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Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENTLEY STREETT,

Defendant - Appellant.

No. 22-2056

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:14-CR-03609-JB-1)

Grant R. Smith, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

C. Paige Messec, Assistant United States Attorney (Alexander M.M. Uballez, United States Attorney, with her on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **TYMKOVICH**, **EBEL**, and **EID**, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant Bentley Streett was arrested for—and eventually pleaded guilty to—various counts of child pornography and sexual activity with minors. His actions were discovered by the mother of one of the minors from whom Mr. Streett attempted to solicit pornography, prompting the mother to contact the National

Center for Missing and Exploited Children. An investigation ensued, resulting in the production of Mr. Streett's cell phone records, followed by his arrest and a search of his home, computers, and phones.

Mr. Streett now appeals on two grounds. First, he argues that the search warrant permitting the search of his home lacked probable cause, and that the search could not be justified by an exception to the requirement that officers obtain a legitimate warrant. As such, he argues that all evidence obtained after this warrant was issued should be suppressed. Second, he argues that the district court erred in denying his motion to dismiss counts 3 through 7 of his indictment. Mr. Streett argues that the statute under which these charges were brought—18 U.S.C. § 2251(a)—is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech.

Exercising jurisdiction under 28 U.S.C § 1291, we AFFIRM the denial of Mr. Streett's motion to suppress and motion to dismiss.

I. BACKGROUND

In October 2013, the National Center for Missing and Exploited Children received an online tip that Mr. Streett had been texting the tipster's 15-year-old daughter, M.Y., and had requested that M.Y. send him a nude photograph. The tipster said that she did not believe M.Y. had sent any photos to Mr. Streett but was concerned that Mr. Streett was soliciting photos from other minors. The tipster also stated that Mr. Streett was located in Albuquerque, New Mexico, and provided his telephone number. The note accompanying the tip provided additional details about

Mr. Streett, including his birth date and other telephone numbers associated with him.

Special Agent Jon Whitsitt was assigned to investigate the tip. He began by gathering as much information as possible without launching a full investigation, before then presenting this information to a supervisor for assignment to the appropriate law enforcement agency. In investigating the tip, Whitsitt did not believe that there was probable cause that sexual exploitation had occurred. He did believe, however, that if the tip were true, a crime had been committed which justified further investigation. He prepared a subpoena duces tecum for the telephone number provided by the tip, as he did for most cases where possible sexual exploitation had occurred. To get authorization for a subpoena, he provided background information to his supervisor and an attorney at the New Mexico Attorney General's Office, Crimes Against Children Task Force. He then received authorization to seek a subpoena.

In November 2013, Whitsitt sent a preservation letter to T-Mobile requesting that all information relating to the phone number in the tip be preserved for 90 days pending a court order.[1] A few days later, a New Mexico state court issued a Grand Jury subpoena requesting records for the phone number, or in the alternative, that the records be sent to Special Agent Whitsitt. T-Mobile sent the information to Whitsitt

[1] The district court order says November 2014, but it is clear from context that the district judge meant November 2013.

and included Streett's telephone number, street address, birth year, and social security number.

In February 2014, the investigation was assigned to Detective Hartsock at the Bernalillo County Sheriff's Office Crimes Against Children Unit. Hartsock was provided with the tip, the subpoena, and the phone records that were received from the subpoena. He then obtained a search warrant for the telephone records received from T-Mobile. These telephone records did not disclose the content of communications, but did provide metadata regarding such communications. The records disclosed a high volume of communications between Mr. Streett and M.Y, including a mixed media message sent from Mr. Streett to M.Y. (which indicates that a photograph was sent). The records also showed that Mr. Streett had communicated with 135 different area codes, and that many of the messages had been mixed media (once again indicating that photographs were being exchanged).

In mid-February 2014, Hartsock filed an affidavit (the "Warrant Affidavit") seeking a warrant (the "Search Warrant") to search the residence associated with Mr. Streett in the T-Mobile records, located at 4620 Plume St. in Albuquerque. The Warrant Affidavit provided a description of the appearance of the 4620 Plume residence and stated that the only car not backed into the driveway was a brown Fiat with a New Mexico license plate number of PL8SPCL. The Warrant Affidavit also described the tip and the T-Mobile records. Moreover, before submitting the Warrant Affidavit, Kittson County officers in Minnesota spoke to M.Y. and learned that she was fourteen at the time Mr. Street requested the nude photo (which Mr. Streett

allegedly knew), and that Mr. Streett had asked her to send him nude photographs multiple times (requests with which she had never complied).[2] The Warrant Affidavit detailed this interview. Hartsock also stated that his training and experience led him to believe that a person does not try to get child pornography just once and only in one way. However, the Warrant Affidavit did not discuss information gleaned from the phone records, why Hartsock decided to search the 4620 Plume residence, or why he believed evidence of criminal activity would be found there.

The Search Warrant was approved telephonically on February 24, 2014, and was then executed on February 25, 2014.[3] When he arrived at the 4620 Plume residence, Hartsock left a copy of the Search Warrant with Mr. Streett's live-in girlfriend, and then proceeded to seize a Mac laptop, a Mac desktop, one smart phone, and one regular phone. Mr. Streett was present, and once the search was completed, he was escorted to an unmarked vehicle and read his Miranda warnings. He then voluntarily spoke to the police and admitted that he uses his Twitter account to meet women, but also said that he asks his followers to be at least eighteen years old. Mr. Streett also admitted, though, that he may have asked some girls under

[2] Although Mr. Streett would not be indicted for his conduct with M.Y., we focus on these facts because they provide the groundwork for the execution of the Search Warrant that is at issue before us.

[3] The Warrant Affidavit and the Search Warrant are essentially the same document. The Search Warrant simply contains a note on the final page that it was telephonically approved by the magistrate judge. Depending on context of the Warrant Affidavit, we may refer to this document as either the Warrant Affidavit or the Search Warrant.

eighteen for nude photographs of themselves—but didn't believe he had any child pornography on his cell phone.

After various other search warrants were executed (none of which are relevant to this appeal), and the identities of various other underaged victims were discovered, a grand jury returned a Second Superseding Indictment charging Mr. Streett for his conduct involving five of the minors. Mr. Streett was charged with two counts of traveling in interstate commerce "for the purpose of engaging in any illicit sexual conduct" with a person under eighteen, in violation of 18 U.S.C. § 2423(b), and five counts of persuading and attempting to persuade a minor "to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct," in violation of 18 U.S.C. §§ 2251(a), (e), and 2256. He was also charged with one count of distributing visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(2), (b)(1), and 2256; two counts of transferring obscene materials to minors, in violation of 18 U.S.C. § 1470; and two counts of possessing child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2), and 2256.

Mr. Streett filed a motion to suppress on the basis that the Search Warrant failed to establish probable cause to search the 4620 Plume residence because it did not connect Mr. Streett to this address via the T-Mobile records. Accordingly, Mr. Streett argued that all evidence obtained from this warrant and all additional searches

must be suppressed.[4] In addition, Mr. Streett filed a motion to dismiss four counts of his indictment on the basis that 18 U.S.C. § 2251(a) is unconstitutionally overbroad under the First Amendment.

The district court denied Mr. Streett's motion to suppress and motion to dismiss. The court agreed with Mr. Streett that the Search Warrant failed to establish probable cause because it did not explicitly link Mr. Streett to the 4620 Plume residence. However, the district court concluded that the Search Warrant was executed in good faith. The district court also ruled that the evidence would inevitably have been discovered even if the Search Warrant had been denied due to its deficiencies because the Warrant Affidavit would inevitably have been corrected and the Search Warrant would have subsequently been issued. Alternatively, the district court concluded that the five victims' identities would inevitably have been discovered from the T-Mobile records even without the Search Warrant. Finally, on the motion to dismiss, the district court concluded that § 2251(a) is not unconstitutionally overbroad. Mr. Streett then pled guilty to each count, reserving his right to appeal the issues before us.

On appeal, Mr. Streett argues that the district court erred in applying the good faith exception to the warrant requirement. He also argues that the inevitable discovery doctrine does not generally apply to defective warrant cases, and even if it did, it does not apply to the Search Warrant here. He additionally argues that it was

[4] The district court concluded that Hartsock had probable cause to search the T-Mobile records, and Streett does not contest this determination.

erroneous to find that the five victims' identities would inevitably have been discovered without the Search Warrant. Lastly, Mr. Streett argues that § 2251(a) is unconstitutionally overbroad, and so his motion to dismiss should have been granted.

We agree with the district court that the Search Warrant did not establish probable cause because it failed explicitly to link Mr. Streett to the 4620 Plume residence, but we affirm the district court's determination that the Search Warrant would inevitably have been issued under a properly revised affidavit had it originally (and properly) been denied for lack of probable cause. Because we affirm on this basis, we do not address the application of the good faith doctrine to the Search Warrant, nor do we address whether the identities of the five victims would otherwise have been discovered without reliance on the Search Warrant, since both issues are mooted by our conclusion that the Search Warrant would inevitably have been issued. We separately conclude that the district court correctly rejected Mr. Streett's argument that § 2251(a) is unconstitutionally overbroad because we do not construe the statute as implicating a substantial amount of protected speech.

II. DISCUSSION

A. The district court properly applied the inevitable discovery doctrine in denying the motion to suppress evidence obtained from a deficient search warrant.

We first consider the general application of the inevitable discovery doctrine to the Search Warrant, which all parties agree was issued without probable cause. We agree with the district court that a revised affidavit and warrant would have been issued promptly if the initial warrant application had been denied. As a result, it was

inevitable that the evidence of Mr. Streett's illegal behavior would have promptly been discovered.

Generally, "evidence obtained in violation of the Fourth Amendment will be suppressed under the exclusionary rule"—subject to a few exceptions. United States v. Christy, 739 F.3d 534, 540 (10th Cir. 2014). "[T]he inevitable discovery doctrine is one such exception." Id. Per this exception, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," then the evidence need not be suppressed. Nix v. Williams, 467 U.S. 431, 444 (1984). In reviewing the applicability of the inevitable discovery doctrine, we review factual determinations for clear error and the ultimate Fourth Amendment conclusions de novo. Christy, 739 F.3d at 540.

Mr. Streett argues that the inevitable discovery doctrine is inapplicable here for two reasons. First, he argues that the inevitable discovery doctrine is inapplicable as a matter of law in cases where a warrant was issued without probable cause. Second, he argues that, even if the doctrine can apply in some cases where a warrant was improperly issued, the Government failed to establish that a proper version of the Search Warrant would inevitably have been issued or that the evidence would have been inevitably discovered. We reject both arguments.

1. The inevitable discovery doctrine can apply to cases where a warrant was improperly issued.

To apply the inevitable discovery doctrine to the defective Search Warrant, we must first consider whether the inevitable discovery doctrine can ever apply when a

warrant has been improperly issued. We find the Third Circuit's decision in United States v. Stabile, 633 F.3d 219 (3d Cir. 2011), instructive on this point. There, the officers intended to obtain a search warrant for a 120 GB hard drive suspected of containing child pornography, but the warrant application accidentally called instead for the search of a separate 40 GB hard drive (for which no probable cause had been shown). Id. at 245. The officers executed the search warrant that was issued and searched the 40 GB hard drive. Id. at 245–46. Then, using the evidence obtained from the search of the 40 GB hard drive, the officers sought and received a new warrant to search five other hard drives (including the 120 GB hard drive they had originally intended to search). Id.

The Third Circuit concluded that the evidence obtained from the search of the 40 GB hard drive did not need to be suppressed because the evidence on that hard drive would inevitably have been discovered. The Third Circuit reasoned that "the Government had probable cause to obtain a warrant to conduct a full search of the 120 GB hard drive" and had "attempted to obtain the first federal search warrant before fully searching the 120 GB hard drive." Id. at 246. Given these facts, if the Government had received the warrant to search the 120 GB hard drive—as they had initially intended—and then proceeded to search that hard drive, the government would have then obtained evidence which would have provided them with probable cause to search the 40 GB hard drive. Id. As such, the contents of the 40 GB hard drive would inevitably have been discovered. And since "the Government attempted to secure state and federal search warrants at every step of the search," the Third

Circuit concluded "that there would be little deterrence benefit in punishing the Government." Id. This reasoning makes sense, and we therefore conclude that the inevitable discovery doctrine can apply when a warrant has been improperly issued. See id.

Mr. Streett makes three primary arguments against the application of the inevitable discovery doctrine to cases of a defective warrant. He first contends that this ruling will defeat the probable cause requirement. This is unpersuasive because in deciding the applicability of the inevitable discovery doctrine, courts must still consider "the strength of the showing of probable cause at the time the search occurred." United States v. Souza, 223 F.3d 1197, 1204 (10th Cir. 2000) (quoting United States v. Cabassa, 62 F.3d 470, 473–74 (2d Cir. 1995)). Without a showing by the Government that the officer had probable cause at the time the warrant application was submitted, the Government could not show that an alternative properly obtained warrant inevitably would have been issued.

Mr. Streett next claims that this ruling will diminish officers' incentive to craft a proper warrant affidavit in the first place. We see nothing in our ruling that would give an officer incentive deliberately to file an inadequate initial affidavit in support of a search warrant. Stabile, 633 F.3d at 246. Officers will still be best served by including all material facts in initial warrant applications.

Finally, Mr. Streett argues that applying the inevitable discovery doctrine in defective warrant cases will require too much hypothetical reasoning, since courts will have to consider whether a proper warrant would have been issued after an

improper warrant was denied. But hypothetical reasoning is required whenever the inevitable discovery doctrine is at issue. For example, in United States v. Christy, we determined that the officer there likely would have obtained a warrant in a hypothetical world since he had strong probable cause and was cross-designated to obtain state and federal search warrants—even though he had taken "no steps to obtain a warrant" when the search occurred. 739 F.3d at 543. This case involves no more hypothetical reasoning than Cristy.

2. The Search Warrant would inevitably have been granted had it originally been denied, and the evidence would inevitably have been discovered.

Having concluded that the inevitably discovery doctrine can apply in cases where a warrant was improperly issued, the question now is whether the Search Warrant at issue here would inevitably have been granted had it been initially denied for lack of an adequate showing of probable cause, and thus whether the evidence would inevitably have been discovered. We conclude that it would have.

We consider four factors to determine how likely it is that a proper warrant inevitably would have been granted: (1) "the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search," (2) "the strength of the showing of probable cause at the time the search occurred," (3) "whether a warrant ultimately was obtained, albeit after the illegal entry," and (4) "evidence that law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause and wanted to force the issue by creating a fait accompli." Souza, 223 F.3d at 1204 (quoting Cabassa, 62 F.3d

at 473 n.2). This requires courts "to examine each of the contingencies involved that would have had to have been resolved favorably to the government in order for the evidence to have been discovered legally and to assess the probability of the contingencies having occurred." Id. at 1205. To meet this burden, the Government must provide "demonstrated historical facts capable of ready verification." United States v. Shrum, 908 F.3d 1219, 1235 (10th Cir. 2018).

The first factor—i.e., the extent of the warrant process—clearly favors the Government. In prior cases, we have found that this factor favors the Government when the officers were deep into the investigative process, see United States v. Cunningham, 413 F.3d 1199, 1204 (10th Cir. 2005), or when they had taken steps to start the warrant application process, see Souza, 223 F.3d at 1205. Here, Hartsock had actually received a warrant. So, the warrant process was not merely close to completion; it had been completed (albeit in defective fashion).

Second, the strength of probable cause also favors the Government. At the time he applied for the Search Warrant, Hartsock had evidence from the tip provided by M.Y.'s mother, as well as evidence provided by M.Y. to the Kittson County officers. This provided Hartsock with strong evidence that Mr. Streett had persistently asked M.Y. for a nude photograph multiple times with knowledge that she was a minor. The T-Mobile records also showed a high amount of communications with 135 different area codes, including many texts alerting Mr. Streett to a Twitter notification, which indicates that Mr. Streett was communicating with various people he had met on the internet (as he had done with M.Y.). Finally,

multiple sources stated that 4620 Plume was Mr. Streett's residence, and Hartsock's experience as an officer led him to believe that solicitors of child pornography often keep this evidence in their homes. This provided strong probable cause that evidence of a crime would be found at 4620 Plume.[5]

The third factor—whether a warrant was ultimately obtained—is admittedly an awkward fit for these facts. Since Hartsock obtained a warrant (albeit a defective one) before the search and executed on it, we consider instead whether it was likely that Hartsock would have obtained a subsequent proper warrant if the deficient application originally had been denied. In the Warrant Affidavit, Hartsock stated that the New Mexico Attorney General's Internet Crimes Against Children task force learned from the T-Mobile records that the phone number "was registered to Bentley Streett, who lives in Bernalillo County." R. vol. 1, at 188. Both parties agree that this failed to establish probable cause that evidence of a crime would specifically be found at the 4620 Plume residence. In a hypothetical world where the warrant application was denied on this basis, though, Hartsock would have only had to add a single sentence to the Warrant Affidavit to render it proper. Rather than say "who lives in Bernalillo County," the affidavit would have established probable cause if it

[5] Mr. Streett argues that the Government cannot rely on the inevitable discovery doctrine when its only argument is that it had probable cause supporting the search. See Souza, 223 F.3d at 1204. Like in Souza, though, we do not only rely on the fact that "at the time the illegal search occurred, probable cause . . . was extremely strong," but also consider the extent of the warrant application process and whether a warrant was issued. Id. at 1205–06. The strength of the probable cause showing is just one of multiple factors we consider.

had simply added something to the effect of "who, according to the T-Mobile records, resides at 4260 Plume Rd. NW, Albuquerque, NM." That would have been an easy fix and Hartsock already had all the information to add that specificity. Since the Warrant Affidavit resulted in the issuance of the Search Warrant even though it ultimately failed to establish probable cause, it is likely that an even more detailed amended affidavit would have secured a warrant as well. Thus, we conclude that the third factor favors the Government because a proper warrant likely would have been obtained had the original application been denied.

Fourth, as for evidence that the officers jumped the gun "due to their lack of confidence about probable cause," Christy, 739 F.3d at 542, this factor also favors the Government. Hartsock both applied for and received a search warrant, and waited until the warrant was issued before executing the search. These facts belie any notion that he was not confident in his lack of probable cause. In sum, then, all four Souza factors favor an application of the inevitable discovery doctrine to these facts.

Mr. Streett argues that the facts here resemble two other cases in which we concluded that the inevitable discovery doctrine was inapplicable, but we do not find these cases analogous. The first is United States v. Owens, where we rejected the notion that contraband discovered by way of an illegal search of a bag in a motel room would inevitably have been discovered by the motel's cleaning staff. 782 F.2d 146, 153 (10th Cir. 1986). We pointed out that, had the cleaning staff found the bag, they may not have necessarily opened it nor called the police. Id. Moreover, it was

entirely possible that the defendant could have returned to the motel room before the cleaning staff discovered the contraband. Id. Because of the various contingencies, we concluded that the inevitable discovery doctrine was inapplicable.

The second case Mr. Streett cites is United States v. Neugin, where we determined that the inevitable discovery doctrine did not apply to the search of a camper left in a restaurant parking lot. 958 F.3d 924, 935 (10th Cir. 2020). We reasoned that, had the police not searched the vehicle, the defendant could have called a towing company or a mechanic and the police would no longer have had access to the camper. Id. Like in Owens, these very plausible contingencies rendered the independent discovery doctrine inapplicable.

These two cases concern various plausible contingencies which would likely cause a presumed future state of affairs to diverge drastically from the actual state of affairs, and which would prevent the contraband from ever being discovered. But here, the actual world where the warrant was improper and the presumed future world where the search would have been proper differs by just one easy-to-add sentence in the Warrant Affidavit. And there is no reason to think that this small fix would have led to a significant delay in either the issuance or execution of the search warrant—especially since the warrant was approved telephonically.[6] These facts do not lend

[6] Mr. Streett argues that, in this alternative world, the magistrate judge may have asked for a records check on the address if it had been included in the Warrant Affidavit, and may have denied the warrant application on this basis. But had the magistrate judge been inclined to ask for a records check, this request likely would have been made in connection with the initial application.

themselves to the much greater contingencies like those that were in play in Owens or Neugin. Rather, the world of the defective affidavit and the hypothetical world of the proper affidavit overlap almost entirely. Thus, the district court did not err in concluding that the discovery of the evidence here was inevitable.

B. The "persuade" provision of 18 U.S.C. § 2251(a) is not facially overbroad.

We turn now to Mr. Streett's argument that counts 3 through 7 of Mr. Streett's Second Superseding Indictment should have been dismissed because 18 U.S.C. § 2251(a) criminalizes a substantial amount of protected speech and is therefore facially overbroad. In the context of a First Amendment challenge like this one, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, n.6 (2008)). Although litigants normally may not assert constitutional rights on behalf of third parties, "the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied," if the statute criminalizes a substantial amount of protected speech compared to its legitimate sweep. United States v. Hansen, 143 S. Ct. 1932, 1939 (2023). "Invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" United States v. Williams, 553 U.S. 285, 293 (2008) (quoting Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, 39 (1999)). "The overbreadth claimant bears the

burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Assn., Inc. v. City of New York, 487 U.S. 1, 14 (1988)). We review a district court's conclusions of law concerning the constitutionality of a statute de novo. United States v. Carel, 668 F.3d 1211, 1216 (10th Cir. 2011).

The overbreadth analysis has two steps. The first step "is to construe the challenged statute" to determine whether it covers protected speech. Williams, 553 U.S. at 293. In other words, "[t]o judge whether a statute is overbroad, we must first determine what it covers." Hansen, 143 S. Ct. at 1940. After the scope of the statute has been determined, the second step of the overbreadth analysis asks us to determine whether the unconstitutional applications of the statute are "substantially disproportionate to the statute's lawful sweep." Id. at 1939. For the statute to be unconstitutionally overbroad, its "unconstitutional applications must be realistic, not fanciful[.]" Id. Proceeding through this two-part analysis, we conclude that § 2251(a) is not substantially overbroad.

1. Mr. Streett has not waived his arguments.

Before considering the merits of Mr. Streett's challenge, we first address the Government's argument that Mr. Streett has waived most of his arguments. The Government claims that Mr. Street only argued below that § 2251(a) is generally overbroad, rather than focusing on the "persuade" provision of § 2251(a) alone. This argument is unavailing. Appellate arguments may be "more detailed" than the arguments presented to the district court, so long as the arguments below "gave the

district court ample opportunity to consider" the issues. United States v. McIntosh, 29 F.4th 648, 655 (10th Cir. 2022). Although Mr. Streett did not specifically focus on the "persuades" language below, he did present a fulsome argument about the unconstitutional overbreadth of § 2251(a), which is a generalized version of the argument he makes before us. Indeed, it would have been obvious to the district court that the "persuades" provision was at issue, since the court recognized that Mr. Streett had been charged with "persuading and/or attempting to persuade a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." R. vol. 1, at 919 (emphasis added). And the district court had ample opportunity to consider this issue thoroughly, evidenced by the district court's thorough 116-page opinion. Mr. Streett therefore preserved his argument. See id.[7]

2. The scope of the "persuade" provision.

We turn now to the scope of § 2251(a). The statute instructs, in pertinent part, that "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct," shall be punished under the statute. It is the word

[7] The Government's other arguments regarding waiver are unavailing because either Mr. Streett did make the argument in question below, the caselaw undergirding Mr. Streett's argument had not been decided yet, see United States v. Hernandez-Calvillo, 39 F.4th 1297 (10th Cir. 2022); Harmon v. City of Norman, 981 F.3d 1141, 1153 (10th Cir. 2020), or the arguments on appeal are simply "more detailed" than the arguments below (rather than being different arguments entirely), McIntosh, 29 F.4th at 654.

"persuades" that Mr. Streett argues is overbroad, so our first task is to interpret the scope of that word in the context of § 2251(a). See Williams, 553 U.S. at 293.

Starting with the plain text of § 2251(a), we have previously held that "[t]o 'persuade' is 'to induce by argument, entreaty, or expostulation into some mental position.'" United States v. Isabella, 918 F.3d 816, 831 (10th Cir. 2019) (quoting United States v. Goetzke, 494 F.3d 1231, 1235 n.3 (9th Cir. 2007)). In defining the term in this way, we drew a distinction between "asking" and "persuading." Id. at 836 (" . . . the line between 'asking' and 'persuading' is imprecise, but a reasonable jury could conclude [the defendant] crossed it." (quoting United States v. Tykarsky, 446 F.3d 458, 473 (3d Cir. 2006))).[8] Merely asking a minor for a naked photo, then, does not constitute persuasion under § 2251(a).[9] Rather, there must be a "calculated action" that involves "pressuring the child, physically or psychologically, to engage in explicit conduct." United States v. Heinrich, 57 F.4th 154, 159 (3d Cir.

[8] It is possible that merely asking a minor for a nude picture might fall under § 2251(a) via some other term like "employs" or "uses." We do not consider or decide whether this is the case, though. Here, we only address the term "persuades."

[9] Mr. Streett argues that the distinction between asking and persuading means that he did not violate § 2251(a). He directs us to the factual bases for counts three through seven in his plea agreement, which state that he "asked for images of [the minor's] genitals" and other nude images, R. vol. 1, at 1284–85, and he points out that the Government agreed that these were sufficient factual bases for the counts. But Mr. Streett has never challenged the sufficiency of the evidence in this case, and so we do not address any such argument here.

2023). In other words, the defendant must overcome some resistance on the part of the minor.[10]

Section 2251(a) raises potential First Amendment concerns if its proscriptions extend beyond child pornography. This is because the First Amendment only permits "restrictions upon the content of speech in a few limited areas"—one of which being child pornography. United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817 (2000)). If § 2251(a) extends beyond child pornography, then, it potentially comes into conflict with the First Amendment. Since we must adopt any interpretation of a statute which is "fairly possible" in order to save the statute from unconstitutionality, Hansen, 143 S. Ct. at 1946 (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018)), we interpret the scope of § 2251(a) as prohibiting the creation of sexually explicit representations of minors only if such representations constitute child pornography for purposes of the First Amendment.

This is a fair reading of the statute. As noted above, § 2251(a) prohibits any person from persuading a minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct." Although the phrase "child pornography" is not used in § 2251(a), § 2251(a) is limited to conduct involving a

[10] This is not to say that repeated requests cannot constitute persuasion. Wearing a minor down by repeatedly asking for a sexually explicit photograph may very well overcome the resistance of the minor.

minor and the definitions section for the chapter defines "child pornography" in part as "any visual depiction . . . where-- the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct[.]" 18 U.S.C. § 2256(8). The visual depiction prohibited by § 2251(a) thus falls under the broader definition of "child pornography" as defined by § 2256(8). Section 2251(a) prohibits certain actions which would constitute a subset of that which constitutes "child pornography" for First Amendment purposes.[11]

In sum, we interpret the "persuades" provision of § 2251(a) as requiring physical or psychological pressure to overcome a minor's resistance to a requested depiction of sexual conduct, and we interpret the scope of the provision as covering only those depictions that would constitute "child pornography" which fall outside the protections of the First Amendment.

3. The potential overbreadth of the "persuades" provision.

Having interpreted the "persuades" provision to only cover the constitutional definition of child pornography, we consider now whether there remains any risk of substantial overbreadth. Mr. Streett raises three examples of potential overbreadth, but we conclude that none of these examples demonstrate that § 2251(a) is substantially overbroad.

[11] The connection between § 2251(a) and the definition of "child pornography" is further bolstered by § 2251(e), which enhances the mandatory minimum sentence for any individual who has a previous conviction for "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."

Mr. Streett first argues that § 2251(a) implicates teenagers' First Amendment right to take sexually explicit depictions of themselves. Mr. Streett contends that such depictions would not constitute child pornography because they are not intrinsically related to the abuse of children. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002). But if Mr. Streett is correct that these images would not constitute child pornography, then the "persuades" provision of § 2251(a) is not implicated because we have interpreted § 2251(a) as covering only those images which constitute child pornography for First Amendment purposes. And if the images do constitute child pornography, then such images enjoy no First Amendment protection. See United States v. Stevens, 559 U.S. 460, 471 (2010). In either case, protected speech is not implicated, and so this does not demonstrate substantial overbreadth. Further, as we have held, the defendant must engage in some physical or psychological pressure which overcomes the minor's resistance.

Mr. Streett's second example involves various hypothetical scenarios where an adult might innocuously encourage a teenager to take a sexually explicit self-photograph. For example, an adult might innocently convince a minor to engage in body positivity by taking sexually explicit photographs of him or herself, or a scholar could write an article arguing that teenagers have the First Amendment right to take their own sexually explicit photographs. According to Mr. Streett, these acts would constitute persuasion under § 2251(a). But, as explained, the term "persuades" requires more than just asking for a sexually explicit photograph. See Isabella, 918 F.3d at 831. So, in these examples, an adult would not violate the "persuades"

provision simply by suggesting that a minor can or should engage in body positivity; the adult would have to overcome a child's resistance using physical or psychological pressure. Heinrich, 57 F.4th at 159–60. In all but the most aggressive scenarios, then, would the adults in these hypotheticals fall within the scope of § 2251(a). Even if such aggressive scenarios may arise, "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" Williams, 553 U.S. at 303 (quoting Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984)). Mr. Streett has therefore failed to demonstrate as a matter of "actual fact" that there are a substantial number of such potentially unconstitutional applications of the "persuades" provision of § 2251(a). Hicks, 539 U.S. at 122 (quoting N.Y. State Club Assn., Inc., 487 U.S. at 14).

The final purported overbreadth issue concerns scienter. A plurality of circuits have held that § 2251(a) does not require the defendant to know that the minor is a minor, and have held that a mistake-of-age defense is not constitutionally mandated, so an adult can be prosecuted for persuading a minor to take a sexually explicit photograph online without the adult knowing that he or she is talking to a minor. See United States v. Humphrey, 608 F.3d 955, 960 (6th Cir. 2010) (" . . . a defendant's knowledge of the minor's age is not an element of the offense.") (collecting cases from the Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits); see also Sabus v. Pawnee Cnty. Bd. of Cnty. Commissioners, No. 22-6095, 2023 WL 3994386, at *4 (10th Cir. June 14, 2023) (unpublished) (citing Humphrey to support

an officer's determination of probable cause, without deciding the scienter issue). Mr. Streett argues that this lack of a scienter requirement concerning the minor's age, combined with the lack of a mistake-of-age defense, renders § 2251(a) substantially overbroad. We disagree.

In making this argument, Mr. Streett attempts to increase the number of unconstitutional applications of § 2251(a) by claiming that the statute extends to the potentially innocent defendant who reasonably believes he or she is persuading someone who is over eighteen years old to create sexually explicit content, when in fact the defendant is speaking to a minor. However, even assuming arguendo that the scienter law of other circuits would be adopted by the Tenth Circuit, Mr. Streett has not demonstrated substantial overbreadth. Even if § 2251(a) does not contain a scienter requirement concerning the minor's age, and even if we do not adopt a mistake-of-age defense, the "persuades" provision still has an inherent scienter requirement in which the defendant must intend to persuade the other party to produce a depiction of sexually explicit conduct. See United States v. Esch, 832 F.2d 531, 536 (10th Cir. 1987) ("[B]y requiring proof of purposeful conduct," § 2251(a) "clearly contains a scienter requirement" that the defendant intended to persuade or induce another to produce sexually explicit conduct); cf. Heinrich, 57 F.4th at 167 ("The defendant charged with producing child porn must both use a child to engage in sexually explicit conduct and intend to take pictures of that conduct."). This scienter requirement limits the sweep of the provision.

Moreover, Mr. Streett has not quantified the substantiality of the risk that an adult will unknowingly persuade a minor to depict sexually explicit conduct, and the record does not establish that the risk is so widespread as to implicate a substantial amount of constitutionally protected behavior because of the alleged overbreadth of the word "persuade." Mr. Streett's only evidence concerns the statistics of online dating more generally and the phenomenon of one person pretending to be another person online—neither of which demonstrate that there are a substantial number of cases where an adult mistakenly persuades a minor to create a depiction of sexually explicit conduct. Once again, "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" Williams, 553 U.S. at 303 (quoting Taxpayers for Vincent, 466 U.S. at 800). Like above, Mr. Streett has failed to meet his burden of establishing substantial overbreadth as a matter of "actual fact." Hicks, 539 U.S. at 122 (quoting N.Y. State Club Assn., Inc., 487 U.S. at 14).[12]

Lastly, to the extent that Mr. Streett's examples do generate some hypothetically unconstitutional applications of § 2251(a), such hypothetical situations certainly have not been shown to constitute a substantial number of cases relative to the constitutional breadth of § 2251(a). The "persuades" provision of § 2251(a)

[12] It is possible that a future party might bring an as-applied challenge concerning the requirement of a mistake-of-age defense for § 2251(a); we only hold here that Mr. Streett's factual scenario does not implicate enough constitutionally protected behavior to render the "persuades" provision of § 2251(a) substantially overbroad.

plainly covers a wide swath of cases that fall outside the protection of the First Amendment—like the one before us—in which an adult attempts to or does persuade a minor into creating a visual depiction of sexually explicit conduct. See, e.g., Isabella, 918 F.3d at 834–35 (defendant attempted to persuade minor to send him sexually explicit photographs); United States v. Kokayi, No. 19-4510, 2021 WL 3733010, at *10 (4th Cir. Aug. 24, 2021) (unpublished) (defendant persuaded minor to send him live sexual videos), cert. denied, 142 S. Ct. 823 (2022); United States v. Waqar, 997 F.3d 481, 487–88 (2d Cir. 2021) (defendant attempted to persuade minor to send him sexual explicit material); United States v. Kelly, 609 F. Supp. 3d 85, 132 (E.D.N.Y. 2022) (defendant persuaded minors to produce taped sexual encounters). Mr. Streett has therefore failed to show that any potentially unconstitutional applications of the "persuades" provision of § 2251(a) are substantial relative to the constitutional applications.[13]

[13] Mr. Streett finally argues that the constitutional applications of § 2251(a) can be enforced via some other term in the statute (e.g., "induce" and "entice"), and so "[t]he availability of these alternative prosecutorial tools dilutes the force" of the legitimate applications of the "persuade" term. United States v. Hernandez-Calvillo, 39 F.4th 1297, 1310 (10th Cir. 2022), abrogated on other grounds by Hansen, 143 S. Ct. at 1942. This argument is unpersuasive. If the term "persuade" can be held to be unconstitutionally overbroad due to the existence of these other terms, then the same challenge can be lodged at each other similar term. And it is "not uncommon in criminal statutes" for there to be some overlap between provisions, even if there is potential superfluity. Loughrin v. United States, 573 U.S. 351, 358 n.6 (2014). Congress is permitted to use various verbs to cover the field of prohibited conduct as best it can. We therefore decline to deem one verb in a criminal statute substantially overbroad solely because Congress used other similar verbs in the same statute.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Mr. Streett's motions to suppress and the denial of Mr. Streett's motion to dismiss counts 3 through 7 of his indictment.

United States v. Streett, No. 22-2056

EID, Circuit Judge, concurring in part and concurring in the judgment.

I join the majority opinion with the exception of Part II.B. I agree with the majority that 18 U.S.C. § 2251(a) is not overbroad under the First Amendment, but I would take a different path to reach that result. Because § 2251(a) on its face criminalizes only acts intended to produce child pornography, it is unnecessary for us to evaluate the scope of the word "persuades."

Child pornography is not protected by the First Amendment. By statute, "'child pornography' means any visual depiction . . . of sexually explicit conduct, where . . . the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8). The First Amendment does not protect "material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 293 (2008). Accordingly, the Constitution does not protect child pornography, and Congress has criminalized it. 18 U.S.C. § 2252A.

Congress has also criminalized taking certain steps to create child pornography. 18 U.S.C. § 2251(a). At issue in this case is § 2251(a), which declares that "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished . . . ." *Id.* In other words, § 2251(a) criminalizes using speech to cause any minor to engage in sexually explicit conduct in order to produce or to transmit child pornography.

Like child pornography, the speech criminalized by § 2251(a) is not protected by the First Amendment. The First Amendment does not protect speech "used as an essential and inseparable part of a grave offense against an important public law." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Accordingly, "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *United States v. Hansen*, 143 S. Ct. 1932, 1947 (2023) (quoting *Giboney*, 336 U.S. at 502). Thus, because "[s]peech intended to bring about a particular unlawful act has no social value," such speech, like the underlying unlawful act, "is unprotected" by the First Amendment. *Id.* That is why, just this year, the Supreme Court found unprotected any speech "that solicits or facilitates a *criminal* violation, like crossing the border unlawfully or remaining in the country while subject to a removal order." *Id.* (emphasis in original).

The speech criminalized by § 2251(a) is likewise unprotected. The speech covered by § 2251(a) is "an essential and inseparable part" of the "grave offense" of attempting to create child pornography. *Giboney*, 336 U.S. at 502. It is thus outside the scope of the First Amendment. *Cf. Williams*, 553 U.S. at 297–98 ("[O]ffers to provide or requests to obtain . . . child pornography involving actual children . . . enjoy no First Amendment protection.").

Therefore, we need not decide the scope of the word "persuades." It does not matter whether an adult "merely ask[s]" a child to create child pornography or instead uses "physical or psychological pressure to overcome a minor's resistance." *Contra* Maj.

Op. at 20, 22. Both are criminal. Neither is protected by the First Amendment. In sum, there is no overbreadth problem here because simply to ask a child to create child pornography is not speech protected by the First Amendment. Because the majority appears to adopt the defendant's incorrect premise that "merely asking" a child to create child pornography would constitute protected speech within the overbreadth analysis, I respectfully concur only in the judgment as to Part II.B.