

2018

Constitutional Law: Protecting Our Youth: A Necessary Limit on the First Amendment—State v. Muccio

Richard A. Podvin

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>

 Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Podvin, Richard A. (2018) "Constitutional Law: Protecting Our Youth: A Necessary Limit on the First Amendment—State v. Muccio," *Mitchell Hamline Law Review*: Vol. 44 : Iss. 1 , Article 9.

Available at: <https://open.mitchellhamline.edu/mhlr/vol44/iss1/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**CONSTITUTIONAL LAW: PROTECTING OUR YOUTH: A
NECESSARY LIMIT ON THE FIRST AMENDMENT—
STATE V. MUCCIO**

By Richard A. Podvin[†]

I.	INTRODUCTION.....	322
II.	HISTORY.....	324
	A. <i>The First Amendment’s Guarantee for Freedom of Speech</i>	324
	B. <i>Limitations to the First Amendment’s Guarantee for Freedom of Speech</i>	326
	1. <i>Police Power and Distaste</i>	326
	2. <i>Constitutional Limitations: Facial and As-Applied Challenges</i>	328
	3. <i>The Overbreadth Doctrine</i>	330
	4. <i>Unprotected Speech: Obscene Speech and Speech Integral to Criminal Conduct</i>	332
	5. <i>Ashcroft v. Free Speech Coalition and States’ Statutory Efforts to Prohibit Sexual Conduct Involving Minors</i>	335
III.	THE MUCCIO DECISION	337
	A. <i>Facts and Procedural Posture</i>	337
	B. <i>A Brief Overview of Section 609.352, subdiv. 2a(2)’s Text</i>	338
	C. <i>The Minnesota Supreme Court’s Decision</i>	339
IV.	ANALYSIS	344
	A. <i>The Minnesota Supreme Court Correctly Determined the Speech Prohibited by Section 609.352, subdiv. 2a(2) is Not Generally Protected by the First Amendment</i>	344

[†] JD Candidate, Mitchell Hamline School of Law, 2019; BA Political Science, Summa Cum Laude, Saint John’s University (MN), 2016. I would like to thank Professor Anthony Winer for his helpful suggestions and guidance during the editorial process. Additionally, thank you to the associates and staff of the *Mitchell Hamline Law Review* for their role in preparing this article for publication. Finally, special thanks to my family: Mom, Dad, Clare, Riley, and the Swenson family for their love and support throughout this process—RAP

B. *The Minnesota Supreme Court’s Decision is Correctly Distinguished from the United States Supreme Court Decision in Ashcroft v. Free Speech Coalition*..... 347

C. *Implications of the Muccio Decision: The Danger of Grooming*..... 348

 1. *Grooming is Outside the Protection of the First Amendment*..... 350

D. *Section 609.352, subdiv. 2a(2) is Narrowly Tailored to Achieve a Compelling Governmental Interest* 351

 1. *Section 609.352, subdiv. 2(a)(2), is a Proper Candidate for the Strict Scrutiny Test, is Narrowly Tailored, and Achieves a Compelling Governmental Interest*..... 354

V. CONCLUSION 357

“The capacity for dissociation enables the young child to exercise their innate life-sustaining need for attachment in spite of the fact that principal attachment figures are also principal abusers.”

-Warwick Middleton¹

I. INTRODUCTION

In November 2014, a father discovered sexually explicit messages and photographs exchanged between his fifteen-year-old son and forty-one-year-old Krista Muccio.² Despite Muccio’s constitutional challenges to her charges, the Minnesota Supreme Court held that Muccio was lawfully charged with felony communication with a child describing sexual conduct. In doing so, the court held that Minnesota Statute section 609.352, subdivision 2a(2) does not substantially regulate protected speech and does not facially violate the First Amendment.³ Minnesota Statute section 609.352, subdivision 2a(2) prohibits a person eighteen years or

1. Warwick Middleton, *Warwick Middleton Quotes*, GOOD READS, https://www.goodreads.com/author/quotes/7085770.Warwick_Middleton (last visited Oct. 20, 2017). Warwick Middleton is an Australian psychiatrist and author, dealing especially with the effects of trauma in society. Warwick Middleton, LINKEDIN, <https://www.linkedin.com/in/warwick-middleton-md-1614a012/> (last visited Dec. 1, 2017).

2. 890 N.W.2d 914, 920 (Minn. 2017).

3. *Id.*

older⁴ from using “the internet, a computer, or any other electronic device capable of electronic data storage or transmission in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct.”⁵ The court held that the statute has a “plainly legitimate sweep”⁶ because much of the speech it regulates is integral to criminal conduct and therefore is not protected by the First Amendment.⁷ Even though the statute prohibits some speech protected by the First Amendment, the court upheld its validity because the statute is not substantially overbroad in comparison to its legitimate sweep.⁸ The Minnesota Supreme Court’s decision in *Muccio* correctly followed the development of First Amendment jurisprudential doctrine.⁹ The constitutional inquiries made by the Minnesota Supreme Court in *Muccio* are similar to those in many other First Amendment cases.¹⁰ However, the ever-constant creation of new forms of electronic communication necessitates new applications of well-established First Amendment principles. The *Muccio* decision is particularly ripe for discussion given its relevance in our increasingly technologically-savvy society.

This case note begins by providing some background on the First Amendment’s guarantee of freedom of speech and the underlying statutory framework.¹¹ A discussion of constitutional doctrine surrounding the First Amendment follows.¹² Next, this note

4. *Id.* at 919 n.2 (citing MINN. STAT. § 609.352, subdiv. 2a(2) (2016)) (“[T]hroughout this opinion, [the court] use[s] the term ‘adult’ to refer to ‘[a] person 18 years of age or older.’”).

5. *Id.* at 919 (citing MINN. STAT. § 609.352, subdiv. 2a(2) (2016)).

6. *See id.* at 920.

7. *Id.* at 923 (citing *State v. Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016)).

8. *Id.* at 929; *see State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (explaining that a statute is overbroad on its face if “it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights” (citation omitted)). Before a court decides to address a facial overbreadth challenge, the court must determine whether the statute in question implicates the First Amendment. *Machholz*, 574 N.W.2d at 419. Then, if the court determines the First Amendment is not implicated, a court need go no further because no constitutional question is raised. *Id.*

9. *See infra* section IV.

10. *Id.*

11. *Infra* Part II.A.

12. *Infra* Part II.B.

explains the factual and procedural history of *Muccio*.¹³ The analysis section of this note argues that the court reached the correct decision in holding upholding the constitutionality of section 609.352, subdivision 2a(2).¹⁴ Furthermore, in the interest of good public policy, the Minnesota Supreme Court correctly held that the state may criminalize sexual communications with one of the most vulnerable groups in our society: children.¹⁵

II. HISTORY

A. *The First Amendment's Guarantee for Freedom of Speech*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”¹⁶ Despite continued attempts of judges and scholars alike to define the scope of First Amendment protections, many fundamental conflicts remain surrounding the limits of this constitutional right.¹⁷

The First Amendment is integral to modern American society. It was described by renowned Supreme Court Justice Benjamin Cardozo as “the matrix, the indispensable condition, of nearly every other form of freedom.”¹⁸ Without the First Amendment’s guarantee of various individual liberties, American democracy would not successfully exist in its current form.¹⁹ In its entirety, the First

13. *Infra* Part III.

14. *Muccio*, 890 N.W.2d at 923–25; *infra* Part IV.A.

15. See Brief for Minnesota Coalition Against Sexual Assault as Amicus Curiae Supporting Appellant at 15, *State v. Muccio*, 890 N.W.2d 914 (Minn. 2017) (No. A15-1951), 2016 WL 3924135 [hereinafter Brief for MNCASA] (arguing that the Minnesota Legislature’s intent in section 609.352, subdivision 2a(2) is to protect children from sexual predators); *infra* Part IV.B.

16. U.S. CONST. amend. I.

17. See Lawrence B. Solum, *Freedom of Communicative Action: A Theory on the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 55 (1989) (noting the attempts of various judicial opinions and scholarly articles to define the First Amendment’s protections to Freedom of Speech). Solum asserts that “Jürgen Habermas’ theory of communicative action can serve as the basis for an interpretation of the First Amendment.” *Id.* Solum further opines that Habermas’ theory “fits the general contours of existing First Amendment doctrine and provides a coherent justification for the freedom of speech.” *Id.*; see generally JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., Beacon Press vol. 2 1985) (delineating the information from which Solum draws his thesis).

18. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

19. See *id.* (“Without freedom of speech, individuals could not criticize government, practice religion, speak out against abuses, assemble together for

Amendment protects two areas of individual liberties: the freedom of religion and the freedom of expression.²⁰ Among the First Amendment's guarantee of "freedom of expression" lies the exclusive right of "freedom of speech."²¹ The First Amendment's guarantee of freedom of speech is echoed in several states' constitutions.²² Many of the states' constitutional guarantees of freedom of speech existed prior to the ratification of the United States Constitution.²³ On June 8, 1789, James Madison introduced an initial version of the Bill of Rights to Congress.²⁴ Madison created his list of proposed amendments from existing state constitutions.²⁵ The freedoms Madison observed through his consideration of state constitutions directly influenced the final text of the First Amendment.²⁶

Prior to World War I, courts treated the First Amendment's guarantee of free speech much less expansively than courts do today.²⁷ However, since courts have begun to favor a broader

common causes and petition the government for redress of grievances.”).

20. *See id.* The First Amendment contains five explicit freedoms: freedom of religion, freedom of speech, freedom of press, freedom of assembly, and freedom to petition the government for a redress of grievances. *Id.*

21. *Id.*

22. *See, e.g.,* N.C. CONST. art. XV (“That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.”); PA. CONST. art. XII (“[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”).

23. *See* 1 DAVID L. HUDSON, JR., *Legal Almanac: The First Amendment: Freedom of Speech* § 1:2.

24. *Id.*

25. *Id.*

26. *Id.* at § 1:1 (explaining how Madison examined some of the common freedoms found in state constitutions during the process of drafting the First Amendment).

27. *See id.* at § 1:4 (explaining that in the years during and immediately following World War I, legislation was passed to silence political opponents of sitting legislators and other dissidents); *see also* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”). *Compare* *Schenck*, 249 U.S. at 47 (emphasizing the context of the defendant's speech as a basis to uphold their convictions under the 1918 Sedition Act), *with* *Near v. Minnesota*, 283 U.S. 697, 715 (1931) (holding that public officers should find redress for false accusations in libel laws, not in laws designed to limit the publication of periodicals or speech of persons in general).

application in various scenarios, interpreting the First Amendment's original text has presented new difficulties.

The Framers' original intent when drafting the first ten amendments to the United States Constitution is often at the center of these discussions.²⁸ However, discerning the original intent of the Framers presents further complex questions.²⁹ Since the Framers primarily sought to determine whether to codify the Bill of Rights amendments, the bulk of textual interpretation has been left to the courts.³⁰ The protections the First Amendment offers can stand at odds with the objectives of private persons, corporations, or even the government itself.³¹

B. Limitations to the First Amendment's Guarantee for Freedom of Speech

1. Police Power and Distaste

The First Amendment's guarantee of freedom of speech is not without bounds.³² This freedom should not completely deprive the government of its authority to exercise its police powers.³³ Judicial opinions from jurisdictions across the United States have identified several areas in which the government may abridge the citizenry's freedom of speech in exercising its police powers.³⁴ The government may adopt reasonable regulations in order to promote overall public health, morals, and safety.³⁵ Therefore, when evaluating a statutory

28. *See id.*

29. *See id.* § 1:2 (highlighting the difficulty of determining the intent of the "many persons involved in the process of drafting, approving, and ratifying the Bill of Rights").

30. *Id.*; *see generally* State v. Hall, 887 N.W.2d 847 (Minn. Ct. App. 2016) (offering a general discussion about interpretation of the First Amendment).

31. *See* 1 RODNEY A. SMOLLA & NIMMER ON FREEDOM OF SPEECH § 1:2 (2017) (discussing how even the framers came into conflict with the ideals they had memorialized when later seeking to institute censorship).

32. 16B C.J.S. *Constitutional Law* § 964 (2017).

33. *Id.* (listing circumstances under which the State may authorize "the legitimate exercise of its police powers" to restrict speech).

34. *Id.* (including promoting general welfare, public health, public safety, public morals, and to prevent fraud); *see also*

35. *See* Poulos v. New Hampshire, 345 U.S. 395, 408 (1953) (discussing public safety and order); City of Eugene v. Miller, 871 P.2d 454, 460 (Or. 1994) (discussing public health); R.K.O. Pictures v. Hissong, 123 N.E.2d 441, 448 (Ohio Ct. Com. Pl. 1954) (discussing public morals).

prohibition on a form of speech, a court must consider the extent and scope of the government's police powers.

The First Amendment's scope generally forbids the government from prohibiting either (1) a form of speech; or (2) the expression of an idea, simply out of mere aversion to the form of speech or towards the idea being expressed.³⁶ As such, the United States Supreme Court has often attempted to determine the protections of the First Amendment in relation to American societal values.

In *Texas v. Johnson*, the United States Supreme Court was presented with a novel First Amendment question that serves as an example of the conflict between upholding societal values and preserving the First Amendment.³⁷ Respondent Gregory Lee Johnson was charged with desecration of a venerable object—burning the United States flag—in violation of section 42.09(a) (3) of the Texas Penal Code.³⁸ After the defendant's conviction was reversed by the Texas Court of Criminal Appeals, the United States Supreme Court granted certiorari.³⁹ The Court found that the burning of the flag constituted protected expressive conduct, despite going to great lengths to note the importance and reverence commonly afforded to the United States flag.⁴⁰ In the majority opinion, Justice Brennan explained, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁴¹ The United States Supreme Court has often attempted to determine the protections of the First Amendment in relation to American societal values.⁴²

36. 16A AM. JUR. 2D *Constitutional Law* § 470 (2017) (citing *Texas v. Johnson*, 491 U.S. 397 (1989)); see *Coates v. City of Cincinnati*, 402 U.S. 601, 615 (1971) (“[M]ere public intolerance or animosity cannot be the basis for abridgment of [the First Amendment’s] constitutional freedoms.”).

37. 491 U.S. 397 (1989).

38. *Id.*

39. *Id.* at 402. The United States Supreme Court granted certiorari in the Defendant’s case since the Texas Criminal Court of Appeals ruled that the Texas statute was, “unconstitutional as applied to him,” and therefore, further inquiry was required to determine whether the Texas statute was unconstitutional on its face. *Id.*

40. See *id.* at 406 (“The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.”).

41. *Id.* at 414 (citation omitted).

42. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (discussing that our society, like other societies, has permitted restrictions upon the content of speech in a few limited areas “of such slight social value as a step to truth that any

Because societal values alone cannot be determinative, in-depth analysis and interpretation of the statute at issue is required.⁴³

2. *Constitutional Limitations: Facial and As-Applied Challenges*

The legislative branch possesses the power to enact criminal statutes and, therefore, the power to determine the criminality of certain acts.⁴⁴ However, a variety of constitutional principles exist to serve as limits to the legislature's power to create law.⁴⁵ These limits, found in both the United States Constitution and individual state constitutions, represent a large portion of the "checks" the judicial branch holds over the legislative branch.⁴⁶ Where a statute is content-neutral,⁴⁷ its constitutionality determinations are "tempered by the general principle that statutes carry a presumption of constitutionality."⁴⁸ On the contrary, when a statute restricts speech on a content-basis, the government possesses the burden to demonstrate the statute's constitutionality.⁴⁹

benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

43. See *infra* Section II.B.

44. HENRY W. MCCARR & JACK S. NORDBY, 7 MINNESOTA PRACTICE: CRIMINAL LAW & PROCEDURE § 1:12 (4th ed. 2017).

45. See, e.g., James A. Gardner, *The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power*, 60 *FORDHAM L. REV.* 217, 236–40 (1991) (discussing the constitutional limitations placed in inherent congressional power).

46. See *id.* § 1:11 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)) ("Courts have an important duty, often unpopular when fulfilled, to hold the legislature within Constitutional bounds.").

47. See generally Geoffrey R. Stone, *Content Neutral Restrictions*, 54 *U. CHI. L. REV.* 46, 48 (1987) ("Content-neutral restrictions limit expression without regard to the content or communicative impact of the message conveyed.").

48. MCCARR & NORDBY, *supra* note 44, § 1:12. See also, e.g., *State v. Fairmont Creamery Co.*, 162 Minn. 146, 150, 202 N.W. 714, 716 (1925) ("There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."); *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989) ("Minnesota statutes are presumed constitutional, and . . . [the Court's] power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." (citing *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 45 (Minn.1979))).

49. MCCARR & NORDBY, *supra* note 44, § 1:12 (citing *Kismet Inv'rs, Inc. v. Cty of Benton*, 617 N.W.2d 85, 93 (Minn. Ct. App. 2000)).

There are two ways the constitutionality of a duly-enacted statute may be constitutionally challenged pertinent to the subject matter of this article.⁵⁰ The first type, a “facial challenge,” contends that the statute is unconstitutional on its face.⁵¹ In a facial challenge, parties seek to assert not only their own constitutional rights but also the rights of others adversely impacted by the challenged statute.⁵² In plain terms, a facial challenge contends that the specific statute is unconstitutional in all its potential applications.⁵³ Facial challenges are rare due to this high threshold.⁵⁴

The second type, an “as-applied challenge,” may be brought when the plaintiff alleges that the statute is unconstitutional given his or her unique situation.⁵⁵ As-applied challenges require the plaintiff to show the statute is unconstitutional as applied to himself or herself, and are necessarily more fact-sensitive.⁵⁶ In *Muccio*, the defendant moved to dismiss her charge under section 609.352, arguing that the statute facially violated the First Amendment.⁵⁷ The defendant challenged the facial overbreadth of the statute because, in her contention, it prohibited speech protected by the First Amendment.⁵⁸

50. *Id.*

51. *Id.*

52. 16A AM. JUR. 2D, *supra* note 36, § 137 (citing *Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007)).

53. *Id.* (“[A] ‘facial challenge’ to a law is a challenge based on a contention that the law, by its own terms, always operates unconstitutionally.” (citing *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504 (Tex. 1995))); *see also* *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 184 (W.D. Pa. 2011) (stating that a facial challenge to a statute concerns the constitutional rights of society as a whole, rather than the rights of the parties before the court).

54. 16A AM. JUR. 2D, *supra* note 36, § 137 (noting that facial challenges are also disfavored for a variety of reasons); *see* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (“Claims of facial invalidity often rest on speculation Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither ‘anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” (alteration in original) (citation omitted)).

55. 16A AM. JUR. 2D, *supra* note 36, § 137.

56. *See id.* (quoting *Ezell v. City of Chicago*, 70 F. Supp. 3d 871, 882 (N.D. Ill. 2014)) (“In a facial constitutional challenge, individual application facts do not matter.” (citation omitted)).

57. *State v. Muccio*, 890 N.W.2d 914, 918 (Minn. 2017).

58. *Id.*

3. *The Overbreadth Doctrine*

As a general rule, a statute is overbroad if it prohibits a substantial amount of protected speech at the expense of a person's constitutionally-protected rights.⁵⁹ An unsupported assertion of overbreadth will not suffice.⁶⁰ In particular, the overbreadth doctrine is applicable in cases containing First Amendment challenges.⁶¹ The doctrine is commonly raised and cited by individuals in hopes to shift "the focus of the litigation from the alleged criminal to the law itself . . . from the actual conduct of the defendant to the hypothetical conduct of others."⁶²

The overbreadth doctrine possesses a unique quality: it is not applicable if the statute presents no violation of First Amendment rights.⁶³ Under the overbreadth doctrine, an individual may challenge a statute because it also affects the rights of others not before the court.⁶⁴ However, a court will invalidate a statute only if its overbreadth is "substantial."⁶⁵ The following two cases help illustrate contrasting applications of the doctrine.

59. See, e.g., *City of Hous. v. Hill*, 482 U.S. 451, 458 (1987) (citing *New York v. Ferber*, 458 U.S. 747 (1982)) ("A statute should only be overturned as facially overbroad when the statute's overbreadth is substantial."); *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (citing *State v. Century Camera, Inc.*, 309 N.W.2d 735, 740 (Minn. 1981)).

60. See 1 SMOLLA, *supra* note 31, § 6:6.

61. See, e.g., *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

62. 1 SMOLLA, *supra* note 31, § 6:4 (emphasis omitted) (citing *NAACP v. Button*, 371 U.S. 415, 432 (1963)).

63. 16A AM. JUR. 2D, *supra* note 36, § 137 (citing *Fisher v. Iowa Bd. Of Optometry Exam'rs*, 510 N.W.2d 873 (Iowa 1994)).

64. *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). In particular, facial challenges under the overbreadth doctrine are available for those who choose to engage in legally protected expressions but may refrain from doing so rather than risk prosecution. *Id.*

65. *Id.* (quoting *City of Hous. v. Hill*, 482 U.S. 451, 458–59 (1987)). As the Court explains in *Board of Airport Commissioners*, the requirement that the overbreadth be substantial arose from the recognition that "the overbreadth doctrine is, 'manifestly, strong medicine.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Furthermore, the Court explained, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

While invalidation of a statute due to facial overbreadth is uncommon, courts have, at times, held statutes unconstitutionally invalid for overbreadth.⁶⁶ In *Board of Airport Commissioners of L.A. v. Jews for Jesus*, for example, the United States Supreme Court invalidated a regulation which prohibited a religious minister from distributing free religious literature at the Los Angeles International Airport.⁶⁷ The regulation at issue sought to prohibit all forms of protected expressions.⁶⁸ In essence, this created a “First Amendment Free Zone” at the airport.⁶⁹ The Court reasoned that the ban was overbroad since the language of the regulation expressly applied to “all First Amendment activities” taking place at the airport.⁷⁰ The Court saw the ban on all forms of protected expression to be an unjustifiably and substantially over-broad restriction on speech protected by the First Amendment.⁷¹ Therefore, the Court held that the regulation violated the First Amendment.⁷²

In *State v. Hensel*, a resident of Little Falls, Minnesota, attempted to sit in a restricted area of a city council meeting.⁷³ The State of Minnesota subsequently charged the defendant with disorderly

66. See, e.g., *Broadrick*, 413 U.S. at 618 (1973) (holding that a statute will not be unconstitutionally overbroad just because “arguably protected conduct may or may not be caught or chilled by the statute.”); *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (“A statute should only be overturned as facially overbroad when the statute’s overbreadth is substantial . . . because the overbreadth doctrine has the potential to void an entire statute, it should be applied ‘only as a last resort’ and only if the degree of overbreadth is substantial and the statute is not subject to a limiting construction.”).

67. *Bd. of Airport Comm’rs*, 482 U.S. at 574–76.

68. *Id.* at 574.

69. *Id.*

70. *Id.* at 575. Additionally, the Court held the regulation was necessarily overbroad because the words, “First Amendment activities” left no room for a narrowed construction. *Id.* A narrowing construction of regulatory or statutory language can potentially prevent substantial overbreadth. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 378–79 (1964) (concluding that given the lack of any limiting construction, the statutes at issue could be held unconstitutional on their face under the First Amendment overbreadth doctrine).

71. *Bd. of Airport Comm’rs*, 482 U.S. at 576.

72. *Id.* at 577.

73. 874 N.W.2d 245, 248–49 (Minn. Ct. App. 2016), *rev’d*, 901 N.W.2d 166 (Minn. 2017). The author realizes the Minnesota Court of Appeals decision is no longer good law. However, information about the Court of Appeals’ decision is still included in this Note to illustrate application of the facial overbreadth doctrine, particularly in Minnesota.

conduct, a violation of section 609.72, subdivision 1(2).⁷⁴ On appeal, the defendant-appellant contended that the statute is facially overbroad since it proscribed her ability to engage in expressive conduct at city council meetings open to the public.⁷⁵ In order to succeed on her facial overbreadth challenge, the Minnesota Court of Appeals explained that the defendant “must establish that no set of circumstances exist[] under which [the statute] would be valid, that the statute lacks any plainly legitimate sweep, or that a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁷⁶ The Minnesota Court of Appeals held that the statute was not facially overbroad because even although there are “marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.”⁷⁷ In essence, though the statute could infringe on some forms of speech and conduct protected by the First Amendment, the court did not find the statute to be facially invalid.⁷⁸

When determining the potential overbreadth of a statute, courts often weigh competing societal interests.⁷⁹ The following section discusses forms of speech not protected by the First Amendment. Statutes which partially prohibit unprotected speech may still fall under scrutiny from the overbreadth doctrine.⁸⁰

4. *Unprotected Speech: Obscene Speech and Speech Integral to Criminal Conduct*

The First Amendment does not grant United States citizens the absolute right to free speech in all forms.⁸¹ The United States

74. *Id.* at 253. The statute proscribes disturbances of meetings, which could include speaking out of turn, heckling, shouting, chanting, and other forms of oral protest. *See id.* (citing MINN. STAT. § 609.72, subdiv. 1(2) (2016)).

75. *See id.* at 252–53.

76. *Id.* at 250 (alteration in original) (quoting *Rew v. Bergstrom*, 845 N.W.2d 764, 778 (Minn. 2014)).

77. *Id.* at 255 (quoting *Parker v. Levy*, 417 U.S. 733, 760 (1974)).

78. *Id.*

79. SMOLLA, *supra* note 31, § 6:6 (citing *Osborne v. Ohio*, 495 U.S. 103, 112 (1973)).

80. *See, e.g., State v. Muccio*, 890 N.W.2d 914, 919 (Minn. 2017).

81. HUDSON, *supra* note 23, § 3:1.

Supreme Court has recognized that the First Amendment's protections are not absolute and that the government may regulate certain categories of expression.⁸² In *Virginia v. Black*, the Commonwealth of Virginia passed legislation that outlawed cross-burnings "with the intent of intimidating any person or group of persons."⁸³ The United States Supreme Court affirmed its past rulings on areas of "unprotected speech," and held that the portion of the statute banning cross burning with the intent to intimidate did not violate the First Amendment's guarantee of freedom of speech.⁸⁴ The Court reasoned that cross-burning could be viewed as intimidating speech, which is a type of "true threat" where a speaker "directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm."⁸⁵ The *Black* Court asserted that the government may proscribe "true threat" speech so long as there is "an intent to intimidate."⁸⁶ Aside from speech that constitutes a "true threat," other forms of speech have been held to be outside the protection of the First Amendment.

In *Miller v. California*, the United States Supreme Court enunciated a controlling standard for another unprotected category of speech: obscene speech.⁸⁷ In *Miller*, the defendant-appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute.⁸⁸ The United States Supreme Court used cases like *Miller* to revisit previous standards on obscene speech.⁸⁹ In order for a form of speech to be obscene and outside

82. See *Virginia v. Black*, 538 U.S. 343, 344 (2003) (asserting that the United States Supreme Court has "long recognized" that the government may regulate certain forms of harmful speech so long as the regulation is "consistent with the Constitution"); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

83. 538 U.S. at 343.

84. *Id.* at 343-48.

85. *Id.* at 360. "True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

86. *Id.* at 362.

87. 413 U.S. 15 (1973).

88. *Id.* at 15.

89. *Id.* at 16. The United States Supreme Court has recognized that the "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of

the protection of the First Amendment, the *Miller* Court implemented a three-part test for all courts to determine whether speech is obscene.⁹⁰ The Court held that the defendant-appellant's conduct could be regulated in affirmation of this standard.⁹¹ The United States Supreme Court's ruling in *Miller* is affirmed by later cases in which the Court affords great protection to minors when obscene material is involved.⁹²

Similar to obscene speech, the First Amendment does not protect "speech integral to criminal conduct."⁹³ In *United States v. Williams*, the Court rejected a First Amendment challenge to a federal statute criminalizing "offers to provide or requests to obtain" child pornography.⁹⁴ The Court concluded that the statute prohibited speech integral to criminal conduct because the statute prohibited offers to provide or obtain illegal material.⁹⁵ Therefore,

offending the sensibilities of unwilling recipients or of exposure to juveniles" (the "Miller test"). *Id.* at 18–19; *see also* *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) (explaining the danger of obscene material "fall[ing] into the hands of children" or "intrud[ing] upon the sensibilities or privacy of the general public"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate."); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (holding that a legitimate state interest exists to prohibit dissemination or exhibition of obscene material to children).

90. *Miller*, 413 U.S. at 24. ("The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

91. *Id.* at 36–37. The Court realized adoption of this standard to be necessary since, "the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike." *Id.* at 28.

92. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). In *State v. Muccio*, in addition to the obscene speech prohibited by section 609.352, subdivision 2a(2), the court recognized that the statute also prohibits communications that include child pornography. *State v. Muccio*, 890 N.W.2d 914, 925 (Minn. 2017). Child pornography is also considered unprotected speech. *See New York v. Ferber*, 458 U.S. 747, 764–65 (1982).

93. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.").

94. 553 U.S. 285, 297–98, 307 (2008).

95. *Id.* at 298 ("Offers to provide or requests to obtain unlawful material,

the First Amendment did not protect the speech criminalized by the federal statute.⁹⁶ The Court explained that speech integral to criminal conduct consists of proposals to engage in illegal activities but not the mere advocacy of criminal acts.⁹⁷

Likewise, in *State v. Washington-Davis*, the Minnesota Supreme Court held that a statute prohibiting the promotion of prostitution was constitutional because the statute's regulation of speech was narrowly focused on speech integral to criminal conduct.⁹⁸ The Court noted its holding in *United States v. Williams* that "[s]peech is integral to criminal conduct when it "is intended to induce or commence illegal activities,"⁹⁹ like "conspiracy, incitement, and solicitation."¹⁰⁰ Since the statute at issue in *Washington-Davis* prohibited the solicitation and inducement of an individual to practice prostitution, the Minnesota Supreme Court concluded the speech at issue was designed to facilitate the commission of a crime.¹⁰¹ In both *Williams* and *Washington-Davis*, the United States and Minnesota Supreme Courts found that the statute in question sought to prohibit speech that is integral to criminal conduct.¹⁰²

5. *Ashcroft v. Free Speech Coalition and States' Statutory Efforts to Prohibit Sexual Conduct Involving Minors*

In *Ashcroft v. Free Speech Coalition*, the Court invalidated a provision of the Child Pornography Prevention Act of 1996.¹⁰³ The Court found the Act's prohibition on sexually explicit images which "appear to depict [human] minors but were produced by means other than using real children" substantially burdens speech

whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection.").

96. *See id.* at 304 (explaining that there is no First Amendment exception to this prohibition).

97. *See id.* at 298–99 ("[T]here remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.").

98. 881 N.W.2d 531, 538 (Minn. 2016) ("The statute's focus on speech directly related to criminal behavior" is clear and, therefore, its prohibition is constitutional).

99. *Williams*, 553 U.S. at 298.

100. *Id.*

101. *Washington-Davis*, 881 N.W.2d at 538.

102. *Id.*; *Williams*, 553 U.S. at 298.

103. 535 U.S. 234 (2002); *see generally* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8) (2008) (defining child pornography).

protected by the First Amendment.¹⁰⁴ In his majority opinion, Justice Kennedy explained that the causal link between the speech prohibited by the statute and the potential, later criminal activity was “contingent and indirect”¹⁰⁵ and “depends upon some unquantified potential for subsequent criminal acts.”¹⁰⁶ Justice Kennedy concluded that the speech prohibited by the statute was protected by the First Amendment.¹⁰⁷ The distinction drawn in *Ashcroft* factored into the Minnesota Supreme Court’s decision in *Muccio*.¹⁰⁸

Throughout the past decade, a number of states have enacted statutes prohibiting sexual conduct with children via various electronic communication methods.¹⁰⁹ These statutes seek to protect children from sexual exploitation and the resulting emotional, physical, and psychological harms.¹¹⁰ Many states have enacted statutes specifically related to the transmission of sexually explicit material to children via electronic means.¹¹¹ Minnesota’s statute prohibiting solicitation of children to engage in sexual conduct, Section 609.352, parallels the efforts of these states.¹¹² State statutes similar to the Minnesota statute have withstood constitutional challenges.¹¹³ In *Muccio*, the Minnesota Supreme Court faced a

104. *Ashcroft*, 535 U.S. at 239; see also *id.* at 253 (“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”).

105. See *id.* at 250. The images proscribed by the statute “can lead to actual instances of child abuse” and “the causal link is contingent and indirect.” *Id.* “The harm does not necessarily follow from the speech, but depends upon some unqualified potential for subsequent criminal acts” *Id.*

106. See *id.*

107. *Id.* at 256.

108. *State v. Muccio*, 890 N.W.2d 914, 924 (Minn. 2017).

109. See generally Benjamin J. Vernia, Annotation, *Validity, Construction, and Application of State Statutes or Ordinances Regulating Sexual Performance by Child*, 42 A.L.R. 5th 291 (1996) (discussing the implications of state statutes attempting to prohibit sexual conduct involving children through various means).

110. See *id.* § 1[a] (“A number of jurisdictions have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject.”).

111. See, e.g., ALA. CODE § 13A-6-111(a) (2017); FLA. STAT. § 847.0135 (2009); MICH. COMP. LAWS § 750.145c (2013).

112. See 15B AM. JUR. 2D *Computers and the Internet* § 264 (2017) (identifying MINN. STAT. § 609.352, subdiv. 2a(2) (2016) as an example of a state statute that prohibits the electronic transmission of sexualized material to children).

113. See, e.g., *Simmons v. State*, 944 So. 2d 317 (Fla. 2006); *People v. Fraser*, 752 N.E.2d 244 (N.Y. 2001).

constitutional challenge to section 609.352, subdivision 2a(2).¹¹⁴ In *Muccio*, the court considered two main constitutional inquiries.¹¹⁵ First, whether section 609.352, subdivision 2a(2) was unconstitutionally overbroad.¹¹⁶ Second, whether the transmission of sexually explicit material to a child is a form of speech protected by the First Amendment.¹¹⁷

III. THE *MUCCIO* DECISION

A. *Facts and Procedural Posture*

In November 2014, a father called law enforcement to report he had located inappropriate photographs on his fifteen-year-old son's iPad.¹¹⁸ These photographs showed "a female's bare genitals, a female naked from the neck to below the waist, and a female's buttocks covered by a thong."¹¹⁹ Forty-one-year-old respondent, Krista Muccio, sent the fifteen-year-old these photos via a direct message on the social photo-sharing platform, Instagram.¹²⁰ Additionally, Muccio and the fifteen-year-old exchanged sexually explicit text messages.¹²¹ In these text messages, Muccio and the boy described the sexual acts they wished to perform on each other.¹²²

As a result of the content of the photographs and text messages exchanged, the State of Minnesota charged Muccio with felony communication with a child describing sexual conduct in violation of section 609.352, subdivision 2a(2).¹²³ The district court dismissed this charge and concluded that the statute "is facially overbroad

114. *State v. Muccio*, 890 N.W.2d 914, 918 (Minn. 2017).

115. *Id.* at 919.

116. *Id.*

117. *Id.*

118. *Id.* at 918.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* The State of Minnesota also charged Muccio with one count of felony possession of child pornography in violation of section 617.247, subdivision 4(a). *Id.* The district court concluded sufficient evidence existed to establish probable cause for this count. *Id.* at 918 n.1. However, the district court stayed Muccio's trial proceedings pending the State's appeal of the district court ruling on the count of felony communication with a child in violation of section 609.352, subdivision 2a(2). *Id.*

under the First Amendment and therefore unconstitutional.”¹²⁴ The Minnesota Court of Appeals affirmed the district court’s decision.¹²⁵ The Minnesota Supreme Court subsequently granted the State’s petition for review to determine if the district court properly dismissed Muccio’s charge of felony communication with a child.¹²⁶

B. A Brief Overview of Section 609.352, subdiv. 2a(2)’s Text

Much of the *Muccio* decision centers around the plain meaning of section 609.352, subdivision 2a(2) which prohibits “[a] person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission . . .” from “engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct.”¹²⁷ The *Muccio* court defines certain phrases of the text in order to help determine the section’s sweep.¹²⁸ The court defined sexual conduct as “sexual contact of the individual’s primary genital area, sexual penetration . . . or sexual performance.”¹²⁹ The Court defined the term “engaging in communication with a child” as “[the requirement that] the adult direct[s] the prohibited content at a child.”¹³⁰ Additionally, the *Muccio* court explained that “communication” means “an act or instance of transmitting.” The definitions of these textual terms had great significance when determining the constitutionality of the statute.¹³¹

124. *Id.* at 918.

125. *State v. Muccio*, 881 N.W.2d 149, 153 (Minn. Ct. App. 2016), *rev’d*, 890 N.W.2d 914 (Minn. 2017).

126. *Muccio*, 890 N.W.2d at 919.

127. MINN. STAT. § 609.352, subdiv. 2a(2) (2016).

128. *Muccio*, 890 N.W.2d at 919.

129. *Id.*; *see also* MINN. STAT. § 609.341 (2016) (defining sexual penetration); MINN. STAT. § 617.246 (2016) (defining sexual performance).

130. *Muccio*, 890 N.W.2d at 919. Importantly, for an adult to “direct the content at a child,” the *Muccio* court held that the adult “must take some affirmative act to specifically select or designate the child as a recipient of the transmission.” *Id.* “Engage” is defined by the *Muccio* court using its dictionary definition, “to take part; participate.” *See also Engage*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 383 (10th ed. 2001).

131. *Muccio*, 890 N.W.2d 919–26.

C. *The Minnesota Supreme Court's Decision*

Arguing before the Minnesota Supreme Court, the State asserted that section 609.352, subdivision 2a(2) is constitutional because it only targets unprotected speech, any overbreadth is unsubstantial, and it is subject to a limiting interpretation that preserves its constitutionality.¹³² Muccio countered the State's argument by contending that the statute burdens a "substantial amount" of protected speech and is therefore "unconstitutional on its face."¹³³ The court agreed with the State's argument and reversed the lower courts' decisions.¹³⁴ The court held that although the statute regulates some speech protected by the First Amendment, the speech regulated by the statute is not "substantially overbroad" in relation to its "plainly legitimate sweep" and therefore, does not violate the First Amendment.¹³⁵

The court addressed three main issues: (1) the plain meaning of the language used in the statute; (2) whether the statute prohibits speech that the First Amendment protects; and (3) whether the statute's prohibitions burden a substantial amount of constitutionally protected speech.¹³⁶ On the first main issue, the court reached three conclusions regarding the plain meaning of section 609.352, subdivision 2a(2). The court based its determination that the statute is not unconstitutionally overbroad on the statute's plain meaning.¹³⁷ The interpretation of a statute's plain meaning must be in accord with the legislature's intent.¹³⁸ In summary, the court determined that the statute "prohibits an adult from participating in the electronic transmission of information relating to or describing the sexual conduct of any person, if the communication was directed at a child, and the adult sending the

132. *Id.* In the alternative, the State argued that the statute is constitutional because it is narrowly tailored to achieve a compelling governmental interest. *Id.* at 919.

133. *Id.*

134. *Id.* at 920.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* The plain meaning of statutory language is determined by giving words of the statute their "common and approved usage." See MINN. STAT. § 645.08, subdiv. 1 (2016) (identifying the proper standard that courts should employ in engaging in plain-meaning analysis of statutes).

communication acted with specific intent to arouse the sexual desire of any person.”¹³⁹

With the plain meaning of the statute established, the court then examined whether the statute prohibits speech protected by the First Amendment.¹⁴⁰ In the State’s view, the statute did not prohibit speech protected by the First Amendment since the statute regulates speech integral to criminal conduct and obscene speech.¹⁴¹ In opposition to the State’s viewpoint, Muccio argued that the speech regulated by the statute is neither integral to criminal conduct, nor obscene speech.¹⁴² According to Muccio, the statute regulated First Amendment protected speech.¹⁴³ The argument whether the statute regulates obscene speech is discussed later in this article.

To determine if section 609.352, subdivision 2a(2) prohibited speech protected by the First Amendment, the court’s first line of analysis centered around whether the speech at issue was integral to criminal conduct.¹⁴⁴ With the plain meaning of the statute previously established,¹⁴⁵ the court offered a discussion about the “grooming”¹⁴⁶ process and its relation to the speech that is prohibited by section 609.352, subdivision 2a(2).¹⁴⁷ In doing so, the

139. *Muccio*, 890 N.W.2d at 922.

140. *Id.* at 923.

141. *See id.* (discussing “speech integral to criminal conduct”); *see also* Virginia v. Black, 538 U.S. 343, 362 (2003); Miller v. California, 413 U.S. 15, 16–19, 24, 36–37 (1973) (discussing obscene speech); Stanley v. Georgia, 394 U.S. 557, 567 (1969); Ginsberg v. New York, 390 U.S. 629, 637–43 (1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

142. *Muccio*, 890 N.W.2d at 923.

143. *Id.*

144. *Id.* “First Amendment protections do not extend to speech used ‘as an integral part of conduct in violation of a valid criminal statute.’ Speech is integral to criminal conduct when it ‘is intended to induce or commence illegal activities.’” *Id.* (first quoting State v. Washington-Davis, 881 N.W.2d 531, 538 (Minn. 2016); then quoting United States v. Williams, 553 U.S. 285, 298 (2008)).

145. *See generally* MINN. STAT. § 609.341 (2016); MINN. STAT. § 609.352, subdiv. 2a(2) (2016); MINN. STAT. § 617.246 (2016); *Muccio*, 890 N.W.2d at 919–26; State v. Muccio, 881 N.W.2d 149, 153 (Minn. Ct. App. 2016), *rev’d*, 890 N.W.2d. 914 (Minn. 2017).

146. Grooming presents unique dangers due to its proximity to criminal child sexual abuse. *See, e.g.*, United States v. Brand, 467 F.3d 179, 203 (2d Cir. 2006) (“Child sexual abuse is often effectuated following a period of “grooming” and the sexualization of the relationship.” (quoting Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 479 (1998))).

147. *Muccio*, 890 N.W.2d at 923, 924.

court described grooming as “a process sexual predators use to shape a child’s perspective and lower the child’s inhibitions with respect to later criminal sexual acts.”¹⁴⁸ Importantly, the *Muccio* court stated that the grooming process often “increases the likelihood that [a] child will cooperate with the adult and reduces the likelihood that [a] child will disclose the adult’s wrongful acts.”¹⁴⁹ For this reason, the court agreed with the State’s viewpoint.¹⁵⁰ The court concluded that much of the speech prohibited by the statute is integral to criminal conduct because the prohibited speech is often used to solicit sexual conduct from a specific child.¹⁵¹ With the matter of “speech integral to criminal conduct” under the statute purportedly resolved, the court next turned to analyzing whether the speech regulated by the statute was obscene.¹⁵²

Similar to speech integral to criminal conduct, the First Amendment does not protect obscene speech.¹⁵³ To determine whether the speech regulated by section 609.352, subdivision 2a(2) was obscene, the court employed the test delineated by the United States Supreme Court in *Miller v. California*.¹⁵⁴ Under the three

148. *Id.* (citing Daniel Pollack & Andrea MacIver, *Understanding Sexual Grooming in Child Abuse Cases*, 34 Child L. Prac. 161, 161 (2015)).

149. *Id.* at 924 (citing Pollack & MacIver, *supra* note 148, at 166); *see id.* (“After desensitizing the child to sexual content, the offender typically solicits the child to engage in some type of sexual conduct that may include sexual intercourse, sex trafficking, or child pornography.”).

150. *Id.* (citing *United States v. Williams*, 553 U.S. 285, 298 (2008) (“We agree with the State that when grooming is done for the purpose of later using the child in sexual conduct, it resembles solicitation of the child, and under *Williams*, such solicitation falls outside First Amendment protections.”)).

151. *Id.*

152. *Id.* at 925.

153. *See Miller v. California*, 413 U.S. 15, 24 (1973) (footnote omitted) (“That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”); *see also* 16A AM. JUR. 2d, *supra* note 36, § 524 (footnote omitted) (“Indeed, speech that is obscene may be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.”).

154. *Muccio*, 890 N.W.2d at 925. For a full quotation of the *Miller* test, see *supra* note 89 and accompanying text. Significantly, when the *Miller* test is applied to speech directed toward children, the United States Supreme Court has given deference to statutes which protect minors from the influence of literature, even if the literature is not obscene by adult standards. *See Sable Commc’ns Comm, Inc. v.*

prongs of the *Miller* test, the court concluded the speech of the statute appeals to the prurient interest, depicts sexual acts in a patently offensive way, and lacks serious literary, artistic, political, or scientific value.¹⁵⁵ With the successful fulfillment of the *Miller* standard, the court concluded that much of the speech regulated by the statute is considered obscene speech.¹⁵⁶

Since the Minnesota Supreme Court acknowledged that even though the speech regulated by section 609.352, subdivision 2a(2) is *often* obscene or integral to criminal conduct, the possibility that the statute regulated some forms of speech protected by the First Amendment still possessed some merit.¹⁵⁷ Accordingly, the court needed to address whether the statute regulates a substantial amount of speech protected by the First Amendment.¹⁵⁸ The court explained

FCC, 492 U.S. 115, 126 (1989).

155. *Muccio*, 890 N.W.2d at 925 (“We have noted that the [United States] Supreme Court has defined a ‘prurient interest’ in sex as a ‘morbid, shameful interest in sex.’”); *see also* State v. Davidson, 481 N.W.2d 51, 59 (Minn. 1992) (stating sexual desire between an adult and a child is a “shameful interest in sex”) The court found the communication regulated by the statute to be patently offensive since the plain meaning of the statute requires the speech to be directed at a child and made with the intent to arouse sexual desire. *Id.* Furthermore, the court in *Muccio* refers to MINN. STAT. §§ 609.342–45 (2016) and notes that, statutorily, “[i]t is a crime for an adult to engage in any sexual conduct with a child.” *Muccio*, 890 N.W.2d at 926. Additionally, since the plain meaning of the statute requires the prohibited communication be made with the “intent to arouse,” the court found that many of the communications within the statute will lack the requisite literary, artistic, political, or scientific merit required by the test. *Id.* Lastly, the court notes that it is “difficult to envision a scenario in which an adult’s sexually explicit online communication with a child younger than 16, made with the intent to arouse or satisfy either party’s sexual desire, would ever be found to have redeeming social value.” *Id.* (quoting Scott v. State, 788 S.E.2d 468, 476 (Ga. 2016)).

156. *Muccio*, 890 N.W.2d at 927.

157. *Muccio*, 890 N.W.2d at 927 (finding it necessary to perform an analysis of speech under the statute that may be protected by the First Amendment due to the argument presented by *Muccio*); *see* State v. Muccio, 881 N.W.2d 149, 157 (Minn. Ct. App. 2016) (highlighting that before the Minnesota Court of Appeals, *Muccio* successfully argued that the statute would prohibit large swaths of speech with literary, artistic, political, or scientific value), *rev’d*, 890 N.W.2d 914 (Minn. 2017).

158. *Muccio*, 890 N.W.2d at 923 (reasoning that the requirement that the overbreadth of a statute be substantial “stems from the underlying justification for the overbreadth exception itself—the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court”); *see* United States v. Stevens, 559 U.S. 460, 468 (2010) (identifying speech integral to criminal conduct as a category of speech the First Amendment does not protect); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

the statute only prohibits speech in a narrow set of circumstances.¹⁵⁹ The Minnesota Supreme Court followed the principles outlined by the United States Supreme Court in *United States v. Williams* to reach its conclusion.¹⁶⁰

The Minnesota Supreme Court found that the statute is most similar to the statute upheld in *Williams* because “the vast majority of the [*Williams* statute’s] applications” were constitutional restrictions on speech integral to criminal conduct.¹⁶¹ Likewise, the Minnesota Supreme Court held that the statute should survive the constitutional challenge as well because it mainly applied to speech integral to criminal conduct.¹⁶² Therefore, the statute did not

159. In *Muccio*, the Minnesota Supreme Court identifies two main provisions of the statute which limit the statute’s sweep. *Muccio*, 890 N.W.2d at 926. First, the statute requires an adult to direct the communication at a child. *Id.* In the court’s opinion, “non-targeted mass Internet communications,” such as “music videos, advertisements, and television series,” would not fall within the scope of the statute’s regulation. *Id.* Second, the statute requires the adult to act with specific intent to arouse the sexual desire of any person. *Id.* The forms of media cited by *Muccio* (songs by Miley Cyrus or *Game of Thrones*, for example) would not fall within the scope of the statute because the adult creating these forms of media would not be acting with the intent required by the statute. *Id.* at 926–27; *cf.* *United States v. Dean*, 635 F.3d 1200, 1205–06 (11th Cir. 2011) (concluding that a statute was not substantially overbroad because it regulated speech outside the scope of those categories of unprotected speech).

160. *Muccio*, 890 N.W.2d at 927.

161. *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 303 (2008)).

162. *See id.* at 928. However, although the *Williams* Court held that the statute at issue was not facially invalid, it still held that “as-applied” challenges could be brought regarding this statute—to the extent that protected speech was shown to fall within the statute’s sweep. *Id.* at 927; *see Williams*, 553 U.S. at 302.

prohibit a substantial¹⁶³ amount of speech protected by the First Amendment.¹⁶⁴

IV. ANALYSIS

A. *The Minnesota Supreme Court Correctly Determined the Speech Prohibited by Section 609.352, subdiv. 2a(2) is Not Generally Protected by the First Amendment*

The holdings of *Williams*¹⁶⁵ and *Washington-Davis*¹⁶⁶ established that the First Amendment does not protect speech that facilitates the commission of a crime¹⁶⁷ or commences illegal activities, such as “conspiracy, incitement, and solicitation.”¹⁶⁸ In *Muccio*, the Minnesota Supreme Court determined that the speech prohibited by section 609.352, subdivision 2a(2) is similar to the permissibly prohibited speech of *Williams* and *Washington-Davis*.¹⁶⁹ *Muccio*

163. In this statutory instance, the term “substantial” does not specifically require the content of prohibited speech to lack literary, artistic, political, or scientific value. Compare *Muccio*, 890 N.W.2d at 927 (“[T]he statute does not specifically require that the content . . . lack literary, artistic, political, or scientific value.”), with *Miller v. California*, 413 U.S. 15, 24 (1973) (“A state offense must also be limited to works which . . . do not have serious literary, artistic, political, or scientific value.”). However, this definition is not without restrictions. See *Muccio*, 890 N.W.2d at 927–28 (stating that non-obscene speech that is not categorically unprotected speech is protected by the First Amendment); see also *Miller*, 413 U.S. at 23–24 (“We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited.”). The Minnesota Supreme Court viewed the statute in *Muccio* favorably because it possessed a specific intent requirement that ensures it does not prohibit speech in the form of discussions about “safe sexual practices [or] artistic images that include nude subjects . . .” *Muccio*, 890 N.W.2d at 928 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 878 (1997)).

164. *Muccio*, 890 N.W.2d at 929 (“Given the relatively few protected communications that the statute regulates, we hold that MINN. STAT. § 609.352 subd. 2a(2) is not substantially overbroad.”).

165. *Williams*, 553 U.S. at 299.

166. *Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016).

167. *Williams*, 553 U.S. at 300; *id.* at 538 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

168. *Williams*, 553 U.S. at 298. See generally W.R. Habeeb, Annotation, *Construction and Effect of Statutes Making Solicitation to Commit Crime a Substantive Offense*, 51 A.L.R.2d 953 (1957) (discussing the common law history that makes solicitation to commit a crime a substantive offense).

169. *Muccio*, 890 N.W.2d at 924; see also *Williams*, 553 U.S. at 299 (holding that speech offering to provide or requesting to obtain child pornography is excluded

correctly applies previous United States Supreme Court and Minnesota Supreme Court precedent.

Minnesota Statutes section 609.352, subdivision 2a(2) requires an adult to direct communication relating to or describing sexual conduct at a child with the specific intent to arouse the sexual desire of any person.¹⁷⁰ The Minnesota Supreme Court believed that this specific intent requirement distinguished section 609.352, subdivision 2a(2) from other statutes that criminalize the transmission of indecent messages in broader terms.¹⁷¹

The holdings of *Williams* and *Washington-Davis* offer persuasive support for the statute at issue in *Muccio*.¹⁷² The statute's language satisfies the *Williams* standard since the speech contained in section 609.352, subdivision 2a(2) directly relates to the solicitation of a child to engage in illegal conduct.¹⁷³ Likewise, the statute's language satisfies the *Washington-Davis* standard because the statutory language itself prohibits speech that often leads to later coercion of the child to engage in sexual conduct with the adult.¹⁷⁴ For a determination of a statute's potential overbreadth, it should not matter whether a party can offer some possible impermissible applications of the statute.¹⁷⁵ Facial invalidation due to overbreadth

from First Amendment protections); *Washington-Davis*, 881 N.W.2d at 538 (holding that speech promoting and soliciting prostitution, or "speech that is directly linked to and designed to facilitate the commission of a crime," is excluded from First Amendment protections).

170. *Muccio*, 890 N.W.2d at 922.

171. *Id.* at 928. The Minnesota Supreme Court distinguishes section 609.352, subdivision 2a(2) from the federal statute in *Reno*. *Id.* The federal statute in *Reno* contained no specific requirement that the indecent messages be transmitted with the specific intent to arouse sexual desires. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 859–60 (1997). The *Reno* Court invalidated the statute since the speech regulated by its scope could include, "discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Id.* at 878. In contrast, the specific intent requirement of section 609.352, subdivision 2a(2) allows the regulation of matters solely intended to arouse the sexual desire of its intended recipient, a child. *See Muccio*, 890 N.W.2d at 928.

172. *See Muccio*, 890 N.W.2d at 924.

173. *Id.* (citing *Williams*, 553 U.S. at 298).

174. *Id.* (citing *Washington-Davis*, 881 N.W.2d at 538).

175. *See Williams*, 553 U.S. at 303 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)); *see also Bushco v. Shurtleff*, 729 F.3d 1294 (10th Cir. 2013) ("Under First Amendment overbreadth doctrine, 'a statute is facially invalid if it prohibits a substantial amount of protected speech.' However, 'the mere fact that one can conceive of some impermissible applications of a statute

is appropriate only when the statute covers a wide range of constitutionally protected speech.¹⁷⁶ As such, the citizenry's right to freedom of speech in these types of circumstances is still preserved by the availability of as-applied challenges.¹⁷⁷

Given the potentially wide range of sexualized subject matter covered by section 609.352, subdivision 2a(2), it is quite possible certain groups could attempt to bring an as-applied challenge to this statute. Consider, for example, an LGBT interest group that seeks to encourage adolescent LGBT persons to be confident in their identity as LGBT individuals. The interest group believes that LGBT adolescents should feel the same pride in their bodies, and comfort with their sexuality, that their straight peers do. The interest group may choose to distribute informational pamphlets to these individuals. Such pamphlets would be directed at children, they could concern the subject of one's sexual identity, and potentially even depict some aspects of LGBT sexual performance. The pamphlets may even excite sexual arousal in these adolescents.

Under section 609.352, subdivision 2a(2), it is possible this interest group may face criminal prosecution for the publication of these pamphlets. However, the *Muccio* decision notes the availability of as-applied challenges in appropriate situations, such as this.¹⁷⁸ In the case of this hypothetical LGBT interest group, an as-applied challenge would pose an intriguing test of section 609.352, subdivision 2a(2), though the Minnesota Supreme Court has not yet ruled on such a case. Although the Minnesota Supreme Court held that section 609.352, subdivision 2a(2) is not facially overbroad and does not limit a substantial amount of protected speech, as-applied challenges are still permitted in the event that this law presents a genuine constitutional issue to a specific party, such as the hypothetical LGBT interest group.

is not sufficient to render it susceptible to an overbreadth challenge.”).

176. See *New York v. Ferber*, 458 U.S. 747, 769–70 n.25 (1982) (providing that “facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct” and noting that invalidation of a statute for substantial overbreadth is “strong medicine” that should be used “only as a last resort”); *Washington-Davis*, 881 N.W.2d at 540 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613–15 (1973)).

177. See *Muccio*, 890 N.W.2d at 928–29 (“Those communications that fall within this narrow sliver of speech will be sufficiently limited [so] that they may be protected through as-applied challenges.”).

178. *Id.* at 927 (citation omitted).

Nevertheless, since section 609.352, subdivision 2a(2) was held to be overbroad by the *Muccio* court, it was necessary for the court to provide a limiting interpretation of the statute that substantially reduces the statute's scope.¹⁷⁹ The majority opinion of *Muccio* presents a solid, cogent argument that, on the whole, speech prohibited by section 609.352, subdivision 2a(2) is speech integral to criminal conduct and generally outside the protection of the First Amendment.

B. The Minnesota Supreme Court's Decision is Correctly Distinguished from the United States Supreme Court Decision in Ashcroft v. Free Speech Coalition

As previously mentioned, in *Ashcroft v. Free Speech Coalition*¹⁸⁰ the United States Supreme Court faced a challenge from an association of businesses that produced "adult-oriented materials."¹⁸¹ The challenged statute prohibited, in certain circumstances, the possession or distribution of pornographic images, which may be created by using adults who look like minors or by using computer imaging.¹⁸² The Court's holding seems at odds with the *Muccio* decision, as the Court held the link between the prohibition of these materials and later criminal activity to be "contingent" and "indirect."¹⁸³

However, the Minnesota Supreme Court found the speech regulated by section 609.352, subdivision 2a(2) distinguishable from the regulated speech in *Ashcroft*.¹⁸⁴ When an adult sends sexual communications to a child with the specific intent to arouse sexual desire, what often follows is criminal in nature.¹⁸⁵ This type of

179. See *State v. Babson*, 326 P.3d 559, 570 (Or. 2014) ("If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth.").

180. 535 U.S. 234 (2002).

181. *Id.*

182. 18 U.S.C. § 2251 (1996).

183. See *Ashcroft*, 535 U.S. at 236.

184. *State v. Muccio*, 890 N.W.2d 914, 925 (Minn. 2017).

185. *Id.*; see Pollack & MacIver, *supra* note 148, at 161 ("In many child sexual abuse cases, the abuse is preceded by sexual grooming. Sexual grooming is a preparatory process in which a perpetrator gradually gains a person's or organization's trust with the intent to be sexually abusive."). The article authored by Pollack and MacIver lists a variety of behaviors sexual predators may engage in during the grooming process; these include "showing the child sexually explicit images." *Id.*

behavior is associated with the grooming process used by sexual predators to gain the trust of children and potentially exploit the target child for future criminal perpetration.¹⁸⁶ Since the sexual communications regulated by section 609.352, subdivision 2a(2) are directly related to the grooming process and by extension child abuse, the causal link between the communications and later criminal activity is not “indirect” in comparison to the speech regulated in *Ashcroft*.¹⁸⁷ The apt distinction drawn by the Minnesota Supreme Court between *Ashcroft* and *Muccio* effectively preserved the constitutionality of section 609.352, subdivision 2a(2).¹⁸⁸

C. *Implications of the Muccio Decision: The Danger of Grooming*

The speech at issue in *Muccio* should be prohibited due to the danger it presents to a particularly vulnerable group in our society: children.¹⁸⁹ In *Muccio*, an amicus curiae brief was filed to the Minnesota Supreme Court by the Minnesota Coalition Against Sexual Assault (MNCASA).¹⁹⁰ In the brief, MNCASA explains the Minnesota Legislature’s intent in drafting and enacting section 609.352, subdivision 2a(2).¹⁹¹ MNCASA’s brief stressed that the

186. See Pollack & MacIver, *supra* note 148, at 165; see also Andiry Pazuniak, *A Better Way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 SETON HALL L. REV. 691, 716 (2010) (stating that courts have often recognized this danger and noted the government’s interest in preventing pedophiles from “grooming” minors for future sexual encounters).

187. See *Muccio*, 890 N.W.2d at 925.

188. *Id.*

189. See *id.* at 924; see also *State v. Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016) (holding that a statute criminalizing speech that was “directly linked to and designed to facilitate the commission of a crime” prohibited speech that was integral to criminal conduct).

190. Brief for MNCASA, *supra* note 15, at 1 (“MNCASA is a nonprofit organization supported by public and private funds. MNCASA represents over 60 sexual assault victim advocacy programs statewide. Its member programs and allies also include health care providers, community groups, nonprofit organizations, professional groups, and members of law enforcement agencies. MNCASA represents the concerns of these stakeholders in matters of public policy, media outreach, prevention awareness, and community organizing around issues of sexual violence.”).

191. *Id.* at 12 (“The legislature has a compelling state interest in protecting children from the harm caused by adult sexual predators. With the increased access to children by adults via the Internet, the legislature sought to expand protections commiserate with the expanded access. The amicus contends that the legislative intent was not to criminalize all grooming behaviors. The intent was to criminalize

Minnesota Supreme Court uphold section 609.352, subdivision 2a(2) in large part due to the danger of grooming, a new form of sexual exploitation.¹⁹²

The advent of new forms of electronic communication¹⁹³ has given rise to new and greater opportunities for criminal conduct.¹⁹⁴ These forms of electronic communication pose a significant threat to society since they can be used to coerce, solicit, or entice individuals to perform illegal activities with little or no face-to-face human interaction.¹⁹⁵ In MNCASA's amicus curiae brief, the coalition argues that the speech prohibited by section 609.352, subdivision 2a(2) is a form of communication that can be related to a dangerous process called "grooming."¹⁹⁶ Grooming is a process used by sexual predators to shape a child victim's perspective and lower the child's inhibitions with respect to later criminal sexual acts.¹⁹⁷ When grooming is done for the purpose of later engaging the child in sexual conduct, it is, unequivocally, speech integral to criminal conduct.¹⁹⁸ Section 609.352, subdivision 2a(2) is a

specific grooming behaviors that harmed children and to stop an adult sexual predator before the harm escalated from online harmful communications to in-person harmful behavior.").

192. *Id.*

193. *See generally* 18 U.S.C. § 2150(12) (2002) ("Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo optical system that affects interstate or foreign commerce.").

194. *See generally* Lori J. Parker, Annotation, *Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet*, 7 A.L.R. Fed. 2d 1953 (2005) (describing the ways electronic communication devices are used to engage in criminal activity).

195. *See* Daniel S. Armagh, *Virtual Child Pornography: Criminal Conduct or Protected Speech?*, 23 CARDOZO L. REV. 1993, 1994 (2002) (discussing the challenges law enforcement officials and prosecutors face when dealing with electronically-based criminal activity).

196. Brief for MNCASA, *supra* note 15, at 12 ("[G]rooming . . . occur[s] when an adult has 'sexually-explicit conversations with the child and/or exposes the child to pornographic material, to attempt to lower the child's inhibitions to future sexual contact.'").

197. *See id.*

198. *State v. Muccio*, 890 N.W. 2d 914, 925 (Minn. 2017) ("[M]uch of the conduct prohibited by the statute, including grooming, is integral to criminal conduct.").

manifestation of the legislature's intent to criminalize specific grooming behaviors.¹⁹⁹

It is in the interest of society to stop adult sexual predators before such harm escalates from online communications to criminal in-person behavior.²⁰⁰ Statutes that criminalize speech relating to sexual activities or sexual abuse and exploitation of children should be judged by a different standard than statutes that criminalize sexual speech solely between adults.²⁰¹ Due to the manner in which the prohibited speech under section 609.352, subdivision 2a(2) may be used to coerce, solicit, or entice a child, it is distinguishable from *Ashcroft*.²⁰² Section 609.352, subdivision 2a(2) is a necessary safeguard to protect children from criminal behavior.²⁰³

1. Grooming is Outside the Protection of the First Amendment

Much of the speech prohibited by section 609.352, subdivision 2a(2) is integral to criminal conduct and outside First Amendment protections.²⁰⁴ This speech prohibited by the statute cannot generally implicate the protections of the First Amendment since it is directly related to the grooming process, an integral portion of criminal sexual abuse of children.²⁰⁵ The Minnesota Legislature's intention to criminalize specific grooming behaviors that harm children, thereby stopping adult sexual predators before the communications lead to harmful or abusive behavior in person, is constitutional in its current form given the specific intent requirement of the statute.²⁰⁶ The grooming process itself contains

199. Brief for MNCASA, *supra* note 15, at 2–12.

200. *See id.* at 13–14.

201. *See, e.g.,* Ginsberg v. New York, 390 U.S. 629, 632–35 (1968) (affirming a New York state ban on the sale of magazines depicting nudity to individuals under the age of seventeen even though the magazines regulated by the statute were not obscene for adults); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251–52 (2002) (citing *Ginsberg v. New York*, 390 U.S. 629) (“The Government, of course, may punish adults who provide unsuitable materials to children . . .”).

202. *See Muccio*, 890 N.W.2d at 924–25.

203. *See* Brief for MNCASA, *supra* note 15, at 15–16.

204. *Muccio*, 890 N.W.2d at 924.

205. *See* Brief for MNCASA, *supra* note 15, at 12.

206. *See id.* at 16–17 (“[T]he statute as enacted is narrowly tailored to address the constitutional tipping point when an adult can be held accountable by the criminal justice system for engaging in sexually explicit communications directed toward a child. The statute’s intent component recognizes that grooming is part of the equation.”).

a great deal of “intentionality” on behalf of the perpetrator to commit a criminal act.²⁰⁷ Therefore, similar to other forms of speech related to criminal conduct,²⁰⁸ there is a direct link between the speech regulated by the statute (speech related to grooming) and future criminal activity.²⁰⁹

In contrast, the speech in *Ashcroft* did not possess this crucial element, as it was not the proximate cause of a criminal act.²¹⁰ The speech’s direct link to grooming prevents the First Amendment from protecting the speech regulated by section 609.352, subdivision 2a(2). Given the certain danger presented by the grooming process, the Minnesota State Legislature effectively promulgated section 609.352, subdivision 2a(2) within these bounds.²¹¹

D. Section 609.352, subdiv. 2a(2) is Narrowly Tailored to Achieve a Compelling Governmental Interest

Towards the end of the *Muccio* opinion, the Minnesota Supreme Court identified two additional lines of analysis pertinent to the subject matter of section 609.352, subdivision 2a(2).²¹² Since the court determined that the statute is not substantially overbroad, there was no need to further analyze whether the statute was

207. *See id.* at 13 (“Grooming encompasses additional facets of intentionality—often child sexual abuse is considered as a ‘process’ more than an ‘act’ because grooming requires a sustained level of engagement by the adult to shape the child’s perspective [and] reduce potential resistance . . .”).

208. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969). In *Brandenburg*, the Court set a standard under which a form of speech related to criminal conduct can be prohibited by statute. *Id.* at 448–49. Speech may be prohibited by statute if it is “directed to inciting or producing imminent lawless action.” *Id.* at 447. “[W]e are here confronted with a statute which . . . purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.” *Id.* at 449.

209. *Muccio*, 890 N.W.2d at 924 (“In this context, the communication is both linked to and designed to facilitate the commission of the later crime.”).

210. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

211. *See id.* at 249 (citing *New York v. Ferber*, 458 U.S. 747, 761 (1982) (“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.”)).

212. *Muccio*, 890 N.W.2d at 929 n.6. (explaining that if the statute had been substantially overbroad, the next two lines of analysis would have been (1) whether the statute is narrowly tailored to achieve a compelling government interest or (2) whether a limiting interpretation would preserve the statute’s constitutionality).

narrowly tailored to achieve a compelling governmental interest.²¹³ However, the issue of whether section 609.352, subdivision 2a(2) passes this test still offers intriguing discussion. Even if the statute in *Muccio* was held unconstitutional on either the “speech integral to criminal conduct” or “obscenity” grounds, the state could have still permissibly proscribed the speech of section 609.352, subdivision 2a(2) if it was shown that the statute “(1) is justified by a compelling government interest and (2) is narrowly drawn to serve that interest.”²¹⁴ In order to offer a complete analysis of the *Muccio* decision and its implicated doctrines, the following sections will pursue this line of analysis.

A regime of tests and standards dominate much of United States Supreme Court jurisprudence since the mid-twentieth century.²¹⁵ Stephen Siegel’s analytical view of constitutional jurisprudence strikes this author as especially perceptive, so it has been adopted for this portion of the article. According to Siegel’s analytical view, the Supreme Court employs a three-level scrutiny standard.²¹⁶ This standard’s three levels of analysis assign separate levels of “heightened protection” to various constitutional norms or rights.²¹⁷ A statute which attempts to regulate while disregarding a protected constitutional norm or right may be found unconstitutional under this standard.²¹⁸

The three levels of the scrutiny standard are “strict scrutiny,” “intermediate scrutiny,” and “minimal scrutiny with bite.”²¹⁹ The

213. *Id.*

214. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 21 (Minn. 2014) (citing *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 799 (2011)).

215. See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358 (2006) (“[T]he whole regime of varying the tiers of scrutiny is itself but one of the techniques by which the modern Court gives differential protection to constitutional norms.”).

216. *Id.*

217. *Id.* (defining heightened protection as “any rule, standard, or analytic approach that gives a constitutional right more security than the minimal protections of rationality review”). For instance, if a statute purports to regulate a constitutional right established by the Court to be subject to the “intermediate” level of scrutiny, upon a challenge to the statute, the government must establish “that [the statute’s] actual purpose substantially promotes an important government interest.” *Id.* at 358 n.25.

218. See *id.* at 355 (“[Strict scrutiny] come[s] into play, for example, whenever government employs a suspect classification, burdens a fundamental interest, or adopts a content-based regulation of speech.”).

219. *Id.* at 358, 359 n.35 (“Minimal scrutiny upholds all action that is a rational

compelling governmental interest test mentioned by the *Muccio* court is largely derived from the strict scrutiny level of analysis.²²⁰ The strict scrutiny test “requires the government to pursue a ‘compelling state interest;’ and demands that [all statutory] regulation promoting the compelling interest be ‘narrowly tailored.’”²²¹ Both of these factors must be present if a statute is to survive the strict scrutiny test.²²² It is also worth noting that, in the context of statutes which seek to prohibit forms of speech, subjection to the strict scrutiny test is only appropriate when the statute’s prohibition on a form of speech is content-based.²²³

The “compelling governmental interest” test mentioned by the *Muccio* court was first used by the United States Supreme Court in First Amendment litigation towards the end of the 1950s, and into the 1960s.²²⁴ A significant, yet unrefined, application of the test in the context of an individual’s First Amendment rights was found in *Barenblatt v. United States*.²²⁵ In *Barenblatt*, a college professor refused to answer questions about membership in the Communist Party and Communist-front clubs when he was called before the House Un-American Activities Committee.²²⁶ In his majority opinion, Justice Harlan explained the need for a strict balancing test when both

means to accomplish to a legitimate government purpose.”)

220. *Id.* at 359 (“If strict scrutiny is but one of the approaches that give enhanced protection to constitutional rights, the compelling state interest standard is just one part of strict scrutiny analysis.”); *see also*, *State v. Muccio*, 890 N.W.2d 914, 919 (Minn. 2017) (discussing the potential need to evaluate the statute based on strict scrutiny if it failed for substantial overbreadth).

221. Siegel, *supra* note 215, at 359–60. “The compelling state interest test, and the doctrine of strict scrutiny. . . are only two of a host of techniques by which the Supreme Court, since the New Deal, has bifurcated judicial review into heightened protection for favored rights and minimal protection for the rest.” *Id.* at 358.

222. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.”).

223. *Id.*; *see also* Siegel, *supra* note 215, at 335 (“[Strict scrutiny] come[s] into play, for example, whenever government employs a suspect classification, burdens a fundamental interest, or adopts a content-based regulation of speech.”).

224. Siegel, *supra* note 215, at 361. It was in these years, with United States Supreme Court justices acutely aware of national security concerns during the Cold War, that the doctrine developed as a way to afford First Amendment protections but still allow the United States government to prohibit speech which could be severely detrimental to the safety of the public at large. *See id.*

225. 360 U.S. 109 (1959).

226. *Id.* at 114.

public and private First Amendment interests are involved.²²⁷ Justice Harlan also stated that in cases involving the First Amendment, the “subordinating interest of the State must be compelling.”²²⁸ With this holding, the United States Supreme Court laid the groundwork for the “compelling government interest test” currently in use.²²⁹ In later years, the test found application in other areas of First Amendment issues, including the regulation of sexualized speech.²³⁰

1. Section 609.352, subdiv. 2(a)(2), is a Proper Candidate for the Strict Scrutiny Test, is Narrowly Tailored, and Achieves a Compelling Governmental Interest

Section 609.352, subdivision 2(a)(2), can be subject to the strict scrutiny test since it regulates speech purely based on subject-matter.²³¹ In other words, content-based regulations are subject to the strict scrutiny test because they directly regulate the substance of a form of speech.²³² When courts decide whether a statute is ripe for review under the strict scrutiny test, other constitutional doctrines, such as overbreadth, can affect their overall determination of constitutionality.²³³ In cases such as *Reno v. American Civil Liberties Union*, the Supreme Court applied the strict scrutiny test to situations involving sexualized speech and minors.²³⁴ It is evident, therefore, that section 609.352, subdivision 2(a)(2) is ripe for review under the strict scrutiny test since it involves a statute which proscribes sexualized speech to minors based purely on the content of the speech.

The requirement that a statute be “narrowly tailored” offers less room for debate compared to a determination of whether the interest a statute protects is “compelling.”²³⁵ In short, this

227. *Id.* at 126–27.

228. *Id.* at 127 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)).

229. See Siegel, *supra* note 215, at 361.

230. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968); *Am. Civ. Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003); *Am. Civ. Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2003).

231. See Chad Davidson, *Constitutional Law—First Amendment—Government Must Demonstrate There is Not a Less Restrictive Alternative Before a Content-Based Restriction of Protected Speech Can Survive Strict Scrutiny*, 70 Miss. L.J. 457, 458 (2000).

232. *Id.* (citation omitted).

233. *Id.* at 464.

234. 521 U.S. 844, 874–79 (1997).

235. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321–29 (2007) (“The Supreme Court has frequently adopted an astonishingly

requirement of the strict scrutiny test can be parsed out into three further categories.²³⁶ In essence, a statute's prohibition is seen as narrowly tailored if: (1) the means chosen for the prohibition are the "least restrictive alternative" for the government to achieve its goals;²³⁷ (2) the governmental infringement is not under-inclusive (that is, the government cannot infringe on the citizenry's rights when doing so will foreseeably fail to achieve the restriction's goals);²³⁸ and (3) the governmental infringement is not over-inclusive.²³⁹

In the context of the *Muccio* decision, it is evident that section 609.352, subdivision 2a(2) is narrowly tailored. The statute is effectively the least restrictive way the government may intrude on an individual's right to free speech because the statute's specific intent requirement necessitates the adult actor to act with the intent to arouse the sexual desire of a child. Drawing from the court's overbreadth analysis of the statute, it can be observed how section 609.352, subdivision 2a(2) is distinguishable from other statutes that attempt to criminalize the transmission of indecent sexualized materials from adults to children.²⁴⁰ As the Minnesota Supreme Court observes in the *Muccio* opinion, much of the speech prohibited by section 609.352, subdivision 2a(2) is either integral to criminal conduct or obscene in nature, two forms of speech outside the First Amendment's protections.²⁴¹ For these reasons, the government's infringement upon persons' rights to free speech in this statute is narrowly tailored.

casual approach to identifying compelling interests.").

236. *Id.*

237. Fallon, *supra* note 235, at 1326; *see, e.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) (providing that protected speech must be regulated by the "least restrictive alternative"); *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (striking down a governmental action because a less speech-restrictive alternative was available).

238. Fallon, *supra* note 235, at 1327.

239. *Id.* at 1328. Similar to the "least restrictive alternative" requirement, the infringement of rights chosen by the government must be not be over-inclusive in the sense that a statute could be invalidated for lack of narrow-tailoring if less-restrictive alternative exists at all. *Id.*

240. *State v. Muccio*, 890 N.W.2d 914, 927–28 (Minn. 2017).

241. *Id.* at 923 ("The State argues that the statute regulates only speech integral to criminal conduct and speech that is obscene, which are categories of speech that the First Amendment does not protect.").

A proper application of the strict scrutiny test necessarily involves the identification of the specific interests the government holds to be “compelling.”²⁴² Determining whether an interest is compelling has often depended on the time period and make-up of the Court.²⁴³ In *Regents of University of California v. Bakke*, the Court declared that compelling interests are those found in the Constitution.²⁴⁴ However, other commentators including Justices of the United States Supreme Court have argued that these compelling interests may be ascertained with little to no textual inquiry.²⁴⁵ It is not abundantly evident how a court chooses to determine which interests are compelling, and which interests are not.²⁴⁶ Nonetheless, in cases such as *Reno v. American Civil Liberties Union*,²⁴⁷ *U.S. v. Playboy Entertainment Group, Inc.*,²⁴⁸ and *New York v. Ferber*,²⁴⁹ the Court has found that a compelling governmental interest exists when the transmission of sexualized speech to minors is involved. Allowing adults to directly communicate with children, with the intent to arouse sexual desire, can often be an integral part of the grooming process through which sexual predators obtain victims for subsequent criminal sexual abuse.²⁵⁰

242. Fallon, *supra* note 235, at 1321.

243. *See id.* at 1322–23 (citing Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 317–18 (1992)) (“Bruce Ackerman has argued that judicial conservatives are more willing to find compelling interests implicit in the Constitution than to conclude that the Constitution implicitly creates or recognizes fundamental rights.”).

244. 438 U.S. 265, 311–13 (1978) (asserting that a public university has a compelling interest in selecting a diverse student body, which arises from the institution’s First Amendment right to academic freedom).

245. Fallon, *supra* note 235, at 1322.

246. *See id.* (describing various methods that have been used, or proposed, to determine if an interest is compelling).

247. 521 U.S. 844, 869 (1997).

248. 529 U.S. 803, 814, 826–27 (2000).

249. 458 U.S. 747, 757 (1982); *see also* *Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Commc’ns Comm’n*, 518 U.S. 727, 747 (1996) (“[T]he interest of protecting children [from sex-related material] . . . is compelling.”); *Sable Commc’ns, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”). 458 U.S. 747, 757 (1982).

250. *See* Brief for MNCASA, *supra* note 15, at 14 (explaining that among other activities, “[g]rooming also includes enticement and solicitation”).

V. CONCLUSION

In *Muccio*, the court determined that section 609.352, subdivision 2a(2) does not violate the First Amendment.²⁵¹ Following the holding in *Williams*, the court deemed the language prohibited by the statute to be “integral to criminal conduct,” and, therefore, outside the protections of the First Amendment.²⁵² Additionally, in accord with the holdings of *Williams* and *Washington-Davis*, the Court held that the language of section 609.352, subdivision 2a(2) is narrowly focused on prohibiting speech integral to criminal conduct.²⁵³

In many situations, sexualized speech can be directed at a child with the intent to wrongfully seduce or abuse.²⁵⁴ This type of speech is integral to the incredibly dangerous grooming process. Therefore, the court correctly upheld Minnesota Statute section 609.352 subdivision 2a(2) as a constitutional safeguard in the interest of criminalizing speech used to facilitate the commission of a particularly heinous crime.

251. State v. Muccio, 890 N.W.2d 914, 920 (Minn. 2017).

252. *Id.* at 923 (citing United States v. Williams, 553 U.S. 285, 298 (2008)).

253. *Id.*

254. Brief for MNCASA, *supra* note 15, at 13 (citation omitted).

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School of Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu