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

State of Vermont

v.

Rebekah S. VanBuren

APPEAL FROM SUPERIOR COURT, CRIMINAL DIVISION (BENNINGTON)
Docket No. 1144-12-15 Bncr

Brief for Appellant State of Vermont

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ISSUE PRESENTED

Did the trial court err by holding that 13 V.S.A. § 2606, which criminalizes the practice known as "revenge porn," violates the First Amendment to the United States Constitution? Pp. 8-28.

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INTRODUCTION

The State charged defendant-appellee Rebekah VanBuren with violating 13 V.S.A. § 2606 after she posted on Facebook private nude pictures her boyfriend received from another woman. In the proceedings below, the trial court dismissed the charge against defendant because the court concluded that section 2606 violates the First Amendment to the United States Constitution. That conclusion is mistaken and should be reversed. The statute criminalizes conduct—publicly distributing a private image of a person's naked body without that person's consent—that historically would be understood as both obscene and an extreme invasion of personal privacy, and thus not constitutionally protected. Even if the First Amendment does cover such conduct, the statute should be upheld because it is carefully drawn to advance the State's compelling interests in protecting the privacy, sexual consent, and reputation of Vermonters.

STATEMENT OF THE CASE

I. The Challenged Statute

This appeal involves the constitutionality of 13 V.S.A. § 2606, which was enacted by the General Assembly in 2015 and provides as follows:

> **§ 2606. Disclosure of sexually explicit images without consent**
>
> (a) As used in this section:
>
> (1) "Disclose" includes transfer, publish, distribute, exhibit, or reproduce.
>
> (2) "Harm" means physical injury, financial injury, or serious emotional distress.

(3) "Nude" means any one or more of the following uncovered parts of the human body:

(A) genitals;

(B) pubic area;

(C) anus; or

(D) post-pubescent female nipple.

(4) "Sexual conduct" shall have the same meaning as in section 2821 of this title.[1]

(5) "Visual image" includes a photograph, film, videotape, recording, or digital reproduction.

(b)(1) A person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm. A person may be identifiable from the image itself or information offered in connection with the image. Consent to recording of the visual image does not, by itself, constitute consent for disclosure of the image. A person who violates this subdivision (1) shall be imprisoned not more than two years or fined not more than $2,000.00, or both.

(2) A person who violates subdivision (1) of this subsection with the intent of disclosing the image for financial profit shall be imprisoned not more than five years or fined not more than $10,000.00, or both.

(c) A person who maintains an Internet website, online service, online application, or mobile application that contains a visual image of an identifiable person who is nude or who is engaged in sexual conduct shall not

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[1] 13 V.S.A. § 2821(2) defines "sexual conduct" as "(A) any conduct involving contact between the penis and the vulva, the penis and the penis, the penis and the anus, the mouth and the penis, the mouth and the anus, the vulva and the vulva or the mouth and the vulva; (B) any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desire of any person; (C) any intentional touching, not through the clothing, of the genitals, anus or breasts of another with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desire of any person; (D) masturbation; (E) bestiality; or (F) sadomasochistic abuse for sexual purposes."

solicit or accept a fee or other consideration to remove, delete, correct, modify, or refrain from posting or disclosing the visual image if requested by the depicted person.

(d) This section shall not apply to:

(1) Images involving voluntary nudity or sexual conduct in public or commercial settings or in a place where a person does not have a reasonable expectation of privacy.

(2) Disclosures made in the public interest, including the reporting of unlawful conduct, or lawful and common practices of law enforcement, criminal reporting, corrections, legal proceedings, or medical treatment.

(3) Disclosures of materials that constitute a matter of public concern.

(4) Interactive computer services, as defined in 47 U.S.C. § 230(f)(2), or information services or telecommunications services, as defined in 47 U.S.C. § 153, for content solely provided by another person. This subdivision shall not preclude other remedies available at law.

(e)(1) A plaintiff shall have a private cause of action against a defendant who knowingly discloses, without the plaintiff's consent, an identifiable visual image of the plaintiff while he or she is nude or engaged in sexual conduct and the disclosure causes the plaintiff harm.

(2) In addition to any other relief available at law, the Court may order equitable relief, including a temporary restraining order, a preliminary injunction, or a permanent injunction ordering the defendant to cease display or disclosure of the image. The Court may grant injunctive relief maintaining the confidentiality of a plaintiff using a pseudonym.

13 V.S.A. § 2606.

Factual Background

The factual summary below is drawn from the allegations in an affidavit signed by investigating officer Vermont State Trooper Travis Hess, PC 11-12, and a statement signed by complainant Jessie Cerretani, PC 14-16, as well as a stipulation entered into by the parties, PC 18.

Complainant had a romantic relationship with Anthony Coon. PC 18. On October 7, 2015, complainant privately sent several nude pictures of herself to Mr. Coon's Facebook Messenger account so that only he could access them. PC 11, 18. Although the exact nature of complainant's relationship with Mr. Coon at the time she sent the pictures is unclear from the record, it appears they had separated and that Mr. Coon had begun a new relationship with defendant. On the morning of October 8, 2015, defendant accessed Mr. Coon's Facebook Messenger account without his permission and viewed the pictures complainant had sent the previous day. PC 18. The record reflects that Mr. Coon previously had used defendant's phone to access his account and that his password had automatically been saved by the phone, which allowed defendant to later access Mr. Coon's account without his knowledge or permission. *See* PC 18. In any event, there is no dispute that defendant lacked permission to access Mr. Coon's account on October 8. PC 18.

After finding the pictures of complainant, defendant posted them to the public section of Mr. Coon's Facebook page and "tagged" complainant. That is, defendant publicly disclosed the nude pictures that complainant had privately sent to Mr. Coon, and she publicly identified complainant as the person depicted. PC 11, 18.

At around 9:30am on October 8, while complainant was at work, she received a call from the father of her children, who let her know that someone was posting naked pictures of her on Facebook. PC 11, 14. Complainant then attempted to cancel her Facebook account and contact Mr. Coon. Shortly thereafter, defendant called complainant and told her she was a "moraless pig" who should not be allowed

to work with children. PC 11. Defendant refused complainant's request to take down the pictures and threatened to inform complainant's employer—a child care facility—about the pictures, stating that she was going to "ruin" complainant and "get revenge." PC 11, 14-15. Following the phone call, complainant "panicked and started crying," and after explaining the situation to her co-workers, she went home because she was "humiliated." PC 15. In light of defendant's threats, complainant's coworkers informed their supervisor about the situation. PC 15-16. Complainant's sisters also viewed the pictures on Facebook. PC 15.

After leaving work, complainant contacted the police. Trooper Hess responded and met with both complainant and defendant. Defendant admitted her responsibility for posting the pictures of complainant and stated, "you think she learned her lesson?" PC 11. Defendant also admitted responsibility for posting the pictures in several posts made through her own Facebook account. PC 11-12, 15-16.

II. Procedural History

The State filed an information against defendant in the criminal division of Bennington superior court on December 1, 2015, alleging that she committed a misdemeanor violation of section 2606 based on the facts described above. PC 10.

Defendant then moved to dismiss the charge on the basis that 13 V.S.A. § 2606 violates the First Amendment to the United States Constitution and Article Thirteen of the Vermont Constitution. PC 6. Defendant also argued that complainant did not have a reasonable expectation of privacy in the pictures, as required by the statute. The State opposed the motion.

On May 4, 2016, the trial court issued an order directing the parties to either submit a stipulation, or be prepared to offer testimony, to address "the following additional facts the court needs to understand for the motion":

> When were the photographs sent to the Facebook account? . . .[Did] the complainant sen[d] them while still in the relationship with Mr. Coon or [were] they . . . sent after that relationship had ended? How did Defendant have access to the private Facebook account of Mr. Coon? Did he provide it to her as they were in a relationship? Did she access it without his permission?

PC 17. At a hearing on June 16, 2016, the trial court accepted the parties' stipulation, which provided:

1. The photographs were posted on a public Facebook page on October 8, 2015.
2. The photographs were sent by complainant to Mr. Coon on October 7, 2015.
3. The complainant was not in a relationship with Mr. Coon at the time the photographs were sent to Mr. Coon.
4. Defendant did not have permission to access Mr. Coon's Facebook account. Mr. Coon believes Defendant obtained access to his account through her telephone, which had the Facebook password saved.

PC 7, 18.

In a decision issued July 1, 2016, the trial court granted defendant's motion because it concluded that the statute violated the First Amendment. The trial court held the statute was subject to strict scrutiny because it regulated "merely 'nude' photographs," and "[n]udity cannot be automatically equated to obscenity." PC 3. The trial court further held that the statute could not survive strict scrutiny—and was thus facially invalid—because it was not narrowly tailored to advance the State's asserted interest in protecting the reputation and privacy of Vermonters. PC 3-4. Although the trial court found the statute unconstitutional on its face, it also questioned whether the facts of this case exemplified a "typical" revenge porn

situation, given that the complainant and Mr. Coon were no longer in a relationship and the pictures were accessed and disclosed by defendant, a third party to that relationship. PC 4-5. The trial court did not address whether the statute violated Article Thirteen of the Vermont Constitution because that argument was inadequately briefed. The State filed a motion for extraordinary relief with this Court, which was granted on August 5, 2016. PC 20.

SUMMARY OF ARGUMENT

The decision below should be reversed. The conduct regulated by 13 V.S.A. § 2606—publicly disseminating someone's private nude pictures without their consent—is not constitutionally protected expression. The trial court incorrectly described the regulated expression as "merely 'nude' photographs." PC 3. That description ignores what makes revenge porn so harmful to its victims: the violation of privacy and consent that occurs when unwanted publicity is given to an intimate communication. In any event, even if the regulated conduct is covered by the First Amendment, the statute is constitutional because it directly advances the State's compelling interests in protecting the privacy, sexual consent, and reputations of its citizens and is not unduly restrictive in light of those interests.

STANDARD OF REVIEW

This Court reviews question of law *de novo*. *Badgley v. Walton,* 2010 VT 68, ¶ 4, 188 Vt. 367, 10 A.3d 469. Legislative enactments are presumed to be constitutional absent "clear and irrefragable evidence" to the contrary. *State v. Curley-Egan*, 2006 VT 95, ¶ 12, 180 Vt. 305, 910 A.2d 200 (quotation omitted). Thus, one who

challenges a statute as unconstitutional bears a "heavy burden." *In re Montpelier & Barre R.R. Corp.*, 135 Vt. 102, 103, 369 A.2d 1379, 1380 (1977).

Moreover, this Court must construe a state statute "to avoid constitutional infirmities" if possible, and should not "reach challenges based on facial unconstitutionality if there is a readily apparent construction that suggests itself as a vehicle for rehabilitating the statute." *State v. Tracy*, 2015 VT 111, ¶ 28, 130 A.3d 196 (quotation and alterations omitted); *see also State v. Green Mountain Future*, 2013 VT 87, ¶ 48, 194 Vt. 625, 86 A.3d 981 ("State courts have wide latitude for assigning narrowing constructions to potentially unconstitutional statutes," and "may give [a statute] a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent.") (quotation omitted).

ARGUMENT

I. The statute is designed to deter and punish nonconsensual pornography, which invades the privacy, violates the sexual consent, and harms the reputation of its victims.

The General Assembly enacted 13 V.S.A. § 2606 in 2015 to combat what is commonly known as "revenge porn" or "nonconsensual pornography"—publishing private nude images of someone online without their consent, usually by a jilted lover. The practice has received widespread attention in recent years.[2] *See, e.g.*,

[2] Although the term "revenge porn" most accurately describes a subset of "nonconsensual pornography"—where someone posts private images of an ex-lover after the relationship ends—the two terms are often used interchangeably to describe any situation where a person's private nude or sexually explicit pictures are published online without that person's consent. This brief uses the terms interchangeably.

Editorial, *Fighting Back Against Revenge Porn*, N.Y. Times, Oct. 13, 2013, at SR10 (advocating for States to criminalize revenge porn and describing the practice as "humiliating" and "reputation-killing" for the affected victims). And with good cause. In today's digital world, the unwanted disclosure of even a single image can have devastating consequences. "A person's nude photo can be uploaded to a website where thousands of people can view and repost it. In short order, the image can appear prominently in a search of the victim's name. It can be e-mailed or otherwise exhibited to the victim's family, employers, coworkers, and friends." Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 350 (2014). Victims of revenge porn—the overwhelming majority of them female—frequently suffer anxiety, receive unwanted sexual attention, are placed at increased risk of harassment or assault, and experience negative social and professional consequences. *Id.* at 350-54.

For example, in one recent case, evidence showed that a victim's life was drastically changed after her ex-boyfriend disseminated her nude pictures online:

> she changed where she lived and how she lived; she stopped interacting with some friends and altered how she interacted with others; she changed in her demeanor, such as with her loss of confidence and constant nervousness; and she expressed and manifested (corroborated by other witnesses) a high degree of mental pain and distress including but not limited to embarrassment, fright, devastation, nervousness, and humiliation.

Patel v. Hussain, 485 S.W.3d 153, 181-82 (Tex. App. 2016). Similarly, in another case, a victim testified that after her nude photos were published online, she received messages from strangers soliciting her for sex, she was approached by members of her own small community about the photographs, and she became

"depressed and shy" and "fearful for her safety." *In re White*, 551 B.R. 814, 818 (2016). And in another, a victim changed her name and moved from Maine to Louisiana after months of receiving "unwanted visits from men seeking sex." *United States v. Sayer*, 748 F.3d 425, 428 (1st Cir. 2014).[3]

Perhaps the most troubling aspect of revenge porn is its disregard for victims' consent. Vermont law has long recognized the importance of individualized sexual consent. As this Court has noted in another context, consent to a sexual relationship "is not an uncontrollable force which, once given, can never be withheld. Each decision to consent is a new act, a choice made on the circumstances prevailing in the present, not governed by the past." *State v. Patnuade*, 140 Vt. 361, 380, 438 A.2d 402, 410 (1981) (rejecting argument that rape victims' sexual history was relevant to whether they consented to sex with defendants). "While most people today would rightly recoil at the suggestion that a woman's consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists." Citron & Keats, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. at 348.

In light of these harms and the inadequacy of existing laws to provide redress in many situations, a number of states including Vermont have passed laws in recent

[3] Both *Patel* and *White* involved civil claims made by revenge porn victims for intentional infliction of emotional distress and invasion of privacy. *Sayer* involved a prosecution under a federal cyberstalking statute.

years specifically designed to deter and punish revenge porn. According to the Cyber Civil Rights Initiative, more than thirty states currently have such laws.[4]

II. Nonconsensual pornography is not constitutionally protected.

There is no constitutional right to disseminate revenge porn. The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, prohibits laws "abridging the freedom of speech." U.S. Const. amend. I. Thus, under the First Amendment, a State generally may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quotation omitted). To withstand constitutional scrutiny then, most content-based restrictions on speech must be narrowly tailored to serve compelling state interests. *Id.*

States, however, have long regulated certain categories of speech without raising any constitutional concerns:

> From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem.

United States v. Stevens, 559 U.S. 460, 468-69 (2010) (quotations and alterations omitted); *Tracy*, 2015 VT 111, ¶ 17 ("Certain narrow and well-defined classes of expression are seen to carry so little social value that the State can prohibit and

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[4] *See, e.g.*, Cyber Civil Rights Initiative, Educate Lawmakers, Revenge Porn Laws, http://www.cybercivilrights.org/revenge-porn-laws/ (stating that thirty-four states and the District of Columbia have enacted revenge porn laws).

punish such expression.") (quotation and alterations omitted). *See also Stevens*, 559 U.S. at 472 (recognizing that there may be additional "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law").

The conduct regulated by section 2606—disseminating an individual's private nude pictures without his or her consent—is not covered by the First Amendment. It has no redeeming social value and qualifies either as the publishing of obscenity or as an extreme invasion of personal privacy. Regardless of which label one chooses, revenge porn is a constitutionally permissible subject of regulation, as more than thirty state legislatures have concluded.

A. Nonconsensual pornography is obscenity.

The expression targeted by the statute is not constitutionally protected because it meets the legal definition of obscenity. To determine whether expression is obscene, the United States Supreme Court has provided the following guidance:

> (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 v. California, 413 U.S. 15, 24 (1973). As this Court has observed, determining what qualifies as obscenity in any given case can be challenging. *See Napro Dev. Corp. v. Town of Berlin*, 135 Vt. 353, 357, 376 A.2d 342, 346 (1977); *see also Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (suggesting

that obscenity "may be indefinable"). Nonetheless, the expression regulated by the statute in this case—nonconsensual pornography—fits within the *Miller* definition.

First, "the average person, applying contemporary community standards would find that the" expression regulated by section 2606, "taken as a whole, appeals to the prurient interest." *See Miller*, 413 U.S. at 24. The United States Supreme Court has suggested in recent years that materials need only be "in some sense erotic" in order to satisfy this prong of *Miller*. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 579 & n.9 (2002); *see also Tracy*, 2015 VT 111, at ¶ 21 n.13 (noting "that the power to constitutionally prohibit obscene expression extends only to expression that is, 'in some significant way, erotic.'") (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)). The Court previously has indicated, however, that "prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (citing *Roth v. United States*, 354 U.S. 476 (1957)). Under either definition, section 2606 regulates "prurient" expression. The statute regulates the nonconsensual disclosure of private images of a "person who is nude or who is engaged in sexual conduct." 13 V.S.A. § 2606(b)(1). The average Vermonter could certainly conclude that images of nudity and sex are capable of eliciting erotic interest. Indeed, that precise interest drives Americans to spend billions of dollars on pornography each year.[5] And given that the statute targets

[5] *See* Chris Morris, *Things are Looking Up in America's Porn Industry*, NBC News, Jan. 20, 2015, http://www.nbcnews.com/business/business-news/things-are-looking-americas-porn-industry-n289431 ("Globally, porn is a $97 billion industry . . . At present, between $10 and $12 billion of that comes from the United States."); Definition of "pornography,"

only private pictures disclosed without consent, the regulated expression also fits within the traditional definition of prurient, which focuses on a "shameful or morbid" sexual interest that surpasses the average person's "good, old fashioned, healthy interest in sex." *See Brockett*, 472 U.S. at 500 (quotation omitted).

Second, section 2606 targets patently offensive depictions of sexual conduct. With respect to this element, the Court explained in *Miller* that a State might appropriately define punishable depictions of "sexual conduct" as "[p]atently offensive representation or descriptions of ultimate sexual acts, . . . masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25. The Court cautioned, however, that it was not its "function to propose regulatory schemes for the State," and that it was only attempting to "give a few plain examples of what a state statute could define for regulation." *Id.*

Section 2606 prohibits the nonconsensual disclosure of a private image of an identifiable person who is "nude" or engaged in "sexual conduct." The statute defines those terms consistently with their ordinary usage. *See* 13 V.S.A. §§ 2606(a)(3), (4), 2821(2). Although "nudity alone is not enough to make material legally obscene," *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), it is well-established that "the question of obscenity may include consideration of the setting in which the publications were presented," *Ginzburg v. United States*, 383 U.S. 463, 465 (1966). Thus, material may cross the line into obscenity because of the manner in which it

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www.merriam-webster.com (defining the term as "movies, pictures, magazines, etc., that show or describe naked people or sex in a very open and direct way in order to cause sexual excitement").

is presented or distributed, even if it is not obscene in the abstract. *See id.* at 465-66. The importance of this contextual analysis is confirmed by *Miller*'s direction to view works "as a whole" and judge them in reference to "contemporary community standards." *See* 413 U.S. at 24-25; *Roth*, 354 U.S. at 495 (Warren, C.J., concurring) ("The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.").

Here, the disclosures prohibited by the statute are patently offensive not merely because they contain depictions of nudity or sexual conduct, but because they invade the privacy and violate the consent of the person depicted. As one commentator recently put it, "revenge porn is patently offensive because the distributor's conduct, in context, offends the fundamental principle of consent in sexual relationships." Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 Stan. L. Rev. 447, 464 (2015). Other scholars agree that nonconsensual pornography of the type prohibited by section 2606 qualifies as obscenity. *See, e.g.*, Eugene Volokh, *Florida "Revenge Porn" Bill*, The Volokh Conspiracy, Apr. 10, 2013 (arguing that under *Stevens*, a State may prohibit "nonconsensual depictions of nudity" because "[h]istorically and traditionally, such depictions . . . would not have been seen as constitutionally

protected")[6]; Citron & Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. at 385 ("Disclosing pictures and videos that expose an individual's genitals or reveal an individual engaging in a sexual act without that individual's consent" is reasonably understood, under *Miller*, as a "patently offensive representation of sexual conduct" that offers no "serious literary, artistic, political, or scientific value"). Accordingly, the trial court was mistaken that section 2606 targets "merely 'nude' photographs" that cannot be considered obscene. *See* PC 3.

Third, the statute does not target material that has "serious literary, artistic, political, or scientific value." It is difficult to imagine many situations in which disclosing, without consent, a picture of someone privately undressing or having sex would seriously contribute to the public weal. Perhaps it might if the picture involved a public official engaging in morally questionable conduct. *See, e.g.*, Sara Kiesler & Alison Gendar, *Student who got lewd pic from Rep. Anthony Weiner's Twitter account denies she's his mistress*, N.Y. Daily News, June 7, 2011. But section 2606 exempts any disclosures "made in the public interest" or "of materials that constitute a matter of public concern." 13 V.S.A. § 2606(d)(2), (3). Those exemptions suffice to cover such anomalous situations and satisfy the third prong of *Miller*.

* * * *

The disclosures prohibited by section 2606 are obscenity because they appeal to the prurient interest, contain patently offensive depictions of sexual conduct, and lack serious societal value. The trial court failed to recognize that nonconsensual

[6] http://volokh.com/2013/04/10/florida-revenge-porn-bill/.

pornography is patently offensive because it invades the privacy and violates the consent of its victims. Although the trial court opined that "it would have been clearer" for the Legislature "to prohibit the disclosure of 'obscene' photographs and then define that term" consistently with *Miller*, a judicial preference for more precise statutory language is no basis to facially invalidate an act of the Legislature. Even the Court in *Miller* recognized that legislatures must have discretion to craft their own laws. *See Miller*, 413 U.S. at 25 ("We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts."). Here, the language chosen by the Legislature is consistent with *Miller*'s guidance. To the extent the statute potentially could be read to cover some expression that is not obscene under *Miller* and is not otherwise beyond the reach of the First Amendment, this Court should give the statute a narrowing construction. *See Tracy*, 2015 VT 111, ¶ 28; *Green Mountain Future*, 2013 VT 87, ¶ 48.

B. Nonconsensual pornography is an extreme invasion of privacy that is not protected by the First Amendment.

The disclosures prohibited by section 2606 fit within the *Miller* definition of obscenity. But they also can be understood as extreme invasions of privacy that States historically have regulated without abridging First Amendment freedoms.

Although the United States Supreme Court has not expressly identified invasions of privacy as a category of speech akin to defamation or obscenity that is generally subject to state regulation, the Court's precedents demonstrate that giving publicity to someone's purely private matters, without their consent, is "historically unprotected." *See Stevens*, 559 U.S. at 472.

Samuel Warren and Louis Brandeis recognized more than a century ago that "existing law affords a principle which may be invoked to protect the privacy of the individual from invasion by either the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds." Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 206 (1890). In defining that principle, the authors wrote that the "right to privacy" protects against, among other things, publicizing "the acts and sayings of a man in his social and domestic relations" and reproducing a woman's face or form "photographically without her consent." *Id.* at 214.[7]

Likewise, the United States Supreme Court has long recognized that States may permissibly protect their citizens from unwanted invasions of privacy. Privacy rights, no less than First Amendment freedoms, are "plainly rooted in the traditions and significant concerns of our society." *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (quoting *Cox Broad.Corp. v. Cohn*, 420 U.S. 469, 491 (1975)); *see also In re Pac. Ry. Comm'n*, 32 F. 241, 250 (C.C.N.D. Cal. 1887) (Field, J.) ("Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value."). And although the federal

[7] Warren and Brandeis also discussed a contemporaneous New York case, in which the court enjoined a photographer from using a picture he had taken of a Broadway actress "surreptitiously and without her consent" while she was performing in tights. *Id.* at 195 n.7.

constitution protects certain aspects of individual privacy, "the protection of a person's general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (citations omitted).

The First Amendment, as it does with respect to defamatory speech, limits the States' ability to punish invasions of privacy, *see, e.g.*, *Florida Star*, 491 U.S. at 533-41 (State could not punish newspaper for publishing rape victim's name where newspaper lawfully obtained information from pressroom copy of police report). But the Court has never applied those limitations to disclosures of purely private matters. *Cf. Bartnicki v. Vopper*, 532 U.S. 514 (2001) (wiretap statute could not be applied to sanction media defendants who lawfully obtained and then broadcast a recording of an illegally intercepted conversation on a matter of public interest); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 & n.10 (1967) (declining to reach issue of whether truthful publication of private matters unrelated to public affairs could be constitutionally proscribed). To the contrary, the Court has suggested that the government may, "consonant with the Constitution" prohibit speech if "substantial privacy interests are being invaded in an essentially intolerable manner." *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (quoting *Cohen*, 403 U.S. at 21); *see also id.* at 452 ("[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."). And the Ninth Circuit recently held, in a case involving

revenge porn, that "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) (rejecting an as-applied challenge to enforcement of the federal cyberstalking law). As Justice Breyer explained, the U.S. Constitution "must tolerate" state laws that place "direct restrictions on speech" if those laws further "privacy and speech-related objectives." *Bartnicki*, 532 U.S. at 537-38 (Breyer, J., concurring). Thus, even public figures retain a right to privacy in "truly private matters" such as sexual relations and other intimate conduct. *Id.* at 540.

Many States protect these privacy interests by recognizing a tort for "publicity given to private life" or "public disclosure of private facts," which typically imposes liability on "[o]ne who gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D (1977). *See also Lemnah v. Am. Breeders Serv., Inc.*, 144 Vt. 568, 574, 482 A.2d 700, 704 (1984) (noting jury instruction under § 652D). Such laws have withstood First Amendment challenges. *E.g.*, *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (enjoining online publication of celebrity sex tape under California's law, and concluding that publication was not protected by the First Amendment because "[s]exual relations are among the most personal and intimate of acts"); *see also Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1405 (8th Cir. 1997) (holding that even where the State lacks a compelling interest, "speech that reveals truthful and accurate facts about a

private individual can be regulated, consistently with the First Amendment . . . if: (1) any such regulation is viewpoint-neutral; (2) the facts revealed are not already in the public domain; (3) the facts revealed about the otherwise private individual are not a legitimate subject of public interest; and (4) the facts revealed are highly offensive").

Section 2606, like the public disclosure of private fact tort, is an important and permissible means to protect individual privacy. The statute, like the laws of more than thirty States, is designed to preserve personal privacy and consent in an age of ubiquitous cell phone cameras, text messages, and social media which allow nonconsensual pornography to be disseminated worldwide at the push of a button. The United States Supreme Court has observed that these new forms of communication "are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010). Accordingly, an individual does not forfeit their right to privacy by communicating through these media. *See id.* As Justice Breyer noted fifteen years ago, "the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy." *Bartnicki*, 532 U.S. at 541 (Breyer, J., concurring). Section 2606 is a permissible response to these challenges; the extreme invasions of privacy the statute prohibits are not protected by the First Amendment.

III. The statute is narrowly drawn to further compelling State interests.

A. The statute survives strict scrutiny.

Because the disclosures regulated by the statute are not protected speech, defendant's First Amendment challenge fails. But even if this Court concludes that section 2606 does restrict constitutionally protected speech, and that strict scrutiny applies, the statute should be upheld because it is narrowly tailored to serve compelling state interests. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (Florida rule prohibiting judicial candidates from personally soliciting campaign funds narrowly tailored to serve State's compelling interest in preserving public confidence in its judiciary).

Section 2606 serves the State's interest in protecting the individual privacy, sexual consent, and reputation of Vermonters. These are compelling interests. *See, e.g.*, *Bartnicki*, 532 U.S. at 532-33 (recognizing that protecting the "privacy of communication" is an important government interest); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985) (Vermont "should not lightly be required to abandon" its "strong and legitimate" interest in protecting private reputation); *Patnuade*, 140 Vt. at 378 (affirming rape convictions and rejecting defendants' arguments that "[c]onsent to sexual conduct with one person" has a "tendency to prove consent to conduct with another").

Moreover, the statute is narrowly tailored to serve those compelling interests: the disclosed image must either depict a sexual act or the most private areas of the human body; the disclosure must be unauthorized; the person depicted must have

had a reasonable expectation of privacy in the image; there must be no public interest in the disclosure; the defendant must have intended to harm the person depicted; and the disclosure must be reasonably likely to cause harm.

The court below found that Section 2606 is not narrowly tailored because less restrictive alternatives, such as civil penalties, might be equally effective. PC 4. But the United States Supreme Court has rejected the notion that criminal sanctions necessarily restrict First Amendment freedoms more than civil penalties. *See New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). Indeed, a person charged with violating a criminal law, unlike a civil defendant, "enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt." *Id.* The type of penalty—civil or criminal—does not change the amount of speech that is restricted. And here the statute restricts no more speech than is necessary to achieve the State's compelling interests in protecting privacy, sexual consent, and reputation.

Moreover, although the statute does in fact create a civil remedy by providing for a private right of action and injunctive relief, 13 V.S.A. 2606(e), that remedy, standing alone, will in many cases fail to deter and punish publishers of nonconsensual pornography. Most victims lack resources to bring lawsuits, many individual defendants are judgment-proof, and federal law shields website operators from liability for hosting others' content. *See generally* Citron & Franks,

Criminalizing Revenge Porn, 49 Wake Forest L. Rev. at 357-61; Barmore, *Criminalization in Context*, 67 Stan. L. Rev. at 457-60; 13 V.S.A. § 2606(d)(4).

B. The statute survives intermediate scrutiny.

The trial court noted that "a mid-level of scrutiny" could potentially apply to laws that restrict "purely private" speech. PC 4 (quoting *Snyder*, 562 U.S. at 452). As discussed above (at pp. 17-21), it is unnecessary to apply any heightened level of scrutiny because, in addition to being obscene, the extreme invasions of privacy targeted by section 2606 are entitled to no constitutional protection. But if this Court determines instead that the prohibited disclosures are entitled to some "less rigorous" level of First Amendment protection, *see Snyder*, 562 U.S. at 452; *Tracy*, 2015 VT 111, at ¶ 15 n.8, the statute nonetheless should survive review under an intermediate level of scrutiny.

Where the Supreme Court applies an intermediate level of scrutiny to restrictions on protected speech, it generally asks whether the restriction is carefully drawn to advance an important government interest. *See, e.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (content-neutral restrictions with incidental burdens on speech); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-80 (1989) (restrictions on commercial speech). Lower courts have applied similar tests to other categories of speech, even in the absence of direct Supreme Court precedent. *See, e.g.*, *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2016) (holding that "licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her

profession"; applying intermediate scrutiny and upholding restriction on sexual orientation change therapy for minors).

If this Court finds that section 2606 regulates protected speech, it should apply intermediate scrutiny because the speech at issue concerns "purely private" matters and deserves "less rigorous" First Amendment protection. *See Snyder*, 562 U.S. at 452; Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure*, 53 Duke L.J. 967, 987-89 (2003) (arguing that "a lesser form of scrutiny" should apply when "reconciling the tension between privacy protections and free speech"). For the reasons set forth above, the statute should be upheld under that test because it is carefully drawn to advance the State's interests in protecting privacy, sexual consent, and reputation.

IV. The statute is not overbroad.

The trial court also suggested that section 2606 is constitutionally overbroad, although it did not rest its decision on that ground. PC 4-5. A statute challenged as overbroad will be declared facially unconstitutional only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473.

Here, the trial court expressed concern that the statute might criminalize disclosure either "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" or by "that person's spouse who might find such unsolicited images and forward

them out of anger and disgust." PC 5. But it is unclear the statute would apply to those hypothetical situations. For example, it is difficult to see how a complainant would have a reasonable expectation of privacy in pictures sent to a stranger. *See* 13 V.S.A. § 2606(d)(1). Or how the recipients who then disclosed the pictures, in order to stop receiving them, would possess the requisite mental culpability. *See id.* § 2606(b)(1). Moreover, the statute would protect a recipient who discloses the unwanted pictures to law enforcement. *See id.* § 2606(d)(2).

Relatedly, although the trial court facially invalidated the statute, its analysis suggests it was troubled by applying the statute to the specific facts of *this* case. According to the court, "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 complainant was no longer in a relationship with Mr. Coon when she sent him her private pictures.[8] PC 4. But defendant's actions here are actually more egregious than those of the arguably "typical" revenge porn defendant who is given pictures during a relationship with the victim and then shares those pictures without the victim's consent. Here, defendant never had any right to see the pictures in the first place. She only saw them because she accessed Mr. Coon's Facebook account without his permission, *see* PC 18, and then she disclosed them without complainant's permission. These facts further undermine any argument that defendant's conduct warrants First Amendment protection. *See Bartnicki*, 532

[8] The trial court's conclusion that Mr. Coon's relationship with complainant had ended presumably is based on the stipulation the parties submitted at the court's request. PC 17-19. Notably, neither Mr. Coon nor complainant were parties to that stipulation.

U.S. at 532 n.19 ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)).

In any event, the Legislature designed the statute to cover more than the "typical revenge porn case," if there is any such thing. Modern technology provides countless ways to create and disseminate photographs and videos. Section 2606 thus generally prohibits disclosing a person's nude or sexually explicit pictures if the person had a reasonable expectation of privacy in the picture and did not consent to its disclosure. Thus, it protects the woman who shared private pictures during a relationship that has now ended, as well as the woman whose private pictures were obtained by a stranger when her phone was hacked, as well as the complainant in this case whose private pictures were published online after they were, in effect, stolen by the defendant. In each of these examples, the statute furthers the State's compelling interests in protecting individual privacy, sexual consent, and reputation.

The trial court's concerns about applying section 2606 to these different scenarios are unfounded. In addition, even if it is possible to imagine a fact pattern where section 2606 could not permissibly be applied, the statute should not be declared overbroad unless there are a "substantial number" of unconstitutional applications, as compared to the statute's numerous permissible applications. *See Stevens*, 559 U.S. at 473. Here, as discussed above, the statute can constitutionally

be applied to the facts of this case as well as the vast majority of situations involving nonconsensual pornography.[9]

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's decision facially invalidating 13 V.S.A. § 2606.

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[9] As discussed above (at p. 17), to the extent the Court determines that a potential application of the statute raises significant First Amendment concerns, the Court should give section 2606 "a narrowing construction to save it from nullification," and interpret the statute, for example, to only apply to images that meet the *Miller* definition of obscenity. *See Green Mountain Future*, 2013 VT 87, ¶ 48.

CERTIFICATE OF COMPLIANCE

Benjamin D. Battles, Assistant Attorney General and Counsel of Record for the appellant State of Vermont, 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 7,517 words.

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