STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP2160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NORRIS W. CULVER, SR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying a Postconviction Motion Entered in the Kenosha County Circuit Court, the Honorable Mary Kay Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Does Wis. Stat. § 942.09(3m)(a)2, which criminalizes posting or publishing a "depiction of a person" knowing it is a "private representation" without consent, violate the First Amendment, Due Process, and the Commerce Clause?

   The postconviction court answered no.

2. Does Wisconsin's lifetime firearm ban on all felons, Wis. Stat. § 941.29(2), violate the Second Amendment for individuals, such as Mr. Culver, who are convicted of a non-violent operating while intoxicated felony?

   The postconviction court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted as this case involves two issues of first impression. Undersigned counsel is not aware of any cases addressing the "post or publish" statute, Wis. Stat. § 942.09(3m)(a)2, or any cases challenging the lifetime firearm ban statute, Wis. Stat. § 941.29(2), by an individual convicted of a non-violent operating while intoxicated felony.

While undersigned counsel anticipates that the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this Court would find it helpful.

STATEMENT OF FACTS AND CASE

Mr. Culver was charged with four counts: (1) possession of a firearm by a felon, as repeater, contrary to Wis. Stat. §§ 941.29(2) & 939.62(1)(b); (2) possession of a firearm by a felon, as repeater, contrary to Wis. Stat. §§ 941.29(2) & 939.62(1)(b); (3) possession of a firearm by a felon, as a repeater, contrary to Wis. Stat. §§ 941.29(2) & 939.62(1)(b); and (4) post or publish a depiction of person knowing it is a private representation without consent, contrary to Wis. Stat. §§ 942.09(3m)(a)2 & 939.62(1)(a). (1:1-2).[1]

According to the criminal complaint, A.A.L. informed police that Mr. Culver had posted nude photos of A.A.L. online without her permission. (1:2-3). A.A.L. also stated that Mr. Culver was a felon and had multiple firearms at his residence. (1:3). Mr. Culver admitted that he posted nude photos of A. A. L. online out of anger. (*Id.*). Mr. Culver also eventually admitted that he had moved guns out of A.A.L's residence to his garage. (*Id.*). Three firearms were located in Mr. Culver's garage.[2] (*Id.*). The complaint further alleged that Mr. Culver was previously convicted of felony operating while intoxicated (4th offense) in Kenosha County Case No. 12-CF-45. (*Id.*).

On August 7, 2015, Mr. Culver entered a guilty plea to count one, felon in possession of a firearm, and count four, post or publish a depiction of a person knowing it is a private

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[1] Unless noted otherwise, all statutes in the brief refer to the statutes in place at the time of the offenses, June 19, 2015. (1:1-2).

[2] Two of the guns were apparently antique long guns and the other gun was a handgun. (38:28, 35, 36, 37).

representation without consent. (37:2, 3-4). The repeater enhancer on each count was struck because a prior felony motor vehicle offense cannot be used as a basis for the enhancer. (*See* 37:9-10). The other two felon in possession of a firearm counts were dismissed on the prosecutor's motion. (37:11).

On September 24, 2015, a sentencing hearing was held. Trial counsel indicated that a text message was discovered from A.A.L. saying "go ahead and post it." (38:5). Mr. Culver declined plea withdrawal. (38:5-11). Pursuant to the plea agreement, the State did not make a specific recommendation. (38:18). The defense requested probation, or alternatively, less than 18 months of initial confinement. (38:31-32).

The Honorable Mary Kay Wagner sentenced Mr. Culver. On the post or publish count, the court imposed 9 months in the House of Correction. On the felon in possession count, the court imposed a 3-year and 3-month prison sentence (15 months of initial confinement and 2 years of extended supervision) to run consecutive. (38:41-42).

Mr. Culver filed a postconviction motion alleging that: (1) the post or publish statute, Wis. Stat. § 942.09(3m), is facially unconstitutional; and (2) the felon in possession statute, Wis. Stat. § 941.29(2), is unconstitutional as applied to Mr. Culver, who has a felony conviction for operating while intoxicated. (28:1-13).[3]

[3] Mr. Culver also requested sentence modification. (28:13-15). That issue is not being pursued on appeal.

A hearing was held and the Honorable Mary Kay Wagner denied postconviction relief. (33; App. 101).[4] Regarding the post or publish statute, the court's reasoning was simply as follows:

> I don't believe it's unconstitutional to restrict the posting or publishing of a depiction of a person knowing it's a private representation without that consent. There are good reasons for the law, and the issues that you raise I think can be resolved in other ways and not make it unconstitutional because they exist.

(39:16; App. 117). Regarding the felon in possession statute, the court stated:

> The court denies the motion based on the reasonableness test that the law prohibiting felons from possessing a firearm is reasonable and not unreasonable; that it's an indication in this case of prior felonies involving alcohol; that the reasonable – that the State would ban felons in this circumstance from possessing a firearm [sic].

(39:11; App. 112).

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[4] The Attorney General's Office declined to participate in postconviction proceedings. (*See* 30).

ARGUMENT

I. The "Post or Publish" Statute, Wis. Stat. § 942.09(3m)(a)2, Violates the First Amendment, the Due Process Clause, and the Commerce Clause.

A. Introduction.

In this case, Mr. Culver was charged with and convicted of one count of the "post or publish" statute, Wis. Stat. § 942.09(3m)(a)2. The statute provides:

> (3m) (a) Except as provided in par. (am), whoever does any of the following is guilty of a Class A misdemeanor:
>
> 1. Posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation.
>
> 2. Posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted.
>
> ***
>
> (b) This subsection does not apply to any of the following:
>
> 1. The parent, guardian, or legal custodian of the person depicted if the private representation does not violate s. 948.05 or 948.12 and the posting or publication is not for the purpose of sexual arousal, gratification, humiliation, degradation, or monetary or commercial gain.
>
> 2. A law enforcement officer or agent acting in his or her official capacity in connection with the investigation or prosecution of a crime.

> 3. A person who posts or publishes a private representation that is newsworthy or of public importance.
>
> 4. A provider of an interactive computer service, as defined in 47 USC 230 (f) (2), or to an information service or telecommunications service, as defined in 47 USC 153, if the private representation is provided to the interactive computer service, information service, or telecommunications service by a 3rd party.

Wis. Stat. § 942.09(3m).[5]

Subsection (1) of 942.09 also provides numerous definitions, including definitions for "private representation" and "post or publish":

> (1) In this section:
>
> (ae) "Consent" means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act....
>
> (bg) "Post or publish" includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public.
>
> (bn) "Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted

[5] It is unclear how section (3m)(a)1 and section (3m)(a)2 are different. This brief focuses on section (3m)(a)2, which is the section charged in this case.

> directly and intentionally gave possession of the representation.
>
> (c) "Representation" means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.
>
> (d) "Sexually explicit conduct" has the meaning given in s. 948.01(7).

Wis. Stat. § 942.09(1) (emphasis added). No definition is provided for "depiction."

As discussed below, Wis. Stat. § 942.09(3m)(a)2, is unconstitutional on its face in violation of the First Amendment, Due Process, and the Commerce Clause.

B. Standard of review.

The constitutionality of a statute is a question of law reviewed de novo. ***Robert T.***, 2008 WI App 22, ¶ 5, 307 Wis. 2d 488, 746 N.W.2d 564.

In a facial challenge, the challenger must show that the law cannot be enforced "under any circumstances." ***State v. Wood***, 2010 WI 17, ¶¶ 13, 15, 323 Wis. 2d 321, 780 N.W.2d 63.

C. The "post or publish" statute is overbroad in violation of the First Amendment.

1. Legal principles.

"The First Amendment of the United States Constitution, applicable to the states under the Due Process Clause to the Fourteenth Amendment, provides in pertinent part that 'Congress shall make no law . . . abridging the

freedom of speech.'" ***Robert T.***, 2008 WI App 22, ¶ 6. "Article I, § 3 of the Wisconsin Constitution provides in pertinent part that '[e]very person may freely speak, write and publish his [or her] sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.'" ***Id.*** Notwithstanding differences in language between these two constitutional provisions, the Wisconsin Constitution has been construed to provide the same freedoms as the federal constitution. ***Id.***

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234, 245 (2002). However, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." ***Id.*** at 245-246. Yet, "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." ***Id.*** at 244. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." ***Id.*** at 255. "The First Amendment does not permit the imposition of criminal sanctions when doing so would substantially chill protected speech." ***State v. Weidner***, 2000 WI 52, ¶ 35, 235 Wis. 2d 306, 611 N.W.2d 684.

2. Strict scrutiny should be applied.

Statutes generally benefit from a presumption of constitutionality. ***State v. Stevenson***, 2000 WI 71, ¶ 10, 236 Wis. 2d 86, 613 N.W.2d 90. However, when, as here, the statute implicates the exercise of First Amendment rights, the

burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster. *See* ***id.***

The applicable level of scrutiny depends on whether a statute is "content-based" or "content-neutral." Content-based regulations are defined as those that distinguish favored from disfavored speech based on the ideas expressed. ***Turner Broad. Sys., Inc., v. FCC***, 512 U.S. 622 (1994). If it is necessary to look at the content of speech in question to determine whether the speaker violated the regulation, then the regulation is content-based. ***Gresham v. Peterson***, 225 F.3d 899, 905 (7th Cir. 2000). If not, it is content-neutral.

If a statute is content-based, the statute must withstand strict scrutiny. ***State v. Baron***, 2009 WI 58, ¶ 14, 318 Wis. 2d 60, 769 N.W.2d 34. To survive strict scrutiny, the State has the burden to show that the content-based regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. ***Id.*** ¶ 45 (quotation omitted).

If the statute is content-neutral, the statute is subject to intermediate scrutiny. ***Baron***, 318 Wis. 2d 60, ¶ 14. To survive intermediate scrutiny, a content-neutral provision must be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels for communication of the information." ***Ward v. Rock Against Racism***, 491 U.S. 781, 791 (1989).

The content-based nature of this restriction is much like the content-based restriction addressed in ***State v. Oatman***, 2015 WI App 76, 365 Wis. 2d 242, 871 N.W.2d 513. In ***Oatman***, this Court examined whether Wis. Stat. § 948.14, which prohibits a sex offender from intentionally capturing a representation of any minor without written consent, violated the First Amendment due to overbreadth.

This Court held that the restriction was content-based because it only regulates images of children. ***Id.*** ¶¶ 9-11.

Like in ***Oatman***, here, Wis. Stat. § 942.09(3m)(a)2 is a content-based regulation because only nude, partially nude, or sexually explicit depictions are regulated. Thus, in the context of a First Amendment challenge, Wis. Stat. § 942.09(3m)(a)2 must survive strict scrutiny.

3. The post or publish statute does not survive strict scrutiny.

Wis. Stat. § 942.09(3m)(a)2 is overly broad and does not survive strict scrutiny. It is not "narrowly tailored" to a "compelling state interest." ***Oatman***, 2015 WI App 76, ¶ 45. While statutes of this nature are sometimes referred to as "revenge porn" statutes, this statute encompasses more than revenge porn.

First, the statute makes no distinction between images that are posted or published with malice or wrongful intent, such as revenge or humiliation, and those that are not. *See generally* ***Baron***, 2009 WI 58, ¶ 49 (holding that an identity theft statute survived a First Amendment challenge because it *only* applies "when one has stolen another person's identity and proceeds to use that identity *with the intent to harm* the individual's reputation"). For example, if a mother-in-law takes a photo of her son's wife nursing a newborn with consent and then proudly posts it online to share the news of a baby without consent, the mother-in-law could be criminally charged.

Second, the statute does not make any distinction between images that cause harm to the person pictured and images that do not. *See generally* ***State v. Hemmingway***, 2012 WI App 133, ¶ 18, 345 Wis. 2d 297, 825 N.W.2d 303

(holding that the stalking statute was not overbroad because "the core of the statute is the stalker's intent to engage in conduct that he or she knows or should know will cause fear in the victim and does cause the victim's actual distress or fear"). The statute is not limited to images that are recognizable or identifiable. Thus, posting a photo of a person's bare buttock, without any identifying characteristics, such as the person's face or name, constitutes a violation of the statute.

Third, the statute does not provide a definition of the word "depiction." The statute states "[p]osts, publishes, or causes to be posted or published, a *depiction of a person* that he or she knows is a private representation, without the consent of the person depicted." Wis. Stat. § 942.09(3m)(a)2 (emphasis added). Thus, it seems that a "depiction" could encompass a nude sketch, drawing, or cartoon of a person that is posted online. ***Kaplan v. California***, 413 U.S. 115, 119 (1973) (noting that "pictures, films, paintings, drawings, and engravings" are protected by the First Amendment); *see also*, ***Douglass v. Hustler Magazine, Inc.***, 769 F.2d 1128, 1141 (7th Cir. 1985) (noting that "[a]rt, even of the questionable sort represented by erotic photographs in 'provocative' magazines—even of the artless sort represented by 'topless' dancing—today enjoys extensive protection in the name of the First Amendment.").

Fourth, the statute does not provide any limitation on where the "depiction" or "private representation" is captured. As noted above, "depiction of a person" is not defined. "Private representation" is defined as:

> a representation depicting a nude or partially nude person or a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only

> by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.

Wis. Stat. § 942.09(1)(bn). Thus, if a person's friend "moons" or shows his buttock in a public park, taking a photo with consent and posting it online could result in criminal liability despite the fact that it happened in public and was plainly visible.

Fifth, the statute's definition of nudity is expansive and includes images that are commonplace, non-obscene, and do not implicate personal privacy interests. For example, "nude" or "partially nude person" includes "any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple." Wis. Stat. § 942.08(1)(a); Wis. Stat. § 948.11(1)(d). This criminalizes images of side or bottom views of breasts even if the nipple is fully and opaquely covered. Such depictions are common in swimwear, street fashion, and gowns worn on gala occasions. For example, consider these celebrity photos[6]:

[6] Photos available at www.dailymail.co.uk/tv/showbiz/article-3032669; www.tvguide.com/galleries/revealing-red-carpet-1083645/6/

Sixth, the statute does not specify a time frame for the requirement that an image be posted or published without consent. What happens if a person gives consent to post a nude photo, the photo is posted, and then the person changes his or her mind? Is the person who posted the photo suddenly criminally liable?

Seventh, the statute indicates it does not apply to a private representation "that is newsworthy or of public importance." It is unclear what "newsworthy" or "of public importance" means. *See generally*, ***Time, Inc. v. Regan***, 539 F. Supp. 1371, 1390 (S.D.N.Y. 1982) *aff'd in part, rev'd in part* by ***Regan v. Time, Inc.***, 468 U.S. 641 (1984) (stating that "[t]he determination of what is "'philatelic, numismatic, educational, historical, or newsworthy' is rife with assumption and opening to varying interpretation"). For example, a few years ago, nude photos of former Packer quarterback Brett Farve circulated the internet from a woman who allegedly received them from him by text.[7] Could the woman be criminally liable or does a nude photo of Brett Farve qualify as newsworthy?

Lastly, at the postconviction hearing, the State argued, relying on ***State v. Robins***, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, that Wis. Stat. § 942.09(3m)(a)2 is constitutional because the statute regulates conduct, not speech. (39:12; App. 113). However, ***Robins*** is distinguishable. In ***Robins***, the defendant challenged Wis. Stat. § 948.07 as applied to child enticements initiated over the internet. ***Robins***, 2002 WI 65, ¶ 39. The Wisconsin Supreme Court held that the child enticement statute regulates conduct, not speech, explaining:

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[7] *See, e.g.*, "Brett Favre Nude Photos Released," www.newsone.com.

> The statute protects against the social evil and grave threat presented by those who lure or attempt to lure children into secluded places, away from the protection of the general public, for illicit sexual or other improper gestures. That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny.
>
> [The defendant's] internet conversations and e-mails . . . do not by themselves constitute the crime of child enticement. Rather [the defendant's] internet conversation and e-mails are circumstantial evidence of his intent to entice a child, which, combined with his actions in furtherance of that intent, constitute probable cause for the crime of attempted child enticement. That some of the proof in this case consists of internet "speech" does not mean that this prosecution, or another like it, implicates First Amendment rights.

Id. ¶¶ 43-44 (citation omitted). Thus, the child enticement statute regulates conduct because it criminalizes the act of "luring" or "attempting to lure" children. Language or speech is simply a "means" of "luring" the children.

In contrast, here, prohibiting a person from posting or publishing a depiction *is* implicating speech as it interferes with a speaker's message—a communication of the expression in the depiction. *See generally,* ***Doe v. Shurtleff***, 628 F.3d 1217, 1222 (10th Cir. 2010) (citing ***Reno v. ACLU***, 521 U.S. 844, 870 (1997) ("The Supreme Court has . . . made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet"); ***ETW Corp. v. Jireh Publishing, Inc.,*** 332 F.3d 915, 924 (6th Cir. 2003) (citing ***Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston***, 515 U.S. 557, 569 (1995)) ("The First Amendment is not limited to written

or spoken words, but includes other mediums of expression including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."). For example, a photographic recording of a staged event and the uploading of the images to a social networking site is an attempt to memoralize and further communicate the expression engaged in by the conduct depicted in the images. Thus, unlike the child enticement statute in ***Robins***, the post and publish statute regulates speech.

Therefore, Wis. Stat. § 942.09(3m)(a)2 is overbroad in violation of the First Amendment and does not survive strict scrutiny.

D. The post and publish statute is void for vagueness in violation of Due Process.

The Fourteenth Amendment of the United States Constitution assures that no person shall be deprived of "life, liberty, or property without due process of law."

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." ***United States v. Batchelder***, 442 U.S. 114, 123 (1979). All are entitled to be informed as to what the State commands or forbids. ***Lanzetta v. New Jersey***, 306 U.S. 451, 453 (1939).

A statute violates due process if it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. ***Connally v. General Constr. Co.***, 269 U.S. 385, 391 (1926). Stated differently, a statute is void if it is so standardless that it either leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to arbitrarily decide, without any legally fixed

standards, what is prohibited and what is not in each particular case. ***Giaccio v. Pennsylvania***, 382 U.S. 399, 402-03 (1966); ***State v. Popanz***, 112 Wis. 2d 166, 172-73, 332 N.W.2d 750 (1983). This test is identical under both the United States Constitution and the Wisconsin Constitution.[8] ***County of Kenosha v. C & S Management, Inc.***, 223 Wis. 2d 373, 393-94, 588 N.W.2d 236 (1999).

As discussed above, the statute is unclear as to what "newsworthy" or "of public importance" means. Moreover, the statute does not specify a time frame for the requirement that an image be posted or published without consent. Thus, it is unknown what happens if a private representation is posted and then the person in the private representation revokes consent.

Lastly, the statute does not define the parameters of the offense that will subject a person to Wisconsin's criminal jurisdiction: whether it is the state citizenship or location of the depicted person, the place where the restricted image was disclosed, or the location of the viewing of a restricted image.

Therefore, the post and publish statute is void for vagueness in violation of the United States Constitution and the Wisconsin Constitution.

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[8] Article I, Section 1 of the Wisconsin Constitution has been interpreted as a due process provision. ***Reginald D. v. State***, 193 Wis. 2d 299, 306-07, 533 N.W.2d 181 (1995).

E. The post and publish statute violates the Commerce Clause.

The Commerce Clause provides that "Congress shall have power . . . to regulate commerce . . . among the several states. . . ." U.S. Const. Art. I, sec. 8, cl. 3.

In ***Gibbons v. Ogden***, the United States Supreme Court took a broad view of this power, recognizing that while states undoubtedly possess the ability to regulate their internal affairs, commerce is best defined as "intercourse between . . . parts of nations . . . and is regulated by prescribing rules for carrying on that intercourse." 22 U.S. 1, 190 (1824). With this definition, the Commerce Clause serves an independent limit on state regulation, even absent Congressional action. ***Id.*** at 199-200. This implication of Congress's power over commerce is referred to as the "dormant" or "negative" Commerce Clause. ***Northwest Airlines, Inc. v. Wisconsin Dept. of Revenue***, 2006 WI 88, ¶ 27, 293 Wis. 2d 202, 717 N.W.2d 280. Under the dormant Commerce Clause, courts "'protect [] the free flow of commerce, and thereby safeguard[] Congress' latent power from encroachment by the several States[]' when Congress has not affirmatively exercised its Commerce Clause power." ***Id.*** (citation omitted).

There is a two-step framework for potential violations of the dormant commerce clause. First, the court must look to whether out-of-staters are discriminated against. ***Pike v. Bruce Church, Inc.***, 397 U.S. 137, 142 (1970). If the state law is found to be nondiscriminatory, a balancing test is applied:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly

> excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. The United States Supreme Court further clarified this test in ***Healy v. Beer Institute, Inc.***, instructing the reviewing court to determine "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. 324, 336 (1989).

As the Second Circuit Court of Appeals has remarked, "[b]ecause the Internet does not recognize geographical boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'project[ing] its legislation into other States." ***American Booksellers Foundation v. Dean***, 342 F.3d 96 (2d Cir. 2003) (holding that a state statute making it a crime to use the internet to transfer sexually explicit materials to minors violated the commerce clause).

Here, the post and publish statute burdens interstate commerce in violation of the commerce clause. As discussed above, the statute does not define what conduct will subject a person to Wisconsin's criminal jurisdiction: whether it is the state citizenship or location of the depicted person, the place where the restricted image was disclosed, or the location of the viewing of a restricted image. This unjustifiably burdens interstate commerce and regulates conduct that occurs outside the borders of Wisconsin, thereby causing irreparable harm. Like the nation's railways and highways, the internet is an instrument of interstate commerce. Just as goods and services travel over state borders by train and truck, information flows across state and national borders on the internet. *See*

generally, ***U.S. v. Carroll***, 105 F.3d 740, 742 (1st Cir. 1997) (stating that "[t]ransmission of photographs by means of the internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce"); ***U.S. v. MacEwan***, 445 F.3d 237, 245 (3d Cir. 2006) (stating that "the internet is an instrumentality and channel of interstate commerce").

Given that the various websites on the internet can be accessed by anyone in the world, there is no way for a person to ensure that a resident of Wisconsin would not receive his or her posting or publication. Thus, for example, if a man and woman go to Chicago for a trip, the man gives consent for the woman to take a nude photo in Chicago, and when they return to Wisconsin, the woman posts it on her online art website, she could be criminally liable.

Thus, the post or publish statute violates interstate commerce.

II. Wis. Stat. § 941.29(2), Wisconsin's Lifetime Firearm Ban for All Felons, Is Unconstitutional As Applied to Mr. Culver Who Was Convicted of a Non-Violent Operating While Intoxicated Felony.

A. Introduction.

In this case, as discussed below, Mr. Culver, who was convicted of a non-violent operating while intoxicated felony, argues that the felon in possession statute is unconstitutional *as applied* to him.[9] An "as applied" challenge is a claim that

[9] At issue in this case is Wis. Stat. § 941.29(2). However, recently, the legislature repealed and renumbered section (2) to (1m)(a). *See* 2015 Wisconsin Act 109. The language for this portion of the statute remains essentially unchanged.

a statute is unconstitutional as it relates to the facts of a particular case or a particular party. ***State v. Smith,*** 2010 WI 16, ¶ 10 n. 9, 323 Wis. 2d 377, 780 N.W.2d 90.[10]

B. Standard of review.

Whether a statute is unconstitutional is a question of law reviewed de novo. ***State v. Stenklyft***, 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769.

In an as applied challenge, the challenger must prove that the statute as applied to him is unconstitutional beyond a reasonable doubt. ***Smith***, 2010 WI 16, ¶ 11.

C. The Second Amendment to the United States Constitution confers an individual right to keep and bear arms.

The Second Amendment to the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Similarly, Article I, section 25 of the Wisconsin Constitution, states "[t]he people have the right to keep and bear arms for security, defense, hunting recreation or any other lawful purpose."

In 2008, the United States Supreme Court held that the Second Amendment confers an "individual right to keep and

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[10] Mr. Culver does not raise a *facial* constitutional challenge to the felon in possession statute. *See* ***Smith***, 2010 WI 16, ¶ 10 n. 9. (stating that a facial challenge to a statute alleges that the statute is unconstitutional on its face and thus is unconstitutional under all circumstances).

bear arms," rejecting an argument that the amendment conferred only a collective right limited to militia members. ***District of Columbia v. Heller***, 554 U.S. 570, 598 (2008). The court's historical analysis noted that the predecessor to the Second Amendment was the English Declaration of Rights in 1689, which assured that Protestants would never be disarmed. ***Id.*** at 592-95. By the time the United States was founded, the right secured in 1689 was "understood to be an individual right protecting against public and private violence." ***Id.*** at 593-94. The "central component" of the Second Amendment, the court held, was individual self-defense. ***Id.*** at 599, 628-29.

Two years later, the Court extended the applicability of the Second Amendment to the states and struck dn a ban on handguns. ***McDonald v. City of Chicago***, 561 U.S. 742 (2010) (plurality opinion).[11]

Both ***McDonald*** and ***Heller*** acknowledged that, like the First Amendment and most other rights, the Second Amendment is not unlimited. ***Heller***, 554 U.S. at 626;

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[11] Five Justices—Roberts, Scalia, Kennedy, Thomas, and Alioto—voted for the judgment of the Court that the Chicago handgun ban was unconstitutional and that the Second Amendment applied to the States. Four voted to incorporate the Second Amendment via the Due Process Clause of the Fourteenth Amendment. ***McDonald***, 561 U.S. at 747. Justice Thomas did not join the four justice plurality opinion in ***McDonald*** because he disagreed with the plurality's conclusion that the Second Amendment is made applicable to the States through the Fourteenth Amendment's Due Process Clause. Instead, he argued that the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourth Amendment's Privileges or Immunities Clause. ***McDonald***, 561 U.S. at 806 (Thomas, J., *concurring*).

McDonald, 561 U.S. at 786. However, neither case defined the precise limitations of the Second Amendment.

D. Statutes categorically banning felons from possessing firearms for life are subject to "as applied" constitutional challenges

Heller and ***McDonald*** both struck down laws that banned the possession of handguns in the home. As the Seventh Circuit has explained, "[b]oth ***Heller*** and ***McDonald*** suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are *categorically* unconstitutional." ***Ezell v. City of Chicago***, 651 F.3d 684, 703 (7th Cir. 2011).

The ***Heller*** decision noted in *dictum*, "although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." It added in a footnote, "[w]e identify these *presumptively* lawful regulatory measures only as examples; our list does not purport to be exhaustive." ***Heller***, 554 U.S. at 626, 627 n.26. ***Heller*** also warned that:

> [S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . *And there will be time enough to expound upon historical justifications for the exceptions we have mentioned if and when those exceptions come before us.*

Id. at 635 (emphasis added).

Heller's statement regarding the "presumptive" validity of felon gun dispossession statutes does not foreclose

an as-applied challenge. "By describing the felon disarmament ban as presumptively lawful, the Supreme Court implicated that the presumption may be rebutted." *See, e.g.,* ***United States v. Williams***, 616 F.3d 685, 692 (7th Cir. 2010).

Thus, a number of courts, including Wisconsin, have examined whether felony dispossession laws are unconstitutional as applied. *See, e.g.,* ***Britt v. North Carolina***, 363 N.C. 546, 681 S.E.2d 320 (2009) (holding that a state statute prohibiting convicted felons from possessing a firearm was unconstitutional as applied to a man convicted of a non-violent felony drug charge that did not involve a gun 30 years ago); ***Binderup v. Attorney Gen. United States of Am.***, 836 F.3d 336 (3d Cir. 2016) (concluding that the misdemeanor offenses of two challengers were not serious enough to strip them of their Second Amendment rights under the federal firearm statute); ***State v. Pocian***, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894 (holding that the felon in possession statute was not unconstitutional as applied because "while [the defendant] did not utilize physical violence in the commission of his three felonies, he did physically take his victim's property); ***State v. Rueden***, No. 2011AP1034-CR, slip op. (WI App June 7, 2012) (App. 126-28) (holding that the felon in possession statute was not unconstitutional as applied to the defendant who had been previously convicted of felony theft and whose current conviction involved stealing a handgun and selling it).

E. Wisconsin's felon in possession statute is unconstitutional as applied to Mr. Culver who was convicted of a non-violent operating while intoxicated felony.

1. Applicable level of scrutiny.

Neither ***Heller*** nor ***McDonald*** defined the level of judicial scrutiny that should be used to determine whether a law is unconstitutional under the Second Amendment. ***Heller*** specifically rejected the rational basis test and an interest-balancing test, but did not mandate a particular analysis. 554 U.S. at 628 n.27, 634-35; *see also* ***McDonald***, 561 U.S. at 791.

In ***Pocian***, this Court applied an intermediate standard of scrutiny to an as applied challenge to Wisconsin's felon in possession statute. 2012 WI App 58, ¶ 14. Intermediate scrutiny provides that a statute "is valid only if substantially related to an important governmental objective." ***Id.*** ¶ 11.[12] In

[12] At the postconviction motion hearing, the District Attorney argued, and the circuit court agreed, that a "reasonableness test" applies based on an unpublished case, ***State v. Brown***, No. 2011AP2049-CR, slip op. (WI App April 17, 2012) (App. 129-36) (stating that "the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare"). (39:5-11; App. 106-12). However, at one point, the ***Brown*** court appears to equate the "reasonableness test" with intermediate scrutiny. *See* ***id.*** ¶¶ 24-25 (App. 132). And, to the extent that the "reasonableness test" is different than intermediate scrutiny, ***Brown*** analyzed Wis. Stat. § 941.23, the carrying a concealed weapon statute, not Wis. Stat. § 941.29, the felon in possession statute, at issue in this case. ***Id.*** ¶ 1.

this case, Mr. Culver does not contest that an intermediate level of scrutiny applies.

2. Applicable test when evaluating an as applied challenge.

In ***Heller***, the Court stated that "[c]onstitutional rights are enshrined with the scope they were understood to have when people have adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." 554 U.S. at 634-35. The "critical tool of constitutional interpretation" in this area is "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification." ***Id.*** at 605.

Thus, to raise an as applied challenge, an individual must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. *See generally*, ***Binderup***, 836 F.3d at 348; ***United States v. Moore***, 666 F.3d 313, 319 (4th Cir. 2012).

3. Mr. Culver is distinguishable from persons historically barred from Second Amendment protections.

In ***Heller***, the Court declined to "expound upon the historical justifications" for the list of "presumptively" unlawful firearm exclusions, such as the "prohibitions on the possession of firearms by felons." 554 U.S. at 626, 635. Thus, this task has been left to the lower courts.

"[M]ost scholars of the Second Amendment agree that the right to bear arms was tired to the concept of a virtuous citizenry and that, accordingly, the government could disarm

'unvirtous citizens.'" *See, e.g.,* ***United States v. Yancey***, 621 F.3d 681, 684-85 (7th Cir. 2010); ***Pocian***, 2012 WI App 58, ¶ 15.

People who have committed or are likely to commit "violent offenses" undoubtedly qualify as "unvirtuous citizens" who lack Second Amendment rights. ***Binderup***, 836 F.3d at 348. However, whether the term "unvirtuous citizen" is more expansive and includes non-violent or non-dangerous individuals is a subject of ongoing debate. *Compare, e.g.,* ***Binderup***, 836 F.3d at 348 (concluding that an "unvirtuous citizen" includes "any person who has committed a serious criminal offense, violent or non-violent"); *but see* ***Binderup***, 836 F.3d at 367-70 (Hardiman, J., *concurring in part and concurring in the judgments*) (concluding that an "unvirtuous citizen" only extends to those who were likely to commit violent offenses or pose a danger to the public).

Moreover, even if an "unvirtuous citizen" includes all individuals convicted of a felony, the term felony in common law applied "only to a few very serious, very dangerous offenses such as murder, rape, arson, and robbery." *See* Kates & Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 HASTINGS L.J. 1339, 1362 (2009). Thus, at minimum, the term "unvirtuous citizen," must cover a person who has committed a "serious criminal offense." ***Binderup***, 836 F.3d at 348-49.

Wisconsin's felon in possession statute sweeps broadly opening the door for constitutional "as applied" challenges to its application to Wisconsin citizens. Wisconsin's felon in possession statute, enacted in 1982, imposes a lifetime ban on

all felons.[13] It does not distinguish between persons convicted of violent crimes and those convicted of non-violent crimes. Nor does it distinguish between serious felonies, such first-degree intentional homicide punishable by life in prison, and non-serious felonies, such as interrupting a funeral procession twice, which carries a maximum potential term of initial confinement of 18 months. *See* Wis. Stat. §§ 940.01; 947.011. Additionally, the statute does not provide any exception for antique firearms. Wis. Stat. § 941.29(2)[14]; *contrast with* 18 U.S.C. § 921(a)(3) & (16) (excluding "antique firearms").

And, in particular, here, no justification exists to permanently deprive Mr. Culver of his fundamental Second Amendment right to keep and bear arms.

First, 55-year-old Mr. Culver does not have any convictions for violent offenses, such as battery, or any property crimes, such as robbery or theft. (*See* 11:4). His "violent recidivism risk" and "general recidivism risk" is "low." (11:16). He has "residential stability" and a lengthy

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[13] In Wisconsin, "felony" defines hundreds of crimes. Felonies may result from: issuing worthless checks greater than $2500 (§ 943.24(2)); loan sharking (§ 943.28); forgery (§ 943.38); falsifying business documents (§ 943.39), twice stealing cable (§ 943.45(3)(d)); twice stealing cell phone service (§ 943.455(4)(d)); twice videotaping a movie without consent (§ 943.49(2)(b)(2)); or causing injury by negligent handling of fireworks (§ 940.24(1)).

[14] "Firearm" is not defined under chapter 941, but has been determined to mean "a weapon that acts by force of gun powder to fire a projectile irrespective of whether it is inoperable due to disassembly." ***State v. Rardon***, 185 Wis. 2d 701, 706-07, 518 N.W.2d 330 (Ct. App. 1994) (noting that those convicted of a felony are not allowed to possess *any* firearms—operable, inoperable, assembled, or disassembled).

employment record. (11:10, 14). While Mr. Culver has four operating while intoxicated ("OWI") convictions, Wisconsin statutes do not define or list OWI offenses as "violent" offenses. *See* Wis. Stat. § 941.291; Wis. Stat. § 301.048(2)(bm)1.a. Moreover, Mr. Culver's most recent conviction, an OWI fourth offense, is a class H felony, which is the second least serious felony classification in Wisconsin.

Second, in this case, Mr. Culver was not found walking around town with a gun in his pocket. Nor was he transporting a gun in a vehicle. Rather, two antique firearms and a handgun were obtained from his residence. There are no allegations in the record that Mr. Culver possessed the firearms while intoxicated or used the firearms in a violent manner.

Therefore, Wisconsin's felon in possession statute is unconstitutional as applied to Mr. Culver. Allowing Mr. Culver to possess a firearm does not pose a danger to the public. *Contrast with* ***Williams***, 616 F.3d at 693-94 (holding that the federal firearm statute was not unconstitutional as applied to a defendant who was convicted of a violent felony for a brutal beating that resulted in 65 stitches for the victim).

4. This case is distinguishable from ***State v. Pocian***.

In 1985, Pocian and a friend wrote and cashed nearly $1500 worth of stolen checks. ***Pocian***, 2012 WI App 58, ¶ 3. Pocian was convicted of three counts of uttering a forged writing in violation of Wis. Stat. § 943.38(2). ***Id.*** Subsequently, in 2008, Pocian shot two deer and registered them with the DNR. ***Id.*** ¶ 4. He was subsequently charged with being a felon in possession of a firearm in violation of Wis. Stat. § 941.29(2). ***Id.***

In ***Pocian***, the defendant argued that the felon in possession statute was unconstitutional facially and as applied because it makes no distinction whatsoever between felony crimes involving the use of force and violence and crimes that are non-violent. All individuals regardless of the type of felony are subject to a lifetime ban on the possession of firearms. *See* ***id.*** ¶¶ 5, 13.

On appeal, in regards to the as applied challenge, the ***Pocian*** court held that "[w]hile Pocian did not utilize physical violence in the commission of his three felonies, he did physically take his victim's property." ***Id.*** ¶ 15. Additionally, this Court stated that "[t]he legislature has determined Pocian's crimes are felonies. As such, Pocian has legislatively lost his right to possess a firearm." ***Id.***

Mr. Culver asserts that his circumstances are distinguishable from those in ***Pocian***. In ***Pocian***, the defendant's three underlying felonies for uttering a forged writing involved "physically taking a victim's property." There is no indication in the record that Mr. Culver has ever been convicted of taking another's property. (11:4).

Moreover, in ***Pocian***, the defendant's three underlying felony convictions were class C felonies, which carried a maximum term of imprisonment of 10 years. *See* Wis. Stat. §§ 943.38(2) & 939.50(3)(c) (1985-86). In contrast, here, Mr. Culver's OWI fourth conviction is less severe—it is a class H felony, which carries a maximum term of imprisonment of 6 years. Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)4 & 939.50(3)(h).

In addition, the defendant in ***Pocian*** actually used a firearm to shoot deer outside his home, unlike Mr. Culver, who was simply storing two handguns and an antique firearm at his residence. *See* ***Heller***, 554 U.S. at 628 (concluding that

the handgun possession ban at issue "extends . . . to the home, where the need for defense of self, family, and property is most acute . . . banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster.").

However, given that the underlying felonies at issue in ***Pocian*** may also be characterized as "non-violent" and lacking an element of force, Mr. Culver acknowledges ***Pocian*** could be interpreted as precluding an as applied challenge in this case. If this Court determines that ***Pocian*** precludes an as applied challenge in this case, Mr. Culver asserts that ***Pocian*** was wrongly decided in order to preserve this challenge for Wisconsin Supreme Court review.

In ***Pocian***, this Court stated that "[t]he legislature has determined Pocian's crimes are felonies. As such, Pocian has legislatively lost his right to possess a firearm." ***Id.*** ¶ 15. Yet, when the Second Amendment applies, its core guarantee cannot be withdrawn by the legislature or balanced away by the courts:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634-35.

Therefore, the felon in possession statute is unconstitutional as applied to Mr. Culver.

F. This argument is not waived.

Mr. Culver's constitutional argument should not be waived due to his plea. The plea waiver rule is a rule of judicial administration, and courts may decline to apply the waiver rule "particularly if the issues are of state-wide importance." ***State v. Tarrant***, 2009 WI App 121, ¶ 6, 321 Wis. 2d 69, 772 N.W.2d 750. Gun ownership rights and the right to protect oneself and one's family are undeniably important issues; as is the question of the application of Wis. Stat. § 941.29(2) to a person with a non-violent operating while intoxicated felony. Further, on February 21, 2017, the United States Supreme Court granted a petition for certiorari in ***Class v. United States***, in which the question presented asked, "Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction?"[15] Thus, Mr. Culver's argument should be resolved on the merits.

Lastly, if this Court deems the argument is meritorious, but finds that it is waived, Mr. Culver alleges ineffective assistance of counsel and requests a remand for a hearing. An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). To determine whether counsel's performance fell below the constitutional standard, Wisconsin courts apply the two-prong test outlined in

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[15] *See* United States Supreme Court docket page for ***Class v. United States***, No. 16-424, available at: https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/16-424.htm; http://www.scotusblog.com/case-files/cases/class-v-united-states/

Strickland v. Washington, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d at 273. The defendant must establish both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***Id.***

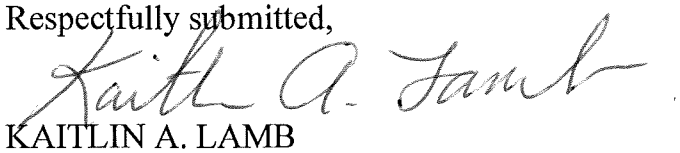
Here, Mr. Culver was deprived of effective assistance of counsel. Trial counsel performed deficiently by failing to challenge the constitutionality of Wis. Stat. § 941.29(2) as applied in light of ***Heller*** and ***McDonald***. There can be no reasonable strategic reason for failing to challenge the constitutionality of the statute. Additionally, Mr. Culver was prejudiced because he pled to an unconstitutional statute. Had Mr. Culver known the statute was unconstitutional as applied to him, he would not have entered a plea. Therefore, Mr. Culver requests an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

CONCLUSION

For the reasons stated above, Mr. Culver respectfully requests that this Court issue an order vacating his convictions and dismissing the complaint with prejudice.

Dated this 17th day of April, 2017.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,005 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of April, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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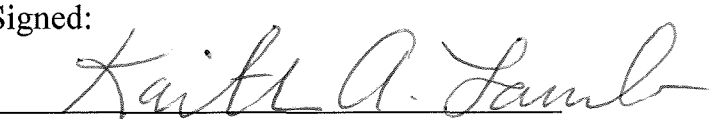

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APPENDIX

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