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No. 88339-4

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

vs.

**Russell Homan,**

Respondent.

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Lewis County Superior Court Cause No. 11-1-00036-7

The Honorable Judge Nelson Hunt

**Respondent's Second Supplemental Brief**

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## SUPPLEMENTAL ISSUES<sup>1</sup>

1. Under RAP 13.7, the Supreme Court may consider and decide any dispositive issues raised but not addressed by the Court of Appeals, or it may remand the case to the Court of Appeals to decide those issues. Here, the Court of Appeals did not address Mr. Homan's overbreadth challenge to RCW 9A.40.090. Should the Supreme Court consider and decide the overbreadth issue, rather than remanding it to the Court of Appeals?
2. A statute is facially overbroad if it criminalizes a substantial amount of constitutionally protected speech or conduct. In an effort to target a narrow range of behavior, the legislature has criminalized political speech and other constitutionally protected expression. Is RCW 9A.40.090 unconstitutionally overbroad on its face?
3. A statute violates the First Amendment "as applied" if its application to a specific set of facts infringes the right to freedom of expression. The state prosecuted Mr. Homan for his speech without showing that he made a "true" attempt to entice a protected person into a specific non-public place. Does the luring statute violate the First Amendment as applied to Mr. Homan?

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<sup>1</sup> The Supreme Court directed the parties to address these issues in its letter of December 26, 2013.

## ARGUMENT

### **I. THE SUPREME COURT SHOULD CONSIDER AND DECIDE MR. HOMAN'S OVERBREADTH CHALLENGE.**

RAP 13.7 addresses the scope of review in the Supreme Court.

The court may consider issues beyond those raised in the Petition or

Answer:

If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

RAP 13.7(b).

In this case, the Court of Appeals reversed Mr. Homan's conviction for insufficient evidence. Opinion, p. 4. According to the court, this made it "unnecessary to address his overbreadth argument." Opinion, pp. 4-5 (citing *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981)).

Mr. Homan did not file an answer pursuant to RAP 13.4(d). However, he has not abandoned or waived the overbreadth argument.

Instead, if the Supreme Court reverses the Court of Appeals' decision, it must either address the overbreadth argument or remand the case to the Court of Appeals for consideration of that argument. RAP 13.7(b).

In the interest of judicial economy, the Supreme Court should address and decide the overbreadth issue if it reverses the Court of Appeals' decision. Mr. Homan's case presents an important constitutional issue that is of substantial public interest and should be decided by the Supreme Court. *See* RAP 13.4(b)(3) and (4). Reversing the Court of Appeals and remanding for a decision on the overbreadth issue would serve no purpose. Any decision by the Court of Appeals will likely return the case to the Supreme Court. The court should exercise its discretion under RAP 13.7(b) and consider the issue now.

**II. THE LURING STATUTE (RCW 9A.40.090) IS FACIALLY OVERBROAD.**

A. A statute violates the First Amendment if it criminalizes a substantial amount of protected speech.<sup>2</sup>

The First Amendment protects free speech and expressive conduct. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The government may not burden free speech through an overbroad statute.<sup>3</sup> *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). A criminal statute is overbroad if it

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<sup>2</sup> Overbreadth analysis under Wash. Const. art. I, § 5 follows the analysis under the First Amendment. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

<sup>3</sup> The exceptions to this general rule include obscenity, defamation, fraud, incitement, speech integral to criminal conduct, *Stevens*, 559 U.S. at 468 (listing cases), as well as fighting

*(Continued)*

reaches a “substantial amount” of constitutionally protected speech or conduct. *Immelt*, 173 Wn.2d at 6. The state bears the burden of justifying a restriction on speech.<sup>4</sup> *Id.*

A court reviewing an overbreadth challenge must “weigh the amount of protected speech proscribed by the [statute] against the amount of unprotected speech that [it] legitimately prohibits.” *Id.*, at 11 (citing *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (Williams I)). If the restriction on protected speech is substantial in comparison to the statute’s legitimate sweep, the law is overbroad. *Immelt*, 173 Wn.2d at 11-12.

The state

may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.

*Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Such an approach “turns the First Amendment upside down.” *Id.*

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words and true threats. *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (citing cases).

<sup>4</sup> First Amendment claims thus depart from the usual rule requiring the party challenging a statute to demonstrate its unconstitutionality. *Immelt*, 173 Wn.2d at 6. Petitioner erroneously suggests that the burden of proving the statute unconstitutional rests with Mr. Homan. Petitioner’s Supplemental Brief, p. 5. This is incorrect: in the free speech context, the burden rests with the state. *Immelt*, 173 Wn.2d at 7.

Any person charged with violating a criminal statute may bring an overbreadth challenge. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000). A first-amendment challenge can succeed regardless of the facts proved at trial: “[f]acts are not essential for consideration of a facial challenge.” *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

An affirmative defense that narrows the reach of a criminal statute cannot cure an overbreadth problem. *Ashcroft v. ACLU*, 542 U.S. 656, 670-671, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).<sup>5</sup> This is so in part because “a realistic threat of arrest is enough to chill First Amendment rights.” *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004).

In *ACLU*, the Supreme Court found the potential for chilling protected speech so harmful that it affirmed a preliminary injunction barring enforcement of a federal statute even before a final determination as to the statute’s constitutionality. *ACLU*, 542 U.S. at 670-671. The

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<sup>5</sup> Similar decisions have been made by the federal circuit courts. *See, e.g., Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 192-193 (3d Cir. 2008); *Vincenty v. Bloomberg*, 476 F.3d 74, 87 (2d Cir. 2007); *Hodgkins*, 355 F.3d at 1051, 1064.

*ACLU* court concluded that available affirmative defenses did not solve the problem:

Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.

*ACLU*, 542 U.S.at 670-71

The *ACLU* court did not characterize its ruling as provisional or otherwise suggest that lower courts could ignore its reasoning. Indeed, the court indicated that its decision was based on the “commands” of the First Amendment. *ACLU*, 542 U.S.at 670. Accordingly, the “trajectory of Supreme Court... jurisprudence”<sup>6</sup> on this issue is clear.

B. RCW 9A.40.090 is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech.

The luring statute imposes liability on anyone who “[o]rders, lures, or attempts to lure” children and the developmentally disabled into non-public places without a parent or guardian’s consent.<sup>7</sup> RCW 9A.40.090(1). This provision requires the state to prove the accused’s efforts to get a protected person “into a specific place.” *State v. Dana*, 84 Wn. App. 166, 172, 926 P.2d 344 (1996).

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<sup>6</sup> *State v. Lui*, 84045-8, 2014 WL 23845 (Wash. Jan. 2, 2014).

<sup>7</sup> The state must prove that the person was “unknown to the child or developmentally disabled person.” RCW 9A.40.090(1)(c).

To obtain a conviction under the “lures, or attempts to lure” prongs, the state must show more than an invitation. *State v. McReynolds*, 142 Wn. App. 941, 948, 176 P.3d 616 (2008) (citing *Dana*, 84 Wn. App. at 172). Instead, the prosecution must prove an invitation accompanied by an enticement to enter a specific place. *Dana*, 84 Wn. App. at 172.

The luring statute criminalizes pure speech. *See, e.g., State v. Johnston*, 156 Wn.2d 355, 360, 127 P.3d 707 (2006); *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). Pure speech is entitled to comprehensive protection under the First Amendment.<sup>8</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

The statute proscribes a large amount of constitutionally protected speech. As in *Immelt*, “[a] moment’s reflection brings to mind” many instances of protected speech that fall within the luring statute’s reach. *Immelt*, 173 Wn.2d at 9. Although most of the people in the following examples could raise the affirmative defense set forth in RCW 9A.40.090(2), this does not cure the problem.<sup>9</sup> *ACLU*, 542 U.S. at 670-671. The risk of arrest has the potential to chill their protected speech,

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<sup>8</sup> Although a person may violate the statute through communicative gestures, the First Amendment would necessarily protect such conduct as well: any gesture that communicated a message would necessarily qualify as expressive conduct. *Immelt*, 173 Wn2d at 7.

even if they could later meet the burden imposed by the affirmative defense. *Hodgkins* 355 F.3d at 1051, 1064.

The reaches a vast amount of protected speech, as illustrated here:

1. The statute reaches political speech. For example, a student concerned about school district policies might publish a flyer or create a Facebook page “inviting” other students to a private residence to discuss the issue, offering additional “enticement” in the form of cupcakes to all who attend.
2. The statute reaches statements made in jest. A Google image search for the phrase “Want some candy, little girl?” will reveal many attempts at humor of this type.<sup>10</sup> A student comedian making a similar joke would risk arrest, even if the purported attempt to lure other children came during a school talent show.
3. The statute reaches genuine offers of help in emergency situations. Lacking permission from a child’s parent or guardian, a good Samaritan—or an ambulance driver—cannot offer to drive an injured child to the hospital without violating the statute (unless the person is known to the child).
4. The statute reaches statements misunderstood as orders. Absent parental consent and acquaintance with the child, a school bus driver would violate the statute by saying “Hop in!” when she encounters a child walking on a busy road.
5. The statute reaches innocent and friendly invitations from one child to another. Notably, a ten-year-old who invites a fifteen-year-old stranger to come inside to play is just as guilty as one who extends that invitation to another pre-teen.

By contrast, the core of criminal behavior the statute seeks to address is limited. The essential purpose of the law is to prevent predatory strangers from gaining control over vulnerable people. *See Dana*, 84 Wn.

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<sup>9</sup> The dissent in the Court of Appeals overlooks this problem. Opinion, pp. 7-8 n. 1 (Hunt, J., dissenting).

<sup>10</sup> *See, e.g.*, <http://cheezburger.com/1431776512>.

App. at 172-173. When compared to this narrow legitimate purpose, the statute's overbreadth is substantial.

Division I erroneously reached the opposite conclusion in *Dana*. According to the *Dana* court, “[t]he impact on protected speech is minimal because a mere invitation... is not sufficient [for conviction]... [T]he invitation must include some other enticement.” *Id.*, at 175.

The *Dana* court made three mistakes in finding the statute constitutional on this basis.

First, the *Dana* court applied the wrong legal standard. The court improperly required the defendant to show the statute's unconstitutionality beyond a reasonable doubt. *Dana*, 84 Wn. App. at 175. This allocation of the burden does not apply to First-Amendment challenges, even though it does apply to most constitutional challenges. *Immelt*, 173 Wn.2d at 7 (citing *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007)). In the free speech context, the government bears the burden of justifying a restriction on speech. *Immelt*, 173 Wn.2d at 7.

Second, by focusing on invitations and enticements, the *Dana* court completely neglected luring by means of an order.<sup>11</sup> See RCW

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<sup>11</sup> The dissent in the Court of Appeals made this error as well. Opinion, pp. 7-8 n. 1 (Hunt, J., dissenting).

9A.40.090(1). Under the statute, a homeowner cannot order a trespassing child to leave his fenced yard, if the only means of departure is through the house or garage. Nor can a police officer order a child into a patrol car following arrest.<sup>12</sup> The *Dana* court’s “enticement” requirement does nothing to cure the statute’s overbreadth problem under the “orders” prong of RCW 9A.40.090(1).

Third, the *Dana* court made an inaccurate assessment of the statute’s sweep.<sup>13</sup> RCW 9A.40.090’s legitimate target is a narrow category of behavior. Again, the statute’s core purpose is to prevent predatory strangers from gaining control over vulnerable victims for improper purposes. By contrast, the amount of protected speech that falls within the statute’s reach is vast. The politically active teenager, the comic at a school talent show, and the others in the examples above all have legitimate reasons for engaging in activity prohibited by the statute.

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<sup>12</sup> Although the homeowner and the police officer could both raise the affirmative defense set forth in RCW 9A.40.090(2), the availability of the defense does not cure the overbreadth problem. *ACLU*, 542 U.S. at 670-671. Where the real possibility of arrest or prosecution chills protected speech, an affirmative defense cannot save an overbroad statute. *Hodgkins* 355 F.3d at 1051, 1064.

<sup>13</sup> Similarly, Judge Hunt mischaracterized the infringement on protected speech as “minimal.” Opinion, p. 8 n. 1 (Hunt, J., dissenting). Judge Hunt also erroneously implied that prosecutorial discretion could cure the overbreadth problem. Opinion, pp. 7-8 n. 1 (Hunt, J., dissenting). Prosecutorial discretion cannot cure a statute’s overbreadth. *Stevens*, 559 U.S. at 480 (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”)

Contrary to the *Dana* court’s conclusion, the statute is substantially overbroad. *Immelt*, 173 Wn.2d at 7-9. It therefore violates the First Amendment. *Id.*

- C. The Supreme Court must either impose a limiting construction that brings the luring statute within constitutional bounds, or it must invalidate the statute.

Where possible, a court addressing an overbreadth challenge must construe the challenged statute to avoid overbreadth problems. *Immelt*, 173 Wn.2d at 7. If such a limiting construction proves impossible, the overbroad provisions must be invalidated. *Id.*

The judiciary has the power to recognize implied elements of an offense.<sup>14</sup> *See, e.g., State v. Anderson*, 141 Wn.2d 357, 362, 5 P.3d 1247 (2000); *State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996). Such non-statutory elements may be implied to “avoid the constitutional defect that arises if the statute has an overly broad scope.” *Crediford*, 130 Wn.2d at 755.

This court can only save RCW 9A.40.090 by implying two additional elements required for conviction. First, the court must require proof of a “true” attempt, similar to the “true threat” requirement applied

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<sup>14</sup> In fact, the judiciary may define all the elements of a crime where necessary. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge).

to harassment and other similar statutes.<sup>15</sup> See, e.g., *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (reversing conviction for failure to instruct jurors on the state’s burden to prove a “true threat.”).

Implying a “true” attempt requirement would eliminate luring prosecutions for mere jests, idle talk, and other similar protected speech. An appropriate formulation might mirror the definition of a “true threat.” *Schaler*, 169 Wn.2d at 283. A “true” attempt would be an order or an invitation and enticement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious effort to persuade the listener to enter the non-public space. Cf. *Schaler*, 169 Wn.2d at 283. As with a “true threat,” the state would be required to establish a “true” attempt under “an objective standard which is, given the First Amendment values at issue, a difficult standard to satisfy.” *Kilburn*, 151 Wn.2d at 53.

Second, the court must imply a mental element, requiring some proof of malicious intent. A mental element is necessary under the First Amendment, because without one, the statute would still reach a substantial amount of protected speech. This flaw would remain even if

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<sup>15</sup> A “true threat” is “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].” *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (*Williams II*) (citation and internal quotation marks omitted, alterations in original).

the court imposes a limiting construction restricting the statute's reach to "true" attempts. An implied intent element would foreclose luring prosecutions for speech such as the student's invitation to a political meeting or the good Samaritan's offer of a ride to the hospital, outlined in the examples above.<sup>16</sup>

The Supreme Court addressed a similar problem in *Black*, 538 U.S. 343. There, the court upheld a statute criminalizing cross burning performed with the intent to intimidate. *Black*, 538 U.S. at 362-63. A four-justice plurality invalidated a provision of the statute that made cross burning *prima facie* evidence of intent to intimidate.<sup>17</sup> *Black*, 538 U.S. at 365-367 (O'Connor, J.). The plurality found this provision unconstitutional on its face. *Id.*

The *Dana* court should have reached a similar conclusion with respect to the luring statute. Instead, the court decided no mental element need be implied. *Dana*, 84 Wn. App. at 176-177. However, as outlined above, the *Dana* court applied the wrong legal standard and failed to

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<sup>16</sup> As previously noted, the availability of the affirmative defense does not cure the overbreadth problem. *ACLU*, 542 U.S. at 670-671.

<sup>17</sup> Three other justices would have invalidated the entire statute. *Black*, 538 U.S. at 380-387 (Souter, J., concurring in part and dissenting in part). Accordingly, the plurality opinion appears to be the narrowest grounds for the court's decision, and thus represents the holding of the court. See *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that

(Continued)

recognize the statute's overbreadth in the first place. *Id.*, at 175-176. Had the *Dana* court found the statute overbroad, it might have sought a saving construction involving a mental element.

Even if the court imposes a limiting construction, it must reverse Mr. Homan's conviction. *See, e.g., Johnston*, 156 Wn.2d at 366 (remanding for a new jury trial with proper instructions); *cf. State v. Pauling*, 149 Wn.2d 381, 392, 69 P.3d 331 (2003) (reinstating judgment and sentence based on trial court's adequate written findings). Because the state presented insufficient evidence of a "true" attempt and malicious intent, the charge must be dismissed with prejudice. *Kilburn*, 151 Wn.2d at 53.

### **III. THE LURING STATUTE (RCW 9A.40.090) IS UNCONSTITUTIONAL AS APPLIED TO MR. HOMAN.**

Even if a statute is facially valid, a litigant may bring an "as-applied" challenge under the First Amendment.<sup>18</sup> *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 476, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). An as-applied challenge under the First Amendment

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position taken by those Members who concurred in the judgments on the narrowest grounds . . .") (internal citation omitted).

<sup>18</sup> A First-Amendment as-applied challenge should not be confused with an as-applied vagueness challenge under the due process clause. *See, e.g., State v. Sullivan*, 143 Wn.2d 162, 183, 19 P.3d 1012 (2001) ("[A] statute that does not involve First Amendment rights  
(Continued)

will succeed whenever application of a statute to the specific facts of the case violates the constitution.<sup>19</sup> *See, e.g., Spence v. State of Wash.*, 418 U.S. 405, 413-14, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).

The statute here violates the First Amendment as applied to Mr. Homan's case.

Mr. Homan's conviction did not rest on a "true" attempt. The state presented no evidence proving that Mr. Homan made a "true" attempt to entice C.C.N. into a specific non-public place. *Cf. Schaler*, 169 Wn.2d at 283 (addressing "true" threats.) As he spoke, he rode past C.C.N. without stopping. He did not look at C.C.N. for a response. He did not tell C.C.N. how to get to his house, nor did he invite C.C.N. to follow him there. RP 32-50. Nor did the factfinder consider whether or not Mr. Homan made a "true" attempt. CP 3-5.

Under the circumstances, a reasonable speaker would not believe that Mr. Homan's words would be taken as a serious attempt to entice a child into a specific non-public place. The statements made here did not

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must be evaluated in light of the particular facts of the case—as applied—requiring inspection of the actual conduct of the party challenging the statute.”)

<sup>19</sup> The distinction between facial and as-applied challenges under the First Amendment goes to the breadth of the remedy imposed by the court. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000) (addressing vagueness challenge).

constitute a “true” attempt. They may have been a joke, “idle chat” (such as might stem from a dare), or some other form of protected speech. Because of the lack of evidence and the absence of any “true” attempt finding, the conviction infringed Mr. Homan’s free speech rights under the First Amendment. *See Schaler*, 169 Wn.2d at 283.

The statute is unconstitutional as applied to Mr. Homan. *Spence*, 418 U.S. at 413-14. His conviction for luring cannot stand. *Id.* The conviction must be reversed and the charge dismissed with prejudice. *Id.*

### **CONCLUSION**

The luring statute is overbroad on its face. Furthermore, the statute is unconstitutional as applied to Mr. Homan. The Supreme Court should reverse Mr. Homan’s luring conviction and dismiss the charge with prejudice.

Respectfully submitted,

### **BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of the Second Supplemental Brief, postage prepaid, to:

Russel Homan  
180 Stevens Rd  
Doty, WA 98539

With the permission of the recipient(s), I delivered an electronic version of the brief, via email to:

Lewis County Prosecuting Attorney  
appeals@lewiscountywa.gov  
sara.beigh@lewiscountywa.gov

And I filed the brief electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 9, 2014.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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Attached is the supplemental brief.

Thank you.

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