IN THE
SUPREME COURT OF VIRGINIA

Record No. 181033

ROBERT LEIGH STOLTZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

After sexually soliciting a detective posing as a 13-year-old girl online and traveling to an agreed-upon location to meet that "girl," Appellant Robert Stoltz was convicted of "us[ing] a communications system . . . 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[.]" Va. Code § 18.2-374.3(C) (emphasis added). Stoltz argues that a "reason to believe" mens rea is unconstitutional, both facially and as applied to him. It is neither.

For one thing, Stoltz abandoned any facial challenge to Code § 18.2-374.3(C). At oral argument before the Court of Appeals, Stoltz's counsel was clear that he "would just ask that this Court find the statute unconstitutional *in this very narrow instance as applied to Stoltz*." The Court of Appeals accepted that representation and decided the case based on it.

Stoltz's facial and as-applied challenges to Code § 18.2-374.3(C)'s "reason to believe" standard also fail on the merits. As a matter of due process, Stoltz argues that the "has reason to believe" provision is unconstitutionally vague because it could (Stoltz claims) be read to

authorize strict liability or criminal responsibility based on negligence. Stoltz's argument flies in the face of Virginia and federal precedent upholding the same "has reason to believe" scienter (or materially indistinguishable scienters) in numerous state and federal statutes and rejecting the same due process arguments that Stoltz advances here.

Stoltz also suggest that the "has reason to believe" standard violates the First Amendment because it is unconstitutionally overbroad. But the "overbreadth" that Stoltz posits is predicated on an understanding of "has reason to believe" that is contrary to the jury instructions in this case and Stoltz's own closing argument at trial. If the jury concluded that Stoltz *did not* have reason to believe that the person he was soliciting was a minor, Code § 18.2-374.3(C) would not apply and he would have been found not guilty.

ASSIGNMENT OF ERROR

Stoltz's assignment of error is as follows:

The Court of Appeals erred in affirming the trial court's error of not finding Va. Code § 18.2-374.3 either unconstitutional facially or as applied in violation of the First Amendment and the Due Process clause of the Fourteenth Amendment to the United States Constitution, where there is no child involved, Stoltz reasonably, objectively and correctly believed that the "child" was actually an adult, the jury indicated they believed him, and yet the jury instructions allowed a guilty verdict despite his actual belief.

STATEMENT

1. On November 4, 2014, Detective Blake Allbritton of the Fairfax County Police Department child exploitation unit noticed a suspicious ad in the "casual encounters" section of Craigslist. JA 80, 95, 272. The ad's title read: "can I cum on you, quick shot and heavy load, male for female or man for woman, thirty-four, Northern Virginia." JA 279. The body of the ad stated,

> [S]orry for the re-post, but too many flakes. Still so horny, blue balls type weekend. I really really need to shoot my load, and would love to shoot it on someone who is turned on by my cum shots, cum fetishes, or just loves to get cummed on. Also, anyone that is curious about it too, I can be quick or not, your call. I will cum wherever you want me to, ass, chest, face, mouth, pussy, stomach, feet, et cetera. You will need to host at your place, or your office/car. Safe, very clean, normal, and cute white guy here, athletic physique, with a good sized and very cum filled cock. Discrete.

JA 279, 712–13.

The ad was posted by Robert Stoltz, CEO of a web design company, whose fiancé was out of town. JA 588, 708–09. Craigslist has no age-restriction capability, JA 375, and Stoltz's ad was viewable to anyone who clicked in the casual encounters section, including children.

JA 275–76. At trial, Stoltz acknowledged knowing that a minor could readily access the casual encounters section of Craigslist. JA 711–12.[1]

Based on his experience working child exploitation cases, the "vagueness [of the] ad [about the desired age of the person being solicited] caught [Detective Allbritton's] eye." JA 329. Of the thousands of ads he reviewed, Detective Allbritton had never seen an ad specifically asking for a juvenile and he testified that such an ad would have been removed by Craigslist immediately. JA 329–30, 381. For that reason, ads not seeking children often specify that they involve an adult seeking an adult. JA 329.

Detective Allbritton responded to Stoltz's ad by adopting an "undercover persona as a thirteen-year-old female" named Annie with the online persona "littleannie133." JA 13, 80–82, 273–74, 290. "Annie's" initial contact, which was sent as an email, read:

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[1] Stoltz also testified about his familiarity with the minimal mechanisms that protect adult sites. JA 593 ("When I build products for our clients they, if they have adult content, whether that's like a smoking site or alcohol site, Miller or Budweiser or MaltBro, or even adult sites and dating sites, they all use the same basic terms and conditions, understanding, which is what the legal procedures are in order to prevent minors from accessing the site. . . . There are no other mechanisms out there that need to go past that in order to protect an adult site.").

> Hi, I'm bored, and off from school today, but I'm only thirteen. I know I shouldn't be in there, but I thought your [ad] was like cool and stuff, so I thought I'd say hi. I have a pic if you want. If I'm too young, that's okay, and I won't bother you. I can't believe I'm sending this email, Annie. Excuse me.

JA 283, 713.

Within minutes, Stoltz responded "twenty-three isn't too young." JA 96, 284, 607. "Annie" then clarified "*thirteen, not twenty three*, hee hee." JA 284 (emphasis added). Stoltz asked Annie for a picture, *id.*, and "Annie" sent Stoltz a picture of a Fairfax County animal control officer, Sharron Chase. JA 285. Although Chase was 25 years old, Detective Allbritton had used Chase's picture in previous undercover work.[2] JA 567. Stoltz responded to the picture by stating "no worries, thanks for sending. You're very cute," and asking about where Annie lived. JA 285. "Annie" replied that she lived "near Burke Wal-mart," and Stoltz responded that "the Burke Wal-mart is, not too far from me."

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[2] Not only was the jury presented with the picture of Chase that Detective Allbritton sent to Stoltz, JA 282, Chase also testified at trial, JA 565–68. The jury thus had the opportunity to evaluate whether Chase's appearance was such that Stoltz might reasonably believe Chase was a minor. See JA 782 (Commonwealth's attorney showing the jury the picture of Chase and describing Chase as appearing like a "[v]ery young, female" who "certainly could fit the bill for a 13 year old girl. We saw her in court today, she certainly don't look her age. I certainly would argue she's a young female.").

JA 286. Stoltz then sent "Annie" a picture and provided a Yahoo email address through which he and "Annie" could continue their conversation. JA 286–87, 289.

"Annie" asked Stoltz "so like what would you want to do – or excuse me – so what would you want to do, and I can't drive, is that okay." JA 286. Stoltz replied, "I'd like to do what I said in my post, but I'm open. What do you have in mind, and when would you be available? I can drive to you, so no worries." JA 286–87. "Annie" responded, "I'm like home alone, because my parents are gone until tomorrow. So like, what would we do exactly? I can't believe I'm saying this." JA 287.

Stoltz stated, "I can't believe your home alone. That's crazy, lol," JA 293, and "Annie" replied, "Yeah, first time they've let me stay alone, and no school today or yesterday," JA 293. "Annie" said she was bored and "curious and stuff." JA 293, 723. Stoltz told "Annie" he was "really open, but if you're curious, maybe I can help. I'm fairly horny though, lol." JA 294, 723.

In the next series of messages, "Annie" confessed that she had "just kissed" a boy but had not "been touched before, sorry." JA 294–95. "Annie" also told Stoltz that he could "come over soon," but asked "what

are we going to do?" JA 295. Stoltz replied that he was "free all night, so whenever. Well, I like kissing and touching. Would you be interested in touching me?" JA 296. When "Annie" asked Stoltz to elaborate, he responded: "I'd like to kiss you, and get naked with you, then touch your body all over, and you can touch me all over, too." JA 296, 727.

At that point, "Annie" indicated she wanted to call Stoltz "to make sure you're real, and not messing with me? Because even though I'm young, I'm not stupid." JA 296. Stoltz eventually agreed to give "Annie" a phone number so that they could talk, something "Annie" insisted upon before she would agree to meet with Stoltz. JA 296, 298.

Fairfax Detective Jeanette Wagner, acting as "Annie," then spoke with Stoltz over the phone in a conversation that was recorded and played for the jury. JA 299–300, 514. During the call, "Annie" and Stoltz arranged to meet at the Burke Walmart near the garden center. JA 82–83, 306. "Annie" then asked by email whether Stoltz was "going to bring protection? I just don't want to get like pregnant and stuff." JA 300. Stoltz responded "Okay." *Id.* When "Annie" stated "I'm like excited," Stoltz responded, "Lol, me too." JA 300.

Stoltz lived in Arlington, JA 531, 588, and traveled nearly 20 miles to the Burke Walmart.[3] Despite initially testifying multiple times at trial that he had "no intention" of meeting "Annie," JA 664, 669–70, 677, Stoltz later admitted he went to the Burke Walmart to see who "Annie" was and potentially do what Stoltz posted in his ad, JA 720, 720–21 ("Q. And so the person who was sending these messages at the time, you were willing to drive to meet them to get sexual gratification potentially? A. Well no, I mean, I was going to drive there to see what they were, yeah, sure . . . . Q. With an eye towards fulfilling what you wanted to get out of your ad? A. Well at this point in time they were not being truthful with me. So, but you know, at some point in time maybe they would come out and be like, you know, I like role play, I like fantasy.").

Detective Allbritton and other officers set up surveillance in the Walmart parking lot and observed Stoltz. JA 83, 99, 308. Detective Allbritton saw Stoltz at the garden center section and watched Stoltz

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[3] There are eight Walmart locations closer to Arlington than the Burke Walmart. https://www.google.com/maps/place/Walmart/@38.8799738,-77.1994299,11z/data=!4m8!1m2!2m1!1swalmart!3m4!1s0x0:0x3399ccbf24ba41ab!8m2!3d38.7693092!4d-77.1362114.

respond in real time to texts that Allbritton sent as "Annie." JA 91–93 309–10. "Annie" and Stoltz texted throughout "the entirety of his being at Walmart." JA 436. When "Annie" asked Stoltz where he was, Stoltz answered "Went back to the car. Too many people looking at me funny." JA 307. Detective Allbritton watched Stoltz walk around the garden center, walk back to his car, and then go in and out of a nearby Dairy Queen before returning to his car and driving away. JA 84–85, 309, 314.

After Stoltz drove his car out of the store parking lot, the police stopped him. JA 86, 315–16. When Detective Allbritton confronted Stoltz about "Annie," Stoltz claimed he "had no clue" what Detective Allbritton was talking about. Stoltz denied being at Walmart to meet anyone and claimed he was there to purchase fertilizer. JA 316, 319, 462. Stoltz allowed Detective Allbritton to look at his cell phone and Detective Allbritton observed that Stoltz's web browser history "looked like it had been deleted." JA 318. Stoltz was not arrested at that time because the police sought further confirmation that Stoltz was the person who had communicated with "Annie." JA 318–19.

After issuing an administrative subpoena to Craigslist, the police confirmed that the IP address associated with the November 4, 2014 ad

on Craigslist was Stoltz's residence. JA 319–20. The police also obtained a search warrant for Stoltz's home, and recovered a laptop where the same email account that Stoltz gave to "Annie" responded to an email chain entitled "Any teen visitors looking for some extra holiday cheer." JA 321, 543–44, 577, 701–02 (Stoltz admitting at trial that he responded to an email chain with that title).

After agreeing to meet Detective Allbritton there, Stoltz was arrested at police headquarters in Fairfax County. JA 321–22. Stoltz was advised of his right and agreed to speak with Detective Allbritton during a recorded interview that was entered into evidence and played for the jury. JA 323–24. In that interview, Stoltz admitted to authoring the Craigslist ad. JA 323. Stoltz first claimed that he went to the Walmart to purchase fertilizer before playing golf. JA 747–48. Eventually, Stoltz changed his account and admitted he "was curious to see if this person that he admitted to speaking to online was real." JA 455, 748; JA 458 ("I believe towards the end [of the interview Stoltz] did start to say he was there to potentially meet somebody, or that he was curious about seeing if there was somebody there, so I do believe he said at the end, he changed his story"). Detective Allbritton also pointed out

that Stoltz was dishonest during the November 4 traffic stop, when Stoltz originally told Detective Allbritton that he was not attempting to meet anyone. JA 328–29, 747–48.

2. Stoltz was charged with using a communications system to solicit a person he knew or had reason to believe was less than 15 years old, in violation of Code § 18.2-374.3(C) (Count I); and attempting to take indecent liberties with a minor, in violation of Code § 18.2-370 (Count II). JA 1.

At trial, Stoltz requested a jury instruction defining the crime in Count I as "using a communications system for the purpose of soliciting, with lascivious intent, a person he *knew, or believed*, was less than fifteen (15) years of age to knowingly and intentionally preform [sic] a sexual act." JA 19 (emphasis added). The court, however, accepted the Commonwealth's proposed instruction which mirrored the language of Code § 18.2-374.3(C) in defining the crime as "using a communications system or electronic means for the purpose of soliciting . . . a person he knew or had reason to believe, was less than fifteen (15) years of age." JA 21 (Instruction 17). At Stoltz's request, the jury instructions specifically defined the term "reason." JA 647–48 (Instruction of Law N

defining "reason" as "a factuality of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the processor to deduce inferences of facts or from propositions").[4]

During deliberation, the jury sought clarification about the meaning of "reason to believe." JA 847. The court directed the jury to review the instructions of law, which included Instruction N, the definition of "reason." JA 849–50. The jury found Stoltz guilty on Count I and not guilty on Count II, JA 856, and the circuit court sentence him to five years of incarceration, JA 31–32.

Following his conviction, Stoltz moved to set aside the jury verdict, arguing that the "reason to believe" standard was unconstitutional. JA 888. The circuit court denied the motion. JA 889.

3. The Court of Appeals affirmed Stoltz's conviction in an unpublished opinion. JA 38–47. The court noted that Stoltz had "initially . . . asserted that Code § 18.2-374.3 was facially unconstitutional," but that he had "abandoned this position at oral

[4] The Commonwealth objected to including Instruction of Law N arguing that the term "reason" can be defined with common sense, but the court agreed with Stoltz's counsel and gave the instruction over the Commonwealth's objection. JA 648.

argument." JA 38 n.1. As a result, the court confined its analysis to whether the statute "is unconstitutional as applied to [Stoltz]." JA 38.

The Court of Appeals emphasized that "[n]othing in" Code § 18.2-374.3(C) "restricts constitutionally safeguarded communication between adults"; to the contrary, the statute simply "proscribes the non-constitutionally protected solicitation of minors." JA 44. The court acknowledged Stoltz's assertion "that he 'reasonably [and] objectively' believed that 'Annie' was an adult." *Id.* But "the credibility of [that] assertion," the court of appeals explained, "was a factual determination" and "[h]ere, the jury rejected [Stoltz's] explanation that he thought he was communicating with an adult, not a minor." JA 44–45; see JA 45 (emphasizing that the jury "was entitled to reject [Stoltz's] explanation that he was at a Walmart not to meet a thirteen-year-old girl with whom he had been communicating but to discover the identity of an adult who had tried to 'scam' him"). The Court of Appeals noted that the jury instructions in this case "did not involve any burden-shifting presumptions," emphasized "the Commonwealth's burden to prove beyond a reasonable doubt every element of the crime," and provided

further guidance "by the instruction that 'reason' is the capacity to distinguish truth from falsehood." JA 46.

STANDARD OF REVIEW

"[A]ll acts of the General Assembly are presumed to be constitutional." *Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002). "The party challenging an enactment has the burden of proving that the statute is unconstitutional, and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity." *Marshall v. N. Virginia Transp. Auth.*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008); accord *In re Phillips*, 265 Va. 81, 85–86, 574 S.E.2d 270, 272 (2003) ("[W]e are required to resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity."). In addition, "[a] verdict of the jury, upon which the trial court enters judgment, settles all conflicts of testimony in favor of the prevailing party and entitles that party to all just inferences deducible therefrom." *Hix v. Commonwealth*, 270 Va. 335, 341, 619 S.E.2d 80, 83 (2005). This Court "view[s] the evidence in the light most favorable to the Commonwealth,

as the prevailing party, and will not set aside the verdict unless it is plainly wrong or without evidence to support it." *Id.*

ARGUMENT

Stoltz does not deny that he used the internet to solicit a person who presented herself as a 13-year-old girl. Instead, Stoltz claims that—despite multiple representations that the person with whom he was speaking was a child—he knew all along that "Annie" was actually an adult. Stoltz further claims that the jury believed his claims but felt compelled to find Stoltz guilty because he "had reason to know" that "Annie" may not have been an adult. As a result, Stoltz claims that a "knew or had reason to believe" mens rea violates the Due Process Clause (either because it imposes strict liability or is unconstitutionally vague) or the First Amendment (because it is overbroad). As both courts below correctly held, those claims lack merit and should be rejected.[5]

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[5] Stoltz asserts that the Court of Appeals "ignored and failed to address" his constitutional arguments. Appellant Br. 29. But the court expressly acknowledged Stoltz's claim that "Code § 18.2-374.3 is unconstitutional as applied to him," JA 38, recited the correct standard for "review[ing] a challenge to the constitutionality of a statute," JA 43, and distinguished the cases on which Stoltz relied (the same cases that Stoltz raises again before this Court). JA 43–47. And regardless of whether the Court of Appeals *explanation* of its holding was deficient in any respect, this Court can still affirm under the right result, wrong

See Part I, *infra* (explaining that Stoltz abandoned any as-applied challenge before the Court of Appeals).

I. Stoltz abandoned his facial challenge to Code § 18.2-374.3(C)

The Court of Appeals did not err in holding that Stoltz abandoned his facial challenge. JA 38 n.1. During oral argument, the court asked "so your contention is it's unconstitutional as applied?" Stoltz's counsel answered, "[a]s applied, yes. *I am not reaching the facial challenge at all*. As applied to this case." 4/25/18 Audio, at 7:50–8:00 (emphasis added).[6]

Stoltz argues that the Court of Appeals misinterpreted the clear language quoted above. Instead, Stoltz insists that counsel's statement was "intending to mean that at argument he was intending to spend his time on the as-applied challenge," Appellant Br. 21 n.7, not that counsel was giving up the facial challenge. But that is not what counsel said and it cannot be squared with how counsel closed his oral argument

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reason doctrine. *Perry v. Com.*, 280 Va. 572, 579, 701 S.E.2d 431, 435 (2010) ("[I]t is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.") (internal quotation marks and citation omitted).

[6] Oral argument audio available at http://www.courts.state.va.us/courts/cav/oral_arguments/2018/Region%204%20-%20Northern%20Virginia/apr/0352_17_4.MP3.

before the Court of Appeals: "We would just ask that this Court find the statute unconstitutional *in this very narrow instance as applied to Stoltz*." 4/25/18 Audio, at 32:19–29 (emphasis added). Under these circumstances, the Court of Appeals appropriately held that Stoltz abandoned his facial challenge.

II. A "knew or had reason to believe" mens rea is prevalent in numerous criminal codes

The scienter "knew or had reason to believe" (and scienters substantially similar to that standard) is present throughout the Virginia Code. For example, Code § 18.2-109 makes it a crime to receive or transfer possession of a vehicle that one "knows or has reason to believe" is stolen. Code § 18.2-308.2:2 likewise prohibits selling a firearm to a person that one "knows or has reason to believe is ineligible to purchase or otherwise receive" it.[7]

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[7] See also Va. Code Ann. § 18.2-265.3(A) (prohibiting sale or possession "with intent to sell drug paraphernalia, knowing, or under circumstances where one reasonably should know" that it was intended for illegal use); Va. Code Ann. § 18.2-331 (prohibiting possession of gambling device when person "believ[es] or ha[s] reason to believe" that the device will be used in the advancement of unlawful gambling activity); Va. Code Ann. § 18.2-349 ("It [is] unlawful for any owner or chauffeur of any vehicle, with knowledge or reason to believe the same is to be used for such purpose, to use the same or to allow the same to be used for the purpose of prostitution or unlawful sexual intercourse[.]") (as amended in 2019).

Other Virginia statutes specifically employ a "know or have reason to believe" formulation in connection with a person's age. Code § 18.2-371.2(A), for example, prohibits selling tobacco products to "any person less than 21 years of age, knowing or *having reason to believe* that such person is less than 21 years of age." (as amended in 2019) (emphasis added). And Code § 18.2-371.3 makes it unlawful to "tattoo or perform body piercing for hire or consideration on a person less than eighteen years of age, knowing or *having reason to believe* such person is less than eighteen years of age." (emphasis added); see also Va. Code Ann. § 18.2-64.1 (making it an enhanced offense to have "carnal knowledge" of certain minors where the offender "know[s] or ha[s] reason to believe" the minor is in custody).

Nor is Code § 18.2-374.3 an outlier in using a "knew or had reason to believe" standard in connection with crimes involving the actual or attempted sexual abuse of children. In Michigan, for example, it is a crime to persuade or induce a child "to engage . . . in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . if that person knows, *has reason to know, or should reasonably be expected to know* that the child is a child." Mich. Comp.

Laws Ann. § 750.145c(2). In Ohio, it is unlawful to provide obscene material "to a juvenile, a group of juveniles, [or] *a law enforcement officer posing as a juvenile*" if one "*knows or has reason to believe* that the person receiving the information is a juvenile." Ohio Rev. Code Ann. § 2907.31(D)(1) (emphasis added); accord Minn. Stat. Ann. § 609.344(d) (prohibiting "sexual penetration" of a person that one "knows or has reason to know . . . is mentally impaired, mentally incapacitated, or physically helpless").

Federal criminal law likewise uses the "knew or had reason believe" formulation in statutes imposing serious criminal penalties. For instance, 18 U.S.C. § 2251 forbids sexual exploitation of children to create visual depictions when person "knows or *has reason to know* that such visual depiction will be transported." (emphasis added). Another statute makes it a crime to obtain national defense information "with intent *or reason to believe* that the information is to be used to the injury of the United States." 18 U.S.C. § 793(a) (emphasis added). Still another statute prohibits importing or exporting listed chemicals "knowing *or having reasonable cause to believe*" that the chemical will

be used to manufacture a controlled substance. 21 U.S.C. § 960(d)(3) (emphasis added).[8]

Our point here is two-fold. First, Code § 18.2-374.3(C)'s use of a "knew or had reason to believe" formulation is neither novel nor especially noteworthy. And, second, accepting Stoltz's arguments would risk rendering numerous statutes constitutionally infirm. For that reason, it is unsurprising that courts reviewing such statutes have

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[8] See also 18 U.S.C. § 1384 (whoever permits someone to remain in a place "knowing or with *good reason to know* that it is intended to be used" for prostitution is guilty of a crime) (emphasis added); 18 U.S.C. § 842(h) (possessing, transporting, or selling explosive materials "knowing *or having reasonable cause to believe*" that the explosive materials were stolen) (emphasis added); 18 U.S.C. § 231(a)(1) (teaching another the use of any firearm or explosive or incendiary device "knowing or *having reason to know* or intending" that it will be unlawfully employed for use in a civil disorder that may adversely affect commerce) (emphasis added); 18 U.S.C. § 1546(b) (using identification document "knowing (or *having reason to know*)" the document was not issued lawfully for the use of the possessor or is false) (emphasis added); 18 U.S.C. § 2512(1) (manufacturing, distributing, possessing, and advertising devices for the surreptitious interception of communications "knowing or *having reason to know*" that the design of the device renders it primarily useful for the purpose of surreptitious interception of communications) (emphasis added); 21 U.S.C. § 841(c)(2) (prohibiting a person from knowingly or intentionally "possess[ing] or distribut[ing] a listed chemical knowing, or *having reasonable cause to believe*, that the listed chemical will be used to manufacture a controlled substance") (emphasis added).

resoundingly rejected the very Due Process and First Amendment challenges Stoltz brings here.

III. Virginia's prohibition on soliciting children over the internet does not violate the Due Process Clause

Stoltz appears to advance two different due process arguments. The first is that Code § 18.2-374.3(C) is unconstitutional because it creates a strict liability or negligence offense. Appellant Br. 11–18. The second is that Code § 18.2-374.3(C) is unconstitutionally vague because it does not adequately describe the nature of the offense it creates. Appellant Br. 18–20. Those arguments are without merit.

A. "Knew or had reason to believe" is a mens rea specific to the defendant and thus is neither strict liability nor ordinary negligence

Stoltz opens his argument by noting that strict liability offenses are disfavored. Appellant Br. 11–18. We agree. But the "knew or had reason to believe" standard is neither negligence, nor strict liability.

1. "In strict liability it is *of no moment* what defendant had reason to believe." *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974) (internal quotation marks and citation omitted) (emphasis added); accord *Funkhouser v. Ford Motor Co.*, 285 Va. 272, 291, 736 S.E.2d 309, 319 (2013) (McClanahan, J., concurring in part

and dissenting in part) (explaining that "[t]he cause of action for failure to warn is not a theory of strict liability" because, among other things, the plaintiff must show "that the defendant knew or had reason to know of [a] dangerous condition, and . . . no reason to believe the plaintiff would realize the dangerous condition."). For that reason, a statute that requires a person to "know or have reason to know" something "does not impose strict liability." *Autrey v. United States*, 889 F.2d 973, 984–85 (11th Cir. 1989).[9]

Stoltz attempts to analogize this case to the Minnesota Court of Appeals' decision in *State v. Moser*, 884 N.W.2d 890 (Minn. Ct. App. 2016), which held that a Minnesota child-solicitation statute improperly set forth a strict liability standard and explicitly eliminated any mistake-of-age defense. But unlike the statute in *Moser*, Code § 18.2-374.3(C) does not impose strict liability or foreclose a mistake-of-age defense. To the contrary, a person may raise a mistake of age defense to

[9] See also *United States v. Colson*, 675 Fed. Appx. 624, 629 (7th Cir. 2017) (stating that a particular statute "imposes strict liability *because* it lacks a scienter requirement that [the defendant] know or have reason to know" the underlying fact that triggers liability (emphasis added); *United States v. James*, 643 Fed. Appx. 836, 837–38 (11th Cir. 2016) (stating that one of the Federal Sentences Guidelines "impose[s] strict liability" *because* it did not require that the defendant have "knowledge or reason to know about" a particular condition).

a charge under Code § 18.2-374.3(C) by establishing that he or she did not have reasonable cause to believe the other person is a child. Indeed, this appears to be the very defense Stoltz attempted to raise at trial. See, *e.g.*, JA 607 ("I thought they were playing around. I had no expectations of it in an adult section, so – because I said 23, they said 13, . . . so fantasy, role playing maybe . . ."); JA 715 ("I had every reason to believe that it was someone over 18."); JA 718 ("I believed that they may have been role playing or having a fantasy, yes.").

2. Stoltz is correct that the Seventh Circuit's decision in *Stern v. Meisner*, 812 F.3d 606 (7th Cir. 2016), is instructive. But that is because that decision specifically rejected the very challenge Stoltz makes here. As here, the defendant in *Stern* was essentially "seeking codification of his trial defense." *Id.* at 611. As here, Stern "argue[d] a guilty verdict is only permissible when the defendant actually, subjectively believes that the child is underage" and argued "[a]t trial" that "he actually, subjectively believed that [the person on the other end] was an adult." *Id.* And, as here, "[t]he jury chose to reject this argument" and find Stern guilty. *Id.*

The Seventh Circuit declined to disturb the jury's verdict. "If Stern's interpretation of the [s]tatute were to be adopted," it reasoned, "then every defendant charged with violation of the [s]tatute would argue that he or she actually believed the victim was an adult, and a jury would be required to find him or her not guilty, provided the jury found the defendant's defense credible." *Stern*, 812 F.3d at 611. The Seventh Circuit reasoned that the argument that the jury must find the defendant actually thought he was soliciting a minor "would render the 'reason to believe' element of the Statute superfluous" and "[s]uch an interpretation is unreasonable and is to be avoided." *Id.*[10]

3. At other points in his brief, Stoltz suggests that Code § 18.2-374.3(C) sets forth a negligence mens rea. Appellant Br. 19. It does not.

Unlike negligence, the "knows or has reason to believe" standard "involves a subjective inquiry that looks to whether the particular defendant accused of the crime knew or had reasonable cause to believe" the person he solicited was a minor. *United States v. Saffo*, 227 F.3d 1260, 1268 (10th Cir. 2000). "This requires scienter to be

[10] Like here, the jury instruction in *Stern* mirrored the language of the statute with the term "has reason to believe." *Id.* at 610.

evaluated through the lens of this particular defendant, rather than from the prospective of a hypothetical reasonable man." *Id.* at 1268–69; see *id.* at 1269 (concluding that "[i]n this context, the 'reasonable cause to believe' standard is one akin to actual knowledge" than negligence); accord *United States v. Iron Eyes*, 367 F.3d 781, 784 (8th Cir. 2004) ("At first glance, [reasonable cause to believe mens rea] might appear to allow the conviction of a merely negligent defendant," but "the better reading, we believe, requires proof that a defendant possessed a gun that it would have been reasonable for him or her, in particular, to believe was stolen.").

In sum, because the "reason to believe" test is tailored to the particular defendant, it is not a negligence standard.

B. Code § 18.2-374.3(C) is not unconstitutionally vague

The "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams,* 553 U.S. 285, 304 (2008). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker v. Levy*, 417 U.S. 733, 757 (1974). "A

successful challenge to the facial validity of a criminal statute based upon vagueness requires proof that the statute fails to provide notice sufficient for ordinary people to understand what conduct it prohibits, or proof that the statute may authorize and even encourage arbitrary and discriminatory enforcement." *Muhammad v. Commonwealth*, 269 Va. 451, 497, 619 S.E.2d 16, 42 (2005) (internal quotation marks and citation omitted).

The Supreme Court of the United States has squarely rejected a vagueness challenge to a federal criminal statute whose mens rea element was quite similar to Code § 18.2-374.3(C). In *Gorin v. United States*, 312 U.S. 19 (1941), the Court found no vagueness problem with the Espionage Act's requirement that the defendant have the "intent or reason to believe" that the information to be obtained is to be used to the injury of the United States or to the advantage of a foreign nation. *Id.* at 27. Instead, the Court concluded that the "intent or reason to believe" scienter "requires those prosecuted to have acted in bad faith" and that there was "no uncertainty" in the Espionage Act's "intent or reason to believe" standard to support a vagueness challenge. *Id.* at 27, 28.

Numerous federal appellate courts also have rejected vagueness challenges to statutes setting forth similar scienters to Code § 18.2-374.3(C). In *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992), for example, the Sixth Circuit rejected both vagueness and overbreadth challenges to a statute using "reason to know" standard and specifically stated "that the reason to know standard is constitutionally sufficient as a basis for criminal liability." *Id.* at 1504; accord *United States v. Saffo*, 227 F.3d 1260, 1268 (10th Cir. 2000) (holding that "the 'knowing or having reasonable cause to believe' standard in 21 U.S.C. § 841(d)(2) imposes a constitutionally sufficient mens rea requirement" and is not unconstitutionally vague); *United States v. Featherston*, 461 F.2d 1119, 1121–22 (5th Cir. 1972) (rejecting vagueness challenge and upholding "knowing or having reason to know" standard in 18 U.S.C. § 231(a)(1)).

Like these statutes, Virginia's prohibition on soliciting minors over the internet requires the defendant to have acted in bad faith. To violate Code § 18.2-374.3(C), a defendant must decide to engage in sexual solicitation despite "knowing or having reason to know" that the person on the other end is under 15. And that statute—like those discussed above—is not void for vagueness.

IV. Virginia's prohibition on soliciting children over the internet is not unconstitutionally overbroad

Stoltz claims that his solicitation of an undercover police officer posing as a 13-year-old girl was protected speech for purposes of the First Amendment and that Code § 18.2-374.3(C) is unconstitutionally overbroad. Appellant Br. 20–23. It is not.

A. Stoltz's facial overbreadth challenge fails

For the reasons stated above, Stoltz has abandoned any facial challenge to Virginia's prohibition on soliciting children over the internet. See Part I, *supra.* But any such challenge also would fail on the merits as well.

1. The overbreadth doctrine is "not recognized . . . outside the limited context of the First Amendment." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The First Amendment doctrine of overbreadth requires proof that a law punishes a *substantial* amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Muhammad v. Commonwealth*, 269 Va. 451, 497, 619 S.E.2d 16, 42 (2005) (internal quotation marks and citation omitted) (emphasis added). To prevent the overbreadth doctrine from expanding beyond its intended purpose, courts "vigorously enforce[] the requirement that a

statute's overbreadth be *substantial*." *United States v. Williams*, 553 U.S. 285, 292 (2008).

"Offers to engage in illegal transactions are categorically excluded from First Amendment protection." *United States v. Williams*, 553 U.S. 285, 297 (2008); accord *Pedersen v. City of Richmond*, 219 Va. 1061, 1066, 254 S.E.2d 95, 98 (1979) ("First Amendment protection is not afforded [to] statements made in the solicitation of criminal acts."). Stoltz does not dispute the statute's legitimate effort to prevent internet solicitation, and subsequent sexual abuse, of children. And by its terms, Code § 18.2-374.3(C) does not apply to even the most graphic solicitation over the internet *unless* a person uses a communication system, "for the purposes of soliciting, with lascivious intent, [a] person he knows or has reason to belief is a child younger than 15 years of age."[11]

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[11] Stoltz does not argue that the absence of a real minor establishes a defense, and for good reason. "The non-existence of a 'real child' does not make" the crime of soliciting a child over the internet "inherently or legally impossible, but only factually impossible." *Hix v. Commonwealth*, 270 Va. 335, 345–46, 619 S.E.2d 80, 86 (2005) ("Hix solicited and intended to have sex with a 13–year–old girl and went to meet her but 'was fooled because his target was in reality an undercover law enforcement officer,' an extraneous circumstance unknown to him and beyond his control. In such a case, the defense of impossibility is

Stoltz's alleged "overbreadth" arises only where the defendant has reason to believe the person is under the age of 15 but nevertheless subjectively concludes that the person is not a minor. Stoltz's brief makes no effort to argue that this alleged overbreadth is "substantial" at all, let alone substantial "relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). Stoltz's alleged "overbreadth" does not justify invalidating Code § 18.2-374.3(C) on its face and prohibiting the Commonwealth from enforcing the statute against conduct that is well within the Commonwealth's power to proscribe. *Id.*; see *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasizing that "there comes a point" where "prediction[s]" about "deter[ring] protected speech to some unknown extent . . . cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.").

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not available for a charge of criminal attempt.") (internal citation omitted); see also *Dietz v. Commonwealth*, 294 Va. 123, 804 S.E.2d 309 (2017) (affirming conviction under Code § 18.2–374.3 after teacher engaged in a lengthy sexualized text and photo conversation with a detective who was responding as her 11-year-old student by using the student's cell phone).

In arguing that Code § 18.2-374.3(C) prohibits constitutionally protected speech, Stoltz relies on *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). But the statute at issue in *Reno* literally covered the internet and swept in "a large amount of speech that adults have a constitutional right to receive and to address to one another" because it included messages sent to a broad swath of people. *Id.* at 874. The Supreme Court emphasized that "[g]iven the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it." *Id.* at 876. "Knowledge that, for instance, one or more members of a 100–person chat group will be a minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults." *Id.* The same is true of *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), which likewise involved significant protected speech between adults. See *id.* at 230 (addressing a statute that prohibited knowing display of commercial materials that are harmful to juveniles "in a manner whereby juveniles may examine and peruse" them, including electronic communications).

Here, by contrast, Code § 18.2-374.3(C) did not prohibit Stoltz's sexually explicit Craigslist ad; instead, it prohibited Stoltz's solicitation of "Annie" when Stoltz knew or had reason to believe that "Annie" was under 15. To the extent Code § 18.2-374.3(C) encompasses a situation where a person has reason to believe the person on the other end is a child but otherwise concludes subjectively that the person is in fact an adult, that narrow situation does not outweigh the Commonwealth's important interest in preventing adult's sexual solicitation of children.

B. Any as-applied overbreadth challenge fails

1. To the extent Stoltz is suggesting that Code § 18.2-374.3(C) is overbroad as applied to him, it is not clear that any such claim can even exist. The basic idea underlying the overbreadth doctrine, after all, is that a person to whom a statute *can* constitutionally be applied may (under certain circumstances) challenge the statute on the ground that it may not be constitutionally applied *to others*. See *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989) (stating that the overbreadth doctrine "enables [a litigant] to benefit from the statute's unlawful application to someone else"). Because the overbreadth doctrine is "an exception to [the] normal rule regarding the standards

for facial challenges," *Virginia v. Hicks*, 539 U.S. 113, 118 (2003), it is not clear that an overbroad-as-applied challenge makes any conceptual sense.

2. Regardless, Stoltz's as-applied argument simply rehashes the evidence supporting his defense that he knew all along that "Annie" was an adult. Appellant Br. 24. Stoltz argues that "under the instructions given, because the detective stated that 'Annie' was 13 years old, no matter how little credibility that assertion held, and regardless of the jury's belief that Stoltz recognized the statement as false, a conviction was assured because there existed some 'reason to believe.'" *Id.*

To begin, Stoltz's argument mischaracterizes the instructions given to the jury. The jury instruction mirrored Code § 18.2-374.3(C)'s language: "using a communications system or electronic means for the purpose of soliciting . . . a person he knew, or had reason to believe, was less than fifteen (15) years of age." JA 21 (Instruction 17). The instructions of law given to the jury (and crafted by Stoltz's counsel) further defined "reason" as "a factuality of the mind by which it distinguishes truth from falsehood, good from evil, and which enables

the processor to deduce inferences of facts or from propositions." JA 647–48. Therefore, if the jury believed that Stoltz actually "distinguished truth from falsehood" and was able "to deduce inferences of fact" that "Annie" was an adult, then, under Instruction of Law N, Stoltz would not have "reason to believe" that "Annie" was under-15 and the jury would not have found him guilty.[12]

Stoltz's argument before this Court as to the meaning of "reason to believe" is also inconsistent with Stoltz's own counsel's position during trial. In his closing argument, Stoltz's counsel described "know or have reason to believe" to the jury:

> I want to tell you that my name is Judge Penny Azcarate. Okay. I told you that. You've got reason to believe it now. Do you believe it? No. Judge Azcarate is right here. But, I told you that I'm Judge Penny Azcarate. That's a reason to believe. *Is that this law? No, it's not that. It's not*.
>
> So if a detective throws out a 13, oh, reason to believe, no, no, no, no, no. There's got to be a foundation because if that would be the case, anytime the detective threw out a 13, immediately there's reason to believe, I've got you. I'm not Judge Azcarate. I told you I was, but obviously no I'm not. *So, that's not what a reason to believe means*.

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[12] "Given that the [trial court's] interpretation of the Statute was reasonable, [Stoltz's] argument regarding the constitutionality of the jury instruction" which mirrored the language of the statute "is moot." *Stern v. Meisner*, 812 F.3d 606, 612 (7th Cir. 2016).

JA 792–93 (emphasis added). Stoltz should not be permitted to set forth a different definition of "reason to believe" on appeal.

What is more, Stoltz's argument is premised on the assumption that the jury took Stoltz at his word that he "reasonably, objectively, and correctly believed" that "Annie" was an adult. Appellant Br. 15, 17; *id.* at 2 (asserting "the jury indicated they believed" Stoltz). Stoltz is not entitled to a presumption that the jury found him credible. The jury ultimately found that Stoltz knew or had reason to believe that "Annie" was under the age of 15. Stoltz is not entitled to peek behind the curtain of jury deliberations or speculate about why the jury found Stoltz "knew or had reason to believe" that he was soliciting someone under the age of 15. *Reed v. Commonwealth*, 239 Va. 594, 598, 391 S.E.2d 75, 77 (1990) (Virginia is "more careful than most states to protect the inviolability and secrecy of jurors' deliberations.") (quoting *Caterpillar Tractor Co. v. Hulvey,* 233 Va. 77, 82, 353 S.E.2d 747, 750 (1987)).

Stoltz notes that he was acquitted on Count II, which charged him with attempting to take indecent liberties with a minor. But this Court has been clear that "a defendant need not have actually committed a crime under Code § 18.2–370 of taking indecent liberties with a child to

have committed a crime under Code § 18.2–374.3(B) of engaging in improper communications involving a child." *Dietz v. Commonwealth*, 294 Va. 123, 135, 804 S.E.2d 309, 315 (2017). The "General Assembly's clear intent, when enacting this statute" was "to protect children from people who would take advantage of them *before* the perpetrator could commit a sexual assault on an actual child." *Id.* (internal quotation marks and citation omitted). At bottom, Stoltz's "argument is not one of legal construction. Rather, it is one based on evidence and credibility, which is the jury's charge. And, in [Stoltz's] case, the jury chose to reject his defense." *Stern v. Meisner*, 812 F.3d 606, 611 (7th Cir. 2016).

* * *

"The Internet offers sexual predators an effective means to find and groom their victims by offering access to a large number of people, allowing for a sense of anonymity and providing a simple way to share data and images." M. Megan McCune, *Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws*, 14 CommLaw Conspectus 503, 506 (2006). As the Court of Appeals explained, "[b]y enacting Code § 18.2-374.3, the General Assembly clearly intended to protect children from people who

would take advantage of them *before* the perpetrator could commit a sexual assault on an actual child." JA 47 (internal quotation marks and citation omitted). That laudable goal—and the familiar way that the General Assembly has chosen to pursue it—are not unconstitutional.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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I certify that, on April 12, 2019, this brief was filed electronically with the Court, in Portable Document Format, and three printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:

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