No. _____

In the Supreme Court of the United States

MICHAEL ANTHONY CASILLAS,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment allow a state to criminalize protected speech by means of a statute aimed at prohibiting the nonconsensual dissemination of sexual images when that statute lacks an intent-to-harm requirement and employs a negligence *mens rea*?

The Minnesota Supreme Court upheld a Minnesota statute under a strict scrutiny analysis despite the Court's holding that the statute prohibits more than obscenity.

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JURISDICTION

The Opinion of the Minnesota Supreme Court was issued on December 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See Mills v. Alabama*, 384 U.S. 214, 217-18 (1966); *accord R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution Provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech or of the press.."

Section 617.261 of the Minnesota Statutes (Pet.App. 73a-77a) states in relevant part as follows:

> 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.

STATEMENT OF THE CASE

Respondent filed a state criminal complaint against Petitioner on November 28, 2017 alleging a sole count of Nonconsensual Dissemination of Private Sexual Images in violation of Minn. Stat. § 617.261. Petitioner filed a pre-trial motion to dismiss the complaint, arguing Minn. Stat. § 617.261 was facially overbroad and an unconstitutional content-based restraint on speech in violation of the First Amendment. The arguments were submitted by written brief to The Honorable Kathryn D. Messerich, Judge of Dakota County District Court.

Judge Messerich issued Findings of Fact, Conclusions of Law, Order and Memorandum on June 13, 2018 denying Petitioner's motion. Pet.App. 65a-72a. The district court appeared to find that the statute implicates the First Amendment given its analysis in its Memorandum, but ultimately concluded that, "The statute at issue regulates obscenity. There is no argument that it 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." Pet.App. 70a. The district court further

held that "[A]ny degree of overbreadth is not sufficiently substantial so as to find that it is unconstitutional on its face." Pet.App. 71a. Based on its rulings, the district court did not engage in a strict scrutiny analysis.

Petitioner's case proceeded to a stipulated court trial pursuant to Minn. R. Crim. P. 26.01, subd. 4 before The Honorable Jerome A. Abrams on January 7, 2019. Judge Abrams found Petitioner guilty of Nonconsensual Dissemination of Private Sexual Images.

On December 23, 2019, the Minnesota Court of Appeals reversed, holding that Minn. Stat. § 617.261 is facially overbroad in violation of the First Amendment to the United States Constitution, and that the constitutional infirmity could not be remedied through a narrowing construction. The Minnesota Court of Appeals held, and Respondent conceded the issue, that Minn. Stat. § 617.261 restricts expressive conduct. 938 N.W.2d 74, 79.

Relying on *Miller v. California*, *United States v. Stevens*, and *Connick v. Myers*, the Minnesota Court of Appeals rejected Respondent's arguments that Minn. Stat. § 617.261 does not implicate the First Amendment because it only regulates obscenity, or, alternatively, is a lawful privacy regulation. *Id.* at 82-83. The Minnesota Court of Appeals noted privacy is not a recognized category of unprotected speech and the court had no authority to create a new category of speech. *Id.* 83.

The Minnesota Court of Appeals held the statute applies to a single intentional dissemination of an image of another person whose intimate parts are partially exposed. *Id.* at 81. The Court of Appeals noted the statute's negligence mens rea only required

that the actor "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. The Court of Appeals held that the negligence mens rea provides for conviction under the statute "even if he [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. The statute "does not require proof that the disseminator caused or intended a specified harm. Instead, the statute enhances a criminal dissemination to a felony offense if . . . 'the actor disseminates the image with intent to harass the person depicted in the image." *Id*. "Thus, the statute's harm-causing and intent-to-harm elements do not limit the expressive conduct proscribed by the statute; they merely determine the level of criminality assigned to expressive conduct within the statute's reach." *Id*. The statute "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." *Id*.

The Court of Appeals held the statute's lack of an intent-to-harm element coupled with a negligence mens rea caused the statute to reach beyond the state's harm-preventing policy interest. *Id*. at 84-85.

The Court of Appeals declined Respondent's invitation to rewrite the statute to narrow its reach holding doing so would require performing "plastic surgery upon the face of the statute" and would seriously invade the legislative domain. *Id.* at 91; citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *United States v. Stevens*, 559 U.S. 460, 480 (2010)

The Minnesota Supreme Court reversed the Minnesota Court of Appeals, holding that while the reach of the statute extended beyond dissemination of obscenity, the statute survived strict scrutiny.

Relying on U.S. Supreme Court opinions in *Miller, R.A.V. v. St. Paul*, *Stevens,* and *Brown v. Ent. Merchs. Ass'n*, the Minnesota Supreme Court rejected Respondent's argument that Minn. Stat. § 617.261 is limited to a prohibition on obscenity and declined to create a new category of unprotected speech loosely classified as 'privacy.' Pet.App. 7a-13a.

The Minnesota Supreme Court failed to address the holding of the Minnesota Court of Appeals that the law was facially overbroad. Instead, the Minnesota Supreme Court applied a strict scrutiny analysis and held Minn. Stat. § 617.261 serves a compelling governmental interest in protecting the "broad and direct threat" to the health and safety of the citizens of Minnesota. The Court pointed to *Hill v. Colorado* for support. 530 U.S. 703 (2000).

The Minnesota Supreme Court held the intentional dissemination requirement of the law resulted in a "specific intent requirement [that] further narrows the statute and keeps it from target[ing] broad categories of speech." Pet.App. 21a.

The Minnesota Supreme Court rejected Petitioner's argument that the law is not narrowly

drawn because less restrictive remedies are available in the form of civil claims, opining that criminal charges are preferable because a criminal defendant enjoys greater procedural safeguards and a victim's identity may become publicized in a civil suit. Pet.App. 23a, FN10.

The Minnesota Supreme Court held the law was one of the rare content-based cases that survived strict scrutiny. Pet.App. 23-24a. The Minnesota Supreme Court pointed to *Burson v. Freeman*, 504 U.S. 191 (1992) and *Williams-Yulee v. Florida Bar*, 575 U.S. __ (2015) as other examples of a content-based restriction surviving strict scrutiny.

Turning to Petitioner's overbroad challenge, the Minnesota Supreme Court again relied on its conclusion that Minn. Stat. § 617.261 passed strict scrutiny and the Court thus refused to address Petitioner's overbreadth challenge. Pet. App. 24a-28a. The Court determined that if the statute survives strict scrutiny then all of the statute's applications are constitutional and it therefore cannot be overbroad. Pet.App. 26a. The Minnesota Supreme Court again cited to *Burson's* lack of an overbreadth analysis for the proposition that an overbreadth analysis is unnecessary if the statute satisfies strict scrutiny. Pet.App. 27a. Perhaps somewhat unsure of its opinion, the Court acknowledged the unsettled relationship between overbreadth and strict scrutiny. Pet.App. 24-25a citing Marc Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and "Scrutiny" Analysis in the Law of Freedom of Speech,* 11 Elon L. Rev. 95, 109 (2019).

REASONS FOR GRANTING THE WRIT

This petition should be granted because the Minnesota Supreme Court's choice to uphold a statute that chills speech based on content misapplied this Court's First Amendment precedent and deepened the split of authority among various state courts.

Forty-six states have enacted a version of a criminal "revenge porn" law.[1] Appellate courts in six states (including Minnesota) have addressed their respective laws, reaching conflicting conclusions. *See*, *State v. VanBuren*, 214 A.3d 791 (Vt. 2019) (holding law content-based but upholding law under strict scrutiny); *Ex Parte Jones*, ___ S.W.3d ___, 2018 WL 2228888 (Tex. Ct. App. May 16, 2018), *rev. granted*, No. PD-0552-18 (Tex. Ct. Crim. App. July 25, 2018) (invalidating law under strict scrutiny and as overbroad due to lack of specific intent to harm and lack of knowledge of privacy requirements); *People v. Iniguez*, 202 Cal. Rptr. 3d 237 (Cal. App. Dept. Superior Ct. March 25, 2016) (upholding law under strict scrutiny because elements of specific intent to cause serious emotional distress and knowledge of expectation of privacy sufficiently narrowed the law)*; People v. Austin*, 2019 IL 123910 (Ill. 2019) *cert. denied* (upholding law under intermediate scrutiny analysis); *State v. Culver*, 918 N.W.2d 103, 107 (Wis. Ct. App. 2018) (upholding the law on overbreadth challenge in interpreting the law to apply to images captured with consent, intended by the depicted person to remain private, the publisher must know of

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

expectation of privacy, and must publish without consent).

No state law as broad as Minn. Stat. § 617.261 has survived a constitutional challenge without being limited in scope by the state court. The Minnesota Supreme Court failed to limit the scope of 617.261 despite the law's readily apparent lack of any intent to harm elements or specific knowledge of privacy or nonconsent of dissemination. Minnesota's law in this area is in the extreme minority of state laws that were passed without requiring a form of specific intent to harm or explicit knowledge of privacy and nonconsent. *See generally* Cyber Civil Rights Initiative, *46 States + DC + One Territory Now Have Revenge Porn Laws*, https://tinyurl.com/z8hpzv2. Minnesota's law is an outlier in this area.

This case presents different questions than those presented in *Austin*. *Austin* asked this Court to review the level of scrutiny applied by a state court. This case asks this Court to determine whether a content-based state law that criminalizes protected speech under a negligence mens rea without employing the restraints of specific intent to harm can survive a strict scrutiny analysis or an overbroad challenge. This case also presents an opportunity for this Court to clarify the relationship between the application of strict scrutiny and overbroad challenges.

State appellate courts reviewing similar laws have applied differing standards of analysis and have reached different legal conclusions. It is an appropriate time for this Court to address the issues presented by this case.

I. The Minnesota Supreme Court's Decision Conflicts with this Court's First Amendment Jurisprudence.

A. The First Amendment protects private speech

The Minnesota Supreme Court held Minn. Stat. § 617.261 only encompasses private speech. Pet.App. 23a. This Court has repeatedly corrected lower courts when a holding impermissibly attempts to rely on a classification of private speech as a basis to restrict protected speech. *See*, *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."); *Id*. at 479-80 ("[e]ven wholly neutral futilities" are protected "as fully as" high-minded discourse); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("[O]f bedrock importance is the principle that the First Amendment's protections extend beyond expressions 'touching upon a matter of public concern."); *Consolidated Edison Co. v. Public Svc. Comm'n*, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."). Online speech is equally protected under the First Amendment. *See, Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997) (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. Ass'n.*, 564 U.S.786, 790 (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").

Petitioner recognizes that this Court has carved out areas where the First Amendment analysis "turns largely on whether th[e] speech is of public or private concern." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). But that public concern test is "the exception[ ] rather than the rule." Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. U. L. Rev. 731, 785 (2013). "It has surfaced in three contexts only: public employee speech and suits for defamation and intentional infliction of emotional distress." *Id.*

Laws such as Minn. Stat. § 617.261 that restrict dissemination of photos and videos, including those of public or political figures, cannot be found to be limited to private speech in all applications. Photographs and visual recordings are inherently expressive and therefore protected under the First Amendment. *See*, *Kaplan v. California*, 413 U.S. 115, 119 (1973). Photos and videos are protected under the First Amendment "until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution." *Id.* at 119-20.

Unlike the Illinois Supreme Court in *Austin*, the Minnesota Supreme Court did not base its holding that the law survived strict scrutiny on a finding that the law only reached private speech. It could not, because the Court likely would have imposed an intermediate scrutiny analysis as the *Austin* court did.

The Minnesota Supreme Court's application of strict scrutiny indicates the court recognized the law reaches more than private speech, and indeed that the law is a content-based regulation.

B. Minn. Stat. § 617.261 is not the rare content-based law that survives strict scrutiny

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. Minn. Stat. § 617.261 prohibits important public and political discourse, such as photos stemming from a politician's extramarital relationship. Such photos are of interest to voters and extend beyond mere private speech. 617.261 leaves to state prosecutors to determine whether dissemination of such photos is in the public interest or touches on a matter of public concern because 617.261 does not define these terms. Consequently, the law stands to censor speech on matters of political concern. This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill v. Alabama*, 310 U.S. 88 (1940). The statute at issue here does not fall within the narrow exceptions to the general prohibition against subject matter distinctions.

The Minnesota Supreme Court cited to this Court's opinions in *Edison*, *Greer*, and *Lehman* to support its implied conclusion that 617.261 is the rare lawful content-based regulation. This reliance was misplaced. This Court's opinions in these cases

stand for the general proposition that government may prohibit speech based on its content if the speech stands to disrupt the legitimate governmental purpose of the property where the speech is occurring. *Greer v. Spock*, 424 U.S. 828 (1976) (lawful prohibition of political speech on military base); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (lawful prohibition of political ads on city transit); *Consolidated Edison Co.*, 447 U.S. at 538 (regulation prohibiting inclusion in monthly bills of inserts discussing matters of public policy an impermissible content-based regulation because inclusion of the inserts does not prevent the function of public utility companies). 617.261 is easily distinguishable from *Greer* and *Lehman* as it has no relation to the function of government property.

This Court has made it clear that content-based regulations are presumptively unconstitutional, and a state must justify such a regulation by showing the regulation is either limited to an unprotected category of speech or is necessary to protect a governmental function of property.

Recent decisions show this Court is taking a broad content-based view. This Court struck down the Lanham Act's prohibition on registration of "immoral[ ] or scandalous" trademarks in *Iancu v. Brunetti*, holding that a viewpoint-based restriction need not be "substantially" overbroad to violate the First Amendment; rather, the finding of content bias essentially ended the analysis. 139 S.Ct. 2294, 2302 (2019) ("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 2301-02.

This Court again declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[ ], living or dead" in *Matal v. Tam* for the same reasons given in *Brunetti*. 137 S.Ct. 1744 (2017).

The plain language of section 617.261 clearly renders it an impermissible content-based regulation. One must look at the content of the disseminated material to determine whether it falls under the statute's restrictions. The section does not ban dissemination of all photographs. It does not draw the line at obscene photos. It only bans those subsets of photos the legislature deems immoral. The statute

is the very definition of an impermissible content-based regulation.

The Minnesota Supreme Court effectively held 617.261 to be a content-based restriction of speech and determined the law to be one of the rare content-based regulations of speech that passed strict scrutiny without identifying proper support for its holding. While Respondent advocated for a compelling interest in the form of protection of personal privacy, the Minnesota Supreme Court manufactured its own purported compelling state interest in the form of the protection of the health and safety of Minnesota citizens. The court's reliance on *Hill*, *Burson*, and *Williams-Yulee* was misplaced.

The Minnesota Supreme Court's purported compelling interest is not on par with the interest to protect access to safe health care in *Hill*. And *Hill* addressed a content-neutral regulation and found that interest to be a significant government interest, not compelling as required here. *Burson* does not support the Minnesota Supreme Court's opinion because *Burson* addressed a content-based restriction in the context of limiting the fundamental rights to political discourse and to vote and held that, while the regulation was a content-based restriction on political speech, it advanced a compelling interest in preventing voter intimidation. *Williams-Yulee* fails to support the Minnesota Supreme Court's opinion because that case addressed the compelling government interest in preserving the public confidence in the integrity of its judiciary. Taken together, *Hill*, *Burson*, and *Williams-Yulee* establish that protection of fundamental rights may support a compelling government interest in regulating speech

based on content. 617.261 does not serve to protect such a compelling fundamental interest.

Nor did the Minnesota Supreme Court explain how 617.261 stands to jeopardize the health and safety of all Minnesota citizens. The court offered no factual support for its conclusions that the health and safety of Minnesotans is jeopardized without the purported protections of 617.261. Instead, the court relied on emotional rhetoric and speculation. The Minnesota Supreme Court failed to justify its holding that 617.261 serves the type of compelling government interest that this Court requires of a content-based regulation of speech.

The Minnesota Supreme Court's compelling interest theory would allow the state to punish saying mean things about someone under the guise of posing a broad threat to the health or safety. The state could criminalize disclosing a spouse's extramarital affair to a third party. Does such disclosure pose a broad threat to the cheating spouse's health or safety? The potential to restrict protected speech on a finding that such speech jeopardizes health or safety is immensely broad. The court's improper compelling interest is a fatal flaw to the remainder of the court's strict scrutiny analysis, which is why the court had to conduct a separate overbroad analysis.

The Minnesota Supreme Court also failed to show the content-based restriction of 617.261 is sufficiently narrow to survive strict scrutiny. A regulation is "narrowly drawn" if it uses the least restrictive means of achieving the government interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The Minnesota Supreme Court conflated intentional dissemination with a specific intent to harm limiting element and held the intentional

dissemination requirement resulted in a "specific intent requirement [that] further narrows the statute and keeps it from target[ing] broad categories of speech." Pet.App. 21a. This holding does nothing to limit the facial reach of 617.261. An intentional dissemination of a non-obscene image – including an image of public concern – is still punishable under the law despite a lack of intent to harm or a resulting causation of harm.

The Minnesota Supreme Court's rationale fails to recognize a number of criminally innocent scenarios, including circumstances where one viewing an image described in 617.261 on a publicly available medium is expected to reasonably know the person depicted did not consent to dissemination or that the image was captured under circumstances in which the person had a reasonable expectation of privacy. The viewer stands to be prosecuted based on an individual prosecutor's subjective belief that the viewer-turned-disseminator should have recognized a purported expectation of privacy.

Or an artistic photographer who creates an anthology of his images of nudes, as well as the book's publisher, seller, or librarian, all stand to be prosecuted under 617.261. It is unlikely that the exceptions in section 617.261, subd. 5(4) would apply to this situation. There is no way for a bookseller or librarian to know whether the subjects consented or whether the image was made in a commercial setting. A photojournalist who posted images of victims of war or natural disaster 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 husband was sharing the photo on social media or did not give consent to share the photo. Should the husband reasonably have known his wife did not consent to the dissemination?

Or what about a boyfriend and girlfriend on vacation? Girlfriend asks boyfriend to take her picture lying on a secluded, private 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? 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? There was certainly no intent to harm, but that does not matter under section 617.261. The act of an intentional dissemination suffices. Boyfriend can be forced to stand trial on felony prosecution.

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 stands to be prosecuted for re-disseminating the photo. Online dissemination under these

scenarios happens countless times every day. Can every instance be prosecuted? Should it? 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. Nevertheless, the Minnesota Supreme Court determined the statute was narrowly tailored.

The Minnesota Supreme Court's Opinion failed to correctly characterize and address the law's use of a negligence mens rea and lack of a specific intent to harm in reaching its narrowly tailored conclusion. This Court has expressed that where a general requirement that a defendant acted knowingly fails to protect the innocent actor the statute should be read to require specific intent. *See, Elonis v. U.S*, 135 S.Ct. 2001 (2015) (holding that a defendant cannot be convicted under a statute that encroaches on the First Amendment based on a standard of reasonableness); *Morissette v. United States*, 342 U.S. 246, 250, 252 (1952) (reaffirming the basic principles that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty); *United States v. Balint*, 258 U.S. 250, 251 (1922) (holding the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime.").

The Minnesota Supreme Court also ignored the fact that Minnesota law provides for civil remedies for alleged victims of dissemination of nude photos in Minn. Stat. § 604.31. The court offered no other explanation for its holding that less restrictive alternatives are available, other than offering a subjective opinion that criminal charges are preferable because a criminal defendant enjoys greater procedural safeguards and a victim's identity

may become publicized in a civil suit. Pet.App. 23a, FN10. The court completely ignored this Court's preference for civil remedies for alleged harm caused by speech. *See*, *Garrison v. Louisiana*, 379 U.S. 64, 69-70 (1964) ("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.").

Content-based regulations are presumptively invalid, and it is rare that a regulation restricting speech because of its content will ever 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,* 564 U.S. at 799. 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." *Stevens*, 559 U.S. at 470.

Just as legislatures and courts are not free to create new categories of unprotected speech, courts are not free to declare new categories of permissible content-based regulations of speech simply because the court does not like the content of the speech.

Minn. Stat. § 617.261 is not the rare content-based restriction of speech that survives strict scrutiny. The Minnesota Supreme Court erred in so holding. This Court should grant review to correct this gross misapplication of First Amendment law.

C. The relationship between strict scrutiny and facial overbroad challenges

The Minnesota Supreme Court refused to conduct an overbroad analysis despite recognizing the unsettled relationship between application of strict scrutiny in the context of a facial overbreadth challenge, relying in part on *Burson*. *Burson* did not raise an overbreadth challenge. *Burson* addressed a content-based challenge to a regulation. It made sense for this Court to engage in a scrutiny analysis in *Burson* given the issues presented. But what if a lower court's strict scrutiny analysis is wrong? Overbreadth, if raised, must be addressed separate from a content-based strict scrutiny analysis because an overbreadth challenge views a statute through a different lens. A finding of overbreadth implies a substantial restriction on protected speech and requires a court to determine whether the reach can be constitutionally narrowed or whether troubling language can be severed. The statute must be struck if the answers to those questions are no. The danger of the Minnesota Supreme Court's opinion is magnified when considering improper application of a purported compelling government interest renders an unconstitutionally overbroad statute constitutional.

States cannot pass legislation that improperly restricts speech based on its content, or that improperly prohibits a substantial amount of protected speech. Strict scrutiny and overbreadth are separate principles of First Amendment law that require separate application. The Minnesota Supreme Court erred in refusing to determine whether 617.261 is overbroad in violation of the First Amendment.

The Minnesota Court of Appeals succinctly addressed Petitioner's overbreadth challenges and held 617.261 to be overbroad in a number of its applications. Pet.App. 56a-60a. The Minnesota Supreme Court declined to address this issue. Petitioner's only redress lies with this Court.

The decision of the Minnesota Supreme Court sets a dangerous precedent for the future of First Amendment cases in Minnesota and stands to provide an unlawful roadmap for other states that have not yet addressed their similar statutes. This Court should clarify the relationship between overbroad challenges and strict scrutiny and provide guidance for lower courts**.** Must one analysis occur first? Does a finding of one preclude analysis of the other? Similar confounding opinions are bound to be issued by lower courts unless this Court clarifies the issue.

II. The Minnesota Supreme Court's Holding Expands the Split of Authority Among State Appellate Courts.

The decision below further divides the split of authority among state appellate courts that have addressed similar laws.

State appellate courts from Vermont, California, and Texas have found similar laws to be content-based and employed strict scrutiny. Vermont and California held their laws survived strict scrutiny on account of elements of specific intent to harm and of requiring knowledge that the subject had an expectation of privacy. The courts held such elements sufficiently narrowed the laws. Vermont went a step further and read in a requirement that the parties involved in the dissemination must have been in a

sufficiently intimate relationship. *VanBuren*, 214 A.3d at 821.

Conversely, the Texas appellate court in *Ex Parte Jones* invalidated its 'revenge porn' law under strict scrutiny due to a lack of the specific intent to harm and knowledge of privacy requirements relied on by the California and Vermont courts. The court also held 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.

Wisconsin upheld its 'revenge porn' law on an overbroad challenge in *Culver* in interpreting the law to apply to images captured with consent, intended by the depicted person to remain private, and requiring the publisher to know of the subject's expectation of privacy, and to publish the image without the subject's consent. 918 N.W.2d at 809.

Illinois took an entirely different approach in its analysis and upheld its state 'revenge porn' law under an intermediate scrutiny analysis, holding that the offense elements "limit[] the statute's application to the types of personal, direct interactions or communications that are typically involved in a close or intimate relationship. 2019 IL 123910. Of the six states to have reviewed 'revenge porn' legislation, Illinois is the only court to not have employed a strict scrutiny or overbroad analysis.

The opinion of the Minnesota Supreme Court was the first to uphold a law of this nature under a strict scrutiny analysis without requiring limiting elements of specific intent to harm, knowledge of an expectation of privacy, knowledge of nonconsent to dissemination, or requiring a preexisting relationship between the subject and disseminator. The alarming

facial overbreadth of Minn. Stat. § 617.261 stands as an outlier amongst the six state appellate court opinions.

This petition presents this Court with the first opportunity to review application of a lower court's strict scrutiny analysis in the context of a 'revenge porn' law. It also presents this Court with an opportunity to clarify whether the general "health and safety" of a state's citizenry qualifies as a compelling government interest in the context of a content-based restriction on speech.

Lower courts are struggling to classify and characterize 'revenge porn' legislation. Lower courts need this Court's guidance to properly determine whether the laws are a content-based restriction on speech, and, if so, what may qualify as a compelling government interest in this context. Lower courts need further guidance on the necessary elements that a law of this nature must contain to sufficiently narrow the law, if possible, to avoid criminalizing protecting speech. Finally, lower courts require this Court's guidance on the proper method of analysis when a content-based challenge and an overbroad challenge have been raised in the same case. Further conflicting opinions are on the horizon without this Court's guidance.

III. The Question Presented is Vitally Important.

Minnesota's error must not be allowed to stand. The court's erroneous application of its strict scrutiny analysis and refusal to address Petitioner's overbroad challenge stands to directly infringe on the First Amendment rights of Minnesotans not only in the

context of a citizen's right to publish a nude image, but the court's decision stands to restrict speech in a number of other areas. Minnesota courts will be free to restrict speech by applying the Minnesota Supreme Court's erroneous strict scrutiny analysis by using the purported "health and safety" compelling interest in a number of different contexts where protected speech is challenged. This Court has historically protected offensive and insulting speech. The Minnesota Supreme Court's opinion is a gateway to regulating offensive speech that the court deems a danger to the safety of Minnesotans without a finding that the speech falls into an unprotected category of speech. The opinion also stands to curtail negligent expressive conduct by an actor who intends no harm or whose conduct does not result in harm. This Court must address these vitally important issues.

A number of respected amici supported Petitioner's position at the stage below. The amici below included well-respected First Amendment scholars and practitioners from international law firms representing associations of booksellers, publishers, press photographers, and various media entities. Other similar practitioners and scholars have filed supporting briefs in a previous petition in *Austin*. There is widespread consensus among some of the most respected First Amendment legal experts that laws like 617.261 grossly violate the First Amendment, especially when these laws are allowed to stand under erroneous reasoning like that given by the Minnesota Supreme Court. This case allows this Court to address the widespread consensus amongst expert First Amendment practitioners that laws like 617.261 impose an unconstitutional restriction on

speech, or clarify why their position is unsupported in the law.

This case also presents this Court with an opportunity to address the vitally important question of whether 617.261 chills political speech. Publications, news outlets, and individuals stand to face felony prosecution under 617.261 for disseminating compromising photos of political figures. The law leaves to the subjective discretion of an individual prosecutor to determine whether the dissemination was for a valid public-interest related reason. Prosecutorial decisions could be influenced by an individual prosecutor's own political beliefs.

This Court has repeatedly emphasized that the protection of anti-government speech in general is at the heart of the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). "Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The "right to receive information and ideas, *regardless of their social worth* is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citation omitted).

This case presents the historically important question of whether we are more worried about protecting an individual or creating a society where we have robust First Amendment protections.

617.261 casts a broad chill. The law "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.

Granting Casillas's petition will re-affirm this Court's commitment to protecting its well-settled First Amendment jurisprudence.

IV. This Case is an Ideal Vehicle.

Almost every state in the country has some variation of a 'revenge porn' law. An overwhelming majority of state laws have intent-to-harm elements. 617.261 stands as an outlier in this context. A number of state appellate court decisions reviewing similar legislation have now been issued. State courts are struggling to consistently apply First Amendment jurisprudence to these laws. The laws that have been upheld have relied on strict limiting language requiring specific intent to harm, causation of harm, and knowledge of an expectation of privacy. Minnesota elected to pass a sweeping law that fails to contain any significant limiting language. The Minnesota Supreme Court nevertheless found a way to uphold the law. This case presents a good opportunity for this Court to grant review and clarify whether these statutes violate the First Amendment.

This case is a good vehicle for answering the question presented because it comes to the Court on direct appeal and presents a facial challenge without any factual disputes.

The varied spectrum of opinions in this case shows the need to clarify this legal issue for lower courts. The trial judge concluded the statute was a constitutional restriction on obscenity. The Minnesota Court of Appeals concluded that the statute was facially unconstitutional under an

overbroad analysis. The Minnesota Supreme Court held the law reaches more than obscenity, refused to address Petitioner's overbroad challenge, and upheld the law under a strict scrutiny analysis. Without this Court's intervention, lower courts will continue to examine these kinds of laws through this unhelpful kaleidoscope of reasoning.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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