

## *MINNESOTA V. MUCCIO*: THE CONSTITUTIONALITY OF MINNESOTA'S SEXUAL GROOMING LAW

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**ABSTRACT**—Grooming a child for a sexual act is dangerous behavior that should be outlawed. However, state grooming laws, when drafted too broadly, run the risk of violating the First Amendment. This Comment examines a recent constitutional challenge to a Minnesota electronic grooming statute and argues that the Minnesota Supreme Court applied the wrong standard of review. The Court failed to apply strict scrutiny and thus upheld an overbroad statute in violation of First Amendment doctrine. This Comment also suggests a simple revision to bring the Minnesota statute in line with the Constitution and offers model legislation for other states interested in enacting a sexual grooming statute.

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INTRODUCTION

The ability of sexual predators to communicate with children online is at an all-time high.<sup>1</sup> This is largely due to children’s increased access to the internet.<sup>2</sup> Children and teens today are using the internet for very different purposes than they were thirty years ago in the 1990s, contributing to their increased vulnerability.<sup>3</sup> Instead of chat rooms and instant messaging, today’s children and teens utilize social media applications like Facebook, Twitter, Instagram, and Snapchat.<sup>4</sup> These modern social media platforms permit children to publicize much more personal information, allowing predators to easily obtain details about a child’s likes, dislikes, activity and behavior.<sup>5</sup> Children who spend more time online are also more vulnerable—

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<sup>1</sup> See *Chapter Seventeen: The Real Numbers and Increasing Online Dangers*, KIDSLIVESAFE, <http://www.kidslivesafe.com/child-safety/online-predators-and-cyberbullying-statistics> [<https://perma.cc/QE9U-4S8S>] (“The number of sexual predators and online sexual offenses has more than doubled in the last three years, with more than 82% of online sex crimes originating from social networking sites that predators use to gain insight into their victim’s habits and likes.”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Instagram and Snapchat are Most Popular Social Networks for Teens; Black Teens Are Most Active on Social Media, Messaging Apps*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFF. RES. (Apr. 2017), <http://apnorc.org/projects/Pages/Instagram-and-Snapchat-are-Most-Popular-Social-Networks-for-Teens.aspx> [<https://perma.cc/54YK-PZYZ>] (reporting American teen use of social media applications at 76% for Instagram, 75% for Snapchat, 66% for Facebook, and 47% for Twitter).

<sup>5</sup> See Lysa Myers, *How Do We Protect Kids From Online Predators?*, WELIVESECURITY (Nov. 27, 2013, 5:59 PM), <https://www.welivesecurity.com/2013/11/27/how-do-we-protect-kids-from-online-predators> [<https://perma.cc/8UH9-XA2U>] (“[Sixty-five percent] of online sex offenders used the victim’s social networking site to gain home and school information about the victim.”); *Social Media, Mobile Phones and Sexting*, INTERNET SAFETY 101, <http://internetsafety101.org/Socialmediastats> [<https://perma.cc/X9WJ-J4M2>] (reporting that 93% of teen Facebook users share their real names, 92%

there is a direct correlation between a teenager's level of isolation and how much time they spend online.<sup>6</sup> This isolation is often caused by low self-esteem and antisocial tendencies, significantly increasing the child's susceptibility to an unwanted sexual advance.<sup>7</sup> Nonprofits and child protective groups have urged parents to keep a closer eye on their children and teens.<sup>8</sup> Unfortunately, however, the growing number of online sex crimes shows that parents' efforts to monitor their children's internet usage are insufficient.<sup>9</sup> Federal and state governments have responded to the risk posed by sexual predators by enacting laws criminalizing the solicitation of minors to engage in sexual acts.<sup>10</sup> These solicitation laws protect minors by criminalizing the invitation to engage in sexual conduct, therefore preventing any harm from occurring before the offender makes physical contact with a child.<sup>11</sup>

In the past decade, various states have begun criminalizing “grooming” speech, which is the speech leading up to the solicitation of a sexual act with

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share pictures of themselves, 21% share their personal cell phone numbers, and 25% share videos of themselves).

<sup>6</sup> Elana T. Jacobs, *Online Sexual Solicitation of Minors: An Analysis of the Average Predator, His Victims, What Is Being Done and Can Be Done to Decrease Occurrences of Victimization*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 505, 536 (2012).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *Tips For Parents: Setting Physical Boundaries*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (2017), [http://www.kidsmartz.org/~media/KidSmartz/ResourceDocuments/KidSmartz\\_Setting\\_Physical\\_Boundaries.pdf](http://www.kidsmartz.org/~media/KidSmartz/ResourceDocuments/KidSmartz_Setting_Physical_Boundaries.pdf) [<https://perma.cc/2SQW-VM2M>] (teaching children they have the right to say no to adults, even when it makes them uncomfortable, which helps them establish protective boundaries); Irene van der Zande, *Four Strategies for Protecting Kids from Sexual Predators*, KIDPOWER (Oct. 28, 2016), <https://www.kidpower.org/library/article/protecting-kids-from-sexual-predators> [<https://perma.cc/CZ8V-CL86>] (describing preventative measures adults can take, such as being a good listener, practicing safety skills, and putting safety concerns ahead of embarrassment or inconvenience); *Victim Grooming: Protect Your Child from Sexual Predators*, BOYS TOWN, <http://www.boystown.org/parenting/article/Pages/victim-grooming-protect-your-child-from-sexual-predators.aspx> [<https://perma.cc/439C-UQ7G>] (discussing how becoming knowledgeable about the “grooming process” and being able to recognize signs of grooming can protect a child from sexual predators). Furthermore, one in three parents say that they have had concerns or questions about their child's technology use in 2014. Maevé Duggan et al., *Concerns about Children, Social Media and Technology Use*, PEW RES. CTR. (July 16, 2015), <http://www.pewinternet.org/2015/07/16/concerns-about-children-social-media-and-technology-use/#fn-13873-24> [<https://perma.cc/X75K-4X2H>].

<sup>9</sup> See KIDSLIVESAFE, *supra* note 1.

<sup>10</sup> See *New York v. Ferber*, 458 U.S. 747, 757–58 (1982) (examining a statute targeting child pornography and finding that the State's interest in preventing sexual exploitation of minors is a “government objective of surpassing importance”); see also Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 607–08 (2005) (examining the government's interest in protecting children from harmful speech).

<sup>11</sup> See *infra* note 12.

a minor.<sup>12</sup> Grooming occurs when an adult intentionally befriends a minor<sup>13</sup> and establishes an emotional connection in order to lower the minor's inhibitions in preparation for illegal sexual contact.<sup>14</sup> Grooming can be done online or face-to-face,<sup>15</sup> and the process includes various stages.<sup>16</sup> When done

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<sup>12</sup> Illinois and Arkansas have expressly prohibited grooming via state statute. See 720 ILL. COMP. STAT. 5/11-25 (2012) ("Grooming"); ARK. CODE ANN. § 5-27-307 (2013) ("Sexually Grooming a Child"). Other states, such as Texas and Oregon, have statutes that effectively prohibit grooming behavior. See TEX. PENAL CODE ANN. § 33.021 (West 2015) ("Online Solicitation of a Minor"); OR. REV. STAT. § 167.057 (2016) ("Luring a Minor"). Indiana and Georgia prohibit communications related to or describing sexual conduct if made with the intent to arouse or gratify sexual desire. See IND. CODE § 35-42-4-13 (2014) ("Inappropriate Communication with a Child"); GA. CODE ANN. § 16-12-100.2(e) (2017) ("Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007").

<sup>13</sup> The jury is the ultimate fact finder when it comes to determining whether the defendant intended to establish a sexual relationship or a legal, appropriate one. However, experts and psychologists have developed lists of behaviors that suggest that an inappropriate relationship was intended, including: (1) giving the child a secret phone or tablet; (2) sudden excessive messaging; (3) buying the child gifts or treats; (4) flattering the child by claiming to have the same likes and interests; (5) telling dirty jokes; (6) claiming to be "best friends" with the child; and (7) touching or hugging the child in front of trusted adults to make the child think the touching is okay. See Kristen Jenson, *#MeToo — 10 Ways Predators Are Grooming Kids*, PROTECT YOUNG MINDS (Oct. 26, 2017), <https://protectyoungminds.org/2017/10/26/10-ways-predators-grooming-kids/> [<https://perma.cc/P3R4-RYA3>]. Looking at whether these behaviors combine to form a pattern can help a jury decide whether the defendant is guilty of grooming or just simply being friendly with a child.

<sup>14</sup> See *Online Grooming*, INHOPE, <http://www.inhope.org/gns/internet-concerns/overview-of-the-problem/online-grooming.aspx> [<https://perma.cc/M8FD-CR7X>] (defining the child grooming process as "actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, in order to lower the child's inhibitions in preparation for sexual activity with the child"). To groom a child, a pedophile must have a way of effectively communicating with that child in private. *Id.* Because communication over the internet is perceived as anonymous, children often feel a false sense of security, even though the children often do not know to whom they are talking. *Id.* After gaining online access to the child, the predator is often skilled at eliciting as much personal information as possible about the minor, such as the minor's home address, current and past locations, interests, and friends. *Id.* Eventually, the predator is able to undermine the minor's reluctance to participate in sexual acts by asking about the child's sexual experiences and subsequently showing him or her child pornography. *Id.*

<sup>15</sup> See *Grooming: What It Is, Signs and How to Protect Children*, NSPCC, <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/grooming/> [<https://perma.cc/6WEA-WHB9>] ("Children and young people can be groomed online or face-to-face, by a stranger or by someone they know - for example a family member, friend or professional."); see also Brief of Amicus Curiae, Minn. Coal. Against Sexual Assault at 3–5, 14, *Minnesota v. Muccio*, 881 N.W.2d 149 (Minn. Ct. App. 2016) (No. A15-1951), 2016 WL 3924135 (describing the grooming process and facts suggesting that Muccio attempted to groom her victim at school face-to-face and at home via cell phone messages).

<sup>16</sup> Studies suggest these stages include friendship and relationship-forming, exclusivity/isolation, and the sexual stage. See Georgia M. Winters & Elizabeth L. Jeglic, *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38 *DEVIANT BEHAV.* 724, 725–27 (2017). Early stages of grooming speech may "appear to be innocent in nature and typical of adult child interactions" when viewed in isolation; however, when coupled with coercion, manipulation and the introduction or constant reference to sexual themes, the intent to engage in a serious offense against a child is more apparent. *Id.* at 725; see also *Grooming Dynamic*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/grooming-dynamic-of-csa> [<https://perma.cc/78GK-YWU8>] ("The perpetrator may observe the child and assesses his/her

successfully, grooming a child increases the likelihood of engaging the child in a sexual act because the child is more likely to trust the adult.<sup>17</sup> Grooming also often causes the child to not report the sexual contact to other authority figures, which allows predators to walk away from criminal conduct without any consequences.<sup>18</sup> For these reasons, grooming speech is especially dangerous. However, while some states have enacted grooming statutes, many are poorly written, and most states have no grooming statutes at all.<sup>19</sup>

The need for grooming laws that protect against child predators is imperative,<sup>20</sup> but the modern-day use of the First Amendment to fight regulations on speech is also strong.<sup>21</sup> Recently, the First Amendment's free speech clause has been successfully used to fight against laws in areas that seem only tangentially related to speech, including election spending by corporations,<sup>22</sup> the baking of cakes by bakers,<sup>23</sup> and even unions' extraction of compulsory agency fees from nonmembers.<sup>24</sup> Because the First Amendment defense has become so robust, courts have complete authority

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vulnerabilities to learn how best to approach and interact with the child. Perpetrators may offer the victims special attention, understanding and a sympathetic ear, and then engage the child in ways that eventually gain their friendship and trust (they may play games with victims or give them rides, provide them with gifts and/or special treats.”).

<sup>17</sup> See Gregory M. Weber, *Grooming Children for Sexual Molestation*, ZERO, [http://www.vachss.com/guest\\_dispatches/grooming.html](http://www.vachss.com/guest_dispatches/grooming.html) [<https://perma.cc/7H39-AK6J>] (“The forging of an emotional bond through grooming leads to physical contact. Predators use the grooming process to break down a child’s defenses and increase the child’s acceptance of touch. The first physical contact between predator and victim is often nonsexual touching designed to identify limits: an ‘accidental’ touch, an arm around the shoulder, a brushing of hair. Nonsexual touching desensitizes the child. It breaks down inhibitions and leads to more overt sexual touching—the predator’s ultimate goal.”).

<sup>18</sup> See INT’L CTR. FOR MISSING & EXPLOITED CHILDREN, *ONLINE GROOMING OF CHILDREN FOR SEXUAL PURPOSES: MODEL LEGISLATION & GLOBAL REVIEW 10* (2017) (“Through the grooming process, an offender seeks to gain the child’s compliance to maintain secrecy, and to avoid detection and punishment.”). Once the predator gains the emotional trust of the minor, the minor is prevented from seeking out the protection of their parents, teachers, and other trusted adults. See *Online Grooming*, *supra* note 1414.

<sup>19</sup> See statutes cited *supra* note 12.

<sup>20</sup> See *supra* notes 1–6.

<sup>21</sup> See *infra* note 51.

<sup>22</sup> See *generally* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (finding that the free speech clause of the First Amendment prohibits the government from limiting spending for communication by corporations).

<sup>23</sup> See *generally* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (finding that the free speech clause of the First Amendment requires civil rights commissions to neutrally consider charges of discrimination when a business owner refuses to provide creative services, such as a wedding cake for a same-sex marriage).

<sup>24</sup> See *generally* *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (finding that the free speech clause of the First Amendment prohibits labor unions from collecting fees from nonunion members).

to strike down newly enacted grooming laws unless such laws are written to withstand a First Amendment challenge.<sup>25</sup>

This Comment argues that states should criminalize grooming speech, but only if the state statutes are carefully drafted to prevent their overbreadth. In doing so, this Comment proceeds in three Parts. Part I provides background information regarding the current state of First Amendment doctrine. Part II discusses a recent case, *Minnesota v. Muccio*,<sup>26</sup> in which the Minnesota Supreme Court assessed the constitutionality of an electronic grooming statute.<sup>27</sup> In Part III, this Comment highlights some of the challenges faced by the Minnesota legislature as a result of a poorly drafted grooming law and provides guidance in the form of model legislation for state legislatures to consider when drafting future laws. Part III also provides a legal analysis to support the criminalization of grooming speech. This Comment argues that grooming speech should be classified as an extension of criminal solicitation and considered unprotected, proscribable speech in the context of the First Amendment.

## I. A PRIMER ON THE FIRST AMENDMENT

The First Amendment protects speech against government regulation.<sup>28</sup> However, there are three distinct ways that a statute regulating speech could fail a First Amendment challenge: first, by falling into one of three categories of unprotected speech; second, by violating the “overbreadth doctrine”; or third, by failing strict scrutiny analysis as content-based discrimination. This Part discusses each one of these in turn.

First, there are three types of speech that are unprotected and may be regulated by either state or federal government: (1) speech communicated to “induce or commence illegal activities”;<sup>29</sup> (2) obscene speech;<sup>30</sup> and (3) child

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<sup>25</sup> See *infra* Section III.B (referencing statutes in Oregon and Texas that were struck down).

<sup>26</sup> *Minnesota v. Muccio (Muccio II)*, 890 N.W.2d 914 (Minn. 2017), *cert. denied*, 138 S. Ct. 328 (2017).

<sup>27</sup> *Id.* at 919.

<sup>28</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

<sup>29</sup> See *United States v. Williams*, 553 U.S. 285, 297–98 (2008) (holding that “offers to engage in illegal transactions are categorically excluded from First Amendment protection,” and therefore speech that is “intended to induce or commence illegal activities” such as conspiracy, incitement, and solicitation is not protected and has no constitutional value).

<sup>30</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing a three-part test for assessing whether material is obscene and therefore unprotected: “(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”) (internal citation omitted).

pornography.<sup>31</sup> The first unprotected category, “speech integral to criminal conduct,” is relevant in the child predator context because when a predator solicits a sexual act from a child, he is communicating in order to commence an illegal activity—the sexual conduct. This allows legislatures to criminalize the sexual solicitation of a minor before any act occurs.<sup>32</sup> Critics of solicitation laws argue that the government should not have the ability to regulate speech that merely suggests a criminal act might happen at a future point in time.<sup>33</sup> In *United States v. Williams*,<sup>34</sup> the U.S. Supreme Court found an “important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.”<sup>35</sup> Additionally, the Minnesota Supreme Court ruled in *State v. Washington-Davis*<sup>36</sup> that a statute’s regulation of solicitation speech survives a First Amendment challenge if that statute “focus[es] on speech directly related to criminal behavior.”<sup>37</sup> If the speech regulated is not “focused,” then it does not fall into the unprotected category of speech, and a court may strike the law down.

Second, a statute can fail a First Amendment challenge under the “substantial overbreadth doctrine,”<sup>38</sup> which the Court developed to address facial challenges to the First Amendment.<sup>39</sup> The goal of the overbreadth

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<sup>31</sup> See *New York v. Ferber*, 458 U.S. 747, 758, 764 (1982) (adding child pornography as an additional category of speech excluded from First Amendment protection and finding that child pornography causes substantial harm to children and therefore has no value).

<sup>32</sup> Because a predator is effectively communicating in order to commence an illegal activity when he solicits a sexual act from a child, the “speech integral to criminal conduct” category allows legislatures to criminalize the sexual solicitation of a minor before any such act occurs. See Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 1030 (2016) (explaining that sexual solicitation of a minor laws are akin to statutes that criminalize constitutionally unprotected attempt of a crime).

<sup>33</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”).

<sup>34</sup> 553 U.S. 285 (2008).

<sup>35</sup> *Id.* at 298–99.

<sup>36</sup> 881 N.W.2d 531 (Minn. 2016).

<sup>37</sup> *Id.* at 538.

<sup>38</sup> See *Free Speech Coal.*, 535 U.S. at 255 (“The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”); see also *Minnesota v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (“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.”).

<sup>39</sup> There are two categories of First Amendment challenges: “as-applied” and “facial” challenges. See Doug Linder, *The Doctrines of Substantial Overbreadth and Vagueness*, EXPLORING CONSTITUTIONAL LAW (2019), <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/overbreadth.html> [https://perma.cc/T5DB-ETWY] (explaining the doctrine of substantial overbreadth as having two categories of challenges: “as applied” and “facial”). An as-applied challenge is typically described as one where the statute, “even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff’s particular circumstances.” Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. &

doctrine is to ensure that the government does not enact a law that inadvertently bans a substantial amount of constitutionally protected speech.<sup>40</sup> The doctrine acknowledges that most laws that regulate speech will inevitably reach some speech that is protected under the First Amendment, and thus, in addition to leaving legislatures powerless, it would be unreasonable to strike down every law that has even one potentially impermissible application to protected speech.<sup>41</sup> In order to invalidate a law under the overbreadth doctrine, therefore, “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”<sup>42</sup>

Finally, if a statute restricts speech that concerns an entire topic, and if there is hostility toward that topic, then the statute discriminates based on content.<sup>43</sup> Content-based discrimination must be subjected to a “least restrictive means” test, also known as strict scrutiny.<sup>44</sup> Under a strict scrutiny analysis, content-based statutes are presumed unconstitutional under the First Amendment because they allow the government to distinguish between

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MARY BILL RTS. J. 657, 657 (2010) (quoting *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995)). This is in contrast to a facial challenge, which is described as one where “no application of the statute could be constitutional.” *Sabri v. United States*, 541 U.S. 600, 609 (2004). If a court finds that a statute is facially unconstitutional, the entire statute is invalidated. *See Kreit, supra* at 657.

<sup>40</sup> *See Free Speech Coal.*, 535 U.S. at 255 (2002); *Machholz*, 574 N.W.2d at 419.

<sup>41</sup> *See Linder, supra* note 39.

<sup>42</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

<sup>43</sup> Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431 (1996) (referring to “hostility toward ideas as such”); *see also* *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94–96 (1972) (first establishing the importance of the content-based distinction). In *Mosley*, a postman challenged a Chicago ordinance that banned picketing outside schools except for “peaceful picketing of any school involved in a labor dispute.” *Id.* at 93. The postman had previously been picketing for months outside schools that he believed were engaging in racial discrimination. *Id.* The Court found that the ordinance distinguished between content and allowed those picketers with messages the city liked to picket, while others were prohibited. *Id.* at 94; *see also id.* at 95 (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

<sup>44</sup> *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”). Strict scrutiny is often seen as “strict” in theory and fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8, 17 (1972). However, the content-discrimination standard is still a vital tool in First Amendment analysis. *See e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring) (“On a theoretical level, it reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. On a practical level, it has in application generally led to seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light.”) (internal citations omitted).

avored and disfavored speech based on the ideas expressed.<sup>45</sup> The presumption of unconstitutionality is rebuttable only by showing the statute is narrowly tailored to serve a “compelling state interest.”<sup>46</sup> A statute is narrowly tailored if it employs the least restrictive means to achieve the government’s compelling interest.<sup>47</sup> The government must satisfy this strict scrutiny test in order to enact a statute that lawfully discriminates based on the ideas or content of the speech.<sup>48</sup>

The U.S. Supreme Court routinely strikes down content-based restrictions on speech on the narrow tailoring or “least restrictive means” prong of strict scrutiny.<sup>49</sup> According to the Supreme Court in *Ashcroft v. ACLU*, “the purpose of the [least restrictive means] test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.”<sup>50</sup>

The above-mentioned three types of First Amendment challenges have been recently proven successful in a number of different areas and subjects<sup>51</sup>—sexual grooming of a minor being one of them. The next Part

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<sup>45</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (striking down a conviction of a protestor that burned an American flag at the Republican National Convention). As Justice William Brennan wrote, “[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.” *Id.* at 414.

<sup>46</sup> See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790, 803–05 (2011) (striking down a 2005 California law banning the sale of certain violent video games to children without parental supervision, finding that video games are protected speech and that the law was not narrowly tailored to the limited purpose of preventing actual harm to a child); see also *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813–14, 827 (2000) (invalidating Section 505 of the Telecommunications Act of 1996 that restricted cable channels communicating sexually explicit content to late-night hours, finding that, despite the Government’s compelling interest, it was a content-based restriction that failed strict scrutiny).

<sup>47</sup> See *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (“[A] court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal.”).

<sup>48</sup> See *Playboy Entm’t Grp.*, 529 U.S. at 813 (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”).

<sup>49</sup> See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421–23 (1996) (describing instances where the Court has struck down laws based on the least restrictive means and narrow tailoring requirements). In *United States v. Stevens*, the Supreme Court struck down Title 18, Section 48 of the U.S. Code, which criminalized the creation, sale, or possession of certain depictions of animal cruelty with the intention of commercial gain. 559 U.S. 460, 464–65, 468 (2010). Because the law regulated communication based on content, the Court held that it was presumptively invalid and found that the Government failed to meet its burden of rebutting that presumption. *Id.* at 468, 481–82.

<sup>50</sup> *ACLU*, 542 U.S. at 666.

<sup>51</sup> See, e.g., David Orentlicher, *The FDA’s Graphic Tobacco Warnings and the First Amendment*, 389 NEW ENG. J. OF MED. 204, 204–06 (2013) (tobacco industry successfully arguing that on-package cancer warnings violated the First Amendment); Sam Gustin, *How ExxonMobil and Airbnb Are Using the First Amendment to Fight Regulation*, MOTHERBOARD (July 1, 2016, 9:30 AM), [https://motherboard.vice.com/en\\_us/article/nz73gz/how-exxonmobil-and-airbnb-are-using-the-first-](https://motherboard.vice.com/en_us/article/nz73gz/how-exxonmobil-and-airbnb-are-using-the-first-)

describes a recent challenge to a Minnesota grooming law and highlights the various arguments that were raised both in support of and against the law under the First Amendment.

## II. MINNESOTA V. MUCCIO

In November 2014, a father found inappropriate pictures on his fifteen-year-old son's iPad.<sup>52</sup> The pictures showed a close-up of a female's behind in a thong, a close-up of a female's genitals, and a female naked from the neck to the waist.<sup>53</sup> Krista Ann Muccio, a woman who worked at his son's school cafeteria, sent pictures to the boy through Instagram.<sup>54</sup> The father reported the photos to law enforcement and a search warrant subsequently revealed that Muccio and the child engaged in sexually explicit conversations and exchanged sexually explicit photographs.<sup>55</sup> The State charged Muccio with two offenses: one count of felony communication with a minor describing sexual conduct,<sup>56</sup> and one count of felony possession of pornographic work involving minors.<sup>57</sup> The electronic felony

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amendment-to-fight-regulation [https://perma.cc/H8NG-Z64P] (noting that corporations have argued that government regulation and fraud investigation violate their right to free expression); Sam Gustin, *Landmark Verizon 'Net Neutrality' Case Tests Open Internet Rules*, TIME (Sept. 9, 2013), <http://business.time.com/2013/09/09/landmark-verizon-net-neutrality-case-tests-open-internet-rules> [https://perma.cc/F5ZC-4D5N] (broadband industry challenging rules protecting net neutrality, claiming a First Amendment right to control their networks); Eric Newcomer, *Airbnb Sues Hometown San Francisco to Block Rental Rules*, BLOOMBERG (June 27, 2016, 9:59 PM), <https://www.bloomberg.com/news/articles/2016-06-27/airbnb-is-suing-hometown-san-francisco-to-block-rental-rules> [https://perma.cc/65VM-MAHQ] (Airbnb challenging San Francisco's law requiring renters to register with the city as a violation of their free speech rights).

<sup>52</sup> *Muccio II*, 890 N.W.2d 914, 918–19 (Minn. 2017).

<sup>53</sup> *Id.* at 918.

<sup>54</sup> *Id.*

<sup>55</sup> *State v. Muccio (Muccio I)*, 881 N.W.2d 149, 153 (Minn. Ct. App. 2016) *review granted* (Aug. 23, 2016), *rev'd*, 890 N.W.2d 914 (Minn. 2017), *cert. denied*, 138 S. Ct. 328 (2017).

<sup>56</sup> *Muccio II*, 890 N.W.2d at 919. The statute Muccio was charged under states:

**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 to commit any of the following acts, **with the intent to arouse the sexual desire of any person**, is guilty of a felony . . .

MINN. STAT. § 609.352 subd. 2a (2009) (emphasis added). The specific section under which she was charged prohibits “**engaging in communication with a child** or someone the person reasonably believes is a child, **relating to or describing sexual conduct . . .**” MINN. STAT. § 609.352 subd. 2a(2) (2009) (emphasis added).

<sup>57</sup> *Muccio II*, 890 N.W.2d at 919. This was allegedly in violation of Minnesota Statute § 617.247 subd. 4(a). *Id.*

communication statute aims to prohibit grooming speech, and as a result, the term “grooming statute” will be used when referring to this law.<sup>58</sup>

*A. In the Lower Courts*

The district court held that the grooming statute<sup>59</sup> was unconstitutional, finding that it was facially overbroad and thus a violation of the First Amendment.<sup>60</sup> The Minnesota Court of Appeals affirmed, holding that the grooming statute violated the First Amendment because it criminalized too much protected speech.<sup>61</sup> The appeals court further found that the statute triggered strict scrutiny.<sup>62</sup>

In reaching its decision, the appeals court first assessed whether the prohibited grooming speech fell into one of three unprotected categories: speech integral to criminal conduct, obscene speech, or child pornography.<sup>63</sup> First, the court found that criminalization of the speech violated the First Amendment because the statute criminalized speech not directly linked to a criminal sexual act.<sup>64</sup> The court explained that communication of explicit material with an intent to arouse is one step removed from solicitation, and thus even further removed from a future criminal act.<sup>65</sup> As a result, the State had shown “no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.”<sup>66</sup>

Second, the court determined that the obscenity exception was inapplicable, finding that the statute criminalized speech not just limited to obscene speech under *United States v. Miller*.<sup>67</sup> The court disagreed with the State’s argument that the statute’s “intent to arouse the sexual desire of any person” requirement, combined with the requirement that the communication is with a child, satisfied the *Miller* test.<sup>68</sup> According to the court, those elements did not limit the statute’s reach to communication that

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<sup>58</sup> See MINN. STAT. § 609.352 subd. 2a (2009). The statute prohibits an adult from engaging in communication with a child if the communication relates to sexual conduct and is communicated with an intent to arouse sexual desire. This includes grooming speech, which is the speech leading up to solicitation of a sexual act.

<sup>59</sup> MINN. STAT. § 609.352, subd. 2a(2) (2009).

<sup>60</sup> *Muccio I*, 881 N.W.2d at 153.

<sup>61</sup> *Id.* See discussion on overbreadth *supra* notes 38–39.

<sup>62</sup> *Muccio I*, 881 N.W.2d at 160.

<sup>63</sup> *Id.* at 155–57.

<sup>64</sup> *Id.* at 155–56. The State admitted that the statute reached speech prior to solicitation, one step removed from criminal conduct. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 156 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002)).

<sup>67</sup> *Id.* at 156–57 (citing *Miller v. California*, 413 U.S. 15, 24 (1973), which established a three-part test for assessing whether material is obscene).

<sup>68</sup> *Id.* at 157.

“appeal[s] to the prurient interest” nor did it “exclude from the statute’s ambit speech which has social value.”<sup>69</sup>

Third, the court determined that the child pornography unprotected-speech category was inapplicable.<sup>70</sup> While the State argued that the statute could be analogized to child pornography statutes because the speech caused harm to minors, the court found that children need not be depicted under the Minnesota statute; there only needs to be a “communication . . . relating to or describing sexual conduct.”<sup>71</sup> As a result, the policy justification behind the criminalization of child pornography was inapplicable because children do not even need to be present or involved in the speech prohibited by the statute.<sup>72</sup>

Next, in assessing whether the statute was unconstitutionally overbroad, the court found that the statute’s intent requirement—which was satisfied if the adult had “the intent to arouse the sexual desire of *any person*”—was far too broad.<sup>73</sup> One consequence of this broad language was that communication that occurred between two adults, and without intent to affect a child, may have fallen within the statute’s ambit because the prohibited speech only needed to be “relating to or describing sexual conduct.”<sup>74</sup> Moreover, because the statute did not define “engaging,”<sup>75</sup> the court found that it was “unclear whether a one-way communication would be sufficient.”<sup>76</sup>

Finally, the court determined that the statute was a content-based regulation and was therefore subject to strict scrutiny.<sup>77</sup> The court first found the State’s interest compelling, because preventing adults from engaging in illegal sexual activity with children was a persuasive and substantial

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting MINN. STAT. § 609.352 subd. 2a(2) (2009)) (emphasis added).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 158 (quoting MINN. STAT. § 609.352 subd. 2a(2) (2009)).

<sup>74</sup> *Id.* (quoting MINN. STAT. § 609.352 subd. 2a(2) (2009)). The court determined that this broad scope included many topics commonly found in pop culture related to sex in movies, books, and video games. *Id.*

<sup>75</sup> See *supra* note 56 for the text of the statute.

<sup>76</sup> *Muccio I*, 881 N.W.2d at 158. For example, under the statute, if an adult published material on Facebook with an intent to arouse “any person” and a child read and commented on the post, then the adult would have “engaged in communication” with “an intent to arouse the sexual desire of any person.” *Id.* Based on this construction of the statute, the court found several colorful examples to illustrate the statute’s overbreadth, including a music video producer, film producer, and writer of young-adult fiction. *Id.* The fact that these acts would be criminalized under the statute led the court to find that it was overbroad. *Id.*

<sup>77</sup> *Id.* at 160.

governmental interest.<sup>78</sup> In determining whether the statute was narrowly tailored, however, the court found that the statute was not the least restrictive means to ensure children are protected from illegal sexual conduct.<sup>79</sup> While the statute prohibited speech communicated with an intent to arouse an individual's sexual desires, that speech was not necessarily communicated with any intent to engage a child in a sexual act.<sup>80</sup> Because the statute was not narrowly tailored, therefore, the statute violated the First Amendment.<sup>81</sup> The State, unhappy with the court's decision, appealed the case to the Minnesota Supreme Court.

### B. The Minnesota Supreme Court's Decision

On appeal, the Minnesota Supreme Court reversed the lower court and ruled that while the statute did apply to some protected speech, it was not overbroad, and the facial challenge thus failed.<sup>82</sup> The Minnesota Supreme Court first interpreted the plain language of the statute in order to determine whether the speech was integral to criminal conduct and therefore unprotected. The court then applied the *Miller* test to determine whether the speech was obscene.

The court first interpreted the statute's plain language by addressing three disputed phrases within the statute: (1) "engaging in communication with a child"; (2) "with the intent to arouse the sexual desire of any person"; and (3) "relating to or describing sexual conduct."<sup>83</sup> The court interpreted the first phrase—"engaging in communication with a child"—to mean "the adult must take some affirmative act to specifically select or designate the child as a recipient of the transmission,"<sup>84</sup> and therefore, the statute did not prohibit non-targeted mass electronic communications, such as social media posts that a child happened to view.<sup>85</sup> The court found that the second phrase—"with the intent to arouse the sexual desire of any person"—included anyone, not just the two individuals involved in the communication.<sup>86</sup> Lastly, in

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<sup>78</sup> *Id.* ("We agree, and the parties do not dispute, that the state has a compelling interest in prohibiting this conduct. 'The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.'") (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002)); *see also New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

<sup>79</sup> *Muccio I*, 881 N.W.2d at 160.

<sup>80</sup> *Id.* at 158–60.

<sup>81</sup> *Id.* at 160.

<sup>82</sup> *Muccio II*, 890 N.W.2d 914 (Minn. 2017), *cert. denied*, 138 S. Ct. 328 (2017).

<sup>83</sup> *Id.* at 920–22 (quoting MINN. STAT. § 609.352 subd. 2a (2009)).

<sup>84</sup> *Id.* at 921.

<sup>85</sup> *Id.* at 920–21.

<sup>86</sup> *Id.* at 921–22.

analyzing the third phrase—“relating to or describing sexual conduct”—the court found that the prohibited communication could be related to anyone; it did not need to describe or relate to sexual conduct involving either the child or the adult.<sup>87</sup> In sum, the court construed the statute’s plain language to mean that it “prohibit[ed] 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 communication acted with the specific intent to arouse the sexual desire of any person.”<sup>88</sup>

Next, the Minnesota Supreme Court determined that most of the speech falling within the ambit of the statute would be unprotected speech either because it was integral to criminal conduct or was obscene under *Miller*.<sup>89</sup> Similarly to the lower court, the Minnesota Supreme Court found that, “when grooming is done for the purpose of later using the child in sexual conduct, it resembles solicitation of the child, and . . . falls outside First Amendment protections.”<sup>90</sup> The court decided that most of the speech prohibited by the statute was integral to criminal conduct, and thus unprotected speech.<sup>91</sup>

Lastly, the Minnesota Supreme Court applied *Miller* and concluded that much of the criminalized speech would often be obscene and therefore unprotected.<sup>92</sup> Because the statute proscribed communication directed at a child with the intent to arouse sexual desire, the court found that the speech would most likely be “designed by the adult to arouse the child’s sexual desire for the adult, or the adult’s sexual desire for the child.”<sup>93</sup> Sexually explicit speech that is designed to cause sexual arousal is patently offensive when an adult directs the speech at a child.<sup>94</sup> As a result, the court found that most communications falling within the statute met all three prongs in the *Miller* test.<sup>95</sup> The court acknowledged that there would be some speech that was protected speech, specifically speech that was non-obscene and did not fall within another category of unprotected speech, such as speech integral

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<sup>87</sup> *Id.* at 922.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 926–27.

<sup>90</sup> *Id.* at 924. The court analogized to the case of *United States v. Williams*, 553 U.S. 285 (2008). *Id.* at 923–24. In *Williams*, the Supreme Court found that there is no First Amendment protection for offers to engage in illegal transactions. 553 U.S. at 298–99. The Court in *Williams* also found that a federal statute prohibiting the “pandering” of child pornography, which included offering or requesting to transfer, sell, deliver, or trade the pornographic items, did not violate the First Amendment, even if the person charged with “pandering” did not in fact possess child pornography to trade. *Id.* at 298–99, 300.

<sup>91</sup> *Muccio II*, 890 N.W.2d at 924–25.

<sup>92</sup> *Id.* at 925–27.

<sup>93</sup> *Id.* at 925–26.

<sup>94</sup> *Id.* at 926.

<sup>95</sup> *Id.* at 926–27.

to criminal conduct or child pornography.<sup>96</sup> However, “the vast majority of the statute’s applications” were constitutional restrictions on speech, and to the extent protected speech was shown to fall within the statute, the court held that challenges may go forward on an as-applied basis.<sup>97</sup>

The Supreme Court denied certiorari for this case in 2017,<sup>98</sup> and in March of 2018, Krista Ann Muccio pled guilty to one count of felony communication with a minor describing sexual conduct.<sup>99</sup> Muccio will face time in prison for this conviction and the Minnesota courts have decided that she was guilty. However, the question remains: Is the statute<sup>100</sup> a violation of the First Amendment? Was the Minnesota Supreme Court incorrect in upholding a law that is content-based, overbroad, and has the potential to chill protected free speech? And is there a simple way to fix the current law in place?

### III. ANALYSIS

The next Part will discuss the significance of the Minnesota Supreme Court’s ruling and will recommend new language for states interested in passing grooming legislation. It will also argue that grooming speech should, legally, be considered akin to solicitation speech, which provides a constitutional rationale for upholding the rewritten statute.

#### A. *The Errors and Unintended Consequences of Minnesota v. Muccio*

This Section addresses the following three reasons why the statute under which Muccio was charged should have been struck down as unconstitutional: first, the statute is content-based and, as such, should have been subject to strict scrutiny analysis; second, the court failed to apply the “least restrictive means” test; and finally, the statute as written is actually a regulation on the freedom of thought, and should therefore have been struck down and rewritten.

First, the law proscribes speech “relat[ed] to or describing sexual conduct,”<sup>101</sup> which makes the statute a content-based restriction.<sup>102</sup> The law

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 927, 928–29.

<sup>98</sup> *Muccio v. Minnesota*, 138 S. Ct. 328, 329 (2017).

<sup>99</sup> See Nick Ferraro, *Lunch Lady Who Argued Sexting With a 15-Year-Old Was Free Speech Pleads Guilty*, PIONEER PRESS (Mar. 8, 2018, 4:47 PM), <https://www.twincities.com/2018/03/08/lunch-lady-who-argued-sexting-with-a-15-year-old-was-free-speech-pleads-guilty> [<https://perma.cc/Z6KP-7L9F>].

<sup>100</sup> MINN. STAT. § 609.352 subd. 2a (2009).

<sup>101</sup> *Id.*

<sup>102</sup> See *Muccio I*, 881 N.W.2d 149, 153 (Minn. Ct. App. 2016) *review granted* (Aug. 23, 2016), *rev’d*, 890 N.W.2d 914 (Minn. 2017), *cert. denied*, 138 S. Ct. 328 (2017); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811–12 (2000) (stating that the essence of a content-based regulation is that “[i]t

is content-based because: (1) the law indicates that speech related to sexual conduct is disfavored by the Minnesota legislature, and (2) the law restricts expression because of a message or idea communicated. Communication “relat[ed] to or describing sexual conduct” includes a wide array of constitutionally protected literary, artistic, and musical work. For example, the law would prohibit sharing songs online, such as Beyoncé’s *Drunk in Love*<sup>103</sup> and Katy Perry’s *I Kissed A Girl*.<sup>104</sup> It encompasses middle school textbooks related to sexual education and medical textbooks depicting sexual organs, if they are accessed electronically. It includes content found in hit television shows like *13 Reasons Why*,<sup>105</sup> *Girls*,<sup>106</sup> *The Office*,<sup>107</sup> and *Stranger Things*.<sup>108</sup> Even books like *The Scarlet Letter*,<sup>109</sup> if accessed electronically, would be included in this broad definition. Because of this, it is difficult to argue that the statute is not a content-based restriction.

Content-based restrictions are due strict scrutiny, which requires a compelling interest on the part of the state. The compelling interest of the Minnesota legislature is to prevent illegal sexual conduct between adults and children.<sup>110</sup> Neither party disputed that the state has a compelling interest in prohibiting this conduct,<sup>111</sup> and preventing the sexual abuse of children is a legitimate goal that the statute aims to prohibit.<sup>112</sup> However, the legislature’s

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‘focuses *only* on the content of the speech and the direct impact that speech has on its listeners’”) (internal citation omitted).

<sup>103</sup> BEYONCÉ, DRUNK IN LOVE (Parkwood Entertainment, Columbia Records 2013) (“I’ve been drinking, I’ve been drinking / I get filthy when that liquor get into me / I’ve been thinking, I’ve been thinking / Why can’t I keep my fingers off it, baby?”) (*lyrics available at* <https://genius.com/Beyonce-drunk-in-love-lyrics> [<https://perma.cc/5VUZ-CKQU>]).

<sup>104</sup> KATY PERRY, I KISSED A GIRL (Capitol Records 2008) (“I kissed a girl and I liked it / The taste of her cherry chapstick / I kissed a girl just to try it / I hope my boyfriend don’t mind it”) (*lyrics available at* [https://www.lyricsmode.com/lyrics/k/katy\\_perry/i\\_kissed\\_a\\_girl.html](https://www.lyricsmode.com/lyrics/k/katy_perry/i_kissed_a_girl.html) [<https://perma.cc/Q2X4-NCZT>]).

<sup>105</sup> *13 Reasons Why: The Second Polaroid* (July Moon Productions, Kicked to the Curb Productions, Anonymous Content, Paramount Television 2018) (depicting a sexual act and discussing consent and rape culture).

<sup>106</sup> *Girls: Pilot* (Apatow Productions, I Am Jenni Konner Productions, HBO Entertainment 2012) (portraying sexual intercourse and other sexual acts).

<sup>107</sup> *The Office: Sexual Harassment* (Deedle-Dee Productions, Reveille Productions, NBC Universal Television Studios 2005) (discussing sexual harassment policies at work).

<sup>108</sup> *Stranger Things: Chapter Nine: The Gate* (21 Laps Entertainment, Monkey Massacre 2016) (containing a sexualized kiss between two teenagers).

<sup>109</sup> *See generally* NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850) (concerning a woman who conceives a daughter through a sexual affair).

<sup>110</sup> *Muccio II*, 890 N.W.2d 914, 928 (Minn. 2017) (“The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people.”) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002)).

<sup>111</sup> *Id.*

<sup>112</sup> *See, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755–56 (1996) (upholding a federal law permitting cable system operators to ban “indecent” or “patently offensive”

goal of preventing the engagement of a child in a criminal sexual act is not necessarily achieved by what the statute proscribes. As written, the statute criminalizes speech made “with the intent to *arouse the sexual desire of any person.*”<sup>113</sup> The statute does not criminalize speech made with the intent to *engage a child in sexual conduct*. The Minnesota Supreme Court thus erred, since it seemed to utilize the “intent to arouse” standard as a proxy for the “intent to engage in sexual conduct with a child.” Those two intentions are very different, however.<sup>114</sup> Speech communicated with the “intent to arouse” does not necessarily need to be made with any criminal intent to engage a child in sexual conduct.<sup>115</sup>

The Minnesota Supreme Court also erred by failing to apply the “least restrictive means” test.<sup>116</sup> If the goal is to criminalize speech before it turns into criminal conduct, the least restrictive means available would be to criminalize speech that was communicated only with the *intent to engage in a criminal sexual act* with a minor. Here, however, the speech criminalized under the statute must only be made “with the *intent to arouse the sexual desire of any person.*”<sup>117</sup> Thus, the statute criminalizes more speech than necessary—specifically, speech made with an intent to arouse oneself, but without any intent to engage a child in sexual conduct.

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speech on leased access channels, since protecting children from such speech is a compelling state interest).

<sup>113</sup> MINN. STAT. § 609.352 subd. 2a (2009) (emphasis added).

<sup>114</sup> The Minnesota Supreme Court’s analysis begins with a discussion of why speech that is “integral to criminal conduct” is unprotected speech. *Muccio II*, 890 N.W.2d at 923. Speech is integral to criminal conduct, and thus unprotected, when it “is intended to induce or commence illegal activities, [such as] conspiracy, incitement, and solicitation.” *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 298 (2008)). The court states that a defendant who engages in sexual communications with a child and has an “intent to arouse” is usually involved in the “grooming process,” and “when grooming is done for the purpose of later using the child in sexual conduct,” it is unprotected. *Id.* at 924. Here, the court construed “intent to arouse” to mean “intent to use the child in sexual conduct”; however, this conflates two different ideas. The “intent to arouse” means stimulation of oneself or of a child, while the “intent to use the child in sexual conduct” means actually engaging the child for the purpose of engaging them in a sexual act.

<sup>115</sup> The certiorari petition also highlighted this issue. *See* Petition for a Writ of Certiorari at 19–20, *Muccio II*, 890 N.W.2d 914 (No. 17-209), 2017 WL 3405493 (“A text message from an older sister to her younger sister that, ‘your boyfriend is really cute—you should totally sleep with him,’ relates to sexual conduct and is intended to arouse the sexual desire of the younger sister for her boyfriend. Indeed, even a message from a youth minister that says, ‘in marital sex, spouses participate in the very love of God,’ may be intended to arouse the sexual desires of young teens toward their future spouses while extolling the virtues of abstinence until marriage. And an e-mail from a counselor to a teen questioning sexual orientation could also fall within subdivision 2a(2)’s scope if it encourages the teen to acknowledge and accept his or her sexual desires.”).

<sup>116</sup> Instead, the court used an overbreadth test to assess whether the statute was substantially overbroad and found that it was not. *Muccio II*, 890 N.W.2d at 929.

<sup>117</sup> MINN. STAT. § 609.352, subd. 2a (2009) (emphasis added).

Moreover, the Minnesota Supreme Court overlooked that this statute implicates the freedom of thought. The statute's specific-intent requirement of "intent to arouse the sexual desire of any person" criminalizes sexual thoughts that may have nothing to do with harming a child.<sup>118</sup> The Constitution protects thoughts just like it protects speech,<sup>119</sup> and the government may not "constitutionally premise legislation on the desirability of controlling a person's private thoughts."<sup>120</sup> For decades, judges and scholars have stressed that the First Amendment is meant to protect against the government controlling our thoughts and right to think freely.<sup>121</sup> The right to think is crucial to freedom, and speech must be protected from the government because "speech is the beginning of thought."<sup>122</sup> An individual's

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<sup>118</sup> One might argue that narrowing the statute to only include "an intent to engage in a criminal sexual act with a child" would not protect against adults merely trying to trigger the sexual arousal of a child. The statute as written in Part III.B does not cover this behavior. This Comment's argument for a narrower intent requirement, and the statutory language in Part III.B, is based on the expressed interest of the state in protecting against the sexual abuse of a child, not mere sexual arousal. However, in certain situations, the intent to trigger the sexual arousal of a child may be harmful on its own, and thus an adult intending to exploit a child by arousing the child would itself be offensive. If states have the broader goal of wanting to protect against that kind of behavior, a more expansive intent requirement may be appropriate. For example, in order to effectively criminalize the intent to arouse a child, the statute may also be properly rewritten to prohibit "an intent to arouse the sexual desire of *the child* for the purpose of exploitation" instead of "an intent to arouse the sexual desire of *any person*" as the Minnesota statute was written.

<sup>119</sup> See, e.g., *Jones v. Opelika*, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting) ("Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind."); *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) ("[F]reedom [of thought] . . . is the matrix, the indispensable condition, of nearly every other form of freedom.")

<sup>120</sup> *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

<sup>121</sup> See, e.g., *Procurier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."); Eugene Volokh, *Texas Court Strikes Down Ban on Communications to Minors "That Relate[] to or Describe[] Sexual Conduct" Made with "Intent to [Sexually] Arouse"*, VOLOKH CONSPIRACY (Oct. 30, 2013, 6:39 PM), <http://volokh.com/2013/10/30/texas-court-strikes-ban-communications-minors-relate-describe-sexual-conduct-made-intent-sexually-arouse> [https://perma.cc/58PG-5ME8] ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.") (internal citation omitted).

<sup>122</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002). Without the freedom of thought, the freedom of speech is meaningless because one can only communicate what they think. See *Freedom of Thought & The First Amendment*, CTR. FOR COGNITIVE LIBERTY & ETHICS, [http://www.cognitiveliberty.org/issues/first\\_amend\\_index.html](http://www.cognitiveliberty.org/issues/first_amend_index.html) [https://perma.cc/GSJ7-7BM7]. As a result, by criminalizing the thoughts in one's head, you are also threatening one's First Amendment rights. See *id.*

thoughts in his head, however “salacious,” “murderous,” or “discriminatory,” are his own and the law may only intervene when he acts upon his thoughts.<sup>123</sup> Therefore, this statute unconstitutionally prohibits both protected speech and thought.

Critics might suggest that this analysis would make it impossible to draft a grooming statute and that the “intent to arouse” language provides a narrow enough range of speech under the statute. However, as explained below, the statute can be easily revised to criminalize speech communicated with an intent to engage a child in an illegal act by simply altering the intent requirement.

### *B. How to Draft a Grooming Law in Line with the First Amendment*

This Section suggests a model grooming statute based on two other jurisdictions that have faced parallel issues. Legislatures in Texas<sup>124</sup> and Oregon<sup>125</sup> faced similar challenges to their grooming laws and courts in both states struck down their statutes under the overbreadth analysis.<sup>126</sup> After striking down the statutes, Texas<sup>127</sup> and Oregon<sup>128</sup> then amended their laws to provide narrower constructions to ensure the statutes’ constitutionality.

To avoid lengthy litigation and a constitutional challenge, states should avoid using the language that will fail strict scrutiny and may be construed by courts as overbroad. State legislatures should avoid using the “intent to arouse” requirement and should replace it with the “intent to engage in sexual conduct with the child.” Using the Minnesota statute as an example, the language of the statute could be amended as follows:

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<sup>123</sup> *Ex parte Lo*, 424 S.W.3d 10, 26 (Tex. Crim. App. 2013) (striking down a Texas grooming law because it violated the free speech clause of the First Amendment).

<sup>124</sup> *See id.* The statute in question in *Ex parte Lo* contains language nearly identical to that found in Minnesota’s grooming law. *See id.* at 17 n.23.

<sup>125</sup> *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202, 1213 (9th Cir. 2010) (striking down OR. REV. STAT. § 167.057 (2015) as overbroad).

<sup>126</sup> *See supra* note 39.

<sup>127</sup> After the ruling in *Ex parte Lo*, the Texas legislature amended Texas Penal Code § 33.021 to remove the overbroad “intent to arouse” language and replaced it with the “*intent to commit an offense listed in Article 62.001(5)(A), (B), or (K), Code of Criminal Procedure.*” *See* TEX. PENAL CODE ANN. § 33.021(b) (West 2015) (emphasis added). Articles 62.001(5)(A), (B), and (K) refer to a broad range of criminal sexual acts with a minor. *See* TEX. CODE CRIM. PROC. ANN. art. 62.00 (West 2017).

<sup>128</sup> After the Ninth Circuit’s ruling in *Powell’s Books*, the Oregon legislature subsequently amended § 167.057 to remove the overbroad language “for the purpose of arousing and satisfying the sexual desires of the person” and replaced it with “*for the purpose of inducing the minor or purported minor to engage in sexual conduct.*” OR. REV. STAT. ANN. § 167.057 (West 2016) (emphasis added).

**Subd. 2a. Electronic solicitation of children.** 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 to commit any of the following acts, ~~with the intent to arouse the sexual desire of any person~~ with the intent to engage in sexual conduct with the child, is guilty of a felony and may be sentenced as provided in subdivision 4: . . .

(2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct.

By eliminating the “intent to arouse” language, and by requiring that an individual act with an intent to engage the child in sexual conduct, the law proscribes the intention to prey on a minor, instead of merely the sexual thoughts inside an individual’s head. States interested in enacting grooming legislation should therefore look to this amended statute for guidance.<sup>129</sup>

### *C. Grooming Speech Should Be Classified as Unprotected Solicitation Speech*

When done effectively, grooming poses a greater danger and threat to children than does mere solicitation. The analysis below explains how grooming speech fits under the First Amendment’s solicitation doctrine.

By narrowing the statute and only criminalizing speech communicated with an intent to engage in sexual conduct, grooming speech is more easily classifiable as “integral to criminal conduct” because it is part of the solicitation process.<sup>130</sup> Sexual abuse through grooming is a “process” and more than a single “act” because grooming the child requires the adult to alter the way a child thinks by building dependence, forming an emotional

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<sup>129</sup> Repetitive behavior that causes harm over time, like constantly desensitizing a child to pornography, can be considered similar to other pattern offenses such as stalking and harassment. To prosecute these types of offenses, the state must show a “course of conduct,” which means a pattern of conduct comprised of a series of acts over a period of time, however short, that evidences a continuity of purpose. See “*Pattern of Conduct*” Examples, U. N.M. JUD. EDUC. CTR., <http://jec.unm.edu/education/online-training/stalking-tutorial/pattern-of-conduct-examples> [https://perma.cc/DW2J-G8CD] (stating that while one verbally abusive phone call might be emotionally jarring, that alone may not be the basis of a criminal harassment prosecution; at some point after two or three calls, a pattern starts to emerge). Although not present in the model statute, and beyond the scope of this Comment, states may consider adding this “course of conduct” language to provide a narrower version of the statute.

<sup>130</sup> See *United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (stating that solicitation, as “an invitation to engage in an illegal exchange for private profit,” may be prohibited).

connection, and gaining the child's trust to prevent resistance.<sup>131</sup> When a sexual predator grooms a child for a sexual act, he goes through many steps to desensitize the child to sexually explicit images and conduct.<sup>132</sup> As a result of the child's dependence, sexual grooming poses a heightened risk of the predator successfully abusing the child.<sup>133</sup> For example, consider a predator that solicits a sexual act from a child he has never met. Now, consider a predator that builds a child's trust and respect for months, and then solicits the child for a sexual act. It is more likely that the predator will be successful in the second scenario, because the child thinks he or she is safe and trusts the adult.<sup>134</sup> Because the grooming increased the likelihood of the predator's success and contributed to the horrible result of a child's abuse, the grooming should be considered part of the solicitation. Grooming, in other words, can be thought of as a drawn-out solicitation process—when sexual grooming begins, the intention to exploit the child begins. By classifying grooming speech as solicitation, therefore, a court or a legislature would not be expanding the scope of unprotected speech. Instead, it would be classifying certain types of speech as solicitation because they are dangerously integral to the solicitation process.

This classification would therefore allow legislatures to pass grooming laws regulating this type of communication while not expanding the First Amendment doctrine.

#### CONCLUSION

In *Minnesota v. Muccio*, the Minnesota Supreme Court failed to recognize that the Minnesota grooming statute is a content-based law that does not pass strict scrutiny. The court overlooked that the statute is overbroad, and that it criminalizes sexual thoughts by criminalizing communication with an “intent to arouse.” The court should instead have struck down the statute and compelled the legislature to amend it. States that plan to enact grooming statutes should avoid potential constitutional challenges by drafting legislation that is narrowly tailored to achieve the compelling interest of protecting minors from sexual abuse. If properly drafted, grooming statutes should be upheld under the “integral to criminal conduct” exception because grooming should be considered an extended

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<sup>131</sup> Brief of Amicus Curiae, Minn. Coal. Against Sexual Assault at 13, *Muccio I*, 881 N.W.2d 149 (Minn. Ct. App. 2016) (No. A15-1951), 2016 WL 3924135.

<sup>132</sup> See *supra* note 16.

<sup>133</sup> See *supra* notes 16–18; Cory Jewell Jensen, Patti Bailey & Steve Jensen, *Selection, Engagement and Seduction of Children and Adults by Child Molesters*, 36 PROSECUTOR 3, 42–43 (2002) (describing the advanced techniques child molesters use to prey on children).

<sup>134</sup> See *supra* notes 16–18.

solicitation process. The passage of narrowly tailored grooming laws will provide better protection for children, while also providing protection for the freedom of speech and thought—all of great importance.