No. A19-0576

State of Minnesota

In Supreme Court

State of Minnesota,

Appellant,

vs.

Michael Anthony Casillas,

Respondent.

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
Isabella Salomão Nascimento (#0401408)
Teresa J. Nelson (#269736)
P.O. Box 14720
Minneapolis, MN 55414
651-645-4097

Attorneys for Amicus Curiae, American Civil Liberties Union of Minnesota

DAKOTA COUNTY ATTORNEY'S OFFICE
Anna Light (#039628)
1560 Highway 55
Hastings, MN 55033
651-438-4438

MINNESOTA ATTORNEY GENERAL
Keith Ellison
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
(651) 757-1371

Attorneys for Appellant

ARECHIGO & STOKKA, P.A.
John Arechigo (#0386535)
332 Minnesota St., Ste. W1080
St. Paul, MN 55101
651-222-6603

Attorney for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

STATE RULES AND REGULATIONS

FEDERAL COURT CASES

STATE COURT CASES

ADDITIONAL AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union of Minnesota (ACLU-MN) is a private, nonprofit, nonpartisan organization supported by approximately 39,000 individual members in the State of Minnesota. It is the statewide affiliate of the American Civil Liberties Union. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the United States and Minnesota Constitutions. Among them are the right to free speech and the right to privacy, both of which are implicated by this case. U.S. CONST. amend. I (speech); U.S. CONST. amends. I, IX, XIV (privacy); Minn. Const. art. I, § 3 (speech); *State v. Gray*, 413 N.W.2d 107, 111 (1987) (privacy). The interest of the ACLU-MN is, therefore, a public one.

Amicus ACLU-MN submits this brief in support of Mr. Casillas, the Respondent, urging this Court to affirm the judgment of the Court of Appeals. The Court of Appeals reversed Mr. Casillas' felony conviction for nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, holding that the statute is facially overbroad in violation of the First Amendment. *State v. Casillas*, 938 N.W.2d 74, 77 (Minn. Ct. App. 2019). The appellate court concluded that the statute's lack of an intent-to-harm requirement and its use of a negligence *mens rea* rendered it unconstitutional, and that neither a narrow construction of the statute nor severance of the problematic language could remedy the defects. *Id*. This Court should affirm on these bases or,

[1] The ACLU-MN certifies under Minn. R. Civ. App. 129.03 that no counsel for a party authored this brief in whole or in part, and that no person or entity made a monetary contribution to the preparation or submission of this brief other than the ACLU-MN, its members, and counsel.

alternatively, on the basis that Minn. Stat. § 617.261 is an unconstitutional content-based restriction of speech protected under the First Amendment.[2]

SUMMARY OF THE ARGUMENT

Based on stipulated facts in the District Court, now before this Court is a quintessential "revenge porn" case. Mr. Casillas and A.K.M. were in a romantic relationship. At some point, that relationship ended. During the course of their relationship, Mr. Casillas and A.K.M. shared private information, and A.K.M. gave Mr. Casillas her password and login information to various accounts. After their relationship ended, Mr. Casillas accessed A.K.M.'s accounts and obtained sexual images of A.K.M. Mr. Casillas eventually sent at least one of the images to other recipients and posted it online. Mr. Casillas was charged under Minn. Stat. § 617.261.

Minn. Stat. § 617.261 was enacted to respond to a growing number of revenge porn cases and to help victims like A.K.M. obtain justice for the harm caused by nonconsensual dissemination of private sexual images. The Legislature failed, however, to tailor the statutory language to comply with the requirements of the First Amendment. Because the statute is a content-based restriction on protected speech, it must be narrowly tailored to achieve a compelling

[2] The Court can affirm the Court of Appeals' reversal of Mr. Casillas' conviction on grounds other than those on which the appellate court relied. *See, e.g.*, *Dukes v. State*, 718 N.W.2d 920, 921–22 (Minn. 2006); *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 392 (Minn. 2003). The alternative basis ACLU-MN proposes for affirmance is properly preserved for review, having been raised by Respondent and ruled on in the first instance by the District Court, re-raised and thoroughly briefed by Respondent before the Court of Appeals, and raised once again by Respondent in this Court.

state interest. The Legislature enacted this criminal statute with a *mens rea* requirement of negligence, when it should have required at least actual knowledge. The Legislature further failed to require a specific intent to cause harm. By enacting such a broad-reaching statute, the Legislature unfortunately left victims like A.K.M. without recourse.[3]

Because Minn. Stat. § 617.261 is a content-based speech restriction, it must satisfy strict scrutiny. The statute fails because it is not narrowly tailored to serve a compelling state interest, and its unconstitutional language cannot be severed or narrowly construed to preserve it. For these reasons, this Court should affirm the decision of the Court of Appeals invalidating Minn. Stat. § 617.261, and leave the Legislature to amend or enact a new statute that criminalizes the nonconsensual dissemination of private sexual images consistent with the protections of the First Amendment.

ARGUMENT

I. LEGAL STANDARD

A. First Amendment Framework

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I; *see also* Minn. Const. art. I, § 3.[4] Under the First

[3] The State has also failed to provide alternative remedies to address A.K.M.'s injury, such as a process to scrub her image from the internet.

[4] "The free-speech protections of the Minnesota Constitution are coextensive with those of the First Amendment to the United States Constitution." *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014).

Amendment, "the government . . . has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015) (internal quotation marks omitted). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or messaged expressed." *Id*. at 2227.

First Amendment protection extends equally to moving pictures, videos, and photographs. *Kaplan v. California*, 413 U.S. 115, 119 (1973). It also protects symbolic or expressive conduct. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

Not all speech or expressive conduct is granted full First Amendment protection, however; exceptions include speech constituting, *inter alia*, obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[5] *United States v. Stevens*, 559 U.S. 460, 468 (2010).[6] "[O]bscene material is unprotected by the First Amendment." *Miller v. California*, 413 U.S. 15, 23 (1973). While "States have a legitimate interest in prohibiting dissemination or exhibition of

---

[5] This Court has explained "speech integral to criminal conduct" as follows: "[I]t is not enough that the speech itself *be labeled* illegal conduct. . . . Rather, it must help cause or threaten *other* illegal conduct . . . which may make restricting the speech a justifiable means of preventing that other conduct." *In re Welfare of A.J.B.*, 929 N.W.2d 840, 852 (Minn. 2019).

[6] The Supreme Court of the United States has explained that, while the list of less-than-fully protected speech or conduct may not be exhaustive, the Court is unlikely to expand it to include new categories of historically-unprotected speech that have not already been identified. *Stevens*, 559 U.S. at 472.

obscene material," *id*. at 18, "statutes designed to regulate obscene materials must be carefully limited," *id*. at 23–24. Such regulation is constitutional only if: "(a) [ ] the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) [ ] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) [ ] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id*. at 24 (internal quotation marks and citations omitted).

B. Standard of Review and Burden

The constitutionality of a statute is a question of law this Court reviews *de novo*. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). The State bears the burden of demonstrating that a content-based restriction is constitutional. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014). The relevant statute in this case is Minn. Stat. § 617.261:

> 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.

A person who violates subdivision 1 of the statute is guilty of a gross misdemeanor, *id*., subd. 2(a), unless 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 website, online service, online application, or mobile application for the purpose of disseminating the image;
(4) the actor posts the image on a website;
(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, 609.891; or
(7) the actor has previously been convicted under this chapter.

Id., subd. 2(b). If any of the factors listed above is present, then the person who disseminated the image is guilty of a felony. *Id*.

Minn. Stat. § 617.261, subd. 1, 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.

II. ANALYSIS

This Court is familiar with First Amendment challenges and the analysis such challenges require. *Amicus* ACLU-MN, with this brief, attempts to tie together all of the doctrine's moving parts, which the parties and various *amici* raise, though not all in the same place. ACLU-MN structures its analysis as follows. Part II.A outlines how Minn. Stat. § 617.261 constitutes a content-based restriction on speech, thereby subject to strict scrutiny. Part II.B demonstrates that the speech criminalized by Minn. Stat. § 617.261 is not within any category of less-than-fully-protected speech identified by the United States Supreme Court. Part II.C provides a strict scrutiny analysis of Minn. Stat. § 617.261 showing that, although compelling state interests exist, the statute is nonetheless unconstitutional because it is not narrowly tailored to achieve those compelling interests, and neither severance nor a narrowed construction can remedy the statute's constitutional defects.

A. Minn. Stat. § 617.261 Is a Content-Based Restriction on Speech.

Minn. Stat. § 617.261 is a content-based restriction on speech because it targets a specific type of speech—the nonconsensual dissemination of private sexual images. That is, the statute criminalizes the dissemination of images of another person depicted in a "sexual act"[7] or the exposure of another person's "intimate parts,"[8] Minn. Stat. § 617.261, subd. 1. The dissemination

[7] Minn. Stat. § 617.261, subd. 7(g) (defining "sexual act" as "mean[ing] either sexual contact or sexual penetration").

[8] Minn. Stat. § 617.261, subd. 7(e) (defining "intimate parts" as "the genitals, pubic area, or anus of an individual, or if the individual is female, a partially or fully exposed nipple").

of the same person's image, where the person is not engaged in a sexual act or "intimate parts" are not exposed—but otherwise the identical image—is not a crime under the statute. Because Minn. Stat. § 617.261 requires a court to assess the content of the image to determine whether it falls within the purview of the statute, it is facially content-based under First Amendment doctrine, and is therefore subject to strict scrutiny. *Reed*, 135 S.Ct. at 2226.

That Minn. Stat. § 617.261 seeks to protect significant privacy interests does not change that it is facially content-based and subject to strict scrutiny. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 135 S.Ct. at 2228 (internal quotation marks omitted). This is not to say that legislatures cannot enact laws to protect certain types of private information or that courts are barred from considering the privacy interests at stake. The requirement of strict scrutiny mandates consideration of any such interests to determine whether they are sufficiently compelling to justify the content-based restrictions. Here, they are not. *See* Part II.C.i., at 11–13, *infra*.

B. The Speech Covered Under Minn. Stat. § 617.261 Is Fully Protected Under the First Amendment.

The speech that Minn. Stat. § 617.261 criminalizes is afforded full protection under the First Amendment. Appellant argues that § 617.261 regulates speech that predominantly constitutes obscenity. Appellant Br., at 20–22. This is not the case, as the Court of Appeals correctly determined. *Casillas*, 938 N.W.2d at 83. For speech to be obscene, it must, in part, depict or describe, in a patently offensive way, sexual conduct specifically defined by the

applicable state law. *Miller*, 413 U.S at 24. There is nothing inherently patently offensive about an image of a person who is engaged in a sexual act or whose intimate parts are exposed. Appellant does not disagree, but instead argues here, as it did before the appellate court, that the image is patently offensive "due to the nonconsensual nature of the dissemination of the images." Appellant Br., at 21. This is not the test for obscenity, which requires that the speech, whether an image, words, or conduct, "depict or describe" sexual conduct in a patently offensive way. Moreover, images that depict a person's "intimate parts," such as breasts or genitalia, may have serious literary or artistic value. *See Miller*, 413 U.S at 24; *see also, e.g.*, Michelangelo's "David"; Manet's "Olympia". Minn. Stat. § 617.261 targets speech that neither depicts sexual conduct in a patently offensive manner nor lacks serious value. The statute therefore does not predominantly or inherently criminalize only speech that qualifies as obscenity.

Appellant also argues that Minn. Stat. § 617.261 criminalizes speech unprotected by the First Amendment because it regulates speech that invades individual privacy. Appellant Br., at 14–20. There is, however, no privacy exception to the rule that content-based restrictions on speech are subject to strict scrutiny. Like the United States Supreme Court in *Stevens*, 559 U.S. at 472, this Court should similarly decline Appellant's invitation to create any such new carve-out.[9]

[9] Appellant also perfunctorily claims that the speech captured by Minn. Stat. § 617.261 constitutes speech integral to criminal conduct. Appellant Br., at 20. But it is not enough that the Legislature has labeled illegal the "nonconsensual dissemination of private sexual images." *A.J.B.*, 929 N.W.2d at 852. Rather, to be integral to criminal conduct, the nonconsensual dissemination of these images would have to facilitate some *other* illegal conduct. *Id*. There is

Because the speech captured by Minn. Stat. § 617.261 does not satisfy the test for obscenity, and because there is no "privacy" category of speech receiving less than full First Amendment protection, Minn. Stat. § 617.261 criminalizes speech afforded full protection under the First Amendment. For the statute to survive, it must therefore satisfy strict scrutiny.

C. Minn. Stat. § 617.261 Fails Strict Scrutiny.

Because Minn. Stat. § 617.261 is a content-based restriction on speech that is entitled to the full protection of the First Amendment, it must survive strict scrutiny, and the burden is on the Appellant to demonstrate the statute's constitutionality. *Melchert-Dinkel*, 844 N.W.2d at 18. The first requirement of strict scrutiny is that there is a compelling state interest in regulating the proscribed speech; Appellant must specifically identify an actual problem in need of solving. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011). The second requirement of strict scrutiny is that the content-based restriction is narrowly tailored; Appellant must demonstrate that the curtailment of this speech is actually necessary to the solution of the problem it has identified. *Brown*, 564 U.S. 786, 799. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

---

nothing about the speech criminalized by Minn. Stat. § 617.261 that innately facilitates other illegal conduct (with the obvious exception of child pornography, which is already fully covered by other penal statutes, such as Minn. Stat. § 617.246 subd. 4). Minn. Stat. § 617.261 thus does not satisfy this exception to First Amendment protection either.

While the Legislature may have enacted Minn. Stat. § 617.261 to safeguard compelling state interests, it did not narrowly tailor the statute to protect those interests. Less restrictive alternatives exist that could serve any compelling state interests. Finally, neither severance nor narrow construction can remedy the statute's constitutional infirmity.

i. Minn. Stat. § 617.261 Attempts to Protect Compelling State Interests.

Amicus ACLU-MN agrees with Appellant and its supporting *amici* that there are compelling state interests that prompted the enactment of Minn. Stat. § 617.261. The Legislature, however, did a disservice to the victims it intended to protect by enacting a law that caught protected speech in its net.

The Legislature intended Minn. Stat. § 617.261 to "create[] civil and criminal remedies to combat a practice commonly referred to as 'revenge porn[.]'" Senate Counsel, Research, and Fiscal Analysis, "S.F. No. 2713 – Dissemination of private sexual images; civil actions and criminal penalties (First Engrossment)," May 2, 2016, *available at* https://www.senate.mn/departments/scr/billsumm/summary_display_from_db.php?ls=89&id=4646 (last visited May 9, 2020). "Revenge porn" typically refers to the unconsented distribution or dissemination of pictures or videos taken (generally) consensually at the time of creation that include an identifiable person who is either nude or engaged in some sexual act. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014). Today, the term "revenge porn" acts as shorthand for even more conduct, including the dissemination of images obtained through hacking another's computer, surreptitious filming, and

recording of sexual assaults. Such reprehensible conduct necessarily raises concerns regarding protection of privacy and gender rights. Violation of those rights can warrant both criminal punishment and civil remedy.

The privacy concerns at stake here are evident and need little explanation.[10] Privacy concerns are not the only interests at stake, however. Revenge porn disproportionately impacts women and exacerbates gender inequalities. The vast majority of victims of revenge porn are women. Erica Goode, *Victims Push Laws to End Online Revenge Posts*, NEW YORK TIMES (Sept. 23, 2013), https://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html. The impacts of the dissemination of revenge porn disproportionately affect women through losing jobs, being approached by strangers who recognize their photos, and being stalked, harassed, and physically attacked at higher rates than men. *Id*.; *see also* Citron & Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. at 350–54. For those victims of nonconsensual dissemination of private sexual images, the harm is real and long lasting.

Nonetheless, laws regulating speech in this area must strike the appropriate balance between addressing these very real harms and safeguarding First Amendment rights. As written, Minn. Stat. § 617.261 does not provide victims with either protection or justice because it contains significant infirmities inviting an inevitable attack on First Amendment grounds, thereby

---

[10] *Amici* ACLU-MN agrees that the disclosure of private information by one individual to a select other does not render that information suddenly public or grant consent for that second person to share it widely without consent. *See* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. Chi. L. Rev. 919, 923 (2005). That said, the expectations of privacy are not boundless and must be balanced with other constitutional protections, including First Amendment rights.

rendering the statute unusable as a deterrent or penalty. By affirming the Court of Appeals' decision, this Court can provide the Legislature with guidance to rectify the constitutional deficiencies in the statute to protect future victims and effectuate the State's compelling interests.

ii. Minn. Stat. § 617.261 Is Not Narrowly Tailored.

Despite the compelling state interests in the regulation of revenge porn, *Amicus* ACLU-MN agrees with the Court of Appeals, the Respondent, and *amici* in support of Respondent that Minn. Stat. § 617.261 is an unconstitutional content-based restriction that fails strict scrutiny. The statute is not narrowly tailored to solve the very real problem that revenge porn statutes are supposed to address, because it requires neither actual knowledge nor an intent to cause harm by the person disseminating the image.[11]

As the Court of Appeals explained, "Minn. Stat. § 617.261's lack of an intent-to-harm element, coupled with a negligence *mens rea*, runs afoul of the First Amendment." *Casillas*, 938 N.W.2d at 85. Under the statute, a defendant does not need to have actual knowledge that the person depicted in the image does not consent to its dissemination; mere negligence is sufficient to warrant conviction, of either a gross misdemeanor or a felony. Minn. Stat. § 617.261, subds. 1(2), 2. A jury can convict if it determines that a defendant "reasonably should [have] know[n]" that the person in the image had a reasonable expectation of privacy at the time the image was created, although the defendant had no actual knowledge because, for example, the defendant was

[11] The Court of Appeals conducted its analysis in terms of facial over-breadth. There is overlap in the analyses for over-breadth and strict scrutiny, the latter being the approach the ACLU-MN believes this Court should take on the issue presented.

not involved in creating the image. Minn. Stat. § 617.261, subd. 1(3). Finally, under the statute as written, a jury can convict even if the defendant disseminated the image with no intent to harm, and no harm actually resulted to the person in the image. Minn. Stat. § 617.261, subd. 1. Nor do the exemptions set out in subdivision 5 of the statute sufficiently narrow its reach, as explained by the Court of Appeals.

With the elements of actual knowledge and an intent-to-harm, perhaps the statute can pass strict constitutional scrutiny. Without them, it cannot. The statute in its present form is not narrowly tailored; it catches in its net a wide array of constitutionally-protected speech, as set out by the Court of Appeals. If the Legislature wishes to satisfy the compelling state interests it intends to protect, it must rewrite the statute to require both intent to cause harm, and actual knowledge of the victim's lack of consent and expectation of privacy.[12] At the very least, the Minnesota Legislature *must* include these as elements of the offense. *Playboy Entm't Grp., Inc.*, 529 U.S. at 813.

Other, even less restrictive alternatives also exist. The ACLU-MN encourages this Court and the Legislature to consider them before imposing criminal sanctions for revenge porn. To further the purpose of Minn. Stat. § 617.261 in deterring behavior driving revenge porn, the law should provide for making the victim whole to the greatest extent possible once harm has occurred. Criminal sanctions do not accomplish this, but civil remedies may. Alternatives to

[12] Appellant has not made and cannot make a showing that there is reason to charge or convict those defendants who were merely negligent or who did not intend to harm the victim of the nonconsensual dissemination, as it is far less likely that the threat of criminal conviction would deter their behavior.

criminal punishment can include a civil corollary to a constitutional revision of the statute, with remedies to help victims recoup any financial loss due to dissemination of their images, as well as procedures to assist victims in removing the images from online platforms. Such alternative remedies better capture and redress the various harms and interests at stake in revenge porn cases.

iii. Neither Severance nor a Narrowing Construction Can Remedy the Constitutional Deficiencies of Minn. Stat. § 617.261.

Appellant argues here, as it did to the Court of Appeals, that if the Court is inclined to find Minn. Stat. § 617.261 unconstitutional, the statute can be salvaged by either striking the problematic language from the statute or narrowly construing it to reach only unprotected speech, such as obscenity, child pornography, and the like. Appellant's Br., at 32–37. Not so.

"[I]f [the Court] conclude[s] that a statute prohibits a substantial amount of protected speech, [the Court] consider[s] whether applying a narrowing construction or severing problematic language from the statute would remedy the constitutional defects." *A.J.B.*, 929 N.W.2d at 848. "[The Court's] power to impose a narrowing construction on a statute is limited." *Id*. "While the canon of constitutional avoidance directs [courts] to construe statutes to avoid meanings that violate constitutional principles, [the Court] remain[s] bound by legislative words and intent and cannot rewrite the statute to make it constitutional." *Id*. The Court has "broader authority when it comes to severance." *Id*. However, severing has its limits:

> Severing unconstitutional provisions is permissible unless [the Court] conclude[s] that one of two exceptions applies. First, a statute cannot be severed if [the Court] determine[s] that the valid provisions are so essentially and inseparably connected with, and so dependent upon, the void provisions that the Legislature would not

> have enacted the valid provisions without the voided language. Second, [the Court is] 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.

Id. (citation omitted). The Court "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).

In this case, compliance with the First Amendment would require at the very least deleting the language "reasonably should know" and "reasonably should have known" from subdivisions 1(2) and 1(3) of the statute and adding an intent-to-harm element. Because the Court is prohibited from adding language to a statute to make it constitutionally compliant, the latter cannot be done and the statute must be invalidated in its entirety.

Nor can a narrowing construction save Minn. Stat. § 617.261. As the Court of Appeals aptly stated, "limiting the statute's application to obscenity[,] [as the Appellant suggests,] is inconsistent with the plain language of the statute, . . . indicating that the legislature did not intend such a limitation." *Casillas*, 938 N.W.2d at 90. Indeed, the same is true for the other proposed narrowed constructions Appellant advances. Thus, Minn. Stat. § 617.261 cannot be salvaged and must be invalidated. If the Minnesota Legislature wishes to criminalize the type of behavior Mr. Casillas is alleged to have committed, it must amend the current statute or enact a new, constitutionally-compliant revenge porn statute.

CONCLUSION

For the foregoing reasons, *amicus* ACLU-MN respectfully requests that this Court affirm the judgment of the Court of Appeals on the ground that Minn. Stat. § 617.261 is an unconstitutional content-based restriction on speech entitled to the full protection of the First Amendment. Doing so would provide the Minnesota Legislature the opportunity to enact a statute that complies with the Constitutions of the United States and Minnesota and that protects against the harm to the victims that Minn. Stat. § 617.261 was intended to safeguard.

Dated: May 21, 2020

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF MINNESOTA

s/Isabella Salomão Nascimento
Isabella Salomão Nascimento (#0401408)
Teresa Nelson (#269736)
P.O. Box 14720
Minneapolis, MN 55414
tnelson@aclu-mn.org
inascimento@aclu-mn.org
651-645-4097

Attorneys for Amicus Curiae
American Civil Liberties Union
of Minnesota

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 & 3, for a brief produced in a proportional font. By automatic word count, the length of this brief is 4,627 words. This brief was prepared using Microsoft Word 2016.

Dated: May 21, 2020

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF MINNESOTA

s/Isabella Salomão Nascimento
Isabella Salomão Nascimento (#0401408)
Teresa Nelson (#269736)
P.O. Box 14720
Minneapolis, MN 55414
tnelson@aclu-mn.org
inascimento@aclu-mn.org
651-645-4097

Attorneys for Amicus Curiae
American Civil Liberties Union
of Minnesota