STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0576

State of Minnesota,
Respondent,

vs.

Michael Anthony Casillas,
Appellant.

Filed December 23, 2019
Reversed
Larkin, Judge

Dakota County District Court
File No. 19HA-CR-17-4702

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant County Attorney, Hastings, Minnesota (for respondent)

John Arechigo, Arechigo & Stokka, P.A., St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

S Y L L A B U S

Minn. Stat. § 617.261 (2016) is facially overbroad in violation of the First Amendment to the United States Constitution, and the constitutional infirmity cannot be remedied through a narrowing construction or severance.

O P I N I O N

LARKIN, Judge

Appellant challenges his conviction of felony nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, arguing that the statute is constitutionally overbroad and therefore facially invalid under the First Amendment to the United States Constitution. We conclude that Minn. Stat. § 617.261 is facially overbroad in violation of the First Amendment as a result of its lack of an intent-to-harm requirement and its use of a negligence mens rea. Because it is not possible to remedy those constitutional defects through application of a narrowing construction or by severing problematic language from the statute, we invalidate the statute and reverse appellant's conviction and sentence.

FACTS

In 2017, respondent State of Minnesota charged appellant Michael Anthony Casillas with felony nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, after A.K.M. reported that Casillas had obtained and disseminated, without her consent, private sexual images of her. The complaint alleged that Casillas obtained A.K.M.'s account log-in information for her wireless and television provider accounts while they were in a relationship and that after their relationship ended, Casillas accessed those accounts and obtained photos and videos containing sexual images of A.K.M. Casillas told A.K.M. that he planned to release the photos and videos. A.K.M. objected. She later received a screenshot of one of the videos that had been sent to 44 recipients and posted online. The video showed A.K.M. engaging in a sexual act with another individual.

Casillas moved to dismiss the charge, arguing that Minn. Stat. § 617.261 is unconstitutionally overbroad and vague in violation of the First Amendment. The district court rejected Casillas's First Amendment challenge, reasoning in part that Minn. Stat. § 617.261 regulates obscenity, which is not protected by the First Amendment.

The parties agreed to proceed under Minn. R. Crim. P. 26.01, subd. 4, which allows a defendant to stipulate to the state's case to obtain review of a district court's dispositive pretrial ruling. Based on the stipulated record, the district court concluded that Casillas was guilty of felony nonconsensual dissemination of private sexual images as charged because he intentionally disseminated an identifiable image of A.K.M. depicted in a sexual act.

The district court reasoned that Casillas "texted A.K.M. and seemingly threatened her about posting the image online, which demonstrates that he knew this wasn't an act based on her consent," and that Casillas "certainly knew that A.K.M. was not consenting to him disseminating the image." The district court also determined that the state had proved that "the image was obtained under circumstances in which [Casillas] knew or reasonably should have known [that A.K.M.] had a reasonable expectation of privacy." The district court reasoned that "an expectation of privacy regarding the image is implicitly inherent from the nature of the act depicted," that Casillas's threat to post the image online demonstrated "that he understood it was an image that should remain private," and that "A.K.M.'s response about prosecuting such conduct further demonstrates that he reasonably should have known that A.K.M. had a reasonable expectation of privacy."

The district court entered judgment of conviction, denied Casillas's motion for a downward dispositional sentencing departure, and ordered him to serve a presumptive 23-month prison term under Minnesota's sentencing guidelines. Casillas appeals.

ISSUE

Did the district court err by rejecting Casillas's First Amendment challenge to Minn. Stat. § 617.261?

ANALYSIS

In this case, we are asked to decide whether Minn. Stat. § 617.261 is overbroad and therefore facially invalid under the First Amendment to the United States Constitution.[1] An appellate court reviews the constitutionality of a statute de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). "Ordinarily, laws are afforded a presumption of constitutionality, but statutes allegedly restricting First Amendment rights are not so presumed." *Dunham v. Roer*, 708 N.W.2d 552, 562 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[2] U.S. Const. amend. I. It applies to the states through the Fourteenth Amendment. *In re Welfare of A.J.B.*, 929 N.W.2d 840, 846 (Minn. 2019). The First

[1] Casillas also argues that the statute is unconstitutionally vague and challenges his sentence. Because our review of Casillas's overbreadth argument is dispositive, we do not reach those issues.

[2] The Minnesota Constitution similarly protects the rights of all persons to "freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." Minn. Const. art. I, § 3. Although Casillas cites the Minnesota Constitution, he argues for relief under the United States Constitution.

Amendment establishes that the government generally may not restrict expression because of its messages, ideas, subject matter, or content. *Id.* The First Amendment's protections extend beyond expressions regarding matters of public concern, and "First Amendment principles apply with equal force to speech or expressive conduct on the Internet." *Id.* "The [Supreme] Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books." *Kaplan v. California*, 413 U.S. 115, 119, 93 S. Ct. 2680, 2684 (1973). The state concedes, and we agree, that Minn. Stat. § 617.261 restricts expressive conduct.

Casillas contends that Minn. Stat. § 617.261 is unconstitutionally overbroad on its face. To succeed in a typical facial constitutional challenge, a challenger must establish that no set of circumstances exists under which the challenged statute would be valid or that the statute lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 472, 130 S. Ct. 1577, 1587 (2010). But in the First Amendment context, the Supreme Court has recognized a second type of facial challenge, whereby 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." *Id.* at 473, 130 S. Ct. at 1587 (quotation omitted).

Thus, a long-recognized exception to the ordinary rules of standing applies to facial overbreadth challenges. *State v. Mireles*, 619 N.W.2d 558, 561 (Minn. App. 2000) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2916 (1973)), *review denied* (Minn. Feb. 13, 2001). Under this exception, litigants may challenge a statute, "not because their own rights of free expression are violated, but because 'the statute's very

existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Id.* (quoting *Broadrick*, 413 U.S. at 611-12, 93 S. Ct. at 2916). "The rationale for allowing an overbreadth challenge, even when a statute is constitutional as applied in a particular circumstance, is that enforcement of an overbroad law chills protected speech, which inhibits the free exchange of ideas." *State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017) (quotation omitted).

The Minnesota Supreme Court recently summarized the analysis applicable to a First Amendment overbreadth challenge as follows:

> We may reverse a conviction for violating the First Amendment if we determine that the statute is unconstitutionally overbroad on its face. A statute may be facially overbroad in violation of the First Amendment when it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights. Because of the fear of a chilling effect on speech, the traditional rules of standing have been altered in the First Amendment context to allow litigants to challenge statutes as unconstitutionally overbroad even when their own conduct could, consistent with constitutional requirements, be punished under a narrowly drawn statute.

A.J.B., 929 N.W.2d at 847 (citations and quotations omitted).

In sum, Casillas may bring a facial overbreadth challenge to Minn. Stat. § 617.261 even if his dissemination of A.K.M.'s image is not protected by the First Amendment. As to the applicable analysis:

> The first step in an overbreadth challenge is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. Once we understand the scope and sweep of the statute, we ask whether its reach is limited to unprotected categories of speech or expressive conduct.

Id. (citations and quotations omitted). If the statute is not limited to unprotected categories of speech or expressive conduct,

> we turn to the core overbreadth inquiry: Does the statute prohibit a substantial amount of constitutionally protected speech? This inquiry looks to the conduct that is criminalized by the statute—some of which is unprotected speech or conduct and some of which is speech and expressive conduct protected by the First Amendment—and asks whether the protected speech and expressive conduct make up a substantial proportion of the behavior the statute prohibits compared with conduct and speech that are unprotected and may be legitimately criminalized. A statute is not substantially overbroad merely because one can conceive of some impermissible applications.

Id. at 847-48 (citations and quotations omitted).

If the statute prohibits a substantial amount of protected expressive conduct, we consider whether applying a narrowing construction or severing problematic language from the statute would remedy the constitutional defect. *Id.* at 848. If the statute is substantially overbroad and cannot be saved by a narrowing construction or severance, "the remaining option is to invalidate the statute." *Id.* (quotation omitted). "Because the overbreadth doctrine has the potential to void an entire statute, it should be applied only as a last resort and only if the degree of overbreadth is substantial and the statute is not subject to a limiting construction." *Dunham*, 708 N.W.2d at 565 (quotation omitted).

With these principles in mind, we turn to the language of Minn. Stat. § 617.261.

1. Minn. Stat. § 617.261 has a broad sweep.

Minn. Stat. § 617.261 provides:

> It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:
>
> (1) the person is identifiable:
>
> (i) from the image itself, by the person depicted in the image or by another person; or
>
> (ii) from personal information displayed in connection with the image;
>
> (2) *the actor knows or reasonably should know* that the person depicted in the image does not consent to the dissemination; and
>
> (3) the image was obtained or created under circumstances in which *the actor knew or reasonably should have known* the person depicted had a reasonable expectation of privacy.

Minn. Stat. § 617.261, subd. 1 (emphasis added).

"'Dissemination' means distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium." *Id.*, subd. 7(b). "'Image' means a photograph, film, video recording, or digital photograph or recording." *Id.*, subd. 7(d). "'Intimate parts' means the genitals, pubic area, or anus of an individual, or if the individual is female, a partially or fully exposed nipple." *Id.*, subd. 7(e).

As to penalties, the statute provides that normally, whoever violates Minn. Stat. § 617.261, subd. 1, is guilty of a gross misdemeanor. *Id.*, subd. 2(a). However, a person who violates subdivision 1 is guilty of a felony and may be sentenced to imprisonment for up to three years if one of the following factors is present:

> (1) *the person depicted in the image suffers financial loss due to the dissemination of the image*;
>
> (2) the actor disseminates the image with intent to profit from the dissemination;
>
> (3) the actor maintains an Internet Web site, online service, online application, or mobile application for the purpose of disseminating the image;

> (4) the actor posts the image on a Web site;
>
> (5) *the actor disseminates the image with intent to harass the person depicted in the image*;
>
> (6) the actor obtained the image by committing a violation of section 609.52, 609.746, 609.89, or 609.891; or
>
> (7) the actor has previously been convicted under this chapter.

Id., subd. 2(b) (emphasis added). "'Harass' means an act that would cause a substantial adverse effect on the safety, security, or privacy of a reasonable person." *Id.*, subd. 7(c).

Minn. Stat. § 617.261 is not violated if

> (1) the dissemination is made for the purpose of a criminal investigation or prosecution that is otherwise lawful;
>
> (2) the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct;
>
> (3) the dissemination is made in the course of seeking or receiving medical or mental health treatment and the image is protected from further dissemination;
>
> (4) the image involves exposure in public or was obtained in a commercial setting for the purpose of the legal sale of goods or services, including the creation of artistic products for sale or display;
>
> (5) the image relates to a matter of public interest and dissemination serves a lawful public purpose;
>
> (6) the dissemination is for legitimate scientific research or educational purposes; or
>
> (7) the dissemination is made for legal proceedings and is consistent with common practice in civil proceedings necessary for the proper functioning of the criminal justice system, or protected by court order which prohibits any further dissemination.

Id., subd. 5.

In sum, Minn. Stat. § 617.261 applies to a single intentional dissemination of an image of "another person who is depicted in a sexual act or whose intimate parts are exposed" if certain requirements are met. *Id.*, subd. 1. Those requirements are based in

part on a broad mens rea requirement: the disseminator "knows or reasonably should know that the person depicted in the image does not consent to the dissemination" and "the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy." *Id.* That "knows or reasonably should know" standard is a negligence mens rea that allows a person to be convicted under Minn. Stat. § 617.261 even if he did not actually know that the person depicted in the image did not consent to the dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. *See A.J.B.*, 929 N.W.2d at 850 (describing a "knows or has reason to know" standard as a broad negligence mens rea).

Moreover, Minn. Stat. § 617.261 does not require proof that the disseminator caused or intended a specified harm. Instead, the statute enhances a criminal dissemination to a felony offense if "the person depicted in the image suffers financial loss due to the dissemination of the image" or "the actor disseminates the image with intent to harass the person depicted in the image." Minn. Stat. § 617.261, subd. 2(b)(1), (5). Thus, the statute's harm-causing and intent-to-harm elements do not limit the expressive conduct proscribed by the statute; they merely determine the level of criminality assigned to expressive conduct within the statute's reach.

In sum, Minn. Stat. § 617.261 covers a wide range of expressive conduct. It covers the dissemination of a sexual image with knowledge that the person depicted in the image did not consent to the dissemination and that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. But

it also covers the dissemination of a sexual image even if the disseminator did not know that the subject of the image did not consent to the dissemination, did not know that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy, and did not cause or intend to cause a specified harm. Given the statute's application to the latter set of circumstances, its sweep is broad.

2. Minn. Stat. § 617.261's sweep is not limited to expressive conduct that is categorically excluded from First Amendment protection.

We next address the state's argument that Minn. Stat. § 617.261 does not implicate the First Amendment because it regulates only unprotected expressive conduct. "[T]he Supreme Court has long permitted some content-based restrictions in a few limited areas, in which speech is of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 19 (Minn. 2014) (quotation omitted). Exceptions to First Amendment protections fall into several delineated categories that include speech or expressive conduct designed to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. *A.J.B.*, 929 N.W.2d at 846 (citing *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012)).

Obscene material is unprotected by the First Amendment. *Miller v. California*, 413 U.S. 15, 23-24, 93 S. Ct. 2607, 2614-15 (1973). But "[s]tate statutes designed to regulate obscene materials must be carefully limited," and the Supreme Court has confined the

permissible reach of such regulation to works that depict or describe sexual conduct. *Id.* Such a regulation must "be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S. Ct. at 2615.

Based on that definition of obscenity, the state contends that Minn. Stat. § 617.261 regulates only obscenity. The state argues that "[t]he average person would find that [Minn. Stat. § 617.261] regulates content that appeals to the prurient interest." The state notes that a prurient interest in sex has been defined as a morbid, shameful interest in sex, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05, 105 S. Ct. 2794, 2802 (1985), and asserts that "people who disseminate nonconsensual, private sexual images evince" such an interest in sex. The state further argues that Minn. Stat. § 617.261 "regulates content that depicts, in a patently offensive way, specifically defined sexual conduct," asserting that "[w]hat makes the proscribed images patently offensive is, again, their nonconsensual nature." Specifically, the state argues that "[i]mages depicting someone's nudity or sexuality taken in private but shared publicly without consent are patently offensive." Lastly, the state argues that the images proscribed by Minn. Stat. § 617.261 lack serious literary, artistic, political, and scientific value.

The state's obscenity argument is not aligned with the definition of obscenity. The definition requires, in part, that an allegedly obscene work "portray sexual conduct in a patently offensive way." *Miller*, 413 U.S. at 24, 93 S. Ct. at 2615. That is, the definition asks whether the content of the image is patently offensive. *See The American Heritage*

Dictionary of the English Language 1374 (5th ed. 2018) (defining "portray" as "[t]o depict or represent pictorially; make a picture of" and "[t]o describe or depict in a certain way"). But the state's argument is not based on the image's content. Instead, the state focuses on the circumstances surrounding the image's dissemination. The state appears to argue that any image of another person who is depicted in a sexual act or whose intimate parts are exposed portrays sexual conduct in a patently offensive way if the image is disseminated without the subject's consent. Although we agree that such nonconsensual dissemination is offensive, that is not the test for determining whether a work is obscene. Even though some images subject to regulation under Minn. Stat. § 617.261 might satisfy the definition of obscenity and therefore may be proscribed consistent with the First Amendment, we cannot say, as a matter of law, that every image subject to regulation under the statute portrays sexual conduct in a patently offensive way and is therefore beyond First Amendment protection.

The state also contends that Minn. Stat. § 617.261 does not implicate the First Amendment because it is a privacy regulation. But privacy is not one of the recognized "delineated categories" of speech excepted from First Amendment protection. *See A.J.B.*, 929 N.W.2d at 846 (noting established exceptions). And "[t]he Supreme Court has been reluctant to expand these categories of unprotected speech." *Id.*; *see Stevens*, 559 U.S. at 472, 130 S. Ct. at 1586 ("Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."). In fact, the Supreme Court has stated, "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries

so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690 (1983).

We recognize that the disseminations proscribed under Minn. Stat. § 617.261 could invade the privacy rights of others and that, under certain circumstances, such disseminations may be proscribed consistent with the First Amendment. *See Dunham*, 708 N.W.2d at 566 (rejecting a First Amendment challenge to Minnesota's criminal harassment statute after concluding that the statute was narrowly tailored because it "only regulates speech or conduct that constitutes . . . substantial invasions of one's privacy" and its focus was "to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another"). But we cannot say, as a matter of law, that every dissemination regulated under Minn. Stat. § 617.261 is beyond the protection of the First Amendment as an invasion of privacy.

In sum, Minn. Stat. § 617.261's sweep is not limited to expressive conduct that is categorically excluded from First Amendment protection.[3]

[3] Two state supreme courts have rejected arguments similar to those made by the state. *People v. Austin*, ___ N.E.3d ___, ___, 2019 WL 5287962, at *6-7 (Ill. Oct. 18, 2019) (rejecting state's argument that "speech that invades privacy" should be categorically excluded from First Amendment protection); *State v. VanBuren*, 214 A.3d 791, 798-807 (Vt. 2019) (rejecting state's argument that "nonconsensual pornography, as defined in [a] Vermont statute, falls outside of the realm of constitutionally protected speech for two reasons: such speech amounts to obscenity, and it constitutes an extreme invasion of privacy unprotected by the First Amendment").

3. Minn. Stat. § 617.261 prohibits conduct that is beyond its legitimate sweep.

Having concluded that Minn. Stat. § 617.261 regulates expressive conduct that is not categorically excluded from First Amendment protection, we ask whether it has a legitimate sweep and, if so, whether the statute extends beyond that sweep.

The state argues that it

> has a significant interest in seeking to deter the nonconsensual dissemination of private, sexually explicit images. This conduct can be construed as a form of domestic abuse, as abusers use the existence of these sexually explicit images to threaten, intimidate, or coerce their partners. It is also a form of sexual harassment that seeks to degrade and humiliate those depicted. . . .
>
> The government has a strong interest in preventing the harm done to victims of nonconsensual porn; that harm is far-reaching. Victims have lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment.

(Citations and quotations omitted.)

We certainly agree that the state's harm-preventing policy interest is legitimate.[4] Minnesota's First Amendment caselaw indicates that speech and expressive conduct can

[4] The state cites scholarly review articles that describe the problem of nonconsensual dissemination of private, sexually explicit images and the indisputable harm that it causes. *See* Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 Calif. L. Rev. 1303, 1304 (2014) (emphasizing that harm done to victims of revenge porn is "often vast" and that many victims report that this practice has had detrimental effects on their lives); *see also* Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. Am. Acad. Psychiatry & Law 359, 362 (2016) (explaining long-term personal and psychological consequences of revenge porn and noting that "the disseminated photographs or videos may continue to haunt [victims]

be proscribed in an effort to serve that interest without violating the First Amendment. For example, in *Dunham*, this court held that Minn. Stat. § 609.748, subd. 1(a)(1) (2004), which defines harassment, does not substantially infringe on constitutionally protected speech or expression, and is not facially overbroad. 708 N.W.2d at 559. This court reasoned in part that "the language of the statute is directed against . . . speech or conduct that is intended to have a substantial adverse effect." *Id.* at 566. Similarly, in *State v. Stockwell*, this court held that the stalking provision in Minn. Stat. § 609.749, subd. 2(a)(2) (2006), is not unconstitutionally void for facial overbreadth in part because "it requires that the actor knows her conduct will cause fear and causes that reaction." 770 N.W.2d 533, 535, 539-40 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009).

Like the statutes in *Dunham* and *Stockwell*, Minn. Stat. § 617.261 serves the legitimate harm-preventing interest advanced by the state by proscribing disseminations that knowingly cause or are intended to cause a specified harm. But Minn. Stat. § 617.261 reaches much further, subjecting to punishment those who disseminate sexual images without either knowingly causing or intending to cause a specified harm. Casillas relies on that reach in support of his overbreadth challenge. He notes the statute's "lack of an intent to harm element or a requirement that the dissemination actually resulted in harm" and asserts that "[t]he negligent knowledge requirement just adds to the . . . constitutional concern." He argues that Minn. Stat. § 617.261 "punishes the act of dissemination itself without any accompanying criminal intent element or causation of harm, under a negligent

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throughout their lives" and that victims of revenge porn experience cyber harassment, cyberstalking, and significant emotional distress).

standard," and that it "lacks the sufficient criminal intent element that may have narrowed the law to avoid constitutional infirmity."

Caselaw supports Casillas's argument that Minn. Stat. § 617.261's lack of an intent-to-harm element, coupled with a negligence mens rea, runs afoul of the First Amendment. For example, in *A.J.B.*, the Minnesota Supreme Court held that Minn. Stat. § 609.749, subd. 2(6) (2018), violated the First Amendment because it was facially overbroad. 929 N.W.2d at 844. That statute provided that a person who harassed another by committing the following act was guilty of a gross misdemeanor: "repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, messages, packages, through assistive devices for people with vision impairments or hearing loss, or any communication made through any available technologies or other objects." Minn. Stat. § 609.749, subd. 2(6). In invalidating the statute, the Minnesota Supreme Court noted that it "subject[ed] even negligent conduct to criminal sanction" and that it "criminalize[d] communications even when the person [did] not know—much less intend—that the communication [would] frighten, threaten, oppress, persecute, or intimidate the victim." *A.J.B.*, 929 N.W.2d at 854-55. The supreme court concluded that "[t]he statute's inclusion of a negligence standard [made] it more likely that the statute [would] have a chilling effect on expression protected by the First Amendment." *Id.* at 855 (quotation omitted).

The Minnesota Supreme Court also held that Minn. Stat. § 609.795, subd. 1(3) (2018), violated the First Amendment because it was facially overbroad. *Id.* at 844. That statute provided that whoever "with the intent to abuse, disturb, or cause distress, repeatedly mails or delivers or causes the delivery by any means, including electronically,

of letters, telegrams, or packages" is guilty of a misdemeanor. Minn. Stat. § 609.795, subd. 1(3). In holding that the statute was unconstitutionally overbroad, the supreme court noted that Minn. Stat. § 609.795 included a specific-intent element that limited the sweep of the statute by excluding negligent acts from the statute's reach. *A.J.B.*, 929 N.W.2d at 858. The supreme court said that "[u]nder certain circumstances, a specific-intent requirement may sufficiently limit the reach of a statute into protected speech and expressive conduct to avoid overbreadth." *Id.* at 860. But the supreme court concluded that the "intentional conduct" element was not a sufficient limitation to save the statute, reasoning in part that "the limiting effect of the specific-intent requirement is counterbalanced by the absence . . . of any requirement that the victim actually suffer any harm." *Id.* at 861. In sum, "[b]y foregoing any requirement that the harm actually occur, the Legislature criminalized behavior, including substantial speech and expressive conduct, that will have no impact on the legitimate purpose of the statute: to prevent the harm." *Id.*

Similarly, in *Hensel*, the Minnesota Supreme Court held that Minn. Stat. § 609.72, subd. 1(2) (2016), which prohibited disturbing assemblies or meetings, was facially unconstitutional under the First Amendment because it was substantially overbroad. 901 N.W.2d at 168. The supreme court reasoned in part that

> [r]ather than prohibiting only intentional conduct, . . . the statute's mens-rea element prohibits actions done with knowledge or reasonable grounds to know that the act will tend to disturb others. This means that an individual need only perform an act that is negligent, which allows the statute to reach all types of acts, intentional or not, that have a tendency to disturb others. The statute's inclusion of a negligence standard makes it more likely that the statute will have a

> chilling effect on expression protected by the First Amendment, the key concern of the overbreadth doctrine.

Id. at 174 (quotations omitted).

Conversely, in *State v. Muccio*, the Minnesota Supreme Court held that Minn. Stat. § 609.352, subd. 2a(2) (2016), which prohibits an adult from participating in the electronic transmission of information relating to or describing the sexual conduct of any person, if the communication is directed at a child and the adult acts with the specific intent to arouse the sexual desire of any person, is not substantially overbroad in violation of the First Amendment. 890 N.W.2d 914, 917-18 (Minn. 2017). The supreme court reasoned in part that "because of its specific-intent requirement, the statute does not target broad categories of speech." *Id.* at 928 (citation omitted); *see also State v. Washington-Davis*, 881 N.W.2d 531, 533, 539 (Minn. 2016) (holding that "Minnesota Statutes § 609.322, subd. 1a(1)-(2) (2014), which criminalizes the promotion of prostitution and the solicitation of individuals to practice prostitution, is not substantially overbroad in violation of the First Amendment" in part because the statute criminalizes the solicitation and promotion of individuals to engage in sexual conduct only if the sexual conduct is done for the purpose of satisfying the actor's sexual impulses).

This court has similarly considered the impact of a specific-intent requirement in an overbreadth analysis. *See Stockwell*, 770 N.W.2d at 539; *Dunham*, 708 N.W.2d at 566. Most recently, in *Linert v. MacDonald*, this court held that Minn. Stat. § 211B.02 (2016), which prohibits candidates from knowingly making false claims of support or endorsement, is not facially overbroad in violation of the First Amendment. 901 N.W.2d

664, 665 (Minn. App. 2017). This court reasoned in part that "the statute's specific-intent requirement—that false claims be *knowingly* made—ensures that the statute does not target broad categories of speech." *Id.* at 669 (quotation omitted).

Two other state supreme courts have considered the impact of an intent-to-harm element—or lack thereof—when analyzing facial First Amendment challenges to laws similar to Minn. Stat. § 617.261. *Austin*, 2019 WL 5287962, at *19-20; *VanBuren*, 214 A.3d at 812. For example, the Illinois Supreme Court rejected an overbreadth challenge to 720 Ill. Comp. Stat. 5/11-23.5(b) (2016), which criminalizes the nonconsensual dissemination of private sexual images. *Austin*, 2019 WL 5287962, at *16-20. In doing so, it rejected "the circuit court's criticism . . . that the statute does not require proof of an illicit motive or malicious purpose." *Id.* at *19. The Illinois Supreme Court recognized that

> most state laws prohibiting the nonconsensual dissemination of private sexual images expressly require some form of malicious purpose or illicit motive as a distinct element of the offense. . . .
>
> In contrast, the legislatures of four states, including our General Assembly, have chosen not to expressly include "malice" as a distinct element of the offense.

Id.

In rejecting the circuit court's reasoning, the Illinois Supreme Court noted that "[t]he circuit court did not, however, cite legal authority for the proposition that a criminal statute necessarily must contain an illicit motive or malicious purpose to survive an overbreadth challenge." *Id.* But our supreme court *has* provided us with such authority, and we are

bound by that precedent. *See State v. Curtis*, 921 N.W.2d 342, 343 (Minn. 2018) (holding that "[t]he court of appeals is bound by supreme court precedent").

The Vermont Supreme Court also rejected a facial First Amendment challenge to its statute banning disclosure of nonconsensual pornography, Vt. Stat. Ann. tit. 13, § 2606 (2015). *VanBuren*, 214 A.3d at 814. In doing so, the Vermont Supreme Court considered whether Vermont's statute was narrowly tailored to serve a compelling state interest. *VanBuren*, 214 A.3d at 807, 811-14. In concluding that it was narrowly tailored, the Vermont Supreme Court reasoned in part that:

> [D]isclosure is only criminal if the discloser knowingly discloses the images without the victim's consent. We construe this intent requirement to require knowledge of both the fact of disclosing, and the fact of nonconsent. Individuals are highly unlikely to accidentally violate this statute while engaging in otherwise permitted speech. In fact, § 2606 goes further, requiring not only knowledge of the above elements, but a *specific intent to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially*.

Id. at 812 (emphasis added) (emphasis omitted) (citations omitted).

Unlike the Vermont statute, Minn. Stat. § 617.261 lacks a specific intent-to-harm element. Although Minn. Stat. § 617.261 has a legitimate harm-preventing purpose, its lack of a specific-intent requirement and use of a negligence mens rea allows it to reach protected First Amendment expression that neither causes nor is intended to cause a specified harm. That reach goes beyond the legitimate state interest justifying the proscription of otherwise protected First Amendment expression. Based on the Minnesota caselaw described above, we conclude that Minn. Stat. § 617.261 proscribes expressive conduct in violation of the First Amendment.

4. Minn. Stat. § 617.261 is overbroad in violation of the First Amendment.

Having determined that Minn. Stat. § 617.261 proscribes expressive conduct in violation of the First Amendment, we turn to the critical inquiry: Does Minn. Stat. § 617.261 prohibit a substantial amount of constitutionally protected speech?

In this age of expansive internet communication, images may be disseminated, received, and observed with ease. As the Court of Appeals of Texas noted in considering a First Amendment challenge to a law similar to Minn. Stat. § 617.261:

> Today, a person can share a photograph or video with an untold number of people with a mere click of a button. The daily sharing of visual material, for many, has become almost ritualistic. And once the act of sharing is accomplished, it is highly questionable whether that act ever can be completely rescinded. But assuming that the visual material is not otherwise protected, these persons are acting within their rights when they share visual material with others.

Ex parte Jones, ___ S.W.3d ___, ___, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018) (footnote omitted), *review granted* (Tex. Crim. App. July 25, 2018). The Texas court noted that

> a Facebook user with her account settings set to share posts as "public" can share a picture to her Facebook page that not only can be viewed by the nearly two billion Facebook users, but also by any other person with internet access whose access to Facebook is not otherwise restricted.

Id. at *7 n.16.

Anyone who is familiar with our current American culture is likely aware that the free flow of information described above contains noncommercial images of people depicted in sexual acts, or whose intimate parts are exposed, and that the subjects of such

images often consent to their dissemination.[5] Indeed, some individuals, beyond merely consenting, seek to promote the broad dissemination of such images, for either political or economic reasons. *See, e.g.*, Debra L. Logan, Note, *Exposing Nipples as Political Speech*, 41 Law & Psychol. Rev. 173, 179 (2017) ("Some women bare their breasts to advocate the position that public decency laws should treat men and women equally; others confront the stigmatization of their bodies as a form of political theater to draw attention, whether toward or against a political candidate, to advocate a political position, or simply to defend the rights of breastfeeding mothers."); Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 Vand. J. Ent. & Tech. L. 255 (2006) (compiling views of women in the adult-entertainment industry).

In this context, Minn. Stat. § 617.261's negligence mens rea is problematic. The statute does not define or explain the circumstances that should cause someone who observes an image described in Minn. Stat. § 617.261 to reasonably know that the person depicted in the image did not consent to its dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. Depending on one's sensibilities and tolerance of sexual images on publicly available mediums, reasonable people could reach different conclusions regarding the privacy expectations associated with such images, rendering the reasonable knowledge

[5] "We now live in an age where celebrities purposely leak their sex tapes to the Internet, hoping they'll go viral, and thereby garner further fame and riches. Stars 'mistakenly' post their nude pictures to Twitter (*oops!*)." Michael L. Baroni, *New "Revenge Porn" Law Is Impotent*, Orange County Law., Feb. 2014, at 12.

standard highly subjective. Indeed, in concluding that Casillas was guilty, the district court reasoned that "an expectation of privacy regarding the image is implicitly inherent from the nature of the act depicted," indicating that some might view a sexual image as private and its dissemination nonconsensual regardless of the actual expectations of the person depicted in the image.

The dissenting opinion in *People v. Austin* sets forth a telling hypothetical that reflects our concern:

> A hypothetical posed to the State during oral argument illustrates this point. Two people go out on a date, and one later sends the other a text message containing an unsolicited and unappreciated nude photo. The recipient then goes to a friend, shows the friend the photo, and says, "look what this person sent me." Has the recipient committed a felony? The State conceded that the recipient had, assuming the recipient knew or should have known that the photo was intended to remain a private communication.

2019 WL 5287962, at *24 (Garman, J., dissenting).

It is not difficult to envision a substantial number of situations in which a person observes an image that may have been disseminated in violation of Minn. Stat. § 617.261 and further disseminates that image without knowing that the subject of the image did not consent to the original dissemination, without knowing that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy, and without intending to cause a specified harm. Given the ease with which impermissible disseminations under the statute may be further disseminated without the intent to harm necessary to proscribe expressive conduct without violating the

First Amendment, we conclude that Minn. Stat. § 617.261 has the potential to reach a substantial amount of protected expressive conduct.[6]

Moreover, that substantial reach has the very chilling effect that the overbreadth doctrine is intended to prevent. *See Hensel*, 901 N.W.2d at 174 (describing the "chilling effect on expression protected by the First Amendment" as "the key concern of the overbreadth doctrine"). An observer of an image on a publicly available medium that depicts a person in a sexual act, or whose intimate parts are exposed, would be wise to refrain from further disseminating that image or risk criminal prosecution under Minn. Stat. § 617.261 based on a prosecutor's subjective belief that the image's content should have caused the observer to know that the person depicted did not consent to the dissemination and that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy. And that risk exists even though such images are often present on publicly available mediums with the consent of the people depicted.[7]

In sum, Minn. Stat. § 617.261 proscribes a substantial amount of protected expressive conduct, and it is therefore overbroad in violation of the First Amendment.

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[6] Although the statute includes certain exemptions, they do not meaningfully limit the statute's impermissible reach of further disseminations as described above. *See* Minn. Stat. § 617.261, subd. 5.

[7] The state argues that the risk of erroneous prosecution of those who disseminate a sexual image without intent to harm is lessened because "the prosecutor would have to [determine that] there [was] a reasonable knowledge . . . that they would have known." That argument does not alleviate our constitutional concern. *See Stevens*, 559 U.S. at 480, 130 S. Ct. at 1591 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

5. The remedy for the First Amendment violation is to invalidate Minn. Stat. § 617.261.

Having determined that Minn. Stat. § 617.261 is overbroad in violation of the First Amendment, we consider whether applying a narrowing construction or severing problematic language from the statute would remedy the constitutional defect. *A.J.B.*, 929 N.W.2d at 848.

When a court determines that a statute is unconstitutional, it must invalidate as much of the statute as is necessary to eliminate the unconstitutionality. *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, 600 (Minn. 1982). We look to the intent of the legislature to fashion a remedy consistent with that intent. *Id.* "[W]e are not to sever a statute if the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *A.J.B.*, 929 N.W.2d at 848 (quotation omitted). Although we can strike a severable statutory provision if it is unconstitutional and void, "we cannot add language to a statute in order to render it constitutionally permissible." *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 836 (Minn. 2002) (quotation omitted).

The state argues that Minn. Stat. § 617.261 is subject to a limiting construction that can remedy its constitutional defect. For example, the state suggests that we construe the statute to refer only to obscenity. But limiting the statute's application to obscenity is inconsistent with the plain language of the statute, which defines the images subject to regulation much more broadly than the recognized definition of obscenity, indicating that the legislature did not intend such a limitation.

The state also suggests that we construe the statute to refer only to substantial invasions of privacy, which is in line with the parameters set forth in the caselaw above. Consistent with that suggestion, the state recommends that we sever the negligence standard from the statute, arguing, "There are no apparent reasons to doubt that the Legislature would have enacted the statute without the negligence standard."

Again, the constitutional defect in Minn. Stat. § 617.261 stems from its lack of an intent-to-harm requirement and its use of a negligence mens rea. Correcting that defect would require us to rewrite the statute. We would have to sever the negligence mens rea standards from subdivision 1(2) and (3) of Minn. Stat. § 617.261. Doing so would limit the statute's reach to those who knew both that the person depicted in the image did not consent to the dissemination and that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy. Such circumstances could show intent to harm. *See State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (stating that because intent is a state of mind, it is "generally proved circumstantially—by drawing inferences from the defendant's words and actions in light of the totality of the circumstances," and that when considering circumstantial evidence of intent, "the jury may infer that a person intends the natural and probable consequences of his actions").

Although severing the negligence mens rea standards would limit the statute's reach to circumstances in which the disseminator intended harm—consistent with Minnesota caselaw upholding First Amendment proscriptions based on the state's legitimate harm-preventing interest—it would also result in a statute that classifies an intentionally harmful

dissemination as both a gross misdemeanor and a felony. *See* Minn. Stat. § 617.261, subd. 2(a) (stating that normally, whoever violates Minn. Stat. § 617.261, subd. 1, is guilty of a gross misdemeanor), (b)(5) (stating that a felony results if "the actor disseminates the image with intent to harass"). We would have to add language to the statute to reconcile that conflict.

In sum, we agree with the state that there is no apparent reason to doubt that the legislature would have enacted the statute without the negligence standard. But achieving that result on the legislature's behalf requires us to "'perform[] . . . plastic surgery upon the face of the [statute],' rather than just adopting an alternative, reasonable construction of the statute's actual words." *Hensel*, 901 N.W.2d at 176-77 (alterations in original) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S. Ct. 935, 940 (1969)). This we will not do. *See Stevens*, 559 U.S. at 480, 130 S. Ct. at 1592 (explaining that rewriting a statute to "conform it to constitutional requirements" would constitute a "serious invasion of the legislative domain"). Such a "shave-a-little-off-here and throw-in-a-few-words-there statute . . . may well be a more sensible statute, but at the end of the day, it bears little resemblance to the statute that the Legislature actually passed." *Hensel*, 901 N.W.2d at 180.

If a statute is "unable to be saved by a narrowing construction or severance, the remaining option is to invalidate the statute." *A.J.B.*, 929 N.W.2d at 848 (quotation omitted). We recognize that "invalidation of a statute for substantial overbreadth is strong medicine that should be used only as a last resort." *Washington-Davis*, 881 N.W.2d at 540 (quotation omitted). But Minn. Stat. § 617.261 reaches a substantial amount of protected

speech in violation of the First Amendment, and we cannot remedy the constitutional infirmity through a narrowing construction or severance. We therefore hold that Minn. Stat. § 617.261 is facially overbroad in violation of the First Amendment to the United States Constitution. Consequently, Minn. Stat. § 617.261 is void.

Our holding in no way changes our view that Casillas's conduct in violation of Minn. Stat. § 617.261—of which he was convicted—is abhorrent. Nor should it be read as failing to appreciate the significant harm that the nonconsensual dissemination of private sexual images causes. The state legitimately seeks to punish that conduct. But the state cannot do so under a statute that is written too broadly and therefore violates the First Amendment. In the end, we are constitutionally obligated to faithfully apply the law.

D E C I S I O N

Because Minn. Stat. § 617.261 is facially invalid under the First Amendment to the United States Constitution, we reverse Casillas's conviction and sentence under that statute, without addressing his remaining arguments for relief.

Reversed.