[redacted]

STATE OF MINNESOTA

COUNTY OF RICE

DISTRICT COURT
THIRD JUDICIAL DISTRICT
JUVENILE DIVISION

In the Matter of the Welfare of:

[redacted],

Juvenile.

Case Type: Delinquency

Court File No. [redacted]

ORDER GRANTING MOTION TO DISMISS

The above matter came before the Hon. John T. Cajacob on [redacted], at a Contested Pretrial Hearing pursuant to the Juvenile's Motion to Dismiss. The Juvenile, [redacted], was represented by attorney John Hamer of Hoffman, Hamer & Associates, PLLC, of Faribault, Minnesota. Rice County Assistant Attorney Catherine Miller represented the State.

At that hearing, counsel agreed to brief the matter and deadlines were set. Subsequent to that hearing, correspondence was filed requesting that the American Civil Liberties Union of Minnesota (ACLU) participate as an amicus curiae. This request was granted, and due dates for the parties' briefs were adjusted to accommodate this addition. Briefs were timely filed by both parties and the ACLU (by attorneys Lousene M. Hoppe of Fredrikson & Byron, P.A., Minneapolis, and Teresa J. Nelson of the ACLU, St. Paul, Minnesota). The Court took the matter under advisement on January 5, 2018. By agreement of both parties, this Court's under-advisement due date was extended to February 20, 2018.

Based on the arguments of counsel, and all of the files, records and proceedings herein, the Court makes the following:

ORDER

1. The Juvenile [redacted]'s Motion to Dismiss is hereby GRANTED.
2. The attached Memorandum is incorporated herein.

BY THE COURT:

Cajacob, John
2018.02.20
16:30:38
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Hon. John T. Cajacob
Judge of District Court

[redacted]

MEMORANDUM[1]

Factual Background[2]

[redacted]

[redacted]

[3] Audra L. Price, *Digital Lovers: Keeping Romeo and Juliet Safe from Sexting and Out of the Courthouse*. 20 Temp. Pol. & Civ. Rts. L. Rev. 355, 357 (2011).

[redacted]

4. On [redacted], through counsel, brought a motion to dismiss the charge, challenging the constitutionality of the statute and its application in her case. Specifically, [redacted] claims that the statute facially and as applied violates the First Amendment, is unconstitutionally vague, and is inconsistent with the intent of the statute.

5. Due to the uniqueness of the constitutional issues involved, this Court granted leave for the ACLU of Minnesota to participate as an amicus curiae.

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[4] Snapchat is a cell phone application that allows a person to share images or video clips with friends. The shared image or video can be viewed for up to 10 seconds [redacted]. Once it is viewed by all recipients, the "snap" self-destructs. *See* https://blog.hootsuite.com/how-to-use-snapchat-beginners-guide/; https://mashable.com/2014/08/04/snapchat-for-beginners/#dscD9RNsluqi. Though the nature of the app is ephemeral, a recipient can take a screenshot of the received image, which prompts notice to the sender. There is also a replay function. *See* https://www.pocket-lint.com/apps/news/snapchat/131313-what-s-the-point-of-snapchat-and-how-does-it-work; https://mashable.com/2014/08/04/snapchat-for-beginners/#dscD9RNsluqi.

Legal Analysis

I. Statutory Foundation

This petition was brought under Minnesota's child pornography law, which in relevant part provides the following:

> A person who disseminates pornographic work to…a minor, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than seven years and a fine of not more than $10,000 for a first offense….

Minn. Stat. § 617.247, subd. 3(a). If convicted or adjudicated of the above offense, the person also must register as a predatory offender under Minn. Stat. § 243.166, subd. 1b(a)(2).[5]

"Pornographic work" includes, in pertinent part:

> an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or
>
> any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:
>
> uses a minor to depict actual or simulated sexual conduct….

Minn. Stat. § 617.246, subd. 1(f)(1) and 1(f)(2)(i).

[redacted] As per subdivision 1(f)(2)(i) above, the act may be actual or simulated.

A "minor" is "any person under the age of 18." (Minn. Stat. § 617.246, subd. 1(b)).

A "delinquent child" is a child who has violated a state or local law. Minn. Stat. § 260B.007, subd. 6.

"Disseminate" means to distribute, give, sell, lease, or display. 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 12.82 (6th ed.) "Dissemination" means distribution to one or more persons, other than the person depicted in the image…." Minn. Stat. 617.261, subd. 7(b).[6]

[5] The statute states the person must register if charged with "possessing pornographic work involving a minor in violation of section 617.247, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances…." Minn. Stat. § 243.166, subd. 1b(a)(2).

Subdivision 1 of Minn. Stat. § 617.247 addresses the policy and purpose of the child pornography statute. The legislature enacted this particular statutory section in order to "protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors." *Id.* Hence, the stated legislative intent is "to penalize possession of pornographic work depicting sexual conduct" involving minors "to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct." *Id.*

II. Issue Analysis

A. Minn. Stat. 617.247, subd. 3(a), is not overly broad on its face because it does not infringe upon a substantial amount of protected speech.

Defense counsel asserts that Minn. Stat. 617.247, subd. 3(a), violates [redacted]'s First Amendment rights, saying it is facially overbroad because "it infringes upon a substantial amount of protected speech." Def. Br. 3, ¶ II.

The First Amendment of United States Constitution, which is reflected in Article 1, Section 3 of the Minnesota Constitution, provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. A statute that implicates speech under the First Amendment must not be overly broad. *State v. Hall,* 887 N.W.2d 847, 852 (Minn. Ct. App. 2016) (citing *State v. Maccholz*, 574 N.W.2d 415, 419 (Minn. 1998)). When a party makes an overbreadth challenge, the court must first inquire whether First Amendment concerns are in fact implicated. *Hall*, 887 N.W.2d at 853 (citation omitted). The language of the child pornography statute directly encompasses speech, which implicates the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

Given that the First Amendment applies to the child pornography statute, the court must then determine whether the statute prohibits "constitutionally protected activity in a substantial number of its applications" when "'judged in relation to the statute's plainly legitimate sweep.'" *Hall*, 887 N.W.2d at 853 (citation omitted). A statute is overbroad on its face if it prohibits

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[6] Although "disseminate" is not specifically defined in subdivision 3(a) of the subject statute, a definition is found in the two closely placed sources cited. For purposes of statutory interpretation, these definitions are used in lieu of a more generic dictionary definition because they are directly associated (via the CRIMJIG and Minn. Stat. § 617.261) with the material covered by this statute.

constitutionally protected speech along with speech that can be prohibited without violating constitutional rights. *Free Speech Coalition*, 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."). Well-settled case law finds that child pornography is not protected speech under either the U.S. or Minnesota constitutions. *See, e.g., State v. Mauer*, 741 N.W.2d 107, 110 (Minn. 2007) (citing *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 72–73, (1994)); *New York v. Ferber*, 458 U.S. 747, 764–65 (1982); *Free Speech Coalition*, 535 U.S. 234).

The "facially overbroad" claim here can be dispensed with on one ground: the subject material in this case constitutes child pornography by statutory definition, and child pornography is not protected speech. The First Amendment's freedom of speech is limited: "it does not embrace certain categories of speech, including…pornographic production with real children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46.

The question of whether partially or fully nude depictions of minors are "child pornography" in all instances has been and is being addressed by various courts, along with how to charge and penalize teenage sexting.[7] However, this case does not involve merely a nude photo of a minor girl. In the subject [redacted] that falls under the definition of "sexual conduct." Minn. Stat. § 617.246, subd. 1(e)(3). "Sexual conduct" is included in the definition of "pornographic work" under Minn. Stat. § 617.246, subd. 1(f)(2)(i). Thus, the "protected speech" argument fails: [redacted] The law is unambiguous that an actual minor depicted in a sexual act is child pornography. At the hearing on November 13, 2017, [redacted] stipulated that [redacted] she sent to [redacted] "meets the definition of 'pornographic work' as defined in Minn. Stat. §617.246, subd. 1(f)(i).'" St. Br. 2.

The Court finds that the statute in question regulates only unprotected speech, and that the speech in the instant case—child pornography—is unprotected. Therefore, this Court finds

[7] *See, e.g.,* Ronak Patel, *Taking It Easy on Teen Pornographers: States Respond to Minors Sexting* (2013), 13 J. High Tech. L. 574; Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality* (2012), 10 Nw. J. Tech. & Intell. Prop. 57; Richard J. Arneson, *Construction and Application of State Laws Relating or Applied to Sexting Involving Juveniles,* 18 A.L.R.7th Art. 8 (2017).

that the statute is not overbroad on its face because here, it does not infringe on any protected speech, let alone a substantial amount of it.

B. Minn. Stat. § 617.247, subd. 3(a) is not overly broad as applied to O.R.W.

Defense counsel also asserts that Minn. Stat. 617.247, subd. 3(a) is overbroad or vague as applied to [redacted]'s act "because it makes teen sexting a crime." Def. Mem. 3, ¶ III.

A statute is unconstitutionally overbroad as applied if it prohibits constitutionally protected activity in the specific context of the facts and circumstances of the case. *Hall*, 887 N.W.2d at 856 (citing *Rew v. Bergstrom*, 845 N.W.2d 764, 780 (Minn. 2014)). Defense counsel's assertion is not precisely on point. In the instant case, the broader concept of "teen sexting" itself is not at issue: pornographic work involving a minor is, whether texted or disseminated by any other means. [redacted] sent [redacted] to another minor. The statute section at issue is very specific about what it is prohibiting: dissemination of (distributing to one or more persons) child pornography to a minor.

This Court finds that Minn. Stat. § 617.247, subd. 3(a) is clear as to what qualifies as pornographic work involving minors and that dissemination of it is prohibited. Therefore, the statute is not overbroad as applied in [redacted]'s case, which involves dissemination of child pornography.

C. Due Process is not violated by unreasonable government interference into [redacted]'s intimate life.

Defense counsel argues that [redacted]'s right to due process under the Minnesota constitution was "violated by unreasonable government interference into the most intimate aspects of normal teenage behavior." Def. Mem. 3, ¶ IV. As argued in counsel's memorandum, the central issue here relates to a right to privacy.

The Minnesota Supreme Court has recognized a right to privacy under the Minnesota Constitution in *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) ("[T]here does exist a right of privacy guaranteed under and protected by the Minnesota Bill of Rights."). At the national level, a constitutional right to privacy is protected as a fundamental right in certain matters of family, sex, and procreation. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394

U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). St. Br. 11. Consistent with the U.S. Supreme Court, Minnesota's protected privacy rights are limited to fundamental rights. *Gray,* 413 N.W.2d at 111. Therefore, a statute must "impermissibly infringe upon a fundamental right" to violate the constitution. *Id.* A fundamental right is one that derives "from natural or fundamental law…[which] triggers strict scrutiny to determine whether the law violates the Due Process Clause." Black's Law Dictionary (10th ed. 2014).

First, the fundamental right protected by those statutes is a right to control one's own body. *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988) "The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent." *Id.* Here, the charge is not what [redacted] did with her body in the privacy of her own room, which arguably would be protected from "interference into [redacted]'s intimate life." Rather, the charge is based on her conduct of having sent [redacted] to another minor. Under the statute's language, texting [redacted] is considered "dissemination," and dissemination of child pornography has not, to date, been determined to be a fundamental right. Therefore, no fundamental right has been violated here.

Second, defense counsel points out one parallel accommodation in Minnesota that protects a minor's right to privacy as applied to youth: "the Minnesota statutory rape laws take precautions to preserve the freedoms of consenting teens from prosecution while still providing stiff protection from predators and pedophiles." Def. Mem. 16 (citing Minn. Stat. §§ 609.342–45 and 609.3451). Counsel argues that because the minor pornography statute here offers no such exception, it cannot survive strict scrutiny. *Id.*

However, because this Court finds that no fundamental right has been impinged, rational basis is the correct standard in this case. Statutory provisions are presumed valid and ordinarily will be sustained if the classification established by the statute is rationally related to a legitimate state interest. *In re Welfare of M.L.M.*, 781 N.W.2d 381, 388 (Minn. Ct. App. 2010), aff'd, 813 N.W.2d 26 (Minn. 2012) (citation omitted). For the child pornography statute, that legitimate state interest is, quite reasonably, protecting children from being used and harmed in the making and distribution of pornography.[8] Minn. Stat. § 617.247, subd. 1.

[8] The State points out that section 617.247, subd. 3(a), does not incorporate harm to the child as an element of the crime. "Strictly construed, it requires only that a person disseminate pornographic work of a minor to another minor, knowing or having reason to know its character." St. Br. 17. However, harm *is* addressed in

Counsel further argues that applying the child pornography statute in this case is not necessary and that less restricted means are available for dealing with teen sexting. Again, the issue is not teen sexting per se; it is a pornographic video of a child. While there are less restrictive means to deal with teen sexting overall, including incidents like this one,[9] that issue is not before the Court and is a matter for the legislature. Here, the Court cannot find that the law reaches a fundamental right pertaining to child pornography that would violate due process.

D. Minn. Stat. § 617.247, subd. 3(a) is not overly broad on its face because it purportedly criminalizes the actions of a substantial amount of victims the law is designed to protect.

Defense counsel again argues that the statute is overbroad because it prohibits protected speech. Def. Mem. 3 ¶ I, 4. As written, the statute likely *might* criminalize "the actions of a substantial amount of victims"—minors—if recent surveys on teenaged sexting are any indication.[10] Many teens admit to having texted nude or sexually explicit photos or videos of themselves.[11] Whether a "substantial" number of victims are or would be affected in Minnesota

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subdivision 1, which provides that the purpose of the statute is "to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors." Minn. Stat. § 617.247, subd. 1.

[9] In Illinois, for example, if a child is found to have been "involved in electronic dissemination of indecent visual depictions, "he or she is adjudged "a minor in need of supervision." The disposition may order counseling or community service. 705 ILCS § 405/3–40; *see also* April Gile Thomas and Elizabeth Cauffman, *Youth Sexting as Child Pornography? Developmental Science Supports Less Harsh Sanctions for Juvenile Sexters.* 17 New Crim. L. Rev. 631 (2014). Vermont crafted a specific statute to address a "minor electronically disseminating indecent material to another person." The statute, 13 V.S.A. § 2802b, provides for a juvenile diversion program and even expungement once the minor reaches age 18. Subdivisions (b)(2) and (b)(3) specifically exclude subjection to sex offender registration. *Id.*

[10] *See, e.g.,* Power to Decide (formerly The National Campaign to Prevent Teen and Unplanned Pregnancy), *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008), https://powertodecide.org/what-we-do/information/resource-library/sex-and-tech-results-survey-teens-and-young-adults; Amanda Lenhart, *Teens and Sexting: Major Findings 3* (2009), Pew Research Center, Internet & Technology, http://www.pewinternet.org/2009/12/15/teens-and-sexting-major-findings/ (cited in Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 Harv. J. L. & Gender 687, 689 (2010).

[11] John Rosengren, *Sext Ed*, Minnesota Monthly (2017), http://www.minnesotamonthly.com/Minnesota-Life/Sext-Ed/; Pat F. Bass, *Pediatrician's Primer on Sexting*, Contemporary Pediatrics (Modern Medicine Network) (2016) ("[R]ecent reports estimate prevalence of sexting as between 15% and 28% of adolescents, with the numbers much greater after they enter college.") (citing J. R. Temple et al., *Brief Report: Teen Sexting and Psychosocial Health.* 37 J. Adolesc. 33-36 (2014)), http://contemporarypediatrics.modernmedicine.com/contemporary-pediatrics/news/pediatrician-s-primer-sexting.

is not quantified, so it is not possible to assess how many minors the application of this statute might affect.[12] Nonetheless, teen sexting in general is not the issue; child pornography is, which is not protected speech. As discussed in paragraph II.A above, for this reason the statute in not unconstitutionally overbroad.

There is no argument whether [redacted] is pornographic under Minn. Stat. § 617.246, subd. 1(f)(1) and (2)(i) or that she sent it to [redacted], ostensibly in violation of Minn. Stat. § 617.247, subd. 3(a): [redacted] meets the statute's definition of pornographic work, and the Minnesota Jury Instruction Guide clarifies that "dissemination" means to distribute. 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 12.82. There is no argument as to who the child is who made it, or that she texted it to another minor using her cell phone. On the other hand, the issue of criminalizing the actions of the minors the statute is designed to protect is highly concerning to this Court. This is a matter of statutory construction and legislative intent and is addressed next.

E. Prosecution of teen sexting under Minn. Stat. § 617.247, subd 3(a), produces absurd and unreasonable results by criminalizing minors when (1) the purpose of the statute is to protect minors and (2) the statute specifically and much more appropriately is designed to criminalize the activities of adults—including child molesters, pedophiles, and traffickers in pornography— who abuse, molest, and harm children by using them in creating and disseminating pornographic works.

Defendant asserts that the child pornography statute, as applied to [redacted], leads to an absurd result. "Each of the defendant juvenile's arguments require some level of statutory construction and analysis. Typically, unambiguous terms are given their plain meaning. [Minn. Stat. § 645.17] provides that 'the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.'" Def. Mem. 3. While the statute might not be constitutionally overbroad on its face or as applied to this child's conduct, the issue of an absurd, unreasonable, or unjust result falls within the realm of statutory interpretation, and necessarily involves a discussion of legislative intent.

[12] Rosengren, *supra* note 11.

This Court sees the real argument as whether a 14-year-old child who, of her own volition, texted [redacted] to a boy she wants to like her, should be prosecuted with a felony violation of child pornography law and suffer its associated punishments. More to the point, does subjecting this child to a record, possibly involving some form of detention or long-term probation, and a mandatory *ten years* on a predatory sex offender registry—not to mention years of effects on her higher education, employment, and housing opportunities—create an absurd, unreasonable result?[13] This Court finds that it does.

1. **The purpose and intent of Minnesota's child pornography statute does not support adjudicating [redacted] delinquent for disseminating child pornography and instead produces an absurd, unreasonable, and unjust result that utterly confounds the statute's stated purpose.**

To determine legislative intent, a court first examines the language of the statute to determine whether, on its face, it is clear or ambiguous. *See Amaral v. Saint Cloud Hosp.,* 598 N.W.2d 379, 384 (Minn. 1999). In addition, statutory constructions requires construing words and phrases according to their plain, ordinary meaning. *Hince v. O'Keefe,* 632 N.W.2d 577, 582 (citing *State by Beaulieu v. RSJ, Inc.,* 552 N.W.2d 695, 701 (Minn. 1996).

The statute's stated purpose is to protect minors from *being victimized* by participating in child pornography. The syntax of the statute implies someone *else* (a "person") is victimizing the child (a "minor"). This distinguishes the perpetrator (a person who is victimizing a minor child) from the victim (a minor who is being victimized). [redacted] is presumably a "person" according the plain language of the statute in § 617.247, subd. 3. This suggests, but does not say, that [redacted] can perpetrate a crime against herself.

In addition, the penalties under Minn. Stat. § 617.247 are severe, adult-offender penalties; they clearly do not contemplate children as offenders. Yet "person" would seem to include such children. In this sense, the statute is ambiguous—it seems to implicate minors by use of the word

[13] Although a serious debate exists over whether it is appropriate to punish teenagers engaged in sexting in the criminal and juvenile justice systems, "[s]ome law enforcement officers and district attorneys have begun prosecuting teens who created and shared such images under laws generally reserved for producers and distributors of child pornography." Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 Harv. J. L. & Gender 687, 689 (2010).

"person," yet distinguishes between person and minor as separate entities in defining child pornography. Moreover, the severe penalties strongly suggest that the statute targets adults who abuse children and traffic in child pornography, not minors who send explicit photos or videos to each other. By using the generic term "person," the statute implies that, by taking and disseminating photos of themselves, minors are involving themselves and other minors in child pornography and are subject to serious criminal penalties.

Are we to understand that [redacted] "victimized" herself when she created and texted [redacted] of herself to a boy she liked? In other words, is this statute meant to also protect teenagers from themselves when they willfully photograph or record themselves in a sexually explicit manner and then send the image or video to a peer? If so, does the legislature mean to criminalize the child who does so in order to "protect" her or him from being victimized? This is unclear from a straight reading of the statute's text.

Courts are to construe a statute to "avoid absurd or unjust consequences." *Id.* (citing *Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434, 441 (1961).[14] This is where the statute fails as prosecuted here in this case.

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a *result demonstrably at odds with the intentions of its drafters* [here, protecting children]....In such cases, the intention of the drafters, rather than the strict language, controls.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (citation omitted) (emphasis added). Case law supports this tenet: "This court's interpretation of statutes is guided by well-established principles that require fidelity to legislative intent." *R.S. v. State*, 459 N.W.2d 680, 690 (Minn. 1990) (Popovich, C.J., dissenting).

Minn. Stat. § 645.17 lists the presumptions by which a court may be guided in ascertaining legislative intent. Of the five factors, the salient one in the instant case is "[t]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable."[15] *Id.*

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[14] "The general terms of a statute are subject to implied exceptions founded on rules of public policy and the maxims of natural justice so as to avoid absurd and unjust consequences." *Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434, 441 (1961).

[15] Absurd means "ridiculously unreasonable, unsound, or incongruous" Merriam-Webster, https://www.merriam-webster.com/dictionary/absurd; or according to Oxford, "Wildly unreasonable, illogical, or inappropriate." Oxford University Press, https://en.oxforddictionaries.com/definition/absurd).

The "absurd results doctrine" is "a statutory tool of construction that allows an interpretation that departs from the plain meaning of the text when a literal reading produces absurd results."[16] The doctrine acts as "an important safety valve" that give judges the discretion to "avoid the inevitable difficulties that arise when general language is applied to concrete circumstances."[17]

This Court is not to give effect to plain meaning if it produces an absurd result that conflicts with the purpose of the statute—here, protecting children. *Olson v. Ford Motor Co.*, 558 N.W.2d 491 [485, 494] (Minn. 1997). "While we recognize our obligation to follow the plain meaning of the words of a statute when they "are sufficient in and of themselves to determine the purpose of the legislation... we are equally obliged to reject a construction that leads to absurd results or unreasonable results which utterly depart from the purpose of the statute." *Wegener v. Comm'r of Revenue*, 505 N.W.2d 612, 617 (Minn. 1993), *as amended on reh'g* (Nov. 19, 1993) (citation omitted). This means that, in the "exceedingly rare case in which the plain meaning of the statute 'utterly confounds' the clear legislative purpose of the statute," the courts must interpret a statute "according to its purpose rather than its plain meaning." *STRIB IV, LLC v. Cty. of Hennepin*, 886 N.W.2d 821, 827 (Minn. 2016) (citing *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 651 (Minn. 2012)); *see also Wegener,* 505 N.W.2d at 617.

This is the situation we have here. Applying the child pornography statute's plain meaning to this case "utterly confounds [its] clear legislative purpose." *Hyatt v. Anoka Police Dept.*, 691 N.W.2d 824, 827 (2005) *(citing Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities,* 659 N.W.2d 755, 761–72 (Minn. 2003)). This Court finds that the reason the statute was enacted—its legislative purpose—is in direct conflict with its application in this case.

Although much research describes the potential harms of sexting,[18] prosecuting a 14-year-old girl consistent with Minn. Stat. § 617.247, subd. 3, which also imposes Minn. Stat. § 243.166 if she is adjudicated delinquent under the charged statute, does not "protect" her; it exacerbates and adds to any potential harms [redacted] might have set in motion for herself. The

[16] D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 BYU J. Pub. L. 73 (2012) (citing *United States v. Ron Pair Enter.*, 489 U.S. 235, 242 (1989), http://digitalcommons.law.byu.edu/jpl/vol26/iss1/4.

[17] John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2485 (2003).

[18] Thomas and Cauffman, *supra* note 9; Bass, *supra* note 11; Wastler, *supra* note 13.

consequences of applying the child pornography statute to these facts show the absurd and unreasonable result that ensues.

First, the adult penalties for this statute, especially sexual offender registration, not only contravene but fly in the face of the rehabilitative purposes of the juvenile justice system in Minnesota. Juvenile justice is intended to protect minors and offer rehabilitation. Minn. Stat. § 260B.198, subd. 1 ("If the court finds that the child is delinquent, it shall enter an order making any of the following dispositions of the case which are deemed necessary to the rehabilitation of the child…."). Specifically, the purpose of juvenile justice laws in Minnesota is

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

Minn. Stat. § 260B.001, subd. 2 (emphasis added). Subdivision 3 continues, "The laws relating to juvenile courts shall be liberally construed to carry out the purpose specified in subdivision 2."

Penalties for violating the child pornography statute, however, are severe. Adult offenders of § 617.247 are subject to the following on a first offense (penalties are doubled for a second or subsequent offense: (1) up to 7 years in prison, (2) up to $10,000 in fines, and (3) conditional release of 5 years following the prison term. Minn. Stat. §617.247, subd. 3. If adjudicated delinquent, a child would not face such dire consequences as in (1)–(3), and the impact of confinement would be lessened. However, under Minn. Stat. § 243.166, subd. 6, anyone, including a child, convicted *or adjudicated* under the child pornography statute *must* register as a predatory sexual offender for 10 years "or until the probation, supervised release, or conditional release period expires, whichever occurs later." A mandatory 5 years is added if the registrant fails to timely execute certain notification provisions (a felony); for a second offense, the registration requirement is for life. *Id.* The Court cannot modify the registration requirement.[19]

[19] In the disposition order for a juvenile under the charged statute, Minn. Stat. § 243.166, subd. 2 states that the Court *may not* modify the child's duty to register. Registration is required under subdivision 1a(b)(2).

Subjecting [redacted] and potentially other similarly situated young teens to these severe penalties and outcomes and their cascading effects would do the opposite of protecting them: these consequences would deepen their shame, burden them with onerous court-ordered conditions and requirements, and unfairly label them for years and potentially decades to come.[20] The punitive price is ruinous—an absurd, unreasonable, harmful result that this Court believes the legislature could not have intended, let alone anticipated.[21] Minn. Stat. § 645.17; *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 831 (Minn. 2012).

Second, the Minnesota child pornography statute and its associated consequences are designed to deter perpetrators of pornography featuring minors, namely, people who would abuse and victimize minors for their own prurient interests or for profit. Minn. Stat. § 617.247, subd. 1. Specifically, the statute's policy is "to protect minors from the physical and psychological damage" caused by "their being used" for those ends. This construction directly implies that another person, and not the child, is having the child pose or perform for that other person's use. *Id.* The stated intent is to penalize possession to protect minors who are "victimized" by such involvement—implying that the conduct is at the behest of another. *Id.* Under that logic, [redacted] is a minor who apparently victimized herself.

Finally, the law also is meant to protect minors from "future involvement in pornographic work depicting sexual conduct." *Id.* The text in this subdivision and its penalties do not even suggest that the law contemplates or takes aim at a young girl deciding on her own, by herself, in

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[20] "Above and beyond the direct consequences of a criminal conviction, the lifelong consequences of sex offender registration will influence a youth's living situation and future employment...as well as affect the youth's educational opportunities, future relationships, and psychological well-being. Furthermore, public access to sexual offender registries...opens the defendant up to be the target of hostility, discrimination, and possibly violence....This requirement...is likely to have devastating consequences on one's emotional wellbeing." Thomas and Cauffman, *supra* note 9, at 640 (citations omitted).

[21] In fact, the child pornography laws, as such, were implemented in 1982, long before cell phones existed. The laws were modified in 1983 to replace "obscene" with "sexual conduct which involves a minor," add a mental examination for anyone reoffending within 15 years, and add subdivisions 3 (dissemination) and 4 (possession). In 1999 the violation was upgraded from a gross misdemeanor to a felony, replaced "photographic depiction" with the much more broadly defined "pornographic work," and doubled certain penalties. In 2001, the legislature increased the penalty for possession from 3 to 5 years for a first offense and prescribed imprisonment and fines for a second offense under subds. 3 and 4. All of this is to say that sexting was virtually nonexistent before and at the time of the amendments, and could not have been imagined as an activity that would subject young people to these severe penalties.

the privacy of her own room, to [redacted] and send it to a boy her own age whom she likes.

Even if the legislature intended to protect juveniles from those kinds of harm when volitionally perpetrated by themselves, "many states have taken the position that 'charging teens with child pornography offenses for the producing of sexting images serves to victimize them, not protect them' and the majority of the teen sexters are not the predators child pornography laws are designed to protect children from."[22] The punishment is vastly disproportionate to this girl's "crime." This Court cannot see how subjecting [redacted] to registering as a sexual offender would protect her or teach her anything but that the justice system is cruel and unjust.[23] The idea that heavy-handed enforcement of pornography laws is going to help these misguided, struggling teens is itself absurd. Such an outcome is in direct contravention with the statute's purpose of protecting children, as well as the purpose of juvenile court, discussed below.

2. The effect of applying Minnesota's child pornography statute to a child who disseminated [redacted] she willingly (if naively) made of herself evokes Eighth Amendment concerns based on disproportionality and cruelty.

Although none of the briefs directly argue the Eighth Amendment as it might pertain to this case,[24] the punitive consequences this girl faces raises Eighth Amendment concerns of cruel and unusual punishment for one so young and immature.[25] According to one author, "there is a profound and troubling irony in prosecuting minors who are sexting with child pornography

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[22] Whitney Strachan, A *New Statutory Regime Designed to Address the Harms of Minors Sexting While Giving A More Appropriate Punishment: A Marrying of New Revenge Porn Statutes with Traditional Child Pornography Laws*, 24 S. Cal. Rev. L. & Soc. Just. 267, 279–80 (2015) (citations omitted); Thomas and Cauffman, *supra* note 9 at 634 ("[B]y prosecuting perpetrators of juvenile sexting, child pornography laws are now being use to punish the very same individuals the law originally intended to protect.").

[23] "The restrictions that come with sex offender registration were developed with the most heinous offenders in mind, but are arguably disproportionate for cases involving minors who…send an ill-advised photo of themselves to a boyfriend or girlfriend." Thomas and Cauffman, *supra* note 9, at 640.

[24] Except in passing in Defendant's Memorandum of Law, ¶ 1: "Charging the victim with a felony that would have her labeled a predator on state and federal registries is cruel." Def's Mem. 1.

[25] "The final principle inherent in the [Eighth Amendment cruel and unusual] Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary…. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted…the punishment inflicted is unnecessary and therefore excessive. *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (citations omitted). *See also* Ioana Tchoukleva, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 Cal. L. Rev. Circuit 92.

charges; child pornography laws, after all, are meant to protect minors from sexual abuse, not to punish them."[26]

The Minnesota Rules of Juvenile Delinquency Procedure, an outgrowth of the Juvenile Court Act, were developed, in pertinent part, "to assure that the constitutional rights of the child are protected." Minn. R. Juv. Del. P. 1.02. Protection from cruel and unusual punishment would be one of them.[27] This is why juveniles are adjudicated rather than convicted, and otherwise treated differently: "As a society, we generally refuse to punish our nation's youth as harshly as we do our fellow adults, or to hold them to the same level of culpability as people who are older, wiser, and more mature."[28, 29] Criminalizing the (often impulsive) acts of texting minors must include consideration of the developing mind of a young person.[30] This Court questions whether Minnesota legislators want to criminalize youths for being immature and of poor judgment—youths who in all likelihood haven't the vaguest idea that what they are doing is felonious because so many of them do it, apparently without a thought.[31] If this is the intention, it should be seriously reconsidered.[32]

It is an absurd outcome when a juvenile who sends a [redacted] to a boy her age is punished as harshly as an adult who films himself performing sexual acts with a minor and

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[26] Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 CommLaw Conspectus 1, 60 (2009).

[27] *See Miller v. Alabama,* 567 U.S. 460 (2012).

[28] *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569 (2005) (finding that juveniles' immature judgment, lack of self-control, susceptibility to peers, and developing personalities reduced their culpability).

[29] "The juvenile justice system was based on individualized rehabilitation and treatment, civil jurisdiction, informal procedure, and separate incapacitation," in recognition that "fundamental differences between children and adults called for lesser punishments." Tchoukleva, *supra* note 25, at 98 (citations omitted).

[30] *See, e.g., Roper v. Simmons*, 543 U.S. at 569; *Miller v. Alabama,* 567 U.S. at 471–72 (holding that children are constitutionally different from adults); *Graham v. Florida*, 560 U.S. 48, 68, 70–73 (2015) (expanding *Roper's* "diminished culpability" rationale concerning juveniles).

[31] Teens are more likely to be concerned about social ramifications than legal ones, of which they are less aware. Even then, two school resource officers and a teacher, responding to the impact of sharing information on the criminal consequences of sexting, all described the utter lack of awareness and the "shock factor" among students and parents alike. Harris et al., *Building a Prevention Framework to Address Teen "Sexting" Behaviors.* Office of Juvenile Justice and Delinquency Prevention, National Criminal Justice Reference Services, No. 244001, 40-42 (2013), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244001.pdf.

[32] For one thing, typical acts of sexting, like this one, while "pornographic" by statutory definition, do not portray or involve sexual abuse or exploitation of a child by another. Nunziato, *supra* note 7, at 76.

then distributes it, usually for profit.[33] "Disproportion of this magnitude could rise to the level of cruel and unusual punishment...."[34]

Minn. Stat. § 260B.255, subdivision 1, provides that "[a] violation of a state or local law or ordinance by a child before becoming 18 years of age is not a crime...," subject to exceptions that do not apply here. But, Minn. Stat. § 243.166 states that registration is *required* and *may not be modified* by a court:

> A person shall register under this section if...the person was charged with... possessing pornographic work involving a minor in violation of section 617.247, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances....

Subd. 1b(a)(2). Juveniles are specifically included under subdivision 2, "Notice":

> When a person who is required to register under subdivision 1b, paragraph (a), is sentenced or becomes subject to a juvenile court disposition order, the court shall tell the person of the duty to register under this section and that, if the person fails to comply with the registration requirements, information about the offender may be made available to the public through electronic, computerized, or other accessible means. The court may not modify the person's duty to register in the pronounced sentence or disposition order.

Even if a juvenile (who typically is adjudicated) cannot be convicted of a crime, he or she can still be criminally penalized or "regulated" according to adult rules, in the case of sexual offender registration and public access to this personal information.[35] This paradoxical outcome

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[33] When child pornography statutes promulgated to protect children "are simultaneously used to prosecute" them, such statutes "have the potential to do more harm than good." Specifically, the authors assert that charging a child with a felony and requiring registration as a sex offender "is a misappropriation of justice." The authors cite well-established research showing that executive functioning in the brain—which allows mature decision-making to replace the impulsivity, risky behavior, and susceptibility to peer pressure that characterize youthful actions—develops well into early adulthood. In light of this, the authors advocate for a "developmentally appropriate" response. Thomas and Caufman, *supra* note 9, at 646–47 (citations omitted).

[34] Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 First Amend. L. Rev. 98, 146 (2010). *See also Graham v. Florida*, 560 U.S. 48; *Miller v. Alabama,* 567 U.S. 460.

[35] In Minnesota, registering as a predatory sexual offender is considered a "regulatory, collateral outcome" aimed at law enforcement, and not a punishment. *Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999) (P. Anderson, J., dissenting) (Although the legislature did not indicate whether the registration statute, Minn. Stat. § 243.166, was intended to be punitive or regulatory, the court found that it was a "civil, regulatory statute."). But to a child, it is a heavy consequence regardless of how it is categorized. "Being labeled a 'predatory offender' is injurious to one's reputation." *Id.* at 718.

[redacted]

emphasizes the disproportionality of the "consequence" of registration—aimed at pedophiles, traffickers in child pornography, and serious adult offenders—to the offense in this case. In this Court's opinion, it is cruel to require a 14-year-old girl, who volitionally texted [redacted] herself to another boy her age so he would like her, to register as a "predatory sexual offender." This Court cannot find that [redacted]'s behavior is the sort targeted when the State passed its child pornography statute and increased it its penal consequences over time.

Conclusion

This Court finds that prosecuting [redacted] under felony statutes originally aimed at the child pornography industry is not the intent of the law. A prosecution in this case produces an absurd, unreasonable, and unjust result that utterly confounds the stated purpose of the statute: to *protect* minors from victimization by others who would use them in making and disseminating child pornography. As implemented in this case, the required punitive measure of registering as a predatory sexual offender for a young child so prosecuted is inappropriate, unreasonably harsh if not cruel, and enormously disproportionate. As such, conviction under this statute is certain to be harmful to the child rather than rehabilitative. If the goal of juvenile justice is to rehabilitate a wayward child, this prosecution and its sentencing requirements are not the way to do it. On these bases, this Court finds that the charge of disseminating child pornography against [redacted] results in an absurd and deleterious outcome that the legislature could not have intended, an outcome that utterly confounds the statute's stated purpose. Therefore, the charge must be dismissed.

J.T.C.