NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA JERMAIN NELSON,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

On Petition For Writ of Certiorari to the First Court of Appeals at Houston, Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a statute unconstitutional, on its face, when it is a content-based restriction that severely criminalizes a substantial amount of harmless speech between adults – speech that is protected under the First Amendment?

2. Is a statute unconstitutional, on its face, under the First Amendment, when it criminalizes thought?

3. Is a statute unconstitutionally overbroad under the Fifth and Fourteenth Amendments to the United States Constitution when its definitions are so vague and ambiguous that it fails to provide a person of ordinary intelligence fair notice of what is prohibited, and when it is so standardless that it authorizes or encourages seriously discriminatory enforcement?

4. Is a statute unconstitutional under the Fifth and Fourteenth Amendments when it does not have a *mens rea* requirement as to the age of the alleged minor?

PARTIES TO THE PROCEEDING

Joshua Jermaine Nelson – Petitioner

State of Texas – Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Joshua Jermaine Nelson, respectfully petitions for a writ of certiorari to review the judgment of the First Court of Appeals at Houston, Texas.

OPINIONS BELOW

The Texas Court of Criminal Appeals refused a Petition for Discretionary Review without written opinion. The notice of that refusal is Appendix 1. Petitioner did not move for rehearing of that refusal. The judgment and opinion of the First Court of Appeals at Houston, Texas in Docket No. 01-19-00325-CR, affirming the district court's denial of Petitioner's Writ of Habeas Corpus challenging the constitutionality of the statute involved, is unpublished and is Appendix 2. There was no Motion for Rehearing filed as to that opinion. The trial court denied the writ of habeas corpus by written order. Appendix 3.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals' refusal of the petition for discretionary review of the opinion of the First Court of Appeals was issued on February 26, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Appendix 1. This petition is timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. Amend. I.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

This is a First Amendment facial challenge to a content-based restriction on speech and thought, § 33.021(c), Texas Penal Code. The First Court of Appeals in Houston, Texas, did not treat this as a content-based restriction on speech (or thought), and as a result applied the wrong presumption—that the statute is valid.

This case presents a fundamental question of constitutional dimensions that arises from a statute that is a content-based restriction on a substantial amount of harmless speech between adults – speech that is protected under the First Amendment – and that severely criminalizes that harmless speech (and thoughts). The challenged statute is similar to statutes in many other states—statutes that have similar constitutional deficiencies in that they criminalize thought.

But the Texas Court of Criminal Appeals refused to hear this case. This even though this case is a parallel case to one heard by the Texas Court of Criminal Appeals wherein, at oral arguments, on February 15, 2017, the State of Texas admitted that this statute is a content-based restriction on speech.[1] However, instead of addressing the ***Leax*** case on the merits of the unconstitutionality of the challenged statute, the Texas Court of Criminal Appeals disposed of that case on procedural grounds, without addressing the unconstitutionality of the statute. Then, when again presented with the opportunity to address the unconstitutionality of the statute, the Texas Court of Criminal Appeals shirked its responsibility to do so by refusing to review the lower court's decision in this case. Hence this Petition.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On February 2, 2015, the State of Texas charged Petitioner by indictment with a second degree felony under § 33.021(c), Texas Penal Code.[2]

Before trial, Petitioner filed a writ of habeas corpus alleging that § 33.021(c),

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[1] *See* ***Leax v. State***, 541 S.W.3d 126 (Tex. Crim. App. 2017). The recording of the oral argument before the Texas Court of Criminal Appeals and the State's admission may be found at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=97c3d08c-d48b-4830-9476-e1366c432886&coa=coscca&DT=OTHER&MediaID=9285c187-1255-4bf7-b647-c8698bdecfb3
The State's counsel's argument begins at the 11:10 mark. At the 11:23 mark, State's counsel stated, "The Appellant is correct. This is a content-based regulation." In any other context, this would be a judicial admission binding on the State of Texas.

[2] C.R. p. 2.

Texas Penal Code, is facially unconstitutional.[3]

On April 22, 2019, the trial court denied Petitioner all relief on his writ of habeas corpus.[4]

On April 30, 2019, Petitioner filed his notice of appeal.[5]

On November 26, 2019, by written opinion, the First Court of Appeals, in Houston, affirmed the trial court.[6] No motion for rehearing was filed.

On February 26, 2020, the Texas Court of Criminal Appeals refused the Petition for Discretionary Review, without written opinion.[7]

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is de novo.[8]

Further, statutes that restrict speech based on its content, such as the statute at issue herein, are presumptively invalid and subject to strict scrutiny.[9] This while

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3 C.R. pp. 86–115.

4 C.R. p. 116. Appendix 3.

5 C.R. pp. 117–118.

6 Appendix 2.

7 Appendix 1.

8 *See* ***Salve Regina College v. Russell***, 499 U.S. 225, 231-232 (1991).

9 ***Davenport v. Washington Ed. Assn.***, 551 U.S. 177, 188 (2007); ***R.A.V. v. St. Paul***, 505 U.S. 377, 382 (1992).

restricting a person's thoughts.[10]

And because the state court did not construe the statute in terms of a prohibition on protected speech between adults, this Court is not bound by the decision of the state court.[11]

REASONS FOR GRANTING THE WRIT

Section 33.021(c), Texas Penal Code, is a content-based restriction that severely criminalizes thought and a substantial amount of harmless speech between adults—speech and thought that are protected by the First Amendment. It is, therefore, unconstitutional.

IMPORTANCE OF CASE:

Texas, like every other state, has sought to criminalize the solicitation of "minors".[12] Many of these statutes refer to solicitation that occurs using a computer or over the Internet.[13] Because there are similar statutes, in all states, most with similar constitutional defects, this Court's opinion will affect the jurisprudence in most, if not all states of the Union.

Further, there are still cases pending in the State of Texas, awaiting trial, where the defendants are charged under this statute. The Court's decision on this case will

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[10] *See* ***Stanley v. Georgia***, 394 U.S. 557, 565–66 (1969) (holding government does not have right to control moral content of person's thoughts).

[11] ***Wisconsin v. Mitchell***, 508 U.S. 476, 484 (1993).

[12] See Appendix 4. This is a listing of similar criminal statutes complied by the ABA Young Lawyers Division Public Service team. It is incorporated by reference for all purposes.

[13] *Id.*

therefore affect not only your Petitioner but also pending and disposed of cases in Texas. The decision herein will also directly affect many cases in at least 30 other states, *infra.*

Unfortunately, every case that has analyzed the challenged statute has incorrectly concluded that the statute regulates conduct, not speech.[14] This, even though it is not a defense to prosecution that the solicited meeting did not occur.[15] Or that the actor did not intend for the meeting to occur.[16] Or that the actor was engaged in fantasy at the time of the commission of the offense.[17]

And by holding that Section 33.021(c) is not a content-based restriction on speech, but only regulates conduct, the court below has decided an important question of federal law, *whether Section 33.021 is a content-based restriction on speech*, in a way that conflicts with the applicable decisions of this Honorable Court.

STATUTE AT ISSUE:

Section 33.021(c), Texas Penal Code, provides:

> A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet

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[14] *See, e.g.,* ***Ex parte Victorick***, 453 S.W.3d 5 (Tex. App. – Beaumont 2014, pet. ref'd, cert. denied 135 S.Ct. 1557 (2015); ***Zavala v. State***, 421 S.W.3d 227 (Tex. App. – San Antonio 2013, pet. ref'd).

[15] § 33.021(d)(1), Texas Penal Code. This provision continues in the amended statute effective September 1, 2015.

[16] § 33.021(d)(2), Texas Penal Code.

[17] § 33.021(d)(3), Texas Penal Code.

another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.[18]

Section 33.021(a)(1), Texas Penal Code defines a minor as:

(A) an individual who represents himself or herself to be younger than 17 years of age; or
(B) an individual whom the actor **believes** to be younger than 17 years of age.[19]

On its face, the statute appears to pass constitutional muster. But upon peeling the proverbial onion, one is smacked with its severe constitutional deficiencies.

How? Because a communication is the imparting or interchange of thoughts, opinions, or information by speech, writing, or signs.[20] In short, communication is speech, whether verbal, or oral, or conduct, or through depictions.

Although difficult, it might be possible to imagine something happening "over the Internet, by electronic mail or text message or other electronic message service or system" that is *not* a *communication*. But the vast majority of such things are communications. So this statute concerns itself with communications. The statute does not concern itself with *all* communications, but only with communications that appear

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[18] This statute was amended, effective September 1, 2015.

[19] Bold emphasis supplied. The current statute, effective September 1, 2015, changes subpart (A) to someone who is actually younger than 17 years of age. Subpart (B) remains unchanged. To that extent, the change in the statute has not mooted this appeal.

[20] Source: Random House Dictionary, © Random House, Inc. 2020.

to solicit sex with a "minor."[21] And it does not address conduct.[22] So to determine whether someone has violated this statute, a factfinder must review the content of a communication. Not *all* content is restricted.

Only communications that discuss a particular *subject matter* — sex — are forbidden.

Only communications that discuss a particular *topic* — meeting for sex — are forbidden.

Only communications that express a particular *view* — that the communicator would like to meet a "minor" for sex — are forbidden.

Only communications that demonstrate a particular *underlying thought* — the communicator's desire to meet with a "minor" for sex — are forbidden.

Where, as here, it is necessary to look at the content of the communication to decide if the speaker violated the law, a restriction is content-based.[23]

And these communications are not conduct—they are all communications and, therefore, speech.

The fact that someone might have to type the letters on a QWERTY keyboard or dictate them on a program such as Dragon Dictate® and then hit the SEND button,

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[21] The problems with the term minor are discussed below. Under this statute, it is not someone under the age of majority.

[22] Conduct: personal behavior; way of acting; bearing or deportment. Source: Random House Dictionary, © Random House, Inc. 2020.

[23] ***Turner Broadcasting Sys., Inc. v. FCC***, 512 U.S. 622, 643 (1994); ***Gresham v. Peterson***, 225 F.3d 899, 905 (7TH Cir. 2000).

does not change these communications into conduct. Any more than letters written from one person to another and mailed are not communications, but, to use the Texas courts' logic, only conduct expressed in the writing on paper. Unfortunately, that is the logic that the court hereunder (and other Texas courts that have analyzed this statute) used to "reason" that the communications over the internet are not speech but only conduct.

And the fact that it is not a defense to prosecution if the meeting did not occur[24] emphasizes the fact that it is speech that is criminalized—not conduct. Further, this statute criminalizes sexual communication between consenting adults even where both of them know that one of them is (mis)labeled as a "minor" under the statute. That is unconstitutionally overbroad.

NINE CATEGORIES OF UNPROTECTED SPEECH:

Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "historic and traditional categories [of expression] long familiar to the bar...."[25] To rebut the presumption that § 33.021(c), Texas Penal Code is invalid, the State must show that the restricted speech falls into one of a few narrowly-defined categories of historically unprotected speech.

> "Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called "fighting words"; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the

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[24] § 33.021(d)(1), Texas Penal Code.

[25] ***United States v. Stevens***, 559 U.S. 460, 468 (2010).

> government has the power to prevent, although a restriction under the last category is most difficult to sustain. These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules."[26]

All speech that does not fall into one of these nine categories is protected speech under the First Amendment.

The only one of these categories into which the speech restricted by Section 33.021(c) could possibly fall is that of *speech intended and likely to incite imminent lawless action*—in a word, "incitement." "Many long established criminal proscriptions — such as laws against conspiracy, incitement, and solicitation — criminalize speech (commercial or not) that is intended to induce or commence illegal activities."[27]

ADULT SPEECH IMPACTED:

On presentment of Petitioner's Writ challenging the constitutionality of the statute, Petitioner offered the sworn declaration of Paul Dohearty on the prevalence and scope of ageplay. This was an exhibit to his writ.[28] And the affidavit stands uncontradicted and unimpeached on this record.

This affidavit details the prevalence of ageplay among adults – roleplaying by consenting adults wherein they take on different age-related roles. The affidavit details the prevalence of ageplay events, the availability of ageplay merchandise and

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[26] ***United States v. Alvarez***, 567 U.S. 709, 716–717 (2012).

[27] ***United States v. Williams***, 553 U.S. 285, 298 (2008).

[28] C.R. pp. 100–115; Appendix 5.

services, the books and articles that are available on ageplay, and ageplay in the media. The affidavit concludes that "Ageplay is a significant part of many lives as well as the larger alternative sexuality community."

In short, ageplay is adult speech, not conduct. Ageplay is also adult speech that is legal.

But ageplay is harmless adult speech that is criminalized under this statute.

BEYOND ADULT AGEPLAY:

Because of the way the statute defines the term "minor", *infra*, innocent adult speech and conduct is criminalized.

Representing oneself to be younger than 17 is not limited to telling someone that you are 16-years-old. It would also encompass an adult who attends a costume ball dressed up as Lolita,[29] Little Bo Peep, Little Lord Fauntleroy, Jack or Jill (of Jack and Jill fame), any of the My Gang characters, or even Harry Potter. Representation would also encompass an adult who acts in a skit, play or movie, portraying Lolita,[30] Little Bo Peep, Little Lord Fauntleroy, Jack or Jill, any of the My Gang characters, or even Harry Potter. By dressing up as or playing these characters, these adults will have represented themselves to be younger than 17 years of age.

And under § 33.021(c), another adult who sends a text message or an email to the adult who played or came dressed as Lolita, or Little Bo Peep, or as any of the

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[29] Vladimir Nabokov, Lolita (Weidenfeld & Nicolson 1959). Lolita is the private name for the 12-year-old, Dolores Haze.

[30] *Id.*

other characters listed above, asking him or her to meet the sender of the email or text message so that they can have sex, will have violated § 33.021(c). Whether these adults would be or are prosecuted under this statute is irrelevant to the Court's analysis.

Why? Because, even though they violate the strict letter of this law, there is nothing illegal in an adult sending an email or a text message to another adult seeking to meet and engage in sexual conduct. Under the First Amendment, this is protected speech. As such, this statute is a content-based restriction that severely criminalizes a substantial amount of harmless speech between adults that is protected under the First Amendment. That is unconstitutionally vague and overbroad.

Likewise, an adult who sends an email or text message to an adult whose email address happens to be little13yrold@aol.com or bornin2010@yahoo.com, or the like, soliciting a meeting for sex, will have violated § 33.021(c) because the recipient of that email will have represented themselves to be younger than 17.

But again, there is nothing illegal in an adult sending an email or a text message to another adult seeking to meet and engage in sexual conduct.

As such, this statute is a content-based restriction that severely criminalizes a substantial amount of harmless speech between adults that is protected under the First Amendment. That is unconstitutionally vague and overbroad. And this Court should so hold.

A statute is unconstitutionally overbroad under the First, Fifth and Fourteenth Amendments to the United States Constitution when its definitions are so vague and ambiguous that it fails to provide a person of

ordinary intelligence fair notice of what is prohibited, or when it is so standardless that it authorizes or encourages seriously discriminatory enforcement.

MINOR:

In everyday parlance, a minor is a person under the legal age of full responsibility.[31] Stated another way, a minor is someone who has not reached full legal age; a child or juvenile.[32]

But in the challenged statute (or in those of the 30 other states with similar statutes, *infra*), a minor is not a minor as that term defined anywhere else in the Texas Penal Code, or in any other Texas statute.[33] Indeed, a minor is not even a person under the legal age of full responsibility, as commonly understood.[34]

Instead, Section 33.021(a)(1), Texas Penal Code defines a minor as:

(A) an individual who represents himself or herself to be younger than 17 years of age; or
(B) an individual whom the actor believes to be younger than 17 years of age.[35]

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[31] Source: Random House Dictionary, © Random House, Inc. 2020.

[32] Source: Black's Law Dictionary (11TH ed. 2019).

[33] *See, e.g.*, § 15.031(f), Texas Penal Code (2011) (younger than 17 years); § 43.24(a)(1), Texas Penal Code (2011) (younger than 18 years); § 481.134(a)(1), Texas Health & Safety Code (2011) (younger than 18 years); § 106.01, Texas Alcoholic Bev. Code (1986) (person under 21 years of age). *See also, e.g.*, § 22.011(c)(1), Texas Penal Code (2009) – definition of child as a person younger than 17 years of age; § 22.04(c)(1), Texas Penal Code (2011) – definition of child as a person 14 years of age or younger.

[34] Source: Random House Dictionary, © Random House, Inc. 2020.

[35] The current statute, effective September 1, 2015, changes subpart (A) to someone who is actually younger than 17 years of age. Subpart (B) remains unchanged. To that extent, the change in the statute has not mooted this appeal.

The constitutional problems with the definition of a minor being someone whom the actor believes to be younger than 17 years is addressed in detail below. That argument is incorporated by reference, for all purposes, here.

And this statute does not differentiate between those sort of emails and text messages exchanged between adults and those exchanged by an adult with someone who is actually under the age of 17 years.

It also does not differentiate between emails sent to a 16-year-old who has had their minor disabilities removed, whether through marriage or through a court petition.[36] So, the person who sends emails to that minor-disabilities-removed 16-year-old soliciting sex, knowing that the recipient is only 16 years old, is actually communicating with an adult. But that is a criminal act under this statute. This is overbroad.

REPRESENTS:

The use of the verb, "represents," in the definition of a minor, creates an ambiguity, for the Texas Legislature did not define the word and therefore, it has its common, ordinary meaning.[37] The ordinary meaning of represent is to portray or depict; present the likeness of, as a picture does; to present or picture to the mind.[38] This is consistent with the definition given to the word by the Supreme Court of Texas,

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[36] *See* Texas Family Code § 2.102 and Texas Family Code § 31.001, et seq. (2015).

[37] ***Gonzalez v. Guilbot***, 315 S.W.3d 533, 540 (Tex. 2010).

[38] Source: Random House Dictionary, © Random House, Inc. 2020.

when it said: "To represent' means 'to stand in the place of."[39] It also means, "to appear in the character of; personate; to exhibit; to expose before the eyes."[40] A far less common definition is to present in words; to describe, state, or set forth; often, to do so forcibly or earnestly so as to influence action.[41]

The statute does not define or delimit when, and to whom, this sort of representation has to have been made so as to bring the person making the representation under the statute's definition of a "minor." So, if a very thin, short and petite 18-year-old girl tells a bowling alley that she is only 13 years old in order to get a discount on bowling, she will have represented herself to be younger than 17 years of age. In such a situation, if later the same day she exchanges emails with another adult in the bowling alley discussing meeting to have sex, without ever having represented to that adult that she is 13 years old, the other adult will have violated this statute, nonetheless. That is unconstitutionally vague and overbroad.

Any of the adults engaging in ageplay, or attending a costume ball dressed as Lolita, or Little Bo Peep, or Little Lord Fauntleroy, or acting in a movie as any of those characters, will have represented themselves to be younger than 17. And soliciting sex from such an adult, via email, violates the statute. That is unconstitutionally vague and overbroad.

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39 ***Swayne v. Chase***, 88 Tex. 218, 214, 30 S.W. 1049 (1895).

40 Source: Black's Law Dictionary, Revised 4TH ed. ©1968

41 Source: Webster's New Twentieth Century Dictionary Unabridged, 2ND Ed. © 1983.

And an adult who uses an email of little13yrold@aol.com or bornin2010@yahoo.com, or anything similar, will have represented themselves to be younger than 17 years of age. And any adult, sending such person an email soliciting a meeting for sex, will have violated § 33.021(c). That is unconstitutionally vague and overbroad.

Further, the definition of minor in the statute has to be read in conjunction with the affirmative defense that is contained within § 33.021(e)(2), Texas Penal Code, that the "actor was not more than three years older than the minor and the minor consented to the conduct." This affirmative defense makes sense when a minor is defined as someone who is actually under the age of 17 or 18 years.[42] But it is completely illogical when the minor, as defined in the statute, is actually a 41-year-old, hairy-chested policeman who has entered a chat room, posing as a teenager and elicits emails from someone who asks the policeman to meet him and engage in sexual contact with him, especially when the policeman agrees to meet with person sending the email or text message.[43]

Why is the affirmative defense illogical and unusable? Because if the person soliciting the 41-year-old, hairy-chested policeman (the "minor") is between 41- and 44-years old, then the person doing the soliciting has an affirmative defense. But if the person soliciting the officer is 45-years old or older (or under 41 years of age), the

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[42] *See, e.g.*, § 15.031(f), Texas Penal Code; § 43.24(a)(1), Texas Penal Code.

[43] Again, § 33.021(a)(1)(A), Texas Penal Code – "Minor" means an individual who represents himself or herself to be younger than 17 years of age.

person does not have an affirmative defense, regardless of the fact that in this situation, both of the participants in the communications are above the full age of legal responsibility and are engaged in conduct that is fully protected by the First Amendment as between adults. That is not only unconstitutionally vague, it is unconstitutionally overbroad under the First, Fifth and Fourteenth Amendments.

As to the argument that it is necessary for the State to use these adult cops to serve as decoys in order to identify and trap these supposed predators, the State could just as easily use a 16-year-old as the decoy. With what is taught in schools and with what is available on the screen and on the internet, we are long since past the age of presuming that all persons under the age of 17 are sweet, innocent and know nothing about sex.[44] And, in fact, all States use age-appropriate decoys (persons under the legal age to buy) to determine whether establishments are selling alcohol to persons under the age of 21, or tobacco to persons under the age of 18 (or 21). This should be no different.

INTERNET:

To be prohibited, the communication must occur via the Internet. But the term, Internet, is not defined in the challenged statute, or in the statute as amended to be effective September 1, 2015.

In analyzing whether § 33.021(c), Texas Penal Code, gives fair notice of the conduct that is forbidden or required, this Court should consider the "land mine" that

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[44] One need only look at MTV's series, *16 and Pregnant* to see this fact.

is buried within the statute.[45]

This "land mine" is encompassed within the manner in which the statute says that a person commits an offense. The statute states that a person commits an offense if the person, over the ***Internet*** ... knowingly solicits a minor, etc..[Emphasis supplied] So, although the statute is not designed to encompass oral communications, if an actor talks on the telephone with someone who fits the statutory definition of a "minor" and the actor's or the "minor's" telephone service uses VoIP,[46] the actor will have violated the statute—even though the actor has not knowingly accessed the Internet, sent an electronic mail or text message, used another electronic message service or system, or gone through a commercial online service to make the solicitation. By not excluding oral communications and by not defining the word, "Internet," the Texas Legislature has back-door criminalized oral communications if they happen to occur on a telephone that uses VoIP.

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[45] Petitioner refers to this provision as a land mine because land mines are buried to avoid detection. Because they are buried and hidden, they inflict serious injuries on innocent civilians years, even decades after the hostilities have ended. *See, e.g.*, http://www.unicef.org/graca/mines.htm (Last accessed May 18, 2020); http://www.icbl.org/en-gb/problem/what-is-a-landmine.aspx (Last accessed May 18, 2020).

[46] VoIP – Voice over Internet Protocol. *See* Wittenberg, *Understanding Voice Over IP Technology*, 2-6 First Ed. 2009. voip – voice over Internet protocol: a technology or set of standards for delivery of telephone calls and other voice communications over the Internet, involving conversion of analog voice signals to digital form. Source: Random House Dictionary, © Random House, Inc. 2020. Common examples of this service are Vonage®, RingCentral® and Mitel®. Source: https://getvoip.com/ppc/business-voip/?keyword=voip%20phone%20service&gclid=CLXht-z3w80CFUmRfgodBycOkA (Last accessed June 25, 2016).

SOLICIT:

Solicit is not defined in the statute, so it has its ordinary meaning.[47]

One ordinary meaning of solicit is to ask for or try to obtain (something) from someone.[48]

Another ordinary meaning of solicit is to offer to have sex with someone in exchange for money.[49] The challenged statute makes no mention of money.

Still another ordinary meaning of solicit is to tempt or entice (another) to do wrong, or to accost (another) for some immoral purpose, as a prostitute does.[50]

So, what is prohibited? Is it merely asking to meet the "minor" for the purpose of having sexual contact, sexual intercourse, or deviate sexual intercourse; or is it offering (asking) the "minor" to meet and have sexual contact, sexual intercourse, or deviate sexual intercourse in return for the payment of money; or is it merely tempting or enticing the "minor"?

This Court has held that "[T]he terms of a penal statute … must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties … and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at

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47 ***Gonzalez v. Guilbot***, 315 S.W.3d 533, 540 (Tex. 2010).

48 Source: Oxford English Dictionary © 2020 Oxford University Press.

49 Source: Random House Dictionary, © Random House, Inc. 2020.

50 Source: Webster's New Twentieth Century Dictonary Unabridged, 2ND Ed. © 1983.

its meaning and differ as to its application violates the first essential of due process of law."[51] Such is it here.

Because of these ambiguities and vagueness, the statute does not give fair notice of what is proscribed or prohibited and it is, therefore, unconstitutionally vague and overbroad. This Court should so hold.

Section 33.021(c), Texas Penal Code, also criminalizes thought. It is, therefore, unconstitutional for this reason alone.

The statute criminalizes soliciting a minor with the intent that the minor will engage in sexual conduct, etc.. Section 33.021(c), Texas Penal Code. And the definition of a minor includes anyone whom the actor *believes* to be younger than 17 years of age. § 33.021(a)(1)(B), Texas Penal Code (emphasis added). It matters not that the "minor" is actually a 41-year-old, hairy-chested policeman who has entered a chat room, posing as a teenager and elicits emails from someone who then asks the policeman to meet him and engage in sexual contact with him.

As neither the term, believes, or the term, intent, is defined, they have their ordinary meaning.[52] Intent is the state of mind accompanying an act, especially a forbidden act.[53] It is also the state of a person's mind that directs his or her actions toward a specific object.[54]

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51 ***Connally v. General Construction Co.***, 269 U.S. 385, 391 (1926).

52 ***Gonzalez v. Guilbot***, 315 S.W.3d 533, 540 (Tex. 2010).

53 Source: Black's Law Dictionary (11TH ed. 2019).

54 Source: Random House Dictionary, © Random House, Inc. 2020.

And a belief is a "conviction of the truth of a proposition, existing subjectively in the mind, and induced by argument, persuasion, or proof addressed to the judgment."[55]

In short, a belief and intent are thoughts.

And the First Amendment protects thoughts just as it protects speech.[56] As this honorable Court warned,

> "The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[57]

Therefore, since the definition of a "minor" in the statute is alternatively couched in terms of a belief (thought), and since the statute requires intent to complete the crime, it violates the First Amendment's protections of thoughts. And this is unconstitutionally overbroad.

In many ways, Section 33.021(c), Texas Penal Code, is very similar to the statute at issue in ***Reno v. ACLU***, 521 U.S. 844 (1997).[58] Therein, this Court reviewed the

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[55] Source: Black's Law Dictionary Revised 4TH ed. ©1968, citing ***Keller v. State***, 102 Ga. 506, 31 S.E. 92 (1898).

[56] ***Wooley v. Maynard***, 430 U.S. 705, 714 (1977) (First Amendment protects "freedom of thought").

[57] ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234, at 252–53 (2002) (quoting ***Stanley v. Georgia***, 394 U.S. 557, 566 (1969)).

[58] The statute at issue there (Title 47 U.S.C.A. § 223(a)(1)(B)(ii) (1994 ed., Supp. II)) defined a minor as someone under the age of 18 years.

Communications Decency Act (CDA) which criminalized using a telecommunications device to transmit communication that is obscene or indecent, knowing that the recipient is under 18 years of age. The Court held the act to be an unconstitutional restriction on adult speech. In striking down the CDA, the ***Reno*** Court emphasized that, even where knowing communication with an actual minor is required to violate the law, burdens on adult speech are unacceptable if less restrictive alternatives are available; and sexual expression which is indecent but not obscene is protected by the First Amendment.

But since under the express terms of the statute at issue here, merely asking the "minor" completes the crime, the actor is being punished for thinking that the hairy-chested policeman is actually under the age of 17.

This Court has made it clear that only governmental regulations aimed at mere thought, and not thought plus conduct, trigger this principle. That is, regulations aimed at conduct which have only an incidental effect on thought do not violate the First Amendment's freedom of mind mandate.[59]

Had the Texas Legislature not eliminated the defense that the meeting did not occur,[60] then it would be much clearer that the statute is aimed at regulating conduct and not just thought or speech.

And, if the Texas Legislature had defined a minor as someone who is under the

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[59] *Id.*., ***Osborne v. Ohio***, 495 U.S. 103, 109 (1990).

[60] § 33.021(d)(1), Texas Penal Code. This provision continues in the amended statute effective September 1, 2015.

age of 17 years, or if they criminalized acting in reckless disregard of the risk that the other person is under the age of 17,[61] then the statute would be far less constitutionally infirm.

But by defining a minor as someone whom the actor believes to be younger than 17 years of age, or who represents themselves to be under 17 years of age, and not requiring that the meeting take place, the Texas Legislature has impermissibly criminalized thought.

That is constitutionally overbroad under the First Amendment, and this Court should so hold.

IMPORTANCE TO THE UNION:

To the extent that the statute defines the minor (or protected person) in terms of the actor's subjective belief, it is similar to statutes in many other states. As shown in Appendix 4, statutes in 30 other states—Alabama,[62] Alaska,[63] Arizona,[64] Florida,[65]

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[61] *See, e.g.* HI Rev. Stat. 707-756 (1)(a)(ii) and (iii).

[62] Alabama Code § 13-A-6-122 (A person who knowingly entices, induces, persuades, seduces, prevails, advises, coerces, lures, or orders, or attempts to entice, induce, persuade, seduce, prevail, advise, coerce, lure, or order, by means of a computer, on-line service, Internet service, Internet bulletin board service, weblog, cellular phone, video game system, personal data assistant, telephone, facsimile machine, camera, universal serial bus drive, writable compact disc, magnetic storage device, floppy disk, or any other electronic communication or storage device, a child who is at least three years younger than the defendant, **or another person believed by the defendant to be a child at least three years younger than the defendant** to meet with the defendant or any other person for the purpose of engaging in sexual intercourse, sodomy, sexual contact, sexual performance, obscene sexual performance, sexual conduct, or genital mutilation, or directs a child to engage in sexual intercourse, sodomy, sexual contact, sexual performance, obscene sexual performance, sexual conduct, or genital mutilation is guilty of electronic solicitation of

Georgia,[66] Hawaii,[67] Idaho,[68] Indiana,[69] Iowa,[70] Kansas,[71] Kentucky,[72] Louisiana,[73]

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a child).

[63] Alaska Stat. §11.41.452 ((a) A person commits the crime of enticement of a minor if the person, being 18 years of age or older, knowingly communicates with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455(a)(1)--(7) and ... (2) **the person believes that the other person is a child under 16 years of age**.)

[64] Arizona §13-3554 (B. It is **not a defense to a prosecution for a violation of this section that the other person is not a minor**.)

[65] Florida Stat. § 847.0135 ((3) Certain uses of computer services or devices prohibited.--Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to: (a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or **another person believed by the person to be a child** ...).

[66] Georgia Code 16-12-100.2 ((d)(1) It shall be unlawful for any person intentionally or willfully to utilize a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, instant messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child, another person believed by such person to be a child, ... (e)(1) A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with **someone he or she believes to be a child** ...)

[67] HI Rev. Stat. 707-756 (Any person who, using a computer or any other electronic device: (a) Intentionally or knowingly communicates: ... (iii) With another person **who represents that person to be under the age of eighteen years**))

[68] Idaho Code 18-1509a ("(1) A person aged eighteen (18) years or older shall be guilty of a felony if such person knowingly uses the internet or any device that provides transmission of messages, signals, facsimiles, video images or other communication to solicit, seduce, lure, persuade or entice by words or actions, or both, a person under the age of sixteen (16) years **or a person the defendant believes to be under the age of sixteen (16) years** to engage in any sexual act with or against the person...")

[69] IN Code § 35-42-4-6 ((b) A person eighteen (18) years of age or older who knowingly or intentionally solicits a child under fourteen (14) years of age, or an

Massachusetts,[74] Michigan,[75] Minnesota,[76] Montana,[77] Nebraska,[78] Nevada,[79] North

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individual **the person believes to be a child under fourteen (14) years of age**, to engage in sexual intercourse,....)

[70] IA ST §710.10 ("1. A person commits a class "C" felony when, without authority and with the intent to commit sexual abuse or sexual exploitation upon a minor under the age of thirteen, the person entices or attempts to entice **a person reasonably believed to be under the age of thirteen**. 2. A person commits a class "D" felony when, without authority and with the intent to commit an illegal sex act upon or sexual exploitation of a minor under the age of sixteen, the person entices or attempts to entice a **person reasonably believed to be under the age of sixteen**. 3. A person commits a class "D" felony when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen, the person entices **a person reasonably believed to be under the age of sixteen**.")

[71] KSA 21-5509 (formerly KS ST 21-3523) ("(a) Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act. (b) Electronic solicitation is a: (1) Severity level 3, person felony if the offender **believes the person to be a child 14 or more years of age but less than 16 years of age**; and (2) severity level 1, person felony if the offender **believes the person to be a child under 14 years of age**.")

[72] Kentucky Rev. Stat. 510.155 ("(1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor **if the person believes that the peace officer is a minor** or is wanton or reckless in that belief, ...")

[73] LSA-R.S. § 14:81.3RT ("A. (1) Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen where there is an age difference of greater than two years, or **a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger**,...")

[74] M.G.L.A. 265, § 26C ("(b) Any one who entices a child under the age of 16, or **someone he believes to be a child under the age of 16**,...")

Carolina,[80] North Dakota,[81] Oklahoma,[82] Rhode Island,[83] South Carolina,[84] South

[75] Michigan Stat. 750.145a ("A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or **an individual whom he or she believes is a child less than 16 years of age** with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or **an individual whom he or she believes is a child less than 16 years of age**....")

[76] Minn. Stat. 609.352 ("Subd. 2. Prohibited act. A person 18 years of age or older who solicits a child **or someone the person reasonably believes is a child** to engage in sexual conduct with intent to engage in sexual conduct is guilty of a felony and may be sentenced as provided in subdivision 4.
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, is guilty of a felony and may be sentenced as provided in subdivision 4: (1) soliciting a child or **someone the person reasonably believes is a child** to engage in sexual conduct; (2) engaging in communication with a child or **someone the person reasonably believes is a child**, relating to or describing sexual conduct; or (3) distributing any material, language, or communication, including a photographic or video image, that relates to or describes sexual conduct to a child or **someone the person reasonably believes is a child**.")

[77] Montana Stat. 45-5-625 ("(1) A person commits the offense of sexual abuse of children if the person: ... (c) knowingly, by any means of communication, including electronic communication or in person, persuades, entices, counsels, coerces, encourages, directs, or procures a child under 16 years of age or **a person the offender believes to be a child under 16 years of age** to engage in sexual conduct, actual or simulated, ...")

[78] Nebraska Stat. 28-320.02 ("(1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is **believed by such person** to be a child sixteen years of age or younger, ...")

[79] NRS 201.560(1)(b) ("(b) Another person whom he or she **believes to be a child who is less than 16 years of age** and at least 5 years younger than he or she is, regardless of the actual age of that other person, with the intent to solicit, persuade or lure the person to engage in sexual conduct.")

Dakota,[85] Vermont,[86] Virginia,[87] Washington,[88] West Virginia,[89] and Wisconsin[90]— all

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[80] North Carolina Stat. 14-202.3 ((a) Offense.--A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, or **a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant**, to meet with the defendant or any other person for the purpose of committing an unlawful sex act.")

[81] North Dakota Stat. 12.1-20-05.1 ("1. An adult is guilty of luring minors by computer or other electronic means when: a. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system or other electronic means that allows the input, output, examination, or transfer of data or programs from one computer or electronic device to another to initiate or engage in such communication with **a person the adult believes to be a minor**; and...")

[82] 21 OK Stat. 21-1040.13a ("A. It is unlawful for any person to facilitate, encourage, offer or solicit sexual conduct with a minor, or **other individual the person believes to be a minor**, ...")

[83] Rhode Island Stat. 11-37-8.8(a) ("(a) A person is guilty of indecent solicitation of a child if he or she knowingly solicits another person under eighteen (18) years of age or **one whom he or she believes is a person under eighteen (18) years of age** for the purpose of engaging in an act of prostitution or in any act in violation of chapter 9, 34, or 37 of this title.")

[84] S.C. Code Ann. 16-15-342(A) ("(A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or **a person reasonably believed to be under the age of eighteen**...")

[85] South Dakota Codified Law §22-24A-5 ("A person is guilty of solicitation of a minor if the person eighteen years of age or older: (1) Solicits a minor, or someone the **person reasonably believes is a minor**, to engage in a prohibited sexual act; ....")

criminalize conduct based on belief in the solicited person's supposed age. All of the statutes in these 30 other states have the same constitutional infirmity of criminalizing thought—infirmities that would be addressed by an opinion herein.

A statute is unconstitutional when it does not have a *mens rea* requirement as to the age of the alleged minor.

Twenty-three years ago, this Court examined what was then available on the Internet, including the number of people who access same, and the growth of

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[86] 13 Vermont Stat. § 2828 ("(a) No person shall knowingly solicit, lure, or entice, or to attempt to solicit, lure, or entice, a child under the age of 16 or **another person believed by the person to be a child under the age of 16**, to engage in a sexual act as defined in section 3251 of this title or engage in lewd and lascivious conduct as defined in section 2602 of this title.")

[87] Virginia Stat. 18.2-374.3 (C) ("C. It is unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or **has reason to believe is a child younger than 15 years of age** to knowingly and intentionally: ...")

[88] RCW 9.68A.090 ("(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone **the person believes to be a minor** for immoral purposes, is guilty of a gross misdemeanor.")

[89] W. Va. Code § 61-3C-14b ("(a) Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure, or attempt to solicit, entice, seduce or lure, **a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor**, ...")

[90] Wisconsin Stat. § 948.075 ("(1r) Whoever uses a computerized communication system to communicate with an individual **who the actor believes or has reason to believe** has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of § 948.02(1) or (2) is guilty of a Class C felony.")

subscribers that was to be expected.[91] As the Court observed,

> "Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community." "[92]

In ***Reno***, the Court reviewed the Communications Decency Act (CDA) which criminalized using a telecommunications device to transmit communication that is obscene or indecent, knowing that the recipient is under 18 years of age.

The CDA had a *mens rea* of knowing conduct. Nevertheless, the Court held the act to be an unconstitutional restriction on adult speech.

Compare the CDA to Section 33.021(c), Texas Penal Code, which is a felony of the second degree, carrying a potential penalty of two – twenty years incarceration, a fine of up to $10,000 and lifetime registration as a sex offender.

But Section 33.021(c) does not require a culpable mental state in so far as the actual age of the person solicited is concerned.

If the (putative) minor entered a chat room designed for adults, and the actor had posted a request to meet for sex, to which the putative minor responded, how is the actor supposed to know that? As the Court noted in ***Reno***,

> "The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective

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[91] ***Reno v. ACLU***, 521 U.S. 844 (1997).

[92] ***Reno***, 521 U.S. at 853.

> way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." "[93]

But the State of Texas does not care. Not one whit. Even if it was the "minor" who initiated the email, text message or VoIP exchange, the State need not prove that the defendant knew that the solicited person was younger than the age of 17, or even that he reasonably believed the solicited person was younger than the age of 17, or even that the actor acted in reckless disregard of whether the solicited person was or was not under the age of 17.

In short, it is a strict-liability crime. And that is constitutionally overbroad under the Fifth and Fourteenth Amendments.

CONCLUSION AND PRAYER

Petitioner prays that this Honorable Court grant certiorari to determine whether the challenged statute criminalizes thought and a substantial amount of harmless speech between adults, in violation of the First Amendment.

Petitioner also prays that this Honorable Court grant certiorari to determine whether the challenged statute is unconstitutionally overbroad under the First, Fifth and Fourteenth Amendments because its definitions are so vague and ambiguous that it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or when it is so standardless that it authorizes or encourages seriously discriminatory enforcement.

Petitioner further prays that this Honorable Court grant certiorari to determine

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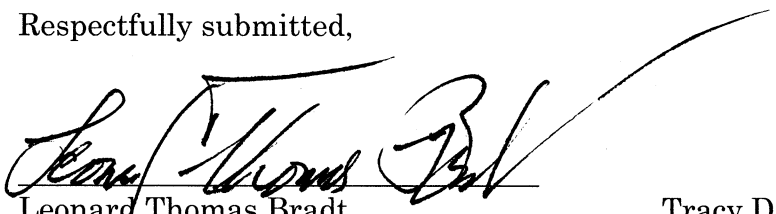
[93] ***Reno***, 521 U.S. at 855.

whether the challenged statute is unconstitutional because it criminalizes thought in violation of the First Amendment.

Lastly, Petitioner prays that this Honorable Court grant certiorari to determine whether online solicitation is a public welfare offense that can constitutionally be made a strict-liability crime, one that does not require a *mens rea* as to the age of the person solicited.

Petitioner prays for general relief.

Respectfully submitted,



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