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 JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE MARY KAY WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Under Wis. Stat. § 942.09(3m)(a)2., it is a Class A misdemeanor to post or publish a depiction of a person who is nude, partially nude, or engaged in explicit sexual activity without the depicted person's consent. Is the statute unconstitutionally overbroad in violation of the First Amendment?

The circuit court answered: no. This Court should affirm the circuit court's ruling.

2. Is Wis. Stat. § 942.09(3m)(a)2. void for vagueness?

The circuit court answered: no. This Court should affirm the circuit court's ruling.

3. Does the statute violate the dormant Commerce Clause?

The circuit court answered: no. This Court should affirm the circuit court's ruling.

4. Under Wis. Stat. § 941.29(2), a person who has been convicted of any felony in the State of Wisconsin is prohibited from possessing a firearm. Is the statute unconstitutional as applied to Norris Culver?

The circuit court answered: no. This Court should affirm the circuit court's ruling.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and can be resolved on the basis of the parties' written arguments. Publication is warranted because the constitutional questions regarding Wis. Stat. § 942.09(3m)(a)2. have not yet been addressed in a published opinion by this Court or the Wisconsin Supreme Court.

INTRODUCTION

Wisconsin Stat. § 942.09(3m)(a)2. makes it a Class A misdemeanor to "post or publish" on the internet images of a person while nude, partially nude, or engaged in sexually explicit conduct without that person's consent. Defendant-appellant Norris Culver pleaded guilty to violating this statute because he posted such images of a former girlfriend on-line. On appeal, he argues that the statute violates the First Amendment and the dormant Commerce Clause. He does not claim that his own conduct is entitled to First Amendment protection. Instead, he invites this Court to invalidate the statute on facial grounds, claiming that it is both overbroad and void for vagueness. This Court should decline this invitation, because the statute is neither overbroad nor vague. It is narrowly tailored to restrict the publication of images that are unworthy of any constitutional protection and nothing more. Further, the statute is clearly written. There can be no serious question about the conduct it proscribes. In addition, the Court should reject Culver's dormant Commerce Clause argument because he lacks standing to raise the claim and because the statute has no effect on interstate commerce.

Wisconsin Stat. § 941.29(2)[1] makes it a Class G felony for a person convicted of a felony in Wisconsin to possess a firearm. Culver pleaded guilty to violating this statute because he possessed several firearms despite his four prior felony convictions. On appeal, Culver argues that the statute is unconstitutional as applied to him because his prior convictions were for a "nonviolent" felony, i.e., operating a vehicle while intoxicated. That argument is dead on arrival

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[1] In the 2015-16 version of the Wisconsin Statutes, this provision is Wis. Stat. § 941.29(1m)(a).

because this Court rejected it five years ago in *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894.

STATEMENT OF THE CASE

Culver pleaded guilty to one count of posting or publishing a private representation without consent in violation of Wis. Stat. § 942.09(3m)(a)2., and one count of felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). (R. 12–13.)

Culver filed a postconviction motion to withdraw his guilty pleas. (R. 28.) He argued that the post-or-publish statute is facially unconstitutional. (R. 28:3.) Implicitly conceding that the statute was constitutional as applied to him, Culver argued that it was overbroad and void for vagueness, thus violating the First Amendment. (R. 28:3, 7.) He additionally contended that the post-or-publish statute was invalid under the dormant Commerce Clause. (R. 28:7.) With respect to the felon-in-possession statute, Culver argued that it was unconstitutional as applied to him because his previous criminal convictions were non-violent. (R. 28:11–12.) He had four prior convictions for operating a vehicle while intoxicated. (R. 1:3.)

The circuit court heard argument on the postconviction motion. (R. 39.) The court denied the motion on the above grounds. (R. 39:11, 16.)

STANDARD OF REVIEW

Culver presents four constitutional challenges to Wisconsin statutes. These are questions of law that this Court reviews de novo. *State v. Stevenson*, 2000 WI 71, ¶ 9, 236 Wis. 2d 86, 613 N.W.2d 90. The de novo standard applies to overbreadth challenges. *Id.* ¶ 9. It also applies to void-for-vagueness challenges, *see State v. Bertrand*, 162 Wis. 2d 411, 416–17, 469 N.W.2d 873 (Ct. App. 1991); challenges under the dormant Commerce Clause,

see Northwest Airlines, Inc. v. Wis. Dep't of Rev., 2006 WI 88, ¶ 25, 293 Wis. 2d 202, 717 N.W.2d 280; and challenges to the constitutionality of the felon-in-possession statute, *see Pocian*, 341 Wis. 2d 380, ¶ 6.

ARGUMENT

I. Wisconsin Stat. § 942.09(3m)(a)2. comports with the First Amendment and is not overbroad.

A. General First Amendment principles.

The First Amendment to the United States Constitution and Article I, section 3 of the Wisconsin Constitution guarantee the right to free speech and free expression. Generally, statutes are presumed to be constitutional. *Stevenson*, 236 Wis. 2d 86, ¶ 10. Where a "statute implicates the exercise of First Amendment rights, however, the burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster." *Id.* Statutes that discriminate against speech on the basis of content are subject to strict scrutiny. *See State v. Baron*, 2009 WI 58, ¶¶ 43–44, 318 Wis. 2d 60, 769 N.W.2d 34. To survive strict scrutiny, a statute must be narrowly drawn to achieve a compelling state interest. *Id.* ¶ 15.

Rights of free speech and expression are not unlimited. Historically, "our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942)). For example, "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."

Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940). The supreme court has "recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations." *R.A.V.*, 505 U.S. at 383.

States may regulate "certain categories of words or conduct without substantially infringing on speech or expressive conduct protected by the First Amendment." *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. 2006). Content regulation is not the same as viewpoint regulation. In *R.A.V.*, the Court explained that categorical proscriptions against particular types of speech—i.e., "fighting words" or libel—are permissible even though they are content-based. 505 U.S. at 383–88; *see also Baron*, 318 Wis. 2d 60, ¶¶ 43, 57 (identity theft statute is content-based but permissible under the First Amendment). In contrast, a statute that treats particular instances of fighting words or libel differently depending on the viewpoint expressed is viewpoint-based and not permissible. *See R.A.V.*, 505 U.S. at 382–85. "[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384.

Where the class of speech subject to content-based discrimination is "proscribable" rather than "fully protected," government regulation is more likely to survive constitutional scrutiny. The First Amendment "applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *R.A.V.*, 505 U.S. at 387 (citations omitted). "[C]ontent discrimination among various instances of a class of proscribable speech often does not pose this threat." *Id.* at 388. "When the basis for the content discrimination consists entirely of the very

reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.*

Like other forms of expression, photography that has a communicative or expressive purpose is protected by the First Amendment. *See ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003); *Douglass v. Hustler Magazine, Inc.* 769 F.2d 1128, 1141 (7th Cir. 1985).

B. Right to privacy and the First Amendment.

An important limitation on one person's freedom of speech is another person's right to privacy. A state may generally regulate speech or expressive conduct that invades the privacy of another without running afoul of the First Amendment. *See Dunham*, 708 N.W.2d at 565–66. "[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), *quoted in United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–60 (1985) (plurality opinion) (where defamatory statements did not involve matters of public concern, proof of actual malice not required).

In particular, "sexually explicit publications concerning a private individual" are "not afforded First Amendment protection." *United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014). This is an example of

"proscribable speech." In *York v. Story*, 324 F.2d 450 (9th Cir. 1963), one police officer took nude photographs[2] of the plaintiff and two other officers developed the photographs and circulated them among department staff. The court concluded that these actions constituted an actionable invasion of privacy that was not protected by the First Amendment. "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Id.* at 455.

A woman's privacy interest in protecting her nude body from uninvited observation was central to this Court's analysis of Wis. Stat. § 942.09(2)(am)1.[3] in *State v. Jahnke*, 2009 WI App 4, 316 Wis. 2d 324, 762 N.W.2d 696. Subsection (2)(am)1. prohibits a person from recording a person in the nude without her consent under circumstances where she has a reasonable expectation of privacy. The Court wrote: "By placing limits on the ability of others to record, the statute protects a person's interest in limiting, as to time, place, and persons, the viewing of his or her nude body." *Id.* ¶ 9. "[T]he pertinent privacy element question is whether the person depicted nude had a reasonable expectation, under the circumstances, that he or she would not be recorded in the nude." *Id.* Jahnke argued that the victim, his ex-girlfriend, had no expectation of privacy because she "knowingly permitted Jahnke to view her nude in-person when they were in her bedroom together." *Id.* ¶ 12.

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[2] The victim had gone to the police department to report an assault upon her. The photographing officer informed her that he had to photograph her undressed as part of the assault investigation. *York*, 324 F.2d at 452.

[3] A different subsection of the statute at issue in this case.

This Court was not convinced. "It is one thing to be viewed in the nude by a person at some point in time, but quite another to be recorded in the nude so that a recording exists that can be saved or distributed and viewed at a later time." *Id.*

A California appeals court reached a similar result in *People v. Iniguez*, 202 Cal. Rptr. 3d 237 (Cal. App. Dep't Super. Ct. 2016). Iniguez had published a nude photograph of his ex-girlfriend on her employer's Facebook page. He was convicted of violating a California statute prohibiting the distribution of images of "intimate body part[s]" captured "under circumstances where the parties agree or understand that the image shall remain private." *Id.* at 243. Iniguez argued that the statute was overbroad.[4] The court disagreed. In pertinent part, it noted that the statute proscribed only photographs "taken under circumstances where the parties agreed or understood the images were to remain private. 'The government has an important interest in protecting the substantial privacy of individuals from being invaded in an intolerable manner.'" *Id.* (citation omitted). "The statute was not overbroad because the limitations specified therein greatly narrowed its applicability, diminishing the possibility that it could lead persons to refrain from constitutionally protected expression, and it constituted 'a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973)).

The Eighth Circuit developed a specific First Amendment test for determining when the government may constitutionally "regulate the public disclosure of facts about

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[4] Overbreadth doctrine is explained in Part I.D. of this Argument.

private individuals." *See Coplin v. Fairfield Pub. Access Television Committee*, 111 F.3d 1395, 1404 (8th Cir. 1997). Under the four-part *Coplin* test, a statute may be constitutional even if it cannot survive First Amendment strict scrutiny. In the absence of a compelling state interest, speech may nonetheless be regulated on the basis of its constitutionally proscribable content if (1) the law is viewpoint-neutral; (2) "the facts revealed are not already in the public domain;" (3) the "facts" revealed "are not a legitimate subject of public interest;" and (4) they are "highly offensive." *Id.* at 1405.

In *United States v. Petrovic*, the Eighth Circuit applied the *Coplin* test to a First Amendment challenge to a prosecution under the federal stalking statute. Petrovic punished his ex-girlfriend for breaking up with him by mailing a vulgarly captioned postcard to her family, neighbors, and co-workers that depicted her "scantily clad." 701 F.3d at 853. The cards provided an address for a website that contained "20,000 or 30,000 pages" of material, including dozens of links to images of the victim nude or engaging in sex acts with Petrovic, video-recordings of their sexual activities, photographs, writings recording the victim's suicide attempts, and more. *Id.*

The court began its analysis by noting that the victim was a private individual and Petrovic's "communications revealed intensely private information about [her]." *Id.* at 855. Applying the *Coplin* test, it first found that the interstate stalking statute is viewpoint neutral. "It proscribes stalking and harassing conduct without making the further content discrimination of proscribing only certain forms of that conduct." *Id.* at 856. Second, it noted that "the intimately private facts and photographs revealed by Petrovic were never in the public domain before Petrovic began his campaign to humiliate [her]." *Id.* at 856. Third, the public had no legitimate interest in the victim's

private sexual activities or other private facts about her life. *Id.* Finally, the material published by Petrovic in the postcards and on the internet were "highly offensive." *Id.* For all these reasons, the application of the statute to Petrovic was constitutional. *See also Osinger*, 753 F.3d at 948 (Ninth Circuit's application of the *Coplin-Petrovic* test to cyberstalking prosecution).

A statute proscribing the publication of private, sexually explicit images of a private person without his or her consent does not offend the First Amendment because the State has a compelling interest in protecting individual privacy, and the public has a comparatively low or non-existent interest in the free publication of such images.

C. First Amendment challenges to anti-harassment and anti-stalking statutes.

Courts have considered First Amendment challenges to anti-harassment and anti-stalking statutes applied to speech or speech-related conduct. They have uniformly concluded that such laws do not offend the First Amendment as long as they are viewpoint-neutral. Although these cases are distinguishable in several respects from the right-to-privacy cases and the statute under review, they nevertheless provide guidance to the resolution of the question presented.

In *State v. Hemmingway*, 2012 WI App 133, ¶ 3, 345 Wis. 2d 297, 825 N.W.2d 303, the defendant was charged with stalking his ex-wife by exclusively verbal means, i.e., through a series of intimidating text messages, phone calls, and emails. He moved to dismiss the criminal complaint on First Amendment grounds. The circuit court granted the motion, and this Court reversed. *Id.* ¶ 1. The Court began its analysis by noting that "stalking provides no social benefit, but instead contributes to fear and violence." *Id.* ¶ 4 (citation omitted). Wisconsin's stalking statute is

aimed at an intentional course of conduct "that would cause a reasonable person . . . to suffer emotional distress or to fear bodily injury" to herself or a member of her "family or household," knowing it would cause such distress or fear. Wis. Stat. § 940.32(2)(a). In Hemmingway's case, his "speech [was] incidental to and evidence of his intent to engage in a course of conduct that he knew or should have known would instill fear of violence in [the victim]." 345 Wis. 2d 297, ¶ 16. That "stalking conduct does not trigger First Amendment scrutiny or protection." *Id.*; *see also id.* ¶ 17 (collecting cases).

In *Osinger*, the defendant was convicted of "cyberstalking," i.e., stalking conducted on the internet. Along with other harassing conduct, Osinger created a Facebook page with nude pictures of the victim, and sent emails to her supervisor and colleagues with similar pictures attached. 753 F.3d at 942. Osinger argued that the federal stalking statute was unconstitutionally applied to his supposedly protected speech. The court rejected the argument. "Any expressive aspects of Osinger's speech were not protected under the First Amendment because they were 'integral to criminal conduct' in intentionally harassing, intimidating or causing substantial emotional distress to [the victim.]" 753 F.3d at 947. Furthermore, "[i]n the limited context of [the stalking statute], Osinger's speech is not afforded First Amendment protection for the additional reason that it involved sexually explicit publications concerning a private individual." 753 F.3d at 948.

Dunham v. Roer involved an overbreadth challenge to a section of Minnesota's anti-harassment statute defining harassment to include "intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial effect on the safety, security, or privacy of another." Minn. Stat. § 609.748, subd. 1(a)(1).The court reasoned that the statute was aimed at

"constitutionally unprotected 'fighting words' . . . , 'true threats' . . . , and speech or conduct that is intended to have a substantial adverse effect, i.e., is in violation of one's right to privacy." *Dunham*, 708 N.W.2d at 566. "[T]he state may regulate [these] categories of words or conduct without substantially infringing on speech or expressive conduct protected by the First Amendment." *Id.* at 565. "[T]he governmental interest in protecting individuals against repeated and substantial intrusions far outweighs any incidental expression of personal 'opinion.'" *Id.* at 567. That "incidental impact . . . if any . . . does not render the statute substantially overbroad." *Id.* Because the statute was "narrowly tailored to ban or regulate unprotected words or conduct," it did "not implicate the First Amendment and cannot, therefore, be successfully challenged as facially overbroad." *Id.* at 565.

First Amendment challenges to anti-harassment and anti-stalking statutes have failed because the statutes are viewpoint-neutral and because they punish conduct rather than speech. Furthermore, the value of any speech restricted by these statutes is low, and the government interest in protecting individual privacy is high.

D. Overbreadth doctrine.

A person may bring a First Amendment challenge to a statute on facial grounds. A facial challenge allows a person to argue that a statute is unconstitutional even where his own First Amendment rights are not affected. *See, e.g.*, *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). A statute can be challenged facially because it is "overbroad" or "void for

vagueness."[5] *See, e.g.*, *Vincent*, 466 U.S. at 796; *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 476–79 (7th Cir. 2012).

The overbreadth doctrine allows a court to invalidate a statute on First Amendment grounds if it restricts constitutionally protected speech as well as unprotected speech. The doctrine "prohibits the Government from banning unprotected speech [only] if a *substantial* amount of protected speech is prohibited or chilled in the process." *State v. Robert T.*, 2008 WI App 22, ¶ 7, 307 Wis. 2d 488, 746 N.W.2d 564 (citation omitted) (emphasis added). The supreme court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003).

The substantiality standard reflects the judicial recognition that "the [overbreadth] doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." *Vincent*, 466 U.S. at 799. "[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Hicks*, 539 U.S. at 119 (citation omitted). If the statute's effect on

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[5] Culver's "void for vagueness" challenge to section 942.09(3m)(a)2. will be discussed in Part II of this Argument.

A statute can also be challenged facially on the theory that it is unconstitutional in all applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Culver makes no such claim here.

constitutionally protected activity is only "incidental," an overbreadth challenge will not succeed. *State v. Thiel*, 183 Wis. 2d 505, 534, 515 N.W.2d 847 (1994).

"The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists.'" *Hicks*, 539 U.S. at 122 (alteration in original) (citation omitted). "[L]imited examples of potentially protected speech do not suffice. For an overbreadth challenge to succeed, the law in question must frequently intrude into areas of protected speech." *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 367 (D. Del. 2015). "Marginal infringement or fanciful hypotheticals of inhibition that are unlikely to occur will not render a statute constitutionally invalid on overbreadth grounds." *Stevenson*, 236 Wis. 2d 86, ¶ 14. An overbreadth challenge "founded upon an extremely liberal and . . . preposterous construction of the ordinance" will fail. *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 47, 426 N.W.2d 329 (1988). "In the absence of a pattern of unconstitutional applications," most courts will not find a statute unconstitutionally overbroad. *Matusiewicz*, 84 F. Supp. 3d at 367.

This Court has set out the following four-step test for overbreadth analysis: (1) Has the challenger shown that the First Amendment applies to the case? (2) Is the subject matter of the statute conduct or speech? (3) If the latter, does the statute substantially prohibit protected speech? (4) If the regulation is content-based, does it survive strict scrutiny? *Hemmingway*, 345 Wis. 2d 297, ¶ 12.

In short, this Court may invalidate a statute on overbreadth grounds, but only if the challenger carries his burden of proving that statute endangers a "substantial" amount of protected speech.

E. Analysis.

1. Section 942.09(3m)(a)2. withstands strict scrutiny.

Section 942.09(3m)(a)2. does not violate the First Amendment. It does restrict speech. *See, e.g.*, *ETW Corp.*, 332 F.3d at 924. It is content-based but viewpoint-neutral. *See Baron*, 318 Wis. 2d 60, ¶ 43. It is therefore subject to strict scrutiny. *See id.* ¶¶ 43–44. The statute easily survives strict scrutiny because it is narrowly drawn to achieve a compelling state interest. *See id.* ¶ 45.

The State has a compelling interest in protecting individuals from unconsented posting or publication of photographs or other representations of them while nude, partially nude, or engaged in sexually explicit conduct. *See Osinger*, 753 F.3d at 948; *York*, 324 F.2d at 455; *Iniguez*, 202 Cal. Rptr. 3d at 243; *Stevenson*, 236 Wis. 2d 104, ¶¶ 46–47 (Wilcox, J., dissenting). The State's interest in protecting a private individual's right to privacy in these circumstances is so compelling that some courts have concluded that a publisher has no First Amendment protection whatsoever in publishing such images. *See Osinger*, 753 F.3d at 948; *York*, 324 F.2d at 455; *see also Petrovic*, 701 F.3d at 855 (noting that a speaker's First Amendment protections when exposing a private person's private matters are "less rigorous"). This Court, in *Jahnke*, emphasized that "a person's interest in limiting, as to time, place, and persons, the viewing of his or her nude body" is an important subject for legislative concern and protection. *See* 316 Wis. 2d 324, ¶ 9.

Section 942.09(3m)(a)2. is narrowly drawn to achieve the State's compelling interest in protecting individual privacy. The California statute examined in *Iniguez*, like the Wisconsin statute, was limited to images captured "under circumstances where the parties agree or understand

that the image shall remain private." Cal. Pen. Code § 647(j)(4)(a). Given that limitation,[6] the *Iniguez* court concluded that the California statute "greatly narrowed its applicability" to protect the "compelling needs of society" and its "important interest in protecting" individual privacy. 202 Cal. Rptr. 3d at 243. The statute was thus unlikely to inhibit "constitutionally protected expression." *Id.*

Similarly, the Wisconsin statute is narrowly drawn. It restricts the intentional and nonconsensual posting and publication of nude, partially nude, or sexually explicit images of a person that the person intended would be seen or possessed by a specific person or persons only. Wis. Stat. § 942.09(1)(bn), (3m)(a)2. It reaches that far and no further. The statute does not threaten to restrict any speech beyond this single category of intrusive speech, speech that does not warrant First Amendment protection. *See Osinger*, 753 F.3d at 948; *York*, 324 F.2d at 455; *Dunham* 708 N.W.2d at 567. The publication of the images proscribed here is the visual equivalent of "epithets or personal abuse" that does not communicate "information or opinion safeguarded by the Constitution." *Cantwell*, 310 U.S. at 309–10. "[T]he state may regulate [these] categories of words or conduct without substantially infringing on speech or expressive conduct protected by the First Amendment." *Dunham*, 708 N.W.2d at 565. The statute's restriction of such images does not raise a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390.

Section 942.09(3m)(a)2. is narrowly tailored to further a compelling state interest. That interest is the protection of an individual's privacy right not to have nude, partially

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[6] The court also took into account the intentional infliction of emotional distress element of the California statute, which is not part of section 942.09(3m)(a)2. *Iniguez*, 202 Cal. Rptr. 3d at 243.

nude, or sexually explicit images of himself or herself broadcast on the internet.

2. The *Coplin/Petrovic* test.

The State has shown that section 940.29(3m)(a)2. survives strict scrutiny. If this Court does not agree that the state interest underlying the statute is compelling, it should use the Eighth Circuit's *Coplin/Petrovic* analysis to determine whether the State's "regulat[ion] [of] the public disclosure of facts about private individuals" in this statute is constitutional. *Coplin*, 111 F.3d at 1404. The statute easily passes the *Coplin/Petrovic* test.

As in the *Petrovic* case, the victim was a private individual and Petrovic revealed "intensely private information" about her. *Petrovic*, 701 F.3d at 855. And here, all four parts of the *Coplin/Petrovic* test are satisfied. First, the statute is viewpoint-neutral. *Id.* at 856. Second, the photographs revealed by Culver were "never in the public domain" before Culver posted them on the internet. *Id.* Third, the public had no legitimate interest in the photographs. *Id.* Finally, the material published on the internet by Culver were "highly offensive." *Id.*

Under the *Coplin/Petrovic* test, the statute is constitutional.

3. Culver's overbreadth arguments fail.

Ordinarily, the burden is on the State to prove beyond a reasonable doubt that a statute does not violate the First Amendment. *Stevenson*, 236 Wis. 2d 86, ¶ 9. However, where, as here, a party challenges a statute on overbreadth grounds, the burden is on the challenger to prove that "substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (citation omitted). Culver has not and cannot do that in this case.

Under the four-part *Hemmingway* test, it is clear that the statute is not overbroad. To begin, the First Amendment does apply to the case, insofar as it restricts speech. *See Hemmingway*, 345 Wis. 2d 297, ¶ 12. Second, speech is the subject matter of the statute. *See id.* However, with respect to the third *Hemmingway* question, it does not substantially prohibit protected speech. *See id.* On the contrary, it prohibits constitutionally unprotected speech only. Finally, as shown above, the statute survives strict scrutiny because it is narrowly drawn to protect the State's compelling interest in protecting individual privacy from the unconsented posting or publication of "private representations."

Culver makes eight overbreadth arguments. The first seven arguments are meritless. Culver's eighth argument is based on a correct legal analysis but does not support his contention that the statute is overbroad. Therefore, he has failed to carry his burden of proving that the statute is substantially overbroad.

Culver argues first that "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." (Culver's Br. 10.) Where the privacy interest is at stake—especially the privacy interest in limiting the when, where, and by whom a person's nude body is viewed—the First Amendment does not demand proof of an evil mental state. It is enough that the defendant exposed a private representation without the depicted person's permission. Any reasonable person—even in our increasingly permissive society—would think twice before putting a revealing picture on the internet without first checking that the person depicted did not object. Such prudent and respectful behavior is to be expected from friends, mothers-in-law (*see* Culver's Br. 10), and spurned lovers alike.

Culver recruits *Baron* to support this part of his argument. (Culver's Br. 10.) *Baron* involved an as-applied First Amendment challenge to the identity theft statute, Wis. Stat. § 943.201(2)(c). *See Baron*, 318 Wis. 2d 60, ¶ 2. Christopher Baron, an emergency medical technician for Jefferson County, acquired the email password of Mark Fisher, the director of the county's Emergency Medical Services. Pretending to be Fisher, Baron collected emails exchanged between Fisher and various paramours (Fisher was married) and forwarded the emails to people in the community. Fisher committed suicide the day after the email blast. *Id.* ¶ 4. Baron was charged with identity theft under subsection (c) of the identity theft statute, which includes as an element the defendant's intent "[t]o harm the reputation . . . of the individual."

Baron argued that, as applied to him, the identity theft statute violated the First Amendment because it "eliminate[d] [his] First Amendment right to defame a public official with true information." *Id.* ¶ 48. In response to that argument, the supreme court reasoned as follows:

> While Baron's First Amendment right to defame a public official is somewhat curtailed by this statute because it impacts whether Baron can use Fisher's identity to dispense the harmful information, the restriction is limited. The statute does not prevent Baron from revealing the reputation-harming information so long as the method chosen does not entail Baron pretending to be Fisher. . . . [T]his identity statute is limited in that it applies only when one has stolen another person's identity and proceeds to use that identity with the intent to harm the individual's reputation. Specifically, a defendant, with the intent to harm a person's reputation, must use the individual's personal identifying information without consent and by representing that he or she is the individual.

Id. ¶ 49.

Culver's use of *Baron* turns the opinion on its head. Baron's theory was that his "intent to harm" Fisher with speech was constitutionally protected, because he had a First Amendment right to make accurate defamatory statements about a public official. The supreme court held that the identity theft statute did not violate Baron's right to defame Fisher. The statute did not criminalize his protected speech; rather, it criminalized his use of Fisher's stolen identity to make the defamatory statements without Fisher's consent. The case does not say, as Culver wants it to, that the statute was constitutional because it included an intent to harm element. On the contrary, it states that, while Baron's intent to harm Fisher with speech may have been constitutionally protected, his theft of Fisher's identity and use of Fisher's identity without his consent was not protected by the First Amendment.

Culver's second overbreadth argument is that the statute does not distinguish between images that cause harm and those that do not. He invokes *Hemmingway*'s analysis of the stalking statute, Wis. Stat. § 940.32(2), to support this argument. A stalking conviction requires proof of an intentional course of conduct that would cause a reasonable person to suffer serious emotional distress or fear bodily injury or death, that the defendant knows will cause such distress or fear in his victim, and that actually does cause such distress or fear. *See* Wis. Stat. § 940.32(2). In *Hemmingway*, the defendant's stalking conviction was based on text messages, phone calls, and emails to his ex-wife. 345 Wis. 2d 297, ¶ 2. This Court concluded that the defendant's speech acts were "incidental to and evidence of his intent to engage in a course of conduct that he knew or should have known would instill fear of violence in [his ex-wife]." *Id.* ¶ 16. The Court explained further that the stalker's bad intent is "the core of the statute" and critical to the statute's constitutionality. *Id.* ¶ 18. Where the

defendant's stalking conduct consists of speech, prosecution under the stalking statute "does not trigger First Amendment scrutiny or protection." *Id.* ¶ 16.

Hemmingway and this case are easily distinguishable. Absent a speaker's intent to cause serious emotional distress or fear of bodily injury or death, text messages, phone calls, and emails are benign categories of communication; it is the bad intent that make those communications criminal. In contrast, the unconsented posting or publication of private representations of a person while nude, semi-nude, or engaged in sexually explicit activity is presumptively distressing. Most people would object to such depictions of themselves being posted or published on the internet. Therefore, unlike the use of ordinary modes of communication to support a stalking conviction, further proof of individual or specific harm is unnecessary for a conviction under section 942.09(3m)(a)2. to survive constitutional scrutiny.

Third, Culver is concerned that the term "depiction" is not defined in the statute.[7] He states that "a 'depiction' could encompass a nude sketch, drawing, or cartoon of a person that is posted online." (Culver's Br. 11.) He implies, but does not actually argue, that including such "depictions" within the ambit of the statute would be constitutionally questionable and that the statute is therefore overbroad. But Culver does not explain how the extension of the statute to such images makes it overbroad. He does not contend that a drawing and a photograph that violate a person's right to privacy in the same way cannot be regulated in the same way. If there is a constitutional difference between a

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[7] The State acknowledges that "depiction" is undefined in the statute. However, the term "[r]epresentation" is defined. *See* Wis. Stat. § 942.09(1)(c).

photograph and a drawing for purposes of this statute, Culver must explain what it is. The burden of proving the statute's overbreadth is on him. *See Hicks*, 539 U.S. at 122. This third overbreadth argument is undeveloped and warrants neither the State's response nor the Court's consideration. *See State v. Jones*, 2002 WI App 196, n.6, 257 Wis. 2d 319, 651 N.W.2d 305.

Fourth, Culver asserts that the statute is overbroad because it "does not provide any limitation on *where* the 'depiction' or 'private representation' is captured." (Culver's Br. 11 (emphasis added).) Again, this argument is not sufficiently developed. Why should location matter? Regardless of where a picture is taken, the consent restrictions on posting or publishing it are the same. Culver's "mooning" example does not advance his argument. (Culver's Br. 12.) A teen-aged boy may willingly "moon" in a public park, and may even consent when a friend photographs the incident with the understanding that the photograph will go no further or be shared only among a small circle of friends. *See* Wis. Stat. § 942.09(1)(bn). That same boy may nevertheless be aghast if the picture turns up on the internet, where it can be seen by his parents, his teachers, a girl he's sweet on, college admissions officers, and potential employers. The important thing is the depicted person's intent and consent, not the place the representation was captured. *See* Wis. Stat. § 942.09(3m)(a)2.

Culver's fifth argument is that the statute is overbroad because its "definition of nudity is expansive and includes images that are commonplace, non-obscene, and do not implicate personal privacy interests." (Culver's Br. 12.) To illustrate his point, he includes two celebrity photographs from the internet. (*Id.*) These photographs (especially the second one) reveal far more than the ordinary person would willingly show outside of an intimate setting. These images are not "commonplace." Presumably, the women depicted did

not "intend[]" the photographs to be viewed only by specifically designated persons, and did "consent" to them being posted or published on the internet. *See* Wis. Stat. § 942.09(1)(bn), (3m)(a)2. That is their choice. And, as long as the publication of such images is intentional and consensual, they are beyond the reach of the statute. These photographs may "not implicate [the] personal privacy interests" of the women depicted. However, most people would feel differently. The statute protects the privacy of those people who, unlike the women depicted on page 12 of Culver's brief, do not want revealing images of their bodies posted on the internet for all to see.

Sixth, Culver worries about the timing of the depicted person's consent under section 940.29(3m)(a)2. What if the person consents but then revokes the consent? (Culver's Br. 13.) Culver fails to explain how this puzzle makes the statute overbroad; thus, the State need not respond to and this Court need not address the argument. *See Jones*, 257 Wis. 2d 319, n.6. Regardless, the answer to the question is not obscure. Any publication while the consent was in effect would be permissible and not criminal. If and when the consent was revoked, however, the publisher would be required to remove the image from its location on the internet to the extent possible. If a person posted a private representation with the depicted person's consent and the depicted person later withdrew that consent, the poster would be liable only to the extent he knowingly failed to remove the posting after learning that consent had been withdrawn. For any previous posting, he would be immunized by the original consent.

Culver's seventh argument is based on the following statutory limitation: subsection (3m) does not apply to "[a] person who posts or publishes a private representation that is newsworthy or of public importance." Wis. Stat. § 942.09(3m)(b)3. Culver does not know what "newsworthy"

or "public importance" mean. (Culver's Br. 13.) The "public importance" concept is well-known to First Amendment jurisprudence. The supreme court recently "articulated some guiding principles" in this area in *Snyder v. Phelps*. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" 562 U.S. at 453 (citations omitted), *quoted in Dumas v. Koebel*, 2013 WI App 152, ¶ 26, 352 Wis. 2d 13, 841 N.W.2d 319; *see also Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) (collecting cases). Newsworthiness is a similar concept in privacy cases. *See, e.g., Bogie v. Rosenberg*, 705 F.3d 603, 614 (7th Cir. 2013) (interpreting Wisconsin law).[8] Culver wonders whether nude photographs of Brett Favre are "newsworthy" or "of public importance." (Culver's Br. 13.) The State assumes that, despite Favre's fame, they are not.

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[8] In *Regan v. Time, Inc.*, 468 U.S. 641 (1993), the Court held that a statute permitting publication of United States currency only for "philatelic, numismatic, educational, historical, or *newsworthy* purposes" could not be sustained under the First Amendment "as a valid time, place, and manner regulation because it discriminate[d] on the basis of content." (Emphasis added). The State has located no post-*Regan* opinion in any court holding that the First Amendment bars the "newsworthiness" defense as impermissible in a civil privacy action or a criminal privacy prosecution. On the contrary, "newsworthiness" generally provides a valid defense or exception in an invasion-of-privacy action. *See, e.g., Bogie*, 705 F.3d at 614.

Eighth, Culver argues that Wis. Stat. § 942.09(3m)(a)2. regulates speech, and that the State's reliance on *State v. Robins*, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, in the circuit court was erroneous. (Culver's Br. 13–15.) The State agrees. However, that does not mean that the statute is overbroad.

Culver has not borne his burden of proving that section 942.09(3m)(a)2. is substantially overbroad. *See Hicks*, 539 U.S. at 122. Courts have written that "limited examples of [infringement on] potentially protected speech do not suffice" to prove substantial overbreadth. *Matusiewicz*, 84 F. Supp. 3d at 367. Similarly, "incidental," "[m]arginal infringement or fanciful hypotheticals that are unlikely to occur" are insufficient. *Thiel*, 183 Wis. 2d at 534; *Stevenson*, 236 Wis. 2d 86, ¶ 14. Here, Culver's examples cannot even be described as "limited," "incidental," "marginal," or "fanciful." His arguments are entirely meritless.

The statute is not overbroad.

II. Wisconsin Stat. § 942.09(3m)(a)2. is not void for vagueness.

A. Legal principles.

The "void for vagueness" doctrine is an aspect of procedural due process. *See United States v. Prof'l Air Traffic Controllers Org.*, 678 F.2d 1, 3 (1st Cir. 1982). The "doctrine rests on the basic due process principle that a law is unconstitutional if its prohibitions are not clearly defined." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012). A statute may be unconstitutionally vague if it either fails to provide adequate notice of the proscribed conduct, or allows a decision-maker to apply it arbitrarily. *State v. Nelson*, 2006 WI App 124, ¶¶ 35–37, 294 Wis. 2d 578, 718 N.W.2d 168.

A criminal statute does not provide fair notice "if it does not 'sufficiently warn people who wish to obey the law that their conduct comes near the proscribed area.'" *Nelson*, 294 Wis. 2d 578, ¶ 36. To survive a vagueness challenge, a statute must define prohibited conduct with sufficient clarity to allow "ordinary people [to] understand what conduct is prohibited." *Hegwood*, 676 F.3d at 603 (citation omitted). But the statute "need not define with absolute clarity and precision what is and what is not unlawful conduct." *Nelson*, 294 Wis. 2d 578, ¶ 36 (citations omitted). The possibility that the statute's applicability may be uncertain in some situations does not render it void for vagueness. *Id.*

Alternatively, a statute may be subject to a vagueness challenge if it fails to "establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." *Hegwood*, 676 F.3d at 603 (citation omitted). A statute is vague "if a trier of fact must apply its own standards of culpability rather than those set out in the statute." *Nelson*, 294 Wis. 2d 578, ¶ 37 (citation omitted).

A statute is not unconstitutional merely "because the boundaries of the prohibited conduct are somewhat hazy." *State v. McCoy*, 143 Wis. 2d 274, 286, 421 N.W.2d 107 (1988) (citation omitted). Justice Holmes famously noted that the law sometimes requires individuals to assume the risk that their conduct may cross the line from permissible to prosecutable. While the "precise course of the line may be uncertain, . . . no one can come near it without knowing that he does so." *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). Thus, "it is familiar to the criminal law to make him take the risk." *Id.*

A statute that provides reasonable notice of the conduct prohibited by its terms is not void for vagueness.

B. Analysis.

Section 942.09(3m)(a)2. is not void for vagueness. Its prohibitions are clear and well-defined and provide sufficient notice to an individual that his conduct violates the law. Moreover, it does not leave room for arbitrary enforcement.

The provision prohibits the direct or indirect[9] posting or publication of a depiction of a person that the actor knows is a "private representation" of the person without the person's consent. An earlier provision in the statute clearly defines "[p]ost or publish" as including posting or publication on the internet. Wis. Stat. § 942.09(1)(bg). "Private representation" is also clearly defined. The definition has two important elements. First, the representation depicts "a nude or partially nude person" or "a person engaging in sexually explicit conduct." Wis. Stat. § 942.09(1)(bn). Second, the depiction was intended by the person depicted "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." *Id.*

There is nothing ambiguous about this statute. It is directed exclusively at depictions of persons who are nude, semi-nude, or engaging in sexually explicit conduct. It contains several layers of consent, intent, and knowledge. First, the "private representation" definition limits the audience that may "capture[], view[], or possess[]" the depiction to the audience intentionally chosen ("*intended*") by the person depicted. Wis. Stat. § 942.09(1)(bn). Second, that intended audience consists only of a person who

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[9] The statute is directed at one who posts or publishes or "*causes* to be posted or published" a private representation without consent. Wis. Stat. § 942.09(3m)(a)2.

"captured the [person's] representation" with her "*consent*," or persons to whom the depicted person "directly and *intentionally* gave possession of the representation." *Id.* Third, the prohibition against posting and publishing private representations requires proof that the defendant "*knows*" that the depiction is a private representation. Wis. Stat. § 942.09(3m)(a)2. Finally, the posting or publication of the private representation is criminal only if performed "without the *consent* of the person depicted." *Id.*

Culver's attempts to show that the statute is void for vagueness are unavailing.

First, Culver points to one of the exceptions to the post-or-publish prohibitions: "a private representation that is newsworthy or of public importance." Wis. Stat. § 942.09(3m)(b)3. He contends that these terms do not have clear meanings. The claim is untenable as the State has already shown. *See supra* at 23–24.

Second, Culver argues that the statute is vague because "it does not specify a time frame for the requirement that an image be posted or published without consent." (Culver's Br. 16.) This argument is both undeveloped and unsupported by legal authority. For that reason, the State need not respond to and this Court need not address the argument. *See Jones*, 257 Wis. 2d 319, n.6. Furthermore, the State has already responded to this argument in a slightly different context and shown that it is meritless. *See supra* at 22–23.

Third, Culver argues that "the statute does not define the [geographical] parameters of the offense that will subject a person to Wisconsin's criminal jurisdiction." (Culver's Br. 16.) He wonders whether jurisdiction could be determined by the citizenship or location of the depicted person, the place the image is disclosed, or the place it is viewed.

The statute criminalizes unconsented posting or publishing of a "private representation." It is that act (or causing another person to commit that act) that forms the basis for criminal liability. Thus, "the place where the restricted image was disclosed" (Culver's Br. 16) will give Wisconsin courts jurisdiction if the disclosure was in Wisconsin. *See* Wis. Stat. § 939.03. However, a depicted person's citizenship or location or the place that some third party views the image are irrelevant to the jurisdictional question because these factors are distinct from any act of posting or publishing. Only the posting and publishing are proscribed by the statute.

The statute is not void for vagueness.

III. Wisconsin Stat. § 942.09(3m)(a)2. does not violate the dormant Commerce Clause.

A. Legal principles.

The United States Congress has the power to "regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress, '[the Supreme Court] has consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state [legislation] even when Congress has failed to legislate on the subject.'" *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation omitted). The dormant Commerce Clause prohibits states from enacting "protectionist" legislation. *E.g.*, *Northwest Airlines, Inc.*, 293 Wis. 2d 202, ¶ 27.

Only parties that have been directly injured by allegedly discriminatory legislation—i.e., out-of-state actors engaged in interstate commerce—have standing to challenge

a statute on dormant Commerce Clause grounds. *See, e.g.*, *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 475–76 (5th Cir. 2013); *Com. v. Rose*, 960 A.2d 149, 153 (Pa. Super. Ct. 2008). Only statutes that actually affect *commerce*—i.e., "objects of interstate trade"—are subject to review under the dormant Commerce Clause. *See City of Philadelphia v. N.J.*, 437 U.S. 617, 621–22 (1978). Only "*legitimate* commerce"—business that is legally sanctioned by statutory or constitutional law—is entitled to protection under the dormant Commerce Clause. *State v. Backlund*, 672 N.W.2d 431, 438 (N.D. 2003) (emphasis added); *see also Simmons v. State*, 944 So. 2d 317, 333 (Fla. 2006): *State v. Hantz*, 311 P.3d 800, 805–06 (Mont. 2013).

A statute may be found invalid under the Clause for one of two reasons. First, a state statute that directly regulates or discriminates against interstate commerce or out-of-state actors almost always violates the dormant Commerce Clause. *See, e.g., City of Philadelphia*, 437 U.S. at 624. Second, a facially neutral statute may violate the Clause, but only if it burdens interstate commerce. *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

The supreme court spelled out the test for determining when a facially neutral statute unconstitutionally burdens interstate commerce in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). First, does the statute regulate in-state and out-of-state commerce "even-handedly"? *Id.* Second, is the "local public interest" underlying the statute "legitimate"? *Id.* Third, are the statute's effects on interstate commerce "only incidental"? *Id.* Finally, is "the burden imposed on such commerce . . . clearly excessive in relation to the putative local benefits"? *Id.* "[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

A statute may also be found invalid under the Clause if it "adversely affect[s] interstate commerce by subjecting [targeted] activities to inconsistent regulations" in different jurisdictions. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987).

The burden is on the party challenging the statute to prove that the statute violates the Clause. *See, e.g., Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005).

B. Analysis.

This Court should not reach the merits of Culver's dormant Commerce Clause argument because he does not have standing to raise it. His argument is premised on the notion that section 942.09(3m)(a)2. burdens an out-of-state actor's freedom to engage in interstate commerce. But Culver is neither an out-of-state actor nor engaged in interstate commerce. Therefore, he lacks standing to challenge the statute on dormant Commerce Clause grounds. *See Cibolo Waste, Inc.*, 718 F.3d at 475–76; *Rose*, 960 A.2d at 153. Perhaps Culver believes that he can challenge the statute on overbreadth grounds. (Culver's Br. 18–19.) But he cites no legal authority permitting the use of the overbreadth doctrine in a dormant Commerce Clause case (and the State has found none). Given Culver's failure to supply supporting legal authority, this Court should give the issue no further consideration. *See Jones*, 257 Wis. 2d 319, n.6.

The argument also fails on the merits. Section 942.09(3m)(a)2. does not violate the dormant Commerce Clause. The statute clears every hurdle in the governing analysis.

As a threshold matter, the statute does not affect commerce. This is a criminal statute. Any effect it might have on interstate commerce is both speculative and

miniscule. *See Simmons*, 944 So. 2d at 333 (criminal statute prohibiting internet child enticement did not violate dormant Commerce Clause) (collecting cases); *Rose*, 960 A.2d at 154 (same) (collecting cases). The statute is directed at the posting or publication of a statutorily defined "private representation" of a person without her consent. Culver has offered no evidence, cited no case authority, and made no argument suggesting that any out-of-state commercial entity is engaged in a *legitimate* or *legally sanctioned* business of posting or publishing private representations without the consent of the subject. (Culver's Br. 19.) The State's legal research has yielded no case authority from any jurisdiction allowing such posting or publication.

If the statute did affect commerce, it would be evaluated under *Pike* because it does not explicitly discriminate against interstate commerce. The statute satisfies all the *Pike* criteria. First, the statute treats in-state and out-of-state commerce even-handedly. Second, the "local public interest" the statute serves—the protection of individual privacy—is "legitimate." *See Stevenson*, 236 Wis. 2d 104, ¶¶ 46–47 (Wilcox, J., dissenting); *State v. Gilmore*, 201 Wis. 2d 820, 830–32, 549 N.W.2d 401 (1996). Third, any impact on interstate commerce is incidental. As noted above, the statute is not specifically directed against commercial actors and, even if it were, the State knows of no jurisdiction in which the posting or publication of private depictions without the subject's consent is a legally protected commercial pursuit. Fourth, for these same reasons, the burden imposed on interstate commerce is not excessive in relation to the local benefits provided: the protection of individual privacy rights is real and substantial, while the burden imposed on commerce is speculative and minimal. And, in the absence of any evidence of laws in other jurisdictions that diverge from section 942.09(3m)(a)2., Culver cannot show that a poster/publisher of private

representations is subject to differential treatment across jurisdictions.

Culver's dormant Commerce Clause argument is also defeated by the plain terms of Wisconsin's criminal jurisdiction statute, Wis. Stat. § 939.03. Under that statute, a person violating section 942.09(3m)(a)2. would be "subject to prosecution and punishment under the law of this state" in only three circumstances: (1) he commits a constituent element of the crime in Wisconsin, (2) while outside of Wisconsin, he aids and abets, conspires with, advises, incites, commands, or solicits another to commit the crime in Wisconsin, (3) while outside of Wisconsin, he does an act with the intent that it cause a consequence in Wisconsin that violates the statute. *See* Wis. Stat. § 939.03(1)(a), (b), (c). Given this jurisdictional limitation, the extraterritorial reach of the Wisconsin statute is virtually non-existent.

The statute does not violate the dormant Commerce Clause.

IV. Wisconsin Stat. § 941.29(2) is constitutional as applied to Culver.

A. Applicable legal principles.

Wisconsin Stat. § 941.29(2) (2013-14)[10] provides that a person who has been convicted of a felony in the State of Wisconsin "who possesses a firearm is guilty of a Class G felony." In essence, section 941.29(2) imposes on all convicted felons a lifetime ban on firearms possession.

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[10] In the 2015-16 version of the Wisconsin Statutes, this provision is Wis. Stat. § 941.29(1m)(a).

This Court has twice upheld the lifetime firearms ban against constitutional challenge. *See Pocian*, 341 Wis. 2d 380, ¶¶ 12, 15; *State v. Thomas*, 2004 WI App 115, ¶ 23, 274 Wis. 2d 513, 683 N.W.2d 497. The burden is on the challenger to prove the statute's unconstitutionality. *Pocian*, 341 Wis. 2d 380, ¶ 6. The statute must survive this court's "intermediate scrutiny," under which "a law 'is valid only if substantially related to an important governmental objective.'" *Id.* ¶ 11.

In *Thomas*, the defendant contended that banning all convicted felons from possessing firearms was irrational because the statute did not distinguish between violent and nonviolent felons. 274 Wis. 2d 513, ¶¶ 30–31. The Court discussed and adopted the reasoning of three non-Wisconsin cases, including *State v. Brown*, 571 A.2d 816 (Me. 1990), which applied Maine's felon-in-possession statute to a man "convicted of operating a vehicle after revocation of the license of a habitual motor vehicle offender." *Thomas*, 274 Wis. 2d 513, ¶ 34. The *Brown* court noted that a blanket ban on firearms possession for all felons had "never been found constitutionally deficient." 571 A.2d at 821. "One who has committed *any* felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person." *Id.* (emphasis added). "Labeling his preexisting felony status the product of a 'nonviolent' crime obscures its seriousness as well as the very real threat to public safety created by his continued misconduct, a threat that might well be aggravated by the availability of a firearm." *Id.* "Defendant has demonstrated a disregard for the law to such an extent that, as applied to him, a legislative determination that he is an undesirable person to possess a firearm is entirely reasonable and consonant with the legitimate exercise of police power for public safety." *Id.*

In *Pocian*, this Court considered an overbreadth challenge to section 941.29 in light of the United States Supreme Court's Second Amendment analysis in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (plurality opinion). The court followed *Heller* in employing intermediate scrutiny (*Thomas* had used rational basis review), but otherwise rejected Pocian's challenge out of hand. It noted that "[n]o state law banning felons from possessing guns has ever been struck down," that "no federal ban on felons possessing guns has been struck down in the wake of *Heller*," and that "[t]he Seventh Circuit recently held that it is constitutional to categorically ban felons from possessing guns." *Pocian*, 341 Wis. 2d 380, ¶ 12 (citing *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)). Agreeing with these precedents, the Court suggested that if Pocian wanted to change the law, "the proper route is through the legislature." *Id.*

Pocian had been convicted of writing forged checks. In addition to his overbreadth argument, he also argued that the felon-in-possession statute was unconstitutional as applied to him, a non-violent offender. *Id.* ¶¶ 2, 13. As Thomas had, Pocian argued that the statute violated the Equal Protection Clause because it fails to distinguish between violent and nonviolent felons. This Court disagreed. "The governmental objective of public safety is an important one, and we hold that the legislature's decision to deprive Pocian of his right to possess a firearm is substantially related to this goal." *Id.*¶ 15. The Court noted that the Framers "[tied] the right to bear arms . . . to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Id.* (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)). The legislature deprived all "unvirtuous citizens," i.e., both

violent and non-violent felons, of the right to possess firearms. *See id.*

Pocian rejected the argument that Wisconsin's felon-in-possession firearms ban cannot be constitutionally applied to nonviolent felons. *Pocian* binds the Court in this case.

B. Analysis.

In this case, Culver argues that the felon-in-possession statute is unconstitutional as applied to him because he was "convicted of a non-violent operating while intoxicated felony." (Culver's Br. 24.) This Court should reject this argument for one of the following reasons: Culver forfeited the argument under the guilty-plea-waiver rule; his alternative argument that counsel was ineffective for not raising the issue at trial is unavailing; and this case is controlled by *Pocian*.

1. The guilty plea waiver rule.

Culver pleaded guilty to violating Wis. Stat. § 941.29(2)(a) by possessing firearms. (R. 12.) A guilty plea waives[11] all non-jurisdictional objections, including constitutional claims. *State v. Bembeneck*, 2006 WI App 198, ¶ 16, 296 Wis. 2d 422, 724 N.W.2d 685. Culver correctly observes that the guilty-plea-waiver rule is a rule of administration, not power, and this Court may choose whether or not to employ it. *See State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886. But Culver offers no compelling reason for this Court to forego the rule in this case. To strengthen his argument, Culver recruits the fact

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[11] Although commonly referred to as the "guilty plea *waiver*" rule, the more accurate term is *forfeiture*. *See Kelty*, 294 Wis. 2d 62, ¶ 63 (Abrahamson, C.J., concurring).

the United States Supreme Court granted the petition for certiorari in *Class v. United States*, U.S. S. Ct. Case No. 16-424, which questions Federal Rule of Criminal Procedure 11, the parallel rule in the federal system. Because *Class* challenges the *federal rule*, it is clearly distinguishable from this case. Even if Rodney Class were to prevail, Wisconsin's guilty-plea-waiver rule would be unaffected.

2. Ineffective assistance of counsel.

Culver argues that, if this Court finds that he waived or forfeited the as-applied argument, it can address the argument within the ineffective assistance of counsel framework. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Trial counsel can never be ineffective for not make an argument contrary to controlling legal authority. *See State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 232 (citations omitted). Trial counsel has "no *Strickland* responsibility to . . . seek a change in Wisconsin law." *State v. Beauchamp*, 2010 WI App 42, ¶ 18, 324 Wis. 2d 162, 781 N.W.2d 254, *aff'd*, 2011 WI 27, ¶ 44, 333 Wis. 2d 1, 796 N.W.2d 780.

As will be shown in the next subsection, the present question is controlled by this Court's *Pocian* decision. Therefore, under *Lemberger* and *Beauchamp*, trial counsel did not perform deficiently for not making an argument contrary to this Court's binding *Pocian* decision.

3. This case is controlled by *Pocian*.

Culver complains that Wisconsin's felon-in-possession statute "does not distinguish between persons convicted of violent crimes and those convicted of non-violent crimes. Nor does it distinguish between serious felonies . . . and non-serious felonies . . . . Additionally, the statute does not

provide any exception for antique firearms." (Culver's Br. 27.) Culver has four felony convictions for operating a vehicle while intoxicated, which (in Culver's view) are non-violent offenses. (Culver's Br. 28.) The firearms possessed by Culver were a handgun and two antique rifles. (*Id.*) Culver argues that the statute is unconstitutional as applied to him because his past offenses are non-violent, he's a non-violent person, and there is no evidence that he used his firearms in a violent manner. (*Id.*) And *Pocian*, he insists, is distinguishable.

Culver is wrong. *Pocian* controls. *Pocian* does not permit the fine distinctions Culver identifies between that case and this one. In *Pocian*, this Court concluded that the categorical ban on firearms possession by any and all felons—both violent and non-violent—is constitutional. *Pocian*, 341 Wis. 2d 380, ¶ 12. No more nuanced analysis is called for.

Culver attempts to differentiate the cases in two respects. First, he quotes this Court's observation that "[w]hile Pocian did not utilize physical violence in the commission of his three [forgery] felonies, he did physically take his victim's property." *Id.* ¶ 15. Culver's point is obscure. Unlike Pocian, Culver committed crimes that could have caused death or grievous bodily injury. If a conviction for forgery, a crime that is both non-violent and non-dangerous, can bar a person from possessing firearms, surely a conviction for OWI, a non-violent crime based on the reckless use of a dangerous instrumentality, can bar a person from firearms possession. The State knows of no act of forgery that has ever directly caused its victim death or grievous bodily harm. Sadly, examples of death and grievous bodily harm resulting from acts of OWI are legion. Culver's second distinction between his case and Pocian's is that Pocian used his gun to hunt deer, whereas Culver was

simply storing his firearms. (Culver's Br. 29.) This distinction gets Culver nowhere. The statute bars mere "possession" of firearms, not actual use. Wis. Stat. § 941.29(2).

Pocian controls. There is no way to distinguish *Pocian* from this case. "[T]he court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). The Court should affirm the circuit court's denial of Culver's postconviction motion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Norris Culver's judgment of conviction and the order denying his postconviction motion.

Dated this 19th day of July, 2017.

Respectfully submitted,

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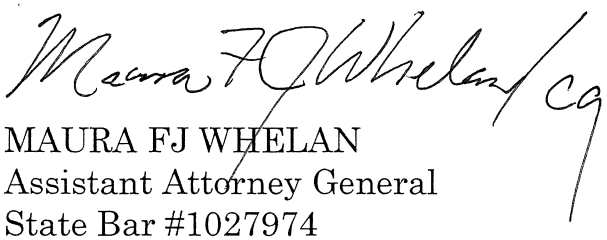

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,625 words.

Dated this 19th day of July, 2017.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

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

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Dated this 19th day of July, 2017.

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