

NO. A07-1949

State of Minnesota
In Court of Appeals

State of Minnesota,

Respondent,

vs.

Larry Edwin Craig,

Appellant.

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION
AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA**

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INTEREST OF AMICI CURIAE¹

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, and the American Civil Liberties Union of Minnesota is its Minnesota affiliate. Their members share a commitment to the defense of the rights that are guaranteed by the United States Constitution. Among the most fundamental of these rights is the right to free expression. This case presents a significant free expression concern because it involves an arrest, charge, and prosecution under an unconstitutionally vague and overbroad law, and because it involves prosecution for soliciting an act which is not a crime.

STATEMENT OF FACTS

On June 11, 2007, Senator Larry Craig was arrested by an undercover officer working a secret sting in a public restroom at the Minneapolis-St. Paul International Airport for allegedly inviting him to have sex. Specifically, Senator Craig was arrested for allegedly:

- “look[ing] through the crack between the stall door and its frame [into the undercover officer’s stall,] look[ing] at his own fidgeting fingers,and then return again to gazing into the[undercover officer’s] stall, repeat[ing] this conduct in the same pattern for approximately two minutes;”
- “enter[ing] the stall [to the left of the undercover officer’s stall] and plac[ing] his roller bag against the front of the stall door;”

¹ No counsel for any party authored this brief in whole or in part. No person or entity, other than Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Minnesota, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

- “tap[ping] his right foot, which [the undercover officer] recognized as a signal often used by persons communicating a desire to engage in sexual conduct,” “mov[ing] his foot closer to the stall occupied by [the undercover officer],” and, after the undercover officer “moved [the undercover officer’s] foot up and down slowly,” “mov[ing] his right foot so that it touched [the undercover officer’s] left foot,” which “was within [the undercover officer’s] stall area”; and
- “swip[ing] his hand under the stall divider for a few seconds from the front of the stall back towards the back wall, palm-up”; “again swip[ing] his hand in the same motion and manner”; “mak[ing] the same motion for a third time,” enabling the undercover officer to observe “that it was [his] left hand due to [his] thumb position,” and to observe “a gold ring on [his] ring finger.”

Complaint at 1-2 (A-1 to A-2).

On June 26, 2007, Senator Craig was charged with disorderly conduct under Minn. Stat. § 609.72(1)(3) and interference with privacy under Minn. Stat. § 609.746(1)(c). Complaint at 2 (A-2). On August 8, 2007, Senator Craig entered a guilty plea only to the charge of disorderly conduct under Minn. Stat. § 609.72(1)(3). Petition to Enter Plea of Guilty – Misdemeanor at 1 (A-4). Minn. Stat. § 609.72(1)(3) provides as follows:

Whoever does any of the following in a public or private place . . . knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: . . . Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Senator Craig moved to withdraw his plea on September 10, 2007. On October 4, 2007, the trial court denied Senator Craig's motion to withdraw his plea. Senator Craig timely appealed on October 15, 2007.

INTRODUCTION

A. SUMMARY OF ARGUMENT.

A court may not accept a guilty plea for conduct that may not constitutionally be made a crime. However, this is precisely what happened in this case. Convicting someone of a crime on the basis of conduct which may not be made a crime is a manifest injustice if anything is. Senator Craig should be allowed to withdraw his plea to correct that manifest injustice. See Argument § V infra.

The State prosecuted Senator Craig because of what it claimed his alleged conduct communicated: an invitation to have sex. The constitutionality of that prosecution turns on whether the State could have constitutionally prosecuted Senator Craig if he had communicated the invitation with words. This is so because the government may not punish expressive conduct because of its message unless it could penalize words conveying the same message. See Argument § I, infra. It is clear that, under the circumstances of this case, the State could not have constitutionally punished Senator Craig had he solicited sex with words.

In the first place, the law under which the State prosecuted Senator Craig has already been struck down as a violation of the Constitution. In In re S.L.J., 263 N.W.2d 412 (Minn. 1978), the Minnesota Supreme Court found that Minn. Stat. § 609.72(1)(3), the law under which Senator Craig was charged, is unconstitutionally overbroad. The

Court did so because it recognized that the government may not criminalize expression merely because it is offensive, alarming, angering, or disturbing, and this is precisely what Minn. Stat. § 609.72(1)(3) does. The S.L.J. Court made one exception; it said that “fighting words” may be banned under the statute. Again, when the State seeks to punish conduct because of the message it communicates, it may do so only if it could punish words conveying the same message. Because Senator Craig’s expressive conduct did not involve fighting words, he may not be constitutionally prosecuted under the law. See Argument § II, infra.

Moreover, what the State alleges was Senator Craig’s invitation to have sex may not constitutionally be made a crime. The Constitution does not allow the State to make an invitation to have sex in private a crime. In this case, there was neither an allegation nor any evidence that Senator Craig was soliciting for sex to take place outside the restroom stall. Thirty-eight years ago, in State v. Bryant, 177 N.W.2d 800 (Minn. 1970), the Minnesota Supreme Court held that individuals who engage in sex in closed stalls in public restrooms have a reasonable expectation of privacy. Because the stall is considered a private place as a matter of law, the State cannot prove beyond a reasonable doubt that Senator Craig was inviting the undercover officer to have sex in public. See Argument § III, infra.

B. THE CONTEXT: SECRET STINGS AND THE FIRST AMENDMENT.

There is a perhaps understandable temptation to see this as a case in which a criminal should not go free merely because the constable has blundered, a case in which

constitutional “technicalities” should not tie the hands of the police trying to deal with a real problem. After all, one might argue, an invitation to have sex in a restroom stall is hardly the kind of important speech the First Amendment should protect most vigilantly. And, one might argue, the State ought to be able to make sure that a public restroom is used for its intended purpose.

But this is not a case about the tension between “technicalities” and a sincere attempt by the State to deal with a real problem. Had the airport police really wanted to make sure no one was having public sex in the restroom, it would have posted a sign warning that public sex will subject a person to arrest instead of mounting a secret sting. Many police departments, including the Minneapolis Police Department, have rejected secret stings as a deterrent. See Max Follmer, “Craig Bust Leads to Debate Over Bathroom Stings,” Huffington Post (Sept. 7, 2007) (available at http://www.huffingtonpost.com/2007/09/07/craig-bust-leads-to-debat_n_63481.html). Their decisions reflect the fact that “[m]ost researchers and practitioners agree that focusing solely on arresting those engaging in public sexual activity is unlikely to reduce the overall scope of the problem.” United States Department of Justice, Office of Community Oriented Policing Services, “Illicit Sexual Activity in Public Places,” at 17 (April 2005) (available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=1460>). Indeed, in light of this fact, the Office of Community Oriented Policing Services of the United States Department of Justice lists “[p]osting notices” first among its recommended responses to illicit sexual activity in public places. Id. at 20. In contrast, it lists “[u]sing undercover decoys” first under the heading “RESPONSES WITH

LIMITED EFFECTIVENESS.” Id. at 26.

The availability of less intrusive, more effective ways of dealing with sex in public restrooms led the Minnesota Supreme Court to strike down a secret surveillance operation in Bryant. As the Court put it:

It is understandable that a large department store would desire to eliminate a use of restrooms that would be revolting to most people who wished to use the facilities properly. There were, however, ways of eliminating such use of the facilities other than surreptitious surveillance. The store had known about the hole in the partition for some time before defendant was apprehended, but had not closed it. The store could have removed the doors if it saw fit, so that anyone using the facilities would have no expectation of privacy; or it could have posted signs warning anyone using the facilities that they were apt to be under surveillance In the very nature of things, in the process of protecting the innocent all search and seizure prohibitions inevitably afford protection to some guilty persons; but the rights of the innocent may not be sacrificed to apprehend the guilty.

Bryant, 177 N.W.2d at 804.

For the ACLU, there is no such thing as a merely “technical” violation of the Constitution. For the ACLU, the State’s earnest wish to deal with a real-world problem is never a reason to temper constitutional protections. But even those who might think otherwise should be unwilling to grant the slightest allowance to the State when it has decided to forego a ready, practical solution that poses little constitutional difficulty in favor of tactics that are impractical and that transgress well-established principles of due process and freedom of expression. And that is exactly what the State has done here.

ARGUMENT

I. PHYSICAL GESTURES THAT AMOUNT TO AN INVITATION TO HAVE PRIVATE SEX ARE A FORM OF CONSTITUTIONALLY PROTECTED EXPRESSION.

The Trial Court ruled that Senator Craig had been charged under the portion of Minn. Stat. §609.72(1)(3) which bans “offensive conduct,” and not the section that bans “offensive language.” Order at 26 (A-48). But while it is true, as the Court says, that “the criminal behavior is the Defendant’s entry into an occupied stall with his eyes, hand, and foot,” *id.* at 26 (A-48), it is also true that the reason Senator Craig was charged for tapping his feet and waiving his hand was the officer’s understanding, explicitly charged in the complaint, that the Senator was “communicating a desire to engage in sexual conduct.” Complaint at 1 (A-1). As the Trial Court put it, “the acts alleged in this case are the solicitation, not the sex act.” Order at 26 (A-48) Senator Craig was arrested and convicted for soliciting sex by making gestures with his hands and his feet.

Expressive conduct is a form of constitutionally protected expression. “[The First Amendment’s] protection does not end at the spoken or written word . . . [C]onduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.” Texas v. Johnson, 491 U.S. 397, 404 (1989) (quotation omitted). While “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word” under United States v. O’Brien, 391 U.S. 367 (1968), “[the government] may not . . . proscribe particular conduct *because* it has expressive elements” any more than the government could do so if the conduct were verbal expression. Johnson, 491 U.S. at 406 (emphasis in original).

What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself,

be justified by the substantial showing of need that the First Amendment requires .

Johnson, 491 U.S. at 406-07 (quotations omitted) (emphases in original). See also State v. Machholz, 574 N.W.2d 415 (Minn. 1998) (riding a horse through a pro-gay crowd in support of an anti-gay message is a form of constitutionally protected expression).

Because the government penalized the Senator's alleged conduct because of the message that it communicated, the government may not penalize the alleged conduct any more than it could if the alleged conduct were verbal expression.

II. THE GOVERNMENT MAY NOT PENALIZE SENATOR CRAIG'S ALLEGED EXPRESSIVE CONDUCT.

Thirty years ago, the Minnesota Supreme Court definitively construed a prior version of Minn. Stat. § 609.72(1)(3), which provided as follows:

Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: . . . Engages in offensive, obscene, or abusive language, or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.^[2]

S.L.J., 263 N.W.2d at 415. Specifically, the Court held that the portion of Minn. Stat. § 609.72(1)(3) that banned offensive language was constitutionally overbroad and vague, and could be applied only to fighting words. Id. at 419. The Court did so because it recognized that the government may not criminalize expression merely because it is offensive, alarming, angering, or disturbing. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea

² The only material difference between the current version and the prior version is that the current version criminalizes offensive, obscene, abusive, boisterous, or noisy conduct while the prior version criminalized only boisterous and noisy conduct.

simply because society finds the idea itself offensive or disagreeable.” Johnson, 491 U.S. at 414 (citations omitted).

[A] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Id. at 408-09 (quotation omitted). Accordingly, the Court acknowledged that “[t]he fact that . . . words . . . are vulgar, offensive, and insulting, and that their use is condemned by an overwhelming majority of citizens does not make them punishable under . . . criminal statutes . . . unless they fall outside the protection afforded to speech by the First Amendment.” S.L.J., 263 N.W.2d at 416 (footnote omitted). As a result, “offensive-speech statutes have been found to be constitutional only if criminal prosecution is permitted solely for ‘fighting words.’” Id. at 417-18 (citations omitted).

While Senator Craig was prosecuted under the “offensive conduct” provision added to § 609.72 after the decision in S.L.J., since the conduct for which he was prosecuted was allegedly offensive because of the message it conveyed (a solicitation for sex), the First Amendment applies here with the same force it applied to the language portion of § 609.72. Johnson, 491 U.S. at 404. See also Sec. I, supra. Thus, the Minnesota Supreme Court’s holding in S.L.J. that “offensive” communication may not be prosecuted unless it amounts to “fighting words,” S.L.J. at 417-8, applies with full force here.

Finally, the “fighting words” exception is not available to the state here. The alleged invitation to have sex was not alleged to have any tendency “to incite an immediate breach of the peace,” was not “inherently likely to provoke violent reaction,”

and did not “have an immediate tendency to provoke retaliatory violence or tumultuous conduct by those to whom [the alleged invitation] [was] addressed.” S.L.J., at 419 (quotations omitted). No one other than the undercover officer witnessed the alleged invitation. Complaint at 1-2 (A-1 to A-2). And the undercover officer, in the course of the secret sting, signaled that the alleged invitation was in fact welcome. Id.

Because the invitation that the State alleges Senator Craig made did not involve fighting words, the government may not penalize it under Minn. Stat. §609.72.

III. THE STATE COULD NOT CONSTITUTIONALLY MAKE WHAT SENATOR CRAIG ALLEGEDLY DID A CRIME UNDER ANY STATUTE.

The government may make the solicitation of an unlawful act a crime. See Brown v. Hartlage, 456 U.S. 45, 55 (1982) (even political speech that solicits an unlawful act is not afforded constitutional protection). The government may not, however, make the solicitation of a lawful act a crime. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772-73 (1976) (even commercial speech that solicits a lawful act is afforded constitutional protection). Accordingly, whether the government may criminalize an invitation to have sex turns on whether the government may criminalize the sex in question.

Sexual intimacy is a constitutionally protected liberty interest. See Griswold v. Connecticut, 381 U.S. 479 (1965) (sexual intimacy between married couples); Eisenstadt v. Baird, 405 U.S. 438 (1972) (sexual intimacy between unmarried couples); Lawrence v. Texas, 539 U.S. 558 (2003) (sexual intimacy between same-sex couples); see also Doe v. Ventura, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001) (Hennepin

County) (sexual intimacy between same-sex couples). The government may criminalize sexual intimacy only where it has a constitutionally sufficient justification for doing so.

Id.

The government does not have a constitutionally sufficient justification for criminalizing private sex. Cf. Lawrence, 539 U.S. at 578 (distinguishing underage, coercive, commercial, or public sex). Therefore, the government may not criminalize private sex. Id. (“The State cannot . . . mak[e] . . . private sexual conduct a crime.”).

Because the government may not criminalize private sex, it may not criminalize an invitation to have private sex. See Cherry v. Maryland, 306 A.2d 634, 640 (Md. Ct. Spec. App. 1973) (“While solicitation to commit a crime may properly be proscribed, it would be anomalous to punish someone for soliciting another to commit an act which is itself not a crime.”); Pedersen v. City of Richmond, 254 S.E.2d 95, 98 (Va. 1979) (“It would be illogical and untenable to make solicitation of a non-criminal act a criminal offense.”); Oregon v. Tusek, 630 P.2d 892, 894-5 (Or. Ct. App. 1981) (“The statute as it now stands . . . makes it a crime to ask another person to participate in an act which is not itself a crime. We find ourselves in agreement with [Pedersen and Cherry].”); New York v. Uplinger, 447 N.E.2d 62, 63 (N.Y. 1983) (“Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose.”). This is so even where the invitation is extended in a public place, whether a bar or a restroom. See Pryor v. Municipal Court, 599 P.2d 636, 645-46 (Cal. 1979) (public proposition of private sex

may not be criminalized); Provo City Corp. v. Willden, 768 P.2d 455, 458 (Utah 1989) (same).

Thus, the crucial question in this case is whether the solicitation Senator Craig allegedly made was for sex in public, in which case the solicitation could be made a crime, or whether it was for sex in private, in which case the solicitation could not be made a crime.³

Almost forty years ago, the Minnesota Supreme Court held that individuals who engage in sexual intimacy in closed stalls in public restrooms have a reasonable expectation of privacy. Bryant, 177 N.W.2d at 801-03. See also State v. Larsen, 650 N.W.2d 144, 148 (Minn. 2002) (Bryant remains good law). Many other courts have similarly held that individuals who engage in acts that do not call attention to themselves in closed stalls in public restrooms have a reasonable expectation of privacy. See, e.g., Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975) (sex and drugs); Hawaii v. Biggar, 716 P.2d 493 (Haw. 1986) (drugs); Buchanan v. Texas, 471 S.W.2d 401 (Tex. Ct. Crim. App. 1971) (sex); Utah v. Kent, 432 P.2d 64 (Utah 1967) (drugs); Britt v. Superior Court, 374 P.2d 817 (Cal. 1962) (sex); Ward v. Florida, 636 So. 2d 68 (Fla. Ct. App. 1994) (sex); Michigan v. Kalchik, 407 N.W.2d 627 (Mich. Ct. App. 1987) (sex); Brown v. Maryland, 238 A.2d 147 (Md. Ct. Spec. App. 1968) (drugs). In this case, based on the current record, the government cannot prove beyond a reasonable doubt that Senator Craig was inviting the undercover officer to engage in anything other than sexual intimacy that would not have called attention to itself in a closed stall in the public

³ While a solicitation to have sex in a public place could be made a crime, it could not be prosecuted under Minn. Stat. § 6098.72, because that law is unconstitutionally overbroad except as applied to fighting words. See Sec. II, above.

restroom. See Bryant, 177 N.W.2d at 801 (reasonable expectation of privacy attached to act of oral sodomy by means of hole cut in partition separating two stalls). In other words, the government cannot prove beyond a reasonable doubt that Senator Craig was inviting the undercover officer to have public sex.

Indeed, the government itself agrees that a restroom stall is a private place. The government charged Senator Craig not only with disorderly conduct under Minn. Stat. § 609.72(1)(3), but also with interference with privacy under Minn. Stat. § 609.746(1)(c) because he “looked through the crack in the door [to the undercover officer’s stall].” Complaint at 1 (A-1). By its terms, Minn. Stat. § 609.746(1)(c) applies only to a “place where a reasonable person would have an expectation of privacy.” Accordingly, the government itself has acknowledged that individuals in closed stalls in public restrooms have a reasonable expectation of privacy. See State v. Ulmer, 719 N.W.2d 213, 215 (Minn. Ct. App. 2006) (partitioned urinals in public restrooms are places where reasonable persons have an expectation of privacy under Minn. Stat. § 609.746(1)(c)).

Since there is no evidence that Senator Craig’s alleged solicitation was for sex in a public place, the solicitation could not be constitutionally punished.

IV. MINN. STAT. § 609.72(1)(3) IS IMPERMISSIBLY OVERBROAD AND IMPERMISSIBLY VAGUE.

The Minnesota Supreme Court’s ruling in S.L.J. that Minn. Stat. § 609.72 was unconstitutionally vague and overbroad is binding here. Moreover, it was undoubtedly correct.

A. The Statute is Unconstitutionally Overbroad.

“The Constitution gives significant protection from overbroad laws that chill

speech within the First Amendment's vast and privileged sphere.” Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002). “[A] law imposing criminal penalties on protected speech is a stark example of speech suppression.” Id. Under overbreadth jurisprudence, even where a defendant may not challenge the criminalization of her own conduct under a statute, she may challenge the criminalization of others’ conduct under the statute on its face:

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Board of Airport Comm’rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (quotation omitted); see also Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (explaining the reasoning underlying the principle); cf. United States v. Salerno, 481 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”).

“Only a statute that is substantially overbroad may be invalidated on its face.” City of Houston v. Hill, 482 U.S. 451, 458 (1987) (citations omitted). “Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” Id. at 459 (citations omitted). Where possible, a statute must be construed to avoid such overbreadth:

When a . . . court is dealing with a . . . statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction If the invalid reach

of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct.

New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); see also Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (“Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.”) (citations omitted).

Minn. Stat. § 609.72(1)(3) is impermissibly overbroad. In the absence of a saving construction, the portion of Minn. Stat. § 609.72(1)(3) that concerns offensive conduct makes unlawful a substantial amount of constitutionally protected expression. There are countless gestures and other communicative acts that not only provoke mere offense, alarm, anger, or disturbance but indeed are intended to do so. See, e.g., Coggin v. Texas, 123 S.W.3d 82 (Tex. Ct. Crim. App. 2003) (raising of middle finger). Such gestures and other communicative acts are uniquely expressive for reasons echoing those set forth in Cohen v. California, 403 U.S. 15 (1971):

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 26. Thus, Minn. Stat. § 609.72's penalization of constitutionally protected expression is greater than that which is essential to the furtherance of an important governmental interest. See Hill, 482 U.S. at 465 (“[L]aws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them” “[are] not narrowly tailored to prohibit only disorderly conduct or fighting words.”)

Id. at 452). In the absence of a further saving construction (e.g., restricting offensive conduct to non-expressive conduct and to fighting words), see In re R.A.V., 464 N.W.2d 507 (Minn. 1991) (restricting angering or alarming conduct to fighting words), overruled on other grounds, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), the portion of Minn. Stat. § 609.72(1)(3) that concerns offensive conduct is substantially overbroad.

B. MINN. STAT. § 609.72(1)(3) is Impermissibly Vague.

Vagueness, like overbreadth, “raises special First Amendment concerns because of its obvious chilling effect on free speech.” Reno v. American Civil Liberties Union, 521 U.S. 844, 871-72 (1997) (citation omitted); see also Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 604 (1967) (“When one must guess what conduct or utterance may [subject her to penalty], one necessarily will steer far wider of the unlawful zone. For the threat of sanctions may deter almost as potently as the actual application of sanctions.”) (quotations omitted). Indeed, “[a]lthough the overbreadth and vagueness doctrines are conceptually distinct, in the First Amendment context they tend to overlap, since statutes are often overly broad because their language is vague as to what behavior is proscribed.” S.L.J., 263 N.W.2d at 417 (citations omitted); see also Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) (“[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.”) (citations omitted).

Under vagueness jurisprudence, like overbreadth jurisprudence, even where a defendant may not challenge the criminalization of her own conduct under a statute, she may challenge the criminalization of others’ conduct under the statute on its face: in the

area of free expression, “[a]lthough a statute may [not] be . . . vague . . . as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness . . . as applied to others.” Gooding v. Wilson, 405 U.S. 518, 521 (1972) (quotation omitted); cf. Maynard v. Cartwright, 486 U.S. 356, 361 (1988) (“Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand.”).

“The [vagueness] doctrine incorporates notions of fair notice or warning.” Smith v. Goguen, 415 U.S. 566, 572 (1974) (footnote omitted). “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” Id. at 572 n.8 (quotation omitted). “A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” Id. (quotation omitted).

“Moreover, [the vagueness doctrine] requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement.’” Id. at 572-73 (footnote omitted). “It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” Id. at 573 n.9 (quotation omitted).

“[S]tandards of permissible statutory vagueness are strict in the area of free expression.” Keyishian, 385 U.S. at 604 (quotation omitted). “Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching

expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.” Smith, 415 U.S. at 573 (footnote omitted).

Minn. Stat. § 609.72 is a classic example of a law that provides only the illusion of standards, that in truth leaves individuals and law enforcement without any guidance, and that implicates critical freedom of expression concerns. As the U.S. Supreme Court explained in striking down as void for vagueness a similar law criminalizing conduct “annoying to persons passing by”:

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). See also Cohen, 403 U.S. at 25 (“[I]t is . . . often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”). Just as the Minnesota Supreme Court held that the portion of Minn. Stat. § 609.72(1)(3) that concerns offensive language is impermissibly vague in the absence of a saving construction (e.g., restricting offensive language to fighting words), S.L.J., 263 N.W.2d at 417, 418-419, this Court must hold that the portion of Minn. Stat. § 609.72(1)(3) that concerns offensive conduct is impermissibly vague on its face in the absence of a saving construction (e.g., restricting offensive conduct to non-expressive conduct and to fighting words).⁴

⁴ State v. Reynolds, 66 N.W.2d 886 (Minn. 1954) – noted in S.L.J., 263 N.W.2d at 416 n.2 – is distinguishable not only because it involved a vagueness challenge to Minn.

V. SENATOR CRAIG’S WITHDRAWAL OF HIS PLEA IS NECESSARY TO CORRECT A MANIFEST INJUSTICE.

Minn. R. Crim. P. 15.05(1) mandates that “[t]he court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” “If a plea is constitutionally invalid, it automatically meets the rule 15.05 manifest injustice standard.” Berkow v. State, 573 N.W.2d 91, 95 (Minn. 1997) (citation omitted).

In this case, the plea is constitutionally invalid. Under due process jurisprudence, the government may not convict a defendant “for conduct that its criminal statute, as properly interpreted, does not prohibit.” Fiore v. White, 531 U.S. 225, 228 (2001); see also Bunkley v. Florida, 538 U.S. 835, 839-40 (2003) (explaining the reasoning underlying Fiore). Because the statute could not have constitutionally criminalized the alleged conduct at the time of the plea, see §§ I-V supra, the government could not have constitutionally convicted Senator Craig for the alleged conduct at the time of the plea. Because the government could not have constitutionally convicted Senator Craig for the alleged conduct at the time of the plea, the government could not have constitutionally accepted his guilty plea for engaging in the alleged conduct. See State v. Wukawitz, 662 N.W.2d 517, 521 (Minn. 2003) (“Once a defendant has pleaded guilty pursuant to a plea agreement, he has been convicted of a crime that may result in a deprivation of his liberty.”) (citation omitted). Simply put, the government may not accept a guilty plea for

Stat. § 609.72(1)(1) but also because the conduct to which Minn. Stat. § 609.72(1)(1) applies – brawling or fighting – does not implicate expression. See Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (“[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”) (citations omitted):

conduct that may not be criminalized, as it did in this case. See id. at 521-22 (“[F]or a guilty plea to be valid, it must be accurate The accuracy requirement protects the defendant from pleading guilty to a more serious charge than he or she would have been convicted of at trial.”) (citation omitted). Accordingly, the plea automatically meets the manifest injustice standard, and the trial court erred in denying Senator Craig’s motion to withdraw his plea.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court reverse the Trial Court’s denial of Senator Craig’s motion to withdraw his plea.

Dated: January 15, 2008.

Respectfully submitted,



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