

No. 17-209

In the
Supreme Court of the United States

Krista Ann Muccio,
Petitioner,

v.

State of Minnesota,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Minnesota State Legislature enacted Minn. Stat. § 609.352, subd. 2a(2) to proscribe sexual predators from using electronic means to engage in grooming behavior with the goal of enticing a specific child to engage in later criminal sexual acts.

The question presented is: Is Minn. Stat. § 609.352, subd. 2a(2) unconstitutionally overbroad in violation of the First Amendment?

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STATEMENT OF THE CASE AND FACTS

On November 29, 2014, a father reported to law enforcement that he found inappropriate images on an iPad used by his son XX. At the time of the report, XX was 15-years-old, having attained that age in early November 1999. The pictures were located in an album labeled “recently deleted” and were sent through Instagram in a private message. One picture was a close up of a female’s genitals with her legs spread apart. A second picture was of a female naked from the waist up with no face shown. A third picture was of a female wearing a thong lying on her stomach with her backside showing. The images were sent to XX from the screenname used by Krista Muccio (“Petitioner”). XX’s father found three additional pictures in the “recently deleted” folder that appeared to be of XX’s bare stomach and chest. At the time of the report, Petitioner was 41-years-old and employed as a lunchroom assistant by the school district attended by XX.

In an interview with police, XX reported the following facts. XX has known Petitioner since the eighth grade because she was the “lunch lady” at his former school. Petitioner started following XX on Instagram in June of 2014. Initially they had normal conversations, but Petitioner progressed to calling him “cute” and started engaging in sexual talk. Amongst other things, Petitioner would talk about what she wanted to do in the bedroom when XX turned eighteen. In June 2014, Petitioner sent XX a picture of a body in a swimsuit, but the face was not visible. Petitioner told XX she wanted to do sexual “stuff” in June, but was not specific about what until November 2014. Petitioner sent three pictures to XX and told him that she wanted something in return. In

response, XX sent a picture of his bare genitalia to Petitioner. Upon receiving the picture from XX, Petitioner replied to XX telling him that it was worth the wait and that she could not wait to see it (i.e., XX's penis) in person. Petitioner also replied with comments about wanting XX to "pound her" and that she was "sick of the slow stuff."

Police conducted an interview of Petitioner during which she admitted that she talked and texted with students, specifically over Instagram using the same screenname that she had used to communicate with XX. Petitioner also admitted communicating with XX over Instagram, including sending XX pictures. Petitioner acknowledged that XX sent her a picture of his genitalia and that she deleted it. When asked if any of the messages she sent to XX were sexually explicit or flirtatious, she stated, "a little bit."

On November 25, 2014, Petitioner sent XX a message stating, "Saw it was your birthday, another year older and closer to 18 lmao." Later in the same conversation, XX stated that he had been staring at Petitioner's "boobs." Petitioner stated that she was blushing and XX responded, "Cuz you want me to fuckyou." Later that night, Petitioner wrote that she was thinking about XX "when [she] should totally not be lol." XX asked if that was because she wanted him and she stated, "still not wanting to admit that out loud...you know prison and such lmao." Petitioner then expressed that she was happy that XX messaged her and XX stated he was glad to hear that. Petitioner responded, "Only cuz you want to fuck me." In response, XX stated that he "want[ed] to fuck the shit out of [her]." Petitioner replied that she was "now going to hell." Toward the end of this conversation, XX requested a picture from Petitioner and she

stated, "YES...And you can't say anything negative no matter what cuz this is seriously way, way, farther than I told myself this was gonna go."

Petitioner sent a picture to XX after which the following messages were exchanged:

Petitioner: Can't believe I'm doing this! And this is tame lol
XX: That is so fucking sexy
Petitioner: Still working on the mom body lol. I think the devil just took my soul! Oh boy.....this better not go farther than your phone!
Lol
Petitioner: I will kick your ass;))
XX: Then youll suck my dick []
Petitioner: Ummmmmmm...Lol
hubba hubba
XX: Now I gott send you something
Petitioner: Is say you owe me;))
XX: Brb
Petitioner: I'll be here :)

XX sent an image to Petitioner with the message, "Not much but there ya go." Petitioner responded that it was worth the wait and stated that she was "totally trying to not be turned on, it's not working lol." XX asked if "it look[s] like something [Petitioner] would play with" and Petitioner responded, "[a]bsfuckinlutely." XX replied that he "cant wait to eat [her] pussy," to which Petitioner responded, "you and me both." During this conversation, Petitioner explicitly described what sexual acts she would like to engage in with XX including:

I would suck your cock like you have never had it sucked before. I would let you cum in my mouth and take it all the way down my throat as you beg for me to stop...to which I wouldn't.... I would let you fuck my pussy as I fingered my ass. I would be so wet as you lightly bit my nipples.... I love getting my hair pulled just a little as you fuck me. I rub my clit which makes me cum even more. Before you cum I would take your cock into my mouth again and let you just let go.... It only takes me a little bit before I'm ready to go again. I love being fucked hard, I'm over the take it slow part by now. I love kissing, it's the only thing that really turns me on. I would let you cum all over my face. Once I cum again, I seriously will not be able to get enough.

Petitioner sent another image to XX to which XX replied by requesting a picture of Petitioner's "ass" and her "fingering." Petitioner replied, "little demanding aren't we??? Works for me;)" Petitioner sent another image to XX with the message, "had to stay clothed just in case...but I happen to love my ass;)"

On April 2, 2015, Petitioner was charged by complaint with one count of felony electronic communication with a minor describing sexual conduct in violation of Minn. Stat. § 609.352, subd. 2a(2) and one count of felony possession of pornographic work involving minors in violation of Minn. Stat. § 617.247, subd. 4(a). Petitioner

challenged the constitutionality of Minn. Stat. § 609.352, subd. 2a(2) and requested that count 1 of the complaint be dismissed on facial overbreadth grounds. On November 25, 2015, the presiding district court judge dismissed count 1 of the complaint finding Minn. Stat. § 609.352, subd. 2a(2) unconstitutional under the First Amendment as “facially overbroad and not narrowly tailored to promote the State’s compelling interest in protecting children from sexual predators online.”

The Minnesota Court of Appeals affirmed the district court concluding that Minn. Stat. § 609.352, subd. 2a(2) implicates the First Amendment, is facially overbroad, not subject to a limiting construction and fails to satisfy strict scrutiny. *State v. Muccio*, 881 N.W.2d 149 (Minn. Ct. App. 2016). In a unanimous decision, the Minnesota Supreme Court reversed holding that the statute’s regulation of protected speech is not substantial and therefore does not violate the First Amendment on its face. *State v. Muccio*, 890 N.W.2d 914 (Minn. 2017).

ARGUMENT

THERE ARE NO COMPELLING REASONS WARRANTING REVIEW ON A WRIT OF CERTIORARI.

Petitioner asserts that review is warranted because the decision of the Minnesota Supreme Court conflicts with the Texas court’s First Amendment analysis in *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) and the Ninth Circuit’s decision in *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). As discussed below, *Muccio* is in accord with *Ex parte Lo* and *Powell’s Books*. Accordingly, there are no compelling reasons warranting review.

Petitioner was charged with one count of electronic solicitation of a child in violation of Minn. Stat. § 609.352, subd. 2a(2) which provides:

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:

...

(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) (2014). The term “child” is defined as “a person 15 years of age or younger.” Minn. Stat. § 609.352, subd. 1(a) (2014). “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.” Minn. Stat. § 609.352, subd. 1(b) (2014).

The purpose of Minnesota’s statute is to protect children from sexual abuse and exploitation

and from exposure to harmful sexual material. *Muccio*, 890 N.W.2d at 928, citing *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (“The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a 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.”) The statute proscribes grooming behavior “targeted at a specific child with the goal of enticing the child to engage in later criminal acts.” *Muccio*, 890 N.W.2d at 924.

The Minnesota statute prohibits an adult from participating in an electronic transmission of information relating to or describing the sexual conduct of any person if the intended target or object of the transmission is a child. *Muccio*, 890 N.W.2d at 920. For the transmission to be directed at a child, “the child must be the object of the adult’s attention.” *Id.* at 921. Stated another way, “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.” *Id.* Furthermore, in making the communication, the adult must act with the specific intent to arouse the sexual desire of any person. *Id.* at 922. Because of these statutory elements, “[n]on-targeted mass Internet communications, such as music videos, advertisements, and television series, [do] not fall within the purview of the statute.” *Id.* at 926.

A. Texas Statute.

The statute at issue at the time *Ex parte Lo* was decided in 2013 provided:

(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.

Tex. Penal Code § 33.021(b) (2007). At the time, the term “minor” was defined as “an individual who represents himself or herself to be younger than 17 years of age” or “an individual whom the actor believes to be younger than 17 years of age.” Tex. Penal Code § 33.021(a)(1) (2007). The term “sexually explicit” is defined as “any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct as defined by Section 43.25.” Tex. Penal Code § 33.021(a)(3) (2007). “Sexual conduct” is defined as “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.” Tex. Penal Code § 43.25(a)(2) (2007).

In its decision, the *Ex parte Lo* Court held that section 33.021(b) was unconstitutionally broad and found that the culpable mental state of “intent to arouse or gratify the sexual desire of any person” was not narrowly drawn to achieve the legislature’s intent to prohibit “grooming.” *Ex parte Lo*, 424 S.W.3d at 23. The court observed that other courts across the United States that have upheld similar statutes share either of two characteristics: (1) the definition of the banned communication tracks the definition of obscenity as defined in *Miller v. California*, 413 U.S. 15 (1973); or (2) the statutes include a specific intent to commit an illegal sexual act, that is, the actor intends to commit a sexual act with a minor. *Id.* at 21.

To correct the overbreadth of the statute, the court suggested that “[a] more narrowly drawn culpable mental state would be ‘with intent to induce the child to engage in conduct with the actor or another individual that would constitute a violation of §§ 21.11 [indecenty with a child], 22.011 [sexual assault], or 22.021 [aggravated sexual assault].” *Ex parte Lo*, 424 S.W.3d at 23.

In reaction to the *Ex parte Lo* decision, in 2015 the Texas State Legislature amended section 33.021(b) to provide:

(b) A person who is 17 years of age or older commits an offense if, with the intent to commit an offense listed in Article 62.001(5)(A), (B), or (K), Code of Criminal Procedure, 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.

Tex. Penal Code § 33.021(b) (2015). The definition of “minor” was also amended to mean “an individual who is younger than 17 years of age” or “an individual whom the actor believes to be younger than 17 years of age.” Tex. Penal Code § 33.021(a)(1). The statute now requires that the actor communicate with a minor with the intent to commit: (1) continuous sexual abuse of young child or children in violation of section 21.02; (2) indecency with a child in violation of section 21.11; (3) sexual assault in violation of section 22.011; (4) aggravated sexual assault in violation of section 22.021; (5) prohibited sexual conduct in violation of section 25.02; (6) compelling prostitution in violation of section 43.02; (7) sexual performance by a child in violation of section 43.25; (8) possession or promotion of child pornography in violation of section 43.26; or (9) trafficking of persons in violation of section 20A.02(a)(3), (4), (7), or (8). Tex. Code Crim. Proc. Ann. art. 62.001(5)(A), (B), or (K) (West 2015).

The Minnesota Supreme Court’s limiting construction of Minn. Stat. § 609.352, subd. 2a(2) in *Muccio* is in accord with the court’s decision in *Ex parte Lo*. Unlike the Texas statute at issue in *Ex parte Lo*, the Minnesota statute 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 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 – in the case of Petitioner, criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b)¹.

B. Oregon Statute.

The pertinent statute at issue at the time *Powell's Books* was decided in 2010 provided:

- (1) A person commits the crime of luring a minor if the person:
 - (a) Furnishes to, or uses with, a minor 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.

Or. Rev. Stat. § 167.057(1) (2007). The term “minor” means “a person under 18 years of age.” Or. Rev. Stat. § 167.051(3) (2007). The term “sexual conduct” means:

- (a) Human masturbation or sexual intercourse;

¹In addition, the Minnesota Supreme Court found that the speech proscribed by the Minnesota statute most often meets the *Miller v. California*, 413 U.S. 15 (1973) standard of obscenity. *Muccio*, 890 N.W.2d at 925-26.

- (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. § 167.051(4) (2007). In *Powell's Books*, the inducing prong of the statute (i.e., Or. Rev. Stat. § 167.057(1)(b)(B)) was not at issue. *Powell's Books*, 622 F.3d at 1209. The inducing prong of the Oregon statute is clearly aimed at proscribing the “grooming” process employed by sexual predators to lower a child’s inhibitions with respect to later criminal sexual acts. See *Muccio*, 890 N.W.2d at 924, citing Daniel Pollack & Andrea MacIver, *Understanding Sexual Grooming in Child Abuse Cases*, 34 Child L. Prac. 161, 161 (2015). The court implicitly found the inducing prong of the statute passed constitutional muster because the communication is being directed at a minor for the purpose of committing a future illegal act – criminal sexual conduct.

Similarly, Minnesota’s statute is also aimed at proscribing the “grooming” process. Given the Minnesota Supreme Court’s limiting construction of Minn. Stat. § 609.352, subd. 2a(2), *Muccio* is in accord with *Powell's Books*. Similar to Oregon’s inducing prong of Or. Rev. Stat. § 167.057(1), to establish a defendant guilty under the Minnesota statute, the state must prove that the defendant directed the

prohibited content to a specific child; in sending the communication, the defendant acted with the specific intent to arouse the sexual desire of any person; and the communication was linked and designed to facilitate the commission of a later crime with that child.

CONCLUSION

There are no compelling reasons warranting review on a writ of certiorari in this matter. Respondent respectfully requests that this Court deny this petition.

Respectfully submitted,

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