STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota, Case No. A19-0576

Petitioner,

vs.

Michael Anthony Casillas,

Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN BOOKSELLERS ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., MEDIA COALITION FOUNDATION, INC., AND NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

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INTRODUCTION[1]

In a salutary effort to criminalize publication of "revenge porn"— the malicious posting by an ex-partner of a nude or sexual image, taken during an intimate relationship and posted after the break-up to harass, intimidate, or harm the former partner—the Minnesota Legislature enacted a content-based, overbroad statute that makes it a crime to publish nude and sexual images fully protected by the First Amendment. Under Minn. Stat. § 617.261 ("Section 617.261"), a defendant can be convicted even with no ill intent, and even though the image is non-obscene. In other words, this "revenge porn" statute criminalizes speech that is neither "revenge" nor "porn." Under Section 617.261, a defendant can be convicted even though the defendant did not know that the depicted person did not consent to the disclosure, did not know that the depicted person had a reasonable expectation of privacy, and did not even know who was depicted. The use of a negligence standard—basing culpability on what the "actor knew or reasonably should have known," Minn. Stat. § 617.261, Subd.1(2),(3)—poses a particular threat to media, because it invites judge and jury to enter the newsroom or editorial offices, displacing editors' and publishers' good faith judgments. Such a standard

[1] No counsel for a party authored this brief in whole or in part, and no party and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

effectively puts the burden on editors and publishers to prove that their editorial process is objectively reasonable.

Although the statute contains an exception if the publication "relates to a matter of public interest and dissemination serves a lawful public purpose," Minn. Stat. § 617.261, Subd.5(5), the undefined and vague terms "public interest" and "lawful public purpose" offer no meaningful protection for the media.

Section 617.261 poses a broad threat to free speech—both online and through traditional means—by photographers, editors, publishers, booksellers, newspapers, magazines, and members of the public. Under Section 617.261, among other examples discussed below:

- It is a crime for a website, magazine, or newspaper to publish partially-nude, non-obscene, non-sexual images from a museum's photography exhibit if the author or publisher "should have known" that although the persons depicted consented to the museum exhibition, they did not consent to the specific publication of exhibition images. Minn. Stat. § 617.261, Subd.1(3).
- It is a crime to publish a book that depicts breast-feeding if a judge or jury concludes that the publisher did not undertake sufficient efforts to confirm whether the mother depicted had consented to showing her

photograph in that particular book, notwithstanding the publisher's good faith belief that she consented. *Id.*

- It is a crime to publish a photograph of an elected official engaged in adulterous or sexual illegal activity, if a judge or jury decides that such publication served no "lawful public purpose." *Id.*, Subd.5(5).
- It is even a crime for a photographer, uncertain as to whether publication of a photograph would violate the statute, to submit the photograph to, and share that concern with, the editor or publisher. *Id.*, Subd.5.

Though Section 617.261 is content-based on its face—it applies only to nude and sexual images—the State of Minnesota (the "State" or "Appellant") asks this Court to find that the statute is content-neutral because it is intended to protect privacy. (App.Br. 38-42). But in so arguing, Appellant remarkably fails even to mention the recent and dispositive U.S. Supreme Court decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015):

> 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 towards the ideas contained' in the regulated speech….

Id. at 2228 (citation omitted). Nor do amici Cyber Civil Rights Initiative *et al.* ("CCRI") and Minnesota County Attorneys Association ("MCAA") mention *Reed*. Under *Reed*, content-based restrictions on speech are "presumptively

unconstitutional," *Id.* at 2226; *United States v. Stevens*, 559 U.S. 460, 467 (2010), and must be subject to "strict scrutiny." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest. In this context, a regulation is "narrowly drawn" if it uses the least restrictive means of achieving the compelling interest. *Brown*, 564 U.S. at 799. To apply a lower level of scrutiny "would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000).

Casting aside these settled principles of First Amendment law, Appellant asserts that Section 617.261 is "a content-neutral time, place, and manner restriction" on "speech involving purely private matters." (App.Br. 38-39). But "time, place, and manner" restrictions on speech are subject to strict scrutiny unless they are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, the content of the speech—nude and sexual images—is intrinsic to the statute's justification.

The speech at issue—non-obscene images of nudity and sexual activity—is fully protected by the First Amendment. *Playboy Enm't Grp, Inc*., 529 U.S. at 811; *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 (1975); *Jenkins v. Georgia,* 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make

material legally obscene"). It is obvious that Section 617.261 regulates this non-obscene speech based on its content. *Stevens*, 559 U.S. at 468 (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *Playboy Enm't Grp, Inc.,* 529 U.S. at 811 ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). That Section 617.261 criminalizes only posting nude or sexual images, but not other images that a depicted person may strongly desire to keep private—wearing a Nazi uniform, appearing (fully-clothed) with a paramour, eating food forbidden by his or her religious beliefs, or simply appearing in a disheveled, inebriated, or otherwise unflattering way—proves its lack of content-neutrality. "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Such prohibitions and regulations "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.,* 468 U.S. 641, 648-49 (1984) (citations omitted).

This Court should decline Appellant's invitation to ignore the U.S. Supreme Court's controlling precedents and adopt a watered-down test for evaluating content-based speech restrictions—one that would pose a dire threat to free speech even beyond the grave threat that this unconstitutional statute poses.

Section 617.261 cannot survive strict scrutiny because when one considers that neither ill intent nor actual knowledge is an offense element; that harm is not an offense element; that the public interest/lawful public purpose exception is vague; and that there are numerous other ways in which the Minnesota Legislature could have narrowed the statute's overbreadth, it is clear that the statute is not "narrowly drawn" to serve a "compelling government interest," *Brown,* 564 U.S. at 799, which could not be served through a "less restrictive alternative." *Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (*citing Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

The Court of Appeals' decision holding Section 617.261 unconstitutional should be affirmed. (Add. 1-29); *State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019).

IDENTIFICATION OF *AMICI*

Amici, their members, and their constituents include booksellers, publishers, writers, authors, artists, photographers, readers, and viewers, in a broad range of mainstream media. Their speech is chilled by Section 617.261 because the statute criminalizes a substantial amount of non-obscene First Amendment-protected speech, published without ill intent and published without knowledge that the depicted person did not consent to the publication and had a reasonable expectation

of privacy, in the full range of media in which *Amici*, their members and their constituents communicate on a daily basis. *Amici* are:

American Booksellers Association ("ABA"), founded in 1900, is a trade organization of 1,887 independently-owned bookstores operating in 2,554 locations nationwide, many of which also maintain websites. ABA exists to protect and promote the interests of independent retail booksellers by, among other things, promoting and protecting the free exchange of ideas—whether expressed in words or images—particularly those contained in books.

Association of American Publishers, Inc. ("AAP"), a not-for-profit organization, represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's members range from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, educational, and religious books produced in the United States, some of which include images of nudity or sexual conduct. Additionally, members of AAP maintain websites featuring and offering for sale their publications, some of which include images of persons engaged in sexual activities or in a state of nudity.

Media Coalition Foundation, Inc. (the "Foundation") is a not-for-profit corporation, established in 2015 by The Media Coalition, an association representing individuals and organizations engaged in communication through both traditional and electronic media. The Foundation monitors potential threats to freedom of speech and engages in litigation and education to protect First Amendment rights.

National Press Photographers Association ("NPPA") is a Section 501(c)(6) nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of speech and the press in all its forms, especially as it relates to visual journalism.

More complete descriptions of *Amici* are set forth in their application for leave to participate as amici.

ARGUMENT

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THIS COURT SHOULD AFFIRM THE COURT OF APPEALS' DECISION HOLDING SECTION 617.261 UNCONSTITUTIONAL AS AN OVERBROAD CONTENT-BASED SPEECH RESTRICTION

Section 617.261 is an overbroad, content-based speech restriction that fails strict scrutiny because it criminalizes the publication of non-obscene nude and non-

obscene sexual images, disseminated without ill intent, by a person who did not know (but "reasonably should have known") that the person depicted had a reasonable expectation of privacy and did not consent to the dissemination. This statute thus criminalizes a broad range of First Amendment-protected speech and poses a particular threat to media. *Ashcroft*, 542 U.S. at 660-66; *Playboy Enm't Grp, Inc.*, 529 U.S. at 813-16. The statute is facially unconstitutional because there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Stevens*, 559 U.S. at 485 (internal quotation marks and citation omitted).

A. Section 617.261 Criminalizes A Broad Range of First Amendment-Protected Speech

Section 617.261 makes it a crime for a person to intentionally disseminate a nude image (or an image showing sexual activity) of an identifiable person if "the actor knows or reasonably should know" that the person depicted did not consent to the disclosure and had a "reasonable expectation of privacy." Minn. Stat. § 617.261, Subd.1(3).

What is missing from the offense elements demonstrates just how overbroad the statute is.

Ill intent is not an offense element. The only "intent" that the statute requires is an intention to make the disclosure; a defendant cannot be convicted if a disclosure was accidental (mistakenly pushing "send" instead of "delete"). Minn.

Stat. § 617.261, Subd.1. However, a defendant can be convicted even if he or she did not intend to harm the depicted person, did not act with malice, and had no ill intent. Appellant notes that the statute was enacted partly to cover the "abhorrent behavior" of the defendant in *State v. Turner*, 864 N.W.2d 204 (Minn. Ct. App. 2015), who had posted ads containing sexual images of his former girlfriend and her daughter "in retaliation." (App.Br. 9-10). *Turner* held the State's criminal defamation statute unconstitutional and set aside Turner's conviction. However, Appellant fails to note that such retaliatory behavior would be covered by a statute that included ill intent as an offense element. Appellant cites *Vermont v. VanBuren,* 214 A.3d 791 (2019) (App.Br. 10), a decision of the Vermont Supreme Court upholding that state's statute, but fails to note that the statute upheld has as an offense element that the disclosure be made "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted" and "would cause a reasonable person to suffer harm." Vt. Stat. Ann. tit. 13, §2606(b)(1).[2]

*Actual knowledge that the depicted person did not consent and had a reasonable expectation of privacy, are not offense elements***.** A defendant can be convicted even if he or she was merely negligent—did not know but "reasonably should know" that the depicted person did not consent to the disclosure, and did

[2] The *VanBuren* court stated that it was not addressing whether the statute would be constitutional absent the intent to harm element. 214 A.3d at 812 n. 10.

not know but "reasonably should have known" that the depicted person had a "reasonable expectation of privacy" based on the circumstances under which the image "was obtained or created." Minn. Stat. § 617.261, Subd.1 (2),(3). The First Amendment prohibits negligence-based regulations of protected speech. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it… ."); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) ("[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.").

In contrast to Section 617.261's negligence standard, the Vermont statute upheld in *VanBuren* requires actual knowledge—"knowingly"—as an offense element:

> A person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm.

Vt. Stat. Ann. tit. 13, §2606(b)(1). The Vermont Supreme Court explained:

> [D]isclosure is only criminal if the discloser *knowingly* discloses the images without the victim's consent. *Id*. We construe this intent requirement to *require knowledge of both the fact of disclosing, and the fact of nonconsent.*

VanBuren, 214 A.3d at 812 (emphasis added).[3] The *VanBuren* Court also found it constitutionally necessary to limit the statute's application to

> the nonconsensual disclosure of nude images obtained in the context of intimate relationships or other relationships in which there is a reasonable expectation of privacy (for example, patient-dermatologist).

VanBuren, 214 A.3d at 821. Thus, under Minnesota but not Vermont law, a person who considers disclosing a nude or sexual image risks criminal liability unless he or she is in a position to assess, accurately and definitively, whether the depicted person gave consent and the circumstances in which the image was created or obtained.[4]

In attempting to defend Section 617.261's "should have known" standard, MCCA argues that "[t]he court of appeals failed to recognize that the private

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[3] Vermont has long recognized the critical difference between "knowingly" and "should have known." *Vermont v. Sargent*, 594 A.2d 401, 402 (1991) ("The issue before us today is whether the "should have known" language contained in the jury instructions is consistent with *Audette*'s [requirement] that a defendant act purposefully or knowingly. We hold that it is not. …Whether a defendant acted knowingly depends on what his or her state of mind actually was, not what it should have been.").

[4] Evaluating whether a defendant "should have known that the person depicted had a reasonable expectation of privacy" based on "the circumstances in which" "the image was obtained or created," as Section 617.261 does, creates an additional problem. What if an image was created under circumstances in which the person depicted had a reasonable expectation of privacy, but the defendant knew (or reasonably believed) that after the image's creation, the person depicted waived any right to privacy by, for example, voluntarily posting the image on his public Facebook page? Under Section 617.261, a defendant's actual knowledge that the depicted person voluntarily ceded a reasonable expectation of privacy could still subject the defendant to prosecution given the circumstances in which the image was created.

sexual images at issue here are exchanged in the context of dating and intimate relationships." (MCAA Br. 6). If, in referring to "the private sexual images at issue *here*" (emphasis added), MCAA means the images Casillas disseminated, then MCAA misunderstands the nature of this case. Whether Casillas obtained the particular images "in the context of dating and intimate relationships" is irrelevant in this facial challenge because Section 617.261 is not limited to images obtained in such relationships. And if, in referring to "the private sexual images at issue *here*" (emphasis added), MCAA means the images criminalized by Section 617.261, MCAA is wrong: The statute is not so limited.

Moreover, although MCAA quotes *Illinois v. Austin*, --- N.E.3d ----, 2019 IL 123910, 2019 WL 5287962 (2019), in its defense of Section 617.261's "should have known" standard, MCAA disregards the Illinois Supreme Court's construction of that language to limit the statute's scope:

> [T]he image must have been obtained under circumstances in which a reasonable person would know or understand that it was to remain private. [720 ILCS 5/] 11-23.5(b)(2). We construe this provision as requiring a reasonable awareness that privacy is intended by the person depicted. *This requirement limits the statute's application to the types of personal, direct interactions or communications that are typically involved in a close or intimate relationship*.

Austin, 2019 WL 5287962, at *15 (emphasis added).[5]

Harm is not an offense element. Harm, like intent to harm, is not an offense element. Nonconsensual publication of nude or sexual images may well cause harm, even serious harm, to many persons depicted. But when considering whether speech should be removed from First Amendment protection, harm should not be presumed. Under Section 617.261, a defendant can be convicted without proof that the person depicted was harmed, and even if the person depicted concedes there was no harm.

Obscenity is not an offense element. Appellant tells this Court:

> Although these laws are colloquially referred to as 'revenge porn' laws, the term 'nonconsensual pornography' is more accurate due to the wide range of instances when private sexual images are disseminated without the victim's consent.

(App.Br. 8). But the term "nonconsensual pornography," while dropping the word "revenge," retains the word "porn," that is, "pornography," thus indicating that

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[5] Appellant relies heavily on *Austin*, which upheld an Illinois statute that criminalizes the "non-consensual dissemination" of nude or sexual images. 720 ILCS §5/11-23.5.

Austin filed a Petition for Certiorari in the U.S. Supreme Court on February 14, 2020. *Austin v. Illinois,* Docket No. 19-1029 (U.S. Supreme Court). The Court requested that Illinois, as Respondent, file a response by July 6, 2020.

Amici respectfully submit that the *Austin* Court's limiting construction was insufficient, and that the Illinois statute is unconstitutional under properly-applied, long-settled First Amendment principles. Amici *filed* an amicus brief in the U.S. Supreme Court in *Austin*, urging that the Court grant certiorari to reiterate those First Amendment law principles, which the Illinois Supreme Court disregarded.

only obscene images are criminalized. Not so. The statute criminalizes the publication of even non-obscene nude and non-obscene sexual images. Under *Miller v. California*, 413 U.S. 15, 24 (1973):

> A state offense [of obscenity] must also 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.

Minnesota's obscenity statute incorporates the *Miller* definition verbatim. Minn. Stat. §617.241. Nothing in Section 617.261 limits its application to images that are "obscene" or "pornographic." It would contravene *Miller* to redefine obscenity, as Appellant requests, on the supposed ground that "it is the nonconsensual nature of the dissemination that makes the image obscene." (App.Br. 21).

Loaded phrases such as "revenge porn," "nonconsensual pornography," and "animal cruelty" cannot justify a law whose scope is broader than the epithet. *Stevens*, 559 U.S. at 474 ("We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a 'depiction of animal cruelty' nowhere requires that the depicted conduct be cruel."). Appellant hypothesizes that "*many* of the images disseminated in violation of this statute constitute obscene speech." (App.Br. 21) (emphasis added). Even were that so—and there is no evidence to support that assertion—the fact remains that obscenity is not an offense element. If obscenity—as defined in *Miller* and Minnesota law—

were an offense element, the statute would be constitutional (and redundant, because any violation of it would also be a violation of Minnesota's obscenity statute. Minn. Stat. §617.241).

Section 617.261 is not limited to child pornography or speech integral to criminal conduct. Doubling down on its mistaken argument that the statute is constitutional because it criminalizes obscenity, Appellant contends:

> Much of the speech regulated by the statute falls into the unprotected-speech categories of obscenity, speech integral to criminal conduct, and child pornography. While Appellant concedes that not every instance of nonconsensual pornography falls into each of these categories, much of the speech swept up by the statute collectively constitutes unprotected speech.

(App.Br. 20-21). Just as Section 617.261 is not limited to obscenity, it is not limited to "child pornography" or speech "integral to criminal conduct."[6] Minnesota has statutes that address those issues. *See, e.g.,* Minn. Stat. § 617.247 ("Possession of pornographic work involving minors"); Minn. Stat. § 609.713

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[6] Compounding this erroneous argument, Appellant cites *United States v. Petrovic*, 701 F.3d 849, 855-56 (8th Cir. 2012), as holding that "distributing a victim's private nude photos without consent 'may be proscribed consistent with the First Amendment.'" (App.Br. 14). *Petrovic* did not so hold. "The jury convicted Petrovic of two counts of interstate extortionate threat in violation of 18 U.S.C. § 875(d) …. The communications for which Petrovic was convicted under § 2261A(2)(A) were integral to this criminal conduct as they constituted the means of carrying out his extortionate threats." 701 F.3d at 855. *Petrovic* held that "[t]he communications for which Petrovic was convicted"—that is, "extortionate threats"—"may be proscribed consistent with the First Amendment." *Id*. at 856.

("Threats of violence"). An overbroad statute that criminalizes speech protected by the First Amendment cannot be sustained on the basis that "the statute also conceivably covers … [speech within] categories of unprotected speech" such as obscenity, speech integral to criminal conduct, and child pornography. *State v. Hensel*, 901 N.W. 2d 166, 171 (Minn. 2017). If Section 617.261 was intended to address child pornography or speech integral to criminal conduct, those should be offense elements. And, as with obscenity, if Section 617.261 were limited to "child pornography" or "speech integral to criminal conduct," the statute would be both constitutional and redundant.

It is a crime to publish historical or newsworthy images of nudity or sexual activity, unless "the image relates to a matter of public interest and dissemination serves a lawful public purpose." Although this vague public interest/lawful public purpose exemption may offer some defendants limited protection, it enables judges and juries to second-guess a photographer's, editor's, publisher's, or bookseller's judgment as to what is in the public interest and whether a particular dissemination serves a "public purpose." Nor is the exception's meaning clear. What distinguishes a "lawful" from an "unlawful" public purpose? If an investigative reporter obtains classified nude images showing that a public official has committed perjury, would publication serve lawful public purposes?

The statute's exceptions for "reporting of unlawful conduct" and "seeking or receiving medical or mental health treatment" are too narrow to protect deserving victims. The Legislature properly recognized that, absent exceptions, the statute would criminalize "revenge porn" victims' efforts to report unlawful conduct and seek treatment. But the exceptions are narrow. Consider this conduct, described in Justice Garman's *Austin* dissent and quoted by the Court of Appeals here:

> 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."

2019 WL 5287962, at *24 (Add. 24). If the texted nude photo was a "selfie," the sender did not violate Section 617.261 because it was not of "another person," but the recipient did when, wanting emotional support, he or she showed it to a friend.

The statute is an outlier. CCRI claims that "nonconsensual pornography laws of five states have been challenged on First Amendment grounds," and "[in] all four of the cases to have reached termination in the state courts, the law has been upheld" (CCRI Br. 24). But California's and Wisconsin's statutes were narrower in scope than Minnesota's;[7] Vermont's statute was not only narrower in

[7] *California v. Iniguez,* 202 Cal. Rptr. 3d 237, 243 (Cal. App. Dep't. Super. Ct. 2016) (statute "only barred a person who photographed or recorded the image from distributing it, when such a person had the intent to cause serious emotional distress," and applied

scope than Minnesota's, but the Vermont Supreme Court further narrowed it to save it from constitutional infirmity;[8] and the Illinois Supreme Court also narrowed Illinois' statute.[9] The intermediate appellate court held Texas's statute unconstitutional; that case is on appeal.[10] And when Arizona's statute (unmentioned by CCRI) was challenged on First Amendment grounds, a permanent injunction was entered on consent, and the state legislature amended the statute to include an intent to harm element.[11] In sum, *no intimate images law as broad as Minnesota's has survived a constitutional challenge without being limited in scope by the state supreme court.*

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only to images "taken under circumstances where the parties agreed or understood the images were to remain private"); *Wisconsin v. Culver,* 918 N.W.2d 103, 109 (Wis. Ct. App. 2018) (for images taken with the depicted person's consent but intended to be private, "the statute pertains only to those images that the publisher *knows* are private").

[8] *VanBuren*, 214 A.3d at 821 (offense elements included that the disclosure was made "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm," and that the defendant acted "knowingly," Vt. Stat. Ann. tit. 13, §2606(b)(1); Vermont Supreme Court further narrowed statute to "nonconsensual disclosure of nude images obtained in the context of intimate relationships or other relationships in which there is a reasonable expectation of privacy (for example, patient-dermatologist).") *VanBuren*, 214 A.3d at 821.

[9] *Austin*, 2019 WL 5287962, at *15 (limiting the statute's application to "the types of personal, direct interactions or communications that are typically involved in a close or intimate relationship").

[10] *Ex Parte Jones,* No. 12-12-000346-CR, 2018 WL 2228888 (Tex. Ct. App. May 16, 2018), *petition for discretionary review granted* (Texas Ct. Crim. App. 2018).

[11] Final Decree, *Antigone Books, LLC v. Brnovich,* 2:14-cv-02100-SSRB (Dkt. 114) (D. Ariz. July 10, 2015); Ariz. Rev. Stat. §13-1425 (amended March 11, 2016).

Similarly, while stating that "[f]orty-six states, the District of Columbia, and Guam have all criminalized nonconsensual pornography" (App.Br. 10), Appellant does not note that ninety percent of those laws are much narrower than the Minnesota statute. For example,

- In *32 states (and Guam)*, the law includes ill intent as an offense element.[12]
- In *four additional states,* the law requires proof that the victim sustained harm as an offense element.[13]
- In *three additional states*, it is an offense element that harm was intended or foreseeable.[14]

The statute's overbreadth poses a particularly grave threat to mainstream media's speech for two reasons.

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[12] Ala. Code §13A-6-240; Alaska Stat. §11.61.120; Ariz. Rev. Stat. Ann. §13-1425; Ark. Code Ann §5-26-302; Colo. Rev. Stat. §18-7-107; Fla. Stat. §784.049; Ga. Code §16-11-90; Guam Code Ann, Tit. 9 §28.102; Haw. Rev. Stat. §711-1110.9; Idaho Code §18-6609(3); Iowa Code §708.7(1)(a)(5); Kan. Stat. Ann. §21-6101(8); Ky. Rev. Stat. Ann. §531.120; La. Rev. Stat. Ann. §14:283.2; Me. Rev. Stat. Ann., tit. 17-A, §511-A; Md. Code Ann., Crim. Law §3-809; Mich. Comp. Laws §750.145e; Mo. Rev. Stat. §573.110; Mont. Code Ann. §45-8-213; N. H. Rev. Stat. Ann. §644:9-a; N. M. Stat. Ann. §30-37A-1; N.Y. Penal Law §245.15; Nev. Rev. Stat. 200.780.; N. C. Gen. Stat. Ann. §14-190.5A; Ohio. Rev. Code Ann. §2917.211; Or. Rev. Stat. §163.472; Pa. Cons. Stat. Ann. tit. 18 §3131; S.D. Codified Laws. Ann. §22-21-4; Tenn. Code Ann. §39-17-318; Vt. Stat. Ann. tit. 13, §2606; Va. Code Ann. §18.2-386.2; D. C. Code Ann. §22-3052; W. Va. Code Ann. §61-8-28A

[13] Cal. Penal Code §647(j)(4); Conn. Gen. Stat. Ann. §53a-189c; N.D. Cent. Code §12.1-17-07.2; Tex. Penal Code. §21.16.1

[14] Okla. Stat. tit. 21 §1040.13b; R.I. Gen. Laws §11-64-1; Wash. Rev. Code §9A.86.010

First, online media is, as a practical matter, disseminated throughout the country—as is much printed media (newspapers, magazines, books, etc.). In deciding what to publish, media must consider whether they will be threatened with liability in any state in which their media is distributed and in which they are subject to personal jurisdiction. If any state's overbroad laws impose criminal liability for First Amendment-protected speech, there is a serious risk that media will refrain from such speech, meaning that the state with the narrowest view of First Amendment protection will chill free speech nationwide.

Second, while Appellant seeks to defend the statute by arguing that "the Legislature included layers of *mens rea* requirements" (App.Br. 13), the Court of Appeals correctly held that the statute applies a negligence standard for critical offense elements:

> 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 [In re Welfare of] A.J.B.,* 929 N.W.2d [840, 850 (Minn. 2019)] (describing a "knows or has reason to know" standard as a broad negligence mens rea).

(Add. 10). Appellant incorrectly argues that "[c]haracterizing section 617.261's *mens rea* standard as negligence misreads the statute" (App.Br. 30), contending:

> The State is still required to prove beyond a reasonable doubt that the actor *"reasonably should have known"* that there was a reasonable

> expectation of privacy in the image and that the person depicted does not consent to the dissemination. The State also must prove that *with this knowledge,* the actor intentionally disseminated the sexual image.

Id. (emphasis added). However, when an element of a crime is satisfied based on what a defendant "reasonably should have known," the State need not prove that the defendant acted "*with this knowledge*;" the element may be satisfied even if he or she acted *without any knowledge.* A negligence standard invites judge and jury to enter the newsroom or editorial offices and second-guess editors' and publishers' judgment. Such a standard effectively puts the burden on editors and publishers to prove that their editorial process is objectively reasonable.

B. The State Asks This Court to Disregard Settled First Amendment Law

In its effort to uphold Section 617.261, Appellant asks this Court to disregard settled First Amendment law.

1. Section 617.261 Is a Presumptively-Unconstitutional Content-Based Speech Restriction That Is Subject to Strict Scrutiny

On its face, Section 617.261 is a content-based speech restriction. The offense's central element is that the defendant "intentionally disseminate[d] an image of another person who is *depicted in a sexual act or whose intimate parts are exposed*, in whole or in part…" (emphasis added). Appellant argues that the

statute is not content-based because the nature of the image is only one element of the offense:

> Section 617.261 does not prohibit the sharing of all sexual or nude images. It only prohibits nonconsensual sharing of those images. Thus, the statute is justified not with reference to the content of the images, but by the lack of consent to disseminate those images.

(App.Br. 39). But the relevant comparison is not between nude images published with and without consent, but between a nude image and an otherwise-identical clothed image of the same person, each published without consent. The statute criminalizes nonconsensual dissemination of the nude but not the clothed image. That distinction is content-based. Dissenting in *Austin*, Justice Garman stated:

> Contrary to the majority's belief, the content of the image is precisely the focus of [the statute]. It is not a crime under this statute to disseminate a picture of a fully clothed adult man or woman, even an unflattering image obtained by the offender under circumstances in which a reasonable person would know or understand the image was to remain private and he knows or should have known the person in the image had not consented to its dissemination. However, if the man or woman in the image is naked, the content of that photo makes it a possible crime. Thus, one must look at the content of the photo to determine whether it falls within the purview of the statute.

2019 WL 5287962, at *23.

If Appellant's analysis—that if the nature of the content is only one element of a regulation, it is content-neutral—were correct, it would be hard to imagine that *any* regulation was content-based. For example, the content-based outdoor sign

ordinance at issue in *Reed*, 135 S. Ct. at 2224, which restricted various categories of outdoor signs based on the different types of information they conveyed, would have been content-neutral under Appellant's proposed analysis because, to paraphrase Appellant, 'the ordinance is justified not with reference to the content of the signs, but by whether the signs disseminating those messages were indoor or outdoor.' (App.Br. 38).

2. Section 617.261's Purpose—To Protect Privacy—Does Not Remove the Statute from Strict Scrutiny

Appellant also asks this Court to follow Illinois' *Austin* decision to create a new rule that content-based speech restrictions are subject only to intermediate scrutiny if they are intended to protect privacy. (App.Br. 38-39). *Reed*, which held that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive," 135 S.Ct. at 2228, bars that proposal.

Appellant's reliance on *Snyder v. Phelps*, 562 U.S. 443 (2011) (App.Br. 2, 40, 41) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985) (App.Br. 41) is misplaced. The issue in *Snyder*, a claim for intentional infliction of emotional distress, 562 U.S. at 450, and in *Dun & Bradstreet*, a defamation case, 472 U.S. at 752, was whether the First Amendment barred those tort claims—not whether a state law criminalizing speech was subject to strict scrutiny.

The absence of a privacy exception to the rule requiring strict scrutiny for content-based speech restrictions does not prevent legislatures from enacting laws to protect certain types of private information, such as medical records. While the constitutionality of such privacy-protective content-based laws must survive strict scrutiny, courts may and do consider the privacy-protective purpose in evaluating whether the statute is necessary and narrowly-tailored to serve a compelling state interest. *See, e.g., Tschida v. Moti*, 924 F.3d 1297, 1303-1304 (9th Cir. 2019) (state statute imposing confidentiality requirement on ethics complaints against state elected officials and employees was "content-based," and therefore subject to strict scrutiny).

Creating a "privacy" exception to the rule mandating strict scrutiny for content-based speech restrictions would be an unwarranted and dangerous expansion of the limited speech categories—such as defamation and obscenity—that, historically, the First Amendment does not fully protect. Indeed, the *Austin* court acknowledged that it was inventing a new, categorical privacy exception to strict scrutiny. *Austin*, 2019 WL 5287962, at *7. That is directly contrary to *Connick v. Myers,* which held:

> 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.

461 U.S. 138, 147 (1983). *See also Stevens*, 559 U.S. at 468-72; *Brown*, 564 U.S. at 791 ("new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (content-based speech restrictions are permissible "only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar'") (citations omitted).

A privacy exception to the strict scrutiny rule would undermine free speech far afield from the private nude or sexual images that Section 617.261 criminalizes. Much contained in media reports may be considered private or personal by their subjects. Indeed, much of the communications individuals make to each other—especially over the Internet and through electronic means such as texts and emails—concerns what the participants might consider private or personal, notwithstanding their communication mode. A legislature may not criminalize publishing lawfully-obtained personal financial information about a public official or private person; sexually-related texts (not images) exchanged between persons in an intimate relationship; or news about a public official's or private person's adulterous relationship. Applying Appellant's reasoning, all such content-based speech restrictions would be subject only to intermediate scrutiny because they were intended to protect privacy. Under *Reed*, though, all such content-based speech restrictions are subject to strict scrutiny. While a privacy-protective

legislative intent is relevant to determining whether the legislative purpose was compelling and the means chosen necessary and narrowly-tailored to that interest, it does not change the level of scrutiny required.

3. Section 617.261 Is Not a Content-Neutral "Time, Place, and Manner" Restriction

Section 617.261 stands in stark contrast to the legitimate "time, place, and manner" sound-amplification guideline at issue in *Ward*—upon which Appellant relies to somehow transform a content-based restriction into a content-neutral restriction. The *Ward* regulation required that all performers, from all musical genres, use a city-supplied sound technician and sound-amplification equipment when performing at a bandshell in Manhattan's Central Park. 491 U.S. at 784. *Ward* held:

> The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline 'ha[s] nothing to do with content,' … and it satisfies the requirement that time, place, or manner regulations be content neutral.

491 U.S. at 792.

In contrast, Minnesota's statute has everything to do with content. The statute does not apply to *all* images disseminated without consent, nor *all* images obtained under circumstances where a reasonable person would expect the image

to remain private; it applies only to nude or sexual images. The Minnesota statute cannot be "justified without reference to the content of the regulated speech." 491 U.S.at 790. *Reed* explained:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.

135 S.Ct. at 2228. Had the sound-amplification guideline in *Ward* applied only to rock music (not other musical genres), just as Minnesota's statute applies only to nude and sexual images (not other images), it would have been content-based, not upheld as a content-neutral "time, place and manner" regulation.

C. Section 617.261 Fails Strict Scrutiny

Section 617.261 fails strict scrutiny not merely because of a single defect, but because of the cumulative effect of the numerous ways in which Minnesota's Legislature could have "narrowly drawn" the statute. *Brown*, 564 U.S. at 799. Those alternatives included:

- making ill intent an offense element;
- criminalizing only disclosures made with actual knowledge of both lack of consent and a reasonable expectation of privacy;
- requiring that the State prove that the victim sustained harm;

- limiting "the statute's application to the types of personal, direct interactions or communications that are typically involved in a close or intimate relationship," as the Illinois Supreme Court did in *Austin*, 2019 WL 5287962, at *15;
- limiting the criminalization of what Appellant calls "nonconsensual pornography" to images that are obscene under *Miller*, 413 U.S. at 24, and Minnesota law;
- editing the exception for disclosures made "in the public interest" that serve a "lawful public purpose" to encompass all newsworthy, historical, and educational disclosures; and
- broadening the statute's exceptions for "reporting of unlawful conduct" and "seeking or receiving medical or mental health treatment" to fully protect persons actually harmed by the conduct that the statute criminalizes.

Each of these options, separately and taken together, is a "less restrictive alternative," *Playboy Enm't Grp, Inc.*, 529 U.S. at 813, *citing Reno* 521 U.S. at 874, that would have protected privacy. The Legislature thus failed to narrowly draw the statute, which therefore fails strict scrutiny.

Nor can the statute be defended based on a supposition that the State would not bring prosecutions absent the knowledge, intent to harm, or other limitations that could have been included in a "narrowly drawn" statute.

> [T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

Stevens, 559 U.S. at 480.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Dated: May 20, 2020

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CERTIFICATE OF DOCUMENT LENGTH

The undersigned counsel for Amici Curiae certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 14-point proportionately spaced typeface utilizing Microsoft Word 2016 and contains 6,994 words, including headings, footnotes, and quotations.

Dated: May 20, 2020

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