STATE OF MINNESOTA

IN SUPREME COURT

A19-0323

Court of Appeals

Lillehaug, J.
Dissenting, Gildea, C.J.

State of Minnesota,

Appellant,

vs.

Filed: July 22, 2020
Office of Appellate Courts

John Joseph Jorgenson,

Respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

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

David L. Liebow, James A. Goodwin, Godwin Dold, Rochester, Minnesota, for respondent.

Travis J. Smith, Murray County Attorney, Slayton, Minnesota, for amicus curiae Minnesota County Attorneys Association.

S Y L L A B U S

On its face, Minnesota Statutes § 609.27, subd. 1(4) (2018), which prohibits any written or oral "threat to expose a secret or deformity, publish a defamatory statement, or otherwise to expose any person to disgrace or ridicule," violates the First Amendment to

the United States Constitution because it criminalizes a substantial amount of protected speech and cannot be saved by a narrowing construction or severance.

Affirmed.

O P I N I O N

LILLEHAUG, Justice.

We are asked to decide whether a subdivision of the Minnesota criminal coercion statute, Minnesota Statutes § 609.27 (2018), is unconstitutional on its face under the First Amendment to the United States Constitution. The district court and the court of appeals held that subdivision 1(4) was unconstitutionally overbroad and could not be saved through a narrowing construction or by severing part of it. We agree and therefore affirm.

FACTS

In the fall of 2016, John Jorgenson was living with his girlfriend, J.C., in her home in Claremont. J.C. ended their relationship and sought to evict Jorgenson. Around that time, Jorgenson began making threatening calls to, and leaving voicemails for R.C., the father of J.C.

According to R.C., Jorgenson called eighteen times, and left twelve voicemails. Among other things, Jorgenson threatened to release a video of J.C. talking about smoking marijuana unless R.C. paid Jorgenson $25,000. Jorgenson threatened to release the video to various entities, including the Minnesota Department of Human Services, J.C.'s employer, and J.C.'s professional licensing board.

After R.C. reported the threats to law enforcement, Jorgenson was charged in Dodge County with one count of attempted coercion.[1] Jorgenson filed a successful motion to dismiss for lack of jurisdiction.

Jorgenson was then charged with one felony count of attempted coercion in Olmsted County. He again filed a motion to dismiss, this time based on two theories: lack of probable cause that he had violated the coercion statute, and that the statute was overly broad in violation of the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

The district court denied Jorgenson's motion to dismiss based on probable cause, and granted the motion based on the First Amendment. The State appealed. The court of appeals affirmed the district court. *State v. Jorgenson*, 934 N.W.2d 362, 366 (Minn. App. 2019). We granted the State's petition for further review to decide whether Minnesota Statutes § 609.27, subd. 1(4), is unconstitutional.

ANALYSIS

Jorgenson asserts that Minnesota Statutes § 609.27, subd. 1(4), is unconstitutional on its face. A defendant, such as Jorgenson, has standing to challenge a statute as unconstitutionally overbroad even if the statute, as applied to him, would not be unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *State v. Machholz*,

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[1] Jorgenson was charged under Minnesota Statutes § 609.275 (2018), the attempted coercion statute. That statute provides: "Whoever 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 and may be punished as provided in section 609.17 [the general attempt statute]." Minn. Stat. § 609.275.

574 N.W.2d 415, 419, 421 (Minn. 1998) (holding that Minnesota's felony harassment statute was unconstitutionally overbroad), *superseded by statute as stated in State v. Hall*, 887 N.W.2d 847 (Minn. App. 2017). Defendants have standing because prior restraint of free speech poses a greater harm to society than does the possibility that some unprotected speech will go unpunished. *Broadrick*, 413 U.S. at 612.

We review a constitutional challenge de novo. *See State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017). We presume that a statute is constitutional and strike it down only if absolutely necessary. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997). In the First Amendment context, however, the State bears the burden to show that a "content-based restriction" on speech is constitutional. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014); *see also State by Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 885–86 (Minn. 1992).

A.

Section 609.27, subdivision 1, provides that anyone who "orally or in writing makes" a "threat" falling into any one of six enumerated categories, and who "thereby causes another against the other's will to do any act or forebear doing a lawful act is guilty of coercion." Subdivision 1(4), one of the six categories, criminalizes "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). If the threat within the meaning of section 609.27, subdivision 1, "fails to cause the intended act or forbearance," it is still a crime as an "attempt to coerce." Minn. Stat. § 609.275 (2018).

Jorgenson argues that subdivision 1(4) is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech. The State argues that the statute is not unconstitutionally overbroad because it only regulates unprotected speech, specifically, "fighting words," and, in any event, does not prohibit a substantial amount of protected speech.

The First Amendment is applied to the states through the Fourteenth Amendment, and provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I, XIV.[2] Under the First Amendment, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (citation omitted) (internal quotation marks omitted). The First Amendment also forbids "the Government [from] imprison[ing] any speaker [because] his speech is deemed valueless or unnecessary, or [because] an ad hoc calculus of cost and benefits tilts in the statute's favor." *United States v. Stevens*, 559 U.S. 460, 471 (2010).

Jorgenson's argument "is a facial attack on a statute in which the challenger must establish that 'a substantial number of a statute's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *See Hensel*, 901 N.W.2d at 170 (quoting *Stevens*, 559 U.S. at 473). Our method of analysis for a facial challenge, such as this one, is well-established, and we have applied it often in recent years. *See In re Welfare*

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[2] The Minnesota Constitution also contains a free speech provision, *see* Minn. Const. art. I, § 3, that provides protections co-extensive with those under the United States Constitution. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014).

of A.J.B., 929 N.W.2d 840, 847–48, 856, 863 (Minn. 2019) (holding that a stalking-by-mail statute was overbroad but that a mail-harassment statute was not); *Hensel*, 901 N.W.2d at 170, 181 (holding that the disturbance-of-assembly statute was facially unconstitutional); *State v. Muccio*, 890 N.W.2d 914, 928–29 (Minn. 2017) (holding that a statute criminalizing electronic communication directed at a child that describes sexual conduct was not facially unconstitutional); *State v. Washington-Davis*, 881 N.W.2d 531, 537, 540–41 (Minn. 2016) (holding that a statute prohibiting solicitation and promotion of prostitution was not unconstitutionally overbroad); *Melchert-Dinkel*, 844 N.W.2d at 18–19, 23–24 (holding that a statute's provisions prohibiting advising and encouraging suicide were not narrowly drawn and did not survive strict scrutiny).

We begin our overbreadth analysis by, first, interpreting the statute and, second, determining whether it includes protected speech. *See Hensel*, 901 N.W.2d at 171–72. These are our first and second steps because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *See United States v. Williams*, 553 U.S. 285, 293 (2008).

The statute expressly prohibits both oral and written communications. Minn. Stat. § 609.27, subd. 1. Subdivision 1(4) "is a content-based regulation of speech because whether a person may be prosecuted under the statute depends entirely on what the person says." *See State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012). Here, "speech is a statutory element in the definition of the offense," and thus is subject to an overbreadth attack. *See State v. Robertson*, 649 P.2d 569, 578 (Or. 1982) (analyzing a statute similar

to Minnesota's coercion statute). This content-based regulation of speech sweeps widely, in several respects.

First, subdivision 1(4) covers "threats," not just "true threats" unprotected by the First Amendment. *See In re Welfare of A.J.B.*, 929 N.W.2d at 846 (identifying delineated categories of speech not protected by the First Amendment, including "true threats"). A threat is "[a] communicated intent to inflict harm or loss on another or on another's property." *Threat*, *Black's Law Dictionary* (10th ed. 2014). A true threat is "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 (2003). A true threat may well place "the victim in fear of bodily harm or death." *Id*. at 360. Subdivision 1(4) does not require that the written or oral communication seriously express an intent to commit a violent act.

Second, subdivision 1(4) criminalizes a wide range of communications on a variety of subject matters. A communication is prohibited if it threatens to expose *any* secret or deformity, publish *any* defamatory statement (whether or not tortious),[3] or otherwise

[3] A statement may be defamatory but not criminal or tortious. Defamation includes statements "which tend[] to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings against him." William L. Prosser, *The Handbook of the Law of Torts* § 106 (3d ed. 1964); *see also* Minn. Stat. § 609.765, subd. 1 (2018) (defining criminal "[d]efamatory matter" as "anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to business or occupation."). To constitute the crime of defamation or the tort of defamation, additional elements (including falsity) must be proven. Minn. Stat. § 609.765, subd. 2 (requiring that the defamatory matter be "false"); *Larson v. Gannett Co.,* 940 N.W.2d 120, 130–31 (Minn. 2020) (stating that the elements for defamation include: "(2) the statement is false.").

expose *any* person to disgrace or ridicule. The communication is prohibited even if the secret or deformity is true, the defamatory statement is accurate, or the facts that might lead to disgrace or ridicule are real.

And the communication is criminal even if the threat itself—or the underlying information—touches upon a matter of public concern. The broad scope of the statute puts it in "the realm of social or political conflict where threats . . . may nevertheless be part of the marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse." *See United States v. Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985) (holding constitutional the "limited scope" of the federal statute prohibiting retaliation against witnesses and informants). As the Oregon Supreme Court noted when declaring unconstitutional a materially similar coercion law:

> [T]he statute makes no distinction whether the coercive demands and threats are addressed by one person to another in a private confrontation or correspondence or in a more or less public setting designed to inform and perhaps involve others in the issues posed by the demand and the potential sanction.

Robertson, 649 P.2d at 589.

Third, subdivision 1(4) criminalizes speech whether the recipient of the threat takes—or forebears from—any action in response. Section 609.27, subdivision 1, requires that the threat "cause[] another against the other's will to do any act or forbear doing a lawful act." But the immediately following statute, section 609.275—under which Jorgenson was charged—states that any threat outlawed by section 609.27, subdivision 1, that "fails to cause the intended act or forbearance" is punishable as an attempt to coerce.

Finally, subdivision 1(4) criminalizes speech even if the recipient of the threat does not suffer any pecuniary loss—or any loss at all. The crime is causing (or attempting to cause) another to do an "act" or forebear from an act. As the sentencing provision in subdivision 2(1) of the statute makes clear, the harm to the recipient, or the gain to the violator, may not be "susceptible of pecuniary measurement." Indeed, the statute contains no requirement that the maker of the threat intend injury or loss to the recipient. Nor does the statute require any tangible harm or injury—not even hurt feelings.

We turn next to whether subdivision 1(4) is limited to regulating unprotected speech. *See In re Welfare of A.J.B.*, 929 N.W.2d at 847. "First Amendment protections are not limitless." *Id.* at 846. As already discussed, exceptions to First Amendment protection generally fall into delineated categories, including "speech integral to criminal conduct," "fighting words," "true threats," and "speech presenting some grave and imminent threat the government has the power to prevent." *United States v. Alvarez*, 567 U.S. 709, 717 (2012). In those categories, the speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The United States Supreme Court has been reluctant to expand these traditional categories of unprotected speech. *See Stevens*, 559 U.S. at 472.

The State argues that subdivision 1(4) does not regulate any protected speech because it only regulates fighting words. Fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common

knowledge, *inherently likely to provoke violent reaction*." *Cohen v. California*, 403 U.S. 15, 20 (1971) (emphasis added).

There is no question that some fighting words are threats, and some threats are fighting words. But subdivision 1(4) criminalizes substantially more than threats composed of, or that include, fighting words. It prohibits threats that do not contain "personally abusive epithets" or are not "inherently likely to provoke violent reaction." As to the latter, subdivision 1(4) forbids threats that are obviously unlikely to provoke violence, such as those made by electronic means from long distance. It even criminalizes threats that may have the effect of discouraging violence.

The State's fighting-words argument is not unfamiliar to us. The State made it in both *Machholz* and *Hensel*. We rejected it then for the same reason we reject it now: the statute criminalizes more speech than just fighting words. *See Hensel*, 901 N.W.2d at 176–77; *Machholz*, 574 N.W.2d at 420–21.

We now move to the next step of the analysis, which is the core overbreadth inquiry. We must determine whether the statute criminalizes not just some protected speech, but a "substantial amount" of protected speech. *See Matter of Welfare of A.J.B.*, 929 N.W.2d at 847. To do so, we:

> look[] to the conduct that is criminalized by the statute—some of which is unprotected speech or conduct and some of which is speech and expressive conduct protected by the First Amendment—and 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.

Id.

The district court and the court of appeals each aptly identified numerous hypothetical examples of protected speech criminalized by this statute. We tested some of those examples, and some of our own, during oral argument. Counsel for the State conceded that threats such as the following would violate the statute:

- A law student who had been sexually harassed by a professor states: "Professor, you have a choice; either resign or I will report and publicize the fact that you sexually harassed me."
- A school bus driver says to a student: "It's illegal for underage persons to smoke cigarettes. Give me those smokes or I will tell your parents that you're smoking."
- A woman, seeing a man she knew was a child pornographer and sexual abuser preparing to move in with her sister and her nieces, promises: "If you don't break up with my sister and leave town, I'll report what I know to my sister and the authorities."

It takes little imagination to come up with a multitude of examples in which a written or oral demand, including a threat to expose a secret or disgraceful fact, or to say something that is defamatory but true, is not only protected speech, but is the kind of speech that has "social value." Such speech occurs in the worlds of government, business, academia, sports, and culture. Such speech may well be at the core of matters of public concern. Or it may occur in another socially valuable setting, family life. *See Robertson*, 649 P.2d at 589 ("The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower 'civil liberties' related to politics . . . .").

Plainly, subdivision 1(4) criminalizes a substantial amount of protected speech. Minnesota Statutes § 609.27, subd. 1(4) is thus unconstitutional on its face.

B.

Our final step is to determine whether we can save the statute by construing it narrowly or severing part of it. *In re Welfare of A.J.B.*, 929 N.W.2d at 848. Our power to narrow by construction "is limited"; we "remain bound by legislative words and intent and cannot rewrite the statute to make it constitutional." *Id.* Only if a statute is "readily susceptible" to a narrowing construction can we "adopt such a construction if it remedies the statute's constitutional defects." *Hensel*, 901 N.W.2d at 175 (citation omitted). " [T]he shave-a-little-off-here and throw-in-a-few-words there statute . . . may well be a more sensible statute, but at the end of the day, it bears little resemblance to the statute that the Legislature actually passed." *Id.* at 180.

Subdivision 1(4) of the coercion statute, and the related attempt statute which incorporates it, are not susceptible to a narrowing construction. The State proposes that we save subdivision 1(4) by interpreting the word "threat" to mean only otherwise unlawful threats, such as fighting words. To interpret the statute that way, we would have to pencil in the adjective, "unlawful," to modify the noun, "threat." Adding the word "unlawful" would rewrite the statute. The power to do that is not ours.

It is especially not ours here because the Legislature has made clear that, as used in subdivision 1(4), the word "threat" encompasses all threats, both unlawful and otherwise lawful. By contrast to subdivision 1(4), paragraphs (1), (2), and (3) in subdivision 1

expressly use the word "unlawful."[4] By choosing not to use the word "unlawful" in subdivision 1(4) to describe either the threat or the injury, the Legislature signaled that it did not intend to prohibit only unlawful threats to expose or publish. We cannot solve the constitutional problem by transplanting a key word.

We do have "broader authority when it comes to severance." *In re Welfare of A.J.B.*, 929 N.W.2d at 848. The goal of severing a statute is to "effectuate the intent of the legislature had it known that a provision of the law was invalid." *Melchert-Dinkel*, 844 N.W.2d at 24 (quoting *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005)). But we cannot sever in two situations. First, we cannot sever if the valid provisions are " 'essentially and inseparably connected with, and so dependent upon, the void provisions' that the Legislature would not have enacted the valid provisions without the voided language." *Id.* (quoting *Shattuck*, 704 N.W.W.2d at 143). Second, we cannot sever if "the remaining valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent." *Shattuck*, 704 N.W.W.2d at 143.

Here, we see no way to sever part of subdivision 1(4) to save the rest of it from its unconstitutional overbreadth. In the court of appeals, the State suggested that everything in subdivision 1(4) could be severed except the prohibition on "publish[ing] a defamatory statement." *Jorgenson*, 934 N.W.2d at 375. That suggestion for major surgery was not

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[4] Minnesota Statutes § 609.27, subd. 1(1), criminalizes "a threat to *unlawfully* inflict bodily harm upon, or hold in confinement, the person threatened or another, when robbery or attempt to rob is not committed thereby." (Emphasis added). Subdivision 1(2) criminalizes a "threat to *unlawfully* inflict damage to the property of the person threatened or another." (Emphasis added). Subdivision 1(3) criminalizes "a threat to *unlawfully* injure a trade, business, profession, or calling." (Emphasis added.).

made to us, and the State made no other proposal for severance. In any event, the prohibition on threatening to publish a defamatory statement that is true is part of the substantial overbreadth problem.

Amicus Minnesota County Attorneys Association suggests that we sever the non-pecuniary harm penalty provision in subdivision 2(1). Even if we put aside our reluctance to "decide issues raised solely by an amicus," *Hegseth v. Am. Family Mut. Ins. Grp.*, 877 N.W.2d 191, 196 n.4 (Minn. 2016), that approach would leave in place the entirety of subdivision 1(4)—the prohibitory words—and still criminalize a substantial amount of protected speech. Severance is not the solution.

When a statute is substantially overbroad, and is unable to be saved by a narrowing construction or severance, "the remaining option is to invalidate the statute." *Hensel*, 901 N.W.2d at 175. Here, subdivision 1(4) cannot be narrowed or saved by severance. Therefore, subdivision 1(4) must be invalidated as violating the First Amendment.

C.

Both the State and the dissent assert that subdivision 1(4) covers only unprotected speech. But they rely on dramatically different theories. As discussed, the State relies solely on the fighting-words exception, which is insufficient. The dissent relies on a different exception. The dissent's theory is that the definition of "threat" is so narrow that it includes only "speech integral to criminal conduct," another of the categorical exceptions

to the First Amendment. *See In re Welfare of A.J.B.*, 929 N.W.2d at 846 (listing the "several delineated categories" of exceptions to the First Amendment).[5]

The State argued the "speech integral to criminal conduct" issue in the court of appeals, but abandoned it there. The State's petition for further review and its brief relied solely on the fighting-words exception. A party forfeits an issue that is not raised in its petition, *see In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005), or in its brief, *State v. Williams*, 771 N.W.2d 514, 517 n.2 (Minn. 2009).

Ordinarily, we would address the dissent merely by observing that the issue has been forfeited. But, because this is a constitutional case, and because we do not lightly overturn a statute, we choose to analyze the dissent's theory. It is unpersuasive, for three reasons.

First, the dissent relies on a definition of "threat" plucked out of its context. The dissent would define "threat" to mean only "a declaration of an intention to injure another or his property by some unlawful act." This definition necessarily includes the element of an unlawful act separate from the communication. The definition comes from a single sentence in *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975), which cited as support cases from the Western District of Tennessee and Kansas. [6]

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[5] We do not understand the dissent to be arguing that the true-threats exception applies. Indeed, if the dissent were correct that every threat as the dissent defines it is "speech integral to criminal conduct," there would be no reason for the true-threats exception to continue to exist.

[6] The State did not cite *Schweppe* in its brief. At oral argument, the State offered substantially the same definition of "threat" that we adopt today: "an expression of an

In *Schweppe*, the defendant was convicted of making terroristic threats to kill a 16-year-old boy and his mother. *Id.* at 612. The issue in that case was not the definition of "threat"; it was whether, under the terroristic-threats statute, the threat to kill needed to be communicated directly to support a conviction. *Id.* at 614. Unlike subdivision 1(4), the terroristic-threats statute expressly called out the element of a separate unlawful act: "Whoever threatens to commit any crime of violence with purpose to terrorize another . . . ." Minn. Stat. § 609.713, subd. 1 (1974). *Schweppe* is inapplicable.

Second, the dissent's assumption that the word "threat" necessarily includes an unlawful act element just does not work for subdivision 1(4). The adjective "unlawful" appears in subdivision 1 in paragraphs (1) ("a threat to unlawfully inflict bodily harm. . . ."), (2) ("a threat to unlawfully inflict damage . . . ."), and (3) ("a threat to unlawfully injure . . . ."), but it appears nowhere in paragraph (4). If the dissent were correct, and the word threat by definition necessarily includes the element of an unlawful act, the word "unlawfully" in subdivision 1(1)–(3) would be pure surplusage. But such an interpretation runs head-long into one of our canons of interpretation: that every statutory word has meaning and none is surplusage. The canon requires us to "give effect to all of a statute's provisions," so that "no word, phrase, or sentence is deemed superfluous, void, or insignificant," *Allan v. R.D. Offutt Co.,* 869 N.W.2d 31, 33 (Minn. 2015); *see* Minn. Stat. § 645.16 (2018)). Specifically, "a condition expressly mentioned in one clause of a subdivision provides evidence that the Legislature did not intend for the condition to apply

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intention to inflict harm or injury." Based on that definition, the State conceded that subdivision 1(4) criminalizes multiple threats frequently found in daily life.

to other clauses in which the condition is not stated." *Seagate Tech., LLC v. W. Dig. Corp.*, 854 N.W.2d 750, 759 (Minn. 2014). For us to add the word "unlawful" to subdivision 1(4), we would be doing what we cannot: "add words or meaning to a statute that were intentionally or inadvertently omitted." *Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012). As the State acknowledged at oral argument, subdivision 1(4), on its face, covers a wide variety of threats to do lawful acts, including threats to lawfully report the unlawful acts of others.

At root, the dissent's interpretation is an understandable wish that we read subdivision 1(4) as merely banning extortion,[7] which is speech integral to criminal conduct. But the Minnesota coercion statute is not a pure extortion statute; it criminalizes threats that are not extortionate.

Federal extortion statutes are much narrower than subdivision 1(4). Under the federal Hobbs Act, extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951 (b)(2) (2018). And it is a crime to mail or transmit in

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[7] Extortion is a classic movie and television theme. An example:

> **Saul:** Okay, there's always: "You got a real nice place here. Be a shame if something happened to it." That angle.
>
> **Skyler:** What are you talking about? Violence?
>
> **Saul:** Attitude adjustment.

Breaking Bad: Open House (AMC television broadcast July 31, 2011) (discussing how to persuade a business owner to launder drug money).

interstate commerce certain threats with the "intent to extort" money or property. 18 U.S.C. § 875(d) (2018). Federal courts, including in the two cases cited by the dissent, have interpreted "intent to extort" to require that the threat be "wrongful." *See, e.g.*, *United States v. Coss*, 677 F.3d 278, 290 (6th Cir. 2012) (holding that, under 18 U.S.C. § 875(d), a threat must "be wrongful" and it must "be made in conjunction with the specific intent to extort" for the purpose of ensuring "that its application is sufficiently constrained to reach only nonprotected speech"); *United States v. Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988) (holding that the element of "intent to extort" saves the statute from overbreadth because "it does not regulate speech relating to social or political conflict").[8]

Subdivision 1(4), which does not even use the words "extort" or "extortion," sweeps far broader than the federal extortion statutes. The threat need not induce force, violence, or fear, as most extortionate threats do. Nor is subdivision 1(4) limited to criminalizing demands for money or property; it encompasses all demands to do—or forbear from doing—any acts, including lawful acts. Such threats are found often in political and social discourse.[9]

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[8] In *Hutson*, 843 F.2d at 1234, the Ninth Circuit distinguished the federal extortion statutes from a Montana intimidation statute it struck down in *Wurtz v. Risley*, 719 F.2d 1438 (9th Cir. 1983), *superseded by statute as stated in State v. Ross*, 889 P.2d 161 (Mont. 1995). Similar to subdivision 1(4), the Montana statute prohibited threats "with the purpose to cause another to perform or to omit the performance of any act." *Hutson*, 843 F.2d at 1234 (quoting *Risley*, 719 F.2d at 1439).

[9] The dissent's assertion that "the statute requires every threat to be accompanied by an intent to extort something of value" is incorrect. No such words appear in the statute. Subdivision 1 focuses on the recipient's "acts"; subdivision 2 makes clear that the act may have no pecuniary value; and under section 609.275, a threat is a criminal attempt even if the intended act or forbearance never happens.

As the Second Circuit explained in *United States v. Jackson*, the omission of a wrongfulness element alone sweeps in all kinds of lawful speech:

> [P]lainly not all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful. For example, the purchaser of an allegedly defective product may threaten to complain to a consumer protection agency or to bring suit in a public forum if the manufacturer does not make good on its warranty. Or she may threaten to enlist the aid of a television "on-the-side-of-the-consumer" program. Or a private club may threaten to post a list of the club members who have not yet paid their dues. We doubt that Congress intended [section] 875(d) to criminalize acts such as these.

180 F.3d 55, 67 (2d Cir. 1999). All of these scenarios would be criminal under the Minnesota coercion statute.

For these reasons, the dissent's theory that the statute prohibits only speech integral to criminal conduct is incorrect. Minnesota Statutes § 609.27, subd. 1(4) is unconstitutional.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

D I S S E N T

GILDEA, Chief Justice (dissenting).

The majority concludes that part of Minnesota's criminal coercion statute, Minn. Stat. § 609.27, subd. 1(4) (2018), violates the First Amendment because it criminalizes a substantial amount of protected speech. Because the majority misinterprets the statute, I dissent.

Jorgenson asserts that Minn. Stat. § 609.27, subd. 1(4), is unconstitutionally overbroad. "Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with *extreme* caution . . . ." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (emphasis added), *superseded by statute as stated in State v. Hall*, 887 N.W.2d 847 (Minn. App. 2017). To assess Jorgenson's overbreadth claim, we must first interpret the statute. *See State v. Washington-Davis*, 881 N.W.2d 531, 537 (Minn. 2016). The analysis ends if we determine that the statute regulates only unprotected speech that does not result in unrelated content discrimination. *See id*.

When the statute is properly interpreted, it is clear that Minn. Stat. § 609.27, subd. 1(4), passes constitutional muster because the statute regulates only unprotected speech. The specific provision at issue in this case defines one type of criminal coercion as "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) (emphasis added). The keyword is "threat." Because the statute does not contain any defined terms, the words and phrases should be construed using their common meaning. *See* Minn. Stat. § 645.08(1) (2018). Technical words and phrases should be construed according to their

defined meaning. *Id.; see also In re Welfare of J.J.P.*, 831 N.W.2d 260, 266 (Minn. 2013) (applying a technical definition to a legal phrase based on its special meaning in the court system), *superseded by statute as stated in In re Welfare of J.T.L.*, 875 N.W.2d 334 (Minn. App. 2015). Under Minnesota law, the legal definition of the term "threat" is "a declaration of an intention to injure another or his property by some *unlawful* act." *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975) (emphasis added).[1] "[T]he question of whether a given statement is a threat turns on whether the 'communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.' " *Id.* (quoting *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974)). By leading with the term "threat," Minn. Stat. § 609.27, subd. 1(4), is expressly limited to situations where an individual threatens another individual by declaring an intention to injure the person or his property by some *unlawful* act. The use of the legal term "threat" in the plain language of the statute limits its scope.

The majority discounts the express and limited prohibition against "threats" in paragraph (4) by concluding that a threat can include protected speech. I disagree. The United States Supreme Court has observed that a threat, or a "verbal or visual assault," is an example of "unwanted communication" and implicates a person's right to be left alone,

[1] The majority asserts that the legal definition of the word "threat" is inapplicable because in *Schweppe*, we interpreted a different criminal statute (terroristic threats) with different statutory language. It is true that in *Schweppe*, we discussed the elements of terroristic threats under Minn. Stat. § 609.713, subd. 1 (1974), but in defining the term "threat," we defined the term generally and not as it relates to terroristic threats only. *See Schweppe*, 237 N.W.2d at 613. Therefore, use of the legal definition of a threat as set forth in *Schweppe* is appropriate.

arguably one of "the most comprehensive of rights and the right most valued by civilized [people]." *Hill v. Colorado*, 530 U.S. 703, 716–17 (2000) (citation omitted) (internal quotation marks omitted). And other courts have held, as I would in this case, that a threat of extortion is unprotected speech because it is speech integral to criminal conduct.[2] *See United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012) (upholding a federal statute criminalizing extortionate threats against the defendant's First Amendment challenge); *United States v. Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988) (upholding the federal extortion statute as not unconstitutionally overbroad or vague).

In *Coss,* the defendants were indicted under federal law with conspiracy to extort money and the transmission of threats to injure the reputation of another with intent to extort money based on allegations that they threatened to release photographs of a well-known celebrity engaging in wrongful behavior unless the celebrity paid a large sum of money to purchase the photographs from them. 677 F.3d at 280–82. The defendants challenged the federal statutes as overbroad and vague in violation of the First Amendment. *Id.* at 282. In analyzing the federal statute, the Sixth Circuit held that "extortionate threats" are not protected speech under the First Amendment. *Id.* at 289. The Sixth Circuit

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[2] The majority argues that I cannot rely on this position because the State "abandoned" the argument. The majority acknowledges that the State raised the argument below but contends that the argument is now forfeited because it was not mentioned in the petition for review or asserted in the State's brief. I disagree. The State's brief asserts that both fighting words and extortionate speech are unprotected speech under the First Amendment. Although the theory of speech integral to criminal conduct is not the focus of the State's brief to our court, it has not been abandoned or forfeited. The State has maintained throughout this litigation that the speech regulated by Minn. Stat. § 609.27, subd. 1(4), is not protected by the First Amendment.

observed that "the hallmark of extortion, and its attendant complexities, is that it often criminalizes conduct that is otherwise lawful." *Id.* at 287. The federal circuit court refused to limit the concept of extortion to unlawful threats because that would exclude "threats to expose embarrassing true information" that are "traditionally associated with the offense of blackmail." *Id.* (quoting Stuart P. Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 Washburn L.J. 553, 580 (2005)). Accordingly, the federal statutes and the defendants' convictions were upheld.

In *Hutson*, the defendant was indicted under federal law with extortion based on allegations that he threatened to send sexually explicit photographs of his ex-girlfriend to her relatives unless she paid a large sum of money to him. 843 F.2d at 1233. The defendant challenged the federal extortion statute as overbroad and vague in violation of the First Amendment. *Id.* at 1234. The Ninth Circuit upheld the federal statute based on its conclusion that extortionate threats are not protected speech under the First Amendment. *Id.* at 1235.

Like the statutes in *Coss* and *Hutson*, the statute at issue in this case does not preclude protected speech because the plain language of the statute is limited to extortionate speech.[3]

According to the majority, my conclusion that the statute only criminalizes extortionate speech is simply wishful thinking. But the history of the statute supports my

[3] The majority rejects my reliance on *Coss* and *Hutson* because the language of Minn. Stat. § 609.27, subd. 1(4), "sweeps far broader than the federal extortion statutes" without including the words "extort" and "extortion." But extortion is extortionate speech and the expression of the concept in different words does not lead to a different outcome.

view. When the Legislature enacted the statute in 1963, the advisory committee commented that the adoption of Minn. Stat. § 609.27 was premised on the crime of extortion and expanded to cover cases where "money or property was obtained from another by means of a threat." *See* Minn. Stat. Ann. § 609.27 (West 2016), advisory comm. cmt.—1963. Each subdivision of the statute was intended to encapsulate a different type of extortionate threat and the crime was called "coercion rather than extortion in view of the variety of acts encompassed." *Id.* Thus, my interpretation of the type of speech regulated by the statute reflects the reality of the Legislature's intent, not simply a wish.

The sentencing provision of the statute aligns the value of the threat with the level of punishment. *See* Minn. Stat. § 609.27, subd. 2 (2018) (violating the statute is (1) a misdemeanor if the pecuniary gain is less than $300 or not susceptible to pecuniary measurement, (2) a gross misdemeanor if the pecuniary gain is more than $300 and less than $2,500, and (3) a felony if the pecuniary gain is $2,500 or more). The comments made by the legislative advisory committee in 1963 reveal that the statute was focused on the crime of extortion. *See* Minn. Stat. Ann. § 609.27 (West 2016), advisory comm. cmt.—1963 (noting that "the forceful compulsion by means of a threat of any act or forebearance [sic] ought to be recognized as a crime."). The majority fails to acknowledge that the statute requires every threat to be accompanied by an intent to extort something of value.[4]

[4] The majority contends that under subdivision 2, "the act may have no pecuniary value." This is not true. For coercion to be charged at the misdemeanor level, the Legislature put the monetary measurement of the threat to extort at less than $300 or if "the benefits received or harm sustained are not susceptible of pecuniary measurement." *See*

Moreover, Minn. Stat. § 609.27, subd. 1(4), focuses on threats directed at an individual. Specifically, the statute criminalizes "threats" made "to expose *any person* to disgrace or ridicule." Minn. Stat. § 609.27, subd. 1(4) (emphasis added). The use of the phrase "any person" shows that the Legislature intended for the statute to cover directly targeted threats aimed at a specific individual. *See State v. Melchert-Dinkel*, 844 N.W.2d 13, 22 (Minn. 2014). The requirement that the threat be aimed at a particular individual is important because it narrows the reach of the statute significantly, making it clear that the statute does not prohibit "general public discussion"[5] on the same topic. *See id.* at 22–23.

Minn. Stat. § 609.27, subd. 2(1) (2018). Something not susceptible to pecuniary measurement still has value. Notably, when the statute was enacted by the Legislature in 1963, the advisory committee commented that "the forceful compulsion by means of a threat of any act or forebearance [sic] ought to be recognized as a crime, even though the offense of the defendant cannot be measured by money standards." Minn. Stat. Ann. § 609.27 (West 2016), advisory comm. cmt.—1963. But even assuming that the majority is correct that pecuniary measurement is a required element of a valid extortion or coercion claim, the remedy would be to simply strike the phrase from the statutory language of subdivision 2(1), not invalidate the statute as unconstitutionally overbroad.

[5] In striking down subdivision 1(4) as unconstitutional, the majority expresses concern that this portion of the statute criminalizes a wide variety of subject matters, including threats that touch on matters of public concern and should therefore be protected by the First Amendment. The majority cites to *State v. Robertson*, 649 P.2d 569 (Or. 1982), but that case is distinguishable.

In *Robertson*, the defendant challenged the constitutionality of the state's coercion statute, and the Oregon Supreme Court struck down the statute as substantially overbroad in violation of the First Amendment. *Id.* at 571, 589–90. The plain language of the coercion statute in Oregon is unlike the Minnesota coercion statute because the Oregon coercion statute uses the general word "demand" and does not include the word "threat." *See id.* at 577 (citing ORS 163.275). In *Robertson,* the Oregon Supreme Court determined that the state Legislature extended and broadened the crime of extortion too far and encompassed "most of the hypothetical examples drawn from politics, journalism, family or academic life." *Id.* at 589. In this case, the majority suggests that the statute struck down in *Robertson* is "similar to Minnesota's coercion statute," but that claim is simply

And all six subparts begin with the word "threat." Minn. Stat. § 609.27, subd. 1(1)–(6). The consistent use of the word "threat" in each subpart suggests that the plain language of the statute was purposefully constructed in a uniform way to criminalize threats made by one person against another and not restrict the broader category of communication.[6]

To be clear, Minn. Stat. § 609.27, subd. 1(4), does not prohibit communication. Jorgenson could have stood on the street corner and shouted about his ex-girlfriend's

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not true. The use of the word "threat" in each subpart of the Minnesota coercion statute limits the scope to extortionate speech.

[6] The majority focuses on the lack of the word "unlawful" in subdivision 1(4) as compared to subparts (1)–(3) of the statute and claims that defining the word "threat" to include an unlawful act makes the use of the word "unlawful" already present in the statutory language of subparts (1)–(3) "pure surplusage." I disagree. Defining the word threat, the first word in all six subparts of subdivision 1, to require an unlawful act by the actor does not make use of the word "unlawful" in subparts (1)–(3) superfluous because the actor's intent to engage in an unlawful act is separate and distinct from the type of threat made to force the victim to act against his or her will. The advisory committee comments from 1963 make the distinction clear and reflect that the Legislature made a conscious choice to use the word "unlawful" in subparts (1)–(3) to limit the scope of the category of threat in each subpart. Minn. Stat. Ann. § 609.27 (West 2016), advisory comm. cmt.—1963. For subpart (1), the committee noted that "[t]he word 'unlawfully' appears necessary in view of the broad language in the introductory clause" or the subpart "would cover a case such as the father spanking his child for not going to bed." *Id.* The committee made similar comments for subparts (2) and (3), noting with regard to subpart (3) that if the word "unlawfully" was not included, "it might be claimed that the statute would make a strike by employees illegal." *Id.* The Legislature made a different choice for subpart 4, where the word "unlawful" is not used to qualify the category of threats. This legislative choice makes sense because the types of threats listed in the subpart (4) (exposing "a secret or deformity," publishing "a defamatory statement," and exposing a person "to disgrace or ridicule") lack the social value that the lawful versions of the types of threats in subparts (1)–(3) might have, such as a lawful employee strike (a lawful injury to a business) or a parent disciplining a child (a lawful holding in confinement or form of bodily harm). *See Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942) (noting that fighting words are not protected by the First Amendment and have " such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

alleged marijuana use to anyone passing by and his speech would not have been criminalized by the statute. The statute simply does not prohibit this type of communication. Instead, subdivision 1(4) prohibits and criminalizes threats by one individual to another with an intent to extort something of value. In this case, rather than shouting the information from a street corner, or simply communicating the information to interested parties, Jorgenson directly threatened to expose the information unless he was paid a large sum of money by his ex-girlfriend's father. The statute properly criminalizes his threat and the First Amendment does not shield him from the criminal consequences.

The majority comes out differently, relying on several hypothetical situations to support its conclusion that Minn. Stat. § 609.27, subd. 1(4), is unconstitutionally overbroad. The majority sets forth three examples—a law student confronting a law professor about sexual harassment, a school bus driver confronting an underage smoker, and an aunt confronting a known sexual abuser in an attempt to save her family from future abuse—and asserts that the speech in each example "benefits society" and should, therefore, be protected and not criminalized. But the statute does not regulate the speech in these hypotheticals; the law student, the bus driver, and the aunt can put their charges up on a billboard and not run afoul of the statute. What they cannot do is threaten someone with an intent to extort something of value.

Because Minn. Stat. § 609.27, subd. 1(4), criminalizes threats, which are not protected speech, I would reverse the court of appeals' decision and hold that subdivision 1(4) does not violate the First Amendment.