

No. 93609-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC GRAY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

When Eric Gray was 17 years old, he texted a woman an image of his penis. The Court of Appeals affirmed Eric's conviction for dealing in depictions of a minor engaged in sexually explicit conduct, finding that the statute permitted Eric to be both the "person" who committed the crime and the "minor" victim in the image. This interpretation of RCW 9.68A.050 is contrary to the plain language of the statute and allows the State to prosecute teenagers who voluntarily develop or share images of their own bodies. This Court should reverse.

B. ISSUES PRESENTED FOR REVIEW

1. Consistent with the legislature's stated intent, the plain language of RCW 9.68A.050 requires that the person who commits the crime and the minor victim be two different people. Even if the Court were to find there was another reasonable interpretation of the statute, the rule of lenity and doctrine of constitutional avoidance require this Court to interpret the statute in Eric's favor. Where Eric was convicted of dealing in depictions of a minor engaged in sexually explicit conduct, but he was the minor victim depicted in the image, should this Court reverse?

2. A statute is void for vagueness under the Fourteenth Amendment where it permits the State to engage in discriminatory enforcement according to the prosecutor's predilections. Where the State

admitted it would not typically prosecute a teenager for sharing an image of his own body, but elected to do so in Eric's case, should this Court find RCW 9.68A.050 unconstitutionally vague and reverse?

3. The First Amendment and article I, section 5 protect an individual's right to freedom of speech. The United States Supreme Court has held that child pornography falls outside the protection of the First Amendment, but that such speech remains entitled to protection where it is not obscene nor the product of sexual abuse. If RCW 9.68A.050 can be interpreted to allow for the prosecution of teenagers who develop or share images of their own body, which are neither obscene nor the product of abuse, should this Court find the statute unconstitutionally overbroad and reverse Eric's conviction?

C. STATEMENT OF FACTS

A woman named Taysha Rupert reported to the Spokane County Sheriff's Office that, over the course of a year, she had repeatedly received phone calls at odd hours of the night asking her sexual questions. CP 66. The frequency of the calls had lessened over time, but she had recently received two text messages. CP 66-67. The first message was an image of an erect male penis. CP 67. The second message stated: "Do you like it babe? It's for you Taysha Rupert. And for Your daughter babe – Sent From TextFree!" CP 67.

The sheriff's office traced the messages back to Eric Gray. CP 69. Eric knew Ms. Rupert because she had previously worked for his mother. CP 70. At the time the messages were sent, Eric was 17, but he was only three months shy of his eighteenth birthday. CP 66-67. Ms. Rupert was 23 years old. CP 66.

Eric struggled with mental health issues and had been diagnosed with Asperger syndrome. 2/28/14 RP 33. When confronted by the deputy sheriff, his eyes watered and he began to stutter. CP 70. He quickly admitted that he had made the phone calls and sent the text messages to Ms. Rupert, including an image of his own penis. CP 70. He explained he was attracted to Ms. Rupert and had obtained her contact information from his mother's records. CP 71.

The deputy sheriff initially determined probable cause had been established to charge Eric with telephone harassment. CP 71. The juvenile prosecutor later added the charge of second degree dealing in depictions of a minor engaged in sexually explicit conduct. CP 1, 63. Eric moved to dismiss, arguing the State had failed to establish a prima facie case. CP 32-36.

The trial court denied Eric's motion. RP 25-27; CP 124. As part of a plea negotiation, the State dismissed the telephone harassment charge and Eric was convicted of the felony sex offense after a stipulated facts

bench trial. RP 37; CP 98, 127 (Finding of Fact 2). At sentencing, the court found several mitigating factors existed, including that Eric suffered “from a mental or physical condition that significantly reduced [his] culpability for the offense.” CP 96. The Court of Appeals affirmed Eric’s conviction on appeal.

D. ARGUMENT

1. RCW 9.68A.050 does not permit the prosecution of the minor depicted in the image.

- a. The only reasonable interpretation of RCW 9.68A.050 is that the person who commits the crime and the minor victim must be two different people.

This Court’s objective when interpreting a statute is to determine the legislature’s intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Where a statute is plain on its face, “the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court may determine a statute’s plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing *Ervin*, 169 Wn.2d at 820).

The Court may look no further than the plain language unless it determines the provision at issue is susceptible to more than one

reasonable interpretation. *Ervin*, 169 Wn.2d at 820 (citing *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). Where more than one interpretation is merely *conceivable*, the statute is not ambiguous. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013) (citing *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)). If the plain language is unambiguous, the Court’s inquiry ends. *State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014).

The plain language of the statutory provision under which Eric was convicted is unambiguous. It states:

(2)(a) 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 as defined in RCW 9.68A.011(4)(f) or (g).¹

RCW 9.68A.050(2)(a)(i).

The trial court found Eric guilty of dealing in depictions of a minor based on evidence that Eric sent a photograph of his own penis to another person in a text message. CP 127. In order to reach this determination,

¹ The trial court determined the image Eric sent met the definition of “sexually explicit conduct” under RCW 9.68A.011(4)(f), which is the “[d]epiction of the genitals or unclothing pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.” CP 127.

the trial court determined Eric was both the “person” who committed the crime and the “minor” who was victimized by the crime. CP 124. No rational reader could reach this conclusion.

It is a well-known canon of statutory construction that “a single word in a statute should not be read in isolation.” *K.L.B.*, 180 Wn.2d at 742 (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)). The plain language of RCW 9.68A.050 distinguishes between the “person” who commits the crime and the “minor” who is photographed. Considering these terms in isolation, Eric was both a “minor” and a “person.” However, read together, the plain language of the statute uses these terms to identify two different individuals. RCW 9.68A.050(2)(a). It does not contemplate the prosecution of a 17-year-old who photographs his own body.

Although this is evident from the language of the provision itself, the statutory scheme as a whole also supports this conclusion. Chapter 9.68A is titled “Sexual Exploitation of Children,” and the sections of that chapter describe acts which, like dealing in depictions of a minor engaged in sexually explicit conduct, constitute crimes that involve the exploitation of children by others. For example, other sections criminalize paying a minor to engage in sex and offering travel services to facilitate child prostitution. RCW 9.68A.100; RCW 9.68A.102.

Despite the plain language of RCW 9.68A.050 and the broader statutory scheme, the Court of Appeals determined the statute was unambiguous and the State's reading was the accurate interpretation because Eric's case "is not a sexting case." *State v. E.G.*, 194 Wn. App. 457, 467, 377 P.3d 272 (2016). This analysis is problematic for multiple reasons. First, the court appeared to believe the term "sexting" only refers to the "innocent sharing of sexual images between teenagers." *Id.* at 468. In fact, "sexting" is a combination of the word "sex" and "texting" and is defined in the dictionary as "the sending of sexually explicit messages or images by cell phone."² There is no question that Eric's act of sending a photograph of his penis in a text message constituted sexting.

Second, regardless of the court's erroneous understanding of the term "sexting," the identity of the recipient has no bearing on whether the act in question constitutes a crime under RCW 9.68A.050. An individual who knowingly "develops" an image of a minor engaged in sexually explicit conduct is guilty of the crime regardless of who he shares it with or, given that he just needs to "develop" the photograph, whether he shares it at all. RCW 9.68A.050(2)(a)(i).

² <http://www.merriam-webster.com/dictionary/sexting> (last accessed February 23, 2017).

The Court of Appeals' apparent concern that minors accused of harassing others over text message should be punished, whereas as two teenagers mutually engaging in sexting should not, is valid. *E.G.*, 194 Wn. App. at 468. However, statutes other than RCW 9.68A.050 serve to protect an unwilling recipient of sexually explicit text messages. For example, the crime the State initially charged Eric with, telephone harassment, provided recourse for Ms. Rupert even if RCW 9.68A.050 did not. CP 1; RCW 9.61.230.³

Thus, other means are available to the State when it seeks to prosecute an individual for sending sexually explicit messages to an unwilling recipient and, even if that were not the case, the plain language of RCW 9.68A.050 does not permit the prosecution of a minor who develops a photograph of himself. The only reasonable interpretation of RCW 9.68A.050 is that the statute requires the person who knowingly develops the photograph to exploit a minor individual other than himself.

Because the statute is unambiguous, the Court's inquiry should end here. *K.L.B.*, 180 Wn.2d at 739. Reversal of Eric's conviction is required

³ RCW 9.61.230 provides, in part, "[e]very person who, with intent to harass, intimidate, torment, or embarrass any other person, shall make a telephone call to such other person: (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act... is guilty of a gross misdemeanor." *See also* RCW 9.61.260 ("cyberstalking" statute that prohibits the same acts as telephone harassment when committed by "electronic communication" instead).

because the only reasonable reading of the statute does not permit the criminal prosecution of a minor who develops a photograph of his own body.

- b. The legislature's stated intent is to protect children from sexual abuse and exploitation.

The legislature's stated intent, as provided in RCW 9.68A.001, supports the plain language of the statute. In this "Legislative findings, intent" section of the chapter, the legislature found:

[T]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratifications based on the exploitation of children.

....

The legislature further finds that children engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse. Approximately eighty to ninety percent of children engaged in sexual activity for financial compensation have a history of sexual abuse victimization. It is the intent of the legislature to encourage these children to engage in prevention and intervention services and 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.

The findings demonstrate that when the legislature drafted the statute it was concerned about holding individuals who engage in the sexual abuse of children for their own commercial gain criminally

accountable. The intent of the legislature was to protect children who were the victims of sexual abuse, not punish teenagers who photographed their own bodies.

- c. If found ambiguous, this Court should construe the statute in Eric's favor.

If this Court finds RCW 9.68A.050 ambiguous, the rule of lenity requires the Court to construe the statute strictly against the State and in favor of Eric. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015); *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). The rule of lenity is a critical safeguard against corruption and the State's abuse of power. *See State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013) (citing *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012)). It "helps further the separation of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement." *Evans*, 177 Wn.2d at 193 (citing *United States v. Bass*, 404 U.S. 336, 348-49, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)) (other internal citations omitted).

Thus, a court may interpret a criminal statute adversely to a defendant only where "statutory construction 'clearly establishes' that the legislature intended such an interpretation." *Evans*, 177 Wn.2d at 193 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d

686 (2009)). The legislature’s stated intent demonstrates, at a minimum, that the State’s interpretation of the statute, which allows a minor to be prosecuted for developing or sharing an image of his own body, is not “clearly established.” See *Evans*, 177 Wn.2d at 193-94. The rule of lenity requires this Court to adopt the interpretation that favors Eric.

In addition, should the Court find there are two plausible readings of RCW 9.68A.050, it should select the interpretation that avoids constitutional concerns. *Clark v. Martinez*, 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005); *Davis v. Cox*, 183 Wn.2d 269, 280, 351 P.3d 862 (2015). The canon of constitutional avoidance is “a means of giving effect to congressional intent,” as it rests on the reasonable presumption that the legislature would not intend an interpretation that raises serious constitutional questions. *Clark*, 543 U.S. at 381-82. As explained below, the State’s construction of the statute renders it unconstitutionally vague and overbroad. This Court should avoid any constitutional doubts by finding that Eric’s interpretation of the statute is the correct one and reverse Eric’s conviction.

2. RCW 9.68A.050 is unconstitutionally vague.

“The prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law’ and a statute that violates it ‘violates the first

essential of due process.’” *Johnson v. United States*, __ U.S.__, 135 S.Ct. 2551, 2556-57, 192 L.Ed.2d 569 (2015) (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)); *see also City of Sumner v. Walsh*, 184 Wn.2d 490, 499, 61 P.3d 1111 (2003). A criminal statute may be found unconstitutionally vague for one of two reasons: (1) by failing to provide the kind of notice that enables ordinary people to understand what acts it prohibits or (2) by authorizing or even encouraging arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); U.S. Const. amend. XIV; Const. art. I, § 3.

Although the vagueness doctrine focuses on actual notice to citizens as well as arbitrary enforcement, the United States Supreme Court has long recognized that “the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.’” *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). Without this critical guidance, the statute “may permit ‘a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal

predilections.”” *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575).

In this way, the vagueness doctrine upholds not only the Due Process Clause but also protects the separation of powers. As the United States Supreme Court explained:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

United State v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1876).

The State represented that it typically would not charge teenagers who engaged in sexting under RCW 9.68A.050. *E.G.*, 194 Wn. App. at 469. The Court of Appeals was untroubled by this admission, finding simply (and erroneously) that the prosecution of Eric was “not a sexting case.” *Id.*

This Court may not “construe a criminal statute on the assumption the [State] will ‘use it responsibly.’” *McDonnell v. United States*, ___ U.S. ___, 136 S.Ct. 2355, 2372-73, 195 L.Ed.2d 639 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). If the State may prosecute Eric for sharing an image of his own body, nothing prohibits it from using the statute to prosecute a teenager

who willingly sends an image of herself to her peer-age boyfriend, or even her peer-age husband.⁴ Indeed, under the State's interpretation of the statute, a teenager who photographs her own body purely for her own sexual arousal could be prosecuted, as long as the State could prove she developed or duplicated the photograph, or intended to develop or duplicate it. RCW 9.68A.050.

The fact that the State admitted it would not typically use the statute to prosecute teenagers under these circumstances demonstrates the standardless discretion RCW 9.68A.050 grants prosecutors and law enforcement. *E.G.*, 194 Wn. App. at 469. This admission shows that the State invokes the statute against teenagers whenever it deems appropriate, rather than according to the dictates of the legislature.

The Ohio Supreme Court, when faced with analogous circumstances, found a statutory rape provision impermissibly vague as applied to a child under 13 years of age. *In re D.B.*, 129 Ohio St.3d 104, 108, 950 N.E.2d 528 (2011). A 12-year-old and an 11-year-old engaged in sex, but only the 12-year-old was charged with statutory rape. *Id.* at 104. The court explained the statute was unconstitutional because when applied to two children under the age of 13, each child was both the

⁴ A 17-year-old is permitted to marry with the written consent of a parent or legal guardian. RCW 26.04.210.

offender and the victim, requiring the State to assign the labels however it saw fit. *Id.* at 108. The court determined that the prosecutor’s decision to charge one child, but not the other, was “the very definition of discriminatory enforcement.” *Id.* at 109.

Similar to the Ohio case, the State used RCW 9.68A.050 to prosecute Eric for sending an image of his own body, making him both the offender and the victim under the statute. In addition, the State’s admission that it elects not to employ RCW 9.68A.050 to prosecute other teenagers who share similar images over text message is the definition of discriminatory enforcement. It permits prosecutors to pursue their personal predilections in direct contravention of the Fourteenth Amendment. *See Kolender*, 461 U.S. at 358. This Court should find RCW 9.68A.050 unconstitutionally vague and reverse Eric’s conviction.

3. RCW 9.68A.050 is unconstitutionally overbroad.

The First Amendment and article I, section 5 protect an individual’s right to freedom of speech.⁵ Statutes that burden expression are subject to challenge for being facially overbroad and should be examined with particular scrutiny when they criminalize behavior. *City of*

⁵ Article I, section 5 states, “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” The First Amendment directs that “Congress shall make no law... abridging the freedom of speech.” The Fourteenth Amendment states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

Bellevue v. Lorang, 140 Wn.2d 19, 27, 992 P.2d 496 (2000); *see also* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (“a law imposing criminal penalties on protected speech is a stark example of speech suppression”).

A statute is overbroad under the First Amendment where it “‘sweeps within its prohibitions’ a substantial amount of constitutionally protected conduct.” *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011) (quoting *City of Tacoma v. Luvane*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992)). While the challenger to the statute typically bears the burden of demonstrating it is unconstitutional, this is not true in the free speech context. *Immelt*, 173 Wn.2d at 6. In response to a First Amendment challenge, the State bears the burden of justifying the infringement on speech. *Id.*; *State v. Homan*, 181 Wn.2d 102, 111 n.7, 330 P.3d. 182 (2014).

In *New York v. Ferber*, the United States Supreme Court held that child pornography is not entitled to First Amendment protection, provided that “the conduct to be prohibited [is] adequately defined by the applicable state law, as written or authoritatively construed.” 458 U.S. 747, 764, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). In order to reach this conclusion, it found that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a

minor' is 'compelling'" and that the distribution of images depicting sexual activity by a minor is "intrinsically related to the sexual abuse of children." *Id.* at 756-58 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 284 (1982)).

The Court determined the prior exclusion of obscene material from First Amendment protection under *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), was insufficient to address the problem of child pornography because the *Miller* test bore "no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." *Ferber*, 458 U.S. at 761. It was therefore necessary to carve out a separate exception for child pornography, regardless of whether the material met the definition of "obscene," in order to prevent the harm to children incurred during the creation of the images.

However, when later faced with a statute that banned any images of children engaged in sexually explicit conduct, including images that had been generated by a computer, the Court rejected the statute as unconstitutionally overbroad. *Free Speech Coalition*, 535 U.S. at 256.

The Court found:

Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment

about its content. The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants.

Id. at 249.

In contrast to the speech protected in *Ferber*, which the Court referred to as a “record of sexual abuse,” the statute in *Free Speech Coalition* prohibited speech that “records no crime and creates no victims by its production.” *Id.* at 250. The Court flatly rejected the argument adopted by the Court of Appeals here, that indirect harm from the images, such as increasing the production of child pornography and frustrating efforts to combat child pornography, justified an infringement on free speech. *Id.* at 241, 250; *E.G.*, 194 Wn. App. 464. It held that such harm did “not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.” *Free Speech Coalition*, 535 U.S. at 250. The Court concluded, “where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” *Id.*

Despite the holding in *Free Speech Coalition*, the Court of Appeals rejected Eric’s First Amendment challenge, finding that to hold otherwise would grant minors rights superior to those of adults. *E.G.*, 194 Wn. App. at 462. This finding obfuscates the true issue. As a minor, Eric had no

greater right to distribute images excluded from First Amendment protection under *Ferber*. He simply had the same right as an adult to voluntarily create and share an image of his own body.

The Court of Appeals also relied on *Ginsburg v. New York*, in which the United States Supreme Court upheld a criminal statute that prohibited the sale of materials to a minor that did not satisfy the obscenity standard for adults. 390 U.S. 629, 643, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); *E.G.*, 194 Wn. App. at 463. However, as the United States Supreme Court pointed out in *Reno v. American Civil Liberties Union*, such a statute “must be carefully tailored to the congressional goal of protecting minors from potentially harmful materials.” 521 U.S. 844, 871, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

In *American Civil Liberties Union*, the statutory provisions at issue protected minors from “indecent” and “patently offensive” communications on the Internet. 521 U.S. at 849. In finding the provisions unconstitutionally overbroad, it noted that they differed from the statute at issue in *Ginsburg* in several important ways, including the fact that the provision in *Ginsburg* only applied to commercial transactions, could be circumvented by a parent, and defined a minor as a person under the age of 17, rather than 18. *Id.* at 865. In contrast, the statutory provisions at issue in *American Civil Liberties Union* permitted

the Government to prosecute a parent who allowed her child to access information using the family's computer, significantly lessening any interest the Government had in protecting minors. *Id.* at 878.

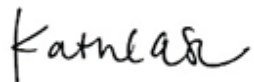
The Court's focus in *Ginsburg*, like its focus in *Ferber*, was protecting children from harm caused by others. This is not at issue here. When the State elects to use RCW 9.68A.050 against a teenager who engages in self-photography, the statute impermissibly infringes on his or her right to freedom of speech. RCW 9.68A.050 is unconstitutionally overbroad, and this Court should reverse Eric's conviction.

E. CONCLUSION

This Court should reverse because the plain language of RCW 9.68A.050 does not permit the prosecution of the minor depicted in the image. Reversal is also required because the statute is unconstitutionally vague and overbroad.

DATED this 3rd day of March, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen A. Shea".

KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 93609-9
)	
ERIC GRAY,)	
)	
PETITIONER.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF MARCH, 2017.

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