CASE NO. A19-0576

State of Minnesota

In Supreme Court

STATE OF MINNESOTA,
Appellant,

vs.

MICHAEL ANTHONY CASILLAS,
Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Section 617.261 punishes someone who "intentionally disseminates 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 from the image itself, by the person depicted in the image or by another person, or 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 knows or reasonably should have known the person depicted had a reasonable expectation of privacy."

Respondent moved to dismiss the Complaint against him in district court arguing the statute is facially overbroad, vague, and an unconstitutional content-based restriction on speech in violation of Art. I, § 3 of the Minnesota Constitution and the First Amendment of the United States Constitution. The district court denied the motion finding the statute does not discriminate based on viewpoint, does not implicate or chill otherwise legitimate speech, is not unconstitutionally overbroad or vague on its face, and is a constitutional content-based regulation of obscenity. The court of appeals reversed, holding the statute is facially overbroad and unable to be saved through a narrowing construction or severance. Did the court of appeals err?

No. Squarely in line with this Court's decisions in *In the Matter of the Welfare of A.J.B.* and *Hensel*, the court of appeals held the statute's lack of an intent-to-harm requirement and use of a negligence *mens rea* resulted in a facially overbroad statute that violated the First Amendment. Relying on this Court's decisions in *A.J.B.*, *Hensel*, *Archer Daniels Midland Co. v. State*, and *Chapman v. Comm'r of Revenue*, the court of appeals recognized that the statute is not subject to a limiting construction or severance and invalidated the statute.

Authorities:

United States v. Stevens, 559 U.S. 460 (2010)

In the Matter of the Welfare of A.J.B., 938 N.W.2d 840 (Minn. 2019)

State v. Hensel, 901 N.W.2d 166 (Minn. 2017)

II. Is Section 617.261 an unconstitutional content-based restriction of speech in violation of Art. I, § 3 of the Minnesota Constitution and the First Amendment of the United States Constitution?

The district court found the statute is a constitutional content-based regulation of obscenity. The court of appeals did not reach this issue.

Authorities:

Iancu v. Brunetti, No. 18-302 (Decided June 24, 2019)

Matal v. Tam, 137 S.Ct. 1744 (2017)

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811-13 (2000)

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Miller v. California, 13 U.S. 15 (1973)

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III. Is Section 617.261 unconstitutionally vague on its face in violation of Art. I, § 3 of the Minnesota Constitution and the First Amendment of the United States Constitution?

The district court ruled in the negative. The court of appeals did not reach this issue.

Authorities:

Elonis v. United States, 135 S.Ct. 2001 (2015)

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IV. Did the district court abuse its discretion in denying Respondent's motion for a mitigated dispositional departure?

The district court ruled in the negative. The court of appeals did not reach this issue.

Authorities:

State v. Trog, 323 N.W.2d 28 (Minn. 1982)

STATEMENT OF THE CASE

Appellant filed a criminal complaint against Respondent on November 28, 2017 alleging a sole count of Nonconsensual Dissemination of Private Sexual Images in violation of Minn. Stat. § 617.261. DOC. ID#1. Respondent filed a pre-trial motion to dismiss the complaint, arguing Minn. Stat. § 617.261 was an unconstitutional content-based restraint on speech and that the section was overly broad and vague on its face. DOC. ID#10. The arguments were submitted by written brief to The Honorable Kathryn D. Messerich, Judge of Dakota County District Court, First Judicial District. DOC. ID#16, 17.

Judge Messerich issued Findings of Fact, Conclusions of law, Order and Memorandum on June 13, 2018 denying Appellant's motion. DOC. ID#18. The district court appeared to find that section 617.261 implicates the First Amendment given its analysis in its Memorandum, but ultimately concluded that, "There is no argument that it [section 617.261] contains any type of viewpoint discrimination. The statute does not implicate or chill otherwise legitimate speech. The statute is a constitutional content-based regulation of obscenity." A-34-35 Additionally, the district court found section 617.261 was not unconstitutionally overbroad or vague on its face. A-35-36.

Respondent's case proceeded to a court trial pursuant to Minn. R. Crim. P. 26.01, subd. 4 before The Honorable Jerome A. Abrams on January 7, 2019. The Honorable Jerome A. Abrams issued an Order on January 24, 2019 convicting Respondent of Felony Nonconsensual Dissemination of Private Sexual Images. DOC. ID#36. Judge Abrams imposed sentence on April 11, 2019, committing Respondent to the Commissioner of Corrections for 23 months over Respondent's motion for mitigated dispositional departure.

DOC. ID#42. Judge Abrams granted Respondent conditional release pursuant to Minn. R. Crim. P. 28.02, subd. 7 pending final appellate proceedings. DOC. ID#65.

STATEMENT OF FACTS

Respondent was charged with, and convicted of, a sole count of a felony-level offense of Nonconsensual Dissemination of Private Sexual Images in violation of Minn. Stat. § 617.261 and sentenced to 23 months in prison.

Respondent had seven total criminal history points at the time of sentencing, which included six felony points and one custody status point. Nonconsensual Dissemination of Private Sexual Images is a severity level three offense. Respondent's presumptive sentence at the time of sentencing was a 26-month commitment to the commissioner of corrections, which included a three-month custody enhancement. Respondent's six felony points came from offenses that occurred in 1997 and 2000, when Respondent was 21 years old. Respondent moved for a mitigated dispositional departure, citing to the age of the majority of his felony points and relying on the support of family and friends as bases for amenability to probation. Judge Abrams denied Respondent's request and committed Respondent to the commissioner of corrections for 23 months, a bottom of the box sentence.

STANDARDS OF REVIEW

The constitutionality of a statute presents a question of law, which this Court reviews de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). The burden is generally on the challenging party to prove beyond a reasonable doubt that a statute is unconstitutional. *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 829 (Minn. 2011). But, in the context of construing the constitutionality of a law restricting First Amendment rights, the law "does not bear the usual presumption of constitutionality normally accorded to legislative enactments." *State by Humphrey v. Casino Mktg. Grp., Inc*., 491 N.W.2d 882, 885 (Minn. 1992). Therefore, this Court should "proceed with the understanding that the state bears the burden of establishing the statute's constitutionality." *Id*. at 885–86.

The decision whether to depart from the presumptive guidelines sentence rests within the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

ARGUMENT

The United States and Minnesota Constitutions both protect the freedom of speech. U.S. Const. amend. I; Minn. Const. art. I, § 3; *State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999) (interpreting the Minnesota Constitution's free-speech protections as equivalent to the First Amendment to the U.S. Constitution). The First Amendment establishes that the government generally may not restrict expression because of its messages, ideas, subject matter, or content. *In re Welfare of A.J.B.*, 929 N.W.2d 840, 846 (Minn. 2019). The First Amendment's protections extend beyond expressions regarding matters of public concern, and "First Amendment principles apply with equal force to speech or expressive conduct on the Internet." *Id*.

The court of appeals opinion was the first Minnesota appellate decision to address the constitutionality of section 617.261. Forty-six states have enacted a version of a criminal "revenge porn".[1] Four separate state appellate courts have addressed their respective "revenge porn" statutes.

I. Foreign state decisions on "Revenge Porn" laws

A. *State v. VanBuren*

A Vermont trial court declared its statute unconstitutionally overbroad in *State v. VanBuren*, Docket No. 1144-12-15Bncr (VT Superior Ct. July 1, 2016). The Vermont Supreme Court reversed, holding the statute did not fall into the obscenity exception but

[1] https://www.cybercivilrights.org/revenge-porn-laws/

concluded that the statute passed strict scrutiny. *State v. VanBuren*, 214 A.3d 791 (VT 2019).

VanBuren addressed V.S.A. § 2606(b)(1), which provides:

> 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. A person may be identifiable from the image itself or information offered in connection with the image. Consent to recording of the visual image does not, by itself, constitute consent for disclosure of the image. A person who violates this subdivision (1) shall be imprisoned not more than two years or fined not more than $2,000.00, or both.

13 V.S.A. § 2606(a)(3) defines "nude" to include the "genitals, pubic area, anus, or post-pubescent female nipple."

The Vermont trial court held the plain language of the statute created a content-based regulation of speech because the statute did not apply to the disclosure of all images, but rather only the identified subset of images. *Id*. at *3. The Vermont court relied on established caselaw that mere nudity is not automatically obscene and thus subject to a lower standard of review. *Id*. at *3. The Vermont trial court ultimately concluded the statute did not pass strict scrutiny because the state did not meet its burden of proving the statute was the least restrictive means to accomplish the purported interest of protecting privacy rights. *Id.* at *3-4.[2]

[2] The court did not offer an opinion on whether the asserted state interests of protecting a person's privacy and reputation rights constituted a compelling state interest.

The Vermont Supreme Court, recognizing the content-based restriction in 13 V.S.A. § 2606, applied a strict scrutiny analysis. The court determined that the statute survived strict scrutiny because First Amendment protection is not as great in matters of private concern, the state had a compelling interest in protecting individuals from nonconsensual dissemination of images of nudity and sexual conduct, and the law is narrowly tailored due to a strong intent element that requires knowing dissemination and knowledge of nonconsent, a specific intent to harm, and an objective requirement that the disclosure would cause harm. *VanBuren*, 214 A.3d at 812-13. However, the court ultimately dismissed the prosecution on grounds of insufficient evidence. *Id*. at 818. The court determined that a "reasonable expectation of privacy" is an essential element of the offense and defined a victim's "reasonable expectation of privacy" as requiring a relationship between the parties of a "sufficiently intimate or confidential nature." *Id*. at 821.

B. *The People v. Iniguez*

California's appellate court recently addressed its revenge porn statute in *The People v. Iniguez*, 202 Cal. Rptr. 3d 237 (Cal. App. Dept. Superior Ct. March 25, 2016). California's revenge porn law is codified at Pen. Code § 647, subd. (j)(4). At the time of the opinion, that section criminalized:

> (A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress. (B) As used in this paragraph, intimate body part means any portion of the genitals, and in the case of a female, also includes

> any portion of the breasts below the top of the areola that is either uncovered or visible through less than fully opaque clothing.

The California appellate court noted the language of the statute only barred a person from distributing applicable images when the person had the intent to cause serious emotional distress. *Iniguez*, 202 Cal. Rptr. 3d at 243. This heightened intent requirement sufficiently narrowed the law and prevented it from being used in cases where a person acted under mistake of fact or negligent accident. *Id.* The court noted the added protection of limiting the law to only images that were taken under circumstances in which the parties agreed or understood that the images were to remain private. *Id.*

C. *Ex Parte: Jordan Bartlett Jones*

Texas is the third state to have an appellate court address its revenge porn law. *See*, *Ex Parte: Jordan Bartlett Jones*, No. 12-17-00346-CR (Twelfth Circuit Court of Appeals, April 18, 2018). Jones was charged under Texas Penal Code, Section 21.16(b) which provides:

> A person commits an offense if:
>
> (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
>
> (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
>
> (3) the disclosure of the visual material causes harm to the depicted person; and,
>
> (4) the disclosure of the visual material reveals the identity of the depicted person in any manner[.]

"Intimate parts" means "the naked genitals, pubic area, anus, buttocks, or female nipple of a person." *Id*.

The Texas appellate court began its analysis by noting the statute discriminates on the basis of content because it does not penalize all disclosure of photographs depicting another person, rather it punishes a particular subset of disclosed images. *Jones*, at *4. The Texas appellate court ultimately concluded the statute was an invalid content-based restriction because it did not use the least restrictive means of achieving the purported compelling interest of preventing an intolerable invasion of a substantial privacy interest. *Id*. at 8. The court noted, as one example of insufficient narrowing, that the statute did not contain a knowledge of privacy requirement. *Id*. The court also found the statute unconstitutionally overbroad because of its "alarming breadth" on account of the lack of the knowledge requirement and lack of any intent to harm. *Id*. at 9.

D. *People v. Austin*

Austin addressed an Illinois statute that required dissemination of an image of a person who is at least 18 years old and required knowledge that the image was to remain private. *People v. Austin*, 2019 WL 5287962 at *8 (Ill. Oct. 18, 2019). The *Austin* court determined the statute implicated the First Amendment and rejected the state's argument to create a new category of unprotected speech for speech that invades privacy. *Id*. at *10-11. The court concluded that the statute regulated content, but nonetheless applied intermediate scrutiny. *Id*. at 13-15. The court ultimately determined the statute passed intermediate scrutiny. *Id*. at 17-26.

E. *State v. Culver*

The statute at issue in *Culver* required a knowing expectation of privacy and dissemination made without explicit consent of the person depicted. 918 N.W.2d 103, 107 (Wis. Ct. App. 2018). In upholding the statute, the Wisconsin court of appeals noted the statute's explicit knowledge of privacy element and interpreted the statute as requiring a specific intent that "the depicted person must have intended the depiction to be captured, viewed, or possessed only by the specific person: either the person capturing the depiction or the person to whom the depicted person directly and intentionally gave the image." *Id*. at 809.

II. Section 617.261 is unconstitutionally overbroad

The first step in evaluating an overbreadth challenge is to construe the challenged statute. *A.J.B.*, 929 N.W.2d at 847. After the scope and sweep of the statute is understood, the reviewing court should determine whether its reach is limited to unprotected categories of speech or expressive conduct. *Id*.; *State v. Washington-Davis*, 881 N.W.2d 531, 537 (Minn. 2016); *United States v. Williams*, 553 U.S. 285, 293 (2008). If the statute implicates the First Amendment, the second step is to determine whether the statute is substantially overbroad. *A.J.B.*, 929 N.W.2d at 847-48; *State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017).

If the statute is substantially overbroad, the reviewing court should determine whether applying a narrowing construction or severing problematic language would cure the constitutional defect. *Id*. at 848.

A. Section 617.261 has a broad sweep

The court of appeals succinctly construed the statute and recognized its broad sweep. *State v. Casillas*, 938 N.W.2d 74, 80-82 (Minn. App. 2019). As the court noted, section 617.261 applies to a single intentional dissemination of an image of another person depicted in a sexual act or whose intimate parts are partially or wholly exposed. *Id*. at 81. The statute employs a negligence *mens rea*, only requiring that the disseminator "knows or reasonably should know that the person depicted in the image does not consent to the dissemination" and "the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy." *Id*. at 81-82. Recognizing this Court's guidance in *A.J.B.*, the court of appeals noted that the negligence *mens rea* provides for conviction under the statute "even if the disseminator 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." *Id*. at 82 citing *A.J.B.*, 929 N.W.2d at 850 (describing a "knows or has reason to know" standard as a broad negligence mens rea). Additionally, the statute does not require the disseminator to know that the image contained sexual activity or a nudity further broadening the statute's reach. The statute requires an intentional dissemination, but not actual knowledge of the content of the disseminated image.

Moreover, section 617.261 does not require proof that the disseminator caused or intended a specified harm. *Id*. Any harm-causing or intent-to-harm elements found in the statute merely determine the level of severity assigned to the expressive conduct and do

not act to limit the expressive conduct prohibited by the statute. *Id.*; Minn. Stat. § 617.261, subd. 2(b)(1), (5).

Appellant urges this Court, as it urged the court of appeals, that the statute's "layers of mens rea requirements" somehow limits its sweep. See, Appellant's Brief at 13. As this Court recognized in *A.J.B.* and the court of appeals recognized in its opinion, negligence mens rea requirements broaden, not limit, a statute's reach. Section 617.261 "covers the dissemination of a sexual image even if the disseminator did not know that the subject of the image did not consent to the dissemination, did not know that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy, and did not cause or intend to cause a specified harm." *Casillas*, 938 N.W.2d at 82. The statute's sweep is broad.

B. Section 617.261 implicates the First Amendment

"The state concedes, and we agree, that Minn. Stat. § 617.261 restricts expressive conduct." *Casillas,* 938 N.W.2d at 79. Despite its continued arguments to the contrary, Appellant has conceded that section 617.261 implicates the First Amendment.

Attempting to frame section 617.261 as either, 1) only reaching an invasion of some individual privacy right in every act of dissemination or 2) proscribing obscenity, Appellant argues the statute is exempt from First Amendment analysis. This argument is wholly without merit or the support of caselaw and was soundly rejected by the court of appeals. "The state's obscenity argument is not aligned with the definition of obscenity." *Casillas*, 938 N.W.2d at 83. As this Court noted in *A.J.B.*, and as the court of appeals properly noted as well, Appellant's privacy arguments are meritless because "privacy" is not one of the

"delineated categories" of speech outside of First Amendment protection and the Supreme Court has been reluctant to expand these categories. *Id*. citing *A.J.B.*, 929 N.W.2d at 846 (noting established exceptions); *see United States v. Stevens*, 559 U.S. 460, 472 (2010) ("Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

The Supreme Court "ha[s] long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). Certain forms of speech may be regulated because they fall outside of the protections of the First Amendment. The type of speech that can permissibly be regulated, however, is limited to certain carefully crafted categories, including obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, and true threats. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citations omitted). "[F]reedom of speech referred to by the First Amendment does not include the freedom to disregard these traditional limitations." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-84 (1992) (unprotected categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content"). Speech that does not fall into one of these categories remains protected. *Stevens*, 559 U.S. at 469. This list is not exhaustive, but there is doubt any new category will find approval. *See, Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 791-92 (2011) (noting the Court's holding in *Stevens* that 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).

Photographs and visual recordings are inherently expressive and therefore protected under the First Amendment. *See, Kaplan v. California*, 413 U.S. 115, 119 (1973) (applying First Amendment standards to moving pictures and photographs). "As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution." *Id*. at 119-20.

Our appellate courts have previously held that Minnesota statutes that implicate expressive activity implicate the First Amendment. *See, State v. Peterson*, ___ N.W.2d ___ (Minn. Dec. 9, 2019) (holding section 609.749, subd. 2(4) implicates the First Amendment); *In the Matter of the Welfare of A.J.B.*, 910 N.W.2d 491, 497 (Minn. App. 2018) (holding that sections 609.749, subd. 2(6) and 609.795, subd. 1(3) implicated the First Amendment because "the conduct criminalized by those statutes involves sending letters, telegrams, messages, or packages, each of which typically involves some expressive activity") (*aff'd)*; *Hall*, 887 N.W.2d at 853 (holding a subdivision of the stalking statute relating to repeated phone calls and text messages implicated the First Amendment because phone calls and text messages "typically contain some expressive activity, whether words or a picture"); *State v. Stockwell*, 770 N.W.2d 533, 538 (Minn. App. 2009) (holding that Minn. Stat. § 609.749, subd. 2(a)(2) implicated the First Amendment because, despite its focus on particular forms of harassing conduct, the statute could have impacted expressive conduct); *see also, State v. Machholz*, 574 N.W.2d 415, 417-420 (Minn. 1998) (holding former section 609.749, subd. 2(7) as unconstitutionally overbroad because the statute swept in a wide range of constitutionally protected activity, including burning a cross at a

political rally (*Brandenburg v. Ohio,* 395 U.S. 444 (1969)), burning a cross on the lawn of a black family (*R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992)), or a march by the National Socialist Party displaying swastikas in a community where many Holocaust survivors reside (*National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977)).

In order to exclude section 617.261 from implicating the First Amendment, this Court must strictly categorize the section as only prohibiting constitutionally unprotected obscenity. This is an impossible task because the statute criminalizes dissemination of photographs without a requirement that the subject matter appeal to the prurient interest or be patently offensive. There is no caselaw suggesting a partially exposed adult female nipple appeals to the prurient interest of an average person or depicts sexual conduct in a patently offensive way. Section 617.261, and other similar state laws, have garnered the moniker "revenge porn" laws. The purpose in the dissemination is not to arouse the viewer. *See, VanBuren*, 214 A.3d at 801. Of note, the three state appellate courts noted above all held their respective statutes implicated the First Amendment. It cannot reasonably be held that section 617.261 only prohibits the dissemination of obscenity and is thus exempted from First Amendment analysis.

Moreover, classifying work as obscene requires a three-part test. The court must determine (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 (3) whether the work, taken as a whole, lacks serous literary, artistic, political, or scientific value. *Miller v. California*, 13 U.S. 15, 24 (1973)

(quotations omitted); *State v. Muccio*, 890 N.W.2d 914, 925 (2017). The issue of whether a matter is obscene, and therefore constitutes unprotected speech, has traditionally been a determination to be initially made by the trier of fact. *Miller*, 13 U.S. at 15. This was a notable issue for the Texas appellate court in *Jones*. *See, Jones* at *5.

It also cannot be argued that section 617.261 does not implicate the First Amendment because it merely punishes the conduct of dissemination and not the speech itself. This circular reasoning has been rejected by this Court in *Maccholz* and *A.J.B.* The process of creating the end product cannot be separated from the product itself for First Amendment purposes. *See, Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. at 2734 n. 1. (concluding that it makes no difference in the First Amendment analysis whether government regulation applies to "creating, distributing, or consuming" speech); *State v. Bishop*, 787 S.E.2d 814, 817-18 (N.C. 2016) ("Such communication [posting information on the internet] does not lose protection merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety – whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket."). The Seventh Circuit and the Supreme Court of Illinois have held that making an audio-visual recording "is necessarily included with the First Amendment's guarantee ... as a corollary of the right to disseminate the resulting recording." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *People v. Clark*, 6 N.E.3d 154, 159–60 (Ill. 2014). The Ninth Circuit has held that the process of creating a tattoo is as much speech as the tattoo itself. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

Concluding that the plain language of section 617.261 *only* prohibits obscenity would likewise not permit a Minnesota trier of fact to make this determination. The section would wholly circumvent the *Miller* test. Even if the material disseminated under section 617.261 was to be classified as obscene, the statute then becomes entirely redundant in light of Minnesota's obscenity statute. *See*, Minn. Stat. § 617.241 (2018). This Court cannot encroach on the role historically reserved for the trier of fact and declare any visual material disseminated under section 617.261 obscene.

Appellant's privacy arguments are similarly unpersuasive. Adopting Appellant's arguments privacy or obscenity arguments requires this Court to create a new category of unprotected speech previously unrecognized by the United States Supreme Court or to entirely redefine the Supreme Court's definition of obscenity. As the court of appeals correctly noted, two state supreme courts have previously rejected these arguments. *Casillas*, 938 N.W.2d 74 at FN3 citing *People v. Austin*, 2019 WL 5287962, at *6-7 (rejecting state's argument that "speech that invades privacy" should be categorically excluded from First Amendment protection); *VanBuren*, 214 A.3d 791, at 798-807 (rejecting state's argument that "nonconsensual pornography, as defined in [a] Vermont statute, falls outside of the realm of constitutionally protected speech for two reasons: such speech amounts to obscenity, and it constitutes an extreme invasion of privacy unprotected by the First Amendment"). This Court must likewise reject Appellant's attempts to exclude Minn. Stat. § 617.261 from First Amendment implications.

Section 617.261 clearly implicates the First Amendment and reaches expressive conduct not categorically excluded from protection. This Court should affirm the court of appeals on this issue.

C. Section 617.261 prohibits a substantial amount of protected speech

As the court of appeals recognized from this Court's opinion in *A.J.B.*, the statute's inclusion of a negligence standard makes it more likely that the statute would have a chilling effect on constitutionally protected expression. *Casillas*, 938 N.W.2d at 85; *A.J.B.*, 929 N.W.2d at 855.

Moreover, a statute punishing speech should include both a specific intent to harm element and a requirement that the victim actually suffered harm. *See, Casillas*, 938 N.W.2d at 86 citing *A.J.B.*, 929 N.W.2d at 860 (concluding that the "intentional conduct" element could not save the statute because, in part, "the limiting effect of the specific-intent requirement is counterbalanced by the absence . . . of any requirement that the victim actually suffer any harm"). "[b]y foregoing any requirement that the harm actually occur, the Legislature criminalized behavior, including substantial speech and expressive conduct, that will have no impact on the legitimate purpose of the statute: to prevent the harm." *A.J.B.*, 929 N.W.2d at 861.

To be a constitutional exercise of the police power of a state, a statute that punishes speech must not be overly broad. *State v. Crawley*, 819 N.W.2d 94, 102 (Minn. 2012); *see, Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In general, a statute can be said to be overly broad if it prohibits or chills a substantial amount of protected speech along with unprotected speech. *Crawley*, 819 N.W.2d at 102; *see, Ashcroft v. Free Speech Coal.*, 535

U.S. 234, 244 (2002). The court's power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. *Walker v. Zuehlke*, 642 N.W.2d 745, 750 (Minn. 2002).

Where the overbreadth of the challenged law is both "real" and "substantial," and where "the words of the [law] simply leave no room for a narrowing construction," "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," this Court must completely invalidate it. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997) ("A limiting construction can be imposed only if the statute "is 'readily susceptible' to such a construction."). We "'will not rewrite a . . . law to conform it to constitutional requirements.'" *Id. at* 844-45 (quoting *Virginia v. American Booksellers Assn., Inc*., 484 U. S. 383, 397 (1988)).

The First Amendment generally protects offensive speech. *See, e.g*., *Stevens*, 559 U.S. at 468 (explaining that the First Amendment protects uncomfortable speech that challenges conventional religious beliefs, political attitudes, or standards of good taste). The Supreme Court has consistently protected emotionally distressing or outrageous speech. *See, Boos v. Barry*, 485 U.S. 312, 322 (1988) ((citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 66 (1988)); *see also, New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011) (Because the emotionally distressing "speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

In the context of private speech, the Supreme Court has long resisted the notion that speech on matters of private concern can be criminally punished. *See, e.g., Stevens*, 559 U.S. at 474-76 ("Most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation."). "[O]f bedrock importance is the principle that the First Amendment's protections extend beyond expressions 'touching upon a matter of public concern.'" *A.J.B.*, 929 N.W.2d at 846; (citing *State v. Tracy*, 130 A.3d 196, 201 (Vt. 2015) (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

Online speech is equally protected under the First Amendment. *See*, *Reno*, 521 U.S. at 870 (stating, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech); *Brown v. Entm't Merch. Assn*'., 131 S.Ct. 2729, 2733 (2011) ("whatever the challenges of applying the Constitution to ever-advancing technology, basic principles of freedom of speech and press, like the First Amendment's command, do not vary when a new and different medium for communication appears").

Applying these standards, it is clear that section 617.261 punishes protected speech. Unlike section 609.352, subd. 2a(2) analyzed in *Muccio*, section 617.261 cannot be said to be "intrinsically related" to criminal conduct or directed at prohibiting works that appeal to prurient interests. Section 617.261 criminalizes the communication of mere nudity. Moreover, unlike section 609.352, subd. 2a(2), section 617.261 does not strictly punish speech related only to unlawful sexual conduct. *Muccio* recognized that a statute that does not limit prohibited communications to those without literary, artistic, political or scientific

value regulates some speech that is not obscene and therefore protected by the First Amendment. *Id*. at 927.

The hypothetical noted by the Texas appellate court in *Jones* would also fall within the reach of Minnesota Section 617.261. *See, Jones* at *7-8. "Charlie" could be punished under section 617.261 in the same scenario hypothesized by the court because section 617.261, subd. 1(2) and (3) contain the same disjunctive problem as the Texas statute.

Section 617.261 also criminalizes the communication of an artistic photographer who creates an anthology of his images of nudes, as well as the book's publisher, seller, or librarian. It is unlikely that the exceptions in section 617.261, subd. 5(4) would apply to this situation. There is no way for seller or librarian to know whether the subjects consented or whether the image was made in a commercial setting. This statute wholly removes a fact-finder determination on this issue and instead criminalizes protected speech.

A person who shared a photograph could also be charged with a felony even if the person depicted had no expectation that the image would be kept private and suffered no harm, such as a friend who re-shared a nude photo or a photojournalist who posted images of victims of war or natural disaster. The photojournalist stands to be prosecuted at the whim of a prosecutor's interpretation that the images did not fall under the public interest or lawful public purpose exceptions in section 617.261, subd. 5(5). What is a "lawful public purpose?" Public interest and public purpose are subjective terms that are not defined in the statute.

Section 617.261 covers a lot of benign images that do not constitute obscenity. A husband who shares a proud photo of his wife breast-feeding their baby that contains a

partially exposed nipple is subject to felony prosecution if the breastfeeding wife did not know her partner was sharing the photo on social media or give consent to share the photo. Should the husband reasonably have known his wife did not consent to the dissemination? The statute also punishes the husband without regard to whether he was aware the photo contained his wife's partially exposed nipple.

Or what about a boyfriend and girlfriend on vacation? Girlfriend asks boyfriend to take her picture lying on the beach. Boyfriend does and posts to Facebook or Twitter or Instagram without girlfriend's explicit consent. Now what if girlfriend's nipple was partially exposed, unbeknownst to both boyfriend and girlfriend, at time photo was taken? Girlfriend then hears from people who see the photo on Facebook that her nipple was partially exposed. Girlfriend never gave boyfriend permission to share photo on social media. How is boyfriend to know whether there was a reasonable expectation of privacy? What is a reasonable expectation of privacy? What if boyfriend and girlfriend had not yet been intimate, as noted in *VanBuren*? There was certainly no intent to harm, but that does not matter under section 617.261. The statute does not even require the actor know he or she is sharing a partially exposed nipple. The act of an intentional dissemination suffices. Boyfriend can be forced to stand trial on felony prosecution.

Section 617.261 imposes felony consequences if someone unknowingly posted a photo of a partially exposed female nipple online. It makes no difference whether the photo was of a 3-year-old daughter on the beach without a swimsuit, or a photo of a 25-year-old girlfriend. There is no requirement that the photo rise to the level of obscenity. There is no accounting for how one gained possession of the photo. An endless string of third parties

stand to be prosecuted for re-disseminating the photo. Online dissemination under these scenarios happen countless times every day. Does the state intend to prosecute every instance? The lack of an intent to harm element or a requirement that the dissemination actually resulted in harm is a fatal flaw that cannot be cured.

Section 617.261 is not a statute designed to prevent sexual exploitation or abuse of children. In *Ferber v. New York*, the United States Supreme Court upheld a statute that prohibited persons from "knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances." 58 U.S. 747, 749 (1982). The Court recognized that, "[l]ike obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the sensor to become unduly heavy." *Id.* at 756. Nonetheless, the Court determined that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *Id.* at 757, and that "classifying child pornography as a category of material outside of the protection of the First Amendment is not incompatible with our earlier decisions." *Id.* at 763. The Court further held that regulation must be limited to works that visually depict sexual conduct by children younger than a certain age, and that the category of "sexual conduct" proscribed be suitably limited and specific. *Id.* at 764.

The Supreme Court, in *Ashcroft*, clarified that virtual child pornography did not fall within the category of materials subject to regulation under *Ferber*. The Court clarified that "*Ferber*'s judgment about child pornography was based on how it was made, not what was communicated," *Id.* at 250-51, and that "in the case of the materials covered by *Ferber*,

the creation of the speech is itself the crime of child abuse." *Id.* at 254. The Court further noted that, in contrast to *Ferber*, regulating virtual child pornography "prohibits speech that records no crime and creates no victims by its production." *Id.* at 250. The circumstances that permitted regulation of child pornography under the First Amendment did not, therefore, permit regulation of virtual child pornography.

The Supreme Court's analysis in *Stevens* further clarified the breadth of *Ferber*. In *Stevens*, the Government argued that regulation of speech depicting animal cruelty was permissible under the First Amendment based on the language in *Ferber* suggesting that within the categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake, that no process of case-by-case adjudication is required." 559 U.S. at 470 (quoting *Feber*, 458 U.S. at 763). The Court rejected the Government's argument, noting that *Ferber* was grounded in the longstanding recognition of the government's ability to regulate speech that is an integral part of criminal conduct; *i.e.*, the sexual abuse of children. *Id.* at 471. "[*Stevens*] explained *Ferber* as a special case because the child pornography market is 'intrinsically related' to the underlying abuse. According to *Stevens*, *Ferber* did not affirm a new exception to the First Amendment but was a special example of the historically unprotected category of speech integral to the commission of a crime." The Supreme Court 2009 Term, Leading Cases, 124 Harv. L. Rev. 239 247 (2010).

Unlike *Ferber*, the plain language of section 617.261 is not sufficiently limited to a category of speech that can permissibly be regulated under *Free Speech Coalition* and *Stevens*, nor is it "intrinsically related" to the commission of a crime. *See also, State v.*

Muccio, 890 N.W.2d 914, 925 (2017) (prohibiting communications an adult directs at a child relating to sexual conduct that are made with the intent to arouse sexual desire). Appellant's reliance on *Ferber* is misplaced.

Appellant argues for the first time that section 617.261 is integral to the criminal conduct of child pornography, defamation, coercion, or stalking. Appellant's attempts to construe section 617.261 as integral to the conduct of defamation adds several elements and requirements not contained in the statute. See, Appellant's Brief at 22. Appellant's coercion argument is circular in nature, and one that has repeatedly been rejected by this Court. There is nothing in the language of section 617.261 that constitutes the stalking offense proffered by Appellant. Appellant's final attempt to construe section 617.261 as integral to criminal conduct is to falsely, and without support, baldly assert that "many" images disseminated under the statute constitute child pornography. There is no plausible argument that the plain language of the statute lends itself to a reasonable interpretation as being limited to the criminal conduct of defamation, coercion, stalking, or dissemination of child pornography.

Section 617.261's reliance on a negligent mens rea in both subdivision 1(2) and 1(3) compounds the constitutional infirmity. This Court has underscored the serious concern with negligent mens rea statutory language found in laws impeding on the First Amendment. *See, Hensel*, 901 N.W.2d at 175 ("This means that an individual need only perform an act that is negligent, which allows the statute to reach all types of acts, intentional or not, that have a tendency to disturb others."); *A.J.B.,* 929 N.W.2d 854-55 (discussing malicious intent elements in federal stalking statutes); *State v. Mauer*, 741

N.W.2d 107, 110-11 (Minn. 2007) (discussing the "chilling effect" associated with criminal statutes that require only negligence).

The language in section 617.261 is nearly identical to that in former section 609.749, subd. 2(6) addressed in *A.J.B* (prohibiting acts done which "the actor knows or has reason to know") and section 609.72, subd. 1(2) (prohibiting acts done "with knowledge or 'reasonable grounds to know'") addressed in *Hensel.*

Not only does the language itself extend the broad reach of the statute, but section 617.261 also fails to define a reasonable expectation of privacy. The Vermont Supreme Court concluded it meant the individuals involved – subject of photo and disseminator – have to be in a "sufficiently intimate or confidential" relationship at the time of the dissemination and that it would not include situations where one person "sexted" a photo of him or herself to another person if they were not in an intimate or sexual relationship at the time of the "sext." Section 617.261 contains no definition and Appellant proposes none. This uncertain and broad language ultimately gives too much deference to local prosecutors to decide which cases are worthy of prosecution under 617.261.

Like *Hensel*, the statute's negligent standard is even more problematic here in that section 617.261 is likewise not limited in its reach because it additionally fails to contain any element of intent to harm, intent to cause harm, or actual harm suffered. *See, Hensel*, 901 N.W.2d at 172; *A.J.B.*, 929 N.W.2d 854 (Minn. 2019) (holding section 609.749 subjects even negligent conduct to criminal sanction and the actus reus elements fail to place any meaningful limitation on the statute's reach).

Section 617.261 also lacks an age limit for the subjects of the materials. The omission of an age limit further expands the unconstitutional reach of section 617.261. There is nothing sexual about a minor female's undeveloped breasts, yet images posted by parents of their 3, 4, or 5-year-old kids naked running on the beach is criminalized.

Section 617.261 also carries the potential to criminalize the "baby in the bathtub" photo. A parent faces felony prosecution for posting a nude photo of a child in the bathtub on a Facebook account. An angry parent in the middle of a heated custody battle could use this as leverage in an attempt to have the other parent prosecuted. The argument that this scenario would never be prosecuted is irrelevant. Criminal laws should not leave the determination to prosecute a particular situation to the discretion of an individual prosecutor. *Stevens,* 559 U.S. at 480, 130 S. Ct. at 1591 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Nor do the statutory exemptions in section 617.261, subd. 5 sufficiently limit the reach of the statute to only punish distribution of obscene material. The Supreme Court has rejected this theory in both *Stevens* and *Brown*. "As in *Stevens,* California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct." *Brown*, 564 U.S. at 792-93 citing *Miller,* 413 U.S. at 24; *see also, Cohen v. California*, 403 U.S. 15, 20 (1971); *Roth v. United States,* 354 U.S. 476, 487; n. 20 (1957).

Comparing section 617.261 with the three appellate decisions from Vermont, California, and Texas further highlights the constitutional concerns with the statute. Unlike California's law, section 617.261 does not contain an intent to harm element and criminalizes mistake of fact and negligent distribution. Section 617.261 lacks the sufficient criminal intent element that may have narrowed the law to avoid constitutional infirmity.

Unlike section 617.261, Vermont's 'revenge porn' statute contains a specific intent to harm, knowledge of privacy, and contained language establishing an age limit for female subjects. The Vermont trial court still concluded this was not enough to pass strict scrutiny. Though the Vermont Supreme Court ultimately reversed the trial court's decision, that court agreed that these elements did not remove the fact that the statute created a content-based restriction on speech. Section 617.261 creates the same content-based restriction on speech, fails to require an intent to harm element, and fails to require actual knowledge that the media was to remain private. It is doubtful the Vermont Supreme Court would have concluded section 617.261 passed strict scrutiny. The widespread reach of the content-based restriction in our statute is much farther than that of Vermont's statute, and section 617.261 is not sufficiently tailored along the lines addressed by the Vermont Supreme Court's opinion.

Like the Texas court noted in *Jones*, section 617.261 similarly does not penalize all disclosure of photographs depicting another person; it punishes a particular subset of disclosed images. In addition, section 617.261 carries the same concerns noted by the Texas appellate court, namely a lack of knowledge of privacy requirement and a lack of any intent to harm element.

People v. Austin does not lend the support Appellant claims it does. As the court of appeals properly noted, the Illinois Supreme Court noted that the state of Illinois does not have any caselaw requiring an Illinois criminal statute to contain a "malicious purpose" to survive an overbreadth challenge. *Casillas*, 938 N.W.2d at 87; *Austin*, 2019 WL 5287962, at *19. Conversely, this Court *has* announced authority that a Minnesota state criminal statute must contain a specific intent-to-harm element to survive an overbreadth challenge. *See, e.g., A.J.B.*, 929 N.W.2d at 860 citing *Muccio*, 890 N.W.2d at 928. (Under certain circumstances, a specific-intent requirement may sufficiently limit the reach of a statute into protected speech and expressive conduct to avoid overbreadth. "Still, the existence of a specific-intent element does not end the analysis. For overbreadth purposes, the critical question is whether the specific-intent element carves out substantial protected speech and expressive conduct that would otherwise have fallen within the terms of the statute while leaving properly criminalized conduct within the statute's prohibition.").

Section 617.261 is an overbroad statute that punishes the act of dissemination itself without any accompanying criminal intent or causation of harm. The statute's overbreadth reaches negligent dissemination. Of note, the overwhelming majority of jurisdictions that have enacted "revenge porn" legislation included limiting malicious intent or causation of harm elements. Several jurisdictions also include strict knowledge requirements.[3]

This Could should affirm the court of appeals on this issue.

D. Section 617.261 does not lend itself to a narrowing interpretation or permissible severance

[3] https://www.cybercivilrights.org/revenge-porn-laws/

Once this Court concludes section 617.261 prohibits a substantial amount of protected speech, it should consider whether applying a narrowing interpretation or severing problematic language would remedy the statute. *A.J.B.,* 929 N.W.2d at 848; *Hensel*, 901 N.W.2d at 175. This Court remains bound by legislative intent and cannot rewrite a statute to make it constitutional. *Id*. "[T]he shave-a-little-off-here and throw-in-a-few-words-there statute [resulting from a narrowing construction] may well be a more sensible statute, but at the end of the day, it bears little resemblance to the statute that the Legislature actually passed." *Hensel*, 901 N.W.2d at 180.

The goal of a reviewing court in determining whether severance is possible is to "effectuate the intent of the legislature had it known that a provision of the law was invalid." *A.J.B.,* 929 N.W.2d at 848 citing *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014) (quoting *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005). However, a reviewing court cannot perform "plastic surgery upon the face of the statute." *Hensel*, 901 N.W.2d at 176-77 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969)). If a statute is "unable to be saved by a narrowing construction or severance, the remaining option is to invalidate the statute." *A.J.B.*, 929 N.W.2d at 848.

This Court cannot properly sever the negligence language from section 617.261 for same reasons this Court said it could not sever the problematic language from section 609.749, subd. 2(6) in *A.J.B*. This Court rejected a proposal to sever "or has reason to know" from section 609.749, subd. 2(6) recognizing doing so would require it to perform plastic surgery on the face of the statute. *A.J.B.*, 929 N.W. 2d at 856. This Court concluded it could sever language and limit 609.795, subd. 1(3) largely because the statute contained

malicious intent language in the form of "intent to abuse." No such language is found in section 617.261.

Even if this Court concluded it could sever the "reasonably should know" language from section 617.261, subd. 1(2) and (3), the section is still constitutionally infirm because of its failure to require an element of specific intent to harm or proof of actual harm, or even knowledge that the disseminated image contained nudity or sexual conduct. *See*, *Hensel*, 901 N.W.2d at 175; *A.J.B.*, 929 N.W.2d at 857. And this Court cannot add language to a statute.

Appellant argues Section 617.261 is readily susceptible to a narrowing interpretation on two fronts: to either be interpreted to only reach obscenity or as constituting substantial invasions of privacy in every act of dissemination. Both arguments fail. And both arguments would result in an unworkable and impractical statute ripe for its own independent constitutional challenges.

Appellant's HIPAA analogy is misplaced. State and federal regulations of private health information are based on factors not present in section 617.261. They regulate information obtained in a legally-recognized confidential relationship and only apply to providers within that relationship; the providers know the information is subject to regulation; and concerns information that must be given in order to obtain health care. The regulations are extremely limited to well-defined information and pose no risk of a chilling effect on a substantial amount of protected speech.

Section 617.261 cannot be narrowly interpreted to only apply to the dissemination of obscenity because the plain language of the statute and statutory definitions impose

criminal penalties for the mere distribution of nudity or partial nudity. As the court of appeals correctly noted, the plain language of the statute is not consistent with the definition of obscenity. *Casillas*, 938 N.W.2d at 90. Nudity is not per se obscenity. *See, Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). The statute would require a re-writing and re-defining to apply to constitutionally proscribable speech. Such a task falls outside of this Court's authority. For the sake of argument, even if the statute could be limited to obscenity, it would result in a vague statute triggering serial as-applied probable cause challenges on the proof element for obscenity. The state would be unable to satisfy the level of proof necessary for obscenity in prosecutions involving mere nudity. Nor would the average person have a proper understanding that disseminating a nude photograph constituted dissemination of obscenity.

Appellant also urges this Court, as it did below, to characterize this statute as an invasion of privacy. The court of appeals summarily rejected this argument, as have other state supreme courts. Appellant advances a modified argument on this issue than argued below. Here, Appellant relies on *State v. Mauer* and urges this Court to construe the negligent language in subdivision 1(2) and (3) as "aware of a substantial and unjustifiable risk." Appellant's Brief at 33. *Mauer* addressed the "with reason to know" scienter requirement in the context of our state possession of child pornography statute. As an initial matter, *Mauer* dealt with an area of speech unprotected by the First Amendment unlike section 617.261. The *Mauer* court was able to construe the intent requirement as a constitutionally sufficient recklessness standard in part because of the limited subject matter addressed by the statute. Conversely, section 617.261 is not limited to obscenity, or

any other area of unprotected speech, and employing a recklessness standard to subdivision 1(2) and (3) does not sufficiently limit the statute's reach.

Appellant further argues that striking the negligent language from the statute would cure the constitutional defects suggesting, "There are no apparent reasons to doubt that the Legislature would have enacted the statute without the 'reasonably should know' language." Appellant's Brief at 34. Appellant's argument is without factual support. Appellant concedes the broad sweep of statute is intended to criminally punish negligent dissemination without any criminal intent or causation of harm. "The legitimate sweep of the statute is larger than causing or intending to cause a specified harm." Appellant's Brief at 28. Appellant argues specific intent to harm is not required to survive constitutionally scrutiny because to do "misunderstands nonconsensual pornography." Appellant's Brief at 28. Appellant advances this argument as if "nonconsensual pornography" were its own delineated category of unprotected speech. Appellant's arguments throughout its brief refute the notion the Legislature would have enacted section 617.261 without the negligence language.

There are several additional objective and legitimate reasons to doubt the Legislature would have enacted section 617.261 without the negligence standards in subdivision 1(2) and (3). The Legislature wanted a low mens rea to be able to prosecute a broad range of situations. The legislature could have omitted the "or reasonably should know" language if it did not intend to craft the law with negligence elements. Like section 617.261, section 609.749 made clear that specific intent to harm was not required

demonstrating that the Legislature wanted the mens rea to be low. *A.J.B.*, 929 N.W. 2d at 856.

Second, the legislature solicited outside influence during the drafting of the statute from the same groups who now join its appeal as amici. The legislature was well-aware that a majority of states who had passed similar legislation crafted laws with specific intent to harm and harm causation elements. The legislature consciously chose to omit specific intent to harm elements and use a negligence mens rea on the recommendation of its amici. See, "Why Can't Minnesota Prosecute 'Revenge Porn' Harassment?", MSP Magazine, April 20, 2020, http://mspmag.com/arts-and-culture/minnesota-revenge-porn-harassment/ (quoting chief bill author, Rep. John Lesch, as saying he is unwilling to modify the statute to require a criminal intent to harm and instead considering pursuing a state constitutional amendment establishing a right to privacy).

If the legislature wanted to include specific intent to harm elements or causation of harm elements, it would have done so. This is further evidenced by the statute's inclusion of an intent to harm element in the penalties provision rather than the underlying substantive offense. *See, Gen. Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791, 800 (Minn. 2019) ("When the Legislature uses limiting or modifying language in one part of a statute, but omits it in another, we regard that omission as intentional and will not add those same words of limitation or modification to parts of the statute where they were not used.").

Striking the "reasonably should know" language from subdivision 1(2) and (3) still leaves the statute without a specific intent to harm or causation of harm elements. The statute remains constitutionally infirm. The statute would further result in an act that

classifies dissemination of a qualifying image as both a gross misdemeanor and a felony, even if this Court could write in the "malicious intent" requirements after striking the "reasonably should know" language. Yet even more language would have to be added to the statute to reconcile this conflict.

Appellant's suggestions are contrary to the legislative intent of section 617.261. The language of the statute is clear. Section 617.261 was meant to punish as much dissemination with as little proof of criminal intent or causation of harm as possible. The statute is not susceptible to a limited or narrowing construction.

The level of plastic surgery required to cure section 617.261 of its constitutional infirmity speaks to the enormity of the statute's First Amendment violations. This Court cannot remedy the infirmity within the bounds of its authority.

III. Section 617.261 remains an unconstitutional content-based restriction of speech

Appellant relies on *Ward v. Rock Against Racism* for the proposition that section 617.261 is content-neutral and intermediate scrutiny thus applies. *Ward* defines a regulation as content-neutral if it makes no reference to the content of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1981). *Ward* is easily distinguishable as it involved a regulation that limited excessive concert noise that impacted neighbors. The regulation did not prohibit the content of the expressive activity, only the amplification of the activity. *Id*. at 802-03. The expressive activity at issue was still allowed. *Id*. Conversely, section 617.261 plainly regulates content of an expressive activity.

Appellant also relies on *Austin* for the application of intermediate scrutiny. Despite finding their statute prohibits a specific category of speech the *Austin* court nonetheless decided to impose intermediate scrutiny based on the purported justifications of the law that Appellant now adopts. As the Supreme Court has noted, "An innocuous justification cannot transform a facially content-based law into one that is content neutral." *See, Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

Austin misapplied First Amendment caselaw in its decision that speech on matters of purely private concern is subjected only to intermediate scrutiny. The *Austin* court essentially created a new category of unprotected speech and ignored longstanding precedent controlling content-based regulations. The *Austin* decision turns the examination of the level of scrutiny to the speaker's words or expressive activity rather than the statute itself. First Amendment caselaw requires the court to look at the language of the statute and not some "innocuous justification."

Appellant further argues section 617.261 is content-neutral, despite the plain language of the statute, arguing the statute only prohibits the nonconsensual sharing of nude images. Appellant's arguments characterize the statute as one requiring explicit knowledge of non-consent on behalf of the disseminator when that element is not required by the plain language of the statute. Appellant's argument further assumes every instance of dissemination prohibited by section 617.261 involves the dissemination of a private personal photo.

Appellant's private speech therefore intermediate scrutiny argument is unsupported by caselaw. While the Supreme Court has remarked on "levels" of First Amendment

protection for different categories of speech, it has never carved out an exception for speech on matters of private concern. Appellant's arguments create a new category of unprotected speech. Appellant stretches the "less-deserving" language and completely removes private speech from First Amendment protection. Adopting this argument would allow state-censorship of nearly everything we say, write, publish, or otherwise disseminate.

A restriction is content-based if it regulates speech based on the effect that speech has on an audience and there is no less restrictive alternative available to accomplish the government's objective. *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 811-13 (2000). "[A]s a general matter, … government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). Content-based regulations are presumptively invalid, and it is rare that a regulation restricting speech because of its content ever will be permissible. *See, Sorrell v. IMS Health Inc*., 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory."); *see also*, *Brown v. Entm't Merch. Ass'n.*, 564 U.S. 786, 799 (2011). "The First Amendment 'reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs such that the Constitution forecloses any attempt to revise the judgment simply on the basis that some speech is not worth it.'" *A.J.B.*, 929 N.W.2d at 846 (quoting, *Stevens*, 559 U.S. at 470).

Recent SCOTUS decisions show the Court is taking a broad content-based view, which triggers heightened scrutiny. In *Iancu v. Brunetti*, the Court recently held the Lanham Act's prohibition on registration of "immoral[ ] or scandalous" trademarks

violates the First Amendment. No. 18-302 (Decided June 24, 2019). The Court held that a viewpoint-based restriction need not be "substantially" overbroad to violate the First Amendment; rather, the finding of content bias essentially ends the analysis. *Id.* at *10 ("But, to begin with, this Court has never applied that kind of analysis [substantially overbroad] to a viewpoint-discriminatory law."). *Brunetti* recognized the impermissible viewpoint discrimination that results from a content-based statute and rejected the Government's proposal to narrow the law because doing so would result in fashioning an entirely new law.

> "The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose 'mode of expression,' independent of viewpoint, is particularly offensive. Brief for Petitioner 28 (internal quotation marks omitted). It covers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one."

Id. at *9.

In *Matal v. Tam*, SCOTUS declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[ ], living or dead." 137 S.Ct. 1744 (2017). The Court noted its finding of viewpoint bias ended the matter. It did not matter whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. *Brunetti*, at *10 (citing *Tam*). "Once we have found that a law 'aim[s] at the suppression of 'views, why would it matter that Congress

could have captured some of the same speech through a viewpoint-neutral statute?" *Id.* at *10-11 (citing, *Tam*, opinion of Kennedy, J.) (slip op., at 2)).

The plain language of section 617.261 clearly renders is a content-based regulation. The section does not ban dissemination of all photographs. It only bans those subsets of photos the legislature deems immoral. The statute is the very definition of a content-based regulation. One must look at the content of the disseminated material to determine whether it falls under the statute's restrictions. Simply put, there is no support to apply an intermediate level of scrutiny analysis to section 617.261.

Adopting Appellant's arguments that section 617.261 is an invasion of privacy still renders the statue an impermissible content-based regulation because it does not prohibit *all* invasions of privacy but, rather, only those alleged invasions Appellant deems reprehensible.

To survive strict scrutiny, the Government has the burden of showing that a content-based regulation of expression is narrowly drawn to serve a compelling government interest. *See, Brown*, 564 U.S. at 799; *Bank v. Belotti* 435 U.S. 765 (1978). A regulation is "narrowly drawn" if it uses the least restrictive means of achieving the government interest. *Playboy Entm't Grp., Inc*., 529 U.S. at 813.

It is beyond dispute that section 617.261 implicates the First Amendment and has a broad sweep. Appellant must therefore first establish the statute's First Amendment infringement serves a compelling state interest. *Crawley*, 819 N.W.2d at 125 (Stras, J. dissenting) (citing *Citizens United v. FEC*, 558 U.S. 310, 322 (2010)) ("It requires the State to prove that [the statute at issue] furthers a compelling government interest and is narrowly

tailored to achieve that interest."). Second, the state must provide evidence that the classification is drawn with precision—that it does not exclude too many people who should not and need not be excluded. *See, In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 135 (Minn. 2014) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990)) ("To survive strict scrutiny, a statute can be neither overinclusive nor underinclusive; rather, it must be 'precisely tailored to serve the compelling state interest.'"). And, third, the state must prove that there are no other reasonable ways to achieve its goal with a lesser burden on the constitutionally protected interest. *Richardson v. Ramirez*, 418 U.S. 24, 78 (1974) (Marshall, J. dissenting). Appellant cannot meet any of these burdens.

The government's interest in restricting the distribution of obscenity has been recognized by the Supreme Court as both compelling and legitimate when the aim is to curb the significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *See, Miller*, 413 U.S. at 18-19. By contrast, the government-asserted interests in revenge porn legislation is the protection of personal privacy of the subjects rather than the sensibilities of viewers. This is yet another reason why section 617.261 cannot be characterized as prohibiting the distribution of obscenity. The question for this Court becomes whether that interest is compelling, and, if so, whether section 617.261 is narrowly tailored through usage of the least restrictive means to achieve this interest.

Appellant attempts to convince this Court that section 617.261 is narrowly tailored because the context of the material disseminated somehow renders it obscene. Appellant's remarkable arguments invoke a heretofore unrecognized category of unprotected speech

and redefine seminal obscenity caselaw. Appellant's arguments are without support and must fail.

The Supreme Court made clear that new categories of exempted speech will not be recognized. It has also rejected the attempt to "shoehorn" certain types of speech into an unprotected group like obscenity. *Brown*, 564 U.S. at 792-94 (rejecting suggestion that violent video games can be included within category of obscenity because violence is distinct from obscenity that Constitution permits to be regulated).

Privacy can constitute a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner. *See*, *Phelps*, 562 U.S. at 459; *see also, Ex parte Thompson*, 442 S.W.3d 325, 348 (Tex. Crim. App. 2014) (holding, "Substantial privacy interests are invaded in an intolerable manner when a person is *photographed without consent* in a private place, such as a home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt.") (emphasis added). These acts are already prohibited under Minn. Stat. § 609.746. In the context of revenge porn legislation, *VanBuren* defined a substantial invasion of privacy as first requiring an intimate relationship between the disseminator and the subject.

The plain language of section 617.261 does not lend itself to a narrowing interpretation that it only reaches substantial invasions of privacy. Moreover, the statute's plain language makes clear it is not limited to private speech, nor can such a narrowing interpretation be applied. The broad sweep of the statute defies these arguments.

Statements on matters of purely private concern do not fall within a generally unprotected category of speech, such as obscenity or fighting words. Speech on matters of

private concern still enjoys First Amendment protection. Adopting Appellant's argument that regulation of private speech is only subject to intermediate scrutiny would give government discretion to punish most of what individuals say and disseminate. This Court should not endorse this dangerous and absurd outcome.

Appellant has not shown how section 617.261 is precisely tailored to its purported interests. The statute is not narrowly drawn because the plain language punishes dissemination by an actor who did not know of an expectation of privacy or can be said to have substantially invaded one's privacy by sharing a photograph. The overbreadth problems remain, even if this Court were to characterize section 617.261 as content-neutral.

Nor is Appellant able to show that less restrictive alternatives to section 617.261 do not exist or accomplish its purported goals. Civil remedies have long been the favored forum of redress for harm caused by speech. The Supreme Court has noted a preference for civil remedies over criminal sanctions in areas involving speech.

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.

Garrison v. Louisiana, 379 U.S. 64, 69-70, citing Model Penal Code, Tent. Draft No. 13, 1961, s 250.7, Comments, at 44.

And civil remedies for "revenge porn" already exist in Minnesota, including civil torts for invasion of privacy, intrusion upon seclusion, appropriation, and publication of private facts. Of note, the torts are limited to situations where facts are communicated to the public at large. *Bodah v. Lakeville Motor Express, Inc*., 663 N.W.2d 550, 553-54 (Minn. 2003). Communications to a small circle of friends are expressly excluded even from civil liability yet are criminalized under 617.261.

Parties can also seek civil damages in a lawsuit for nonconsensual dissemination under section 604.31. Curiously, that section requires knowledge of a reasonable expectation of privacy, rather than the negligent knowledge standard in section 617.261. Individuals can also seek an injunction under section 604.31, subd. 4. Individuals also have the option of seeking a harassment restraining order to prevent or stop dissemination, despite Appellant's claims that section 617.261 is not a form of harassment. See, Appellant's Brief at 28 (arguing section 617.261 is an invasion of personal privacy and *not* a form of harassment).

Appellant concedes civil remedies are available to alleged victims, that the remedies reach the purported intent of section 617.261 and are less restrictive than the statute. See Appellant's Brief at 48. Yet, Appellant makes several conclusory statements as to why civil remedies are insufficient to address its purported concerns of revenge porn legislation.

Even if this Court holds a right to privacy is a substantial or even compelling state interest for purposes of analyzing the constitutionality of section 617.261, it is clear the statute is not sufficiently narrow to achieve the interest. The statute is overbroad for the reasons argued in Section II above. Additionally, the purported interests to be protected –

interference with privacy and dissemination of obscenity and child pornography – are already protected elsewhere in our criminal statutes. Finally, Appellant cannot overcome the fact that numerous civil remedies already exist. It is difficult to think of another criminal statute that offered an alleged victim so many other viable, effective, lawful, and less restrictive alternatives than section 617.261. In order to survive a strict scrutiny analysis, section 617.261 must be the *least restrictive alternative* to remedy the purported government interest. Section 617.261 cannot pass this rigid test.

The burden on speech is too great "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U.S. at 874 (1997). The arguments asserting a purported privacy interest must fail because the plain language of section 617.261 is not narrowly tailored to only reach situations involving substantial privacy interests and intolerable invasions. Appellant has not shown why available less restrictive alternatives would be at least as effective in achieving the purported interests of section 617.261.

For these reasons, this Court must declare Section 617.261 an impermissible content-based restriction in violation of the First Amendment.

IV. Section 617.261 is unconstitutionally vague on its face

The Due Process Clauses of the United States Constitution and the Minnesota Constitution prohibit vague statutes. *State v. Christie*, 506 N.W.2d 293, 301 (Minn. 1993). A statute, "May be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S.

352, 358 (1999)). A criminal statute must "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . . ." *Morales*, 527 U.S. at 56 (citing *Kolender*, 461 U.S. at 357).

"Where a statute imposes criminal penalties, a higher standard of certainty of meaning is required." *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). "Persons of common intelligence must not be left to guess at the meaning of [a statute] nor differ as to its application." *City of Edina v. Dreher*, 454 N.W.2d 621, 622 (Minn. App. 1990). "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

Vague statutes encourage arbitrary enforcement. "[W]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358.

Even if section 617.261 could be narrowly interpreted to only apply to the dissemination of obscenity (it cannot be, for the reasons argued herein), ordinary persons of common intelligence would not understand a photograph of a partially exposed nipple to constitute obscenity because not all nudity is obscenity. Section 617.261 punishes circumstances in which an individual could not know that the content and character of the disseminated material appealed to the prurient interest or offended the viewer's sensibilities, or even that the material contained nudity.

Section 617.261 sets up for litigation too many situations that will arise where a partner texts a nude or semi-nude photo of him or herself to a partner and partner shows the photo to a third party. Should the partner "reasonably have known" that the sender did not consent to the "dissemination," or "reasonably should have known" that the sender had a reasonable expectation of privacy? And what is the third party expected to know? The third party faces criminal prosecution upon re-sharing the photo. The negligence standard of section 617.261 creates enormous due process issues. It cannot be said that the partner here, or the individuals in the examples cited herein, would have fair warning that their conduct was criminal.

The Supreme Court recently addressed this concern in *Elonis*, reversing a conviction stemming from an online communication of a true threat. *See, Elonis v. U.S*, 135 S.Ct. 2001 (2015). The federal statute at issue did not require a heightened *mens rea* element, but rather, permitted prosecution if a "reasonable person" would understand a defendant's words as a threat. *Id*. The Court made it clear that a defendant cannot be convicted under a statute that encroaches on the First Amendment based on a standard of reasonableness. *Id*.

The Supreme Court further noted that it does not regard "mere omission from a criminal enactment of any mention of criminal intent" as dispensing with such a requirement. *Id.; Morissette v. United States*, 342 U.S. 246, 250 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id*. at 252. The "general rule" is that a guilty mind is "a necessary element in the

indictment and proof of every crime." *United States v. Balint*, 258 U.S. 250, 251 (1922). A defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." *Elonis*, 135 S.Ct. 2001 citing *Staples v. United States*, 511 U.S. 600, 608, n. 3 (1994). In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement "would fail to protect the innocent actor," the statute "would need to be read to require . . . specific intent." *Elonis*, 135 S.Ct. 2001 at 9–13.

As in *Hensel* and *A.J.B.*, the mens rea element of section 617.261 imposes criminal punishment for negligent acts. The statute violates the general disfavor of a negligent standard.

Section 617.261's inability to be limited to obscenity also contributes to its due process violations. If this Court were to hold section 617.261 punishes obscenity, the Court would thereby apply, sua sponte, community standards of decency for the innumerable communities across the state rather than letting the individual community members make that determination as triers of fact. The statute would do nothing to restrict the state from arbitrarily deciding to prosecute dissemination of partial nudity without regard to whether the image or media rises to the level of obscenity as determined by triers of fact.

For these reasons, this Court must declare section 617.261 unconstitutionally vague.

V. The district court clearly abused its discretion in failing to grant Respondent's motion for a sentencing departure

The decision whether to depart from the presumptive guidelines sentence rests within the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). A sentencing court has no

discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The court must impose the presumptive guideline sentence unless "substantial and compelling circumstances" warrant a departure. *Id*.; Minn. Sent. Guidelines § II.D. This court reviews "the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2018).

In determining whether a mitigated dispositional departure is appropriate, the court should focus on each defendant individually and decide whether the presumptive sentence would be best for a particular defendant and for society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983); *State v. Allen*, 706 N.W.2d 40, 45 (Minn. 2005); *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981). A district court may order a mitigated dispositional departure by imposing probation instead of an executed sentence when a defendant is amenable to probation or treatment. *Trog*, 323 N.W.2d at 31. Amenability to probation includes several factors such as age, prior record, remorse, cooperation, attitude in court, and support of family and friends. *Id*.

Courts have noted that in these cases, "particular" means "exceptional" or "distinctive." *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014). Requiring a defendant to be particularly amenable to probation ensures that the defendant's "amenability to probation distinguishes the defendant from most others and truly presents the 'substantial and compelling circumstances' that are necessary to justify a departure." *Id*.

Five-and-a-half of Respondent's points came from offenses that occurred 17 and 20 years prior to this incident. The majority of those points effectively resulted from a three-week stretch of behavior stemming from June 15, 1995 to July 7, 1995. Doc ID# 37 at 2-3. Appellant accumulated an additional point from an incident in 1999 for possession of contraband while incarcerated in New Mexico. *Id*. at 3. Appellant received an additional custody status point because this incident occurred while Respondent original term of probation on a 2012 Ramsey County Criminal Damage to Property case had not expired. This current incident occurred *after* Respondent had been discharged from probation on that file, and less than six months prior to expiration. *Id.* at 3.

The unique nature of Respondent's criminal history score distinguishes him from similarly situated offenders and provides a substantial and compelling reason to warrant departure. Elevated criminal history scores typically result from oft-repeated criminal behavior over the course of several years. Respondent's score effectively comes from a three-week stretch in his life when he was 21 years old and from an incident that occurred after discharge from probation. While Respondent's criminal history score may stand out on paper, his score is distinguishable from similar elevated scores. The district court abused its discretion in failing to recognize this substantial and compelling factor.

Respondent's Pre-Sentence Investigation report indicated a strong social support system, including siblings, children, and grandchildren. Several letters written on Respondent's behalf were provided to the district court. These letters spoke to Respondent's relationship with his family and demonstrated a strong support system. DOC ID# 37. This factor favors an ability to succeed on probation.

There is nothing categorically more severe about Respondent's case or charge that would have otherwise resulted in a commitment to the commissioner of corrections.

The district court clearly abused its discretion when it imposed the executed guideline sentence.

CONCLUSION

The Minnesota Supreme Court consistently affords greater protection to the Minnesota Constitution. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (departing from U.S. Supreme Court precedent about when a seizure occurs); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (refusing to apply *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) by holding Minnesota police need objective individualized articulable suspicion before making an investigative traffic stop).

Not only is section 617.261 facially overbroad, but it discriminates on the basis of content. Content-based restrictions on speech are presumptively invalid. The burden is on the state to overcome this founding constitutional principal. Section 617.261 falls well short of the significant standards required of content-based criminalization of speech. Several less-restrictive means are available that do not run afoul of the First Amendment**.**

For all of the reasons argued herein, Respondent requests this Court hold Minn. Stat. § 617.261 facially unconstitutional an unable to be remedied by a narrowing interpretation or severance.

Respectfully Submitted,

ARECHIGO & STOKKA, P.A.

Dated: May 13, 2020

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