No. 19-1029

# In The
# Supreme Court of the United States

BETHANY AUSTIN,

*Petitioner,*

*v.*

STATE OF ILLINOIS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois**

## BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

PAUL M. SHERMAN
SAMUEL B. GEDGE
*Counsel of Record*
WILLIAM R. ARONIN
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit public-interest law firm committed to securing greater protection for individual liberty. Much of the Institute for Justice's free-speech practice centers on protecting individuals' right to speak. Often, our clients communicate about matters that—while important—are "of purely private significance." Pet. App. 24a. The Illinois Supreme Court held that the government has more latitude to punish this sort of speech. The Institute for Justice has a substantial interest in this Court's resolution of that issue.[1]



## SUMMARY OF ARGUMENT

Like forty-five other States, Illinois makes it a crime to distribute nonconsensual pornography. Amicus takes no position on whether Illinois's nonconsensual-pornography law is facially constitutional. In upholding the law, however, the Illinois Supreme Court declared a rule with far-reaching implications: If speech is "of purely private significance," even laws

[1] Counsel for all parties received notice of amicus curiae's intent to file this brief at least ten days before its due date. Petitioner has lodged a blanket amicus consent letter with the Court, and respondent has consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

criminalizing that speech call for only intermediate scrutiny. Pet. App. 24a.

That reasoning is as novel as it is dangerous; it gives the government latitude to punish *most* of what we say and write. The Illinois court's decision thus raises a question of broad importance, and this case is a good vehicle for addressing it.

## ARGUMENT

In upholding a nonconsensual-pornography statute, the Illinois Supreme Court announced a First Amendment standard that reaches far beyond intimate photos. The court acknowledged that the nonconsensual-pornography statute "on its face targets the dissemination of a specific category of speech." Pet. App. 21a. And ordinarily, the court noted, "[a] content-based law is justified only if it survives strict scrutiny." Pet. App. 19a. Having correctly recited that rule, however, the court swiftly abandoned it. Citing "two independent reasons," the court held that the statute merited only "an intermediate level of scrutiny." Pet. App. 20a.

Neither of the court's reasons squares with this Court's First Amendment precedent. First, the Illinois Supreme Court forgave the statute's content-based terms because it concluded that the law was "*justified* without reference to the content of the regulated speech." Pet. App. 21a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). That is wrong—this Court repudiated that reading of *Ward* five Terms ago.

*See Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."). The court's second reason for adopting intermediate scrutiny is wrong as well—and far more serious. In the court's telling, speech "of purely private significance" is less valuable than "speech on public issues." Pet. App. 24a. So the government can single out—even criminalize—speech about "private matter[s]," subject only to intermediate scrutiny. That conclusion warrants this Court's immediate review.[2]

## A. The Illinois Supreme Court's decision presents an issue of broad importance.

In giving the State latitude to restrict speech "of purely private significance," the Illinois Supreme Court declared a rule that is unprecedented and unworkable.

1.a. As a rule, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (citation omitted). For that

[2] The petition's first question presented raises the level-of-scrutiny issue addressed in this brief. The Court has jurisdiction because the petition's second question presented—on which we take no position—"would bar further prosecution" if resolved in petitioner's favor. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989); *see also id.* ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule.").

reason, "[a] law that is content based on its face is subject to strict scrutiny." *Reed*, 135 S. Ct. at 2228.

There are only a few, narrow exceptions. "[C]ontent-based restrictions on speech have been permitted . . . when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (quoting *Stevens*, 559 U.S. at 468). Governments can outlaw child pornography, for example, or fraud. *Id.* Incitement is another exception. *Id.* And under current doctrine, laws singling out commercial speech trigger *Central Hudson* review, a standard less probing than strict scrutiny. *See generally Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 572, 574-75 (2001) (Thomas, J., concurring in part and concurring in the judgment).

On top of those usual exceptions, the Illinois Supreme Court added a carve-out for speech "of purely private significance." "Speech on matters of public concern lies at the heart of first amendment protection," the court reasoned. Pet. App. 24a. By extension, the court posited, all other speech is second-tier. And second-tier speech gets second-tier protection, in the form of intermediate scrutiny. Pet. App. 24a, 27a.

That holding marks a startling expansion of the government's power to punish speech. This Court has of course characterized political speech as "occup[ying] the highest rung of the hierarchy of First Amendment values." *Janus* v. *AFL-CIO*, 138 S. Ct. 2448, 2476 (2018) (citation omitted). But the Court "has never held that

there's any general exception for speech on matters of 'private concern.'" Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1095 (2000) (*Information Privacy*). Quite the opposite; for decades, the Court has remarked that "[e]ven wholly neutral futilities" are protected "as fully as" high-minded discourse. *Stevens*, 559 U.S. at 479-80 (citations omitted). Put simply, speech enjoys equal protection whether it is of public concern or private.

That principle has been reaffirmed time and again. In *Brown* v. *Entertainment Merchants Ass'n*, for example, the Court applied strict scrutiny to a law regulating violent videogames. 564 U.S. 786, 788, 799 (2011). In *Sable Communications of California, Inc.* v. *FCC*, the Court applied strict scrutiny to a law banning "dial-a-porn." 492 U.S. 115, 118, 126 (1989). The Court did the same in *Ashcroft* v. *American Civil Liberties Union*, in considering a law restricting online pornography. 542 U.S. 656, 660-61 (2004). Whatever their value, videogames, phone sex, and pornography do not meet most people's definition of "speech on public issues." Pet. App. 24a. Yet at no point did this Court try to calibrate the level of scrutiny to the speech's private or public importance. In *Brown*, in fact, the Court wrote off that exercise as not just "difficult," but "dangerous." 564 U.S. at 790; *see also Winters* v. *New York*, 333 U.S. 507, 510 (1948).

b. The Illinois Supreme Court acknowledged none of this. Instead, it borrowed from private torts

and public-employment law to construct a "public concern" test for free-speech law writ large. And, to be sure, this Court has carved out areas where the First Amendment analysis indeed "turns largely on whether th[e] speech is of public or private concern." *Snyder* v. *Phelps*, 562 U.S. 443, 451 (2011). But that public-concern test is "the exception[] rather than the rule." Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. U. L. Rev. 731, 785 (2013) (*One-to-One Speech*). It has surfaced in three contexts only: public-employee speech and suits for defamation and intentional infliction of emotional distress. *Id.* And each of those contexts has features that set it apart from speech restrictions generally. For most of the Nation's history, for example, defamation was wholly unprotected. *See generally Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting). As for speech by public employees, the government's interests "as an employer" have long been held to "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Bd. of Ed.*, 391 U.S. 563, 568 (1968).

Those idiosyncrasies have sustained the public-concern test for private torts and public employment. But whatever virtue the test may have there, it has no merit as a First Amendment tenet more broadly. *See* Pet. 21. Take *Connick* v. *Myers*, one of the leading cases on public-employee speech. 461 U.S. 138 (1983). There, the Court held that a city employee's survey about office morale "d[id] not fall under the rubric of matters of

'public concern.'" *Id.* at 148. So (simplifying slightly) the Court ruled that the employee could constitutionally be fired. Yet that analysis does not translate to speech laws more generally, as the Court in *Connick* noted—explicitly. "We in no sense suggest," the Court stressed, "that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." *Id.* at 147. Had the New Orleans District Attorney prohibited the public at large from griping about his office's morale, that content- and viewpoint-based rule would not have been upheld. Nor would it have found safe-harbor in intermediate scrutiny.

By exporting "public concern" to free-speech doctrine as a whole, the Illinois Supreme Court thus devalued far more than "revenge porn"; it assigned second-tier status to most of what we say, write, hear, and read. Most of our day-to-day exchanges, after all, are not of "public concern." But they are no less meaningful, valuable, or important. To illustrate, consider some of amicus's clients:

- A retired veterinarian who uses the internet to give advice to pet owners worldwide. *Hines* v. *Quillivan*, 395 F. Supp. 3d 857, 861-62 (S.D. Tex. 2019), *appeal docketed*, No. 19-40605 (5th Cir. July 3, 2019).

- A company that converts legal descriptions of land into computer-generated maps and sells

them to community banks. *Vizaline, L.L.C.* v. *Tracy*, 949 F.3d 927, 928 (5th Cir. 2020).

- A privately certified health coach who offers diet advice. Order, *Del Castillo* v. *Philip*, No. 17-cv-722 (N.D. Fla. July 17, 2019), *appeal docketed*, No. 19-13070 (11th Cir. Aug. 9, 2019).

- A teacher who instructs students about horseshoeing. *Pac. Coast Horseshoeing Sch., Inc.* v. *Grafilo*, 315 F. Supp. 3d 1195, 1197 (E.D. Cal. 2018), *appeal docketed* (9th Cir. May 9, 2018).

- A man who runs a website offering advice and moral support for people wishing to try the paleolithic diet. *Cooksey* v. *Futrell*, 721 F.3d 226, 230 (4th Cir. 2013).

If asked, regulators and courts would likely view much of this speech as "of purely private significance." But to the people involved, the information may be far more important than the latest political documentary or news article or campaign ad. That drives home the significance of the Illinois court's decision. By granting the government latitude to criminalize speech "of purely private significance," the court cheapened all manner of "speech grounded in the real, everyday experience of ordinary people." Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 37 (1990).

2. The Illinois court's public-concern test would also be impossible to administer in practice. Even in

the contexts of public employment and defamation, the "distinction between public and private concerns" suffers from "inherent indeterminacy." Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 Mo. L. Rev. 597, 598 (2000). It requires courts to "examine the 'content, form, and context' of th[e] speech, 'as revealed by the whole record.'" *Snyder*, 562 U.S. at 453 (quoting *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (opinion of Powell, J.)). "[N]o factor is dispositive," with "all the circumstances of the speech" finding their way into the mix, "including what was said, where it was said, and how it was said." *Id*. at 454.

That test is hard enough in the world of public employees and private torts. Even there, "the boundaries of the public concern test are not well defined." *Id.* at 452 (citation omitted). And "[b]ecause the standard is so vague and subjective, courts can (and often do) arrive in good faith at opposite characterizations of essentially similar expression." Stern, *supra*, at 653; *see also* Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind. L.J. 43, 81 (1988). Partly for this reason, even commentators who may be open to giving States leeway to target revenge porn have questioned the blanket rule the Illinois court embraced here. *See* Volokh, *One-to-One Speech*, at 788 ("[G]iven the vagueness and breadth of what courts have been willing to label 'private concern,' that line shouldn't be transplanted to criminal punishments for true statements."); *see also* Volokh, *Information Privacy*, at 1094-95.

In fact, the public-concern test is uniquely unsuited to cases like this one, involving allegedly unconstitutional statutes. For torts and public employment, the public-concern standard is straightforward (if vague in execution): Courts evaluate the speech that prompted the tort suit or the disciplinary action. The speech is on trial. But when it is a statute at issue, the analysis is different; ordinarily, courts scrutinize the challenged law, not the challenger's speech. It is the statute that matters, not the intricacies of each speaker's words. *See, e.g.*, *Alvarez*, 567 U.S. 709.

That makes the Illinois Supreme Court's decision doubly flawed. Stated most simply, the public-concern test does not work as a First Amendment rule of general applicability. On the Illinois court's reasoning, the level of scrutiny for a given statute depends, not on the statute itself, but on the "content, form, and context" of each challenger's words. Pet. App. 25a-26a. In this case, for example, the court first made a value judgment about whether Bethany Austin's letter "relate[d] to any broad issue of interest to society at large." Pet. App. 26a. The court "ha[d] no difficulty in concluding" that it did not. Pet. App. 26a. So the court held that the challenged statute qualified for intermediate scrutiny. Pet. App. 26a-27a.

As a standard for judging statutes, that approach is a non-starter, particularly for the many laws that regulate public and private speech in equal measure. The sign code in *Reed* v. *Town of Gilbert*, for instance, covered signs of public and private interest alike. 135 S. Ct. at 2224-25. Yet on the Illinois Supreme Court's

view, the sign code would face strict scrutiny if enforced against a sign about politics but intermediate scrutiny if enforced against one about bingo (assuming bingo is not "an issue of public concern"). That is not how the First Amendment works. In holding otherwise, the Illinois Supreme Court broke with free-speech precedent at a bedrock level. Its reasoning would not just make the public-concern test the rule rather than the exception; it would oblige the courts to pass value judgments about speech in many—even most—First Amendment cases.

### B. This case is a good vehicle to address whether the government has latitude to punish speech of purely private significance.

1. Almost every State in the Nation has criminalized nonconsensual pornography in one form or another. Pet. 7-8 & n.4. In turn, more and more courts are confronting challenges to those laws. *See State* v. *VanBuren*, 214 A.3d 791 (Vt. 2019) (upholding law under strict scrutiny); *State* v. *Casillas*, 938 N.W.2d 74 (Minn. App. 2019) (invalidating law as overbroad); *Ex Parte Jones*, ___ S.W.3d ___, 2018 WL 2228888 (Tex. Ct. App. May 16, 2018), *rev. granted*, No. PD-0552-18 (Tex. Ct. Crim. App. July 25, 2018) (invalidating law under strict scrutiny and as overbroad). On the level-of-scrutiny question presented here, however, further percolation would have little value. The Illinois Supreme Court's reasoning did not turn on any peculiar feature of the State's revenge-porn law; the court devalued "private" speech categorically. Certainly, there

is no reason to think this issue likely to arise in other revenge-porn cases specifically. Analogous statutes in other States are almost all narrower than Illinois's. So, unlike in Illinois, courts in those States will be less likely to see level-of-scrutiny questions as case-dispositive.

Vermont illustrates the point. Like Illinois, Vermont criminalizes distributing nonconsensual pornography. Vt. Stat. tit. 13, § 2606(b)(1). Vermont's law, however, is materially narrower. Unlike Illinois, Vermont targets only people who act "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted." *Id.* Vermont also targets only disclosures that "would cause a reasonable person to suffer harm." *Id.*; *see also id*. § 2606(a)(2) ("'Harm' means physical injury, financial injury, or serious emotional distress."). In part because of these "express limitations on the statute's reach," the Vermont Supreme Court upheld the law even under strict scrutiny. *VanBuren*, 214 A.3d at 813. As a result, the court's decision did not implicate the level-of-scrutiny question presented here. And that will likely be true in many States whose laws resemble Vermont's. There is thus no persuasive reason for delaying review on petitioner's level-of-scrutiny question.

2. This case is also a suitable vehicle because the Illinois Supreme Court's use of intermediate scrutiny appears to have been outcome-determinative. The dissenting justices concluded that the challenged law "cannot withstand strict scrutiny, as it is not narrowly tailored to serve the State's interests and less

restrictive alternatives are available." Pet. App. 71a (Garman, J., dissenting). The majority opinion fortifies that conclusion.

*First*, the court acknowledged that Illinois's law is an outlier in its scope. "We recognize," the court remarked, "that most state laws prohibiting the nonconsensual dissemination of private sexual images expressly require some form of malicious purpose or illicit motive as a distinct element of the offense." Pet. App. 53a. In fact, at least thirty States include an intent requirement of this type. *See generally* Cyber Civil Rights Initiative, *46 States + DC + One Territory Now Have Revenge Porn Laws*, https://tinyurl.com/z8hpzv2. At least seven States include as an element that the victim suffer emotional distress or some other type of harm. At least five include as an element that the dissemination take place electronically. Of the forty-six States with nonconsensual-pornography laws, only four are arguably as broad as Illinois's.[3] Put another way, forty-one States have acted to address the harms of nonconsensual pornography using what appear to be "plausible, less restrictive alternatives." *Ashcroft*, 542 U.S. at 666; *cf.* Pet. App. 33a (acknowledging that "[t]hese widespread efforts demonstrate that government recognizes the plight of victims of this crime and their need for protection"). If not dispositive, that

[3] Del. Code tit. 11, § 1335(a)(9); Ind. Code § 35-45-4-8; Minn. Stat. § 617.261(1); Wis. Stat. § 942.09(3m)(a). The Illinois Supreme Court said that New Jersey's statute is similar, Pet. App. 54a, but since 2016, the scope of New Jersey's law has been unclear, N.J. Stat. § 2C:14-9(c).

figure suggests that the Illinois Supreme Court may have reached a different conclusion had it used more exacting scrutiny.

*Second*, in applying intermediate scrutiny, the Illinois Supreme Court relied heavily on a misreading of "the tort of public disclosure of private facts." Pet. App. 30a. The court appears to have viewed Illinois's nonconsensual-pornography statute and the public-disclosure tort as analogous. Pet. App. 30a. But in truth, that comparison only highlights the statute's breadth. Typically, an element of the public-disclosure tort is that a private fact be "publicized." As the trial court observed, "[t]he tort requires broad dissemination to the public at large or to a group with a special relationship to the plaintiff." Pet. App. 101a (citation omitted); *see also Miller* v. *Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990). Illinois's nonconsensual-pornography statute reflects no such limiting principle; "simply viewing an image sent in a text message and showing it to the person next to you could result in felony charges." Pet. App. 67a (Garman, J., dissenting). Far from signaling that the statute is well-tailored, then, comparison with the public-disclosure tort reinforces the statute's breadth—a point the State appears to have perceived on appeal. *See* Appellant's Ill. Sup. Ct. Br. 15 ("[I]f necessary to preserve the constitutionality of the statute, it would not be unreasonable to construe the statute to similarly require dissemination to the public at large or to a group with a special relationship to the plaintiff.").

*Third*, the Illinois Supreme Court viewed "intermediate scrutiny" as an extraordinarily permissive standard. As construed by the court, Illinois's nonconsensual-pornography law applies to paintings and drawings. Pet. App. 50a-51a (taking comfort in the belief that those cases would be "rare"); Oral Arg. 40:49-41:41 (Ill. May 14, 2019), https://tinyurl.com/ydv6pgk6. It covers the woman who reacts to an unwanted sexual text message by showing a friend. Pet. App. 67a, 69a (Garman, J., dissenting); Oral Arg. 34:57-36:10. And it covers the woman who tries to deter that behavior by forwarding the message to the sender's girlfriend or mother. *See generally* Appellee's Mot. Stay Mandate 5-6 (Ill. filed Nov. 19, 2019). As Justice Garman observed in dissent, the law's "broad reach could include a wide swath of conduct, including innocent conduct." Pet. App. 67a.

Even so, the Illinois Supreme Court framed its "intermediate scrutiny" in unusually complaisant terms. "[T]he 'narrowly tailored' requirement of intermediate scrutiny," the court reasoned, "is satisfied so long as the law promotes a substantial government interest that would be achieved less effectively absent the law." Pet. App. 34a. And in holding that standard met, the court deferred in large part to the State's police power. The court relied on non-speech cases to conclude that lawmakers have "broad discretion" to identify "the public interest and welfare" and to "determine the means needed to serve such interest." Pet. App. 34a (quoting *People* v. *McCarty*, 858 N.E.2d 15, 35 (Ill. 2006)). The court blessed the legislature's "wide discretion to

classify offenses and prescribe penalties." Pet. App. 34a (citation omitted). The court even suggested that challengers—rather than the government—bear the burden in First Amendment cases. Pet. App. 5a ("All statutes are presumed to be constitutional, and the party challenging a statute's constitutionality bears the burden of clearly establishing its invalidity."). With those principles as its starting point, the court then made quick work of petitioner's—and the dissenting justices'—questions about means-end fit. *See* Pet. App. 33a-44a.

In this way, the Illinois Supreme Court's decision works a double harm. Not only did the court adopt a lax view of intermediate scrutiny, but it converted that standard into the default for many First Amendment cases statewide. Going forward, intermediate scrutiny will be the norm in Illinois for laws that either (1) punish speech "of purely private significance" or (2) stem from supposedly pure motives, regardless of content-based terms. The result is a rule that devalues fully protected speech and warrants this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SHERMAN
SAMUEL B. GEDGE
*Counsel of Record*
WILLIAM R. ARONIN
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

MARCH 2020