No. 19A____

IN THE

Supreme Court of the United States

BETHANY AUSTIN,

Applicant,

v.

ILLINOIS,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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December 24, 2019

APPLICATION

To the Honorable Brett M. Kavanaugh, Associate Justice and Circuit Justice for the U.S. Court of Appeals for the Seventh Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Bethany Austin respectfully requests a 30-day extension of time, to and including February 14, 2020, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois.

1. The Supreme Court of Illinois issued its decision on October 18, 2019. *See Illinois v. Austin*, --- N.E.3d ----, 2019 IL 123910 (2019) (Appendix A). Unless extended, the time to petition for certiorari will expire on January 16, 2020. This application is filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257.

2. This case presents important questions of constitutional law on which this Court has not spoken, including the fact that a statute that supposedly "regulates a purely private matter" does not undercut the requirement that it withstand strict scrutiny if it does so based on the content of speech.

3. Like many states of late, Illinois enacted a so-called "revenge porn" statute. Its Criminal Code makes "non-consensual discrimination of private sexual images" a class-four felony, where an alleged offender (1) intentionally disseminates an image of another person at least 18 years of age, who is identifiable from the image itself or information displayed with it, and is engaged in a sex act or whose intimate parts are exposed, if that alleged offender (2) obtains the image under

circumstances in which a reasonable person would know or understand it was to remain private, and (3) knows or should have known the person depicted has not consented to the dissemination. 720 ILCS § 5/11-23.5(b).

4. Bethany Austin was charged with violating § 11-23.5(b) after she sent her family and friends a letter to refute her ex-fiancée's false account of why their engagement ended. She appended text messages and pictures from a shared cloud account, which automatically sent all of her fiancée's texts to Austin's iPad. The texts and pictures from the shared account revealed her fiancée and a neighbor had become sexually involved while Austin was living with her fiancée. This precipitated the end of the relationship, and the fiancée told friends and family it happened because Austin had gone "crazy," and "no longer cooked or did household chores." To clear her name, Austin sent a few select friends and family members the texts and photos that had been forwarded to her, and which revealed the true reason for the breakup. Incensed his deception had been exposed, Austin's ex-fiancée contacted police. In the resulting investigation, the neighbor admitted she knew Austin and her fiancée shared the cloud account, yet claimed the pictures were private and intended only for her paramour.

5. The State charged Austin with one count of violating § 11-23.5(b), which called for a prison term of one to three years. She moved to dismiss the indictment on the First Amendment grounds that the statute is a facially unconstitutional content-based restriction of speech not narrowly tailored to serve a compelling government interest, and that it is unconstitutionally overbroad. The

trial court agreed and held the statute unconstitutional on its face. That holding allowed direct appeal under state law to Illinois' Supreme Court, which reversed and remanded in a split 5-2 decision that Austin failed to carry her burden of clearly establishing § 11.23.5(b)'s invalidity. 2019 IL 123910, ¶¶ 14, 86, 121.

6. The Illinois Supreme Court held § 11-23.5(b) is not subject to strict scrutiny, but rather only intermediate scrutiny, because it found the statute to be a content-neutral time, place and manner restriction, and—separately—because it regulates a purely private matter. *Id.* ¶ 43. As to the former, the court held that § 11-23.5(b) restricts dissemination of sexual images not based on their content but on circumstances of acquisition and dissemination, and on the government's aim to address the "secondary effects" thereof on privacy interests, rather than to suppress discussion of any particular topic. *Id.* ¶¶ 47-50. It also held that only intermediate scrutiny applied because the statute does not regulate speech on matters of public concern "at the heart" of the First Amendment's protection, but only that involving "purely private" matters. *Id.* ¶ 53. Such speech, the court held, is not entitled to "special protection," *id.*, and as such, § 11-23.5(b) "does not pose such inherent dangers to free expression … as to justify … strict scrutiny." *Id.* ¶ 57.

7. The court held § 11-23.5(b) survived intermediate scrutiny because it serves a substantial government interest in protecting individual privacy rights, *id.* ¶¶ 61-69, which would be served less effectively absent the law, *id.* ¶¶ 70-76, and does not burden substantially more speech than necessary. *Id.* ¶¶ 77-86. It went on to hold § 11-23.5(b) is neither overbroad despite its absence of a malicious purpose

requirement, nor unconstitutionally vague despite failures to define what it means to "disseminate" covered images and the statute's "lawful public purpose" exception. *Id.* ¶¶ 88-119. Justice Garman dissented, joined by Justice Theis, on grounds that § 11-23.5 is a content-based restriction on speech which must face strict scrutiny, and that the statute is neither narrowly tailored nor the least restrictive means of dealing with nonconsensual dissemination of private sexual images. *See id.* ¶ 125.

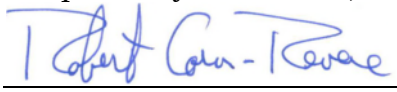
8. Austin seeks to have this Court clarify that, regardless of whether a law regulates speech based on its supposed "purely private" content, strict scrutiny is the required standard of review, and that courts cannot apply a lower level of scrutiny solely on grounds that the speech regulated may not be of public concern. Austin also seeks to have this Court clarify that statutes like "revenge porn" laws that directly regulate speech based on content are not subject to only intermediate scrutiny as the Illinois Supreme Court held, but rather must survive strict scrutiny, as Vermont's Supreme Court held. *See Vermont v. Vanburen*, 214 A.3d 791, 800, 808-14 (Vt. 2019). Austin further seeks to have the Court clarify that the burden on a First Amendment challenge to a statute like § 11-23.5(b) that expressly criminalize speech rests on the government to establish constitutionality, rather on the challenging party to clearly establish invalidity.

9. An extension of time is requested on grounds that Ms. Austin only recently engaged the undersigned pro bono Supreme Court counsel for this case, and accordingly, and in view of intervening year-end holidays, requires sufficient

time to prepare and file her petition with this Court, to which end Ms. Austin seeks a 30-day extension.

10. For these reasons, applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including February 14, 2020.

Respectfully submitted,



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