APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Appellant,
vs.
MICHAEL ANTHONY CASILLAS,
Respondent.

A19-0576

Appeal from the Minnesota Court of Appeals, Justice Hudson.

Filed: December 30, 2020

Keith M. Ellison, Attorney General, Saint Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Anna R. Light, Assistant Dakota County Attorney, for appellant.

John T. Arechigo, Arechigo & Stokka, P.A., Saint Paul, Minnesota, for respondent.

Leita Walker, Ballard Spahr LLP, Minneapolis, Minnesota;

Michael A. Bamberger, Richard M. Zuckerman, Dentons US LLP, New York City, New York; and

Raleigh Hannah Levine, Mitchell Hamline School of Law, Saint Paul, Minnesota, for amici curiae American Booksellers Association, Association of American Publishers, Inc., Media Coalition Foundations, Inc., and National Press Photographers Association.

Isabella Salomão Nascimento, Teresa J. Nelson, American Civil Liberties Union of Minnesota, Minneapolis, Minnesota, for amicus curiae American Civil Liberties Union of Minnesota.

Tracy Shoberg, Battered Women's Justice Project, Minneapolis, Minnesota;

Rana Alexander, Standpoint, Saint Paul, Minnesota;

Lindsay J. Brice, Minnesota Coalition Against Sexual Assault, Saint Paul, Minnesota; and

Katherine S. Barrett Wiik, Best & Flanagan LLP, Minneapolis, Minnesota, for amici curiae Cyber Civil Rights Initiative, Standpoint, Minnesota Coalition Against Sexual Assault, and the Battered Women's Justice Project.

Travis J. Smith, Murray County Attorney, Kelsey R. Kelley, Assistant Anoka County Attorney, William C. Lundy, Certified Student Attorney, Slayton, Minnesota, for amicus curiae Minnesota County Attorneys Association.

SYLLABUS

Although Minnesota Statutes § 617.261 (2018), prohibits more than obscenity, it survives strict scrutiny and, therefore, is a constitutional restriction on speech.

Reversed and remanded.

OPINION

HUDSON, Justice.

This case asks us to decide whether Minnesota's statute that criminalizes the nonconsensual dissemination of private sexual images, Minnesota Statutes § 617.261 (2020), is unconstitutional under the First Amendment to the United States Constitution. The district court found the statute was constitutional because it only prohibits obscenity, which is unprotected speech. The court of appeals reversed, holding that the statute prohibits more than obscenity and is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech. Although we agree that Minnesota Statutes § 617.261 prohibits more than obscenity, we conclude that the statute does not violate the First Amendment because it survives strict scrutiny. Accordingly, we reverse the court of appeals' decision and remand to that court for consideration of the outstanding issues raised by respondent Michael Anthony Casillas.

FACTS

In 2016, Michael Anthony Casillas and his girlfriend A.M. were engaged in a three-month romantic relationship. During this period, A.M. gave

Casillas access to her Dish Network account so he could watch television at work. After the relationship ended, Casillas used A.M.'s login information to access her other online accounts, including her Verizon cloud account. From the cloud account, Casillas obtained a photograph and a video that depicted A.M. engaged in sexual relations with another adult male.

Casillas sent A.M. a text message threatening to disseminate both the photograph and video while concealing his identity through fake email accounts and IP changers (devices used to obfuscate the identity of the person accessing the internet). A.M. told Casillas that sharing the photograph and video without her consent is a prosecutable offense. Undeterred by A.M.'s warning, Casillas carried out his threat by sending the video to 44 individuals and posting it online.

Casillas was charged with a felony-level violation of Minnesota Statutes § 617.261, the statute that criminalizes the nonconsensual dissemination of private sexual images. In Dakota County District Court, he moved to dismiss the charge on constitutional grounds, alleging that the statute is overbroad, an impermissible content-based restriction, and void for vagueness. The district court denied the motion, concluding that the conduct regulated by the statute is entirely unprotected obscene speech. The district court also determined that any degree of overbreadth was insubstantial. Following a stipulated-facts trial, Casillas was found guilty and sentenced to 23 months in prison.

The court of appeals reversed, concluding that the statute prohibits more than obscenity and is unconstitutionally overbroad because it "proscribes a substantial amount of protected expressive conduct."

State v. Casillas, 938 N.W.2d 74, 90 (Minn. App. 2019). Because the court of appeals held that the statute was overbroad, it did not rule on other issues raised by Casillas.[1] We granted the State's petition for further review to decide whether Minnesota Statutes § 617.261 is unconstitutional under the First Amendment.

ANALYSIS

Casillas claims Minnesota Statutes § 617.261 violates the First Amendment for two reasons.[2] First, he asserts that the statute is an impermissible content-based restriction that is not narrowly tailored to serve a compelling government interest. Second, he argues that the statute is overbroad because it punishes the act of dissemination itself without any accompanying criminal intent or causation of harm.

We review constitutional challenges to statutes de novo. *State v. Jorgenson*, 946 N.W.2d 596, 601 (Minn. 2020). Statutes are presumptively constitutional and we only strike them down "if absolutely necessary." *Id.* When a statute is a content-based restriction on speech, however, "[t]he State bears the burden of showing that" the statute "does not violate the First Amendment." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014).

To prevail on an overbreadth claim, a challenger "must establish that 'a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"

---

[1] Casillas also argued before the court of appeals that Minnesota Statutes § 617.261 is void for vagueness under the due process clause and challenged his sentence. *Casillas*, 938 N.W.2d at 78 n.1.

[2] The State does not challenge Casillas's standing in this case.

State v. Hensel, 901 N.W.2d 166, 170 (Minn. 2017) (alteration in original) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). The overbreadth doctrine is "strong medicine" that is employed sparingly. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

I.

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[3] The First Amendment's Free Speech Clause applies "to the States through the Fourteenth Amendment." *Virginia v. Black*, 538 U.S. 343, 358 (2003).

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted). "[T]he amendment establishes that 'above all else,' the government 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *Melchert-Dinkel*, 844 N.W.2d at 18 (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). The Free Speech Clause is not limited to "the

[3] The Minnesota Constitution has its own free speech provision which allows "all persons" to "freely speak, write and publish their sentiments on all subjects." Minn. Const. art. I, § 3. Minnesota's free speech provision "provides protections co-extensive with those under the United States Constitution." *Jorgenson*, 946 N.W.2d at 601 n.2; see also *State v. Wicklund*, 589 N.W.2d 793, 798–801 (Minn. 1999) (analyzing Minnesota's free speech clause and "declin[ing] to extend the free speech protections of Article I, Section 3 of the Minnesota Constitution beyond those protections offered by the First Amendment").

spoken or written word," but extends to other expressive conduct including videos and photographs. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Additionally, it "appl[ies] with equal force to speech or expressive conduct on the Internet." *In re Welfare of A.J.B.,* 929 N.W.2d 840, 846 (Minn. 2019).

However, "First Amendment rights are not absolute under all circumstances." *Greer v. Spock*, 424 U.S. 828, 842 (1976) (Powell, J., concurring); *see also Miller v. California*, 413 U.S. 15, 23 (1973) ("The First and Fourteenth Amendments have never been treated as absolutes." (citation omitted) (internal quotation marks omitted)). While "any significant restriction of First Amendment freedoms carries a heavy burden ofjustification," this burden is not an impossible standard for the State to meet. *Greer*, 424 U.S. at 843 (Powell, J., concurring). With these principles in mind, we turn now to Minnesota Statutes § 617.261.

II.

Minnesota Statutes § 617.261 provides that:

> It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:
>
> (1) the person is identifiable:
>
> (i) from the image itself, by the person depicted in the image or by another person; or
>
> (ii) from personal information displayed in connection with the image;

> (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and
>
> (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.

Minn. Stat. § 617.261, subd. 1. Violation of the statute is a gross misdemeanor. *Id.*, subd. 2(a). Any one of seven factors, however, can aggravate an offense to a felony. *Id.*, subd. 2(b). In this case, Casillas was charged with a felony based on his intent to harass the victim by disseminating the private sexual images. *Id.*, subd. 2(b)(5). The statute also contains seven exemptions to prosecution and an expansive definitional section. *Id.*, subds. 5, 7.

As a preliminary matter, we must ascertain the scope of Minnesota Statutes § 617.261 and decide whether the statute covers any protected speech. Challenges to unprotected speech restrictions are analyzed differently than challenges to protected speech restrictions. *State v. Muccio*, 890 N.W.2d 914, 920 (Minn. 2017) (explaining that overbreadth challenges fail if a statute only proscribes unprotected speech); *State v. Crawley*, 819 N.W.2d 94, 109 (Minn. 2012) (explaining that content-based restrictions on unprotected speech are evaluated differently than similar restrictions on protected speech).

The State argues that this statute prohibits only unprotected speech for two reasons. First, the State asks us to recognize a new category of unprotected speech: substantial invasions of privacy. Casillas responds that the State has failed to present sufficient evidence to support the creation of a new

category of unprotected speech. We agree with Casillas.

Although the First Amendment provides broad free speech protection, the United States Supreme Court has "permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V.*, 505 U.S. at 382–83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). These limited areas include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Stevens*, 559 U.S. at 468. Additional areas of unprotected speech include child pornography, true threats, and fighting words. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). All of the categories are "well-defined and narrowly limited classes of speech." *Chaplinsky*, 315 U.S. at 571; *see also In re Welfare of A.J.B.*, 929 N.W.2d at 846 (noting established exceptions).

The United States Supreme Court has emphatically rejected "freewheeling" attempts "to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472; *see also Jorgenson*, 946 N.W.2d at 604 ("The United States Supreme Court has been reluctant to expand these traditional categories of unprotected speech."). It is possible, however, there are "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed." *Stevens*, 559 U.S. at 472.

To successfully argue for a new unprotected category of speech, the proponent must present "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized)

tradition of proscription." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011). This is a heavy burden to bear, and the Supreme Court has recently rejected creating new categories of unprotected speech for animal cruelty, *Stevens*, 559 U.S. at 472, depictions of excessive violence, *Brown*, 564 U.S. at 791–93, and false statements, *Alvarez*, 567 U.S. at 722–23.

In this case, we conclude that the State has failed to carry the heavy burden required to provide a basis to establish a new category of unprotected speech. Although we recognize that developments in both law and society may merit a reevaluation of privacy interests within the context of the First Amendment, there is not enough evidence or established guidance to categorically remove constitutional protection for speech that constitutes a substantial invasion of privacy. *See Brown*, 564 U.S. at 790 ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (citation omitted) (internal quotation marks omitted)); *see also State v. VanBuren*, 214 A.3d 791, 807 (Vt. 2019) (explaining the decision of the Vermont Supreme Court declining to recognize invasions of privacy as unprotected speech); *People v. Austin*, 155 N.E.3d 439, 454–55 (Ill. 2019) (explaining a similar decision by Illinois Supreme Court), *cert. denied*, 141 S. Ct. 233 (2020). Moreover, the State's proposed category is actually based on the speech's transmission method and not its underlying content. Categories of unprotected speech are determined by their content and not by their method of transmission. *See Brown*, 564 U.S.at 790–91.

Second, the State argues that section 617.261 regulates only speech that falls within historically recognized categories of unprotected speech. Before the district court, the State argued that Minnesota Statutes § 617.261 prohibits only speech that is considered obscene. The district court agreed with the State, but the court of appeals rejected that argument. The State has now shifted its argument and contends that the statute proscribes speech within three historically recognized categories: obscenity, speech integral to criminal conduct, and child pornography. Casillas counters the State's argument by pointing to numerous situations where the statute criminalizes protected speech. We agree with Casillas that the statute covers some protected speech.

The State undercuts its own argument by stating that *much* of the speech covered by this statute is unprotected. For a statute to be exempted from the First Amendment, *all* ofthe speech proscribed by the statute must be unprotected. *See Muccio*, 890 N.W.2d at 927(explaining that an overbreadth analysis must continue when a statute "regulates *some* speech that the First Amendment protects" (emphasis added)); *see also Crawley*, 819 N.W.2d at 109–10 (proceeding with an unprotected speech analysis only after construing a statute to solely proscribe defamation). Assuming the State intended to argue that by criminalizing the nonconsensual dissemination of private sexual images the statuteexclusively prohibits unprotected speech, we still conclude that its argument falls short.

The State first argues that Minnesota Statutes § 617.261 covers only unprotected obscene speech. "[L]ewd and obscene [expressions] . . . are no essential part of any exposition of ideas, and are of

such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Whether something qualifies as obscene involves a three-part test:

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

Miller, 413 U.S. at 24 (citations omitted) (internal quotation marks omitted).[4] However, nudity "in and of itself is not obscene." *Koppinger v. City of Fairmont*, 248 N.W.2d 708, 712 n.3 (Minn. 1976); *see Knudtson v. City of Coates*, 519 N.W.2d 166, 169 (Minn. 1994)(acknowledging that "nudity is prevalent in advertising, movies and video").

Like the court of appeals, we conclude that the district court erred when it determined that the speech regulated by the statute falls only within the obscenity category of unprotected speech. If an adult shares an image of another adult's intimate parts

[4] The State argues that even if an image does not appeal to the prurient interest, the nonconsensual nature of the dissemination makes the image obscene because it is offensive and harmful to the victim. The court of appeals properly rejected this argument because it is inconsistent with the *Miller* definition of obscenity. *See Casillas*, 938 N.W.2d at 83.

without the other adult's consent, the image may not be "patently offensive" or "appeal to the prurient interest." *See Muccio*, 890 N.W.2d at 925 (explaining that for an image to be obscene it must involve a "morbid, shameful interest in sex") (quoting *State v. Davidson*, 481 N.W.2d 51, 59 (Minn. 1992)). "Sexual expression" can be "indecent but not obscene" and therefore "protected by the First Amendment." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also Koppinger*, 248 N.W.2d at 712 n.3. Similarly, if a man shares a picture of his wife breast-feeding their baby against her wishes and part of her nipple is exposed, this picture would not qualify as appealing "to the prurient interest," but may fall under the statute. There are dozens of other examples of non-obscene nude photos that are criminalized by this statute. Consequently, the district court erred when it determined that the statute regulates only obscenity.

The next category suggested by the State is speech integral to criminal conduct. "Speech is integral to criminal conduct when it 'is intended to induce or commence illegal activities,' such as 'conspiracy, incitement, and solicitation.'" *Muccio*, 890 N.W.2d at 923 (quoting *United States v. Williams*, 553 U.S. 285, 298 (2008)). Speech in this category is unprotected when it is "directly linked to and designed to facilitate the commission of a crime." *State v. Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016).

We conclude that almost none of the speech encompassed by this statute is speech integral to criminal conduct.[5] Private sexual images are not

[5] We do not foreclose the possibility that there are some instances when speech criminalized by this statute will be

generally used to "facilitate the commission of a crime." *Id.* They are not "[o]ffers to engage in illegal transactions" nor are they "requests to obtain unlawful material." *Williams*, 553 U.S. at 297–98. Therefore, they do not categorically qualify as speech integral to criminal conduct.

The final category of unprotected speech suggested by the State is child pornography. Pornography featuring real children falls outside the scope of the First Amendment and can be banned. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–50 (2002). This category is specifically designed to protect children from sexual abuse or sexual exploitation. *Id.* at 249. This argument is easily rejected because the majority of private sexual images depict nude adults.

It is not difficult to imagine private sexual images that would qualify as protected speech but are criminalized by this statute. Envision a man and a woman who go on a date.The man sends the woman a nude photo of himself after the date with instructions not to share the picture. The woman still decides to share or disseminate it. The photo is not obscene because it does not depict a "morbid, shameful interest in sex." *Davidson*, 481 N.W.2d at 59. The photo is not speech integral to criminal conduct because it is not "directly linked to and designed to facilitate the commission of a crime." *Washington-Davis*, 881 N.W.2d at 538. Finally, the photo does not depict children and does not qualify as child pornography. Yet, the sharing of this photograph would still be criminalized under the nonconsensual

---

speech integral to criminal conduct. For example, an advertisement for prostitution may involve the nonconsensual dissemination of a private sexual image. These situations, however, are few compared to the statute's overall reach.

dissemination of private sexual images statute. Ultimately, we reject the State's argument that the statute proscribes only unprotected speech.

III.

Having determined that Minnesota Statutes § 617.261 covers some protected speech, we turn to Casillas's argument that the statute is a content-based restriction and that does not survive strict scrutiny.[6] The State counters by arguing that the statute is a content-neutral time, place, and manner restriction and therefore it need only survive an intermediate scrutiny analysis.

A content-based restriction is one "that target[s] speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "[I]f a law applies to particular speech because of the topic discussed or the idea or message expressed," it is a content-based regulation. *Id.* Some of these restrictions are content-based on their face, but "others are more subtle, defining regulated speech by its function or purpose." *Id.* Either way, content-based restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.*; *see also Boos v. Barry*, 485 U.S. 312, 334 (1988). Under a strict scrutiny analysis, narrow tailoring means that the statute must be "the least restrictive means for

[6] Even if we accept Casillas's argument, we note that content-based restrictions are not prohibited per se and that "governmental regulation based on subject matter has been approved in narrow circumstances." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980); *see also Burson v. Freeman*, 504 U.S. 191, 211 (1992).

addressing" the government's interest. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 827 (2000). A statute, however, does not need to be "perfectly tailored" to survive strict scrutiny. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)).

A content-neutral restriction is one that "is . . . neutral on its face." *Reed*, 576 U.S. at 165. In other words, these types of restrictions "are justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Content-neutral restrictions are constitutional if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Id.* Under an intermediate scrutiny analysis, narrow tailoring means that the restriction is "not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

In this case, we need not determine whether Minnesota Statutes § 617.261 is content-based or content-neutral because we find that the State has met its burden under the more searching strict scrutiny analysis.

Our strict scrutiny analysis begins by evaluating the strength of the governmental interest in prohibiting the nonconsensual dissemination of private sexual images. To satisfy strict scrutiny, the State must show that it has a compelling interest in passing the statute. *Brown*, 564 U.S. at 799. This means "[t]he State must specifically identify an

'actual problem' in need of solving." *Id.* (quoting *Playboy Ent. Grp.*, 529 U.S. at 822–23). The problem being solved "must be paramount" and "of vital importance." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In this case, we conclude that the State has identified an "actual problem" of paramount importance in the nonconsensual dissemination of private sexual images and is working within its well-recognized authority to safeguard its citizens' health and safety through Minnesota Statutes § 617.261. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." (citation omitted) (internal quotation marks omitted)); *see also* Minn. Const. art. I, § 1 (explaining that Minnesota's "[g]overnment is instituted for the security, benefit and protection of the people").

The nonconsensual dissemination of private sexual images generally "involves images originally obtained without consent, such as by use of hidden cameras or victim coercion, and images originally obtained with consent, usually within the context of a private or confidential relationship. Once obtained, these images are subsequently distributed without consent." *Austin*, 155 N.E.3d at 451. This dissemination is commonly referred to as "revenge porn."[7] While "[o]ne's naked body is a very private

[7] The phrase "revenge porn" is misleading. The nonconsensual dissemination of private sexual images statute does not require personal vengeance as a motive. *See* Minn. Stat. § 617.261. Nor does the statute require that an image qualify as pornographic to be prohibited. *Id*; *see also Austin*, 155 N.E.3d at 451 (noting the term "revenge porn" is misleading because "revenge" suggests vengeance, but "perpetrators may be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all," and "porn" ismisleading in suggesting "that visual

part of one's person and generally known to others *only by choice*," the nonconsensual dissemination of private sexual images removes this choice from a victim and exposes the victim's most intimate moments to others against the victim's will. *Lake v. Wal-Mart Stores, Inc.*,582 N.W.2d 231, 235 (Minn. 1998) (emphasis added).

Those who are unwillingly exposed to their friends, family, bosses, co-workers, teachers, fellow students, or random strangers on the internet are often deeply and permanently scarred by the experience. Victims suffer from post-traumatic stress disorder, anxiety, depression, despair, loneliness, alcoholism, drug abuse, and significant losses in self-esteem, confidence, and trust. Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 Feminist Criminology 9 (2016). Survivors often require therapy and medical intervention. *Id.* The effects of revenge porn are so profound that victims have psychological profiles that match sexual assault survivors. *Id.* at 3. Tragically, not every victim survives this experience and some commit suicide as a result of their exposure online. Sophia Ankel, *Many Revenge Porn Victims Consider Suicide—Why Aren't Schools Doing More to Stop It?*, The Guardian (May 7, 2018, 12:05 PM), https://www.theguardian.com/lifeandstyle/2018/may/07/many-revenge-porn-victims-consider-suicide-why-arent-schools-doing-more-to-stop-it [opinion attachment].

Those who survive this harrowing experience without significant health consequences still may have their reputations permanently tarnished. Many

---

depictions of nudity or sexual activity are inherently pornographic").

victims have a scarlet letter affixed to their resumes when applying for jobs or additional educational opportunities. *VanBuren*, 214 A.3d at 810–11. When a simple internet search for a victim's name displays multiple nude images, employers frequently put the victim's application aside. *Id.* Employers have fired employees who have been victimized by their former partners. *Id.* Losing employment is a difficult issue for any person, but is especially problematic when victims need employment-sponsored health benefits to deal with the trauma of being exposed online. *Chartbook Section 2: Trends and Variation in Health Insurance Coverage*, Minn. Dep't of Health, https://www.health.state.mn.us/data/economics/chartbook/docs/section2.pdf (estimating that 58 percent of Minnesotans obtain their health insurance from their employer).

"[I]t is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area." *VanBuren*, 214 A.3d at 810. Even if a victim is fortunate enough to avoid the serious mental, emotional, economic, and physical effects, the person will still suffer from humiliation and embarrassment. The harm largely speaks for itself.

Making matters worse, this problem is widespread and continuously expanding. In 2017, a U.S. survey conducted by the Cyber Civil Rights Initiative found that one in eight survey participants had been the victim of or threatened with nonconsensual disseminationof private sexual images. Brief of Amici Curiae Cyber Civil Rights Initiative et al. at 7, *State v. Casillas*, No. A19-0576 (filed Apr. 23, 2020). Thousands of websites feature revenge porn, and social media platforms, such as Twitter, Facebook, Instagram, and Snapchat, allow for explicit content to

spread rapidly. *Id.* (estimating the number of revenge porn websites at nearly 10,000).

Based on this broad and direct threat to its citizens' health and safety, we find that the State has carried its burden of showing a compelling governmental interest in criminalizing the nonconsensual dissemination of private sexual images. *See Melchert- Dinkel*, 844 N.W.2d at 23 (finding the State has a compelling interest in protecting its citizens from suicide); *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 635 (Minn. 2012) ("There is no question that the [government] has a compelling interest in ensuring the health and safety of its citizens."); *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 417 (Minn. 2007) (finding the State has a compelling interest in protecting its citizens from drunk driving); *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) ("States have a compelling interest in . . . protecting the public from sexual violence.").

Next, we analyze whether Minnesota Statutes § 617.261 is "narrowly tailored" and "the least restrictive means" to solve the underlying problem. We conclude that the State has carried this burden.

First, the Legislature explicitly defined the type of image that is criminalized. The image must be "of another person who is depicted in a sexual act or whose intimate parts are exposed." Minn. Stat. § 617.261, subd. 1. The terms "sexual act," "intimate parts," and "image" are all expressly defined. *Id.*, subd. 7(d)–(e), (g). Moreover, the person depicted in the image must be identifiable "from the image itself . . . or . . . from personal information displayed in connection with the image." *Id.*, subd. 1(1)(i)–(ii). Furthermore, the image has to be "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.*, subd. 1(3). Images that do not clear each of these hurdles fall outside the scope of the statute.

Second, a defendant must "intentionally" disseminate the image. Minn. Stat. § 617.261, subd. 1. This mens rea requirement means that a defendant must knowingly and voluntarily disseminate a private sexual image; negligent, accidental, or even reckless distributions are not proscribed. This specific intent requirement further narrows the statute and keeps it from "target[ing] broad categories of speech." *Muccio*, 890 N.W.2d at 928.

Third, the statute has seven enumerated exemptions. Minn. Stat. § 617.261, subd. 5(1)–(7). Some protected speech is taken outside of the scope of the statute by subdivision 5. For example, the statute exempts prosecution for image dissemination pursuant to essential law enforcement functions performed by both citizens and public safety personnel. *Id.*, subd. 5(1)–(2). The statute allows for private sexual images to be distributed "in the course of seeking or receiving medical or mental health treatment." *Id.*, subd. 5(3). Advertisers, booksellers, and artists are protected because images "obtained in a commercial setting" for legal purposes fall outside the statute's reach. *Id.*, subd. 5(4). Journalists cannot be prosecuted because there are exemptions for the dissemination of private sexual images that involve matters of public interest and "exposure[s] in public." *Id.*, subd. 5(4)–(5).[8] Educators and scientists are

[8] Casillas argues that a photojournalist who posts nude images of battle scenes or natural disasters could be prosecuted under Minnesota Statutes § 617.261. But this contention ignores the language of the statute. Wars and natural disasters are plainly matters of public interest and sharing information about these

protected because there is an exemption for private sexual images disseminated for "legitimate scientific research or educational purposes." *Id.*, subd. 5(6). Accordingly, even if protected speech falls within the ambit of subdivision one and a disseminator acted with the requisite mens rea, that person may still be exempt from prosecution under these precise exceptions.

Fourth, to be prosecuted under the statute, a disseminator must act without consent. *Id.*, subd. 1(2). This provision provides additional protection for commercial advertisements, certain adult films, artistic works, and other creative expression outside the statute's scope.[9]

Finally, this statute only encompasses private speech. "[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "Speech on matters of purely private concern is of less First Amendment concern" than speech on public matters that go to the heart of our democratic system. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). Unlike the overly broad statutes at issue in our recent decisions in *In re Welfare of A.J.B.* and *Jorgenson*, this statute covers only private sexual images and does not prohibit speech that is "at the core of protected First Amendment speech." 929 N.W.2d at 853; *see* 946 N.W.2d at 605.

---

events is a "lawful public purpose." Minn. Stat. § 617.261, subd. 5(5).

[9] In our view, it is not difficult to obtain consent before disseminating a private sexual image. Simply ask permission. We cannot imagine an emergency situation that requires the immediate dissemination of a private sexual image.

Because the statute proscribes only private speech that (1) is intentionally disseminated without consent, (2) falls within numerous statutory definitions, and (3) is outside of the seven broad exemptions, we find the statute to be narrowly tailored.[10]

The Legislature's decision to enact the nonconsensual dissemination statute "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Instead, the statute was enacted to prevent the permanent and severe harms caused by the nonconsensual dissemination of private sexual images. While we acknowledge and "reaffirm that it is . . . rare" for a content-based restriction to survive strict scrutiny, this restriction is one of those rare

---

[10] Casillas argues that rather than criminalizing the nonconsensual dissemination of private sexual images, a narrower approach would be for the Legislature to provide civil remedies only. However, the permissible constitutional scope of civil remedies and criminal remedies is the same. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . ." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). In fact, criminal charges may be the preferable method for proscribing this type of behavior because "people charged criminally enjoy greater procedural safeguards than those facing civil suit, and the prospect of steep civil damages can chill speech even more than that of criminal prosecution." *VanBuren*, 214 A.3d at 814. We are additionally concerned that a victim's identity may become publicized by a civil suit, thus leading to greater harm. *See Austin*, 155 N.E.3d at 463 (citing Erica Souza, *"For His Eyes Only": Why Federal Legislation is Needed to Combat Revenge Porn*, 23 UCLA Women's L.J. 101, 111–15 (2016); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 357–59 (2014)).

cases. *Burson*, 504 U.S. at 211 (upholding a content-based Tennessee law under a strict scrutiny analysis); *see also Williams-Yulee*, 575 U.S. at 457 (upholding a Florida speech restriction under a strict scrutiny analysis). In sum, even if we assume that the statute creates a content-based restriction, the State has satisfied its burden of showing that the restriction does not violate the First Amendment because the restriction is justified by a compelling government interest and is narrowly tailored to serve that interest.[11]

IV.

Next, Casillas argues that Minnesota Statutes § 617.261 is unconstitutionally overbroad because it burdens a substantial amount of protected speech. The State counters by arguing that the amount of criminalized protected speech is minimal when compared to the statute's legitimate sweep. The court of appeals agreed with Casillas and rested its entire opinion on a finding of overbreadth. *Casillas*, 938 N.W.2d at 88–90.

We note that the relationship between the overbreadth doctrine and a scrutiny analysis is unclear. Marc Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth And "Scrutiny" Analysis in the Law of*

---

[11] We further note that Minnesota Statutes § 617.261 is not "exceptional." *McCullen v. Coakley*, 573 U.S. 464, 490 (2014) (noting that a Massachusetts statute "raise[d] concerns" over its tailoring because it was the only statute of its kind). As amici note, 46 other state legislatures have passed similar statutes prohibiting the nonconsensual dissemination of private sexual images. Brief of Amici Curiae Cyber Civil Rights Initiative et al. at 4, *State v. Casillas*, No. A19-0576 (filed Apr. 23, 2020).

Freedom of Speech, 11 Elon L. Rev. 95, 109 (2019). There are instances when lower courts have made a decision based on strict scrutiny and the United States Supreme Court has affirmed on overbreadth grounds. *Compare Stevens*, 559 U.S. at 467, 482 (upholding the lower court's strict scrutiny analysis using the overbreadth doctrine) *with United States v. Stevens*, 533 F.3d 218, 232–35 (3d Cir. 2008) (deciding the constitutionality of a dog-fighting statute on strict scrutiny grounds alone). In other cases, some members of the United States Supreme Court conduct a scrutiny analysis only and then other members evaluate a statute's overbreadth. *Compare Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding a statute under intermediate scrutiny) *with id.* at 499 (Stevens, J., dissenting) (concluding the statute is overbroad). This variation in analytical approaches leads to understandable overlap in the relevant legal principles. *See Austin*, 155 N.E.3d at 467 ("Under intermediate scrutiny, a content-neutral statute is overbroad only when it burdens substantially more speech than necessary to advance its substantial governmental interest."). As Professor Marc Rohr summarizes: "The relationship of these two modes of free-speech analysis has never been adequately explained by the Supreme Court." Rohr, *supra*, at 109.

Our most recent First Amendment cases have not given us the opportunity to clarify the relationship between the two doctrines. *See Jorgenson*, 946 N.W.2d at 600 (presenting only an overbreadth challenge to Minnesota's criminal coercion statute); *In re Welfare of A.J.B.*, 929 N.W.2d at 844 (presenting only an overbreadth challenge to Minnesota's mail-harassment and stalking-by-mail statutes); *Hensel*, 901 N.W.2d at 170 (presenting only an overbreadth

challenge to Minnesota's disturbance-of-a-meeting-or-assembly statute); *Muccio*, 890 N.W.2d at 929 (presenting only an overbreadth challenge to Minnesota's statute prohibiting sexually explicit communications with children); *Washington-Davis*, 881 N.W.2d at 534 (presenting only an overbreadth challenge to Minnesota's statute prohibiting solicitation and promotion of prostitution).

In *Melchert-Dinkel*, however, the challenge to a statute that criminalized "assisting, advising, or encouraging" suicide raised both a scrutiny and overbreadth argument. 844 N.W.2d at 18. The court of appeals ruled that the statute was constitutionally permissible because it was not substantially overbroad. *State v. Melchert-Dinkel*, 816 N.W.2d 703, 715–17 (Minn. App. 2012). Upon appeal, we partially severed the statute and then upheld the reformulated statute under a scrutiny analysis without discussing overbreadth. *Melchert-Dinkel*, 844 N.W.2d at 24.

Melchert-Dinkel is instructive in helping us resolve this case. When a statute is challenged on both scrutiny and overbreadth grounds, a scrutiny analysis should be conducted first. This approach is best because a statute that survives a scrutiny analysis will necessarily survive the overbreadth challenge.

"An overbreadth challenge is a facial attack on a statute in which the challenger must establish that 'a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Hensel*, 901 N.W.2d at 170 (alteration in original) (quoting *Stevens*, 559 U.S. at 473). If a statute survives a scrutiny analysis, the court has already determined that *all* of the statute's applications are constitutional. Neither Casillas nor

his supporting amici identify a case where a statute survived strict scrutiny but was struck down as unconstitutionally overbroad. We have great difficulty imagining such a scenario. Therefore, we conclude that an overbreadth analysis is needlessly redundant if a statute has already survived strict scrutiny review.

This analytical framework is further supported by the United States Supreme Court's decision in *Burson v. Freeman*. In *Burson*, the Court was faced with a First Amendment challenge to a Tennessee statute that prohibited political speech within 100 feet of a polling place. 504 U.S. at 193–94. The Supreme Court upheld the statute exclusively on strict scrutiny grounds without discussing overbreadth. *Id.* at 196–211. As previously mentioned, a successful overbreadth challenge requires that a "substantial amount" of protected speech is criminalized under a given statute. *In re Welfare of A.J.B.*, 929 N.W.2d at 847. There is no doubt that the Tennessee statute in *Burson* criminalized a substantial amount of protected speech, but it was upheld because it was narrowly tailored and served a compelling governmental interest. *See Burson*, 504 U.S. at 211. While neither party raised the issue in that case, an overbreadth challenge would have been fruitless because the restriction on protected speech was already determined to be constitutional.

The constitutional right to free speech stands as a bedrock for our democracy. This sacred right shields our citizens from prosecution and imprisonment while they debate and discuss the pertinent issues of our time. Even the most unpopular ideas and expressions find refuge under the First Amendment's umbrella. To protect this fundamental promise, we evaluate

any encroachment on free speech with both caution and skepticism.

The nonconsensual dissemination of private sexual images, however, presents a grave threat to everyday Minnesotans whose lives are affected by the single click of a button. When faced with such a serious problem, the government is allowed to protect the lives of its citizens without offending the First Amendment as long as it does so in a narrow fashion. Minnesota Statutes § 617.261 is a representation of this constitutional compromise and adequately balances the fundamental right to free speech with the citizens' right to health and safety.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the court of appeals for consideration and decision of the remaining issues raisedin this appeal.

Reversed and remanded.

Women

Many revenge porn victims consider suicide – why aren't schools doing more to stop it?

Sophia Ankel
Mon 7 May 2018 12:05 EDT

Sarah Richards was 15 when naked pictures of her were shared around her school. Months earlier, her then-boyfriend had suggested they have a Skype video call. "I was super excited to be dating this person," she says. "He was part of a group of boys that I really wanted to be friends with because I thought they were so cool. I had my first sexual experience with him, so I trusted him."

Feeling confident and safe in the comfort of her own bedroom, she recalls how she got undressed for him on camera, making sure not to expose anything below her waist. "I just thought this was fun and innocent. It wasn't pictures, so it seemed less permanent." It wasn't until months later, after breaking up with him, that Richards found out that screenshots had been taken without her consent.

She was ridiculed on social media, with Twitter posts, Facebook mentions and even lengthy YouTube videos dedicated to making fun of her developing adolescent body. The campaign was accompanied by a hashtag and a logo that were based on an intimate body part. The bullying went on for months. Richards, who is now 21, felt trapped: "A lot of the abuse was online. And I still had to go to school every day. I was super angry and upset, but I was also racked with guilt because I just thought: I brought this on myself."

A report last year by the National Education Union (NEU) an the pressure group UK Feminista

revealed that more than a third of girls have experienced some form of sexual harassment in UK mixed-sex schools. An issue connected to this – and a growing concern in schools – is non-consensual sharing of nude images, otherwise known as revenge porn. According to a survey by the charity Childnet International, more than half of UK teenagers have friends who shared intimate images of someone they know and 14% of girls say that they have been pressured to share nude images in the past year.

Technology, while central to young people's lives, is a key factor in the emergence of these new forms of sexual harassment. Victims can't hang up the phone to an online assault; it continues without them, lingering in cyberspace for years. Adolescents exploring their sexuality isn't new, but the fact that their sexual experimentation takes place in an online world where the footprints are easily stored doesn't make the process any easier. The backlash can be fatal: 51% of US revenge-porn victims have contemplated suicide, according to research carried out by the campaign End Revenge Porn.

Schools are only now playing catch-up – the sexual health curriculum in the UK has long been outdated. Presently, only students attending local-authority-run secondary schools – which make up about a third of schools overall – are guaranteed sex education. A survey of 16- to 24-year-olds by the Terrence Higgins Trust revealed that one in seven students had not received any education on the subject of sex and relationships, while more than half of pupils received sex education no more than once a year during their education.

The current statutory guidance on sex education was published in 2000. The curriculum includes information on heterosexual relationships, covering

what intercourse looks like, how to prevent pregnancy and sexually transmitted diseases. It doesn't, however, cover other sexual orientations, sexting, online abuse, revenge porn or what consent in the digital realm looks like.

It is this lack of understanding that has led organisations such as the Schools Consent Project to take charge in the past couple of years. The charity, founded in 2014, leads regular workshops in schools in the UK, providing students with the legal definitions of consent and key sexual offences such as sexting and revenge porn. Founder and director Kate Parker says: "We want young people to appreciate that consent is the bedrock to any sexual interaction; it distinguishes a sexual act from a sexual crime."

In March 2017, the Department of Education finally confirmed that updated relationships and sex education will be made compulsory for all schools in England as early as September 2019. It's a step forward, but the process won't be easy: there is currently a huge gap in the data for sexual harassment in schools, due to a lack of reporting and because this type of abuse is not recognised by the curriculum. "When it comes to policymakers, very often they want to see stats and figures, but data on gender-based violence in schools is difficult to gather", says Lilia Giugni, the CEO of GenPol, a thinktank that this year published a key policy paper that explicitly links sex education to gender-based violence.

Not only do pupils need to be taught these vital lessons, but teachers and schools must also begin to become familiar with how to deal with cases of sexual harassment on their premises. According to the NEU report, only a third (38%) of secondary school teachers in mixed-sex schools are aware of students

being sent or exposed to pornography in schools and only 20% received this knowledge as part of their initial teacher training.

Richards never reported what happened to her to a teacher. "I didn't tell the school, or any authority," she says. "I didn't know that it was even possible to take any action, to be honest. But I do regret it because I suppressed so much. It wasn't until the last few years that I realised that it is the cause of a lot of bad emotions and anxieties."

In the digital age, UK schools must begin to adapt and recognise the damage caused to young people by these new, online forms of sexual harassment. This begins with accepting that revenge porn exists in schools. For Richards, a formal process that addresses the issue frankly rather than making it a taboo, is what is needed before anything else. "I would really love to see more stories about others' experiences because it would normalise the situation for me and give peace of mind to my 16-year-old self. I still need closure."

Some names have been changed.

In the UK, Samaritans can be contacted on 116 123. In the US, the National Suicide Prevention Lifeline is 1-800-273-8255. In Australia, the crisis support service Lifeline is 13 11 14. Other international suicide helplines can be found at befrienders.org.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS

STATE OF MINNESOTA,
Respondent,
vs.
MICHAEL ANTHONY CASILLAS,
Appellant.

A19-0576

Appeal from Dakota County District Court
File No. 19HA-CR-17-4702

Filed: December 23, 2019
Reversed
Larkin, Judge

Keith M. Ellison, Attorney General, Saint Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Anna R. Light, Assistant County Attorney, Hastings, Minnesota (for respondent).

John Arechigo, Arechigo & Stokka, P.A., St. Paul, Minnesota (for appellant).

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

SYLLABUS

Minn. Stat. § 617.261 (2016) is facially overbroad in violation of the First Amendment to the United States Constitution, and the constitutional infirmity cannot be remedied through a narrowing construction or severance.

OPINION

LARKIN, Judge

Appellant challenges his conviction of felony nonconsensual dissemination ofprivate sexual images under Minn. Stat. § 617.261, arguing that the statute is constitutionally overbroad and therefore facially invalid under the First Amendment to the United States Constitution. We conclude that Minn. Stat. § 617.261 is facially overbroad in violation of the First Amendment as a result of its lack of an intent-to-harm requirement and its use of a negligence mens rea. Because it is not possible to remedy those constitutional defects through application of a narrowing construction or by severing problematic language from the statute, we invalidate the statute and reverse appellant's conviction and sentence.

FACTS

In 2017, respondent State of Minnesota charged appellant Michael Anthony Casillas with felony nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, after A.K.M. reported that Casillas had obtained and

disseminated, without her consent, private sexual images of her. The complaint alleged that Casillas obtained A.K.M.'s account log-in information for her wireless and television provider accounts while they were in a relationship and that after their relationship ended, Casillas accessed those accounts and obtained photos and videos containing sexual images of A.K.M. Casillas told A.K.M. that he planned to release the photos and videos. A.K.M. objected. She later received a screenshot of one of the videos that had been sent to 44 recipients and posted online. The video showed A.K.M. engaging in a sexual act with another individual.

Casillas moved to dismiss the charge, arguing that Minn. Stat. § 617.261 is unconstitutionally overbroad and vague in violation of the First Amendment. The district court rejected Casillas's First Amendment challenge, reasoning in part that Minn. Stat. § 617.261 regulates obscenity, which is not protected by the First Amendment.

The parties agreed to proceed under Minn. R. Crim. P. 26.01, subd. 4, which allows a defendant to stipulate to the state's case to obtain review of a district court's dispositive pretrial ruling. Based on the stipulated record, the district court concluded that Casillas was guilty of felony nonconsensual dissemination of private sexual images as charged because he intentionally disseminated an identifiable image of A.K.M. depicted in a sexual act.

The district court reasoned that Casillas "texted A.K.M. and seemingly threatened her about posting the image online, which demonstrates that he knew this wasn't an act based on her consent," and that Casillas "certainly knew that A.K.M. was not consenting to him disseminating the image." The district court also determined that the state had

proved that "the image was obtained under circumstances in which [Casillas] knew or reasonably should have known [that A.K.M.] had a reasonable expectation of privacy." The district court reasoned that "an expectation of privacy regarding the image is implicitly inherent from the nature of the act depicted," that Casillas's threat to post the image online demonstrated "that he understood it was an image that should remain private," and that "A.K.M.'s response about prosecuting such conduct further demonstrates that he reasonably should have known that A.K.M. had a reasonable expectation of privacy."

The district court entered judgment of conviction, denied Casillas's motion for a downward dispositional sentencing departure, and ordered him to serve a presumptive 23-month prison term under Minnesota's sentencing guidelines. Casillas appeals.

ISSUE

Did the district court err by rejecting Casillas's First Amendment challenge to Minn. Stat. § 617.261?

ANALYSIS

In this case, we are asked to decide whether Minn. Stat. § 617.261 is overbroad and therefore facially invalid under the First Amendment to the United States Constitution.[1] An appellate court reviews the constitutionality of a statute de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014).

[1] Casillas also argues that the statute is unconstitutionally vague and challenges his sentence. Because our review of Casillas's overbreadth argument is dispositive, we do not reach those issues.

"Ordinarily, laws are afforded a presumption of constitutionality, but statutes allegedly restricting First Amendment rights are not so presumed." *Dunham v. Roer*, 708 N.W.2d 552, 562 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[2] U.S. Const. amend. I. It applies to the states through the FourteenthAmendment. *In re Welfare of A.J.B.*, 929 N.W.2d 840, 846 (Minn. 2019). The First Amendment establishes that the government generally may not restrict expression because of its messages, ideas, subject matter, or content. *Id.* 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 [Supreme] Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books." *Kaplan v. California*, 413 U.S. 115, 119, 93 S. Ct. 2680, 2684 (1973). The state concedes, and we agree, that Minn. Stat. § 617.261 restricts expressive conduct.

Casillas contends that Minn. Stat. § 617.261 is unconstitutionally overbroad on its face. To succeed in a typical facial constitutional challenge, a challenger must establish that no set of circumstances exists under which the challenged statute would be valid or that the statute lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460,472, 130 S. Ct. 1577, 1587 (2010). But in

---

[2] The Minnesota Constitution similarly protects the rights of all persons to "freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." Minn. Const. art. I, § 3. Although Casillas cites the Minnesota Constitution, he argues for relief under the United States Constitution.

the First Amendment context, the Supreme Court has recognized a second type of facial challenge, whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473, 130 S. Ct. at 1587 (quotation omitted).

Thus, a long-recognized exception to the ordinary rules of standing applies to facial overbreadth challenges. *State v. Mireles*, 619 N.W.2d 558, 561 (Minn. App. 2000) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2916 (1973)), *review denied* (Minn. Feb. 13, 2001). Under this exception, litigants may challenge a statute, "not because their own rights of free expression are violated, but because 'the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Id.* (quoting *Broadrick*, 413 U.S. at 611-12, 93 S. Ct. at 2916). "The rationale for allowing an overbreadth challenge, even when a statute is constitutional as applied in a particular circumstance, is that enforcement of an overbroad law chills protected speech, which inhibits the free exchange of ideas." *State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017) (quotation omitted).

The Minnesota Supreme Court recently summarized the analysis applicable to a First Amendment overbreadth challenge as follows:

> We may reverse a conviction for violating the First Amendment if we determine that the statute is unconstitutionally overbroad on its face. A statute may be facially overbroad in violation of the First Amendment when it prohibits constitutionally protected activity, in addition to activity that may

> be prohibited without offending constitutional rights. Because of the fear of a chilling effect on speech, the traditional rules of standing have been altered in the First Amendment context to allow litigants to challenge statutes as unconstitutionally overbroad even when their own conduct could, consistent with constitutional requirements, be punished under a narrowly drawn statute.

A.J.B., 929 N.W.2d at 847 (citations and quotations omitted).

In sum, Casillas may bring a facial overbreadth challenge to Minn. Stat. § 617.261 even if his dissemination of A.K.M.'s image is not protected by the First Amendment. Asto the applicable analysis:

> The first step in an overbreadth challenge is to construe the challenged statute; it is impossible to determine whether astatute reaches too far without first knowing what the statute covers. Once we understand the scope and sweep of the statute, we ask whether its reach is limited to unprotected categories of speech or expressive conduct.

Id. (citations and quotations omitted). If the statute is not limited to unprotected categories of speech or expressive conduct,

> we turn to the core overbreadth inquiry: Does the statute prohibit a substantial amount of constitutionally protected speech? This inquiry looks to the conduct that is criminalized by the statute—some of which is unprotected speech or conduct and some of which is

> speech and expressive conduct protected by the First Amendment—and asks whether the protected speech and expressive conduct make up a substantial proportion of the behavior the statute prohibits compared with conduct and speech that are unprotected and may be legitimately criminalized. A statute is not substantially overbroad merely because one can conceive of some impermissible applications.

Id. at 847-48 (citations and quotations omitted).

If the statute prohibits a substantial amount of protected expressive conduct, we consider whether applying a narrowing construction or severing problematic language from the statute would remedy the constitutional defect. *Id.* at 848. If the statute is substantially overbroad and cannot be saved by a narrowing construction or severance, "the remaining option is to invalidate the statute." *Id.* (quotation omitted). "Because the overbreadth doctrine has the potential to void an entire statute, it should be applied only as a last resort and only if the degree of overbreadth is substantial and the statute is not subject to a limiting construction." *Dunham*, 708 N.W.2d at 565 (quotation omitted).

With these principles in mind, we turn to the language of Minn. Stat. § 617.261.

1. Minn. Stat. § 617.261 has a broad sweep.

Minn. Stat. § 617.261 provides:

> It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:
>
> (1) the person is identifiable:

(i) from the image itself, by the person depicted in the image or by another person; or

(ii) from personal information displayed in connection with the image;

(2) *the actor knows or reasonably should know* that the person depicted in the image does not consent to the dissemination; and

(3) the image was obtained or created under circumstances in which *the actor knew or reasonably should have known* the person depicted had a reasonable expectation of privacy.

Minn. Stat. § 617.261, subd. 1 (emphasis added).

"'Dissemination' means distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium." *Id.*, subd. 7(b). "'Image' means a photograph, film, video recording, or digital photograph or recording." *Id.*, subd. 7(d). "'Intimate parts' means the genitals, pubic area, or anus of an individual, or if the individual is female, a partially or fully exposed nipple." *Id.*, subd. 7(e).

As to penalties, the statute provides that normally, whoever violates Minn. Stat. § 617.261, subd. 1, is guilty of a gross misdemeanor. *Id.*, subd. 2(a). However, a person who violates subdivision 1 is guilty of a felony and may be sentenced to imprisonment for up to three years if one of the following factors is present:

(1) *the person depicted in the image suffers financial loss due to the dissemination of the image;*

(2) the actor disseminates the image with intent to profitfrom the dissemination;

> (3) the actor maintains an Internet Web site, online service, online application, or mobile application for the purpose of disseminating the image;
> (4) the actor posts the image on a Web site;
> (5) *the actor disseminates the image with intent to harass the person depicted in the image*;
> (6) the actor obtained the image by committing a violation of section 609.52, 609.746, 609.89, or 609.891; or
> (7) the actor has previously been convicted under this chapter.

Id., subd. 2(b) (emphasis added). "'Harass' means an act that would cause a substantial adverse effect on the safety, security, or privacy of a reasonable person." *Id.*, subd. 7(c).

Minn. Stat. § 617.261 is not violated if:

> (1) the dissemination is made for the purpose of a criminal investigation or prosecution that is otherwise lawful;
> (2) the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct;
> (3) the dissemination is made in the course of seeking or receiving medical or mental health treatment and the image is protected from further dissemination;
> (4) the image involves exposure in public or was obtained in a commercial setting for the purpose of the legal sale of goods or services, including the creation of artistic products for sale or display;

> (5) the image relates to a matter of public interest and dissemination serves a lawful public purpose;
> (6) the dissemination is for legitimate scientific research or educational purposes; or
> (7) the dissemination is made for legal proceedings and is consistent with common practice in civil proceedings necessary for the proper functioning of the criminal justice system, or protected by court order which prohibits any furtherdissemination.

Id., subd. 5.

In sum, Minn. Stat. § 617.261 applies to a single intentional dissemination of an image of "another person who is depicted in a sexual act or whose intimate parts are exposed" if certain requirements are met. *Id.*, subd. 1. Those requirements are based in part on a broad mens rea requirement: 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.* That "knows or reasonably should know" standard is a negligence mens rea that allows a person to be convicted under Minn. Stat. § 617.261 even if he did not actually know that the person depicted in the image did not consent to the dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. *See A.J.B.*, 929 N.W.2d at 850 (describing a "knows or has reason to know" standard as a broad negligence mens rea).

Moreover, Minn. Stat. § 617.261 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 person depicted in the image suffers financial loss due to the dissemination of the image" or "the actor disseminates the image with intent to harass the person depicted in the image." Minn. Stat. § 617.261, subd. 2(b)(1), (5). 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.

In sum, Minn. Stat. § 617.261 covers a wide range of expressive conduct. It coversthe dissemination of a sexual image with knowledge that the person depicted in the image did not consent to the dissemination and that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. But it also 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 hada reasonable expectation of privacy, and did not cause or intend to cause a specified harm. Given the statute's application to the latter set of circumstances, its sweep is broad.

2. Minn. Stat. § 617.261's sweep is not limited to expressive conduct that is categorically excluded from First Amendment protection.

We next address the state's argument that Minn. Stat. § 617.261 does not implicate the First Amendment because it regulates only unprotected expressive conduct. "[T]he Supreme Court has long

permitted some content-based restrictions in a few limited areas, in which speech is of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 19 (Minn. 2014) (quotation omitted). Exceptions to First Amendment protections fall into several delineated categories that include speech or expressive conduct designed to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. *A.J.B.*, 929 N.W.2d at 846 (citing *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012)).

Obscene material is unprotected by the First Amendment. *Miller v. California*, 413 U.S. 15, 23-24, 93 S. Ct. 2607, 2614-15 (1973). But "[s]tate statutes designed to regulate obscene materials must be carefully limited," and the Supreme Court has confined the permissible reach of such regulation to works that depict or describe sexual conduct. *Id.* Such a regulation must "be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S. Ct. at 2615.

Based on that definition of obscenity, the state contends that Minn. Stat. § 617.261 regulates only obscenity. The state argues that "[t]he average person would find that [Minn. Stat. § 617.261] regulates content that appeals to the prurient interest." The state notes that a prurient interest in sex has been defined as a morbid, shameful interest in sex, *Brockett*

v. Spokane Arcades, Inc., 472 U.S. 491, 504-05, 105 S. Ct. 2794, 2802 (1985), and asserts that "people who disseminate nonconsensual, private sexual images evince" such an interest in sex. The state further argues that Minn. Stat. § 617.261 "regulates content that depicts, in a patently offensive way, specifically defined sexual conduct," asserting that "[w]hat makes the proscribed images patently offensive is, again, their nonconsensual nature." Specifically, the state argues that "[i]mages depicting someone's nudity or sexuality taken in private but shared publicly without consent are patently offensive." Lastly, the state argues that the images proscribed by Minn. Stat. § 617.261 lack serious literary, artistic, political, and scientific value.

The state's obscenity argument is not aligned with the definition of obscenity. The definition requires, in part, that an allegedly obscene work "portray sexual conduct in a patently offensive way." *Miller*, 413 U.S. at 24, 93 S. Ct. at 2615. That is, the definition asks whether the content of the image is patently offensive. *See The American Heritage Dictionary of the English Language* 1374 (5th ed. 2018) (defining "portray" as "[t]o depict or represent pictorially; make a picture of" and "[t]o describe or depict in a certain way"). But the state's argument is not based on the image's content. Instead, the state focuses on the circumstances surrounding the image's dissemination. The state appears to argue that any image of another person who is depicted in a sexual act or whose intimate parts are exposed portrays sexual conduct in a patently offensive way if the image is disseminated without the subject's consent. Although we agree that such nonconsensual dissemination is offensive, that is not the test for determining whether a work is obscene. Even though

some images subject to regulation under Minn. Stat. § 617.261 might satisfy the definition of obscenity and therefore may be proscribed consistent with the First Amendment, we cannot say, as a matter of law, that every image subject to regulation under the statute portrays sexual conduct in a patently offensive way and is therefore beyond First Amendment protection.

The state also contends that Minn. Stat. § 617.261 does not implicate the First Amendment because it is a privacy regulation. But privacy is not one of the recognized "delineated categories" of speech excepted from First Amendment protection. *See A.J.B.*, 929 N.W.2d at 846 (noting established exceptions). And "[t]he Supreme Court has been reluctant to expand these categories of unprotected speech." *Id.*; *see Stevens*, 559 U.S. at 472, 130 S. Ct. at 1586 ("Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").In fact, the Supreme Court has stated, "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690 (1983).

We recognize that the disseminations proscribed under Minn. Stat. § 617.261 could invade the privacy rights of others and that, under certain circumstances, such disseminations may be proscribed consistent with the First Amendment. *See Dunham*, 708 N.W.2d at 566 (rejecting a First Amendment challenge to Minnesota's criminal harassment statute after concluding that the statute was narrowly tailored because it "only regulates

speech or conduct that constitutes . . . substantial invasions of one's privacy" and its focus was "to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another"). But wecannot say, as a matter of law, that every dissemination regulated under Minn. Stat. § 617.261 is beyond the protection of the First Amendment as an invasion of privacy.

In sum, Minn. Stat. § 617.261's sweep is not limited to expressive conduct that is categorically excluded from First Amendment protection.[3]

3. Minn. Stat. § 617.261 prohibits conduct that is beyond its legitimate sweep.

Having concluded that Minn. Stat. § 617.261 regulates expressive conduct that is not categorically excluded from First Amendment protection, we ask whether it has a legitimate sweep and, if so, whether the statute extends beyond that sweep.

The state argues that it

> has a significant interest in seeking to deter the nonconsensualdissemination of private, sexually explicit images. This conduct can be construed as a form of domestic abuse, as abusers use the existence of these sexually explicit

[3] Two state supreme courts have rejected arguments similar to those made by the state. *People v. Austin*,_ N.E.3d___,___, 2019 WL 5287962, at *6-7 (Ill. Oct. 18, 2019) (rejecting state's argument that "speech that invades privacy" should be categorically excluded from First Amendment protection); *State v. VanBuren*, 214 A.3d 791, 798-807 (Vt. 2019) (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").

> images to threaten, intimidate, or coerce their partners. It is also a form of sexual harassment that seeks to degrade and humiliate thosedepicted. . . .
>
> The government has a strong interest in preventing the harm done to victims of nonconsensual porn; that harm is far-reaching. Victims have lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment.

(Citations and quotations omitted.)

We certainly agree that the state's harm-preventing policy interest is legitimate.[4] Minnesota's First Amendment caselaw indicates that speech and expressive conduct can be proscribed in an effort to serve that interest without violating the First Amendment. For example, in *Dunham*, this court held that Minn. Stat. § 609.748, subd. 1(a)(1) (2004), which defines harassment, does not substantially infringe on constitutionally protected speech or expression, and is not facially overbroad. 708 N.W.2d

---

[4] The state cites scholarly review articles that describe the problem of nonconsensual dissemination of private, sexually explicit images and the indisputable harm that it causes.*See* Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 Calif. L. Rev. 1303, 1304 (2014) (emphasizing that harm done to victims of revenge porn is "often vast" and that many victims report that this practice has had detrimental effects on their lives); *see also* Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. Am. Acad. Psychiatry & Law 359, 362(2016) (explaining long-term personal and psychological consequences of revenge porn and noting that "the disseminated photographs or videos may continue to haunt [victims]).

at 559. This court reasoned in part that "the language of the statute is directed against . . . speech or conduct that is intended to have a substantial adverse effect." *Id.* at 566. Similarly, in *State v. Stockwell*, this court held that the stalking provision in Minn. Stat. § 609.749, subd. 2(a)(2) (2006), is not unconstitutionally void for facial overbreadth in part because "it requires that the actor knows her conduct will cause fear and causes that reaction." 770 N.W.2d 533, 535, 539-40 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009).

Like the statutes in *Dunham* and *Stockwell*, Minn. Stat. § 617.261 serves the legitimate harm-preventing interest advanced by the state by proscribing disseminations that knowingly cause or are intended to cause a specified harm. But Minn. Stat. § 617.261 reaches much further, subjecting to punishment those who disseminate sexual images without either knowingly causing or intending to cause a specified harm. Casillas relies on that reach in support of his overbreadth challenge. He notes the statute's "lack of an intent to harm element or a requirement that the dissemination actually resulted in harm" and asserts that "[t]he negligent knowledge requirement just adds to the . . . constitutional concern." He argues that Minn. Stat. § 617.261 "punishes the act of dissemination itself without any accompanying criminal intent element or causation of harm, under a negligent standard," and that it "lacks the sufficient criminal intent element that may have narrowed the law to avoid constitutional infirmity."

Caselaw supports Casillas's argument that Minn. Stat. § 617.261's lack of an intent-to-harm element, coupled with a negligence mens rea, runs afoul of the First Amendment. For example, in *A.J.B.*, the Minnesota Supreme Court held that Minn. Stat. §

609.749, subd. 2(6) (2018), violated the First Amendment because it was facially overbroad. 929 N.W.2d at 844. That statute provided that a person who harassed another by committing the following act was guilty of a gross misdemeanor: "repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, messages, packages, through assistive devices for people with vision impairments or hearing loss, or any communication made through any available technologies or other objects." Minn. Stat. § 609.749, subd. 2(6). In invalidating the statute, the Minnesota Supreme Court noted that it "subject[ed] even negligent conduct to criminal sanction" and that it "criminalize[d] communications even when the person [did] not know—much less intend—that the communication [would] frighten, threaten, oppress, persecute, or intimidate the victim." *A.J.B.*, 929 N.W.2d at 854-55. The supreme court concluded that "[t]he statute's inclusion of a negligence standard [made] it more likely that the statute [would] have a chilling effect on expression protected by the First Amendment." *Id.* at 855 (quotation omitted).

The Minnesota Supreme Court also held that Minn. Stat. § 609.795, subd. 1(3) (2018), violated the First Amendment because it was facially overbroad. *Id.* at 844. That statute provided that whoever "with the intent to abuse, disturb, or cause distress, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages" is guilty of a misdemeanor. Minn. Stat. § 609.795, subd. 1(3). In holding that the statute was unconstitutionally overbroad, the supreme court noted that Minn. Stat. § 609.795 included a specific-intent element that limited the sweep of the statute by excluding negligent acts from

the statute's reach. *A.J.B.*, 929 N.W.2d at 858. The supreme court said that "[u]nder certain circumstances, a specific-intent requirement may sufficiently limit the reach of a statute into protected speech and expressive conduct to avoid overbreadth." *Id.* at 860. But the supreme court concluded that the "intentional conduct" element was not a sufficient limitation to save the statute, reasoning in part that "the limiting effect of the specific-intent requirement is counterbalanced by the absence. . . of any requirement that the victim actually suffer any harm." *Id.* at 861. In sum, "[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." *Id.*

Similarly, in *Hensel*, the Minnesota Supreme Court held that Minn. Stat. § 609.72, subd. 1(2) (2016), which prohibited disturbing assemblies or meetings, was facially unconstitutional under the First Amendment because it was substantially overbroad. 901 N.W.2d at 168. The supreme court reasoned in part that

> [r]ather than prohibiting only intentional conduct, . . . the statute's mens-rea element prohibits actions done with knowledge or reasonable grounds to know that the act will tend to disturb others. 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. The statute's inclusion of a negligence standard makes it more likely that

> the statute will have a chilling effect on expression protected by the First Amendment, the key concern of the overbreadth doctrine.

Id. at 174 (quotations omitted).

Conversely, in *State v. Muccio*, the Minnesota Supreme Court held that Minn. Stat. § 609.352, subd. 2a(2) (2016), which prohibits an adult from participating in the electronic transmission of information relating to or describing the sexual conduct of any person, if the communication is directed at a child and the adult acts with the specific intent to arousethe sexual desire of any person, is not substantially overbroad in violation of the First Amendment. 890 N.W.2d 914, 917-18 (Minn. 2017). The supreme court reasoned in part that "because of its specific-intent requirement, the statute does not target broad categoriesof speech." *Id.* at 928 (citation omitted); *see also State v. Washington-Davis*, 881 N.W.2d 531, 533, 539 (Minn. 2016) (holding that "Minnesota Statutes § 609.322, subd. 1a(1)-(2) (2014), which criminalizes the promotion of prostitution and the solicitation of individuals to practice prostitution, is not substantially overbroad in violation of the First Amendment" in part because the statute criminalizes the solicitation and promotion of individuals to engage in sexual conduct only if the sexual conduct is done for the purpose of satisfying the actor's sexual impulses).

This court has similarly considered the impact of a specific-intent requirement in an overbreadth analysis. *See Stockwell*, 770 N.W.2d at 539; *Dunham*, 708 N.W.2d at 566. Most recently, in *Linert v. MacDonald*, this court held that Minn. Stat. § 211B.02 (2016), which prohibits candidates from knowingly making false claims of support or

endorsement, is not facially overbroad in violation of the First Amendment. 901 N.W.2d 664, 665 (Minn. App. 2017). This court reasoned in part that "the statute's specific-intent requirement—that false claims be *knowingly* made—ensures that the statute does not targetbroad categories of speech." *Id.* at 669 (quotation omitted).

Two other state supreme courts have considered the impact of an intent-to-harm element—or lack thereof—when analyzing facial First Amendment challenges to laws similar to Minn. Stat. § 617.261. *Austin*, 2019 WL 5287962, at *19-20; *VanBuren*, 214 A.3d at 812. For example, the Illinois Supreme Court rejected an overbreadth challenge to 720 Ill. Comp. Stat. 5/11-23.5(b) (2016), which criminalizes the nonconsensual dissemination of private sexual images. *Austin*, 2019 WL 5287962, at *16-20. In doing so, it rejected "the circuit court's criticism . . . that the statute does not require proof of an illicit motive or malicious purpose." *Id.* at *19. The Illinois Supreme Court recognized that

> most state laws prohibiting the nonconsensual dissemination of private sexual images expressly require some form of malicious purpose or illicit motive as a distinct element of the offense. . . .
>
> In contrast, the legislatures of four states, including our General Assembly, have chosen not to expressly include "malice" as a distinct element of the offense.

Id.

In rejecting the circuit court's reasoning, the Illinois Supreme Court noted "[t]he circuit court did not, however, cite legal authority for the proposition

that a criminal statute necessarily must contain an illicit motive or malicious purpose to survive an overbreadth challenge." *Id.* But our supreme court *has* provided us with such authority, and we are bound by that precedent. *See State v. Curtis*, 921 N.W.2d 342, 343 (Minn. 2018) (holding that "[t]he court of appeals is bound by supreme court precedent").

The Vermont Supreme Court also rejected a facial First Amendment challenge to its statute banning disclosure of nonconsensual pornography, Vt. Stat. Ann. tit. 13, § 2606 (2015). *VanBuren*, 214 A.3d at 814. In doing so, the Vermont Supreme Court considered whether Vermont's statute was narrowly tailored to serve a compelling state interest. *VanBuren*, 214 A.3d at 807, 811-14. In concluding that it was narrowly tailored, the Vermont Supreme Court reasoned in part that:

> [D]isclosure is only criminal if the discloser knowingly discloses the images without the victim's consent. We construe this intent requirement to require knowledge of both the fact of disclosing, and the fact of nonconsent. Individuals are highly unlikely to accidentally violate this statute while engaging in otherwise permitted speech. In fact, § 2606 goes further, requiring not only knowledge of the above elements, but a *specific intent to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially*.

Id. at 812 (emphasis added) (emphasis omitted) (citations omitted).

Unlike the Vermont statute, Minn. Stat. § 617.261 lacks a specific intent-to-harm element. Although Minn. Stat. § 617.261 has a legitimate harm-preventing purpose, its lack of a specific-intent requirement and use of a negligence mens rea allows it to reach protected First Amendment expression that neither causes nor is intended to cause a specified harm. That reach goes beyond the legitimate state interest justifying the proscription of otherwise protected First Amendment expression. Based on the Minnesota caselaw described above, we conclude that Minn. Stat. § 617.261 proscribes expressive conduct in violation of the First Amendment.

4. Minn. Stat. § 617.261 is overbroad in violation of the First Amendment.

Having determined that Minn. Stat. § 617.261 proscribes expressive conduct in violation of the First Amendment, we turn to the critical inquiry: Does Minn. Stat. § 617.261 prohibit a substantial amount of constitutionally protected speech?

In this age of expansive internet communication, images may be disseminated, received, and observed with ease. As the Court of Appeals of Texas noted in considering a First Amendment challenge to a law similar to Minn. Stat. § 617.261:

> Today, a person can share a photograph or video with an untold number of people with a mere click of a button. The daily sharing of visual material, for many, has become almostritualistic. And once the act of sharing is accomplished, it is highly questionable whether that act ever can be completely rescinded. But assuming that the visual material is not otherwise protected, these persons

> are acting within their rights when they share visual material with others.

Ex parte Jones, ___S.W.3d _____,_____, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018) (footnote omitted), *review granted* (Tex. Crim. App. July 25, 2018). The Texas court noted that

> a Facebook user with her account settings set to share posts as "public" can share a picture to her Facebook page that not only can be viewed by the nearly two billion Facebook users, but also by any other person with internet access whose access to Facebook is not otherwise restricted.

Id. at *7 n.16.

Anyone who is familiar with our current American culture is likely aware that the free flow of information described above contains noncommercial images of people depicted in sexual acts, or whose intimate parts are exposed, and that the subjects of such images often consent to their dissemination.[5] Indeed, some individuals, beyond merely consenting, seek to promote the broad dissemination of such images, for either political or economic reasons. *See, e.g.*, Debra L. Logan, Note, *Exposing Nipples as Political Speech*, 41 Law & Psychol. Rev. 173, 179 (2017) ("Some women bare their breasts to advocate the position that public decency laws should treat men and women equally; others confront the stigmatization of their bodies as a form of political theater to draw

[5] "We now live in an age where celebrities purposely leak their sex tapes to the Internet, hoping they'll go viral, and thereby garner further fame and riches. Stars 'mistakenly' post their nude pictures to Twitter (*oops!*)." Michael L. Baroni, *New "Revenge Porn" Law Is Impotent*, Orange County Law., Feb. 2014, at 12.

attention, whether toward or against a political candidate, to advocate a political position, or simply to defend the rights of breastfeeding mothers."); Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 Vand. J. Ent. & Tech. L. 255 (2006) (compiling views of women in the adult-entertainment industry).

In this context, Minn. Stat. § 617.261's negligence mens rea is problematic. The statute does not define or explain the circumstances that should cause someone who observes an image described in Minn. Stat. § 617.261 to reasonably know that the person depicted in the image did not consent to its dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. Depending on one's sensibilities and tolerance of sexual images on publicly available mediums, reasonable people could reach different conclusions regarding the privacy expectations associated with such images, rendering the reasonable knowledge standard highly subjective. Indeed, in concluding that Casillas was guilty, the district court reasoned that "an expectation of privacy regarding the image is implicitly inherent from the nature of the act depicted," indicating that some might view a sexual image as private and its dissemination nonconsensual regardless of the actual expectations of the person depicted in the image.

The dissenting opinion in *People v. Austin* sets forth a telling hypothetical that reflects our concern:

> A hypothetical posed to the State during oral argument illustrates this point. Two

> people go out on a date, and one later sends the other a text message containing an unsolicited and unappreciated nude photo. The recipient then goes to a friend, shows the friend the photo, and says, "look what this person sent me." Has the recipient committed a felony? The State conceded that the recipient had, assuming the recipient knew or should have known that the photo was intended to remain a private communication.

2019 WL 5287962, at *24 (Garman, J., dissenting).

It is not difficult to envision a substantial number of situations in which a person observes an image that may have been disseminated in violation of Minn. Stat. § 617.261 and further disseminates that image without knowing that the subject of the image did not consent to the original dissemination, without knowing that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy, and without intending to cause a specified harm. Given the ease with which impermissible disseminations under the statute may be further disseminated without the intent to harm necessary to proscribe expressive conduct without violating the First Amendment, we conclude that Minn. Stat. § 617.261 has the potential to reach a substantial amount of protected expressive conduct.[6]

Moreover, that substantial reach has the very chilling effect that the overbreadth doctrine is

[6] Although the statute includes certain exemptions, they do not meaningfully limit the statute's impermissible reach of further disseminations as described above. See Minn. Stat. § 617.261, subd. 5.

intended to prevent. *See Hensel*, 901 N.W.2d at 174 (describing the "chilling effect on expression protected by the First Amendment" as "the key concern of the overbreadth doctrine"). An observer of an image on a publicly available medium that depicts a person in a sexual act, or whose intimate parts are exposed, would be wise to refrain from further disseminating that image or risk criminal prosecution under Minn. Stat. § 617.261 based on a prosecutor's subjective belief that the image's content should have caused the observer to know that the person depicted did not consent to the dissemination and that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy. And that risk exists even though such images are often present on publicly available mediums with the consent of the people depicted.[7]

In sum, Minn. Stat. § 617.261 proscribes a substantial amount of protected expressive conduct, and it is therefore overbroad in violation of the First Amendment.

5. The remedy for the First Amendment violation is to invalidate Minn. Stat. § 617.261.

Having determined that Minn. Stat. § 617.261 is overbroad in violation of the First Amendment, we consider whether applying a narrowing construction or severing problematic language from the statute

[7] The state argues that the risk of erroneous prosecution of those who disseminate a sexual image without intent to harm is lessened because "the prosecutor would have to [determine that] there [was] a reasonable knowledge . . . that they would have known." That argument does not alleviate our constitutional concern. *See 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.").

would remedy the constitutional defect. *A.J.B.*, 929 N.W.2d at 848.

When a court determines that a statute is unconstitutional, it must invalidate as much of the statute as is necessary to eliminate the unconstitutionality. *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, 600 (Minn. 1982). We look to the intent of the legislature to fashion a remedy consistent with that intent. *Id.* "[W]e are not to sever a statute if the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *A.J.B.*, 929 N.W.2d at 848 (quotation omitted). Although we can strike a severable statutory provision if it is unconstitutional and void, "we cannot add language to a statute in order to render it constitutionally permissible." *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 836 (Minn. 2002) (quotation omitted).

The state argues that Minn. Stat. § 617.261 is subject to a limiting construction that can remedy its constitutional defect. For example, the state suggests that we construe the statute to refer only to obscenity. But limiting the statute's application to obscenity is inconsistent with the plain language of the statute, which defines the images subject to regulation much more broadly than the recognized definition of obscenity, indicating that the legislature did not intend such a limitation.

The state also suggests that we construe the statute to refer only to substantial invasions of privacy, which is in line with the parameters set forth in the caselaw above. Consistent with that suggestion, the state recommends that we sever the negligence standard from the statute, arguing, "There are no apparent reasons to doubt that the Legislature

would have enacted the statute without the negligence standard."

Again, the constitutional defect in Minn. Stat. § 617.261 stems from its lack of an intent-to-harm requirement and its use of a negligence mens rea. Correcting that defect would require us to rewrite the statute. We would have to sever the negligence mens rea standards from subdivision 1(2) and (3) of Minn. Stat. § 617.261. Doing so would limit the statute's reach to those who knew both that the person depicted in the image did not consent to the dissemination and that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy. Such circumstances could show intent to harm. *See State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (stating that because intent is a state of mind, it is "generally proved circumstantially—by drawing inferences from the defendant's words and actions in light of the totality of the circumstances," and that when considering circumstantial evidence of intent, "the jury may infer that a person intends the natural and probable consequences of his actions").

Although severing the negligence mens rea standards would limit the statute's reach to circumstances in which the disseminator intended harm—consistent with Minnesota caselaw upholding First Amendment proscriptions based on the state's legitimate harm- preventing interest—it would also result in a statute that classifies an intentionally harmful dissemination as both a gross misdemeanor and a felony. *See* Minn. Stat. § 617.261, subd. 2(a) (stating that normally, whoever violates Minn. Stat. § 617.261, subd. 1, is guilty of a gross misdemeanor), (b)(5) (stating that a felony results if "the actor disseminates the image with intent to harass"). We

would have to add language to the statute to reconcile that conflict.

In sum, we agree with the state that there is no apparent reason to doubt that the legislature would have enacted the statute without the negligence standard. But achieving that result on the legislature's behalf requires us to "'perform[] . . . plastic surgery upon the face of the [statute],' rather than just adopting an alternative, reasonable construction of the statute's actual words." *Hensel*, 901 N.W.2d at 176-77 (alterations in original) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S. Ct. 935, 940 (1969)). This we will not do. *See Stevens*, 559 U.S. at 480, 130 S. Ct. at 1592 (explaining that rewriting a statute to "conform it to constitutional requirements" would constitute a "serious invasion of the legislative domain"). Such a "shave-a-little-off-here and throw-in-a-few-words-there statute . . . 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.

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 (quotation omitted). We recognize that "invalidation of a statute for substantial overbreadth is strong medicine that should be used only as a last resort." *Washington-Davis*, 881 N.W.2d at 540 (quotation omitted). But Minn. Stat. § 617.261 reaches a substantial amount of protected speech in violation of the First Amendment, and we cannot remedy the constitutional infirmity through a narrowing construction or severance. We therefore hold that Minn. Stat. § 617.261 is facially overbroad in violation of the First Amendment to the United

States Constitution. Consequently, Minn. Stat. § 617.261 is void.

Our holding in no way changes our view that Casillas's conduct in violation of Minn. Stat. § 617.261—of which he was convicted—is abhorrent. Nor should it be read as failing to appreciate the significant harm that the nonconsensual dissemination of private sexual images causes. The state legitimately seeks to punish that conduct. But the state cannot do so under a statute that is written too broadly and therefore violates the First Amendment. In the end, we are constitutionally obligated to faithfully apply the law.

DECISION

Because Minn. Stat. § 617.261 is facially invalid under the First Amendment to the United States Constitution, we reverse Casillas's conviction and sentence under that statute, without addressing his remaining arguments for relief.

Reversed.

APPENDIX C

STATE OF MINNESOTA
DAKOTA COUNTY DISTRICT COURT
FIRST JUDICIAL DISTRICT

STATE OF MINNESOTA,
Plaintiff,
vs.
MICHAEL ANTHONY CASILLAS,
Defendant.

19HA-CR-17-4702

Findings of Fact, Conclusions of Law, Order and Memorandum

Filed: June 13, 2018
Judge Messerich

The above-entitled matter came before the Honorable Kathryn D. Messerich, Judge of District Court, on April 6, 2018, at the Dakota County Judicial Center, Hastings, Minnesota, for a Contested Omnibus hearing upon Defendant's Motion to Dismiss. The issue before this Court is whether Minnesota Statutes § 617.261 is unconstitutional as overbroad and/or vague on its face. The parties were permitted to submit written argument and the Court took the matter under advisement on May 18, 2018.

The State was represented by Assistant Dakota County Attorney, Torrie J. Schneider. Defendant was

personally present and represented by his attorney, John Arechigo.

Based upon the proceedings, this Court makes the following:

FINDINGS OF FACT

1. Defendant is charged with one count of Nonconsenual Dissemination of Private Sexual Images pursuant to Minnesota Statutes § 617.261.

2. It is alleged in the Complaint that Defendant had been in a relationship with A.K.M. and during that relationship Defendant had access to A.K.M.'s account log in information. When the relationship ended, it is alleged that Defendant used that log in information to obtain photographs and videos from A.K.M.'s cloud account, including sexually explicit material. He threatened A.K.M. via text that he would release them. On June 20, 2017 it is alleged that Defendant sent a sexually explicit video of A.K.M. to 44 recipients.

3. Defendant has filed a motion to dismiss claiming that the statute is unconstitutional as overbroad and/or vague on its face.

CONCLUSIONS OF LAW

1. Minnesota Statutes §617.261 is not unconstitutionally overbroad.

2. Minnesota Statutes §617.261 is not void-for-vagueness.

ORDER

1. Defendant's motion to dismiss is **DENIED**.

2. The attached memorandum is incorporated herein as additional findings and rationale for the Court's decision.

/s/ Kathryn D. Messerich
Kathryn D. Messerich
Judge of District Court

Dated: June 13, 2018

MEMORANDUM

Defendant argues that Minnesota Statutes §617.261 is unconstitutional under both the First Amendment of the United States Constitution and Article I, §§3, 7 of the Minnesota Constitution. He claims that the statute violates First Amendment protected speech rights, is unconstitutional content-based restriction on speech, is unconstitutionally overbroad, and unconstitutionally vague.

"Minnesota statutes are presumed constitutional and our power to declare a statute unconstitutional should be exercised with extreme caution and only when necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). When interpreting statutes, courts presume that the "legislature does not intend to violate the constitutionof the United States or of this state." Minn. Stat. §645.17 (2018). The Court must interpret the statute, giving "effect to the legislature's intent." *State v. Crawley,* 819 N.W.2d 94, 102 (Minn. 2012). When determining the meaning of a statute, the Court interprets words "according to their common and approved usage." Minn. Stat. § 645.08(1) (2017).

Minnesota Statutes § 617.261 NONCONSENSUAL DISSEMINATION OF PRIVATE SEXUAL IMAGES reads:

> Subdivision 1. Crime. 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 orin 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.

Minnesota Statutes § 617.261 (2017).

The party challenging a statute bears the initial burden of demonstrating that it implicates the First Amendment. *State v. Stockwell*, 770 N.W.2d 533, 537 (Minn. Ct. App. 2009). The "burden is typically on the State to show that a content-based restriction does not violate the First Amendment. On the other hand, the party challenging the constitutionality of a statute bears the burden to show that protected speech is implicated in the first place." *State v. Washington-Davis*, 881 N.W.2d 531, 537, n.8. Otherwise, it would "create a rule that all conduct is presumptively expressive.", *Stockwell,* 770 N.W.2d at

537, (quoting *Clark v. Cmty. For Creative Non-Violence,* 468 U.A. 288, 293 n.5 (1984).

Here, the Defendant must demonstrate that the statute implicates the First Amendment. The First Amendment protects offensive, emotionally distressing, or outrageous speech and includes some expressive activity, not just words. See *State. v. Machholz,* 574 N.W.2d 415, 419 (Minn. 1998), *U.S. v. Stevens*, 559 U.S. 460 (2010), *Boos v. Barry*, 485 U.S. 312, 322 (1982) (citation omitted). Forms of speech that may be regulated because they fall outside the protections of the First Amendment include obscenity, defamation, fraud, incitement and speech integral to criminal conduct. *Stevens*, 559 U.S. at 468-69 (internal citations omitted). The speech that this statute regulates is dissemination of private sexual images, specifically of a person in a sexual act, or whose intimate parts are exposed.

Obscenity is a category of speech that falls outside the constitutional protections of the First Amendment. "[O]bscene speech – sexually explicit material that violates fundamental notions of decency – is not protected by the First Amendment." *U.S. v. Williams*, 553 U.S. 285, 293 (2008). The U.S. Supreme Court has defined a test for obscenity in *Miller v. California,* as (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24 (citations omitted).

While it may be argued that not all sexual images are going to fall under the definition of "obscenity",

such as artistic works, this Court finds that the statute does regulate obscenity under the framework provided by the case law. The statute has excluded images that have serious literary, artistic, political, or scientific value. The statute is specific to nonconsensual dissemination of images. That indicates that it doesnot involve the "free exchange of ideas" that the First Amendment is intended to protect.

"[U]nprotected areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content." *State v. Crawley,* 819 N.W.2d 94, 109 (Minn. 2012), (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Obscenity is an unprotected area of speech. There are "three exceptions to the general prohibition against content-based discrimination within unprotected categories of speech." *Crawley* at 110. One of the exceptions is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V.*, 505 U.S. at 388. 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 ofobscenity.

If the First Amendment were implicated, where conduct is involved, the Court hasto determine if "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). "A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited

without offending constitutional rights." *State v. Stockwell*, 770, N.W.2d 533, 538 (Minn. Ct. App.2009) (quoting *Machholz* at 419). The overbreadth doctrine should be applied "only as a last resort.…" *Machholz* at 419, quoting *Broadrick* at 603.

The Court has found that the statute does not regulate protected speech and is not required to address the issue of overbreadth. Even so, any degree of overbreadth is not sufficiently substantial so as to find that it is unconstitutional on its face. This statute balances the safety and security rights of individuals against an actor's right to communicate. The statute is very specific as to the images and dissemination it prohibits and is also limited by an intent requirement and a knowledge element. In reviewing the statute in its entirety, and in light of the applicable case law, the Court finds that the statute is not overbroad and does not significantly compromise recognizedFirst Amendment protections.

Based on the above rulings, this Court does not address whether the statute is narrowly tailored to serve the government's compelling interest of protecting victims of"revenge porn" in order to pass the "strict scrutiny" test.

Defendant also argues that the statute at issue is unconstitutionally vague. "The void-for-vagueness doctrine requires that a 'penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Bussman,* 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v.Lawson,* 461 U.S. 352, 357 (1983)). "Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but bythe requirement of proof

beyond a reasonable doubt." *U.S. v. Williams,* 553 U.S. 285, 306 (2008), citations omitted. "What renders a statute vague is no the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.* The Court in the *Williams* case went on to state that it "struck down statutes that tied criminal culpability to …wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.*

In this case, the statute has numerous explicit definitions to aid in determining what specific act is prohibited. A number of the terms are also defined in other parts of the criminal code, such as "know" and "intentionally". The statute has an intent requirement – that the actor "*intentionally* disseminate an image…"; that the "actor *knows or reasonably should know*…"; and that "the image was obtained or created under circumstances in which the actor *knew or reasonably should have known* the person depicted…" Minn. Stat § 617.261, subd. 1, *emphasis added.* The statute is not void for vagueness. For the above reasons, Minnesota Statutes §617.261 is constitutional and Defendant's motion to dismiss is denied.

K.D.M.

APPENDIX D

MINNESOTA STATUTES
SECTION 617.261

617.261 NONCONSENSUAL DISSEMINATION OF PRIVATE SEXUAL IMAGES.

Subdivision 1. **Crime.** 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:

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.

Subd. 2. **Penalties.** (a) Except as provided in paragraph (b), whoever violates subdivision 1 is guilty ofa gross misdemeanor.

(b) Whoever violates subdivision 1 may be sentenced to imprisonment for not more than three years orto payment of a fine of $5,000, or both, if one of the following factors is present:

(1) the person depicted in the image suffers financial loss due to the dissemination of the image;

(2) the actor disseminates the image with intent to profitfrom the dissemination;

(3) the actor maintains an Internet Web site, online service, online application, or mobile application for the purpose of disseminating the image;

(4) the actor posts the image on a Web site;

(5) the actor disseminates the image with intent toharass the person depicted in the image;

(6) the actor obtained the image by committing a violation of section 609.52, 609.746, 609.89, or 609.891; or

(7) the actor has previously been convicted under this chapter.

Subd. 3. **No defense.** It is not a defense to a prosecution under this section that the person consented to the capture or possession of the image.

Subd. 4. **Venue.** Notwithstanding anything to the contrary in section 627.01, an offense committed under this section may be prosecuted in:

(1) the county where the offense occurred;

(2) the county of residence of the actor or victim or in the jurisdiction of the victim's designated address if the victim participates in the address confidentiality program established by chapter 5B; or

(3) only if venue cannot be located in the counties specified under clause (1) or (2), the county where any image is produced, reproduced, found, stored, received, or possessed in violation of this section.

Subd. 5. **Exemptions.** Subdivision 1 does not apply when:

(1) the dissemination is made for the purpose of a criminal investigation or prosecution that is otherwise lawful;

(2) the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct;

(3) the dissemination is made in the course of seeking or receiving medical or mental health treatment and the image is protected from further dissemination;

(4) the image involves exposure in public or was obtained in a commercial setting for the purpose of the legal sale of goods or services, including the creation of artistic products for sale or display;

(5) the image relates to a matter of public interest and dissemination serves a lawful public purpose;

(6) the dissemination is for legitimate scientific researchor educational purposes; or

(7) the dissemination is made for legal proceedings and is consistent with common practice in civil proceedings necessary for the proper functioning of the criminal justice system, or protected by court order which prohibits any furtherdissemination.

Subd. 6. **Immunity.** Nothing in this section shall be construed to impose liability upon the following entities solely as a result of content or information provided by another person:

(1) an interactive computer service as defined in United States Code, title 47, section 230, paragraph (f), clause (2);

(2) a provider of public mobile services or private radio services; or

(3) a telecommunications network or broadband provider.

Subd. 7. **Definitions.** (a) For purposes of this section, the following terms have the meanings given.

(b) "Dissemination" means distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium.

(c) "Harass" means an act that would cause a substantial adverse effect on the safety, security, or privacyof a reasonable person.

(d) "Image" means a photograph, film, video recording, or digital photograph or recording.

(e) "Intimate parts" means the genitals, pubic area, or anus of an individual, or if the individual is female,a partially or fully exposed nipple.

(f) "Personal information" means any identifier that permits communication or in-person contact with a person, including:

(1) a person's first and last name, first initial and last name, first name and last initial, or nickname;

(2) a person's home, school, or work address;

(3) a person's telephone number, e-mail address, or social media account information; or

(4) a person's geolocation data.

(g) "Sexual act" means either sexual contact or sexual penetration.

(h) "Sexual contact" means the intentional touching of intimate parts or intentional touching with seminal fluid or sperm onto another person's body.

(i) "Sexual penetration" means any of the following acts:

(1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or

(2) any intrusion, however slight, into the genital or anal openings of an individual by another's body part or an object used by another for this purpose.

(j) "Social media" means any electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content.

Subd. 8 **Other crimes.** Nothing in this section shall limit the power of the state to prosecute or

punish a person for conduct that constitutes any other crime under any other law of this state.

History: *2016 c 126 s 9*