A19-0576

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Appellant,

vs.

Michael Anthony Casillas,

Respondent.

APPELLANT'S BRIEF

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PROCEDURAL HISTORY

November 28, 2017:	Casillas charged with felony nonconsensual dissemination of private sexual images pursuant to Minn. Stat. § 617.261.
February 28, 2018:	Casillas filed motion to dismiss.
June 13, 2018:	The district court denied Casillas' motion.
January 7, 2019:	Court trial commenced.
January 24, 2019:	The district court convicted Casillas as charged.
April 11, 2019:	The district court sentenced Casillas to 23 months in prison.
April 14, 2019:	Casillas filed a timely notice of appeal.
April 25, 2019:	The district court stayed execution of the sentence and conditionally released Casillas pending resolution of this appeal.
December 23, 2019:	Published decision of court of appeals filed, reversing the district court, striking down Minn. Stat. § 617.261 as unconstitutionally overbroad, and vacating Casillas' conviction.
January 22, 2020	Appellant filed a petition for review to this Court.
March 17, 2020:	This Court granted Appellant's petition for review.

ISSUE

Does Minnesota Statutes section 617.261 violate the First Amendment of the United States Constitution?

Rulings below: Casillas filed a motion to dismiss the complaint against him for felony nonconsensual dissemination of private sexual images, arguing that the statute is an unconstitutional restriction on speech. The district court rejected Casillas' constitutional challenges, reasoning the statute was not unconstitutionally overbroad or vague. The court of appeals reversed, holding that section 617.261 is facially overbroad in violation of the First Amendment and the constitutional infirmity cannot be cured through a narrowing construction or by severing language from the statute.

Apposite Authority: *Snyder v. Phelps*, 562 U.S. 443 (2011).
United States v. Williams, 553 U.S. 285 (2008).
State v. Muccio, 890 N.W.2d 914 (Minn. 2017).
U.S. Const. amend I.

STATEMENT OF THE CASE

Appellant charged Casillas with felony nonconsensual dissemination of private sexual images pursuant to Minnesota Statutes section 617.261. Casillas moved to dismiss, arguing that the statute is facially overbroad, an unconstitutional content-based restriction on speech, and void for vagueness. The district court denied the motion, finding that the statute regulates primarily unprotected speech and is not unconstitutionally vague. After a stipulated facts trial, Casillas was convicted as charged.

Casillas appealed to the Minnesota Court of Appeals. The court of appeals reversed the district court, concluding the statute is unconstitutionally overbroad. Appellant petitioned for review, which this Court granted on March 17, 2020.

STATEMENT OF THE FACTS

A.K.M. ended her relationship with Casillas in October 2016. (Index #36 at 2.) Casillas sent several communications to A.K.M. after the relationship ended. (*Id.*) A.K.M. reported to law enforcement that Casillas hacked into her Facebook and Gmail accounts and gained access to her Verizon cloud account. (*Id.*) A.K.M. explained that she had previously given Casillas her password and log-in information to use her Dish account and that she used the same password for her other online accounts. (*Id.* at 2-3.) A.K.M. reported that Casillas obtained a video and picture from A.K.M.'s Verizon cloud account. (*Id.* at 2.)

A.K.M. received a text message on June 18, 2017, from a phone number that was a voice-over-internet-protocol ("VOIP") number. (*Id.* at 3.) Through a series of administrative subpoenas, law enforcement obtained the subscriber information associated with the VOIP number. (*Id.* at 3-4.) The subscriber's name was Casillas, and the subscriber information included another phone number, which was also attributable to Casillas. (*Id.* at 4.) The text message stated, "still have the video lol…can you SAY POST ONLINE lol." (*Id.* at 3.) A.K.M. responded, "can you say, posting sexual content online without written consent is a prosecutable offense." (*Id.*) She received another text stating, "yes…can you SAY doesn't matter that's the reason for fake email accounts? And ip changers?" (*Id.*) Another text message stated, "or just maybe your work will get fliers now that would be interesting." (*Id.*)

On June 20, 2017, A.K.M. received a text message containing an image of a screenshot of another phone. (*Id.* at 3-4.) The screenshot depicted a video being sent at 8:55 p.m. on June 20 to 44 recipients. (*Id.*) The screenshot indicated that the video was

seen or opened by thirteen recipients. (*Id.* at 4.) The video clearly depicted A.K.M. performing fellatio on another individual. (*Id.*)

The State charged Casillas with one count of nonconsensual dissemination of private sexual images, in violation of Minnesota Statutes section 617.261. (Index #1.) On February 28, 2018, Casillas filed a motion to dismiss, arguing that the statute is unconstitutionally overbroad and vague. (Index ##10, 16.) On June 13, 2018, the district court denied the motion to dismiss, finding that the statute does not regulate protected speech and that it is not void for vagueness. (Index #18 at 6.)

The case was submitted to the district court for a stipulated facts trial. (Index #36 at 1.) On January 24, 2019, the district court found Casillas guilty of felony nonconsensual dissemination of private sexual images. (*Id.* at 10.) Casillas moved for a "mitigated departure" from the sentencing guidelines. (Index #41.) The district court sentenced Casillas to a guideline sentence of 23 months in prison. (Index #42; Index #68 at 31.)

Casillas filed a notice of appeal and moved for a stay of execution of his sentence and to be conditionally released from custody pending resolution of this appeal; his motion was granted. (Index ##52, 65.) On December 23, 2019, the Minnesota Court of Appeals issued its published decision reversing the district court and vacating Casillas' conviction. (Add. 1-29.) The court of appeals held that section 617.261 is facially overbroad in violation of the First Amendment, and the constitutional infirmity cannot be remedied through a narrowing construction or severance. (Add. 1.) The court characterized Casillas' behavior as "abhorrent" but struck down the statute and vacated his conviction. (Add. 29.) The court did not reach Casillas' vagueness or sentencing arguments. (*Id.*)

ARGUMENT

I. MINNESOTA STATUTES SECTION 617.261 DOES NOT VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. While the First Amendment right to free speech is vital and fundamental, not all forms of speech and expression are beyond the reach of reasonable regulation. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Some categories of speech are "of such slight social value as a step to truth that any benefit that may be derived from [them are] clearly outweighed by the social interest in order and morality." *State v. Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016) (quotation omitted). The right to free speech is "not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

"No one should be able to turn others into objects of pornography without their consent." Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 390 (2014). To do so violates fundamental notions of bodily autonomy and privacy. *Id.* at 353-54. Minnesota Statutes section 617.261 is a valid regulation of this anti-social and harmful behavior.

A. Standard of Review.

Constitutional challenges are reviewed de novo. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014). While statutes are generally presumed to be constitutional, a statute that restricts First Amendment rights is not presumed constitutional. *State v. Stockwell*, 770 N.W.2d 533, 537 (Minn. App. 2009). This Court's "power to declare a

statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

B. Section 617.261 Is Not Overbroad in Violation of the First Amendment.

Casillas raised a facial overbreadth challenge to the statute in the district court. Although the statute may not be overbroad as applied to Casillas, the overbreadth doctrine allows him to assert that the statute is unconstitutional on its face. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). The doctrine is based on the concern that overly broad statutes have a chilling effect on the legitimate exercise of free speech. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Statutes are only overbroad in violation of the First Amendment if they prohibit a *substantial* amount of constitutionally protected speech. *Washington-Davis*, 881 N.W.2d at 539. For a statute to be facially challenged on overbreadth grounds, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *United States v. Stevens*, 559 U.S. 460, 485 (2010). The overbreadth doctrine is "strong medicine" that "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." *Machholz*, 574 N.W.2d at 419 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

1. Statutory construction of section 617.261.

The first step in the overbreadth analysis is to construe the challenged statute to determine if it regulates protected speech. *United States v. Williams*, 553 U.S. 285, 293 (2008); *State v. Muccio*, 890 N.W.2d 914, 920 (Minn. 2017), cert. denied, 138 S. Ct. 328 (2017); *Washington-Davis*, 881 N.W.2d at 537-38. The rules of construction permit this

Court to broadly review the purpose of and occasion for the statute, as well as the legislative history. *See* Minn. Stat. § 645.16. Thus, prior to discussing the language of the statute itself, it is important to understand the problem the Legislature seeks to address, review the legislative history of section 617.261, and consider the national response.

i. The urgent and devastating problem of nonconsensual pornography.

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.

> Images need not to have been posted by a scorned ex-lover or friend, in order to seek revenge after a relationship has gone sour, or include nudity in order to be considered revenge porn. A hacker or a rapist can also perpetrate revenge porn simply by circulating an explicit image of a person without his or her consent.

Erica Souza, *"For His Eyes Only": Why Federal Legislation Is Needed to Combat Revenge Porn*, 23 UCLA Women's L.J. 101, 102 (2016) (quotations and citations omitted).

The heart of the definition of nonconsensual pornography "lies in the fact that the victim did not consent to its *distribution*—though the victim may have consented to its recording or may have taken the photo or video themselves." Christian Nisttahuz, *Fifty States of Gray: A Comparative Analysis of 'Revenge-Porn' Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 Tex. Tech, L. Rev. 333, 337 (2018). "[P]erpetrators may be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all. The only common factor is that they act without the consent of the person depicted." *People v. Austin*, -- N.E.3d --, --, 2019 WL 5287962, at *3 (Ill. Oct. 18,

2019). The act "transforms a private image into public sexual entertainment," without the consent of the person depicted. Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251, 1260 (2017). The nonconsensual dissemination of private sexual images "is not wrong because nudity is shameful or because the act of recording sexual activity is inherently immoral. It is wrong because exposing a person's body against her will fundamentally deprives that person of her right to privacy." *Id.*

ii. The legislative history and intent behind section 617.261.

In response to this quickly growing problem, the Minnesota Legislature criminalized "nonconsensual dissemination of private sexual images." Minn. Sess. Laws 2016 ch. 126, § 9. The legislative intent behind Minnesota's nonconsensual pornography statute is to protect the privacy rights of individuals, to respect the dignity and bodily autonomy of those individuals, and to prevent the far-reaching harm caused by online posting of private sexual images without consent. *See* Hr'g on S.F. 2713, Sen. Jud. Comm., 89th Minn. Leg., April 7, 2016 (digital audio) (beginning at 2:55). Minnesota law, prior to the enactment of this statute, failed to adequately address the serious issue of nonconsensual dissemination of private images. The Legislature's intent was to proscribe nonconsensual pornography that previously went unaddressed. *See generally id.*

Section 617.261 was also enacted partly in response to the Minnesota Court of Appeals' decision in *State v. Turner*, which struck down the criminal defamation statute as unconstitutional. 864 N.W.2d 204 (Minn. App. 2015). In *Turner*, the defendant "posted ads on Craigslist" that had sexual depictions of his former girlfriend and her minor daughter and included their contact information. *Id.* at 206. The defendant admitted that he posted

the ads "in retaliation" and because "he was mad at" his former girlfriend. *Id.* The State charged the defendant with criminal defamation. *Id.* The court of appeals held that the statute was overbroad and not susceptible to a narrowing construction and thus unconstitutional. *Id.* at 211. Section 617.261 now covers the abhorrent behavior of Turner—and Casillas—that would otherwise go unpunished.

iii. The national response to address nonconsensual pornography.

Minnesota is not alone: nearly every state in the country has recognized the need for a criminal law to address and deter the devastatingly harmful behavior that is nonconsensual dissemination of private sexual images. Forty-six states, the District of Columbia, and Guam have all criminalized nonconsensual pornography. *See Revenge Porn Laws*, Cyber Civil Rights Initiative, *available at* https://www.cybercivilrights.org/revenge-porn-laws (last visited April 7, 2020). "The mass adoption of these statutes by states on opposite sides of the political spectrum reflects the urgency of the problem." *Austin*, -- N.E.3d at --, 2019 WL 5287962, at *4 (quotation omitted). The problem is widespread and growing. Over one in eight adult American social media users has been victimized or threatened with nonconsensual pornography. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report*, at 11 (June 12, 2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf.

State supreme courts across the country are weighing in on the constitutionality of their statutes; the Vermont and Illinois Supreme Courts recently upheld their nonconsensual pornography statutes in the face of First Amendment challenges. *See State*

v. VanBuren, 214 A.3d 791 (Vt. 2019); *Austin*, -- N.E.3d --, 2019 WL 5287962. The Wisconsin Court of Appeals upheld its law as constitutional, and the Wisconsin Supreme Court denied further review. *State v. Culver*, 918 N.W.2d 103, 109 (Wis. App. 2018), *review denied*, 923 N.W.2d 165 (Wis. 2018). The U.S. Supreme Court may be asked to weigh in soon. *Is Revenge Porn Protected Speech? Lawyers Weigh In, and Hope for a Supreme Court Ruling*, The Washington Post (Dec. 26, 2019), *available at* https://www.washingtonpost.com/nation/2019/12/26/is-revenge-porn-protected-speech-supreme-court-may-soon-weigh.

iv. The statutory language of section 617.261.

Against this backdrop, Appellant now turns to the statutory language at issue. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. The rules also provide the presumption that "[t]he legislature does not intend to violate the constitution of the United States or of this state." *Id.* § 645.17(3). Minnesota Statutes section 617.261, subdivision 1, 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.

Whoever violates subdivision 1 is guilty of a gross misdemeanor. *Id.*, subd. 2(a). To be guilty of a felony, one of the following factors must be 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, or 609.891; or
> (7) the actor has previously been convicted under this chapter.

Id., subd. 2(b). The statute provides a definitions section, specifically defining terms such as "dissemination," "harass," "intimate parts," "sexual contact," and "sexual penetration." *Id.*, subd. 7.

The statute lists several exemptions, directing that subdivision 1 does not apply when:

> (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. Furthermore, the statute provides immunity to "interactive computer service[s]," "provider[s] of public mobile services or private radio services," or "telecommunications network[s] or broadband provider[s]." *Id.*, subd. 6.

In line with its intent to protect privacy rights while also being cognizant of other constitutional rights, the Legislature included layers of mens rea requirements. First, the State must prove beyond a reasonable doubt that the dissemination of the image was intentional. *Id.*, subd. 1. Accidental, mistaken, negligent, or even reckless dissemination is not criminalized. Second, the State must prove that the actor "know[s] or reasonably should know" that the person depicted does not consent to the dissemination. *Id.*, subd. 1(2). Third, the State must prove that the actor "knew or reasonably should have known" that the person depicted had a reasonable expectation of privacy when the image was created or obtained. *Id.*, subd. 1(3). In addition to the multiple layers of mens rea, the statute requires that the image contains nudity or depicts a sexual act, which is specifically defined by statute. *Id.*, subds. 1, 7. The statute also requires that the person in the image be identifiable. *Id.*, subd. 1(1). Further limiting the scope of the law, the statute explicitly lists several specific exemptions. One cannot be prosecuted if the dissemination is made for any of the following purposes: criminal investigation; reporting unlawful conduct; seeking medical treatment; public exposure; commercial or artistic; matters of public interest, scientific research and education; or legal proceedings. *Id.*, subd. 5.

With this understanding of the purpose for the statute and the narrow scope of its language, the next step is to determine whether the statute implicates the First Amendment.

2. Section 617.261 does not implicate the First Amendment because it regulates unprotected speech.

When addressing a facial overbreadth challenge, this Court must determine whether the statute in question implicates the First Amendment. *Stockwell*, 770 N.W.2d at 537. No constitutional question is raised if the First Amendment is not implicated. *Machholz*, 574 N.W.2d at 419. "The Supreme Court has held that the party challenging a statute bears the initial burden of demonstrating that the First Amendment is implicated because '[t]o hold otherwise would be to create a rule that all conduct is presumptively expressive.'" *Stockwell*, 770 N.W.2d at 537 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984)). Conduct can implicate the First Amendment if it is expressive, but "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark*, 468 U.S. at 294.

i. Section 617.261 regulates speech that constitutes an invasion of individual privacy without consent, which falls outside the protection of the First Amendment.

There is no First Amendment right to invade a person's privacy without consent in the absence of a legitimate public interest. *United States v. Petrovic*, 701 F.3d 849, 855-56 (8th Cir. 2012) (distributing a victim's private nude photos without consent "may be proscribed consistent with the First Amendment"); *see also The Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989) ("To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition.").

Violating a person's sexual privacy by disseminating private sexual images without the person's consent is reprehensible behavior that does not enjoy First Amendment protection. *See* Souza, *"For His Eyes Only"*, 23 UCLA Women's L.J. at 109 ("[T]hough not a physical act," disseminating nonconsensual pornography "is a forced sexual indignity and should therefore qualify as a form of sexual abuse."); *see also United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014) (concluding that unauthorized "sexually explicit publications concerning a private individual" are not "afforded First Amendment protection").

The U.S. Supreme Court has recognized that there may be "some categories of speech that have been historically unprotected but have not yet been specifically identified or discussed as such." *Stevens*, 559 U.S. at 472. This includes speech of "such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality." *Virginia v. Black*, 538 U.S. 343, 358-59 (2003). The First Amendment tolerates the regulation of public disclosure of private information that is of no legitimate concern to the public. There is a long legal history in this country of regulating expression that invades individual privacy without violating the First Amendment. *See VanBuren*, 214 A.3d at 802 (detailing the legal history). "The Supreme Court has never struck down a restriction of speech on purely private matters that protected an individual who is not a public figure from an invasion of privacy or similar harms . . . ." *Id.* "[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *U.S. Dept. of J. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989). The U.S. Supreme Court has "recognized the privacy interest in keeping personal facts away from the public

eye." *Id.* at 769. The Court has acknowledged that "press freedom and privacy rights are both plainly rooted in the traditions and significant concerns of our society." *The Fla. Star*, 491 U.S. at 533.

The well-established tradition of allowing the government to protect individual privacy interests is exemplified in an 1890 law review article co-authored by then-future Supreme Court Justice Louis Brandeis. The authors argued for the development of an invasion of privacy tort because the existing causes of action were inadequate in the changing world. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The article explained,

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the housetops. For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons.

Id. at 195 (citations and quotations omitted). This sentiment is only more applicable today.

This brief is written while under government orders to stay home and "social distance" amid the coronavirus pandemic. As we are encouraged to isolate and limit physical contact with others, we rely more heavily on virtual connection through our smartphones and the Internet. We are encouraged to pay for goods and services through online financial transactions and to seek medical advice via e-visits and telehealth appointments. We seek out social and emotional connection via text message, social media,

and videoconference web services such as Zoom. This necessary reliance on these virtual transactions makes us all more vulnerable to invasions and violations of the private information we may share with a single confidant. At the same time, people are turning to social media and the Internet for entertainment with all too much time on their hands. In this ever-changing digital age, not only are images captured instantaneously but those images can be shared with millions of people with a tap of a touch screen. Now, what is shared in a direct communication to a trusted companion may be proclaimed across the vast social media platforms, with the capability of reaching millions instantly.

> While nonconsensual pornography is not a new phenomenon, its prevalence, reach, and impact have increased in recent years in part because technology and social media make it possible to 'crowdsource' abuse, as well as make it possible for unscrupulous individuals to profit from it. Dedicated 'revenge porn' sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows.

Franks, *"Revenge Porn" Reform*, 69 Fla. L. Rev. at 1260.

Since Warren and Brandeis' 1890 article, the law has evolved to recognize the tort of invasion of privacy. As this Court stated when recognizing this common-law tort, "The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

"[T]here is a panoply of federal and state statutes that limit disclosures of personal data." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections*

Against Disclosure, 53 Duke L.J. 967, 971-72 (2003). For example, Minnesota law prohibits the disclosure of an individual's health records without consent or other legal authorization.

> A provider, or a person who receives health records from a provider, may not release a patient's health records to a person without:
>
> (1) a signed and dated consent from the patient or the patient's legally authorized representative authorizing the release;
>
> (2) specific authorization in law; or
>
> (3) a representation from a provider that holds a signed and dated consent from the patient authorizing the release.

Minn. Stat. § 144.293.

Federal law also prohibits and imposes criminal sanctions for disclosing information from an individual's health record without authorization under the Health Insurance Portability and Accountability Act ("HIPAA"). *See* 42 U.S.C. § 1320d–6(a)(3) (providing that "[a] person who knowingly ... discloses individually identifiable health information to another person, shall be punished" by a fine of not more than $50,000 or imprisonment of not more than one year, or both). HIPAA's purpose is to protect individual privacy and "'to ensure the integrity and confidentiality' of an individual's health care information and 'to protect against any reasonably anticipated . . . unauthorized uses or disclosures of the information.'" *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 49-50 (Minn. App. 2009) (quoting 42 U.S.C. § 1320d–2(d)(2)). Similarly, the government regulates disclosure of "any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior

written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). A violation of this statute is a misdemeanor. *Id.* § 552a(i).

In the context of intellectual property, Minnesota law imposes criminal sanctions when one "intentionally manufactures, produces, distributes, offers for sale, sells, or possesses with intent to sell or distribute any counterfeited item or service, knowing or having reason to know that the item or service is counterfeit." Minn. Stat. § 609.895, subd. 2 (defining the crime of counterfeited intellectual property). In the context of testimonial privileges, Minnesota law recognizes the inherently confidential nature of communications that occur in many trusted relationships and prohibits one party to the relationship from testifying about those communications without the consent of the other party. *See* Minn. Stat. § 595.02 (codifying privileges for marital, attorney-client, clergy-parishioner, physician-patient, and other relationships). The law recognizes that disclosing such communications without consent would violate the presumption of privacy within those relationships. Section 617.261 similarly protects individuals' right to privacy and regulates speech that historically has not received First Amendment protection.

In *Dunham v. Roer*, the Minnesota Court of Appeals addressed the constitutionality of the harassment-restraining-order statute. 708 N.W.2d 552 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). The court held that the statute was constitutional because the focus of the statute was on conduct that intruded on the privacy of another. *Id.* at 566. The court concluded that the statute regulated speech or conduct that constituted "fighting words," "true threats," or a "substantial invasion of one's privacy," which were all unprotected by the First Amendment. *Id.* The U.S. Supreme Court has also stated that a

government may constitutionally prohibit such speech if there is "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971). There is a "privacy interest in avoiding unwanted communication [that] varies widely in different settings." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). This privacy interest is part of the "right to be let alone" that has been described as "the most comprehensive of rights." *Id.* at 716-17.

In upholding their nonconsensual pornography laws, both the Vermont and Illinois Supreme Courts acknowledged that

> the nonconsensual dissemination of private sexual images 'seems to be a strong candidate for categorical exclusion from full First Amendment protections' based on '[t]he broad development across the country of invasion of privacy torts, and the longstanding historical pedigree of laws protecting the privacy of nonpublic figures with request to matters of only private interest without any established First Amendment limitations.'

Austin, -- N.E.2d at --, 2019 WL 5287962, at *6 (quoting *VanBuren*, 214 A.3d at 807).

Section 617.261 regulates conduct that constitutes a "substantial invasion of one's privacy" and therefore regulates expressive conduct that falls outside the scope of the First Amendment.

ii. Section 617.261 regulates speech that constitutes obscenity and other categories of unprotected speech.

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.

First, many of the images disseminated in violation of this statute constitute obscene speech. The test for obscenity, as provided by the U.S. Supreme Court, is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

The average person would find that section 617.261 regulates work that appeals to the prurient interest. While a nude or sexual image alone may not appeal to the prurient interest, it is the nonconsensual nature of the dissemination that makes the image obscene. These are not cases of nudity in cinematic or artistic works. The people who disseminate nonconsensual, private sexual images evince a "morbid, shameful interest in sex." *See State v. Davidson*, 481 N.W.2d 51, 59 (Minn. 1992) (defining "prurient interest"). In addition, the works proscribed by the statute depict patently offensive sexual conduct due to the nonconsensual nature of the dissemination of the images. It is offensive and harmful to allow someone to view us and our intimate parts without our consent. *See Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891) ("To compel any one, especially a woman, to lay bare the body . . . is an indignity, an assault, and a trespass."). The works proscribed by section 617.261 lack any serious literary, artistic, political, and scientific value; the statute specifically exempts works with any such value. *See* Minn. Stat. § 617.261, subd. 5. Thus,

no one can be charged under the statute if the images disseminated have public safety, medical, commercial, artistic, public interest, scientific, educational, or legal value. All three prongs of the obscenity test are met; the speech proscribed by the statute falls outside the protections of the First Amendment.

Second, many instances of nonconsensual pornography constitute speech integral to criminal conduct. "First Amendment protections do not extend to speech used as an integral part of conduct in violation of a valid criminal statute." *Muccio*, 890 N.W.2d at 923 (quotations omitted). If an actor posts an image of an individual performing a sexual act knowingly out of context or otherwise edited to depict a falsity about the individual depicted, this would constitute criminal defamation. *See* Minn. Stat. § 609.765. In addition, Minnesota's coercion statute lists an attempt to violate section 617.261 as an element of committing coercion. *See* Minn. Stat. § 609.27, subd. 1. And Minnesota's stalking statute includes using "another's personal information, without consent, to invite, encourage, or solicit a third party to engage in a sexual act with the person," which would include the conduct proscribed by section 617.261. *See* Minn. Stat. § 609.749, subd. 2(8).

Lastly, many of the images disseminated under section 617.261 depict minor teenagers performing sexual acts or exposing their private body parts. This constitutes child pornography and is unprotected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

In all these instances, section 617.261 proscribes unprotected speech and does not implicate the First Amendment. "If the statute does not reach speech that the First

Amendment protects, but instead solely regulates speech undeserving of First Amendment protection, the statute is constitutional . . . ." *Washington-Davis*, 881 N.W.2d at 537.

3. Even if section 617.261 implicates the First Amendment, the statute is not substantially overbroad on its face.

If this Court concludes that the statute proscribes some amount of protected speech in addition to unprotected speech, the Court must then determine if the statute is "substantially overbroad 'in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting *Broadrick*, 413 U.S. at 615). Statutes are only overbroad in violation of the First Amendment if they prohibit a *substantial* amount of constitutionally protected speech. *Id.* at 539. For a facial challenge on overbreadth grounds to succeed, "there must be 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. If the statute proscribes some protected speech, but not a substantial amount, this Court must uphold the statute, and defendants can subsequently bring as-applied challenges to address the cases where protected speech is actually proscribed. *Muccio*, 890 N.W.2d at 927-29 (discussing *Williams*, 553 U.S. 285; *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Washington-Davis*, 881 N.W.2d at 540).

The overbreadth doctrine seeks to strike a balance between competing social costs. *Williams*, 553 U.S. at 292.

> On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious

> harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

Id. at 292-93 (emphasis added). Appellate courts "tread carefully as we balance the constitutional demands of the First Amendment against society's interest in protecting Minnesotans' safety, health, and welfare." *In re Welfare of A.J.B.*, 929 N.W.2d 840, 847 (Minn. 2019). Section 617.261 does not reach so broadly as to significantly compromise recognized First Amendment protections.

The statute plainly has a legitimate sweep: to protect against substantial invasions of individual privacy by punishing and preventing dissemination of our most intimate moments without our consent. The statute legitimately aims to protect against a harm that necessarily reaches beyond an individual victim to society as a whole because the prevalence of nonconsensual pornography "sends a message to all women that they are not equal, that they should not get too comfortable, . . . that it might happen to them." Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, Oxford J. Legal Stud. (2017), *available at* https://claremcglynn.files.wordpress.com/2015/06/mcglynnrackley-ojls-offprint-jan-2017-image-based-sexual-abuse.pdf. As recognized by the Minnesota Court of Appeals in *Dunham* and the U.S. Supreme Court in *Cohen* and *Hill*, statutes may legitimately regulate expressive conduct that substantially invades the privacy of another in an essentially intolerable manner. *See Dunham*, 708 N.W.2d at 566; *Cohen*, 403 U.S. at 21. Within its legitimate sweep, section 617.261 regulates intolerable conduct that substantially invades the privacy interests of individuals. Even if the statute reaches some

speech outside this legitimate scope, it does not present a realistic danger that recognized First Amendment protections will be significantly compromised. Even if it is marginally possible that section 617.261 could reach some protected expression, it does not substantially or realistically prohibit such expression.

i. The hypotheticals posed by Casillas to the court of appeals failed to consider the entire statute.

Casillas provided several hypotheticals in his brief to the court of appeals. In each hypothetical, Casillas failed to consider the entire statute but rather focused on one aspect of it in each hypothetical. Casillas asserted that an artistic photographer who creates an anthology of his nude photographs would be charged with a crime. This is incorrect because it ignores the statute's exemption for images created for "artistic products for sale or display," and it is very unlikely the person depicted had a reasonable expectation of privacy in an image taken by an artistic photographer. Minn. Stat. § 617.261, subds. 1(3), 5(4). Casillas next asserted that it is "unclear" whether a photojournalist's images of victims of war or natural disasters would be exempt as "a matter of public interest." Contrary to Casillas' assertion, his example quite clearly falls under this exemption. *Id.*, subd. 5(5). In addition, these images likely would also involve "exposure in public." *See id.*, subd. 5(4). Several of Casillas' hypotheticals ignored the "reasonableness" requirement contained in subdivisions 1(2) and 1(3). In order to criminalize a husband's photograph of his wife breastfeeding, for example, the State must put forth evidence showing that, beyond a reasonable doubt, he *reasonably* should have known that she did not consent to the dissemination and that, based on the circumstances in which the photograph was created

or obtained, he *reasonably* should have known that she had a *reasonable* expectation of privacy in the photograph. In addition, his hypotheticals regarding a girlfriend lying on the beach or a three-year-old daughter on a beach ignore the exemption for exposure in public. *Id.*, subd. 5(4).

Lastly, Casillas argued that the statute criminalizes a parent's decision to post a photograph of a baby in a bathtub to social media. Commonsense defies this argument. Parents have a fundamental liberty interest in "the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Parents also have a constitutional right to familial privacy. *R.S. v. State*, 459 N.W.2d 680, 690 (Minn. 1990). Implicit in these fundamental rights is the notion that a parent may decide when to consent to sharing an image of their children.

Casillas also suggested that "accidental dissemination" is criminalized. This is wholly incorrect. The statute requires that the dissemination be *intentional*. And the statute requires that the State prove that when the actor intentionally disseminated the image, he either knew or reasonably should have known both that the person depicted did not consent to the dissemination and that the person had a reasonable expectation of privacy. The statute plainly does not criminalize accidents.

Casillas' hypotheticals do nothing but highlight "the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301. "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* at 302. Appellant is confident that this Court will consider the entire statute. *See State v. Boecker*, 893

N.W.2d 348, 351 (Minn. 2017) ("A statute must be construed as a whole."). The crime of nonconsensual dissemination of private sexual images is only completed when all components of subdivision 1 are present, including proof of intent to disseminate and proof of either actual knowledge or proof that the defendant "should have known" that the person depicted in the image did not consent to the dissemination and that the image was made with a reasonable expectation of privacy. In addition, conduct which falls under subdivision 5 is exempted from the statute.

If a small amount of protected speech still falls under the statute's domain, that speech should be "protected through as applied challenges," as both this Court and the U.S. Supreme Court have repeatedly held. *Muccio*, 890 N.W.2d at 928-29 (citing *Washington-Davis*, 881 N.W.2d at 540); *see also Williams*, 553 U.S. at 302. There is no realistic danger that the statute significantly compromises recognized First Amendment protections.

ii. Requiring an intent-to-cause-a-specified-harm element misunderstands the crime of nonconsensual pornography.

When analyzing whether the overbreadth of section 617.261 was substantial, the court of appeals acknowledged that the State's harm-preventing policy interest is legitimate. The court of appeals defined the legitimate sweep of the statute as proscribing "disseminations that knowingly cause or are intended to cause a specified harm." (Add. 16.) The court went on to conclude that the sweep of the statute is much broader, due to its "lack of an intent-to-harm element, coupled with a negligence mens rea." (Add. 17.) The court of appeals' conclusions here demonstrate it critically misunderstood the crime of nonconsensual pornography, as demonstrated by its narrow definition of the legitimate

sweep of the statute, its imposition of an intent-to-harm element, and its characterization of the statute's mens rea requirement as one of mere negligence.

The legitimate sweep of the statute is larger than causing or intending to cause a specified harm. The statute's aim is to protect the privacy rights of individuals from nonconsensual dissemination of their private sexual images. The harm is the dissemination without consent. By mischaracterizing the legitimate sweep of the statute, the court of appeals' overbreadth analysis was flawed.

A specific intent to cause a specified harm is not required to pass constitutional review and requiring such an element misunderstands nonconsensual pornography. The court of appeals seemed to characterize the cases from this Court as providing binding precedent that statutes must contain specific-intent requirements in order to survive First Amendment analysis. (Add. 17-20.) But no caselaw unequivocally states that every law regulating expressive conduct must contain specific intent in order to pass constitutional muster. In each case, this Court construed the specific statute to determine whether it would "have a chilling effect on expression protected by the First Amendment." *A.J.B.*, 929 N.W.2d at 855. While the presence of a specific-intent element may be relevant to determining the breadth of a statute, it is not dispositive.

In the context of nonconsensual pornography, requiring a specific intent to cause a specified harm is very problematic. Requiring an intent to harm "mischaracterizes nonconsensual pornography as a form of harassment rather than as an invasion of privacy." Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators* (updated Sept. 22, 2016), *available at* https://www.cybercivilrights.org/guide-to-

legislation. In addition, perpetrators disseminate images for a multitude of reasons. For example, members of a university fraternity "uploaded photos of unconscious, naked women to private Facebook pages" and a fraternity member defended the conduct "by insisting that it 'wasn't malicious whatsoever. It wasn't intended to hurt anyone . . . . It was an entirely satirical group and it was funny to some extent.'" Souza, *"For His Eyes Only"*, 23 UCLA Women's L.J. at 121. In another example, a proprietor of a revenge-porn site stated, "'I call it entertainment . . . . [W]e just want the pictures there for entertainment purposes and business . . . . [O]ur business goal is to become big and profitable.'" *Id.* "Thus, intent-to-harm requirements distinguish between victims of the same conduct, and prohibit some victims' recovery based on factors completely outside of the victims' control. Including an intent-to-harm requirement also incentivizes perpetrators to continue such conduct so long as they can plausibly deny an intent to hurt anyone." *Id.*

Other laws prohibiting nonconsensual dissemination of identifying personal information do not require proof of harm or intent to cause a specified harm. *See* 5 U.S.C. § 552a (records maintained on individuals); 42 U.S.C. § 1320d-6(a)(3) (HIPAA); Minn. Stat. § 144.293 (health records). These privacy laws recognize that the harm is the dissemination itself. A specific intent-to-cause-a-specified-harm element is not necessary to bring section 617.261 in line with the First Amendment and would allow certain instances of intentional nonconsensual dissemination of private images go unpunished.

iii. Characterizing section 617.261's mens rea standard as negligence misreads the statute.

Section 617.261 requires that when the actor intentionally disseminates a sexual image, the actor also "knows or reasonably should know" that the dissemination was nonconsensual and that, based upon the circumstances present when the image was created or obtained, the actor "knew or reasonably should have known" that there was a reasonable expectation of privacy in the image. Minn. Stat. § 617.261, subd. 1(2), (3). The court of appeals characterized this "reasonably should know" language as a negligence standard and held that the statute prohibits speech beyond its legitimate sweep because it punishes "those who disseminate sexual images without either knowingly causing or intending to cause a specified harm." (Add. 16.)

But including the "reasonably should know" language within its knowledge requirements does not impermissibly broaden the sweep of the statute. 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.

The court of appeals described our "age of expansive internet communication" as allowing for many instances of *consensual* dissemination of images that depict sexual acts. (Add. 22.) In its description, the court of appeals failed to mention the "10,000 websites" that feature "revenge porn" and other forums that "openly solicit private intimate images and expose them to millions of viewers." Franks, *"Revenge Porn" Reform*, 69 Fla. L. Rev.

at 1260-61. The court of appeals seemed to be concerned that what the actor "should have known" is a subjective determination and that prosecutors and juries may decide that the actor "should have known" an image was private solely based on its sexual nature. But knowledge—or reason to know—of a reasonable expectation of privacy is not proven by the content of the image itself, but by the *context* of how the image was created, obtained, and shared. The Legislature explicitly incorporated this contextual analysis into the statute: the State must prove that "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(3). The statute requires the prosecutor and the finder of fact to look at the circumstances in which the image was created or obtained by the actor to determine whether the actor "reasonably should have known" that there was an expectation of privacy. Likewise, "consent is contextual." *Austin*, -- N.E.3d at --, 2019 WL 5287962, at *4. The State has to offer sufficient evidence regarding the *context* of the dissemination to prove beyond a reasonable doubt that the actor knew or reasonably should have known that the image was private and distributed without consent.

The court of appeals posed a hypothetical in its opinion, taken from the dissenting opinion in the Illinois case, regarding when a recipient of a text containing a nude photo shows a third party the image. (Add. 24.) The recipient could not be charged or convicted under section 617.261 unless, first, the person depicted was identifiable in the image. In addition, a prosecutor would need more evidence regarding whether the person depicted had a reasonable expectation of privacy in the image before they could charge the recipient

or successfully obtain a conviction under section 617.261. Lastly, whether *showing* someone an image meets the definition of "dissemination" is questionable. Minnesota's statute defines "dissemination" as "distribution to one or more persons . . . or publication by any publicly available medium." Minn. Stat. § 617.261, subd. 7(b). Merely showing another the image may not amount to distributing or publishing the image at all.

Section 617.261 does not chill the free sharing of information or the free exchange of ideas. Just as with other privacy laws protecting identifying information about an individual, section 617.261 does not prohibit all dissemination of information, it merely requires the disseminator to first consider whether he has consent to disseminate private sexual images that identify the person depicted.

Given the far-reaching harm that results from the sharing of private sexual images without consent, the "reasonably should know" language within the statute's two knowledge requirements, coupled with the intent requirement, is sufficiently narrow for purposes of the overbreadth doctrine. The doctrine is designed to strike a balance between the competing interests of fostering the free exchange of ideas and curtailing conduct "so antisocial that it has been made criminal." *Williams,* 553 U.S. at 292-93. Section 617.261 strikes such a balance.

4. Section 617.261 is subject to a limiting construction.

If this Court concludes that the statute prohibits too much constitutionally protected speech, the next step in the analysis is to determine whether the Court "can limit the scope of the statute so as to remedy the constitutional defects." *A.J.B.*, 929 N.W.2d at 856. "Because it has the potential to void an entire statute, the overbreadth doctrine requires . . .

that the statute in question not be subject to a limiting construction." *State v. Mireles*, 619 N.W.2d 558, 562 (Minn. App. 2000). "[W]hen possible, we uphold a law's constitutionality by narrowly construing the law so as to limit its scope to conduct that falls outside First Amendment protection while clearly prohibiting its application to constitutionally protected expression." *State v. Crawley*, 819 N.W.2d 94, 102 (Minn. 2012) (citations omitted); *see also Ferber*, 458 U.S. at 769 n.24 (if the invalid reach of the law can be cured by narrow judicial construction, "there is no longer reason for proscribing the statute's application to unprotected conduct"); *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978) (judicially limiting the disorderly conduct statute to "fighting words" to preserve the constitutionality of the statute). "'Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.'" *Crawley*, 819 N.W.2d at 105 (quoting *Broadrick*, 413 U.S. at 613).

In this case, the Court can uphold the constitutionality of section 617.261 by construing its terms narrowly to refer only to substantial invasions of privacy. *See Cohen*, 403 U.S. at 21; *Dunham*, 708 N.W.2d at 566. For example, this Court can adopt an interpretation of "reasonably should know" that would avoid a constitutional conflict. In *State v. Mauer*, this Court interpreted "reason to know" in the child-pornography statute to mean when the actor is "aware of a substantial and unjustifiable risk." 741 N.W.2d 107, 112 (Minn. 2007). By construing "reasonably should know" in section 617.261 narrowly to mean "aware of a substantial and unjustifiable risk," this narrow construction would resolve the alleged overbreadth raised by Casillas and the court of appeals. Under this heightened mens rea, the State would be required to prove that the actor was aware of the

substantial and unjustifiable risk that the person depicted does not consent to the image's distribution and was aware of the substantial and unjustifiable risk that the person depicted had a reasonable expectation of privacy in the image.

5. The allegedly problematic language in section 617.261 can be severed.

Similarly, this Court can uphold the constitutionality of the statute by severing certain provisions to bring it in line with the First Amendment, if necessary. This Court has "broad[] authority when it comes to severance." *A.J.B.*, 929 N.W.2d at 848. The goal is to "effectuate the intent of the legislature had it known that a provision of the law was invalid." *Id.* (quoting *Melchert-Dinkel*, 844 N.W.2d at 24). Further, this Court "presume[s] that statutes are severable unless the Legislature has specifically stated otherwise." *Id.*; *see also* Minn. Stat. § 645.20.

> Severing unconstitutional provisions is permissible unless we conclude that one of two exceptions applies. First, a statute cannot be severed if we determine 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, we 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 (quotations and citations omitted).

If it deems it necessary, this Court can sever the words "or reasonably should know" from section 617.261, subdivision 1(2), and "or reasonably should have known" from subdivision 1(3). There are no apparent reasons to doubt that the Legislature would have enacted the statute without the "reasonably should know" language. *Cf. A.J.B.*, 929 N.W.2d

at 856. The statute contains a higher level of mens rea at the outset of the statute: "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 . . . ." Minn. Stat. § 617.261, subd. 1. The Legislature included the knowledge and "reasonably should have known" standards in the subparts of the subdivision as additional mens rea requirements on top of the intentional element. Further, the Legislature made the additional mens rea disjunctive to each other—the actor must have actual knowledge *or* the actor reasonably should have known that there was an expectation of privacy and a lack of consent. Thus, the Legislature imposed two higher levels of mens rea and merely included the "reasonably should have known" as an alternative to the actual knowledge requirement and in addition to the intentional mens rea requirement.

In *A.J.B.*, this Court considered severing the negligence standard from the stalking-by-mail statute but determined that it could not because to do so would impose "a more demanding mens rea requirement" to every other type of conduct identified in the statute. 929 N.W.2d at 857. That problem does not exist here. Unlike the statute at issue in *A.J.B.*, the "reasonably should know" language in section 617.261 is confined to just two subparts of the statute, and the statute includes a higher mens rea requirement for the dissemination of the statute. In addition, the two subparts include an actual knowledge requirement as a more rigorous alternative to the "reasonably should have known" language. Therefore, severance in this case is permissible. By simply deleting the words "or reasonably should know" from subdivision 1(2) and the words "or reasonably should have known" from subdivision 1(3), this lower mens rea standard would be severed and the statute would

require intentional dissemination coupled with actual knowledge of lack of consent and actual knowledge of the presence of a reasonable expectation of privacy.

When addressing severance in this case, the court of appeals agreed that there is no reason to doubt that the Legislature would have enacted the statute without the "reasonably should know" language. (Add. 28.) The court of appeals concluded that severing these words from the statute would sufficiently limit the statute's reach to be "consistent with Minnesota caselaw upholding First Amendment proscriptions based on the state's legitimate harm-preventing interest." (Add. 27.)

However, the court of appeals' analysis took a misguided turn when it concluded that severing "reasonably should know" from the statute would "result in a statute that classifies an intentionally harmful dissemination as both a gross misdemeanor and a felony." (Add. 27-28.) Here, the court of appeals erred. While there is an enhancement clause for dissemination with the intent to *harass*, Minn. Stat. § 617.261, subd. 2(b)(5), requiring actual knowledge of both an expectation of privacy and lack of consent to the dissemination does not equate to proving a specific intent to *harass*. The court of appeals reached this cursory conclusion with no analysis or explanation why proof of actual acknowledge of these elements equates to proof of an intent to *harass*. Because the court of appeals incorrectly concluded that severing the "reasonably should know" language would conflate the gross misdemeanor and felony crimes, it mistakenly concluded that to remedy the statute would constitute "plastic surgery upon the face of the [statute]." (Add. 28.)

Severing the "reasonably should know" and "reasonably should have known" language from the two subparts of the statute would resolve the concerns raised by Casillas and the court of appeals. The court of appeals acknowledged as much in its opinion. (Add. 27.) When one acts intentionally to disseminate a private sexual image of an identifiable person with the actual knowledge that the person depicted had a reasonable expectation of privacy in the image and with actual knowledge that the person depicted does not consent to distribution of the image, there is no room for occasions where one would disseminate such an image for a legitimate purpose and be subject to prosecution. By limiting the statute to actual knowledge, the State would be required to prove specific intent on the part of the actor and such a requirement could reassure this Court "that the statute does not target broad categories of speech." *See Linert v. MacDonald*, 901 NW.2d 664, 669 (Minn. App. 2017) ("[T]he statute's specific-intent requirement—that false claims be *knowingly* made—ensures that the statute does not target broad categories of speech.").

C. Section 617.261 Passes Constitutional Scrutiny.

Casillas argued to the district court and court of appeals that section 617.261 must be struck down because it is a content-based regulation of protected speech and failed strict scrutiny review. The court of appeals did not address this argument; it rested on its overbreadth analysis alone.

In arguing that the statute did not pass constitutional muster in his brief to the court of appeals, Casillas characterized section 617.261 as a viewpoint-discriminatory law. Viewpoint discrimination is "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of U.*

of Virginia, 515 U.S. 819, 829 (1995). But Casillas failed to explain how the statute discriminates based on the *viewpoint* of the actor disseminating private images without the consent of the person depicted. Similarly, Casillas assumed the statute is a content-based restriction on speech and that strict scrutiny applies. But, again, Casillas did not explain how the statute is a content-based restriction. Perhaps he views the statute as discriminating on the basis of content by prohibiting disclosures of *sexual* images, not all images. But that rationale would mean that every law which aims to keep certain kinds of information private is a content-based restriction requiring strict scrutiny review. All privacy laws aim to do just that.

Privacy laws are built on the premise that some kinds of information are more sensitive than others and that the government should regulate disclosure of some kinds of sensitive information. For example, both federal and state law regulate the disclosure of financial information and health information. *See* 15 U.S.C. § 6802 (regulating disclosure of nonpublic financial information); 42 U.S.C. § 1320d-6(a)(3) (HIPAA); Minn. Stat. § 144.293 (regulating disclosure of personal health information). According to Casillas' reasoning, these are content-based restrictions on speech subject to strict scrutiny review. Appellant asks this Court to consider whether a less rigorous test applies to privacy laws, including section 617.261.

1. Intermediate scrutiny applies because section 617.261 is a content-neutral regulation that regulates speech involving purely private matters.

Appellant asserts that intermediate scrutiny applies for two independent but related reasons: (1) the statute is a content-neutral time, place, and manner restriction (2) that

regulates speech involving purely private matters. *See Austin*, -- N.E.3d at --, 2019 WL 5287962, at *7 (concluding that the Illinois statute, which is remarkably similar to Minnesota's law, was a content-neutral time, place, and manner restriction of private information).

i. Section 617.261 is a content-neutral regulation of speech.

"In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation." *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quotation omitted). The U.S. Supreme Court has warned, "It would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 660 (1994).

The purpose behind section 617.261 is to protect the privacy of individuals who do not consent to dissemination of their private images and to prevent the far-reaching harm that occurs when that privacy is violated. 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. "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech" through content-neutral regulations so long as "they are narrowly tailored to serve a significant governmental

interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quotation omitted).

The Illinois Supreme Court concluded that its statute is a content-neutral time, place, and manner restriction. *Austin*, -- N.E.3d at --, 2019 WL 5287962, at *7. The Illinois court reasoned, "[T]he proper focus is on whether the government has addressed a category of speech to suppress discussion of that topic." *Id.* at *8 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Turner Broadcasting System*, 512 U.S. at 659; *Ward*, 491 U.S. at 791). Here, the answer is clearly no. Regulating the intentional dissemination of private images by requiring consent and a lack of expectation of privacy poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation omitted). The government has not sought to suppress discussion of all sexual topics; it seeks to suppress violations of privacy without consent. Intermediate scrutiny should apply because section 617.261 is a content-neutral regulation.

ii. Section 617.261 regulates purely private matters.

In addition, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest." *Snyder*, 562 U.S. at 452 (citations omitted). "The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (quotation omitted); *see also McDonald v. Smith*, 472 U.S. 479, 489 (1985) (stating the purpose of the First Amendment

is "to ensure the growth and preservation of democratic self-governance"). "Accordingly, speech on *public* issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 452 (quotation omitted). Conversely, speech on purely private matters is less deserving of First Amendment protections and therefore, the level of scrutiny is less demanding. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985).

Speech of public concern relates to matters of "political, social, or other concerns to the community . . . or when it is subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 451-52. Conversely, examples of speech of *private* concern include a particular individual's credit report or sexually explicit videos of an employee. *See Dun & Bradstreet, Inc.*, 472 U.S. at 762; *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004). Section 617.261 deals with the most private and intimate of matters: dissemination of images depicting someone's exposed private parts or someone performing an intimate sexual act when that person had a reasonable expectation of privacy and when that person does not consent to distributing the images to the public. "The nonconsensual disclosure of someone's sexually explicit images does little to advance expressive autonomy and self-governance." Citron & Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. at 385.

Since section 617.261 is a privacy regulation, it should be subjected to the same scrutiny as other laws that proscribe unauthorized disclosure of private information, such as medical records, financial information, social security numbers, or drivers' license information.

> A number of federal statutes restrict disclosure of information from school records, cable company records, video rental records, motor vehicle records, and health records. . . . Various states have also restricted the disclosure of particular forms of information, such as data about health, alcohol and drug abuse, sexual offense victims, HIV status, abortion patients, and mental illness.

Solove, *The Virtues of Knowing Less*, 53 Duke L.J. at 971-72 (citations omitted). "United States legal history supports the notion that states can regulate expression that invades individual privacy without running afoul of the First Amendment." *VanBuren*, 214 A.3d at 802.

Intermediate scrutiny is utilized as an approach "to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrant neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review)." *United States v. Alvarez*, 567 U.S. 709, 730-31 (2012) (Breyer, J., concurring). The standard is whether the statute is narrowly tailored to serve a significant government interest and allows for ample alternative channels for communication. *See Ward*, 491 U.S. at 791.

This Court should conclude that intermediate scrutiny applies in this case. *See Austin*, -- N.E.3d at --, 2019 WL 5287962, at *7 (applying intermediate scrutiny). However, Appellant will analyze the statute under strict scrutiny, because if the statute passes strict scrutiny, which Appellant maintains it does, it necessarily passes intermediate scrutiny.

2. Even if this Court concludes strict scrutiny applies, section 617.261 nevertheless survives.

If this Court concludes that strict scrutiny applies, the statute still passes constitutional muster. To pass strict scrutiny, the State must show that the law "(1) is justified by a compelling government interest and (2) is narrowly drawn to serve that interest." *Melchert-Dinkel*, 844 N.W.2d at 21. In other words, the State must identify a problem in need of solving and the curtailment of free speech must be necessary to solving the problem. *Id.*

i. Section 617.261 is justified by a compelling government interest.

Privacy of communication is itself "an important interest." *Bartnicki*, 532 U.S. at 532. The U.S. Supreme Court has recognized the "privacy interest in avoiding unwanted communication." *Hill*, 530 U.S. at 716. The "right to be let alone" has been described as "the most comprehensive of rights." *Id.* at 716-17.

The State has a compelling interest in seeking to deter the nonconsensual dissemination of private, sexually explicit images. In some cases, this conduct is a form of domestic abuse, as abusers use the existence of these sexual images to threaten, intimidate, or coerce their partners. *See* Citron & Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. at 351. In other instances, it is a form of sexual harassment that seeks to degrade and humiliate those depicted. *Id.* In all cases, this conduct is a gross violation of a person's privacy and bodily autonomy. Additionally, this is overwhelmingly a crime against women: "In a study conducted by the Cyber Civil Rights Initiative, 90% of those victimized by revenge porn were female." *Id.*

The government has a strong interest in preventing the harm done to victims of nonconsensual pornography; 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." Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 Calif. L. Rev. 1303, 1303 (2014).

> Victims must cope with long-term personal and psychological consequences, given that the disseminated photographs or videos may continue to haunt them throughout their lives. According to one study, 49 percent of victims reported that they experienced cyber harassment and cyberstalking by online users who viewed their posted photographs. The same study noted that 80 to 93 percent of victims suffered significant emotional distress after the release of their explicit photographs. The distress includes anger, guilt, paranoia, depression, or even suicide.

Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. Am. Acad. of Psych. & L. 359, 362 (2016).

Research shows that the harms suffered by victims of child pornography and by victims of nonconsensual pornography are similar.

> The humiliation, powerlessness, and permanence associated with these distinct but similar crimes leave victims engaged in a lifelong battle to preserve their integrity. Consequently, victims of revenge pornography suffer from similar enduring mental health effects as described by victims of child pornography, such as depression, withdrawal, low self-esteem, and feelings of worthlessness.

Id. Courts have repeatedly recognized that preventing this harm to victims of child pornography is a compelling governmental interest. *See Osborne*, 495 U.S. 103 ("It is

evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'.") (quoting *Ferber*, 458 U.S. at 765-57*)*. The government interest is no less compelling when applied to victims of nonconsensual pornography. While Appellant recognizes that one group is comprised solely of children, many children—teenagers—are victims of revenge porn as well. Regardless, the governmental interest remains the same—to prevent the long-lasting, far-reaching, and debilitating harm that comes from dissemination of private sexual images without the consent of the person depicted.

The Vermont Supreme Court held that its statute served a compelling government interest. The Vermont court concluded, "The government's interest in preventing any intrusions on individual privacy is substantial; it's at its highest when the invasion of privacy takes the form of nonconsensual pornography." *VanBuren*, 214 A.3d at 811. The Vermont court analogized nonconsensual pornography to other privacy laws whose purpose is to prevent nonconsensual disclosure of personal information. *Id.* The court reasoned,

> The fact that the disclosure requires speech, and that restriction of that speech is based squarely on its content, does not undermine the government's compelling interest in preventing such disclosures. From a constitutional perspective, it is hard to see a distinction between laws prohibiting nonconsensual disclosure of personal information comprising images of nudity and sexual conduct and those prohibiting disclosure of other categories of nonpublic personal information.

Id.

The Illinois Supreme Court held that its statute served a significant government interest. The Illinois court concluded that "the nonconsensual dissemination of private

sexual images causes unique and significant harm to victims in several respects," citing domestic violence, sex trafficking, sexual violence, harassment, and psychological harm. *Austin*, -- N.E.3d at --, 2019 WL 5287962, at *12. The Illinois court discussed research that shows many victims lose their jobs, are forced to change their names, and some have been driven to suicide because the victims are identifiable in the image. *Id.*

Section 617.261 is justified by a compelling government interest.

ii. Section 617.261 is narrowly drawn to serve the compelling government interest.

The statute is narrowly tailored to its government interest. Because section 617.261 contains several scienter requirements, as well as specific definitions, it is narrowly tailored. First, regarding mens rea, the actor must "intentionally disseminate" the image or images. Minn. Stat. § 617.261, subd. 1. If the dissemination was not intentional, then no crime has occurred. Second, the actor must have known or reasonably should have known that the person in the image did not consent to the dissemination when he disseminated it. *Id.*, subd. 1(2). If the actor reasonably did not know that the person depicted did not consent, then no crime has occurred. This knowledge requirement is an affirmative element that the State must prove beyond a reasonable doubt. Finally, the actor must have known or reasonably should have known under the circumstances that when the image was created or obtained that the person depicted had a reasonable expectation of privacy in the image. *Id.*, subd. 1(3). Again, if the actor reasonably did not know that the person expected the image to be kept private, no crime has occurred. And again, this is an element the State must prove beyond a reasonable doubt.

Further, if the offense involves one of the seven enumerated ways that one could be charged with a felony under the statute, two of those also contain a mens rea requirement: one requiring the intent to profit from the dissemination and one requiring the intent to harass the person in the image by the dissemination. *Id.*, subd. 2(2), (5). Those are additional elements that the State has the burden of establishing beyond a reasonable doubt.

In addition to the multiple mens rea requirements, the statute provides several definitions to ensure that its terms are not interpreted more broadly than the Legislature intended. *Id.*, subd. 7. Specifically, the following terms are defined: "dissemination," "harass," "image," "intimate parts," "personal information," "sexual act," "sexual contact," "sexual penetration," and "social media." *Id.* The terms "intentionally" and "know" are defined elsewhere in the criminal statutes, Minn. Stat. § 609.02, subd. 9, leaving nothing in the statute that would need to be defined in order to avoid a broad application. The Legislature further narrowed the statute by specifically including a provision granting immunity to "an interactive computer service," "a provider of public mobile services or private radio services," and "a telecommunications network or broadband provider." *Id.* § 617.261, subd. 6. The State cannot enforce this statute against people or companies "solely as a result of content or information provided by another person." *Id.* This is yet another example of the Legislature ensuring that the State can only enforce this statute against those who are actually intentionally disseminating nonconsensual pornography.

The statute allows for the exercise of free speech: sexual images may be disseminated if the person depicted consents to the dissemination. And sexual images may be disclosed in the course of many legitimate activities, such as criminal investigation,

artistic expression, commercial sales, scientific research, medical treatment, or reporting unlawful conduct. *See id.*, subd. 5.

Lastly, the statute is necessary. Before enactment of section 617.261, there was no way to prosecute nonconsensual dissemination of private sexual images. In 2015, the court of appeals struck down the criminal defamation statute that prosecutors had previously attempted to use in similar, yet limited, situations. *Turner*, 864 N.W.2d at 211. The *Turner* decision left prosecutors with no mechanism by which to combat this behavior. Other, then-existing statutes were insufficient: the interference-with-privacy statute only deals with "surreptitious" invasions and does not involve dissemination, Minn. Stat. § 609.746; the harassing-telephone-calls statute only deals with actual phone calls, Minn. Stat. § 609.79; the harassment-by-letter-or-package statute only deals with the mail or physical delivery, Minn. Stat. § 609.795, subds. 1(1)-(2); and the stalking statute by definition does not include this behavior, Minn. Stat. § 609.749. Thus, the enactment of section 617.261 filled the void in Minnesota law for combating this harmful behavior.

Casillas argued to the district court and court of appeals that civil remedies are a less-restrictive alternative to criminalization. Casillas is correct that civil tort claims exist that could be applicable to the conduct that this statute criminalizes. But civil protections are not sufficient to protect the State's compelling interest in protecting the privacy of individuals, protecting individuals from domestic abuse and sexual harassment, and preventing the far-reaching harm caused by nonconsensual pornography. If a civil cause of action is enough to address the societal harm of nonconsensual pornography, the same would be true for numerous crimes, such as assault, that also have a civil remedy. Arguing

that civil remedies are adequate to address the harm done in these cases belittles and minimizes the seriously damaging and degrading conduct that is nonconsensual pornography.

Civil remedies are also inadequate because civil law suits are costly, and many victims cannot afford to sue their perpetrators. *See* Citron & Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. at 358. "This reduces the deterrent effect of civil litigation, as would-be perpetrators are unlikely to fear a course of action that is unlikely to materialize." *Id.* Civil suits also expose victims to *greater* privacy intrusion as victims generally need to use their real names in the suit. *Id.* In addition, civil actions often do not end in a judgment that can be reached practically speaking because defendants often do not have large assets, making them effectively judgment proof. *Id.* For these reasons, victims are unable or deterred from bringing civil suits. The only effective deterrent against this type of abuse is criminal penalty.

Therefore, the statute is narrowly tailored to serve the government's compelling interest of protecting against the far-reaching harms of nonconsensual dissemination of private sexual images, and no less restrictive means exist to address this particular compelling interest; the statute passes both intermediate and strict scrutiny and is constitutional.

CONCLUSION

Appellant respectfully requests that this Court reverse the court of appeals' decision, uphold the constitutionality of Minnesota Statutes section 617.261, and affirm Casillas' conviction of felony nonconsensual dissemination of private sexual images.

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Dated: April 15, 2020

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STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Appellant,

vs.

Michael Anthony Casillas,

Respondent,

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APPELLATE COURT CASE NO.: A19-0576

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