest criminal court and federal court of appeals that have held that these types of statutes violate the First Amendment, the Georgia Supreme Court upheld a statute functionally identical to subdivision 2a(2) in *Scott v. State*, 788 S.E.2d 468 (Ga. 2016), *cert. denied*, 137 S. Ct. 1328 (2017). Thus, speech protected by the First Amendment in Texas or states within the Ninth Circuit may constitute a felony in Georgia or Minnesota. In fact, speech that is protected in the state from which it was sent may open the sender to prosecution in the state where it is received. *See* Minn. Stat. § 609.352 subd. 2b (applying statute to communications sent or received in Minnesota).

In addition to the states directly implicated in the split, and those with similar statutes, *see* Pet. 27 & n.12, other states will need guidance on how they can protect children from harmful online communications without silencing protected speech. If states draft statutes in the mold of those upheld below and by the Georgia Supreme Court, innocent speakers will "hedge and trim," *see Thomas v. Collins*, 323 U.S. 516, 535 (1945), to avoid online communications that could potentially

fall within those statutes' overly broad reach. Abstaining from protected speech is often easier than "undertak[ing] the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation." *See Hicks*, 539 U.S. at 119. It is particularly important to avoid this chilling in 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. Civ. Liberties Union*, 521 U.S. 844, 868 (1997)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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