IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT

VS

REBEKAH VANBUREN

SUPREME COURT DOCKET NO. 2016-253

APPEAL FROM THE

SUPERIOR COURT OF VERMONT – CRIMINAL DIVISION
BENNINGTON COUNTY
DOCKET NO. 1144-12-15 Bncr

BRIEF OF THE APPELLEE

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The First Amendment of the Constitution protects freedom of expression. Judge Howard correctly applied strict scrutiny to 13 V.S.A. § 2606, which was passed by the Vermont Legislature in 2015 to criminalize speech that in its judgment was not worthwhile—so called revenge porn—or non-obscene nude photographs (including "selfies"). This Court should affirm his decision finding that § 2606 violates the First Amendment.

Statement of Facts

During the 2015 legislative session, the State of Vermont enacted new legislation meant to criminalize and punish disclosure of sexually explicit images without consent. Title 13 V.S.A. § 2606 (b) states that a person is guilty if he or she knowingly discloses a visual image of an identifiable person who is nude or engaged in sexual conduct, without his or her consent. The statute also requires that a person must have the intent to harm, harass, intimidate, threaten or coerce the person depicted, and that the disclosure would cause a reasonable person to suffer harm. To disclose is defined as to "transfer, publish, distribute, exhibit or reproduce."

In the fall of 2015, the Bennington criminal division became the first to consider the constitutionality of this new law. This case arose out of one woman's attempt to seduce Rebecca VanBuren's boyfriend. Rebecca, the defendant, was in a relationship with Anthony Coon. P.C. 1. Mr. Coon did not have his own cell phone; instead, he used Ms. VanBuren's phone frequently to check Facebook. In other words, messages directed to Mr. Coon opened automatically on Ms. Van Buren's phone, even though she was not the intended recipient. P.C. 18. Unbeknownst to Ms. VanBuren, complainant was trying to attract Anthony's affections. This young woman sent nude pictures of herself to Mr. Coon's Facebook account, but the messages went directly to Ms. VanBuren's phone. *Id.* Shocked and angered, Ms. VanBuren clicked to post complainant's nude photos to Mr. Coon's public Facebook page. Ms. VanBuren tagged the complainant and made the nude pictures public to friends of hers and Mr. Coon's on Facebook.

When the complainant learned that nude pictures of her were posted on Facebook, she called Ms. VanBuren's phone looking for Mr. Coon and left a message. Ms. VanBuren told the complainant that she hoped she learned a lesson about sending nude photographs to men with whom she had no relationship. Complainant reported the issue to Facebook and then closed her Facebook account, and Mr. Coon also shut down his account. Two months later, in early December, Ms. VanBuren was charged with a violation of 13 V.S.A. § 2606 (b) for making complainant's pictures accessible on Mr. Coon's Facebook page with the alleged intent to "harm, harass, intimidate, threaten or coerce" her. P.C. 2.

Defense counsel filed a motion to dismiss on the grounds that the statute violated the First Amendment of the United States Constitution. P.C. 1, 6–7. Judge Howard agreed with Ms. VanBuren and her counsel that indeed the First Amendment broadly protects speech and expression. P.C. 2. Additionally, Judge Howard was not persuaded that the naked consensual photographs in question fell into any category of speech of such "little social value … that the State can prohibit and punish such expression." P.C. at 2, citing *Connick v. Myers*, 461 U.S. 138, 147 (1983). According to the court, the pictures in question—simple nude selfies— were not obscenity, nor was the State's argument that the photos ought to be considered obscene "simply because of the intent … used" persuasive, when there was no authority whatsoever for the court to enlarge the definition of obscenity under the First Amendment. P.C. 3–4. Judge Howard wrote:

> This finding requires the court review the statute and its prohibitions under a "strict scrutiny" basis, as this is a content discrimination case since the statute does not apply to all images disclosed with the required intent, but only to nude images as defined or ones depicting sexual conduct. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811–813 (2000) (holding a statute that focuses on one type of speech and its impact on listeners is the essence of content-based regulation and subject to strict scrutiny).

P.C. 3. Applying strict scrutiny, the court concluded that even assuming that the State's goal of protecting its citizens' privacy and reputational rights was compelling, the State did not meet its burden of showing that there were no less restrictive alternatives to carry out its objectives.

Judge Howard also rejected the argument that a mid-level scrutiny could or ought to be applied to § 2606. The court observed that even in cases involving purely private speech, courts had never applied a less exacting level of scrutiny: "Without a firm ruling, though, that such a mid-level test is established, this trial court does not believe it can apply one here." P.C. at 4.

Judge Howard found that the State did not address why the civil penalties referred to in the statute itself did not provide reasonable and effective means to carry out its policy. The court questioned why a criminal restriction on speech was the only remedy for a complainant who had sent unsolicited flirtatious photographs to someone she wished seduce. The State had no explanation why all nude photos should trigger protection, as opposed to obscene ones. P.C. 4–5. The court declined to address Ms. VanBuren's claims under the Vermont Constitution, or her claims that the statute was unconstitutional as applied to her, because 13 V.S.A. § 2606 was facially invalid under the First Amendment. *Id.*

The State's request for extraordinary relief to review the trial court's order of July 1, 2016, dismissing the charge in Docket No. 1144-12-15 Bncr was granted. P.C. 20.

Standard of Review

Questions of law are reviewed de novo. *State v. Tracy*, 2015 VT 111, ¶ 14, 130 A.3d 196. Additionally, the constitutional standard of review is strict scrutiny as the statute is content-based on its face, rendering it presumptively unconstitutional. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226–27 (2015). "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." *Id.* at 2228.

Argument

I. Section 2606 fails strict scrutiny because it blatantly criminalizes speech on the basis of content expression that is protected by the First Amendment.

Non-obscene images of nudity are fully protected by the First Amendment. *United States v. Playboy*, 529 U.S. 803, 811 (2000); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *Jenkins v. Georgia*, 419 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene"). "The First Amendment provides that 'Congress shall make no law … abridging the freedom of speech,'" and it means that "government has no power to restrict expression because of its message, its ideas, its subject matter, its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civil Liberties Union*, 553 U.S. 564, 573 (2002)). Section 2606 criminally restricts and limits the way a person who receives a voluntarily disclosed nude or sexually explicit photograph of another can share that image based solely on the content of the image. Because that is undisputedly a straightforward, content-based restriction on speech, the court correctly decided that the law offends well-established First Amendment principles and fails strict scrutiny because the statute is not narrowly tailored to meet a compelling state interest.

A. The statute is a content-based restriction on speech and is therefore presumptively invalid under the First Amendment and subject to strict scrutiny.

From the outset, the State has an enormous hurdle to clear in order to successfully defend the statute. Section 2606 seeks to regulate and punish non-obscene speech solely based on its content—images of nudity or specified sexual activity—and therefore, it presumptively violates the First Amendment. See *Reed*, 135 S. Ct. at 2226 ("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."); *United States v. Stevens*, 559 U.S. 460, 468 (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *Playboy*, 529 U.S. at 811 ("The speech in question is defined by its content; and the statute which seeks to restrict it is content-based"). Vermont does not criminalize the publication of most images without the consent of the depicted person even if they might also be embarrassing, such as an image of the person highly inebriated or vomiting—only those containing nudity. But "[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004). Such prohibitions "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (citations omitted).

As a content-based prohibition of protected, non-obscene speech, § 2606 is "presumptively invalid," and the Government bears the heavy burden to rebut that presumption. *Stevens*, 559 U.S. at 468 (quoting *Playboy*, 529 U.S. at 817). This means that the statute can stand "only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813 (citation omitted). Under strict scrutiny, the prohibition or regulation "must be narrowly tailored to promote a compelling Government interest" which cannot be served through a "less restrictive alternative." *Id.* at 813. That is a tall order: "It is rare that a regulation restricting speech because of its content will *ever* be permissible … When First Amendment compliance is the point to be proved, the risk of non-persuasion—operative in all trials—must rest with the Government, not with the citizen" *Id.* at 818 (emphasis added). "To do otherwise would be restrict speech without an adequate justification, a course the First Amendment does not permit." *Id.* at 813.

B. The statute is not necessary to serve a compelling state interest, nor is it narrowly drawn to achieve any such end.

In order to survive strict scrutiny, the State must prove the existence of an "actual problem" in need of solving, and then demonstrate that the curtailment of free speech is "actually necessary" to the solution. See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Vermont passed 13 V.S.A. § 2606 because it accepted the assertion of an activist organization that dissemination of intimate shared images with the intent to harm, harass, intimidate, threaten or coerce causes personal and societal harm, and so the State has an interest in criminally punishing the dissemination. The anecdotes and conclusory assertions of the State and amici do not establish that the sharing of voluntarily disclosed nude images on the internet causes harm or risk that justifies a content-based restriction on speech. The State does not come close to carrying the heavy burden of proving that the problem is so significant it rises to a compelling need, nor that criminal penalties are the narrowest means to address this potential problem.

1. Anecdotal stories, conclusory assertions, and nonspecific references fail to establish an actual problem that must be solved.

The "compelling problem" prong of a strict scrutiny analysis is a rigorous one. The burden is on the State to show actual evidence of a serious problem that must be solved—anecdotes, assumptions, and conclusory assertions are not enough. *Playboy*, 529 U.S. at 825. The Court differentiates between a government goal and a compelling problem. *United States v. Playboy* illustrates the heavy empirical burden that the government must meet to establish a valid content-based restriction on speech. *Id.* at 811. In that case, Playboy offered adult programming that was not obscene but was sexually explicit as a premium channel on cable television. At issue was a federal statute that required cable providers to either "fully scramble or fully block programming" for viewers who did not order the station, in order to prevent a phenomenon

known as "signal bleed," which happened when scrambling was imperfect. Certain images and the audio would come through the scramble, thus allowing children, who might be home during the day, to be exposed to adult images. *Id.* at 806. If cable providers could not manage signal bleed, which many could not, then they were prohibited from broadcasting adult programming except late at night. Playboy sued the government, alleging the alternative ban to all adult programming during the day could not survive strict scrutiny because the government had established neither the existence of an actual problem, nor that the time ban infringing on speech was the "actually necessary" solution. *Id.* at 822–23, 826–827. The Supreme Court struck down the statute, holding that even if limiting the ability for children to be exposed to adult images was a legitimate *goal* for the government to have, the government had not established a compelling *problem* in need of solving, nor was the time ban a narrowly tailored solution to the problem. The Court was especially critical of the government's approach to the case, faulting the Department of Justice for relying on conclusory assertions rather than evidence and for its "offhand" dismissal of alternative solutions. *Id.* at 824-25.

In *Brown v. Merchants Ass'n*, the Supreme Court rejected a law that prohibited the sale of violent video games to minors "in which the range of options available to a play include[d] killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted." 564 U.S. 786, 789 (2011). Here too, the Court found that California could not show how a ban on sales to children was necessary to address a compelling problem, where a system rating the video games was already in place to inform concerned parents of what their children were purchasing. *Id.* at 803. Again, the Court held the State to a strict standard of proof when it came to proving a compelling need for content-based regulation, criticizing the State for its inability to prove any "direct causal link" between the content of video games and actual harm

and rejecting the State's claim that it could rely on "predictive judgment" based on psychological studies. *Id.* at 799. "Because [the State] bears the risk of uncertainty, ambiguous proof will not suffice." *Id.* at 800 (internal citation omitted).

In *Brown,* the majority observed that Justice Alito, dissenting, had done considerable independent research to identify video games in which "the violence [was] astounding," and he recounted the disgusting video games in detail "in order to disgust us." Still the majority concluded that disgust is not a valid basis for restricting expression, because "ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the **ideas** expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription." *Id.* at 799 (emphasis in original).

In *Playboy*, it turned out that not nearly as many people as the government supposed were really upset about signal bleed; fewer than 0.05% of households complained and asked the cable company for a complete block of the Playboy channel instead of scrambling with potential signal bleed. "The Government presented evidence of two city councilors, eighteen individuals, one United States Senator, and the officials of one city who complained either to their [cable] operator, to their local Congressman, or the FCC about viewing signal bleed on television." *Id.* at 820. And, the government presented an expert's spreadsheet estimate that 39 million homes with 29.5 million children had the potential to be exposed to signal bleed, though there was little attempt to confirm those numbers. The United States Supreme Court rejected this evidence as insufficient to demonstrate that there was a real problem in need of solving.

Comparing the Supreme Court's analysis to the State's and amici's case presented here yields the same conclusion: Title 13 § 2606 cannot survive strict scrutiny. The State has attempted to establish a grave need for 13 V.S.A. § 2606, largely by emphasizing anecdotal

stories and by stating the obvious—we live in a digital age where cell phones are ubiquitous. Amici, the same activist organization that successfully lobbied for the statute in the legislature, cites to its own records of people that contacted its website for the number of people whose nude pictures were disseminated further than they intended; to news articles that describe the circumstances of particular women; and to a survey from the Data and Society Research Institute, which concludes that 4% of internet users who have sent intimate photographs have had their intimate images threatened to be exposed in some way. Brief of Amici at 3–11. The anecdotes, presumptions, and assertions provided by the State and amici in this case are even less probative than the thin evidence rejected by the Supreme Court in *Playboy* and *Brown*.

Just as the anecdotal evidence offered by individual complainants in *Playboy* was of no probative value, the stories of those who have had their images disclosed, while troubling, are no basis for a content-based regulation here. *Playboy*, 529 U.S. at 819–20. The survey produced by Data and Society (apparently prepared based on the definitions developed by amicus itself), like the government's research survey in *Playboy*, proves the existence of the phenomenon, but fails to prove the severity of the harm. It is unclear, for example, how many of the 1 in 10 women under the age of 30 who the study found have been subject to the possibility of nonconsensual image sharing actually felt harmed or what, if anything, such harm entailed. Amici can only speculate as to how many images are actually posted, or in how many instances the complainant prevented the dissemination of the images just by asking. The research also did not examine how many such situations were resolved without the involvement of the court.

State and amici are also unclear—to the point of obfuscation—whether all the incidents were based on consensual selfies exchanged in happier times, or whether the photos were taken with force, or surreptitiously (in violation of other laws), or how often, if ever, the depicted

images would meet the constitutional definition of obscenity. As the Supreme Court wrote in *Playboy*:

> This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. **The question is whether than actual problem has been proved in this case.** We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.

Id. at 822–23 (emphasis added). Theoretical extrapolation of a potential problem based on a collection of nonspecific anecdotes and conclusory assertions does not meet the high burden established by the Supreme Court.

Furthermore, the State and amici essentially concede that it is dislike for the ideas expressed by those who post nude images that motivates the legislation.[1] But just as in *Brown*, the fact that society does not approve of, or is even disgusted by, violent video games or dissemination of nude selfies does not mean that the State or amici have met their very high burden on strict scrutiny. 564 U.S. 786 at 799. Even where speech has the power to inflict great pain, "we cannot react to that pain by punishing the speaker." *Snyder v. Phelps*, 562 U.S. 443, 451–59, 460–61 (2011). In the Vermont legislature's rush to pass this legislation it failed to insist on hard data establishing a problem in need of solving. Policing the ugly breakups of

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[1] The State's and amici's view is clear from their language: the State says "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." State's Brief at 9, citing Citron and Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 348 (2014); see also State's Brief at 16–17 ("The trial court failed to recognize that nonconsensual pornography is patently offensive because it invades the privacy and violates the consent of its victims"). Amici describe the "trauma of having the most intimate and private details of their lives displayed to the public" that "courageous" victims face, and notes "[t]here should be little question that preventing these harms is a legitimate as well as compelling governmental interest." Amici's brief at 9–10,18. Appellant's and amici's unapologetic disapproval of the message expressed is explicit in their semantics.

relationships between once-consenting adults in the digital age to ensure that individuals are not too mean to one another is not a compelling governmental interest. See *Playboy*, 529 U.S. at 818 ("[T]hese judgments [regarding the content of speech] are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

2. *Section 2606 is not the most effective, efficient or narrowly tailored way to address the problem, nor is it the least restrictive means to accomplish the State's interest.*

The statute also fails the second prong of strict scrutiny analysis because the State has no concrete explanation or any research to support its claim that the only way to address the alleged harm it tries to identify is with a criminal penalty infringing on free speech. In the trial court opinion, Judge Howard specifically questioned why, for example, the civil remedies created in 13 V.S.A. § 2606 were not an appropriate remedy when he determined that Vermont's statute is not narrowly tailored. The State's and amici's answer is that complainants lack the resources to pursue civil actions, but they provide no support for this proposition.[2] State's Brief at 23; Amici's Brief at 23.

Oddly, both the State and amici cite *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964), to argue that criminal sanctions do not restrict First Amendment freedoms more than civil penalties. See State's Brief at 23, Amicus' Brief at 22. Yet, surely the very reason they argue for the criminal statute is precisely because they believe it will more effectively chill the speech of would-be revenge pornographers than a civil penalty! In fact, although the United States

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[2] Professor Franks, CCRI's director, is more candid in her view that this must be criminal; she advocates for criminal penalties, specifically because she believes that the collateral consequences of a conviction will chill speech in a way she desires: She says that "[s]ince criminal convictions in most cases stay on one's record forever, they are much less likely to be ignored … Criminalizing nonconsensual pornography is also appropriate and necessary to convey the proper level of social condemnation for this behavior. *See* Citron and Franks, *supra*, at 349.

Supreme Court did say—in 1964—that for the *New York Times* a stiff and automatic civil penalty "**may**" be more chilling to the newspaper than criminal sedition laws that applied to individuals for making similar criticisms, *id.* at 277 (emphasis added), that was not the Supreme Court's last word on the subject.

In a much more recent case, and in a much more relevant context, in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–72 (1997), the United States Supreme Court held that criminal statutes do chill speech more than civil laws. The Court considered whether Communications Decency Act (CDA) provisions imposing criminal penalties of up to two years in prison on those adults who send indecent or patently offensive communications to persons under the age of 18 through the internet violated the First Amendment. The Supreme Court concluded, as here, that these were obviously content-based restrictions subject to strict scrutiny—that the vagueness of the terms "indecency" and "patently offensive" was especially problematic because of its chilling effect on speech, and that

> [s]econd, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. **The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.** *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Id. at 871–72 (emphasis added) (internal citations omitted).

Justice Stevens reiterated this same point in his concurrence with the majority in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 674–75 (2004). There, the United States Supreme Court addressed the Child Online Protection Act (COPA), a criminal prohibition on posting content on the internet that was "harmful to minors." *Id.* at 661. The Court enjoined

prosecutions under COPA because there was no evidence that filtering software could not accomplish the same goal as the criminal penalties imposed by the law. Justice Stevens, joined by Justice Ginsberg, said that criminal prosecutions are "an inappropriate means to regulate the universe of materials classified as 'obscene,'" since "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Id.* (citation omitted). And, "[a]ttaching criminal sanctions to a mistaken judgment about the contours of the novel and nebulous category of 'harmful to minors' speech clearly imposes a heavy burden on the exercise of First Amendment freedoms." *Id.*; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (" … but a law imposing criminal penalties on protected speech is a stark example of speech suppression").

Thus, even if this Court could find a compelling state interest in preventing the disclosure of nude photographs, a criminal sanction is the most restrictive means to do so, and the State and amici have not even attempted to adequately answer Judge Howard's question as to why the civil remedy provided in the statute is inadequate to solve the problem they identify. P.C. 4. In fact, in addition to the one contained in the statute at 13 V.S.A. § 2606 (d), there are a number of potential solutions.

First, Facebook and other major internet players have already begun preventing the dissemination of such images themselves. In 2012, Facebook changed its community standards to crack down on revenge pornography and "sextortion" banning nude images when they are reported. It also targets pedophile networks and urges users to carefully consider the repercussions of the images they share. *See* Alexandra Topping, *Facebook Revenge Pornography Trial "Could Open Floodgates,"* The Guardian (Oct. 9. 2016), www.theguardian.com/technology/2016/oct/09/facebook-revenge-pornography-case-could-open-

floodgates. Twitter, Periscope and Reddit have also altered their privacy policies banning abusive or threatening behavior, including revenge porn. *See* Lauren C. Williams, *Revenge Porn, Free Speech and the Fight for the Soul of the Internet*, Think Progress (June 22, 2015), https://thinkprogress.org/revenge-porn-free-speech-and-the-fight-for-the-soul-of-the-internet-d5964947a401#.sxbdikafg.

Another possible remedy rejected by the State and amici is copyright law. In *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. Intell. Prop. & Ent. Law 422, 446 (2014), Amanda Levendowski argues that copyright law protects the photographer's right to control the image he or she created, and because most often the eventual complainant is the photographer, copyright enforcement "stands out as the most efficient and predictable way to achieve the goal of most victims—takedown of the image." A relatively simple procedure, complainants do not need to register their copyrights of their selfies, or hire a lawyer to file a takedown notice; rather, complainants need only submit their name and signature; identify the image; and provide links to the infringing material, contact information and written verification that they believe the use is unauthorized. Complainants can also issue de-indexing requests to search engines like Google or Yahoo, to remove infringing links from search results. *Id.* at 443. While it is true that a takedown on one site does not prevent the image from being disseminated on another website, it does achieve one of the most meaningful remedies because it removes the offending image, which the criminal section of § 2606 does not even require.

There are also civil remedies available in tort, including intentional infliction of emotional distress (IIED), which already provide a means to address revenge pornography through the law. In *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 Berkeley Tech. L.J. 929, 949 (2014), Jenna Stokes argues that

IIED is ideal to address social harms like revenge porn because its "built-in contextual analysis makes it uniquely adept at dealing with bad behavior on the Internet." To prevail on a claim, a plaintiff must show extreme and outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, that has resulted in the suffering of extreme emotional distress. *See Denton v. Chittenden Bank*, 163 Vt. 52, 64 (1996). Or, if the legislature was concerned, as the State and amici are, about the cost to complainants of civil litigation, it might provide a streamlined small claims court procedure for complainants to bolster the civil remedy in § 2606.

Finally, Vermont already has laws against criminal stalking 13 V.S.A. §§ 1061, 1062; violating an abuse prevention order, 13 V.S.A. § 1030; voyeurism, 13 V.S.A. § 2605; disturbing the peace by telephone or other electronic communications, 13 V.S.A. § 1027; disorderly conduct, 13 V.S.A. § 1026; lewd and lascivious conduct, 13 V.S.A. §§ 2601–02; and extortion, 13 V.S.A. § 1701. This statutory criminal framework is likely already adequate to address and deter many of the instances of dissemination of nude photographs without consent that State and amici raise, and even if they are not, neither the State nor amici present any proof that a remedy less restrictive of speech than criminal punishment would be inadequate.

Perhaps most importantly, the very facts of this case illustrate the adequacy of the remedies already available: Owing nothing to the intervention by the police, who were contacted after Facebook was alerted, or the trial court, which dismissed the case, the complainant's nude selfies were removed promptly when both complainant and Mr. Coon closed their Facebook accounts and several friends of the complainant reported the images to Facebook. Neither the State nor amici have a good answer for why that is not an acceptable ending to this story. The complainant might have felt embarrassed or sheepish. Perhaps she even felt pain or shame, but,

nevertheless, the offending pictures came down without any infringement upon the First Amendment.

3. *The intent element cannot save this statute; in fact, it only makes it more convoluted and both underinclusive and overinclusive.*

The State makes much of 13 V.S.A. § 2606's intent element, which means that a person can only be prosecuted for disseminating an image given to them if they do so with the "intent to harm, harass, intimidate, threaten or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm." 13 V.S.A. § 2606 (b)(1). The argument that the intent element sufficiently narrows § 2606 is like the argument the government unsuccessfully made in *Reno*, 521 U.S. 844, 880. There, the government claimed that a provision imposing criminal penalties when a person sent obscene, indecent or patently offensive materials was sufficiently narrowly tailored because the statute required an offender to "have knowledge" and to target a "specific" child with the offending speech. The Supreme Court dismissed this limiting language because "[e]ven the strongest reading of the 'specific person requirement,'" would confer "broad powers of censorship, in the form of a 'heckler's veto' upon any opponent of indecent speech." *Id.* Here, § 2606 seeks to punish only those who disseminate intimate photographs with the intent to harm, harass, intimidate, threaten or coerce, but like the CDA provision, it does not narrow the chilling effect of speech that is protected by the First Amendment.

In addition, it imposes an impermissible value judgment: The statute limits speech only where people are mean to one another. The same conduct, with the same purported harms, is permissible as long as the disseminator intended something other than harm, harassment, intimidation, threat or coercion. This argument is flawed because:

> The fundamental point of speech is to have impacts on listeners' minds—increasing their knowledge, changing their opinions, affecting emotional states, and so on. It would therefore be a rank evasion of the First Amendment if legislatures could discriminate against content and viewpoints they do not like by

> cagily basing their speech restrictions, not on the actual impacts the speech has on listeners, but on the listener—impacts that speakers *intend*. Consider for example, a law that forbids "trying to engender feelings of hate or animosity toward people of Sharmandian ancestry." There may be obvious good reasons for wanting to enact such a law, but doing so would nonetheless be … a pure evasion of the First Amendment. That is to say, there is … a First Amendment right to urge others to feel hate or animosity toward any group one chooses, whether it be the innocent Sharmandians, on one hand, or pedophiles, terrorists, drug traffickers, cyberbullies, misogynists, capitalists, lawyers or whatever.

John Humbach, *The Constitution and Revenge Porn*, 35 Pace L. Rev. 215, 257 (2014); *see also Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Although a government is no doubt permitted to guide or influence public opinion, it is not permitted to do so by banning speech that it does not favor. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671–72 (2011) (reasoning that "a State's failure to persuade does not allow it to hamstring the opposition and "the State cannot engage in content-based discrimination to advance its own side of a debate").

While some who disseminate nude images may wish to punish a former lover that has spurned them, or encourage others to hate or shame that person, others will publish nude photos of others with motives not captured by this law. Some will post photos as comeuppance to another who has subjected them to a barrage of unwelcome naked pictures meant to entice an intimate relationship. Others might want to show off the photos simply because they cannot believe their luck at having such a beautiful partner. Others might do so because they think it is funny. Perhaps the most "harmful" motive for posting such images is profit, which is not addressed by the statute at all. *See* Samantha Scheller, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C.L. Rev. 551, 559–65 (2015). An intent element does nothing more than "create an unprincipled and indefensible hierarchy of perpetrators." *See* Citron & Franks, *supra*, at 387.

When legislation affects First Amendment rights it must be pursued by means that are neither seriously underinclusive nor overinclusive. *Brown*, 564 U.S. 786 at 804. Thus, if § 2606's focus is to protect the privacy rights of those affected by the dissemination of naked photos, its intent element is too narrow because a reposting done for profit, or a posting done simply to share beauty would not be punished. It is overinclusive because, as discussed herein, the First Amendment protects speech even when, and, in fact especially when, it is ugly. See *id.* at 799; *see also Playboy,* 529 U.S. at 826 ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive or even ugly").

Section 2606 fails strict scrutiny because it does not meet a compelling need, and even if did, this statute would fail because neither the State nor amici can show why the remedies available are insufficient to address the problem. Even if § 2606 was narrowly tailored, it would still need to be the least restrictive means to accomplish the State's goal. When it struck down the CDA, the United States Supreme Court held that a burden on speech is too great, "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statue was enacted to serve." *Reno*, 521 U.S. at 874 (1997). Civil actions, copyright laws, intentional infliction of emotional distress, and the self-policing of the internet all offer ways to effectively prevent or punish the exchange and dissemination of naked selfies with far less impact on protected speech.

II. Intermediate scrutiny cannot save this statute either.

Though there are no cases where intermediate scrutiny has applied to a content-based restriction on speech because the speech was "private," both the State and amici urge that this Court adopt such a rule now. But none of the cases cited by the State that suggest that "private" speech is subject to less protection than public speech actually apply such a distinction. In *Snyder*

v. Phelps, despite Mr. Snyder's urging that the Westboro Baptist's hateful signs were personally directed at him and his family during his son's funeral, the Supreme Court applied the highest level of scrutiny. 562 U.S. at 455. *Snyder* arose in the context of the use of a civil remedy—intentional infliction of emotional distress—not a criminal, content-based restriction on speech like § 2606, and still the Supreme Court applied strict scrutiny.

The State's reliance on cases discussing "private" speech is misplaced. In *Dunn & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), a plurality concluded that a plaintiff whose credit report contained an error was entitled to damages for defamation even though the credit company had not acted with malice. The Court held that there was a difference between making a mistake about purely private matter like a credit report versus an error in publication like that in the *New York Times v. Sullivan* 376 U.S. 254 (1966), where public issues were at stake and where a plaintiff could not collect punitive damages without establishing malice. *Id.* at 755–63. But the Court did not lay out an intermediate scrutiny analysis, and, furthermore, the speech in question was defamatory, meaning that it was already outside the protection of the First Amendment and quite different from the criminal penalty at issue here in 13 V.S.A. § 2606.

Likewise, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), a radio station played a wiretap recording between a union negotiator and the union president. The radio station did not intercept the cellphone conversation between the two, but it obtained the recording and played it on the air during a news program, which violated content-neutral wiretapping laws because the station had reason to know it had been obtained illegally. *Id.* at 518–19. Even though the Supreme Court acknowledged that the tape had been obtained illegally and without the consent of the union negotiator and president, because the public would have an interest in the information, a majority upheld the right of the radio station to rebroadcast the private conversation. *Id.* at 532–34.

Although each of these cases discuss a distinction or a different way of treating speech that is private as opposed to public, none go so far as to diminish the longstanding rule that strict scrutiny applies to content-based regulations on speech. In fact, the opposite is true: *Bartnicki* and *Snyder* conclude that the speech at issue is public after all, and in *Dunn & Bradstreet* the Supreme Court made a narrow ruling about speech that was defamatory anyway. The State is trying to thread a very slender needle, and these cases hardly establish a basis to ask this Court to apply intermediate scrutiny to a so clearly criminal, content-based restriction on speech as 13 V.S.A. § 2606. *See Reed*, 135 S. Ct. at 2227–28 (establishing that strict scrutiny is required if the government restriction is "based on the message a speaker conveys," determining that degree of constitutional scrutiny does not turn on well-intentioned government motives).

But, even should this Court does find the State's argument that intermediate scrutiny should apply persuasive, the State cannot meet its burden under intermediate scrutiny either. In *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Supreme Court considered Massachusetts' 35-foot buffer zone restrictions outside of abortion clinics. The Court applied intermediate scrutiny and held that the government could "impose reasonable restrictions on the time place, or manner of protected speech, provided the restrictions '[were] justified without reference to the content of the regulated speech, that they [were] narrowly tailored to serve a significant governmental interest, and that they [left] open ample channels for communication of information.'" *Id.* at 2529 (citation omitted). The Supreme Court concluded that the statute was not narrowly tailored because Massachusetts had plenty of choices for how to decrease congestion around abortion clinics, and it would simply not accept the State's conclusory assertion that it had "tried other laws on the books" and other approaches "but they do not work." *Id.* at 2539. The Court was unsympathetic:

> To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency.

Id. at 2540. The State and amici still cannot explain why no remedy other than a criminal statute can address the harm that they argue is significant. They cannot satisfy strict scrutiny, nor do they come close to satisfying intermediate scrutiny.

III. Non-obscene, nude photographs exchanged through social media do not fall into any category that the United States Supreme Court has ever recognized as an exception to First Amendment protection, nor should this Court create a new unprecedented exception now.

"From 1791 to the present" the First Amendment "has permitted restrictions upon the content of speech in a few limited areas." *Stevens*, 559 U.S. at 468 (citations omitted). These "historic and traditional categories long familiar to the bar" include obscenity, defamation, incitement, and speech integral to criminal conduct. *Id.* These are "well-defined and narrowly limited classes of speech," the punishment and limitation of which have never been thought to raise Constitutional problems. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The State and amici urge this Court to do what the Supreme Court has not done: They are advancing an agenda to legislate the dissemination of nude photographs on the internet either by extending the definition of obscenity or by creating a new category of low-value, private speech not subject to the First Amendment.

In *Stevens*, the Supreme Court affirmed that it would not extend the categories of unprotected speech in even extreme cases, when it struck down a law that banned animal "snuff" or "crush" videos, a very specific type of fetish pornography featuring videos of live animals screeching in distress as they are crushed to death beneath a woman's bare foot or stiletto heel, usually with a dominatrix-style patter in the background. 559 U.S. 460 at 465–66. The

government argued that depictions of such cruelty should be added to the list of speech outside First Amendment protection, and it argued, like the State in this case, that "whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." *Id.* at 470. The Court unequivocally and emphatically shot down this notion in an 8-to-1 decision:

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweighs the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits" and declaring that those limits may be passed at pleasure. *Marbury v. Madison*, 2 L. Ed 60 (1803).

Id. The State and amici argue that the definition of obscenity should be extended to cover the nude selfies prohibited by the statute in this case, or alternatively, that such private speech has low social value that ought to represent its own new category entitled to fewer protections. But as ugly as the motivation or the harm might be in certain cases, *Stevens* demonstrates that the hurdle for enlarging a historical category, or for creating a new category placed outside the First Amendment, is practically insurmountable. The Supreme Court specifically rejected any expansion of the categories of unprotected speech based on that "highly manipulable balancing test." *Id.* at 472.

A. Nude selfies and photographs are not obscene.

The nude images the state seeks to regulate can be squeezed into the unprotected category of obscenity if only this Court is willing to expand the long-established definition of obscenity in the first instance. Though the State concedes that the nude photographs and depictions in question do not come close to meeting the U.S. Supreme Court's current definition of obscenity, they ask this Court to create a new hybrid sub-category of obscenity, arguing that the mean

motives of the disseminator, taken together with the privacy interest of the complainant, will combine to turn a non-obscene nude picture into an obscene one.

Miller v. California, 413 U.S. 15 (1973), sets forth the test for obscenity, and it allows for no such expansion. As the State concedes, *Miller* provides a three-part test of what is obscene, based objectively on:

> (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.

415 U.S. at 24 (emphasis added). Each part of the test focuses solely on *the work itself*, not on collateral matters like the manner in which it is disseminated or the intention of the disseminator. Here, Ms. VanBuren posted only nude photos of the complainant, and Judge Howard recognized that there was no argument that the photos themselves were obscene. Although the State concedes that the U.S. Supreme Court has held that mere nudity does not constitute obscenity, State's Brief at 14, it argues that an unprecedented "contextual analysis" could support a finding of obscenity.

But the State has cited no case supporting the expansion it proposes because there is none. In fact, in *Miller*, Chief Justice Burger stated that "no one will be subject to prosecution for the … exposure of obscene materials unless these materials depict or describe patently offensive 'hard core; sexual conduct … ," which mere nudity certainly is not. 415 U.S. at 27. *See also Reno*, 521 U.S. at 874–75 (even sexual expression that is indecent or offensive to some is not inherently obscene).

The State's reliance on *Roth v. California,* 354 U.S. 476 (1957), is also misplaced. As Chief Justice Burger points out in *Miller*, *Roth* and the cases which followed never gained the support of a majority of the justices, because they created unworkable standards, and were, in effect, superseded by *Miller*. *Miller*, 415 U.S. at 21–22. Similarly, neither has *Ginzburg v. United States*, 383 U.S. 463 (1966), carried the day. In 1966, before the Supreme Court later applied First Amendment protections to commercial speech in *Virginia Bd. Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court had held that First Amendment-protected materials could be deemed obscene because of the way they were advertised or marketed (often called pandering). *Ginzburg v. United States*, 383 U.S. 463 (1966). But the *Ginzburg* approach has been rejected by the Supreme Court in recent years. This is illustrated by Justice Scalia's dissent and Justice Stevens's concurrence in *United States v. Playboy*, 520 U.S. 803 (2002). Justice Scalia wrote in dissent:

> We have recognized that the commercial entities which engage in "the sordid business of pandering by deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed," engage in constitutionally unprotected behavior. *Ginzburg* … .

529 U.S. at 883. Justice Stevens, concurring, responded to Justice Scalia's dissent:

> … *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Justice Scalia's proposal is thus not only anachronistic, it also overlooks a key premise upon which our commercial speech cases are based. The First Amendment assumes that, as a general matter, "information is not in itself harmful, that people will perceive their own best interests in only they are well enough informed, and that the best means to that end is open the channels of communication rather than to close them." … The very fact that the programs marketed by *Playboy* are offensive to many viewers provides a justification for protecting, not penalizing, truthful statements about their content.

529 U.S. at 829.

The U.S. Supreme Court does not define obscenity on the basis of the subjective motivation or manner of distribution. The idea that the First Amendment definition of obscenity should hinge on the manner by which something is shared, or on the motive of the sharer, is unworkable and unsupported by precedent. Whether someone reposts a nude selfie to show off one's girlfriend, or punishes the propositioning sender of a "dick pic" by forwarding the offending picture to the sender's mother and grandmother, or puts a sex tape on a revenge porn site to embarrass or shame an ex-lover, is not relevant to whether the image itself is obscene or not. Nor does it necessarily make a difference whether the disseminator prints the image and shows it to others or posts it on the internet. Instead the U.S. Supreme Court takes a cautious, very "limited categorical approach" to defining speech that may be prohibited based on content without offending the First Amendment.

The State's unsupported expansion of the definition of obscenity must be rejected by this Court. *See R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992).

B. Privacy rights cannot trump First Amendment rights to become a new category of unprotected speech either.

As commentator Mark Bennett observed, *United States v. Stevens* would have been the perfect opportunity for the Supreme Court to hold that First Amendment rules are different for statutes criminalizing speech on matters of no public concern, but it did not. *See* Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, Defending People, Oct. 14, 2013, http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional. Instead *Stevens* doubled down and did the exact opposite: It declared that there was no "freewheeling authority to declare new categories of speech outside the First Amendment" and that the First Amendment protects a narrow category of fetish pornography featuring the killing of small animals. 559 U.S. at 472.

In the face of *Stevens*, the State's proposal that private speech constitute a heretofore unrecognized category of unprotected speech is a huge ask and one with implications that stretch far beyond the conduct prohibited by § 2606. The State attempts to rely on the same line of cases discussing private vs. public speech, but those cases do not apply intermediate scrutiny or indicate that the images at issue here should be exempted as a new "historical" category.

Though the First Amendment is sometimes at odds with polite notions of personal privacy, the right to disclose or even publicize private information is undiminished. In *Cox Broadcasting v. Cohn*, the Supreme Court struck down a Georgia ordinance that prevented the media from identifying a rape victim by name. 420 U.S. 469, 489 (1975). In doing so the Supreme Court noted that "[b]ecause the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press." Again in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Supreme Court upheld the newspaper's right to publish the name of a rape victim, stating that "[w]here important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury. A ban on disclosures effected by 'instrument[s]of mass communication' simply cannot be defended on the ground that partial prohibitions may effect partial relief." *Id.* at 540.

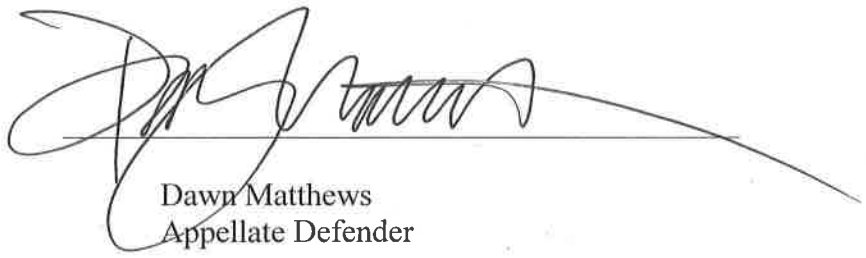
That a voluntarily shared picture is not treated with the discretion that the selfie-taker intended is no ground for opening an unprecedented category of speech up to government regulation and criminal prosecution. The State and amici are on no firmer ground in arguing for a new category of speech based on privacy or low-value speech than they are in attempting to

expand obscenity or in attempting to demonstrate why this content-based restriction meets the strict or intermediate scrutiny required by the First Amendment.

CONCLUSION

For these reasons, this Court must affirm Judge Howard's finding that 13 V.S.A. § 2606 is unconstitutional on its face.

Dated at Montpelier, Vermont this 13th day of February, 2017.



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CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Office Word 2010 and the word count is 8,894.

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