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IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ERIC D. GRAY, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

# SUPPLEMENTAL BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

A. Does RCW 9.68A.050 prohibit a minor from electronically sending a photograph of himself to another which, if sent by any other minor or adult, would constitute a prohibited "depiction of a minor engaged in sexually explicit conduct"?

B. Is RCW 9.68A.050 unconstitutionally overbroad where it does not sweep within its prohibitions any conduct protected by the First Amendment?

C. Is RCW 9.68A.050 unconstitutionally void for vagueness where its prohibitions are clear and unambiguous?

D. Is judicial interpretation limiting RCW 9.68A.050 to exclude "teenage sexting" appropriate where the statute is neither overbroad nor void for vagueness as applied to this case, and where this case is not a "normal teenage sexting case"?

## II. STATEMENT OF THE CASE

In mid-2012, a male using a restricted number began calling T.R. at night, uttering sexual noises and asking questions of a sexual nature.[1] Then, on June 2, 2013, T.R. received two text messages from the same number: one contained a picture of an erect penis, and the other said, "Do u like it babe? It's for you [T.R.]. And for Your daughter babe."[2] T.R. reported the messages to police, who tracked the telephone number to Eric Gray. Upon questioning by law enforcement, Gray admitted sending the messages and

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[1] The facts of the case have been taking from the published opinion of Division 3 of the Court of Appeals in *State v. E.G.*, 194 Wn.App. 457, 377 P.3d 272 (2016).

[2] T.R. was 22 years old at the time of the incident and her daughter was a young minor. T.R. was a former employee of the defendant's mother.

that the engorged penis was his own. The State charged him with second degree dealing in depictions of a minor engaged in sexually explicit conduct and making harassing telephone calls in the juvenile division of the Spokane County Superior Court. The court extended juvenile jurisdiction over Gray as he was nearly 18 years old.

The defense moved to dismiss the charges, arguing, among other things, that the dealing in depictions of a minor statute could not be applied to a minor who was also the "victim" of the offense. The trial court denied the motion. The parties agreed to proceed to a stipulated facts trial on only the charge of dealing in depictions of a minor engaged in sexually explicit conduct. Pursuant to the agreement, the State moved to dismiss the harassing telephone calls charge, and agreed not to charge two other counts of indecent exposure related to the defendant's alleged masturbation on a school bus. Also, the defendant agreed to revocation of the Special Sex Offender Dispositional Alternative he was currently serving for a previous adjudication for communicating with a minor for immoral purposes.

The trial court found that Gray had committed the offense of second degree dealing in depictions of a minor engaged in sexually explicit

conduct. As a result of the conviction, the defendant was required to continue to register as a sex offender.[3]

Gray appealed the adjudication. The Court of Appeals affirmed, finding RCW 9.68A.050 to be unambiguous and not unconstitutionally overbroad or vague. The defendant petitioned this Court for review.

## III. ARGUMENT

As a juvenile, Gray sent a sexually explicit photograph of himself and was prosecuted for dealing in depictions of a minor engaged in sexually explicit conduct. He claims that because he voluntarily took and sent the photograph, his conduct is protected by the First Amendment, as no child was exploited to create the pornography. Despite his willing production of the picture, Gray should not be afforded additional constitutional protection than any other person who distributes similar material. The seemingly harsh results of the application of RCW 9.68A.050 to more innocuous conduct, such as "teenage sexting" must be addressed to the legislature.

### A. RCW 9.68A.050 UNAMBIGUOUSLY PROHIBITS A MINOR FROM SENDING A SEXUALLY EXPLICIT PHOTOGRAPH OF HIM OR HERSELF; THIS PROHIBITION IS CONSISTENT WITH THE STATUTORY INTENT OF RCW 9.68A.

The meaning of a statute is a question of law reviewed by the court *de novo*. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11,

[3] Before his conviction for this charge, the defendant was required to register as a sex offender pursuant to the communication with a minor for immoral purposes adjudication.

43 P.3d 4 (2002). The court's purpose in construing a statute is to determine and effectuate the intent of the legislature. *Id*.; *Dep't of Ecology v. City of Spokane Valley*, 167 Wn.App. 952, 961, 275 P.3d 367 (2012). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). In determining a provision's plain meaning, the court looks to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id*.

When a statute is unambiguous, "there is no room for judicial interpretation…beyond the plain language of the statute." *State v. D.H.*, 102 Wn.App. 620, 627, 9 P.3d 253 (2000). The fact that two interpretations are *conceivable* does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

The statute prohibiting dealing in depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.050(2)(a)(i), provides:

> 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…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).

A minor is defined as *any* person under eighteen years of age. RCW 9.68A.011(5). Sexually explicit conduct, among other things, means "actual or simulated depiction of the genitals or unclothed pubic or rectal areas of *any* minor…for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(4)(f) (emphasis added). The plain language interpretation of "a person" includes any "natural person," whether adult or minor. RCW 9A.04.110(17); RCW 9A.04.090 (making the definition in RCW 9A.04.110 applicable to offenses found in any title).[4]

In reading the plain language of RCW 9.68A.050, it is apparent that the legislature intended to ban pornographic material of any minor from being disseminated by any person. RCW 9.68A.011(4) (child pornography constitutes prima facie contraband; the image itself is prohibited). Had the legislature intended to restrict the definition of "a minor" in RCW 9.68A.011(5) so as not to include the person distributing the unlawful material, it could have expressly done so. Likewise, had the legislature intended to restrict the definition of "a person" to one other than the minor depicted, it could have expressly done so.

[4] *See also* Reid McEllrath, *Keeping Up with Technology: Why a Flexible Juvenile Sexting Statute is Needed to Prevent Overly Severe Punishment in Washington State*, 89 Wash. L. Rev. 1009, 1023 (2014) (acknowledging that RCW 9.68A.050's plain language encompasses both adult and juvenile defendants).

Resort to the legislative history of a statute is inappropriate unless the statute is ambiguous. *See, e.g., State v. Theilken*, 102 Wn.2d 271, 276, 684 P.2d 709 (1984) (resort to legislative history was inappropriate because the term "any felony" was unambiguous). The Court of Appeals properly determined RCW 9.68A.050 to be unambiguous. *E.G.* at 467.

However, if this Court reviews the legislative history of RCW 9.68A.050, that history makes it clear that the legislature's efforts to "protect children from sexual exploitation" by the promulgation of this statute is partially resultant from "the changing nature of technology [such that] offenders are now able to access child pornography in different ways and increasing quantities," such as through cellular telephones and other electronic devices, and "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse." RCW 9.68A.001. The legislature's intent in promulgating the statute was to "stamp out the vice" of child pornography "at all levels in the distribution chain." RCW 9.68A.001.[5] The prohibition of Grays's purposeful injection of this photograph into the electronic realm

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[5] "The court may not rely on a statement of intent found in a legislative preamble to a statute to *override the unambiguous elements* section of a penal statute or to add an element not found there." *D.H.*, 102 Wn. App. at 627 (internal citation omitted) (emphasis added). The State only cites the legislative findings articulated in RCW 9.68A.001 to demonstrate the consistency of the plain meaning of the statute and the legislative intent.

prevents the possibility that the depiction will subsequently be reproduced and distributed beyond its intended recipient.

> Society…has a legitimate interest in stemming the distribution of child pornography which has become rampant on the Internet… Pedophiles will not necessarily discern any difference between a self-produced image of a minor originally intended for an intimate partner and one resulting from force, coercion, and abuse by an adult. The end product is the same, thus justifying some effort to deter the production in the first instance and to discourage the dissemination of these images – particularly in cyberspace. In the hands of an unscrupulous adult, the images can be circulated and reproduced…readily and endlessly....

Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 First Amend. L. Rev. 98, 126 (2010).

Until the legislature amends the language of RCW 9.68A.050, it is presumed to "say[] what it means and mean[] what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). The statute's plain language makes no distinction between photographs that are consensually created and disseminated and those that have been taken and distributed against the victim's will. Simply put, our legislature has proscribed a certain act, the distribution of child pornography. Therefore, any person, regardless of their age or whether they are the person depicted in the photograph, who engages in that unlawful act may be prosecuted under the statute.

**B. AN INTERPRETATION OF RCW 9.68A.050 ALLOWS JUVENILES TO DISTRIBUTE DEPICTIONS OF THEMSELVES ENGAGED IN SEXUALLY EXPLICIT CONDUCT LEADS TO ABSURD RESULTS.**

An interpretation of RCW 9.68A.050 that juveniles may voluntarily produce and distribute self-pornography without offending the statute leads to absurd results. This Court should not construe a statute in a way that leads to absurd results. *Five Corners*, 173 Wn.2d at 311.

Under a construction where a minor is permitted to take and distribute a photograph of him or herself engaged in sexually explicit conduct, it is an absurdity that the recipient of the photograph (whether a minor or adult) could be prosecuted under RCW 9.68A.070 for possession of the depiction. An interpretation that allows juveniles to take and disseminate photographs of themselves engaged in sexually explicit conduct would disallow prosecution of juveniles for distributing child pornography for pecuniary gain. Such an interpretation could also embolden child pornographers to use willing juveniles as partners in their pornography enterprises; if the juvenile in such a circumstance admitted to the taking and distribution of the photograph, and the adult remained anonymous, no one could be held criminally liable for the distribution of the depiction under the defendant's desired interpretation.

The only way to preclude the repeated viewing of these sexually explicit depictions is to ensure such photographs are eradicated from the stream of commerce and the unfettered realm of cyberspace. The most effective means of ensuring the eradication of child pornography is to forbid the introduction of such photographs into the stream of commerce by *anyone*, even the juvenile depicted. The only logical interpretation of RCW 9.68A.050 with this goal in mind is the plain language interpretation: pornographic images of children, including self-produced images, may not be distributed by anyone, even the minor-subject-creator.

### C. RCW 9.68A.050 IS NEITHER UNCONSTITUTIONALLY OVERBROAD NOR VOID FOR VAGUENESS.

Legislative enactments are presumed constitutional, and Gray, as the party challenging the constitutionality of RCW 9.68A.050, bears the burden of overcoming this presumption beyond a reasonable doubt. *State v. Mertens,* 148 Wn.2d 820, 826, 64 P.3d 633 (2003).

In *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the United States Supreme Court held that child pornography involving *actual* minors is outside the protection of the First Amendment. This standard has been reiterated by the Supreme Court, as well as Washington courts, because the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing

importance. *Id.*; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (holding virtual child pornography *is* protected speech under the First Amendment, but that child pornography using real children may be banned without regard to whether it depicts works of value); *State v. Luther*, 157 Wn.2d 63, 134 P.3d 205 (2006); *State v. Myers*, 133 Wn.2d 26, 941 P.2d 1102 (1997).

### 1. <u>RCW 9.68A.050 is not unconstitutionally overbroad.</u>

Under the First Amendment, Congress "shall make no law… abridging the freedom of speech." U.S. Const. amend. 1.[6] A statute violates the First Amendment if it is overbroad; that is, a statute is unconstitutional if it prohibits a substantial amount of *protected* speech. *United States v. Williams,* 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); *City of Tacoma v. Luvene,* 118 Wn.2d 826, 839, 827 P.2d 1374 (1992).

> The [overbreadth] doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional - particularly a law directed at conduct so antisocial that it has been made criminal - has obvious harmful effects. In order to maintain an appropriate balance, we 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*

[6] Gray has presented no argument that the Washington State Constitution is more protective in this context than the First Amendment. Thus, the Court should decline to review any argument based independently on Article 1, Section 5 of the State Constitution. *See State v. Arlene's Flowers, Inc.*, No. 91615-2, 2017 WL 629181, at *11 (Feb. 16, 2017).

> *sweep*. Invalidation for overbreadth is “““strong medicine””” that is not to be “casually employed.”

*Williams*, 553 U.S. at 292–93 (internal citations omitted) (emphasis added).

The first determination that must be made in an overbreadth analysis is what speech or conduct the statute actually covers. *Id*. (“It is impossible to know whether a statute reaches too far without first knowing what the statute covers”). As discussed above, RCW 9.68A.050 covers *only* the dissemination of sexually explicit depictions portraying children. This type of material is not entitled to any First Amendment protection. *Ferber*, 458 U.S. at 764; *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 403 (2002).

Additionally, other portions of RCW 9.68A have withstood overbreadth challenges, and this Court has already observed that the “legitimate reach of [RCW 9.68A.011(3)] in prohibiting conduct *unprotected* by the First Amendment far surpasses whatever impermissible application this statute may reach.” *Myers*, 133 Wn.2d at 34.

Defendant has not demonstrated that his conduct is entitled to First Amendment protection. He has not established that the statute reaches any speech, whatsoever, protected by the First Amendment. Simply because the juvenile subject of a pornographic photograph is a willing participant does not exempt that depiction from the ambit of child pornography laws.

*United States v. Laursen*, 847F.3d 1026 (9th Cir. 2017) (defendant's legal, sexual relationship with 17-year-old girl did not legitimize his possession of "selfie" photographs taken by her; claims of vagueness and overbreadth of federal child pornography statutes lacked merit).

Gray claims that the primary justification for the prohibition on child pornography is that child pornography is "intrinsically related to the sexual abuse of children," *Ashcroft*, 535 U.S. at 249-50, and that justification collapses where the depiction is willingly taken and distributed by the juvenile depicted. However, what Gray misses is that since *Ferber* and *Ashcroft*, the ease by which child pornographers may obtain and disseminate photographs by electronic means has increased exponentially. While it may be said that in Gray's situation, no juvenile was harmed in the production of the sexually explicit material, it cannot likewise be said that he would not suffer future harm at the hand of a pornographer who obtains and distributes the photograph to others. "The reasonable expectation that the material will ultimately be disseminated is by itself a compelling state interest for preventing the production of the material," because if the photographs are released, "future damage may be done to these minors' careers or personal lives." *A.H. v. Florida*, 949 So.2d 234, 238-39 (2007).

> Not only can computers be hacked, but by transferring photos using the net, the photos may have been and perhaps still are accessible to the provider and/or other individuals. Computers also allow for

> long-term storage of information which may be disseminated at some later date. The State has a compelling interest in seeing that material which will have such negative consequences *is never produced*.

*Id*. at 239 (emphasis added).[7]

Thus, the significant flaw in Gray's claim that RCW 9.68A.050 is overbroad is that he has not established that minors have a superior right to inject such photographs into the stream of electronic commerce than the right of any other person to distribute the photograph of another minor. The phenomenon of "teenage sexting" does not somehow transform otherwise unprotected speech into protected speech. His failure to make this showing defeats his challenge that the statute is overbroad.

**2. <u>RCW 9.68A.050 is not void for vagueness.</u>**

Under the Fourteenth Amendment and article 1, section 3 of the Washington Constitution, a "statute is 'void for vagueness' if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). The vagueness doctrine serves two

[7] Cellular telephones are mini-computers, cameras, video players, and televisions, capable of large data storage. *State v. Samalia*, 186 Wn.2d 262, 271, 375 P.3d 1082 (2016). Cellular telephones may be subject to computer virus or hacking attacks and in the wrong hands, any data sent to a particular cellular phone could be intercepted and distributed. *See State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014) (defendant's cellular telephone text messages were intercepted by a police officer).

purposes: to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws. *Id*.

The required degree of specificity of a statute is limited in two significant ways: (1) a statute is presumed to be constitutional unless its unconstitutionality appears beyond a reasonable doubt and (2) impossible standards of specificity are not required, meaning "if [persons] of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty." *Id*. at 27. To avoid a chilling effect on speech, "courts have held a stricter standard of definiteness applies if material *protected* by the First Amendment falls within the prohibition." *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008) (emphasis added). The stricter standard of review discussed in *Bahl* is inapplicable here, because no *protected* speech is chilled by the application of RCW 9.68A.050. The statute *only* prohibits the distribution of child pornography which is unprotected speech.

As with overbreadth challenges, the presumption in favor of a law's constitutionality in vagueness challenges should be "overcome only in exceptional cases." *Eze*, 111 Wn.2d at 28. As this Court stated in *Eze*:

> These general limitations…reflect our deference to the Legislature's constitutional lawmaking role, as well as our recognition of the difficulties that attend legislating in areas such as disorderly conduct, where the terms are difficult to define… We should not demand from the Legislature a higher degree of definition and

> certainty in its official pronouncements than we are capable of producing in our own, lest we appear to be usurping the properly legislative power of defining criminal elements.

*Id*. at 27-28.

The language of the statute is clear, as established above. The statute plainly and unambiguously prohibits the distribution of depictions of *any minor* engaged in sexually explicit conduct, by *any person*. The statute provides "objective criteria" by which to evaluate whether a person has violated the statute, as it clearly delineates what constitutes sexually explicit conduct. RCW 9.68A.011(4)(f); *and see, e.g*., *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525-526, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994) (drug statute set forth "objective criteria" for assessing whether items constituted "drug paraphernalia" and was not unconstitutionally vague). Therefore, RCW 9.68A.050 is not unconstitutionally vague such that ordinary citizens do not know what conduct is proscribed.

Gray's allegation of arbitrary enforcement also fails. He has previously argued that while teenage sexting is commonplace, RCW 9.68A.050 is rarely used to prosecute teenage sexting, and was arbitrarily enforced against only him. The test for arbitrary and discriminatory enforcement is whether the legislature has established "minimal guidelines to govern law enforcement" to prevent a "standardless sweep that allows policemen, prosecutors and juries to pursue their own

predilections." *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). The fact that the State may infrequently prosecute juveniles under RCW 9.68A.050 for "normal teenage sexting" does not suggest that enforcement of the statute is arbitrary, or that its agents, i.e., police and prosecutors, are unable to understand what conduct the statute prohibits. Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). The Court should not speculate as to the reason for infrequent prosecution for "normal teenage sexting." Lack of prosecution may result from the fact that law enforcement is infrequently notified of the occurrence of such crimes; there exists a lack of evidence to prosecute, *see, e.g., Miller v. Mitchell*, 598 F.3d 139, 153-154 (2010); it is the "victim's" request not to prosecute, *see, e.g.,* RCW 13.40.077(1)(i) (decision not to prosecute a juvenile may be predicated on victim's request); or a panoply of other valid reasons. The defendant has not presented *any* argument of prosecutorial vindictiveness, nor has he demonstrated discriminatory enforcement of the law. Furthermore, Gray did not engage in "normal teenage sexting," but rather engaged in a pattern of harassment and lewd behavior while undergoing sex-offender treatment for a conviction of a different sex offense.

The defendant has failed to demonstrate that the language of RCW 9.68A.050 is unconstitutionally overbroad such that it chills the exercise of protected speech or is unconstitutionally vague such that it fails to afford clear standards by which to judge whether a person has violated the statute. Therefore, Gray's constitutional challenges must fail.

### D. HARSH CONSEQUENCES THAT MAY RESULT FROM JUVENILE SEXTING SHOULD BE ADDRESSED TO THE LEGISLATURE, NOT TO THIS COURT.

"Sexting" is defined as "the sending of sexually explicit messages or images by cell phone."[8] Consensual teenage "sexting" as a "normal" part of sexual development is the type of sexting that raises a host of concerns by advocacy groups such as the ACLU, due to the harsh consequences[9] that may result from a conviction for distributing depictions of minors engaged in sexually explicit conduct. These concerns, especially the harsh results of punishing teenage sexting as a sex offense, must be addressed to the legislature. In *Laursen*, *supra*, the 9th Circuit stated:

> Although application of the statute in these contexts may lead to harsh results, we echo the persuasive reasoning of the Seventh Circuit that "Congress may legitimately conclude that even a willing or deceitful minor is entitled to governmental protection from self-

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[8] *See* merriam-webster.com, "sexting" (last accessed 3/2/17).

[9] In the 2008 survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy, of 653 teenagers surveyed, 75% said they knew that sending sexually suggestive content, would have "serious negative consequences;" despite this awareness, 20% said they had electronically sent or posted on the internet nude or semi-nude photographs of themselves. Eric S. Latzer, *The Search for a Sensible Sexting Solution: A Call for Legislative Action*, 41 Seton Hall L. Rev. 1039, 1042 (2011).

> destructive decisions that would expose him or her to the harms of child pornography." *United States v. Fletcher*, 634 F.3d 395, 403 (7th Cir. 2011) as amended (citations and internal quotations omitted).

*Laursen* at *5.

This Court has similarly held that it gives the plain meaning of statutory language full effect, even where the results seem harsh under the circumstances, and does not question the wisdom of the policies enacted by the legislature. *See Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997); *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992). "If the legislature dislikes the impact of a statute as enacted, then it is up to the Legislature, and not the court, to undertake the responsibility to change it." *Boyd*, 133 Wn.2d at 88. Thus, defendant's complaints regarding the harsh consequences that result from his conviction for violating RCW 9.68A.050, such as continued sex offender registration, or the stigma of being labelled a "sex offender," must be addressed to the legislature for reconsideration of the wisdom of the statute in light of the phenomenon of "teenage sexting."

RCW 9.68A.050 was most recently amended in 2010, well after the teenage "sexting" phenomenon first made news headlines.[10] Had the

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[10] *See,* Clay Calvert, *Sex, Cell Phones, Privacy and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 CommLaw Conspectus 1 (2009); Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion From Leading to A Lifetime of Unintended Consequences for Minors and Young Adults*, 96 Iowa L. Rev. 357 (2010).

legislature intended to exempt consensual teenage "sexting" from the ambit of the statute, it could have done so at any time since then. Yet it has not taken any action, unlike other state legislatures. *See e.g.*, Ark. Code Ann. §5-27-609; Fla. Stat. Ann. ch. 847.0141; Haw. Rev. Stat. Ann. §712-1215.6; La. Rev. State. Ann. §81.1.1; R.I. Gen. Laws §11-9-1.4; S.D. Codified Laws §§26-10-33, 26-10-34, 26-10-35; W. Va. Code §49-4-717.

Ultimately, though, Gray's behavior does not fall within this category of consensual "teenage sexting." Gray sent an image of himself to an adult and her young minor child, with whom he was not in a sexual relationship, and with whom he had no relationship whatsoever. Gray had been harassing the victim by his late-night sexually explicit telephone calls. His actions are a far-cry from a teenager who consensually sends a naked photograph to her/his boyfriend/girlfriend, or from adolescent boys sending each other naked pictures of adolescent girls.

Furthermore, the claimed harsh results stemming from Gray's conviction are disingenuous, as he was already a registered sex offender. It is his continued unlawful behavior that has resulted in the registration requirement, rather than an unduly harsh statutory provision; he was convicted of communication with a minor for immoral purposes, then he failed to comply with his special sex offender disposition alternative, and then he was convicted of this charge. Gray's failure to benefit from court-

ordered sex offender treatment, and to abstain from behavior of this nature both indicate that he is precisely the type of individual who, for community safety, should be required to register as a sex offender.

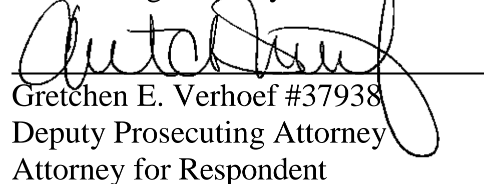
## IV. CONCLUSION

The legislature is permitted to declare certain conduct to be forbidden; in this case, it has unambiguously prohibited any person from distributing pornographic images of children. The defendant is not exempted from the reach RCW 9.68A.050 simply because he voluntarily took and sent a photograph of himself.

The defendant's constitutional attacks on RCW 9.68A.050 fail because he has not demonstrated that any protected speech or conduct falls within the statute's prohibitions or that the statute is so vague that an ordinary person would not understand its prohibitions. The harsh results that may occur from the enforcement of a statute are up to the legislature to remedy. The State respectfully requests the Court affirm the Court of Appeals and Superior Court in this matter.

Dated this 3 day of March, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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I certify under penalty of perjury under the laws of the State of Washington, that on March 3, 2017, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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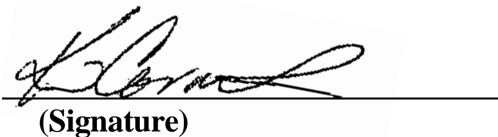

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