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Supreme Court No.: 93609-9

Court of Appeals No.: 32354-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

E.G.,

Petitioner.

FILED
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SUPREME COURT

MEMORANDUM OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF REVIEW

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I. INTRODUCTION

Amicus Curiae the American Civil Liberties Union of Washington ("ACLU") respectfully submits this brief in support of the Petition for Review submitted by defendant-petitioner E.G.

In short, the Court should accept E.G.'s petition because the Court of Appeals' ruling below adopted an interpretation of Washington's child pornography statute, RCW 9.68A.001 *et seq.*, that, if allowed to stand, would permit prosecutors throughout the State to charge minors with felony child pornography offenses for taking sexually-explicit images of themselves under the very statute intended to *protect* them from child pornographers. This interpretation of the child pornography statute raises significant public-interest concerns, is adverse to the intent of the legislature, and implicates both free-speech concerns under the First Amendment and vagueness concerns under the Fourteenth Amendment. Review is thus proper under RAP 13.4(b)(3) and (4).

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of *Amicus Curiae* the ACLU are set forth in the accompanying Motion of the ACLU for Leave to File *Amicus Curiae* Memorandum in Support of Review.

III. ISSUES ADDRESSED BY *AMICUS CURIAE*

1. Whether review is warranted due to the substantial public interest raised by the Court of Appeals' interpretation of a statute that, if permitted to stand, would make common teenage "sexting" the felony crime of child pornography?

2. Whether review is warranted based on significant questions of constitutional law because the decision below contravenes

decades of jurisprudence holding that child pornography laws are constitutional only when they protect child victims?

IV. STATEMENT OF THE CASE

As the parties' briefs explain, E.G. is a minor with disabilities who was charged with the felony offense of distribution of child pornography under RCW 9.68A.050 after he sent a text message with a photograph of his own penis to a non-consenting, adult woman when he was 17 years old. The woman reported the incident to the police, and the Spokane County prosecutor charged E.G. not only with harassment, but also felony distribution of child pornography. After the trial court rejected E.G.'s motion to dismiss for insufficient evidence, he was convicted of distribution of child pornography.

The Court of Appeals for Division III rejected E.G.'s appeal and affirmed his conviction in a published opinion. *State v. E.G.*, 194 Wn. App. 457, 377 P.3d 272 (2016). Because the Court of Appeals' decision affirming E.G.'s conviction involves a question of statutory interpretation that is of substantial public interest, and because the decision implicates significant constitutional concerns, the ACLU respectfully submits that the Court should accept E.G.'s petition for review. RAP 13.4(b)(3), (4).

V. ARGUMENT

A. E.G.'s Petition Involves an Issue of Substantial Public Interest That Should Be Determined by the Court.

1. The Court of Appeals' Ruling Violates Statutory Construction Rules.

The Court of Appeals interpreted the distribution of child pornography statute as applying to a minor who voluntarily takes and

shares a sexually explicit photograph of himself. 194 Wn. App. at 467-69. RAP 13.4 provides that the Court may accept a petition for review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). E.G.'s petition easily satisfies this criteria because it relates to a question of statutory interpretation that has not been addressed by this Court and has the potential to affect thousands of minors throughout the State.

Questions of statutory interpretation present an issue of substantial public importance on which this Court frequently grants review in the criminal context, and that this Court reviews *de novo*. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015); *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The ACLU is aware of no other case in the State that has addressed this issue. The Court should grant E.G.'s petition because the lower court's interpretation of the child pornography statute ignores both the plain language of the statute and the Legislature's stated intent in enacting it.

The "fundamental objective" of a court tasked with interpreting the meaning and scope of a statute is to determine and give effect to the intent of the legislature, looking not only to the text of the specific statute but also to related provisions and the "statutory scheme as a whole." *Larson*, 184 Wn.2d at 848.

The Court of Appeals misinterpreted the distribution of child pornography statute as applying to E.G.'s conduct. The plain language of the statute distinguishes between a "person" who commits the crime of

dealing in depictions of sexually explicit conduct and the "minor" who is the subject of such depictions, providing that:

> *A person* commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when *he or she*:
>
> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts *a minor* engaged in an act of sexually explicit conduct . . .

RCW 9.68A.050(2)(a) (emphasis added). Whether the "minor" victim of this crime can also be the "person" who deals in depictions is a pure question of statutory interpretation, and one that the ACLU submits the Court of Appeals answered incorrectly.

Further, the Court of Appeals' interpretation and application of the distribution of child pornography statute to E.G.'s conduct conflicts with legislative intent:

> The legislature further finds that children engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse . . . . It is the intent of the legislature . . . to hold *those who pay to engage in the sexual abuse of children* accountable for the trauma *they* inflict on children.

RCW 9.68A.001 (emphasis added). By distinguishing between the "children" intended to be protected by the statute who are the subjects of child pornography and "those who pay to engage in the sexual abuse of children," the Legislature made clear that the statute was intended to protect the minor victims of such depictions, not to make minors who take sexually explicit photographs of themselves felony sex offenders. It is patently unreasonable to read the specific language of RCW 9.68A.050 as criminalizing the behavior of "a minor" like E.G.

The Court of Appeals did not directly address this argument, instead basing its interpretation of the statute on the baffling justification that E.G.'s prosecution was not "a sexting case" or a "case of the innocent sharing of sexual images between teenagers," and making a misguided analogy to other criminal statutes that "protect children from themselves." 194 Wn. App. at 468, 468 n.9; *but see id.* at 466 n.5 (citing dictionary definition of "sexting" as "the sending of sexually explicit messages or images by cell phone").

If permitted to stand, the lower court's overbroad interpretation of the statute would enable county prosecutors to charge any consenting minor who voluntarily creates and shares a sexually explicit image of themselves with a felony child pornography offense. And, as the ACLU knows has happened elsewhere in the state, it would also permit county prosecutors to charge the unwilling recipient(s) of any such image with possession of child pornography. It would even permit prosecutors to charge teenagers who take sexually explicit "selfies" with their own cell phones *even if they do not share the photos.*

The role of the judiciary when interpreting a criminal statute is not to give it such an absurdly broad meaning that the only thing standing between well-meaning individuals and a criminal conviction is prosecutorial discretion; instead, the proper role of the courts is to safeguard the rights of individuals by construing the statute in a manner that gives effect to the Legislature's overarching—and here, explicitly stated—intent in enacting the criminal statute and avoids absurd

consequences. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("'[A] reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.'" (internal citation omitted)).

2. The Court of Appeals' Ruling Makes "Sexting" a Felony.

The ACLU submits this brief as *amicus curiae* because the issues raised by E.G.'s petition are much greater in significance and scope than the instant case. As the ACLU noted in its *amicus* brief below, so-called "sexting" is a phenomenon inextricably linked with 21st century technology, because the transmission of sexually-explicit images is vastly simpler and quicker today than it was in the early 1980s when the distribution of child pornography statute was originally enacted. As smartphones become ubiquitous, sexting—along with its potential for significant legal repercussions—is becoming more and more prevalent.

The Court of Appeals appears to have cherry-picked research from an outlier study to downplay the magnitude of this problem, citing a 2012 study which concluded that between two and 10 percent of teens had been involved in sending sexually-explicit or "sexually suggestive" images. 194 Wn. App. at 465 n.4 (citing Kimberly J. Mitchell, et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 13 (2012)). In doing so, the court essentially ignored an earlier study that concluded that roughly *20 percent* of youths engaged in sexting.[1] Indeed,

[1] National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008) (available at https://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech _summary.pdf).

the problem only appears to be growing, with a more recent June 2014 study focused on 18- to 22-year-olds finding that more than half of respondents had sexted as minors, with a staggering *28%* of respondents acknowledging that they sent photographic sexts that were "most likely to be considered illegal." Heidi Stohmaier, et al., *Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences*, 11 SEX. RES. SOC. POLICY 245-255 (2014).[2] That same study found that 61% of respondents were not aware that sending explicit photographs could be prosecuted under child pornography laws, and noted that many jurisdictions in the United States have created educational and/or diversionary options in an effort to help teenagers who are caught sexting to avoid the harsh legal penalties associated with child pornography convictions. *Id.* at 247, 251.

Even accepting *arguendo* the frequency rates cited by the Court of Appeals, there is no real dispute that the ruling below creates significant legal risk for thousands of minors within the State. This extent of criminalization was clearly not intended by the Legislature,[3] and the problem's magnitude is only growing. The Court should grant E.G.'s

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[2] Available at: https://www.researchgate.net/profile/David_Dematteo/publication/272015427_Youth_Sexting_Prevalence_Rates_Driving_Motivations_and_the_Deterrent_Effect_of_Legal_Consequences/links/5609276308ae4d86bb118d9c.pdf?origin=publication_detail. This 2014 study observed that the 2012 Mitchell study "may underestimate the true incidence of sexting due to a methodological approach (i.e., telephone survey) that may discourage honest responding." *Id.* at 246-47.

[3] Joanna L. Barry, *The Child As Victim and Perpetrator: Laws Punishing Juvenile "Sexting,"* 13 VAND. J. ENT. & TECH. L. 129 (2010) (noting that "legislators never contemplated children sharing images of themselves, even though teenage sexting might squeeze into the literal definition of child pornography" (quotation omitted)).

petition to correct an interpretation of the child pornography statute that criminalizes conduct like E.G.'s, leaving the illusory promise of prosecutorial discretion as the only barrier between a felony sex crime conviction and a normal transition to adulthood.[4]

B. E.G.'s Conviction Involves Significant Questions of Law under the United States Constitution and the Washington State Constitution.

RAP 13.4 provides that the Court may accept a petition for review if the petition involves "a significant question of law under the Constitution of the State of Washington or of the United States . . ." RAP 13.4(b)(3). As set forth in E.G.'s petition for review, the Court should also accept review to consider the significant questions this appeal raises under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 5 of the Washington State Constitution.

First, E.G.'s petition raises significant First Amendment and Article I, Section 5 concerns. The United States Supreme Court has recognized a narrow exception to the rule that content-based restrictions on speech are presumptively unconstitutional for child pornography laws, based on the overarching policy that "a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (quotation omitted); *see also Osborne v. Ohio*, 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (upholding ban on possession of

[4] The ACLU's *amicus* brief below cited a number of studies concluding that the sending or receiving of sexually-explicit photographs is part of adolescent development in this modern technological age. *See Amicus Curiae* Brief of American Civil Liberties Union of Washington and Juvenile Law Center at 11-13.

child pornography given the "importance of the State's interest in *protecting the victims* of child pornography" (emphasis added)).

The Supreme Court underscored the limits of this exemption in *Ashcroft v. Free Speech Coalition*, when it invalidated a federal law criminalizing artistic depictions of child pornography that were not created using real children on the ground that "[v]irtual child pornography is not intrinsically related to the sexual abuse of children" and "creates no victims by its production." 535 U.S. 234, 250, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (quotation omitted).

These rulings make clear that state laws criminalizing sexually-explicit depictions of minors are permissible limits on speech only when they are directly tied to *protecting the victims* of child pornography.

The Court of Appeals ignored this fundamental limit on child pornography laws, instead characterizing the issue as whether to "creat[e] a right" for minors to produce and distribute sexually-explicit images of themselves. 194. Wn. App. at 464. But the issue raised by E.G.'s petition is not whether the Court should "create" a novel constitutional right. Rather, it is whether the Court should accept review to correct a construction of the statute that runs afoul of the Constitution by reaching beyond that which the First Amendment permits government to criminalize. *Cf. Fed. Commc's Comm'n v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (principle of constitutional avoidance counsels that statutes should be "construed to avoid serious constitutional doubts" (citation omitted)). The problem here

is compounded by the fact that it is not the plain language of the statute that creates the constitutional issue, but rather the lower court's strained interpretation of that plain language.

Second, the Court should accept E.G.'s petition because the Court of Appeals' interpretation of the distribution of child pornography statute raises significant vagueness concerns under the Fourteenth Amendment. As set forth above, the language of the statute clearly distinguishes between the "minors" it is intended to protect and "a person" who develops, duplicates, etc. the sexually-explicit depictions of that minor. RCW 9.68A.011(4)(f); RCW 9.68A.050(2)(a). An average citizen—let alone a minor—reading the statute would not understand it to criminalize depictions of minors that the minor "develops" themselves, raising significant vagueness concerns. These concerns are amplified in the context of criminal laws imposing content-based restrictions on speech. *See O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988) ("[W]here First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential."). As with the First Amendment concerns cited above, the Court of Appeals' ruling raises significant vagueness concerns under the Fourteenth Amendment, and the Court should grant review of E.G.'s petition to correct it.

VI. CONCLUSION

For the reasons set forth above, the ACLU respectfully submits that the Court should grant E.G.'s petition and accept review of the decision of the Court of Appeals below.

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

CORR CRONIN MICHELSON
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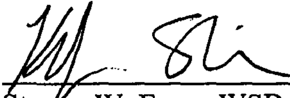

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DECLARATION OF SERVICE

The undersigned declares as follows:

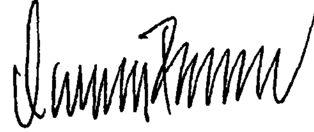
1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for *Amicus Curiae* American Civil Liberties Union of Washington.

2. On October 28, 2016, I caused the foregoing to be filed with the Supreme Court of the State of Washington and served on the parties to this action as follows:

Kathleen A. Shea Washington Appellate Project 1511 Third Avenue, Suite 701 Seattle, WA 98101 *Attorney for Petitioner*	□ Facsimile □ Messenger X U.S. Mail □ E-Mail
Gretchen E. Verhoef Deputy Prosecuting Attorney County-City Public Safety Building West 1100 Mallon Spokane, WA 99260 *Attorneys for Respondent*	□ Facsimile □ Messenger X U.S. Mail □ E-Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of October, 2016, at Seattle, Washington.



Lauren Beers