STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0323

State of Minnesota,
Appellant,

vs.

John Joseph Jorgenson,
Respondent.

Filed October 7, 2019
Affirmed
Bratvold, Judge

Olmsted County District Court
File No. 55-CR-18-4564

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for appellant)

David L. Liebow, Godwin Dold, Rochester, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold, Judge.

S Y L L A B U S

Minn. Stat. § 609.27, subd. 1(4) (2016), which is part of Minnesota's criminal coercion statute, is facially unconstitutional under the First Amendment because it restricts free speech, is substantially overbroad, and is not reasonably susceptible to a narrowing construction or severance of unconstitutional provisions.

O P I N I O N

BRATVOLD, Judge

The state challenges the district court's pretrial dismissal of its complaint against respondent John Joseph Jorgenson. The district court determined that the charging statute, Minn. Stat. § 609.27, subd. 1(4) (2016), is unconstitutional on its face because it prohibits a substantial amount of constitutionally protected speech and cannot be narrowed by judicial construction. We affirm.

FACTS

The state's complaint alleged the following facts: Jorgenson and J.C. were in a romantic relationship and lived together on J.C.'s property. J.C. ended the relationship in the fall of 2016 and was "in the process" of evicting Jorgenson at the time Jorgenson made phone calls to J.C.'s father. J.C.'s father contacted law enforcement and complained that Jorgenson called him multiple times, stating that he wanted $25,000 to not release a video of J.C. "talking about smoking marijuana." Jorgenson allegedly threatened to release the video to the Minnesota Department of Human Services and J.C.'s employer.[1]

The state charged Jorgenson with one count of attempted coercion under Minn. Stat. § 609.275 (2016), with reference to Minn. Stat. § 609.27, subd. 1(4). Specifically, the complaint alleged that Jorgenson had unlawfully made "a threat to expose a secret or

[1] In his motion to dismiss, Jorgenson asserted that he and J.C. had a "real property" dispute about a debt he incurred while living on her property. In the probable-cause statement, police reported that J.C.'s father had "offered" Jorgenson $20,000 "to walk away from his claim of ownership" and that Jorgenson declined the offer.

deformity, publish a defamatory statement, or otherwise to expose any person to disgrace or ridicule, but failed to cause the intend[ed] act or forbearance."

Jorgenson moved to dismiss on two grounds: (1) lack of probable cause that he had violated the statute, and (2) Minn. Stat. § 609.27, subd. 1(4), is unconstitutionally overbroad in violation of the First Amendment to the United States Constitution and article I, section 3 of the Minnesota Constitution. The state filed a memorandum in opposition, and initially agreed that the First Amendment is implicated by Jorgenson's facial challenge. But the state also argued that the statute prohibits specific conduct, is not unconstitutionally overbroad, and, alternatively, could be narrowed by construing the statute to proscribe only "unlawful" threats by requiring a "lack of nexus between the underlying claim and the threat."

In February 2019, the district court issued an order denying Jorgenson's motion to dismiss for lack of probable cause, but granting the motion to dismiss "on the basis that the charging statute is unconstitutionally overbroad and violative of the First Amendment." The district court reasoned that the statutory language is substantially overbroad and "not reasonably susceptible" to a narrowing construction. The state appeals.

ISSUE

Is Minnesota Statutes section 609.27, subdivision 1(4), an unconstitutional restriction of free speech under the First Amendment, and if so, is a judicial remedy capable of saving subdivision 1(4)?

ANALYSIS

The state may appeal as of right from "any pretrial order, including probable cause dismissal orders based on questions of law." Minn. R. Crim. P. 28.04, subd. 1(1). The state must show that the district court's legal error had "a critical impact on the outcome of the trial." *Id.*, subd. 2. Here, the district court's order is appealable because it dismissed the state's complaint based on a question of law—the constitutionality of the charging statute. *See State v. Varnado*, 582 N.W.2d 886, 889 n.1 (Minn. 1998) (stating that district court's dismissal of a criminal complaint against defendant satisfies the critical-impact test). We review the constitutionality of a statute de novo. *State v. McLaughlin*, 725 N.W.2d 703, 712 (Minn. 2007).[2]

[2] Although neither party discusses the issue in this appeal, we note that a party challenging the constitutionality of a statute must give notice to the Minnesota Attorney General where "neither the state nor any of its agencies, officers, or employees is a party in an official capacity." *See* Minn. R. Civ. P. 5A (where party raises the challenge in district court); Minn. R. Civ. App. P. 144 (where party raises the challenge in appellate court). Generally, appellate courts have required strict compliance with these notice requirements. *See Charboneau v. Am. Family Ins. Co.*, 481 N.W.2d 19 (Minn. 1992).

Here, the record does not establish that Jorgenson served the attorney general with notice of the constitutional issue while in district court. But the county, which is a political subdivision, represents the state and served the notice of appeal on the attorney general. *See* Minn. R. Crim. P. 28.04, subd. 2(2) (requiring the state to serve the attorney general in pretrial appeal). And the notice of appeal specifically identifies the constitutional challenge. Still, the attorney general has never appeared in this case.

In similar circumstances, the supreme court has required separate notice to the attorney general. *See Appeal of Leary*, 136 N.W.2d 552, 560 (Minn. 1965) ("[The Attorney General] cannot be expected to have knowledge of every proceeding in which any subdivision of the state represented by a county attorney may raise a constitutional issue as to a statute."); *see also Elwell v. Hennepin County*, 221 N.W.2d 538, 544 (Minn. 1974) (reasoning that the county was not an agent of the state "for this purpose" where the county challenged constitutionality of statute and failed to give notice to attorney general). Despite our concern, we do not consider the issue further because the state is a party and did not raise the issue.

I. Minnesota Statutes section 609.27, subdivision 1(4), is an unconstitutional restriction of free speech under the First Amendment and is not susceptible to a narrowing construction or severance.

The state argues that the district court erred when it determined that section 609.27, subdivision 1(4), is unconstitutional. The state contends that the statute "regulates unprotected speech [and] is presumed to be constitutional." Jorgenson argues that the statute is unconstitutional because it applies to a "great deal of constitutionally protected speech" and cannot be narrowly construed to survive constitutional scrutiny.

The Minnesota Supreme Court has recently summarized the four steps of an overbreadth challenge. *See In re Welfare of A.J.B.*, 929 N.W.2d 840, 847-48 (Minn. 2019); *see also State v. Hensel*, 901 N.W.2d 166, 171-76 (Minn. 2017) (providing the same general framework). The first step is to interpret "the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *A.J.B.*, 929 N.W.2d at 847.

The second step is to determine whether the challenged statute restricts protected speech or only unprotected speech or expressive conduct.[3] *Id.* The general rule is that appellate courts "presume Minnesota statutes are constitutional and will strike down a statute as unconstitutional only if absolutely necessary." *State v. Johnson*, 813 N.W.2d 1, 4 (Minn. 2012). The party challenging the statute has the burden to show that it restricts

[3] The United States Supreme Court has provided "several delineated categories" of unprotected speech, including "speech or expressive conduct designed to 'incite imminent lawless action,' 'obscenity,' 'defamation,' 'speech integral to criminal conduct,' 'so-called 'fighting words,' 'child pornography,' 'fraud,' 'true threats,' and 'speech presenting some grave and imminent threat the government has the power to prevent.'" *A.J.B.*, 929 N.W.2d at 846 (quoting *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012)).

protected speech. *See id.* ("The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision."); *McLaughlin*, 725 N.W.2d at 712 ("A party who challenges a statute's constitutionality bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt.").

If a court determines that the challenged statute restricts protected speech, then it proceeds to the third step, which is "the core overbreadth inquiry: Does the statute prohibit a substantial amount of constitutionally protected speech?" *A.J.B.*, 929 N.W.2d at 847 (quotation omitted). At this stage, appellate courts no longer presume that the statute is constitutional. *See State by Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 885 (Minn. 1992); *see also State v. Stockwell*, 770 N.W.2d 533, 537 (Minn. App. 2009) ("[A] statute which restricts First Amendment rights is not presumed constitutional."). Appellate courts must ask "whether the protected speech and expressive conduct make up a substantial proportion of the behavior the statute prohibits compared with conduct and speech that are unprotected and may be legitimately criminalized." *A.J.B.*, 929 N.W.2d at 847. A statute "is not substantially overbroad merely because one can conceive of some impermissible applications." *Id.* at 847-48 (quotation omitted).

If the challenged statute "prohibits a substantial amount of protected speech," the last inquiry is whether the judiciary can remedy the constitutional defects by "applying a narrowing construction or severing problematic language from the statute." *Id.* at 848. If a court cannot save a statute with a narrowing construction or by severing language, the

"remaining option is to invalidate the statute." *Id.* The analysis below proceeds with the steps described above.

A. Steps one and two: The plain language of section 609.27, subdivision 1(4), is not ambiguous and restricts protected speech.

Statutory interpretation raises a question of law that this court reviews de novo. *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018). The goal of statutory interpretation is to "effectuate the intent of the Legislature." *Id.* Appellate courts "read a statute as a whole and give effect to all of its provisions." *Id.* When interpreting a statute, we consider whether the statute's language is ambiguous. *Id.* A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Id.*

We start with the statutory language. The state charged Jorgenson with attempted coercion under Minn. Stat. § 609.275, which provides that "[w]hoever makes a threat within the meaning of section 609.27, subdivision 1, clauses (1) to (6), but fails to cause the intended act or forbearance, commits an attempt to coerce."[4] Minn. Stat. § 609.27, subd. 1, prohibits coercive threats, which it defines in six clauses, the fourth of which is relevant to this appeal.

[4] The state argues in its brief to this court that "the district court dismissed [Jorgenson's] complaint based on the erroneous belief that [Jorgenson] was charged under Minnesota Statutes Section 609.27." The state contends that the district court "analyzed the wrong statutory section." The state recognizes, however, that "section 609.275 incorporates the definitions of 609.27." Given the statutory framework, the district court did not err by dismissing the state's complaint after it determined that section 609.27, subdivision 1(4), is unconstitutionally overbroad.

> Whoever orally or in writing makes any of the following threats and thereby causes another against the other's will to do any act or forbear doing a lawful act is guilty of coercion . . . .
>
> (4) a threat to expose a secret or deformity, publish a defamatory statement, or otherwise to expose any person to disgrace or ridicule.

Minn. Stat. § 609.27, subd. 1(4).

Subdivision 1(4) does not define the terms "threat," "secret," "disgrace," "deformity," or "ridicule." Accordingly, we consider the "obvious" or common meaning of these words. *State v. Iverson*, 664 N.W.2d 346, 351 (Minn. 2003); Minn. Stat. § 645.08 (2018) ("[W]ords and phrases are construed according to rules of grammar and according to their common and approved usage . . . ."). *Black's Law Dictionary* defines a "threat" as: "A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent." *Black's Law Dictionary* 1708 (10th ed. 2014). Another definition of "threat" is "an expression of an intention to inflict pain, harm, or punishment." *The American Heritage Dictionary of the English Language* 1813 (5th ed. 2011). A "secret" is something "[k]ept hidden from knowledge or view; concealed." *Id.* at 1583; *see also Black's Law Dictionary*, *supra*, at 1556 (defining "secret" as "[s]omething that is kept from the knowledge of others or shared only with those concerned; something that is studiously concealed"). A "deformity" is "[a] bodily malformation, distortion, or disfigurement." *American Heritage*, *supra*, at 477. "Disgrace" is the "[l]oss of honor, respect, or reputation; shame." *Id.* at 517. "Ridicule" is "[t]he act of using words, gestures, images, or other products of expression to evoke laughter or contemptuous feelings regarding a person or thing." *Id.* at 1509.

Here, neither party contends that subdivision 1(4) is ambiguous. We agree that its language is plain and not ambiguous. If we read subdivision 1(4) along with the common definitions mentioned above, we conclude that the statute criminalizes threats to expose something hidden, malformed, or defamatory that "otherwise" exposes "any person" to shame or contempt, and thereby cause another against their will to do "any act" or forbear a "lawful" act. Still, the state argues "the statute is drafted narrowly" because it limits "prohibited speech to demands for money to prevent the exposure of a defect or other unsavory attribute that will result in shame and damage to one's reputation." We agree, in part, but disagree that subdivision 1(4) is narrow.

The state is correct that subdivision 1(4) prohibits threats to extort because a threat to expose a secret or deformity and thereby cause "another against the other's will to do any act" may include a demand for money or property in exchange for keeping a secret. Extortion is unprotected speech because it is "speech integral to criminal conduct"—using threats unlawfully to take someone's property. *See United States v. Hobgood*, 868 F.3d 744, 746 (8th Cir. 2017); *see also Seals v. McBee*, 898 F.3d 587, 597 n.25 (5th Cir. 2018) ("Core criminal speech such as extortion, bribery, or perjury has no First Amendment protection."). Subdivision 1(4) also criminalizes a threat to defame, which is unprotected speech. *See A.J.B.*, 929 N.W.2d at 846.

But subdivision 1(4) is not limited to threats to extort or defame because it does not criminalize only a demand for money or property, nor does it require that the threatened disclosure be false information. Instead, subdivision 1(4) broadly criminalizes any threat

to expose a secret or deformity "that causes another against the other's will to do *any* act or *forbear doing a lawful act*." Minn. Stat. § 609.27, subd. 1 (emphasis added). Subdivision 1(4) thus criminalizes threats that do *not* extort money or property and threats to reveal information that is *not* defamatory so long as the threat demands a lawful or unlawful act or the forbearance of a lawful act.

With the expansive and unambiguous language of subdivision 1(4) in mind, we agree with the district court that some constitutionally protected private and public speech is criminalized by subdivision 1(4).[5] The breadth of the threats proscribed by subdivision 1(4) is troubling because, for example, it would prohibit a former classmate or coworker from privately threatening to disclose to the media an elected official's embarrassing past if the official does not resign from public office. *See State v. Robertson*, 649 P.2d 569, 580 (Or. 1982) (discussing the constitutionality of a similar criminal coercion statute). Subdivision 1(4) would also criminalize a prosecutor's attempt to induce a defendant to plead guilty in exchange for not filing charges on an unrelated incident. *See id.* In these examples, the former classmate, former coworker, and the prosecutor would be threatening to expose a secret or otherwise "expose [a] person to disgrace or ridicule" in order to "cause[] another against the other's will to do any act or forbear doing a lawful act."

[5] Generally, speech that is privately communicated on a public concern is protected under the First Amendment. *See Rankin v. McPherson*, 483 U.S. 378, 388-89, 107 S. Ct. 2891, 2899-2900 (1987) (holding that speech privately communicated to a coworker on a public concern was constitutionally protected).

See Minn. Stat. § 609.27, subd. 1(4). Thus, we conclude that subdivision 1(4) restricts at least some constitutionally protected speech.[6]

B. Step three: Section 609.27, subdivision 1(4), prohibits a substantial amount of constitutionally protected speech.

"[T]he core overbreadth inquiry" is whether the statute prohibits "a substantial amount of constitutionally protected speech." *A.J.B.*, 929 N.W.2d at 847. The district court discussed several appellate opinions from other jurisdictions that struck down statutes similar to subdivision 1(4). The most apposite case is from Oregon, which had a statute similar to Minnesota's coercion statute. *See Robertson*, 649 P.2d at 569.

In *Robertson*, the state indicted defendants under a state coercion statute, and defendants argued that the statute was too vague for a penal law and also restricted freedom

[6] Subdivision 1(4) does not sweep as broadly as Jorgenson contends. Jorgenson suggests that exposing secrets to the public to coerce behavior "would fall well within what [the coercion statute would] prohibit." He cites two United States Supreme Court opinions in support of this assertion. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 909, 102 S. Ct. 3409, 3423 (1982) (holding that attempts to coerce individuals into action by publicly exposing nonparticipants in a boycott was protected speech); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S. Ct. 1575, 1577-78 (1971) (holding that the public distribution of pamphlets exposing a business practice to coerce change is protected speech).

We disagree. In speech that directly exposes a secret to the public *without a promise to maintain a secret*, such as when the media publishes a political candidate's secret or a political interest group publicly criticizes a private business's investment strategy, there is no "threat." Instead, the secret is exposed to the public to influence the behavior of a political candidate, voters, or a business. Therefore, subdivision 1(4) does not criminalize constitutionally protected boycotting or pamphleting, as discussed in prior United States Supreme Court cases.

of speech. *Id.* at 571, 577.[7] The trial court determined that the statute was unconstitutionally vague, but the court of appeals reversed and upheld the statute in two divided opinions, first in a panel decision, and later en banc. *Id.* at 571. The state supreme court reversed, reasoning that the statute was unconstitutionally overbroad. *Id.* at 589.

The supreme court recognized that the coercion statute's language covered "all demands 'to engage in conduct from which (the addressee) has a legal right to abstain, or to abstain from engaging in conduct in which he has a legal right to engage.'" *Id.* Because the coercion statute prohibited threats to coerce legal conduct, regardless of the parties' relationship, or the relationship between the threatened disclosure and the coerced conduct, or whether the demand is made publicly or privately, the supreme court discussed numerous examples "drawn from politics, journalism, family or academic life" that would implicate protected speech. *Id.*[8] In sum, the supreme court could not "escape the conclusion

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[7] The Oregon statute provided:

> (1) A person commits the crime of coercion when he compels or induces another person to engage in conduct from which he has a legal right to abstain, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will: . . .
>
> (e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule . . . .

Id. at 577 (quoting Or. Rev. Stat. § 163.275).

[8] For example, the Oregon Supreme Court in *Robertson* noted that the coercion statute prohibits a journalist from telling "a public official that he will disclose private facts showing an official's financial interest in a pending measure if the official does not refrain from voting on the measure." *Id.* at 580. The court also observed that someone who

that [the challenged statute] as written reaches areas of constitutionally privileged expression." *Id.* The supreme court also concluded it could not save the statute because it is "a legislative responsibility to narrow and clarify the coverage of a statute so as to eliminate most apparent applications to free speech or writing." *Id.* at 590. Thus, the Oregon Supreme Court reversed the court of appeals and remanded to enter judgment in favor of the defendants. *Id.* at 589-90.[9]

Other appellate courts have examined statutes with wording sufficiently similar to Minn. Stat. § 609.27, subd. 1(4), to be instructive. While Minnesota does not have a statute that specifically criminalizes extortion, other states do, and some extortion statutes have been scrutinized under the First Amendment. *See State v. Weinstein*, 898 P.2d 513, 515 (Ariz. Ct. App. 1995); *State v. Pauling*, 69 P.3d 331, 337 (Wash. 2003). For example, in *Weinstein*, the extortion statute was similar to Minnesota's coercion statute and provided: "A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to . . . [e]xpose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair his credit or business." 898 P.2d at 515 (quoting Ariz. Rev. Stat. 13-1804(A)(6)).

Weinstein rejected the state's appeal from the dismissal of an extortion complaint that alleged respondent had demanded a refund of his security deposit and rent from his

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"proposes to disclose an airline pilot's secret illness if he does not get medical attention" may violate the coercion statute. *Id.*

[9] The Washington Court of Appeals examined a coercion law similar to the Oregon statute and held that it was unconstitutionally overbroad and "no judicial reconstruction can save it." *See City of Seattle v. Ivan*, 856 P.2d 1116, 1123 (Wash. Ct. App. 1993).

landlord and, if the refund was not provided, threatened to file suit and contact the landlord's parole officer to disclose violations. *Id.* at 514. The court of appeals held that the extortion statute was unconstitutionally overbroad because it "broadly criminalizes expression protected by the First Amendment," including claims of right, such as a customer threatening to report a contractor for "shoddy work" unless the contractor sends someone to fix the problem, and an attorney threatening a lawsuit by demanding, on behalf of a client, performance of a contractual duty. *Id.* at 515, 517. As a result, the court of appeals affirmed the trial court's decision. *Id.* at 517; *see also Pauling*, 69 P.3d at 337 (holding Washington's extortion statute is unconstitutional and imposing a limiting construction because the statute "lack[ed] a requirement that the threat used to obtain the property or services of another be wrongful").

In light of the broad language of the statute and persuasive caselaw from other jurisdictions, we conclude that Minn. Stat. § 609.27, subd. 1(4), prohibits "a substantial amount of constitutionally protected speech." *A.J.B.*, 929 N.W.2d at 860. Subdivision 1(4) proscribes protected speech as did the laws examined in *Robertson*, *Weinstein*, and *Pauling*, and the examples of protected speech described in these cases are also proscribed by subdivision 1(4)'s plain language. Subdivision 1(4) prohibits a significant amount of protected speech, such as expressions asserting legitimate claims of right, *e.g.*, a consumer threatening to write a bad review for a defective product unless she receives a remedy, and expressions attempting to correct a wrong in private, *e.g.*, an employee privately

communicating that she will publicly expose her employer's tolerance of sexual harassment unless the employer changes its policy.[10]

C. Step four: This court must invalidate section 609.27, subdivision 1(4), because no narrowing construction is available and severance cannot save the statute.

The Minnesota Supreme Court has recognized two judicial remedies for an unconstitutional statute. *See A.J.B.*, 929 N.W.2d at 848. First, if the constitutionality of a statute can "turn upon a choice between one or several alternative meanings," it is susceptible to a limiting construction. *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S. Ct. 2502, 2513 (1987). In limiting the construction of a statute, appellate courts "remain bound by legislative words and intent and cannot rewrite the statute to make it

[10] A common theme in *Robertson*, *Weinstein*, and *Pauling* is that the challenged law did not include an affirmative defense for constitutionally protected speech. Likewise, subdivision 1(4) does not include an affirmative defense for constitutionally protected speech. Although we do not endorse any particular statutory scheme, we acknowledge, as the court in *Robertson* did, that the Model Penal Code narrows the crime of coercion by incorporating an affirmative defense. *See Robertson*, 649 P.2d at 590 (citing Model Penal Code § 212.5). The Model Penal Code's "criminal coercion" section provides an affirmative defense when an actor seeks to compel others "to behave in a way reasonably related to the circumstances which were the subject of the accusation," such as "making good a wrong done" or "refraining from taking any action or responsibility for which the actor believes the other is disqualified." Model Penal Code § 212.5. Many states with criminal coercion statutes have adopted the Model Penal Code's approach, or something similar to it, in drafting their statutes. *See, e.g.*, Alaska Stat. Ann. § 11.41.530 (2018); Conn. Gen. Stat. § 53a-192 (2019); Del. Code Ann. tit. 11, § 792 (2015); Ky. Rev. Stat. Ann. § 509.080 (2014); N.J. Stat. Ann. § 2C:13-5 (2009); N.Y. Penal Law § 135.75 (2019); N.D. Cent. Code Ann. § 12.1-17-06 (2017); Ohio Rev. Code Ann. § 2905.12 (2015); 18 Pa. Cons. Stat. Ann. § 2906 (2015).

constitutional." *A.J.B.*, 929 N.W.2d at 848. When the language of a statute is "plain and its meaning unambiguous," a statute is not susceptible to a limiting construction. *Hill*, 482 U.S. at 468, 107 S. Ct. at 2513.

Second, appellate courts have broad power to sever unconstitutional language from a statute, but not to rewrite the statute. *A.J.B.*, 929 N.W.2d at 848. Our primary goal in severing language is to "effectuate the intent of the legislature had it known that a provision of the law was invalid." *Id.* Appellate courts "attempt to retain as much of the original statute as possible while striking the portions that render the statute unconstitutional." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014). Generally, we presume that we can sever problematic language from a statute unless the legislature indicates otherwise. *Id.* Caselaw recognizes two exceptions. First, we cannot sever statutory language if the valid provisions are "inseparably connected with, and so dependent upon, the void provisions." *Id.* Second, we cannot sever statutory language if the valid provisions are incomplete and can no longer fulfill the legislative intent. *Id.*; *see also* Minn. Stat. § 645.20 (2018) (providing when statutes are severable).

The state argues that if we determine that Minn. Stat. § 609.27, subd. 1(4), unconstitutionally restricts a significant amount of protected speech, then we should remedy the statute and not invalidate subdivision 1(4). First, the state argues that we could narrowly construe subdivision 1(4) so that it only reaches "those threats that cause . . . the victim to make payment or surrender other tangible property subject to pecuniary measurement." Second, the state contends that we "could construe [subdivision 1(4)] to

reach only threats of exposure that are similar to the threat of defamation," such as libel. Third, the state argues that we could sever two of the threats described in subdivision 1(4) and prohibit only threats of defamation.

The state's first suggestion that we could limit subdivision 1(4) to prohibit only extortion would require this court to rewrite the plain language of the statute, which is not limited to threats demanding money or property. Because subdivision 1(4) applies broadly to threats "to do *any* act or *forbear doing a lawful act*," the state's suggestion means we would have to sever this language and add new language. *See* Minn. Stat. § 609.27, subd. 1(4) (emphasis added). But the judicial remedy of a narrowing construction does not apply when, as here, a statute is unambiguous and, moreover, the remedy requires the court to add language, which we will not do. *See A.J.B.*, 929 N.W.2d at 848; *Hill*, 482 U.S. at 468, 107 S. Ct. at 2513.

Moreover, the state's suggestion appears to be contrary to the legislature's intent. The sentencing provision for subdivision 1(4) provides the maximum sentence of 90 days if "*the benefits received* or harm sustained *are not susceptible of pecuniary measurement*." Minn. Stat. § 609.27, subd. 2 (2016) (emphasis added). This language indicates that the legislature intended to punish threats even when no pecuniary benefit or harm resulted. In short, we conclude that, because the plain language of subdivision 1(4) does not refer to threats to extort, the state's first suggestion is not a narrowing construction and, therefore, not a permissible judicial remedy.[11]

[11] Notably, Minnesota previously had an extortion statute, which specifically referred to "obtaining . . . property from another with his consent induced by a wrongful use of force

The state's second suggestion to limit Minn. Stat. § 609.27, subd. 1(4), to unlawful threats similar to defamation, such as libel, would also require this court to sever some statutory terms and add new terms to subdivision 1(4). We reject the state's second suggestion because subdivision 1(4) is not ambiguous and the subtraction or addition of statutory terms is not the same as a narrowing construction.

The state argued to the district court that it should narrowly construe subdivision 1(4) by adding the word "unlawful" before "threat to expose." While the state does not make this suggestion on appeal, we note that if the legislature had intended to proscribe only unlawful threats, it knew how to do so. Clauses 1, 2, and 3 of Minn. Stat. § 609.27, subd. 1, which respectively refer to threats to inflict bodily harm, threats to damage property, and threats to injure a trade, business, profession, or calling, all use the word "unlawfully." When the legislature omitted this word in the very next clause—subdivision 1(4)—it implicitly rejected criminalizing only threats to unlawfully expose secrets or other information that could subject a person to disgrace or ridicule. *See Gen. Mills, Inc. v.*

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or fear or under color of official right." *See* Minn. Stat. § 621.14 (1961). In 1961, Minnesota also had separate statutes for blackmail, coercion, and threatening to publish libel. *See* Minn. Stat. §§ 621.18 (blackmail), .56 (coercion), .58 (threatening to publish libel). The legislature repealed all of these statutes when it enacted the criminal code of 1963. *See* 1963 Minn. Laws ch. 753, at 1185 (listing the repealed statutes in the header). The criminal code replaced these statutes with only a coercion statute that is very similar to the one used to charge Jorgenson. *See* 1963 Minn. Laws ch. 753, art. I, at 1204-05 (codified at Minn. Stat. § 609.27 (1965)). Although we do not rely on this legislative history to determine the meaning of Minn. Stat. § 609.27, the history of this statute confirms our understanding that the legislature intended to criminalize coercion and not just extortion. We also note that despite significant changes in First Amendment law over the past 50 years, the Minnesota Legislature has not substantially revised the coercion statute since it was enacted in 1963.

Comm'r of Revenue, 931 N.W.2d 791, 800 (Minn. 2019) ("When the Legislature uses limiting or modifying language in one part of a statute, but omits it in another, we regard that omission as intentional and will not add those same words of limitation or modification to parts of the statute where they were not used."). Accordingly, we cannot narrowly construe subdivision 1(4) to criminalize only unlawful conduct.[12]

The state's last suggestion is to sever language from subdivision 1(4) so that it criminalizes only threats to defame. Subdivision 1(4) proscribes threats to "publish a defamatory statement," which is unprotected speech, but it also refers to "a threat to expose a secret or deformity . . . or otherwise to expose any person to disgrace or ridicule." Minn. Stat. § 609.27, subd. 1(4). Severing the language prohibiting the other two threats and leaving the language proscribing "a threat to . . . publish a defamatory statement" would require us to strike most of subdivision 1(4).

We do not believe that, had the legislature known about the constitutional infirmity of subdivision 1(4), it would have criminalized only defamatory statements. *See A.J.B.*, 929 N.W.2d at 848. Other options existed, such as drafting an affirmative defense of

[12] Although the state does not raise this argument, another possibility for a narrowing construction is to limit subdivision 1(4) to "true threats." The United States Supreme Court has held that "true threats" are unprotected speech and "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548 (2003). This suggestion is similar to adding "unlawful" to the statute, and we reject it because it requires that we sever threats to expose secrets or deformities, which the legislature expressly criminalized. We conclude subdivision 1(4) cannot be narrowly construed as limited to threats of violence. *See Ivan*, 856 P.2d at 1118 n.3 (examining a similar coercion law and determining that the statute is "far broader" than true threats).

protected speech similar to the Model Penal Code.[13] The state does not ask us to engraft affirmative defense language, undoubtedly because adding new language to subdivision 1(4) is beyond this court's authority. *Id.*

Because we are unable to adopt a judicial remedy that saves Minn. Stat. § 609.27, subd. 1(4), we conclude that the only "remaining option is to invalidate the statute." *Id.* Accordingly, we hold that Minn. Stat. § 609.27, subd. 1(4), is facially overbroad under the First Amendment.

D E C I S I O N

Minn. Stat. § 609.27, subd. 1(4), is unconstitutional on its face because it proscribes a substantial amount of protected speech. Because subdivision 1(4) unambiguously restricts protected speech that is not extortion or defamation, no limiting construction is available to criminalize only unprotected speech. Alternatively, severing all language in subdivision 1(4), except for threats to make defamatory statements, is inconsistent with the legislature's intent to criminalize nondefamatory conduct. Accordingly, the district court properly concluded that it must grant Jorgenson's motion to dismiss the state's complaint and invalidate subdivision 1(4).

Affirmed.

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[13] The relevant coercion provision in the Model Penal Code was adopted in 1962. *See Schumann v. McGinn*, 240 N.W.2d 525, 535 (Minn. 1976) (recognizing that the Model Penal Code was "promulgated in 1962"); *see also* Model Penal Code § 212.5 (Am. Law Inst., Official Draft 1962). As discussed *supra* note 11, Minnesota adopted its coercion statute in 1963.