IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2016-253

State of Vermont, *Appellant*

v.

Rebekah S. VanBuren, *Defendant-Appellee*

ON APPEAL FROM SUPERIOR COURT,
CRIMINAL DIVISION (BENNINGTON)
DOCKET NO. 1144-12-15 Bncr

Brief of *Amici Curiae* the Cyber Civil Rights Initiative and the Vermont Network Against Domestic and Sexual Violence in Support of Appellant

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This brief is filed, with the permission of the Court, on behalf of amici the Cyber Civil Rights Initiative (including its legislative director, law professor Mary Anne Franks), and the Vermont Network Against Domestic and Sexual Violence.[1]

The Cyber Civil Rights Initiative (CCRI) advocates for technological, social, and legal reform on the issue of online harassment. The non-profit organization began as the End Revenge Porn campaign in 2012, created by Dr. Holly Jacobs, a victim of nonconsensual pornography. CCRI specifically focuses on the growing problem of the unauthorized distribution of intimate images. That practice is commonly referred to as "revenge porn" but is more accurately described as "nonconsensual pornography." The organization has provided support to more than 4,000 victims of "revenge porn" worldwide, including a 24-hour crisis helpline; collaboration with the Cyber Civil Rights Legal Project and more than two dozen attorneys offering pro bono legal services; and an online guide for removing private, sexually explicit material from the internet. CCRI also works with major social media and technology companies to develop policies to prevent the nonconsensual proliferation of intimate images and other forms of online harassment.

Dr. Mary Anne Franks, CCRI's Vice-President and Legislative and Tech Policy Director, is a Professor of Law at the University of Miami Law School. Professor Franks drafted the first model "revenge porn" law in 2013, which has

[1] This Court granted CCRI's motion for permission to file an *amicus* brief. The Vermont Network against Domestic and Sexual Violence separately moves for permission to join the brief.

been used as a template for many of the 34 states that have passed legislation protecting sexual privacy. Professor Franks, a constitutional law scholar, assisted in the drafting of the federal Intimate Privacy Protection Act (IPPA), introduced by Congresswoman Jackie Speier in 2016, and currently serves as the reporter for the Uniform Law Commission's Committee on the Unauthorized Disclosure of Intimate Images. Professor Franks is the author of many articles on the issue of nonconsensual pornography, including the first law review article on the criminalization of "revenge porn," co-authored with CCRI Advisory Board member and online harassment expert Danielle Citron.

The Vermont Network Against Domestic and Sexual Violence is a coalition of Vermont organizations committed to ending domestic and sexual violence. In addition to supporting its member programs, the Network focuses on community outreach, education, and advocacy. The Network supported the passage of 13 V.S.A. § 2606.

Amici Curiae file this brief with two purposes in mind. The first is to provide the Court with expert information on the issue of nonconsensual pornography. As one of the only national organizations specifically devoted to combating nonconsensual pornography, CCRI has substantial, specialized expertise that will assist the Court in understanding the issues in this case, especially the serious harms caused by "revenge porn." The second purpose is to offer perspective on the First Amendment issues raised by this case, drawing on Professor Franks' expertise.

ARGUMENT

I. Nonconsensual pornography causes devastating and often irreparable harm by exposing its victims to harassment, causing lasting psychological injuries, damaging relationships, and undermining professional opportunities.

The 34 state legislatures[2] that have acted against nonconsensual pornography have done so because this abhorrent practice causes grave and often irreparable harm to the victims. Nonconsensual pornography is "the distribution of sexually graphic images of individuals without their consent." Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014). This includes "images originally obtained without consent (*e.g.*, hidden recordings or recordings of sexual assaults), as well as images "originally obtained with consent, usually within the context of a private or confidential relationship." *Id.* Nonconsensual pornography includes footage obtained by hidden cameras, consensually exchanged images within a confidential relationship, stolen photos, and recordings of sexual assaults.

While nonconsensual pornography is not new, technology has dramatically changed its prevalence and impact. Most American adults now carry smartphones, which allow them to take pictures and videos and post them online in seconds.[3] We have become accustomed to the astonishing speed with which images circulate

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[2] *See* CCRI, *34 States + DC Have Revenge Porn Laws*, https://www.cybercivilrights.org/revenge-porn-laws/ (collecting state statutes).

[3] Pew Research Center, *Technology Device Ownership: 2015*, http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/ (68% of American adults own a smartphone).

worldwide, whether amusing videos or haunting photos from war zones. That same speed and ease of distribution means that intimate and sexually explicit photos posted online can reach thousands, even millions of people, with a click of a mouse.

For victims, the consequences are devastating. Within days or even minutes, these images can dominate an internet search of the victim's name. And images are often sent without consent through emails, text messages, and mobile applications, in ways that directly target and reach the victim's family, workplace, and friends. Indeed, that is what happened in this case, where the defendant "tagged" the victim on Facebook. PC 1.

Contrary to what the colloquialism "revenge porn" suggests, perpetrators of nonconsensual pornography can be inspired by a range of motivations, from personal vindictiveness to greed to providing "entertainment." Ex-partners disclose private, sexually explicit material as a means of vengeful punishment.[4] Domestic abusers use the threat of disclosure of intimate photos to keep their partners from leaving or from reporting abuse to law enforcement.[5] Traffickers and pimps use nonconsensual pornography to keep unwilling individuals in the sex trade.[6] Rapists

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[4] *See* Jack Simpson, *Revenge Porn: What is it and how widespread is the problem?* The Independent (July 2, 2014),

[5] *Id*; Annmarie Chiarini, *I was a victim of revenge porn,* The Guardian (Nov. 19, 2013), http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change.

[6] *See* Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 818 (2008); Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC Chicago (Feb. 22, 2013), http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html.

record their attacks to further humiliate their victims and to discourage them from reporting sexual assaults.[7] Nursing home workers post nude photos of elderly and disabled patients to social media for amusement.[8] "Revenge porn" site owners traffic in unauthorized sexually explicit photos and videos to make money or to attain notoriety.[9]

No matter who the perpetrator is or how the images or videos are originally obtained, their unauthorized disclosure causes immediate, devastating, and in many cases irreparable harm. According to a nationally representative 2016 study by the Data & Society Research Institute, 1 in 25 American internet users has been a victim of or threatened with the disclosure of intimate images.[10] That means more than ten million women, men, and children suffer the effects of this devastating violation of privacy, which include extortion, harassment, lost jobs, depression,[11]

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[7] Tara Culp-Ressler, *16 Year-Old's Rape Goes Viral on Twitter*, Think Progress (July 10, 2014), http://thinkprogress.org/health/2014/07/10/3458564/rape-viral-social-media-jada/.

[8] *See* Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat,* Pro Publica (Dec. 21, 2015), https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat.

[9] *Revenge Porn' Website has Colorado Women Outraged*, CBS Denver (Feb. 3, 2014), http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/.

[10] Data and Society, *New report shows that 4% of U.S. internet users have been a victim of "revenge porn,"* (Dec. 13, 2016), https://datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/ .

[11] Matt R. Nobles et al., *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, 31 Just. Q. 986 (2014).

and even suicide.[12]

One of those victims is Annmarie Chiarini. For years, an internet search for Annmarie's name would not reflect the fact that she is an English professor, a mother of two children, and a writer.[13] Instead, her search results would be dominated by links to hard-core pornographic websites. These links would lead to sexually explicit photos of Annmarie that she had taken under pressure by her long-distance boyfriend. In 2010, when Annmarie broke off the relationship due to his increasingly controlling and aggressive behavior, her ex-boyfriend responded by posting these private photos to an online auction site.[14] He also used them to create a fake profile of Annmarie on a pornography website, including detailed information about where she lived and worked and solicitations for sex. Within two weeks, the profile had been viewed more than 3,000 times and had generated 20 pages of sexually explicit and often violent comments. Annmarie sought help from law enforcement officials, who laughed at her and shamed her for the photos. In 2011, desperate and depressed, Annmarie attempted to commit suicide.[15] Fortunately, her attempt was unsuccessful. Annmarie decided to fight for legislative reform in

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[12] *See* Emily Bazelon, *Another Sexting Tragedy*, Slate (Apr. 12, 2013), http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html.

[13] Annmarie Chiarini, https://annmariechiarini.com/about/ .

[14] *See* Office of Congresswoman Jackie Speier, Press Release, *Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn* (July 14, 2016), https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual.

[15] Katrina Bush, *Effort to criminalize 'revenge porn' continues in Maryland* (Oct. 31, 2013), http://www.abc2news.com/news/state/effort-to-criminalize-revenge-porn-continues.

Maryland, where she lived, and went on to become the Victim Services Director for the Cyber Civil Rights Initiative.

Anisha Vora broke up with her high-school sweetheart in 2012, after she discovered he was being unfaithful. Shortly afterwards, Anisha's ex-boyfriend started posting intimate photos of her to pornographic websites.[16] Within a few weeks, the number of sites on which her photos appeared had increased from a handful to three thousand.[17] Anisha's ex-boyfriend also impersonated her on several of these sites, setting up fake profiles and sending messages that included Anisha's phone number and home address along with statements expressing rape fantasies. In addition to being deluged with emails and texts containing graphic sexual propositions, Anisha was confronted on multiple occasions at the house where she lived with her parents by strangers demanding sex.[18] Fortunately for Anisha, New Jersey was one of the few states at the time that criminalized nonconsensual pornography. Anisha's ex-boyfriend was eventually arrested and convicted. Like Annmarie, Anisha became an advocate for other victims by joining the Cyber Civil

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[16] *See* Vicki Hyman, *N. J. revenge porn victim tells her story in Showtime's 'Dark Net,'* NJ.com (Jan. 20, 2016), http://www.nj.com/entertainment/tv/index.ssf/2016/01/dark_net_showtime_anisha_vora_revenge_porn.html.

[17] Radio Times, *'Revenge Porn' and how laws are protecting victims*, WHYY (Dec. 12, 2016), https://whyy.org/cms/radiotimes/2016/12/12/revenge-porn-and-how-laws-are-protecting-victims/.

[18] *Id.*

Rights Initiative.[19]

Other victims of nonconsensual pornography have not fared as well as Annmarie and Anisha. In 2012 in California, several boys sexually assaulted a fifteen-year-old girl named Audrie Pott at a party. The boys took pictures of themselves sexually assaulting Audrie and drawing on her body with markers. When Audrie woke up the next morning, she did not know where she was or what had happened to her. Through Facebook conversations, Audrie learned what the boys had done to her and that pictures of her naked body and of the assault were circulating around her school. A week later, Audrie asked to come home early from school. When Audrie's mother checked on her 20 minutes after they arrived at home, the bathroom door was locked and there was no answer from inside. Audrie's mother forced open the door and found Audrie hanging from a belt attached to the showerhead. Attempts to revive Audrie were unsuccessful.[20] Audrie is only one of several victims who have committed suicide after being victimized by nonconsensual pornography.[21]

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[19] *See* Rebecca Ruiz, *How to help when someone uses intimate photos as revenge*, Mashable (June 5, 2016), http://mashable.com/2016/06/05/what-to-do-revenge-porn/#H8iZ03Df5GqM.

[20] Nina Burleigh, *Sexting, Shame and Suicide*, Rolling Stone (Sept. 17, 2013), http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917.

[21] *See, e.g.,* BBC News Serv., *Tiziana Cantone: Suicide following years of humiliation online stuns Italy* (Sept. 16, 2016), http://www.bbc.com/news/world-europe-37380704 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral); Bazelon, *Another Sexting Tragedy*, *supra* note 12 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated); Kate Briquelet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, The Daily Beast (June 20,

Many of the estimated 3,000 websites that feature nonconsensual pornography[22] are dedicated solely to this material. These sites are popular because they provide an easily accessible, largely anonymous platform that connects profit-driven purveyors with voyeuristic consumers. These sites frequently post personal information about the victims (*e.g.*, name, age, address, employer, email address, and links to social media profiles) alongside the images, making it easy for online mobs to contact, threaten, and harass the victims. *See* Citron & Franks, *supra* at 350-51.

In addition to the trauma of having the most intimate and private details of their lives displayed to the public, and the harassment and threats they receive because of the disclosure, victims also endure significant economic harm. Victims' images are often discovered by or disclosed to their employers, leading them to be fired.[23] Because employers will frequently conduct online searches of the names of prospective employees, victims of nonconsensual pornography whose images turn up in search results may be unable to find jobs. *See* Citron & Franks, *supra* at 352.

2016), http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html (15-year-old girl shoots herself in the head after ex-boyfriend posts nude photo on social media).

[22] *See Revenge Porn: Misery Merchants*, The Economist (July 5, 2014), http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be.

[23] *See* Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1, 8-10 (2009); s*ee also Warren City Bd. of Educ.*, 124 Lab. Arb. Rep. (BNA) 532, 536-37 (2007) (arbitration decision upholding the termination of a teacher fired because an ex-spouse distributed nude images to co-workers and school officials).

To avoid further abuse or humiliation, victims may withdraw from online life entirely, which can be detrimental to their job prospects and careers. *See id.* Victims spend thousands of dollars on takedown services or online reputation management services in an often futile attempt to get the damaging material removed from the internet.[24] Victims who seek legal help face tens of thousands of dollars in fees pursuing judgments that, even if awarded, they may never collect.[25]

Courageous victims and advocates have educated lawmakers about the grievous harm suffered by victims of nonconsensual pornography, prompting a strong legislative response. CCRI's Vice-President, law professor Mary Anne Franks, drafted the first model "revenge porn" statute in 2013. This model statute was based on the oldest existing state law against the practice, New Jersey's, which was passed in 2003. *See* N.J. Stat. § 2C:14-9. At the time, nonconsensual pornography was a crime only in New Jersey and two other states. Since 2013, the majority of state legislatures have responded to this growing epidemic. Today, 34 states and Washington D.C. have passed laws criminalizing the practice and bipartisan federal legislation on the issue is pending in Congress.[26] Vermont's

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[24] *See* Ian Sherr, *Forget being a victim. What to do when revenge porn strikes*, CNET (May 13, 2015), https://www.cnet.com/news/forget-being-a-victim-what-to-do-when-revenge-porn-strikes/ (noting that a typical case "can cost as much as $10,000.").

[25] *See* Tracy Clark-Flory, *Criminalizing 'revenge porn,'* Salon (April 6, 2013) https://www.salon.com/2013/04/07/criminalizing_revenge_porn/ (quoting attorney Erica Johnstone: "It can cost tens of thousands before even proceeding to a judgment… Even in the case of a default judgment… These defendants are often judgment proof.").

[26] *See supra* note 2; Intimate Privacy Protection Act of 2016, H.R. 5896, 144th Cong. (2016), https://www.congress.gov/bill/114th-congress/house-bill/5896.

legislature began work on its response in 2015, reaching out to Professor Franks during the drafting and committee hearing process for 13 V.S.A. § 2606.

II. This Court should uphold § 2606 as a measured and constitutional response to the harms caused by nonconsensual pornography.

This Court should reverse the superior court and uphold the constitutionality of § 2606. The statute is tailored to prevent the serious harm caused by nonconsensual pornography, and does so without treading on the core values protected by the First Amendment. Given the purely private—indeed, intimate—nature of these images, a prohibition on nonconsensual disclosure is not subject to strict scrutiny. And regardless, because the statute is narrowly drawn and targeted at a compelling government interest, it survives strict or intermediate scrutiny.

A. The superior court erred in concluding that § 2606 is subject to strict scrutiny.

The superior court's holding that § 2606 regulates the content of certain communications and is therefore subject to the highest degree of constitutional scrutiny is flawed. Generally speaking, it "is true enough that content-based regulations of speech are presumptively invalid." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). The U.S. Supreme Court has recognized, however, that "[t]he rationale of the general prohibition . . . is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the

marketplace." *Davenport,* 551 U.S. at 188 (citations and quotation marks omitted). There are "numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted." *Id.*

As relevant here, strict scrutiny should not be applied to legal protections against the unauthorized disclosure of matters of private concern. The First Amendment's limits on state action are "often less rigorous" in matters of purely private significance. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). That is truer still when the government seeks to protect against unauthorized disclosure of private information, not because of any disagreement with message or viewpoint conveyed by the disclosure, but because "[p]rivacy of communication" is itself "an important interest." *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001). The "core value of privacy" has constitutional underpinnings that reflect the critical importance of allowing people to shield their most intimate and private experiences from public scrutiny. *See State v. Kirchoff,* 156 Vt. 1, 7, 587 A.2d 988, 992 (1991) (holding that Article 11 of Vermont Constitution "embraces the core value of privacy"); *State v. Morris*, 165 Vt. 111, 117, 680 A.2d 90, 94 (1996) (holding that people have reasonable expectation of privacy in sealed trash containers because trash may reveal "intimate details of people's lives" including "sexual practices" and "romantic relationships"); *see also Lawrence v. Texas*, 539 U.S. 558, 564-67 (2003) (describing privacy interests protected by Due Process Clause). The high social value placed on privacy is further illustrated by scores of state and federal laws prohibiting the unauthorized distribution of private information—from trade secrets to medical

records to drivers' licenses to social security numbers to video rentals—that have never been deemed unconstitutional or even challenged on constitutional grounds. *See* Daniel Solove, *A Brief History of Information Privacy Law,* in Proskauer on Privacy Law (2006). When such laws have been challenged, courts general apply intermediate, rather than strict, strict scrutiny to evaluate their constitutionality. *See, e.g., Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949-52 (7th Cir. 2015) (applying intermediate scrutiny to reject a First Amendment challenge to a federal statute criminalizing the disclosure of personal information from motor vehicle records), *cert. denied*, 136 S. Ct. 689 (2015).

The U.S. Supreme Court has also endorsed a reduced level of scrutiny for the regulation of sexually explicit material. As the Court has explained, even when sexually explicit material does not rise to the level of obscenity,[27] the First Amendment nevertheless offers such speech protection "of a wholly different, and lesser magnitude." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). More specifically, when reviewing laws that address the secondary effects of sexually explicit material, courts have routinely applied intermediate scrutiny and upheld restrictions on these materials, provided the restrictions are designed to serve a substantial government interest, are narrowly tailored to serve that interest, and do not unreasonably limit alternative avenues of communication. *See*, *e.g.*, *City of*

[27] As the State explains in its opening brief, nonconsensual pornography may be proscribed as obscenity, and § 2606 is a constitutionally permissible approach to doing so. State's Br. 12-17. One of our purposes here is to show that, even if this Court concludes that nonconsensual pornography does not qualify as obscene, § 2606 remains constitutional under the standards applied to the secondary effects of non-obscene sexually explicit material.

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-50, 54 (1986) (upholding a zoning ordinance restricting the location of adult theaters); *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (same with regard to a measure requiring male performers in adult films to wear condoms); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) (same with regard to an ordinance limiting the hours of operation for adult bookstores).

Section 2606's restriction on the unauthorized disclosure of private, sexually explicit images treads in territory far removed from the core concerns of the First Amendment. The defendant's conduct—posting nude photos of the victim without consent—should not receive the full measure of the First Amendment's protection. Rather, this Court should have "no difficulty in concluding" the distribution of homemade sexually explicit material "does not qualify as a matter of public concern under any view." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam). Prohibiting the nonconsensual disclosure of such material poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas." *Snyder*, 562 U.S. at 452 (quotation omitted).

Indeed, in upholding a conviction for harassing and intimidating conduct, the Ninth Circuit reasoned that unauthorized "sexually explicit publications concerning a private individual" are not "afforded First Amendment protection." *United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014); *see also United States v. Petrovic*, 701 F.3d 849, 855-56 (8th Cir. 2012) (rejecting a First Amendment challenge by a defendant convicted under federal stalking law for distributing a victim's private

nude photos and information). Even more recently, the eminent constitutional law scholar Erwin Chemerinsky wrote that the "First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."[28]

Supreme Court precedent should not be construed to mandate the most searching scrutiny of statutes that protect victims from nonconsensual publication of these deeply private images. Certainly, the high Court has signaled its commitment to vigorous enforcement of the First Amendment's free speech guarantee. *See, e.g., Reed,* 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." (quotation omitted)); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804 (2011) (holding unconstitutional California's ban on selling violent video games to minors); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (holding unconstitutional federal statute banning depictions of animal cruelty). This Court has also recognized the Supreme Court's "evolving case law concerning the Constitution's commitment to protecting even vile, offensive, hurtful, and exceptionally insulting speech." *State v. Tracy*, 2015 VT 111, ¶ 36, 130 A.2d 196. The Supreme Court has not, however, considered a statute like § 2606, nor has it grappled with the grievous harm caused by nonconsensual pornography. If not itself obscene speech—*see* State's Br. 12-17—nonconsensual pornography is at a

[28] Office of Congresswoman Speier, *supra* note 14.

minimum closely related to obscenity. The publication of nude or sexually explicit pictures of a person without the person's consent is not a part of our nation's historical traditions. *Cf. Brown*, 564 U.S. at 792 (observing that legislative restrictions on speech must be consistent with long tradition of proscription). The dissemination of these intimate and private images without consent conflicts with other rights engrained in our constitutional traditions—rights *not* to speak and to maintain one's privacy (including bodily privacy) against unwarranted intrusions. *Cf. Lawrence*, 539 U.S. at 567 (describing sexual conduct as "the most private human behavior"); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

Accordingly, assuming some degree of constitutional scrutiny of § 2606 is required, the proper standard is intermediate review. After all, § 2606's prohibition on distributing sexually explicit images of individuals without their consent does not implicate any concern that the government is trying to inhibit debate on issues of public concern or "drive certain ideas or viewpoints from the marketplace." *Davenport*, 551 U.S. at 188 (quotation omitted). On the contrary, § 2606 is aimed at the protection of highly personal private information and the prevention of harmful secondary effects—including financial, reputational, and emotional injuries—that predictably attend the disclosure of sexually explicit depictions of individuals without their consent. *See Dahlstrom*, 777 F.3d at 949-52 (applying intermediate

scrutiny to restrictions on the disclosure of personal information); *Vivid Entm't, LLC v. Fielding*, 774 F.3d at 580-81 (applying intermediate scrutiny to restrictions directed at the secondary effects of sexually explicit depictions). The somewhat relaxed standard of intermediate scrutiny provides sufficient protection for any First Amendment interests at stake.

B. Section 2606 survives whether analyzed under strict or intermediate scrutiny.

The ultimate inquiry under intermediate scrutiny is "one of reasonableness," *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 439-41 (6th Cir. 1998), which § 2606 satisfies easily. That is, VanBuren's First Amendment challenge should fail because § 2606 promotes a substantial government interest, is narrowly tailored, and does not unreasonably limit alternative avenues of communication. *See City of Renton*, 475 U.S. at 47-50. But even if the Court applies strict scrutiny, the Court should uphold § 2606, which is narrowly tailored to address compelling government interests.

1. The governmental interests served by § 2606 are not only significant, but compelling.

Most obviously, § 2606 seeks to vindicate the government's interest in preventing the real-life harms of nonconsensual pornography. As the U.S. Supreme Court observed more than century ago, "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow," and to "compel any one … to lay bare the body…without lawful authority, is an indignity, an assault, and a trespass." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251–52 (1891). Laws

regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one's body. Criminal laws prohibiting surveillance and voyeurism rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person's consent not only inflicts dignitary harms upon the individual observed, but inflicts a social harm serious enough to warrant criminal prohibition and punishment.[29] We have already described in the pages above, *see supra* 3-10, the many ways in which victims of nonconsensual pornography suffer, from the trauma and humiliation of having the most intimate and private details of their lives placed on display to job loss, severe harassment and threats, and serious reputational harm. There should be little question that preventing these harms is a legitimate as well as compelling governmental interest.

Even in the absence of actual harm, § 2606 also protects personal privacy, which is an important governmental interest in its own right. *See Bartnicki*, 532 U.S. at 532-33. Privacy is also instrumental in fostering the relationships and values that are crucial in an open society. People rely on the confidentiality of transactions in other contexts all the time: they trust doctors with sensitive health information; salespeople with credit card numbers; lawyers with their closely guarded secrets. They are able to rely on the confidentiality of these transactions because society takes it as a given that consent to share information is limited by

[29] National District Attorneys Association, *Voyeurism Statutes 2009*, http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf.

context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished. Laws protecting victims from unauthorized disclosures of their financial, legal, or medical information have a long and mostly uncontroversial history. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information. *See*, *e.g.*,18 U.S.C. § 1832(a)(2) (criminalizing the unauthorized disclosure of trade secrets); 42 U.S.C. § 1320d-6(a)(3) (criminalizing unauthorized disclosure of individually identifiable health information). It would be remarkable to suggest that the protection of a private individual's sexual information against unauthorized disclosure is entitled to any less respect.

Furthermore, by protecting Vermonters against the disclosure of intimately private images without their consent, § 2606 advances the government's interest in safeguarding important aspects of speech and expression. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). Although privacy laws do, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public." *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring). This is particularly true when the potential threat of dissemination is "widespread," *id.*, as it is with images that can be shared over the internet. The fear that private, intimate information

might be exposed to the public discourages individuals from engaging not only in erotic expression, but also from other kinds of expressive conduct. Many victims report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed.

To suggest that none of these is a compelling governmental interest would cast into doubt widely accepted legal restrictions for the protection of privacy. These range from restrictions on the disclosure of records with personally identifying information, *see*, *e.g.*, 9 V.S.A. § 2440 (social security numbers); 30 V.S.A. § 7059 (E-911 records); Vt. Dep't of Financial Reg., Reg. B-2015-02 (consumer financial and health information); to criminal prohibitions on voyeurism and unlawful surveillance, *see* 13 V.S.A. § 2605; to common-law protections against publicizing the private life of another, *see Lemnah v. Am. Breeders Serv., Inc.*, 144 Vt. 568, 574-75, 482 A.2d 700, 704 (Vt. 1984) (citing *Restatement (Second) of Torts* § 652D (1977)). This Court should recognize that protecting a person's bodily privacy and right to consent to disclosure of nude and sexually explicit pictures is a compelling government interest, let alone a substantial enough interest to pass intermediate scrutiny.

2. Under any level of scrutiny, § 2606 is narrowly tailored to advance its purposes.

Section 2606 is narrowly drawn to protect the fundamental right to privacy without infringing upon freedom of speech. It prohibits only the knowing disclosure of images of identifiable persons who are nude or engaging in sexual conduct

without those persons' consent, with the intent to harm, harass, intimidate, threaten, or coerce those persons. It is further restricted to disclosures that would cause a reasonable person to suffer harm.

Indeed, § 2606 is far more narrowly drawn than it would need to be to survive constitutional scrutiny. Several state laws, and as well as CCRI's own model state statute, do not include a motive element similar to § 2606's required intent to harm, harass, intimidate, threaten, or coerce. *See*, *e.g.*, 720 Ill. Comp. Stat. 5/11-23.5; Minn. Stat. § 617.261; Wash. Rev. Code § 9A.86.010. Because the harm of nonconsensual pornography is unaffected by the motive of the perpetrator, a narrowly tailored law need not include an intent-to-harm element. *See* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 U.C.L.A. L. Rev. 1366, 1405-06 (2016) (explaining that narrow restrictions on nonconsensual pornography are justifiable and need not be limited to circumstances where the disclosure is intended to harm the victim).

Section 2606 specifically exempts disclosures that are "made in the public interest" or "constitute a matter of public concern." 13 V.S.A. 2606(d)(2), (3). The provision also does not apply to disclosures of images of voluntary nudity or sexual conduct in public or commercial settings, or in places where the person does not have a reasonable expectation of privacy. While no statute will "satisfy those intent on finding fault at any cost," *U.S. Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 579 (1973), the Constitution does not require the satisfaction of an impossible standard. The First Amendment requires that statutes be narrowly tailored, not

"perfectly tailored." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson v. Freeman,* 504 U.S. 191, 209 (1992)).

The superior court suggested two concerns about § 2606's tailoring: that a criminal prohibition is not the least restrictive means of achieving a compelling government interest, PC 4, and that the statute applies to what the court did not consider to be "clear example[s] of the typical revenge porn case," *id.* at 4-5. Neither concern is valid.

First, the superior court erred in holding that the civil remedy is a less restrictive alternative that makes a criminal sanction unconstitutional. Indeed, the court's suggestion that the statute's civil remedy is constitutional seriously undermines any conclusion that the criminal provision violates the First Amendment. The civil provision merely provides an alternative means of regulating the very same expression as the criminal provision. If nonconsensual pornography is protected under the First Amendment, it should be no more permissible to restrict it using civil means as it is to use criminal means. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law. . . ." *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

In any event, the superior court's assumption that the civil provision is not only constitutional, but less restrictive than the criminal provision, conflicts with the Supreme Court's indication in the opposite direction. The Court has noted that criminal statutes afford more safeguards to defendants than tort actions, suggesting that civil regulation of conduct raises First Amendment issues at least as serious as

criminal regulation. *See id.* ("Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.").

The civil provision is also not, standing alone, sufficient to protect the state's compelling interest in protecting the privacy of Vermonters. Civil actions are costly, time-consuming, and often result in greater invasions of the victim's privacy. Average victims will not be able to afford the tens of thousands of dollars it may cost to bring a civil action, especially if they have just lost their jobs, have been forced to leave their homes, or are seeking psychological help due to being victimized. Even those victims who are able to obtain legal representation and obtain favorable judgments are frequently faced with judgment-proof defendants. *See* Citron & Franks, *supra* at 349.

Second, the superior court's observation that the facts of this case are not "typical" is both incorrect and irrelevant to the constitutional analysis. The court expressed concern that "the facts of this case are not a clear example of the typical revenge porn case described in many articles and mentioned in support of such statutes" because it was "not a case of photographs sent or exchanged during a relationship and then used after the relationship ends, usually unpleasantly." PC 4. In fact, as explained above, *supra* 4-8, nonconsensual pornography takes many forms and inflicts grave harm regardless of the motive of the perpetrator or the relationship between the perpetrator and the victim. *See* Volokh, *supra* at 1405-06

(explaining that the phrase "revenge porn" is "vivid" but "isn't quite sound" because disclosing sexually explicit images without consent is "equally harmful" irrespective of the perpetrator's motive). And even if this case is not considered "typical," the harm caused here is precisely the kind of harm that § 2606 is designed to avert.

The superior court further worried that § 2606 "would apparently criminalize disclosure by a party who never had any relationship with complainant and who received such unsolicited sexual photographs and decided to disclose them to convince complainant not to send any more or out of anger for being the recipient." PC 5. Yet again, this is no reason think that § 2606 is inadequately tailored or overbroad. As noted above, nonconsensual pornography often involves disclosure of private images by those who did not have an intimate or confidential relationship with the victim. Examples include a California Highway Patrol officer passing around intimate pictures obtained from a female arrestee's cellphone as part of a "game" among officers;[30] Penn State University fraternity brothers uploading photos of unconscious, naked women to a members-only Facebook page for entertainment purposes;[31] and website owners publishing thousands of private,

[30] Matthias Gafni & Malaika Fraley, *Warrant: CHP officer says stealing nude photos from female arrestees 'game' for cops*, *Contra Costa Times* (Oct. 24, 2014), http://www.contracostatimes.com/my-town/ci_26793090/warrant-chp-officer-says-stealing-nude-photos-from.

[31] Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity, Philadelphia,* (Mar. 18, 2015), http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/.

sexually explicit private images for profit and entertainment.[32]

As for the superior court's concern that § 2606 would apply to a "person's spouse who might find such unsolicited images and forward them out of anger and disgust," PC 5, depending on the facts, the statute either would not apply or would, and should, protect a victim from nonconsensual disclosure. The statute does not apply to situations in which the person depicted does not have a reasonable expectation of privacy or to disclosures made in the public interest, including the reporting of unlawful conduct. If a person voluntarily sends nude photographs to someone, such as a lover's spouse, with whom they have no personal relationship and no expectation of nondisclosure, the person has likely disavowed a reasonable expectation of privacy. If the photographs are sent in connection with illegal conduct, such as extortion, disclosure is plainly permissible. In contrast, if a person finds nude pictures of a spouse or spouse's lover by—similar to these facts—accessing another person's phone or social media accounts, and makes those images public, § 2606 should apply. That is the harm the statute seeks to prevent. Moreover, for any criminal offense, there can be sympathetic perpetrators and unsympathetic victims, but this is irrelevant to the analysis of a statute's constitutionality.

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[32] Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, Rolling Stone (Nov. 13, 2012), http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113; *'Revenge Porn' Website Has Colorado Women Outraged*, CBS Denver (Feb. 3, 2013), http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/.

3. Section 2606 does not unreasonably limit alternate avenues of communication.

As a final matter, § 2606 survives constitutional scrutiny because it does not amount to a complete ban on expression. *See Vivid Entm't*, 774 F.3d at 578. Vermonters remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images. *See id.* at 582. Moreover, they remain free to criticize or complain about private citizens in ways that do not violate the privacy rights of others. The narrowly tailored prohibition in § 2606 does not come close to stopping the countless ways in which people publicize their anger, criticisms, and even hate online. The internet, along with its enormous benefits, has opened up spaces for free-ranging, raucous, and often unpleasant and offensive debate. That is what the First Amendment protects. The First Amendment does not, however, protect the nonconsensual dissemination of nude or sexually explicit images that are deeply personal, unrelated to the public interest, and never intended to be made public.

CONCLUSION

For the foregoing reasons—and for the reasons set forth in the State's opening brief—the judgment of the superior court should be reversed.

Dated: January 16, 2017

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CERTIFICATE OF COMPLIANCE

Bridget C. Asay, counsel for amici curiae, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 6549 words.

Dated: January 16, 2017

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