NO. A15-0005

State of Minnesota
In Supreme Court

State of Minnesota,

Respondent,

vs.

Robin L. Hensel,

Appellant.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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Interest of Amicus Curiae[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the protection of civil rights and liberties. The American Civil Liberties Union of Minnesota (ACLU-MN) is one of its statewide affiliates and has more than 8,000 members in the State of Minnesota. It protects the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and state and federal laws.

Since its founding in 1920, the ACLU has been committed to ensuring the fairness and integrity of the justice system and to provide meaningful redress for those whose rights are violated. In furtherance of that goal, the ACLU has been involved in numerous cases across the country involving public participation. The ACLU's mission to protect the rights and liberties of all individuals creates its interest in ensuring that citizens' First Amendment rights are protected. In addition to affecting the Appellant in this case, this Court's decision will have a

[1] This brief is filed pursuant to this Court's May 9, 2016 Order granting the American Civil Liberties Union of Minnesota leave to participate as *amicus curiae*. In accordance with Minn. R. Civ. App. P. 129.03, the American Civil Liberties Union of Minnesota certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

significant impact on the rights of all Minnesotans who wish to participate in deliberative democracy and local government.

INTRODUCTION

This appeal arises from the conviction of a politically unpopular citizen's participation in two Little Falls City Council meetings in 2013. The First Amendment issues raised in her appeal have implications for any Minnesotan who participates in local government, especially for those whose views differ from those of elected officials. Robin L. Hensel was arrested, ostensibly, because the city council disapproved of the location of her chair at the meeting. (T.163.)

ARGUMENT

I. Minnesota Statutes § 609.72, subd. 1(2) is vague and overbroad because it reaches an unpredictable variety of speech.

Minnesota Statutes § 609.72, subd. 1(2) has no spatial limitation. Subdivision 1(2) ensnares communication in "public or private place" where a lawful meeting occurs. It is broad enough to cover epileptic seizures; liability for which is excluded by § 609.72, subd. 1 ("A person does not violate this section if the person's disorderly conduct was caused by an epileptic seizure.").

The clearest problem with § 609.72, subd. 1(2), however, is that it criminalizes the knowing disturbance of two people. Nothing more is required to violate the law (emphasis added):

> Subdivision 1. Crime.
>
> Whoever does any of the following in a public or private place, including on a school bus, **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:
> …
> (2) **disturbs an assembly or meeting**, not unlawful in its character….

Section 609.72, subd. 1(2) encumbers a huge set of core political speech and large swaths of ordinary human interaction, as well as great art and literature. In effect, this law criminalizes disturbances generally. It violates the First Amendment.

By criminalizing disturbances, this law is a heckler's veto, *see Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997), against those with messages, or means of communication, that disturb. And because this law is a criminal law, it can only be used as it was used in this case: by the State—police, prosecutors, and politicians. It will never be used against politically popular ideas, because those ideas

do not disturb. This law can only be used to discriminate against unpopular viewpoints and means of expression.

The harm from this overbreadth and vagueness is real, and extends beyond just political speech. Much religious imagery is intentionally disturbing:

> For I will pass through the land of Egypt this night, and will smite all the firstborn in the land of Egypt, both man and beast; and against all the gods of Egypt I will execute judgment: I am the LORD. And the blood shall be to you for a token upon the houses where ye are; and when I see the blood, I will pass over you, and the plague shall not be upon you to destroy you when I smite the land of Egypt.

Exodus 12:12-13 (King James, 21st Century ed.). Some sermons, homilies, and scripture knowingly disturb assemblies—intentionally. *Cf. Matthew* 10:34 ("Think not that I am come to send peace on earth. I came not to send peace, but a sword.").

Minn. Stat. § 609.72, subd. 1(2) also criminalizes distributing literature to groups. James Joyce's *Ulysses* (1922), is considered one of the great English-language works of Twentieth Century. It was once the subject of an action for its destruction and to bar its importation into this country. *See United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 182-84 (S.D.N.Y. 1933). That trial judge denied the

government's motion for a decree of forfeiture and destruction. But he observed that the book "seems to me to be disgusting," and "I am quite aware that owing to some of its scenes 'Ulysses' is a rather strong draught to ask some sensitive, though normal, persons to take." *Id*. at 184-85. Under Minn. Stat. § 609.72, subd. 1(2), There would be probable cause to arrest someone who gives copies of *Ulysses* to an assembly of "normal" persons, after all, that defendant should have known the work is "disgusting," *id.* and thus could disturb the recipient assembly under § 609.72, subd. 1(2). A literary professor who distributed Vladimir Nabokov's *Lolita* (1955) would fare even worse.

Great art can be disturbing too. Vincenzo Camuccini's *Death of Ceasar* vividly depicts a disturbingly brutal murder:

Consider also any number of otherwise tasteful Renaissance depictions of the myth of *Leda and the Swan* (not pictured here). These paintings show Zeuz, as a swan, seducing Leda, a human woman. This is clearly bestiality; some versions of the story call it rape, not seduction. Probable cause exists under Minn. Stat. § 609.72, subd. 1(2) to arrest a person who brings to a Parks Board meeting a print of Correggio's *Leda and the Swan* (or worse, a print of Melzi's). After all, any peace officer could reasonably believe that any person showing such depictions to a meeting intend to disturb.

Some of the most famous plays of Western Civilization are deeply and intentionally disturbing. Shakespeare's *Romeo and Juliet* is famous for its teenage double suicide. Disturbing images can be powerful—because they disturb. Sophocles' *Antigone* still speaks to us, thousands of years after being written, because of the desecration of Polynices' corpse. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) ("The power of Sophocles' story in *Antigone* maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother.").

Comedy and satire are—often disturbing too. Jonathan Swift's 1729 *A Modest Proposal* is—on its face—an exhortation of racist cannibalism: poor Irish children should be eaten. Even pornographic magazines, like *Hustler*, use disturbing speech to convey viewpoints. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (providing First Amendment protection to a fake Campari advertisement describing drunken incest between Reverend Jerry Falwell and his mother).

These works are not just theoretical bases for liability. Not long ago, a tenured English professor at a public college was disciplined for combining a "confrontational" teaching style[2] with readings from *A Modest Proposal* and *Hustler*. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996). Professor Cohen is lucky he taught in California. Here in Minnesota, his intentionally disturbing teaching could have landed him in jail for 90 days, Minn. Stat. § 609.03, with a $700 fine. Minn. Stat. § 609.033.

People of ordinary intelligence, and English professors, cannot reasonably know whether their speech will violate Minn. Stat. § 609.72, subd. 1(2), because unpopular speech itself disturbs many types of

[2] Presumably he used this teaching style in front of a meeting of college students.

meetings. Local government meetings like the one Hensel attended are rife for disturbance because emotions run high in local government, not unlike college classrooms.

The court of appeal's use of "tranquility" (slip op. at 8) to define "disturb" fundamentally misapprehends the nature of these local government meetings. Furthermore, the Court of Appeal's reliance on *Black's Law Diction's* definition of "disturbance of a public meeting" (slip op. p. 8) is circular. The question of a disturbance's lawfulness cannot be answered by a definition of disturbance that includes "unlawful." *See Black's Law Dictionary* 546 (9th ed. 2009) (defining "disturbance of a public meeting" as "[t]he unlawful interference with proceedings of a public assembly").

Local government meetings are hotbeds of disturbance. At a recent Willmar City Council Meeting, for example, an unidentified city council member was heard on an open microphone saying, "Oh great … Listen to this idiot," in response to a person making a public comment. *Editorial: Willmar City Council members are losing our trust*, WEST CENTRAL TRIBUNE, available at http://www.wctrib.com/opinion/

editorials/3747209-editorial-willmar-city-council-members-are-losing-our-trust (last visited May 25, 2016).

Likewise, the Chair of the Minneapolis Park Board recently yelled at the local NAACP president who attempted to raise racial-disparity concerns at a meeting. *See* Steve Brandt, *Park Board president yells at Minneapolis NAACP president after meeting interruption*, STARTRIBUNE LOCAL BLOG MPLS (May 12, 2016), available at http://www.startribune.com/racial-justice-issues-erupt-in-confrontation-at-park-board/379232411/ (the Chair's table pounding begins at 0:07 and her yelling begins at 0:08 and continues through about 0:45) (last visited May 25, 2016). The chair later apologized, *id.*, but tranquility had been destroyed. Ordinary local government participation thus becomes a violation of § 609.72, subd. 1(2)—a crime.

CONCLUSION

At base there are only three classes of speech that escape the criminal censorship of Minn. Stat. § 609.72, subd. 1(2). One class is speech so banal that it cannot offend as a matter of law. Second, speech—disturbing or not—told only to a single person would fall outside this law, which requires a meeting or an assembly. Third,

speech conveyed to unlawful assemblies is not censored by this law, which requires the meeting be "not unlawful." The legitimate targets of this law are few compared with all the protected speech it criminalizes. This law "burn[s] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In a contest between it and the First Amendment, the latter prevails.

RESPECTFULLY SUBMITTED.

May 26, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. This brief was prepared using Microsoft Word 2010, using Trebuchet MS and Century Schoolbook fonts in 14 point type, and contains 1,761 words, including footnotes.

Scott M. Flaherty