STATE OF MINNESOTA
COUNTY OF RICE

DISTRICT COURT
THIRD JUDICIAL DISTRICT
JUVENILE DIVISION

In the Matter of the
Welfare of:

Court File No.: 66-JV-17[redacted]

[redacted]

Juvenile Defendant.

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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INTRODUCTION

Defendant [redacted], a juvenile, made a [redacted] of herself and sent it via social media to a boy whom she liked. In an extraordinary twist, the prosecutor's office has filed a juvenile petition charging her with violating Minnesota's child pornography statute. Only an absurd interpretation and perverse application of this statute punishes the very children who the statute was enacted to protect. Such an interpretation is plainly adverse to the legislature's intent in enacting the child pornography law, violates [redacted].'s free-speech rights under the First Amendment, raises vagueness concerns under the Fourteenth Amendment, and jeopardizes thousands of minors across the state by criminalizing increasingly common adolescent behavior. Amicus Curiae American Civil Liberties Union of Minnesota ("Amicus" or "ACLU-MN") respectfully asks the Court to dismiss the charge against [redacted]

BRIEF FACTUAL BACKGROUND

As explained in the State's Juvenile Petition and Defendant's Memorandum of Law supporting her motion to dismiss the charge against her, [redacted] is a 14-year-old girl who allegedly sent a [redacted] to at least one classmate via the social media application "Snapchat". Snapchat is a social media application, very popular among teens, that allows users to send their friends photos or short videos up to 10 seconds long ("snaps").[1] These photos and videos disappear seconds after they've been viewed by their recipients, but an enterprising recipient can take a "screen shot" of a snap they receive if they act quickly or can record a video with other applications or other devices if they are prepared in advance to do so.[2]

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[1] *See What is Snapchat? An Intro to the Popular Ephemeral App*, available at https://www.lifewire.com/what-is-snapchat-3485908.

[2] *Id.*; Elise Moreau, Lifewire, *How to Save Snapchat Videos*, https://www.lifewire.com/how-to-save-snapchat-videos-3485995.

In [redacted].'s case, the [redacted] was allegedly [redacted] and then further disseminated by one or more recipients. A classmate who saw [redacted] gave a statement to the Faribault Police, and the prosecutor chose to charge [redacted] with the felony sex offense of knowingly disseminating pornographic work involving a minor to another person under Minn. Stat. § 617.247.3(a). This crime is punishable by up to seven years imprisonment and a $10,000 fine. Further, an adjudication of delinquent on this charge would require [redacted] to register as a predatory offender for at least 10 years following the adjudication. Due to the way the current predatory offender registration law is drafted, her registration as a sex offender is required even if she pleads to some lesser charge. *See* Minn. Stat. § 243.166, subd. 1b(a)(2) ("A person shall register under this section if: . . . the person was petitioned for a violation of . . . possessing pornographic work involving a minor in violation of section 617.247, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances." (emphasis added)).

ARGUMENT

I. THE JUVENILE PETITION IS BASED ON AN ABSURD INTERPRETATION OF MINNESOTA'S CHILD PORNOGRAPHY STATUTE THAT IS CONTRARY TO LEGISLATIVE INTENT AND HAS FAR-REACHING HARMFUL EFFECTS.

When deciding whether a criminal complaint or juvenile petition must be dismissed, the Court may examine whether the conduct charged falls within the range of conduct that the legislature intended to criminalize. The Court's responsibility, and the object of all interpretation and construction of laws, is "to ascertain and effectuate the intention of the legislature". Minn. Stat. § 645.16; *State v. Campbell,* 814 N.W.2d 1, 4 (Minn. 2012). When ascertaining the intention of the legislature, the courts are guided by the presumption that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable". Minn. Stat.

§ 645.17. Therefore, when reviewing a statute, courts assume that the legislature does not intend to violate the United States and Minnesota Constitutions or intend to produce absurd or unreasonable results. Minn. Stat. § 645.17; *Chapman v. Comm'r Revenue,* 651 N.W.2d 825, 831 (Minn. 2002). Although plain meaning is the governing principle in applying statutory language, Minnesota courts will not give effect to plain meaning if it produces an absurd result that plainly conflicts with the purpose of the legislation as a whole. *Olson v. Ford Motor Co.,* 558 N.W.2d 491, 494 (Minn. 1997); *Wegener v. Comm'r of Revenue,* 505 N.W.2d 612, 617 (Minn. 1993). Penal statutes are to be construed strictly so that all reasonable doubt concerning legislative intent is resolved in favor of the defendant. *State v. Colvin,* 645 N.W.2d 449, 452 (Minn. 2002).

Consistent with these rules of statutory interpretation, this Court should dismiss the juvenile petition against [redacted] for dissemination of child pornography. [redacted] voluntarily took and shared [redacted] of her own body. For the reasons explained below, the criminalization of her conduct as distribution of child pornography is in conflict with the intent of national child pornography laws as well as the specific, enumerated purposes of the Minnesota child pornography statute.

A. The Legislative History and Purpose of Child Pornography Laws Demonstrate Their Protective Intent.

Possession and distribution of child pornography are prohibited in order to "protect the victims of child pornography [and] . . . to destroy [the] market for the exploitative use of children." *Osborne v. Ohio*, 495 U.S. 103, 109, (1990); *see also New York v. Ferber*, 458 U.S. 747, 758 (1982). The U.S. Department of Justice has explicitly underscored the link between its interest in prosecuting child pornography and the government's interest in protecting children: "To take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa." U.S. Dep't of Justice, Att'y Gen.'s Comm'n on Pornography, Final Rep., at 417

(1986).[3] The U.S. Supreme Court has likewise emphasized that protecting the "physiological, emotional, and mental health of the child" victim is the purpose of child pornography laws, making them categorically distinguishable from bans on adult pornography, which violate the First Amendment. *Ferber*, 458 U.S. at 758; *Shoemaker v. Taylor*, 730 F.3d 778, 786 (9th Cir. 2013) (citing *Ferber* for the harm caused to children in child pornography). In *Ferber*, the Court recognized that the distribution of child pornography is intrinsically related to sexual abuse because it creates a permanent record of the abuse and perpetuates the market for production of material requiring the sexual exploitation of children. *Ferber*, 458 U.S. at 759. Further confirming the child-protection purpose of child pornography laws, the Court later rejected a prohibition of pornography that uses "virtual" children or adults who appear to be minors, because *Ferber*'s child protection justification was absent. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002). The Court in *Free Speech Coalition* rejected the government's claim of potential harm to children based on the possibility that the images might cause pedophiles to molest children or be used by pedophiles to groom children, deeming this "indirect" because the harm "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.* at 250.

The interests protected by child pornography laws are not advanced in the instant case, where there are no exploited child victims. Here, [redacted] voluntarily took and shared [redacted] of herself:

> Just as with virtual child pornography, no crime is being committed when a teen takes a nude photograph or video of herself. . . . [S]exting does not create

[3] The Report found that child pornography laws should address these four problems: (1) child pornography creates a permanent record of sexual abuse; (2) photographs of children engaged in sexual activity can be used as tools for further molestation of other children; (3) photographs of children engaged in sexual practices with adults can be used as evidence against those adults in prosecution for child molestation; and (4) harm to children creates a special interest in decreasing incentives to produce child pornography. U.S. Dep't of Justice, Att'y Gen.'s Comm'n on Pornography, Final Rep., at 410-12.

> victims at the time of its production. Participants willingly create . . . these images. Furthermore, sexting is not intrinsically related to the sexual abuse of children as none of these teens are being coerced into sexual activity by oppressive child pornographers. Thus, just as virtual child pornography could not be made criminal, neither should sexting.

Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. Marshall J. Computer & Info. L. 431, 450 (2009). Any prospective harm to [redacted] would be an "indirect" injury and dependent on "unquantified potential for subsequent criminal acts." *See Free Speech Coal.*, 535 U.S. at 250. Accordingly, [redacted]'s conduct is squarely outside the *Ferber* exception to First Amendment protection. Even assuming, arguendo, that there was evidence that [redacted] was coerced into creating [redacted] by an oppressive child pornographer, *her* actions would still fall outside the *Ferber* exception.

B. The Intent and Purpose of Minnesota's Sexual Exploitation Statute does not Support Adjudicating [redacted] as Delinquent for Dissemination of Child Pornography.

Consistent with the historical underpinnings of child pornography laws, Minnesota's child pornography statute is focused on protecting children and youth. The express purpose of Minnesota's law, as written directly into the statute itself, is:

> to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors. It is therefore the intent of the legislature to penalize possession of pornographic work depicting sexual conduct which involve minors or appears to involve minors in order to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct.

Minn. Stat. § 617.247, subd. 1; *State v. McCauley*, 820 N.W.2d 577 (Minn. App. 2012). The intent is clear: this statute is meant to protect children and teens from being victimized, exploited, or harmed by child pornographers. *Id.* The plain text of this subdivision refers to a minor "being used" in pornographic work. This language clarifies the purpose of this law, which

is to protect children from sexual abuse by *others*. Only an unrecognizable twist of the English language could result in the reading that the prosecution has taken of this statute: that is, that it applies to a 14-year-old girl who voluntarily disseminates [redacted] of herself [redacted] to a classmate on whom she has a crush.

The statute does not contemplate the possibility of a youth freely deciding [redacted] her own body, and reasonably so. [redacted] cannot criminally "use" or "victimize" herself, nor does the disclosure of her identity need to be protected from herself. In fact, the child pornography statute does not even attempt to address the phenomenon widely known as "sexting". Sexting is the sending of sexually explicit digital images, videos, text messages or emails, usually by cell phone.[4] It is a popular phenomenon among teens, including teens in Minnesota.[5] A 2014 study published in Modern Medicine reported that 15–28 percent of middle and high school students had exchanged nude photos or sexually explicit texts—mostly photos.[6] A 2012 survey by the Massachusetts Aggression Reduction Center (MARC) of 18-year-olds found 30 percent had sent nude pictures during high school, and 45 percent had received them.[7] It is unreasonable to assume that the legislature intended to label 15-45% of teens as felons and sex offenders when they exchange photographs or videos of themselves with one another. Moreover, the Minnesota legislature allows a person between 13 and 16 years of age to consent to sexual intercourse with

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[4] *See* http://www.dictionary.com/browse/sexting.

[5] *See* http://www.minnesotamonthly.com/Minnesota-Life/Sext-Ed/.

[6] Pat F. Bass III, MD, Modern Medicine Network, *Pediatrician's primer on sexting* (Aug. 1, 2016), http://contemporarypediatrics.modernmedicine.com/contemporary-pediatrics/news/pediatrician-s-primer-sexting.

[7] Elizabeth Englander, Massachusetts Aggression Reduction Center, *Low Risk Associated with Most Teenage Sexting: A Study of 617 18-Year-Olds* (July 2012), http://webhost.bridgew.edu/marc/sexting%20and%20coercion %20 report.pdf.

someone that is less than 24 months older than them. *See* Minn. Stat. §§ 609.342 – .3451. Here, the teens in question could have legally engaged in sexual intercourse, but, taking the prosecution's view of the law, are criminals and predatory offenders if they exchange nude pictures or videos of themselves. This result is plainly absurd.

C. The Absurd and Unreasonable Reading of the Statute is Further Underscored by the Context and Consequences that Result from this Application of the Child Pornography Statute.

The child pornography charge against [redacted] contravenes the rehabilitative purpose of the Minnesota juvenile justice system, criminalizes normal adolescent exploration of sexual identity and relationships, and imposes hard registration consequences as a sex offender. Any interpretation of the statute that allows the charges against [redacted] to proceed is unreasonable, absurd and contrary to legislative intent.

1. The interpretation and application of the child pornography statute to these facts contravenes the rehabilitative purposes of Minnesota's juvenile justice system.

The child pornography law's intentions, through its legislative history and judicial interpretation, could not be clearer; prosecuting [redacted] in the name of "protecting" her is contrary to the juvenile court's responsibility to youth under its care. No other criminal statute contemplates that both the perpetrator and the victim of the alleged crime could be the same person, heightening the absurdity of an adjudication of delinquency against [redacted].[8] Furthermore, but for the fact that [redacted] was under the age of eighteen when she [redacted] of her own body, the State would never attempt to charge [redacted] for a felony child pornography offense.

[8] Attempted suicide was a crime at common law and some states had, in their past, statutes that criminalized suicide and attempted suicide. *See* Donald W. Grieshober, *Suicide – Criminal Aspects*, 1 Vill. L. Rev. 316, 317-319 (1956). Such statutes are long off the books and would now be viewed as against public policy.

Courts around the country, including the U.S. Supreme Court, routinely take into account the immaturity and inexperience of juveniles when prosecuting and punishing young offenders. *See, e.g.*, *Montgomery v. Louisiana*, 577 U.S. ___ (2016) (retroactively applying rule that federal and state governments are required to consider the unique circumstances of each juvenile defendant in determining individualized sentence); *Miller v. Alabama*, 567 U.S. 460 (2012) (striking down mandatory life without parole sentences for juveniles); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (holding that a youth's age should be considered when determining custody for *Miranda* purposes); *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life-without-parole sentences for juvenile, non-homicide offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for youth under the age of 18). These holdings rest, in part, on the well-settled research demonstrating that adolescent brains are different from adult brains. Research shows, and courts have held, that these differences impact the ability of adolescents to understand the consequences of their actions, control their emotions, understand the influence of their peers, and make rational decisions, thereby reducing the youth's culpability for his conduct. *See, e.g.*, *Roper*, 543 U.S. at 569; *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 68.

Minnesota's juvenile justice system has always recognized that youth matters. Accordingly, the purpose of Minnesota's delinquency statutes is:

> to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.

Minn. Stat. § 260B.001 (emphasis added). The Minnesota Supreme Court has similarly acknowledged that young offenders should be treated differently. *See, e.g.*, *State v. Trog*, 323

N.W.2d 28 (1982) (holding that age is a factor that justifies mitigation of sentence). Minnesota also limits access to records of juvenile delinquency proceedings. Minn. Stat. § 260B.171.

Leveling charges against [redacted] for distribution of child pornography is inconsistent with the goals of the juvenile justice system. If allowed by this Court, [redacted]'s conviction will brand her a predatory offender for *at least a decade* — a stigmatizing label that not only requires compliance with onerous registration requirements, but also presents significant barriers to [redacted]'s integration into society as an adult. Indeed, there is nothing "rehabilitative" about the State's charging [redacted] with a felony. Minn. Stat. § 242.18 (establishing the purpose for juvenile corrections is rehabilitative).

2. Prosecuting teenage sexting criminalizes adolescent exploration of sexual identity and relationships.

Prosecuting a 14-year-old girl who voluntarily [redacted] of herself for dissemination of child pornography is not only unnecessarily harsh and punitive; it serves no penological or public safety purpose. Rather, criminalizing teenage sexting criminalizes typical adolescent conduct — a result far removed from the purpose and intent of the statute.

While many adults may consider it unwise and reckless (or immoral), the sending or receiving of digital sexual photos of oneself or one's partner is a common part of contemporary adolescent behavior. The average teen sends approximately 60 text messages every day.[9] Various researchers have estimated that up to 30% of teens have sent naked photos or videos of

[9] *See* Andrew J. Harris, *Understanding the World of Digital Youth*, *in* ADOLESCENT SEXUAL BEHAVIOR IN THE DIGITAL AGE: CONSIDERATIONS FOR CLINICIANS, LEGAL PROFESSIONALS, AND EDUCATORS 24, 28 (Fabian Saleh, Albert Grudzinskas, & Abigail Judge, eds., Oxford University Press 2014).

themselves to others and up to 45% percent of teenagers have received such sexts.[10] One study found that roughly 70 percent of teens who sexted had sent the image to their significant other.[11] Among teens who have sent nude or semi-nude messages, 66 percent of girls and 60 percent of boys say they did so to be "fun or flirtatious," and 40 percent of girls say they sent sexually suggestive texts as a "joke."[12] Young people engage in risk-taking behaviors because of their "lack of maturity and underdeveloped sense of responsibility." *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *see also Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 72; *see also In re Welfare of C.R.M.*, 611 N.W.2d 802 (Minn. 2000) (holding, in context of juvenile case, that the courts should avoid interpreting statutes to criminalize a broad range of what would otherwise be innocent conduct).

Sexual exploration is indisputably normal adolescent behavior. Learning to think of oneself as a sexual being and dealing with sexual feelings is an important part of adolescence, and sexual experimentation is one aspect of the "trying on" of different personalities and new

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[10] *See* Section I.B., *supra*. Other studies have found somewhat lower rates of teen sexting. *See, e.g.*, Sameer Hinduja, Cyberbullying Research Center, *Sexting: A Brief Guide for Educators and Parents*, https://cyberbullying.org/Sexting-Fact-Sheet.pdf (citing various studies such as The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008); MTV-AP, Digital Abuse Study (2009); Cox Communications, *Teen Online & Wireless Safety Survey* (2009); Pew Internet & American Life Project, *Teens and Sexting* (2010)). A 2016 study of 5,539 middle and high school students found that 12% of surveyed students had sent sexts and 19% had received them. Sameer Hiduja and Justin Patchin, *Sexting among Middle and High School Students* (2016), available at https://cyberbullying.org/new-teen-sexting-data.

[11] See Cox Communications, National Center for Missing and Exploited Children, & John Walsh, *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls* at 36 (2009), *available at* http://www.scribd.com/doc/20023365/ 2009-Cox-Teen-Online-Wireless-Safety-Survey- Cyberbullying-Sexting-and-Parental-Controls.

[12] Nat'l Campaign to Prevent Teen &Unplanned Pregnancy & Cosmogirl.com, *Sex and Tech: Results from a Survey of Teens and Young Adults* at 4 (2008), available at https://www.drvc.org /pdf /protecting_children/sextech_summary.pdf.

behaviors that is necessary to the process of identity development.[13] "[T]hrough experimentation and risk-taking . . . adolescents develop their identity and discover who they will be."[14] Nevertheless, the stakes for engaging in this normal and natural behavior are heightened today not because teenagers have changed, but because the means of communication and expression at their disposal has. Sexting is a phenomenon inextricably linked with 21st-century technology; transmission of sexual images is much simpler and quicker when teenagers do not need to purchase film for cameras, get the resulting photos developed, buy stamps, and put the photos in the mail. None of this, however, converts impulsive adolescent sexual behavior into felony distribution of child pornography.

Prosecutors and courts around the country are recognizing that sexting should not be handled through child pornography prosecutions. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 146-47 (3d Cir. 2010) (during pendency of appeal, prosecutor confirmed that child pornography charges would not be brought against two of the minor plaintiffs); *N.D. v. United States*, 1 F. Supp. 3d 1240, 1244 (N.D. Ala. 2014) ("The court is particularly troubled by the application of the Sentencing Guidelines to 'sexting' cases . . . . Regardless of the appropriateness of engaging in such virtual conversations, the court doubts that this behavior is the kind that Congress was targeting when it passed child pornography laws."); *State v. C.M.*, 154 So. 3d 1177 (Fla. Dist. Ct. App. 2015) (affirming dismissal of juvenile delinquency petition based on trial court's finding

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[13] Jennifer Woolard, *Adolescent Development*, *in* TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM 13, 15 (2009).

[14] Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 Child Adolescent Psychiatric Clinics N. Am. 497, 508 (2004).

that juvenile's sexting offense did not constitute a delinquent act).[15] Those prosecutors who interpret the law to allow such prosecutions face increased criticism based on common sense.[16]

3. Juvenile convictions for child pornography carry harsh consequences.

Although juvenile adjudications are not criminal convictions, records of juvenile court involvement can follow an individual through his or her adulthood. There are collateral consequences to a delinquency adjudication that may hinder a juvenile's ability to productively reintegrate into society, impeding an individual's future housing, education, and employment opportunities as well as impacting subsequent judicial matters. *See* Council on Crime and Justice, *Juvenile Records in Minnesota*, https://dps.mn.gov/entity/jjac/Documents/Juvenile%20Records%20in%20Minnesota.pdf. An adjudication of delinquency may hinder a juvenile's future plans to seek higher education, obtain employment, or enlist in the military. While historically juvenile adjudications have not been characterized as criminal convictions for purposes of employment applications, increasingly applications for employment, college admission, and financial aid include specific references to juvenile adjudications. *Id.* at 13-17. Even the existence of juvenile charges can result in a disqualification for employment in

[15] *See also* Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony*, N.Y. Times, Nov. 13, 2015, http://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html; Assoc. Press, *North Carolina Teen Texting Case Highlights Gray Areas In Child Pornography Laws*, The Chron.-Telegram, Sept. 24, 2015, http://chronicle.northcoastnow.com/2015/09/24/north-carolina-teen-sexting-casehighlights- gray-areas-in-child-pornography-laws/; Tom Jackman, *Manassas City Police Say They Will Not Serve Search Warrant In Teen 'Sexting' Case*, Wash. Post, July 10, 2014, https://www.washingtonpost.com/blogs/local/wp/2014/07/10/manassas-city-police-say-they-will-not-serve-search-warrant-in-teen-sexting-case/.

[16] Ryan Cooper, *The insane logic of sexting prosecutions* (Sept. 8, 2015), http://theweek.com/articles/575396/insane-logic-sexting-prosecutions; Tracy Clark-Flory, *Teens Involved in "Experimental" Sexting Don't Often Face Prosecution* (Sept. 3, 2015), http://www.vocativ.com/228366/teens-experimental-sexting-prosecution/index.html; Bridgette Dunlap, *Why Prosecuting a Teen Girl for Sexting is Absurd* (Oct. 7, 2016), https://www.rollingstone.com/culture/news/why-prosecuting-a-teen-girl-for-sexting-is-absurd-w443829.

programs licensed by the Minnesota Department of Human Services and the Minnesota Department of Health. Id. at 15-16. Based on the U.S. Army's classification system, juvenile delinquency adjudications qualify as criminal offenses and may preclude eligibility for enlistment without a moral waiver, which is not certain to be granted. *Id.* at 19. In addition to creating barriers to successful future plans, juvenile adjudications can also affect a youth's current livelihood.

A delinquency adjudication may also have significant ramifications in subsequent judicial matters. A past juvenile adjudication may affect sentencing in a future criminal proceeding. *Id.* at 24. In most juvenile courts, sentences are indeterminate, with no mandatory minimum or maximum sentences and no sentencing guidelines. This means, at least in theory, that whether criminal prosecutions for sexting are pursued as misdemeanors or felonies, this distinction is without meaning in the juvenile justice system. In the vast majority of states, a juvenile adjudicated delinquent for a misdemeanor charge is technically eligible for the same juvenile disposition (sentence) as a juvenile adjudicated delinquent for homicide or any other violent felony by the juvenile court.[17]

Most concerning here is that, although [redacted]'s conduct consisted of nothing more than sharing [redacted] of herself, she will be subject to the same assumptions and discrimination as juveniles and adults who have committed serious sex crimes. Children labeled as "sex offenders" are viewed by the public as dangerous. *See, e.g., Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling . . . as a sex offender."); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (Sept. 11, 2007), https://www.hrw.org/report/2007/09/11/

[17] Michael Pinard, The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications, 6 NEV. L.J. 1111, 1115 (2006).

no-easy-answers/sex-offender-laws-us. Of the nearly 300 youth offender registrants whose cases were assessed in a Human Rights Watch report, almost half (132) indicated they had experienced at least one period of homelessness as a result of the restrictions caused by registration. *See* Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* at 65 (May 2013), *available at* https://www.hrw.org/sites/default/files/ reports/us0513_ForUpload_1.pdf [hereinafter, Raised on the Registry]. Youth subject to registration continuously report that finding or keeping employment is one of the most constant challenges relating to registration. *Id.* Landlords may refuse to rent to a young adult after that landlord has been contacted by the sheriff to verify an address. In addition, some juvenile registrants cannot live in public housing, which may require parents to either prohibit their child from living with them or move. 42 U.S.C. § 13663(a); 24 C.F.R. 960.204. City ordinances increasingly restrict sex offenders from obtaining housing.[18]

It is also well-documented that registration leads to depression, hopelessness, and fear for one's safety. In extreme cases, sex offender registration has led juveniles to suicide. *See* Raised on the Registry. Many registrants experience vigilante activities such as property damage, harassment, and even physical assault. *Id.* Neurological studies have shown that adolescents are "especially vulnerable to the stigma and isolation that registration and notification create," and because youth who are labeled as "sex offenders" often experience rejection from peer groups and adults, they are less likely to attach to social institutions like schools and churches.[19] This

[18] Maya Rao, Star Tribune, *Cities are rushing to restrict sex offenders*, http://www.startribune.com/where- do- offenders- live-cities-scramble/374566221/

[19] Justice Policy Institute, *Registering Harm: How Sex Offense Registries Fail Youth and Communities* at 24 (2008), *available at* http://www.justicepolicy.org/images/upload/08-11_rpt_walshactregistering harm_jj-ps.pdf.

lack of attachment is detrimental to a young person's rehabilitation and development,[20] a result that is completely contradictory to the intent and purpose of Minnesota's child pornography law.

II. MINN. STAT. § 617.247 IS UNCONSTITUTIONALLY OVERBROAD, BECAUSE IT PROSCRIBES A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

Even if the prosecution's interpretation of the child pornography statute is reasonable, the charge in this case is based on an interpretation of the child pornography statute that raises significant concerns under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Minnesota Constitution. The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, and applies that restriction to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). When a statute "explicitly regulates expression based on content," it is "presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quotation omitted). Criminal statutes allowing for prosecution of an individual based entirely on what the individual has said are generally content-based restrictions. Absent an exception from First Amendment protection, a content-based restriction is invalid unless it survives strict scrutiny, meaning (1) "it is justified by a compelling government interest," (2) it "is narrowly drawn to serve that interest," and (3) there is "a direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799, 131 S. Ct. 2729, 2738 (2011). A compelling government interest "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805. The government must use the "least

[20] Candace Kruttschnitt et al., *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 Justice Quarterly 61 (2000).

restrictive means" to further a compelling interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989). An individual may bring both facial and as-applied challenges against government action, but the same substantive First Amendment standard applies to each type of challenge. *Rew v. Bergstrom*, 845 N.W.2d 764, 778 (Minn. 2014).

A. Minn. Stat. § 617.247 Encompasses Constitutionally-Protected Speech.

In order to comport with the First Amendment, "a statute that punishes speech must not be overbroad." *State v. Crawley*, 819 N.W.2d 94, 102 (Minn. 2012). A statute is overbroad on its face "if it prohibits or chills a substantial amount of protected speech along with unprotected speech." *Id.* (citing *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002)). Absent an exception from First Amendment protection, a content-based restriction is invalid unless it survives strict scrutiny, meaning (1) "it is justified by a compelling government interest," (2) it "is narrowly drawn to serve that interest," and (3) there is "a direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799, 131 S. Ct. 2729, 2738 (2011). A compelling government interest "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805. The government must use the "least restrictive means" to further a compelling interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989). The only categories of unprotected speech are "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Id.* at 104 n.9 (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)). Accordingly, a statute is unconstitutionally overbroad if it prohibits or chills a substantial amount of speech that does not fall into one or more of the above categories.

Although content-based restrictions on speech are presumptively unconstitutional, the United States Supreme Court has recognized a narrow exception in upholding 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 (1982) (quotation omitted); *see also Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (upholding ban on possession of child pornography given the "importance of the State's interest in protecting the victims of child pornography" (emphasis added)). But 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 (2002) (quotation omitted).

In *United States v. Williams,* by contrast, the Court upheld subsequent legislation that permitted the prosecution of individuals who promoted or solicited materials that involved "a visual depiction of an actual minor." 553 U.S. 285, 297 (2008). Once again, it relied on the fact the children were real, meaning the statute was limited to addressing the *harm* involved in the production, rather than the content of the image. *Id.* The court found "[s]imulated child pornography will be as available as ever, so long as it is offered and sought *as such,* and not as real child pornography." *Id.* at 303 (emphasis original); *see also Stevens,* 559 U.S. at 482 (finding a statute addressing only the *portrayal* of harmful acts against animals, not the underlying conduct, was overbroad and violated the First Amendment).

As these cases make clear, punishment for child pornography is consistent the protections of the First Amendment when it is based on the harm caused to the children in the production of

the material. When a minor [redacted] her own body and sends that [redacted] to another in an attempt to indicate romantic or sexual interest, the same compelling risk of physical and psychological injury simply does not exist. Thus, the statute infringes upon constitutionally-protected speech.

B. Minn. Stat. § 617.247 Prohibits a Substantial Amount of Constitutionally-Protected Speech.

Once the Court determines the scope of the statute's reach, the inquiry turns to whether the statute "is substantially overbroad . . . if, in addition to prohibiting unprotected speech, it also prohibits a substantial amount of constitutionally protected speech." *State v. Washington-Davis*, 881 N.W.2d 531, 539 (Minn. 2016); *see Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In contrast to the concerns in *Ferber,* here the statute's overbreadth is substantial, both in the absolute sense and relative to the statute's plainly legitimate sweep. *See Ferber,* 458 U.S. at 773; *Williams,* 553 U.S. at 292. The sharing of sexually suggestive images and content among teenagers over text message is so common that it has its own term: "sexting." As explained in the studies cited *supra*, a substantial portion of teenagers admit to producing, receiving, and distributing nude or semi-nude depictions of themselves.[21] These numbers do not capture the number of teenagers who engage in the behavior but deny it, nor do they account for the instances in which the image is forwarded on to an additional recipient. Twenty-five percent of teenage girls, and thirty-three percent of teenage boys, say they have had nude or semi-nude images shared with them that were originally meant for someone else.[22] Both minors who produce and send images of themselves and minors who forward on those images to a peer could

[21] John A. Humbach, 'Sexting' *and the First Amendment,* 37 Hastings Const. L.Q. 433, 435 (2010); The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results From a Survey of Teens and Young Adults* at 1 (2008) [hereinafter, Sex and Tech].

[22] Sex and Tech at 3.

be prosecuted under Minn. Stat. § 617.247. The language of Minn. Stat. § 617.247, both on its face and as applied here, criminalizes common teenage behavior, as it permits up to 45% of teenagers to be prosecuted as felony sex offenders. Because the sharing of self-produced sexually-explicit images over text message is common among minors, the statute criminalizes a substantial amount of protected expressive activity.

C. The Statute Must be Interpreted Narrowly to Reach Only Unprotected Speech.

Minn. Stat. § 617.247 is unconstitutionally overbroad in violation of Minn. Const. article I, section 3, and the First Amendment. The final question is how the Court might remedy the constitutional violation. If the statute is "readily susceptible" to a narrowing construction, the court can adopt such a construction if it remedies the statute's constitutional defects. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Here, the Court should interpret the statute as inapplicable to minors who distribute sexually-explicit depictions of themselves in order to avoid the free speech concerns created by the State's overbroad reading of the statute.

III. THE STATUTE IS IMPERMISSIBLY VAGUE, BECAUSE IT DOES NOT EFFECTIVELY INFORM THE PUBLIC ABOUT PROSCRIBED CONDUCT.

No ordinary teenager would understand that sending a [redacted] of herself to a peer over Snapchat would result in felony child pornography charges and registration as a predatory offender. "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 flouts it 'violates the first essential of due process.'" *Johnson v. United States,* ___ U.S. ___, 135 S.Ct 2551, 2557 (2015). The United States Constitution provides that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. The Minnesota Constitution contains a similar provision. Minn. Const. art. I, § 7. It is

well established that the right to due process includes the right to not be convicted and punished based on an unconstitutionally vague statute. *See State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985); *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). "The void-for-vagueness doctrine requires that 'a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)).

A statute can be void for vagueness in two ways. First, the statute may "authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Second, the statute could "fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Id.* The touchstone for the fair-warning requirement is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *United States v. Lanier*, 520 U.S. 259, 267 (1997). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

Minn. Stat. § 617.247 fails both prongs of the test. An ordinary person reading the statute would interpret it as the legislature intended: that a person is guilty of dealing in depictions of a minor engaged in sexually explicit conduct when he disseminates an image of a minor, *other* than herself, to another. A teenager of ordinary intelligence would be aware that possessing and distributing child pornography is wrong, and would understand that laws were enacted to protect children, prevent abuse and exploitation, and stop the production and supply of child

pornography. But, as Judge Steinberg noted in an Oct. 19, 2012 decision in Pennsylvania where he dismissed a complaint that applied the state's child abuse statute to teen sexting activity:

> Those same teenagers, unless prosecuted, would be clueless that their conduct falls within the parameters of the Sexual Abuse of Children statute. Not only is sexting prevalent in their world, but it is doubtful they would connect sexting with the sexual exploitation of children.

See In re: C.S., No. CP-39-JV-0000447-2012, at *6-7 (Pa. Ct. Com. Pl. Oct. 19, 2012), http://www.krautharris.com/documents/In-re-CS.pdf), *rev'd on other grounds,* 84 A.3d 698 (Pa. 2014). Charging [redacted] with a felony sex offense under this statute for [redacted] of her own body to someone else demonstrates that the statute fails to define the offense with sufficient definiteness to allow ordinary people to understand when they may be charged under this law, as the statute does not provide sufficient notice that this behavior is proscribed.

In addition, the statute is extremely susceptible to arbitrary enforcement. A review of cases and examples show that the decision to charge teen sexting activity under child pornography or child sex abuse laws around the country is arbitrary and varies widely from state to state or even within states. *See* Melissa R. Lorang, Dale E. McNiel and Renée L. Binder, 44 (1) J. Am. Acad. of Psychiatry and Law Online, 73, 76-78 (March 2016). With respect this point, the *In re C.S.* Court reasoned:

> It is apparent that pursuing child pornography charges against teenagers "encourages arbitrary and erratic arrests and convictions", which is one of the concerns addressed by the void for vagueness doctrine. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Commonwealth v. Asamoah*, 809 A.2d 943, 946 (Pa.Super. 2002). In light of the statistics related to "sexting", the decision to prosecute is more likely subject to the vagaries of local law enforcement than the recognition that this type of conduct should be charged. "The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 244. However, placing sexting on the same crime scale as child pornography is an overreaction by law enforcement. A law enforcement response may be appropriate under certain circumstances, but using the child pornography statutes is a "round hole/square peg" approach to enforcement. Those who are adjudicated

> or convicted of child pornography offenses are sexual offenders and often predators. Teenagers who engage in sexting should not face the same legal and moral condemnation.

In re: C.S., No. CP-39-JV-0000447-2012 at *8.

"Laws may not 'trap the innocent by not providing fair warning' or delegate 'basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). Despite the fact that no children had been exploited or abused by her actions, the State has elected to prosecute [redacted] for a felony sex offense. [redacted] was not provided fair warning that she engaged in conduct that violated this statute or constituted a sex offense, and the State's decision to prosecute her is an arbitrary application of the law. The statute is void for vagueness, and reversal is required.

CONCLUSION

The juvenile petition should be dismissed. Dismissal is the only way to address the absurd application of Minnesota's child pornography statute to [redacted]'s case, to prevent a violation of her constitutional right to free expression, to avoid prosecuting [redacted] under a statute that she could and would never have anticipated violating by her actions, and to prevent the disproportionate consequences that a finding of delinquency and registration as a predatory offender would impose on [redacted]

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