No. 19-1029

IN THE
Supreme Court of the United States

BETHANY AUSTIN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION AND THE MARION B. BRECHNER FIRST AMENDMENT PROJECT IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is a non-profit association incorporated in Illinois, with some 180 members throughout the United States, Canada, and Europe. Its membership consists of preeminent attorneys whose practice emphasizes the defense of First Amendment rights and related liberties. FALA members have litigated cases involving a wide spectrum of such rights, including free expression, free association, and privacy issues. FALA's members were directly involved in many of this Court's decisions that form First Amendment jurisprudence in the area of erotic speech and expression. FALA has also frequently appeared as an amicus before this Court to provide its unique perspective on the most important First Amendment issues of the day.

Amicus Curiae Marion B. Brechner First Amendment Project (the "Project") in the College of Journalism and Communications at the University of Florida in Gainesville is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a wide range of scholarly and

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[1] Both parties received timely notice and have consented in writing to the filing of this *amici curiae* brief. Pursuant to Supreme Court Rule 37.6 no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

educational activities benefiting scholars, students and the public. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

Amici are concerned that the Supreme Court of Illinois erred in not following this Court's clear rule articulated in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), for determining when a statute must face strict scrutiny — namely, when it is content based on its face, regardless of whether there is a benign purpose or motive underlying the legislation. Furthermore, Amici are troubled that Illinois's highest court adopted two highly malleable work-arounds — one pivoting on stretching the already contested secondary-effects doctrine that has been closely cabined and confined by this Court to the context of regulating bricks-and-mortar sexually oriented businesses, the other turning on a slippery and untenable divide between public and private speech — for dodging strict scrutiny when a statute is facially content based. In brief, Amici are distressed by the Supreme Court of Illinois's disregard for this Court's precedent in *Reed* and by its attempt to substitute in *Reed*'s place a highly problematic test that too easily sacrifices First Amendment interests in free expression.

SUMMARY OF THE ARGUMENT

The Illinois statute at issue in this case — 720 Illinois Comp. Stat. § 5/11-23.5 — on its face restricts

speech based on its content.[2] Specifically, it restricts the dissemination of an image of a person "who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part," and does not purport to restrict the dissemination of images with other content.

The court below correctly noted that this Court has proscribed the limits of "unprotected" categories of speech. *See*, *e.g.*, *United States v. Alvarez*, 567 U.S. 709, 717 (2012); *United States v. Stevens*, 559 U.S. 460, 468 (2010). These categories of speech are "well-defined and narrowly limited," because the "prevention and punishment of [speech within these historical categories of unprotected speech] have never been thought to raise any Constitutional problem." *Stevens* 559 U.S. at 468-69.

Although the court below disavowed "identify[ing] a new category of speech that falls outside of [F]irst [A]mendment protection" (*see* Pet. App. 17a), and correctly identified non-consensual distribution of intimate images as "not fall[ing] within an establish first amendment categorical exception" (*ibid.*), it applied intermediate scrutiny, rather than the strict scrutiny applicable to content-based restrictions, for two reasons: 1) that the statute is "justified on the grounds of protecting privacy" (Pet. App. 22a); and 2) that the statute "regulates a purely private matter" (*ibid.* ¶53).

Thus, the court below effectively identified two categories of speech as falling outside the First

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[2] The dissent below would have found that the statute is a content-based restriction. Pet. App. 65a.

Amendment's usual requirement that strict scrutiny be applied to content-based laws like the one squarely at issue in *Austin*: *speech with secondary effects on privacy interests*; and *speech on purely private matters*.

ARGUMENT

A. A content-based restriction's justification does not render it content neutral.

This Court has held that where a regulation "[o]n its face… is a content-based regulation of speech," there is "no need to consider the government's justifications or purposes for enacting" the regulation. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

The statute is content based on its face: it regulates the dissemination of intimate images, but not of other images. *Reed* informs that this renders the statute content based—and therefore subject to strict scrutiny—"regardless of the government's … content-neutral justification…." *Ibid.* 2228.

The opinion of the court below flies in the face of *Reed*'s holding. The reasoning of the court below was that the statute restricts dissemination of sexual images based on the government's purpose to address "secondary effects" of the dissemination (Pet. App. 22a) where the "secondary effect" is harm to the privacy of the subject of the speech.

There are at least three strands of this Court's jurisprudence that the court below's reasoning conflicts with.

First, this Court has applied the secondary-effects doctrine only in the context of regulating bricks-and-mortar adult businesses. *See, e.g.*, *City of Littleton,*

Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 783-84 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426 (2002); *see also* Jacobs, Leslie Gielow, *Making Sense of the Secondary Effects Analysis after Reed v. Town of Gilbert*, 57 Santa Clara L.R. 385, 390 (2017). It thus did not consider subjecting the sign regulation in *Reed* to intermediate scrutiny because the regulation was aimed at the "secondary effects" of diminished "aesthetic appeal and traffic safety." *Reed*, 135 S.Ct. at 2231. Similarly, it did not consider subjecting the video-game restriction in *Brown v. Entertainment Merchants Association* to intermediate scrutiny because the restriction was aimed at the "secondary effect" of "harm to minors." *Brown v. Entm't Merchants Ass'n.*, 564 U.S. 786, 799 (2011). Furthermore, it did not subject the Stolen Valor Act in *U.S. v. Alvarez* to intermediate scrutiny, with the secondary effect being *harming the integrity of the Congressional Medal of Honor*. *U.S. v. Alvarez*, 567 U.S. 709, 725 (2012). Nor did it subject the statute in *U.S. v. Stevens* to intermediate scrutiny, with the secondary effect being, say, *inciting animal cruelty*. *U.S. v. Steve*ns, 559 U.S. 460 (2010). Nor has this Court ever subjected restrictions on the defamation of public figures to intermediate scrutiny, with the secondary effect being "harming someone's reputation."

A "secondary effects" test for whether a statute passes First Amendment muster or not invites legislatures and courts to balance the cost of speech against its value, a proposition to which this Court has reacted in horror, calling such an argument "startling and dangerous," because "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad

hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470.

Second, this Court has never held that any harm to the subject of speech is a "secondary effect" of speech justifying restriction. This Court has considered cases where the secondary-effects doctrine is incorrectly invoked to justify regulation of the "direct impact" of a content-based regulation. For example, in *Boos v. Barry,* the District of Columbia sought to enforce an ordinance prohibiting any picketing within 500 feet of a foreign embassy if the sign tended to bring the foreign government into "public odium" or "public disrepute." *Boos v. Barry*, 485 U.S. 312, 315 (1988). This Court rejected the District's argument that it sought only to regulate the secondary effects of such picketing because the ordinance instead focused on the "direct impact" of the speech on its audience. *Ibid.* at 321. In *Boos* this Court found that the "emotive impact of speech on its audience" is not a "secondary effect." *Ibid*. Just as the effect of speech on its hearer is a direct and not a secondary effect of the speech, the effect of speech on its *subject* is not a secondary effect. Were it otherwise, every law intended to protect someone from others hearing the truth, including any restriction on truthful speech about public officials, would have to face only intermediate scrutiny.

Thus, this Court made it clear in *U.S. v. Playboy Entm't Grp.*, 529 U.S. 803 (2000), that concerns about signal bleed from cable television channels with adult content did not transform a content-based law subject to strict scrutiny into one requiring only intermediate scrutiny. *See id.* at 815 ("We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values

has no application to content-based regulations targeting the primary effects of protected speech. . . . The statute now before us burdens speech because of its content; it must receive strict scrutiny.") (internal citation omitted).

Third, this Court has "repeated[ly] refus[ed] to answer categorically whether truthful publication may ever be punished consistent with the First Amendment" because "the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (internal quotation omitted).

Because the statute is a content-based restriction on truthful speech, because it is justified by the direct effect that the restricted speech has on its subject, and because it is outside the context of bricks-and-mortar sexually oriented business, the use by the court below of the secondary-effects doctrine to apply intermediate scrutiny specifically falls afoul of this Court's *Reed* holding that "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228.

B. A content-based restriction is no more valid because it restricts speech involving purely private matters.

The second justification the court below gave for applying intermediate scrutiny, instead of strict scrutiny, to this facially content-based restriction, was that "the statute regulates a purely private matter" (Pet. App. 20a).

The court below takes from this Court's decision in *Snyder v. Phelps*, 562 U.S. 443 (2011), an implicit imprimatur for criminal restrictions on speech of

purely private matters. But even speech on "purely private matters" may be truthful, thus raising First Amendment concerns about whether their punishment is lawful.

In *Snyder* this Court held that the Westboro Baptist Church could not be held liable for intentional infliction of emotional distress if its speech was not of purely private concern. *Snyder*, 562 U.S. at 451-52. It is doubtful whether the public/private speech distinction from *Snyder* survives this Court's modern jurisprudence because of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Decided four years after *Snyder*, *Reed* involved an outdoor sign ordinance which was utilized to stop a small church from advertising its services. *Reed*, 135 S. Ct. at 2225. This Court did not consider whether the speech was of public or private concern; rather, it only analyzed the sign ordinance in terms of content neutrality. *Id.* at 2227. Because the sign code was "content-based on its face," this Court struck down the ordinance as a content-based restriction that did not survive strict scrutiny. *Id.* at 2231. The Town of Gilbert did not advance an argument that the speech at issue dealt only with private matters, and this Court summarily disposed of a number of similar arguments as to why the matter should be considered "content-neutral." *Id.* at 2228-2230. This Court held that "an innocuous justification cannot transform a facially content-based law into one that is content-neutral." *Id.* at 2228, *citing Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994).

The court below cites privacy torts as evidence that privacy may trump free speech. But as the court below notes (Pet. App. 35a–37a), torts and crimes are different creatures. Criminal restrictions have more

of a chilling ("deterrent") effect than torts. This Court has never addressed whether the privacy torts trump the First Amendment so that violations of privacy may be punished criminally.

The court below also provides, as examples of privacy-protecting restrictions, laws against the disclosure of medical records, biometric data, and Social Security numbers (Pet. App. 23a). These laws apply only to disclosures of this information by covered entities, such as health care providers or the government. Much like federal health-information privacy laws such as HIPAA, they include no private right of enforcement by the person whose privacy interest is protected; nor does a cause of action—much less a criminal prosecution—lie against a private person who disseminates such private information.

Here "the record doesn't specify" what person or persons received the objectionable speech. *Illinois v. Austin*, No. 16 CF 935 (Ill. 22nd Cir. Ct. Aug. 8, 2018), Petitioner's App. at 75a. At least one person, a family member of Ms. Austin's fiancé, received it. And while the described speech—proof that Ms. Austin's fiancé had cheated on her and was deceiving the family about the reason for their breakup—appears not to have been of general public interest, it may not have been an inappropriate subject for discussion within the family: much we say to our relatives and intimates is not of public concern; it cannot become less protected than weighty political matters because it involves family matters.

Speech on matters of public concern "lies at the heart of [F]irst [A]mendment protection" (Pet. App. 24a), it is true. Yet speech on other matters may be just as important, and drawing lines among categories is difficult. As this Court observed in

Brown, "The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown*, 564 U.S. at 790. The Court added there that the fact that "video games communicate ideas" was sufficient "to confer First Amendment protection." Id. For it is only by protecting speech on matters that are not necessarily of public concern that we can protect speech at the heart of the First Amendment. Otherwise, the state's power to decide that certain speech is not of public concern becomes, itself, the power to censor.

Not only is this the power to censor, but it is the power to censor based explicitly on content. Paradoxically, in order to make a determination of whether speech is of public or private concern, a reviewing court must consider the content of the restriction. *See Snyder*, 562 U.S. at 453, *quoting Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (2007). Thus, in order to make an argument on the difference between public and private speech, the government must concede that the restriction is content-based.

Only once the content of the speech is examined can a reviewing court then decide whether the speech at issue may be constitutionally prohibited. *Snyder*, 562 U.S. at 454.

Just as this Court in its recent free-speech jurisprudence has not concerned itself with whether statutes restricting crush videos, stolen valor, violent video games, and church signs were intended to address "secondary effects" of such speech, it has not concerned itself with whether speech concerning

purely private matters may be the subject of a criminal prosecution.

The problems with the court below's "purely private speech" exception to First Amendment protection, then, are at least fourfold:

First, "purely private speech" is inherently a question of content: the applicability of a statute that restricts only purely private speech will be determined by the content of the speech; "by any commonsense understanding of the term [this] is 'content based.'" *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Because such a regulation would always be content based, then, it must always be subject to strict scrutiny review.

Second, to allow the government to decide that some matters are not suitable for publication is to give the government broad powers of censorship that will threaten the speech that is at the core of the First Amendment. By the very act of categorizing the content of speech into distinct categories which would enjoy varying levels of protection, the government takes up the censor's pen.

Third, to declare that all speech that is not of public concern will receive lesser protection is to allow the government access to and the power to censor our most intimate interpersonal and intrafamilial communications. When this Court has determined that certain speech lacks protection because it falls into one of the historical categories of unprotected speech, it has never demarcated a line between matters of public and private concern. Interpersonal communication must be as free as public communication, lest we invite the government into the "realm of personal liberty" to which they may not

enter. *Lawrence v. Texas*, 539 U.S. 558, 5578 (2003), *citing Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

And fourth, this is the creation of a broad new category of unprotected speech in circumstances in which this Court's jurisprudence forbids it. For example, in *Stevens*, the government argued that "depictions of animal cruelty" should be added to the list of the categories of unprotected speech because such depictions lacked "expressive value" (*see also* the arguments *supra* regarding secondary effects). *Stevens*, 559 U.S. at 469. This Court reacted in horror, calling the argument "startling and dangerous," because "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id*. at 470. The Court below, if its opinion is allowed to stand, will have engaged in just such an ad hoc balancing of the relative social costs and benefits of the speech at issue, and will on that basis have created a broad new category of unprotected speech with the stroke of a pen. Just as this Court found it "startling and dangerous" that the government would attempt to create such a new category with depictions of animal cruelty, so should it find the Illinois Supreme Court's rationale startling and dangerous.

CONCLUSION

In *Reed* this Court held that the government's "benign motive" does not make a facially content-based law content neutral. By adopting a secondary-effects analysis the court below has made the government's intent determinative of whether a statute is content based.

In *Stevens* this Court "held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown*, 564 U.S. at 791. By adding a broad new category of unprotected speech—*speech on matters of purely private concern*—while expressly disclaiming the addition of a new category, the court below has attempted an end-run around this holding.

Amici hope that this Court will use this case as an opportunity to reiterate that, in *Stevens* and *Alvarez* and *Brown* and *Reed*, it meant what it said: speech outside of a few narrow categories of historically unprotected speech is protected, and a facially content-based restriction on protected speech is void unless it survives strict scrutiny, not some lesser standard of review.

Respectfully submitted,

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