STATE OF MINNESOTA

IN SUPREME COURT

A19-0576

Court of Appeals Hudson, J.

State of Minnesota,

Appellant,

vs.

Filed: December 30, 2020
Office of Appellate Courts

Michael Anthony Casillas,

Respondent.

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 Foundation, 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 S. 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.

S Y L L A B U S

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.

O P I N I O N

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

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[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.

"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.' " *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

[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").

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 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 of justification," 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:
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> (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* of the 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 statute exclusively 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 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

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[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.

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 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

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

(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 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

[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).

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 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 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

[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" is misleading in suggesting "that visual depictions of nudity or sexual activity are inherently pornographic").

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 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 dissemination of 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 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]

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[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 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.

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.

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]

[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)).

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 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

[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).

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 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.

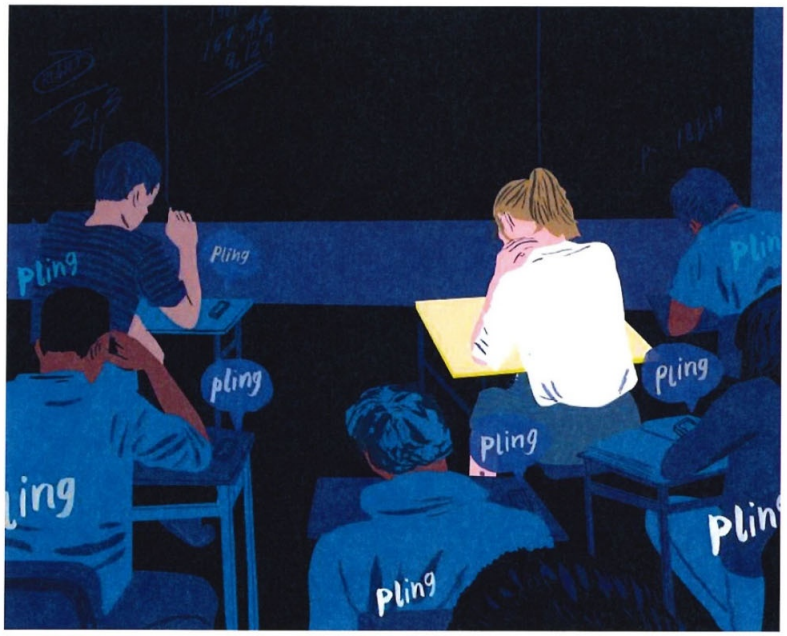
CONCLUSION

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 raised in this appeal.

Reversed and remanded.

Women

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



▲ More than half of UK teenagers have friends who have shared intimate images of someone they know. Illustration: Christine Roesch

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) and 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 have 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.