No.

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY A. ROLLINS, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court has held that a statute restricting photographs, videos, or sound recordings is presumptively invalid under the First Amendment to the Constitution, and the government bears the burden to rebut that presumption. *U.S. v. Stevens*, 559 U.S. 460, (2010); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). "As with pictures, films, paintings, drawings, and engravings, both oral utterances and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution." *Kaplan v. California*, 413 U.S. 115, 119-20 (1973). To survive a constitutional challenge to a statute that infringes upon a fundamental right, that statute must meet the "strict scrutiny" standard, which requires that it be "narrowly tailored" to a "compelling government interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 162 (2015).

In this case, the Illinois Appellate Court erroneously applied intermediate scrutiny review to uphold the constitutionality of a statute criminalizing a "child sex offender" from "photograph[ing], videotap[ing], or tak[ing] a digital image of a child...without the consent of the parent or guardian." 720 ILCS 5/11-24(3) (2016). Because the statute prohibited only photographs of children, it was content-based, and the court should have employed strict scrutiny analysis and found the statute was not narrowly tailored to a compelling government interest and, therefore, violated the First Amendment. *People v. Gregory A. Rollins*, 2021 IL App (2d) 181040, ¶¶ 25-26. Here, the petitioner took a non-obscene, non-pornographic photograph of a fully-clothed minor in a public place and later published that photograph to the internet.

This case presents important questions involving the application of the First

Amendment to the Constitution to a state statute: (a) did the appellate court err in finding this statute was subject to intermediate scrutiny, and (b) in applying the proper standard of strict scrutiny, does this statute violate the First Amendment on its face?

Moreover, this Court should grant review where the decision of the Illinois Appellate Court conflicts with that of the Wisconsin Court of Appeals, which invalidated a substantially similar statute on First Amendment grounds. *Wisconsin v. Oatman*, 2015 WI App 76.

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The petitioner, Gregory A. Rollins, respectfully prays that a writ of *certiorari* issue to review the judgment below.

DECISIONS BELOW

The published opinion of the Illinois Appellate Court is attached at Appendix A and is reported at 2021 IL App (2d) 181040. No petition for rehearing was filed. The order of the Illinois Supreme Court denying leave to appeal is reported at 175 N.E.3d 131 (2021), and is attached at Appendix B.

JURISDICTION

The Appellate Court of Illinois, Second District, issued its decision on March 26, 2021. No petition for rehearing was filed. The petitioner filed a timely petition for leave to appeal, which the Illinois Supreme Court denied on September 29, 2021. This petition is filed within 90 days of the Supreme Court's denial of the petition. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"No State shall...deprive any person of life, liberty, or property, without due process of law...."

Section 5/11-24 of the Illinois Criminal Code [720 ILCS 5/11-24 (2016)] provides:

"Child photography by sex offender

(a) In this Section:
'Child' means a person under 18 years of age.
'Child sex offender' has the meaning ascribed to it in Section 11-0.1 of this Code.

(b) It is unlawful for a child sex offender to knowingly:
(1) conduct or operate any type of business in which he or she photographs, videotapes, or takes a digital image of a child; or
(2) conduct or operate any type of business in which he or she instructs or directs another person to photograph, videotape, or take a digital image of a child; or
(3) photograph, videotape, or take a digital image of a child, or instruct or direct another person to photograph, videotape, or take a digital image of a child without the consent of the parent or guardian.

(c) Sentence. A violation of this Section is a Class 2 felony. A person who violates this Section at a playground, park facility, school, forest preserve, day care facility, or at a facility providing programs or services directed to persons under 17 years of age is guilty of a Class 1 felony."

STATEMENT OF THE CASE

On June 29, 2016, the petitioner was charged by indictment with four counts of child photography by a sex offender, pursuant to 720 ILCS 5/11-24(b)(3) (2016). The counts alleged that on May 28, 2016, the petitioner, a child sex offender, knowingly took digital images of a child under the age of 18 years, without consent of the child's parent. (C. 20-24) The petitioner photographed the fully-clothed 13-year-old while both were at a public place.

The petitioner's counsel filed a motion to dismiss the charges and declare 720 ILCS 5/11-24 unconstitutional on its face, alleging that the statute violated the petitioner's rights under the First Amendment to the United States Constitution. (C. 62-66) Additionally, the petitioner filed a *pro se* motion seeking to dismiss the charges and declare the statute unconstitutional, citing *Wisconsin v. Oatman*, 2015 WI App 76, where the Wisconsin Court of Appeals invalidated a substantially similar statute as violating the First Amendment. (C. 129-144)

The trial court issued a written order denying the petitioner's motions. (C. 312-320) The court determined the statute was content-based, as it applied only to photographs of minors taken by child sex offenders, and therefore applied strict scrutiny analysis in reviewing it. (C. 314) The court ultimately concluded the statute was constitutional because it advanced the compelling government interest of protecting children from child sex offenders. Additionally, the trial court found the statute here was more narrowly tailored than the Wisconsin statute found unconstitutional in *Oatman* because it required only the oral consent of the child's parent or guardian, rather than the written consent required in *Oatman*. The court further concluded that the Illinois statute contained a *scienter* element that would shield a defendant from liability under the statute in cases where a child was

merely in the background of a photo, rather than the intended subject of the photo. (R. 312-320)

The State *nolle prossed* Counts II through IV of the indictment, and the parties proceeded to a stipulated bench trial on Count I. (C. 369, R. 328-329) The petitioner's sole argument at trial challenged the constitutionality of the statute. (R. 328)

The parties stipulated to the following facts: (1) the petitioner was convicted on March 21, 2001 of predatory criminal sexual assault of a child in Cook County case 00 CR 29801; (2) on May 31, 2016, Buffalo Grove, Illinois police officer Brian Hansen learned that photos of a fully clothed child had been taken at MIR Tactical, an Airsoft gun store, and he obtained surveillance footage showing a father, two children, and two men interacting inside the store. One of the men, later identified as the petitioner, was depicted on the video recording using his cell phone during the interaction; (3) Officer Hansen transported the petitioner to the police station, where the petitioner acknowledged taking photos of a child without the consent or knowledge of either the minor or the minor's parent. The petitioner further told Hansen that he uploaded the images to a cloud-based account, where he could view them at a later time, and share them with others, before deleting them from his phone. The petitioner provided Hansen with his login information, and Hanson accessed the account, where he saw an image entitled "Airsoft-Angel1.jpg," which depicted B.J., as alleged in Count I of the indictment, and was identified by the petitioner as a photo he had taken without consent of the minor's parent; (4) Bradley J.,the parent of minor child, B.J., and his sons were at MIR Tactical, an Airsoft store, when they were approached by the petitioner and his brother, both of whom Bradley previously had met there while playing Airsoft. The petitioner's brother asked Bradley for his cell phone number so they could

arrange to play Airsoft together in the future; (5) Bradley identified "Angel1.jpg," a photograph from the petitioner's cloud storage, as depicting B.J., and Bradley did not give the petitioner permission to take the photograph. (C. 370-372)

Following the stipulated bench trial, the court found the petitioner guilty of child photography by a sex offender, as alleged in Count I of the indictment, and sentenced him to an agreed prison term of five years. (C. 374-375, R. 330)

On March 26, 2021, the Illinois Appellate Court, Second District, affirmed the petitioner's conviction by first rejecting the trial court's determination that the statute, which "specifically restricts only photographs of children taken by sex offenders," was content-based and thus subject to strict scrutiny review. *People v. Rollins*, 2021 IL App (2d) 181040, ¶ 18. According to the appellate court, because "there is no indication here that section 11-24 is motivated by a desire to suppress ordinary pictures of children," because "not all pictures of children are restricted," and because "the concern motivating the legislature appears to have been how the picture was produced," the statute was content-neutral and therefore only subject to intermediate scrutiny review. 2021 IL App (2d) 181040, ¶ 19. Upon applying intermediate scrutiny analysis and construing the statute as requested by the State on appeal – limited to photographs where the child was the "focus" of the photograph – the appellate court upheld the constitutionality of the statute, both facially and as applied to the petitioner. 2021 IL App (2d) 181040, ¶¶ 41-42, 54, 57.

The petitioner filed a petition for leave to appeal in the Illinois Supreme Court, seeking review of the appellate court's interpretation of Illinois' child photography by a sex offender statute under the First Amendment. On September 29, 2021, the Illinois Supreme Court denied the petition in a summary order. 175 N.E.3d 131 (2021). (Appendix B)

REASON FOR GRANTING CERTIORARI

This Court should grant review where the Illinois Appellate Court erroneously applied intermediate scrutiny to affirm the petitioner's conviction for child photography by a sex offender [720 ILCS 5/11-24], and upheld that statute as constitutional under the First and Fourteenth Amendments to the United States Constitution after the petitioner took, and later published, a non-obscene, non-pornographic photograph of a fully clothed child in a public place.

In a case of first impression, the Illinois Appellate Court, Second District, issued a published opinion affirming the petitioner's conviction for child photography by a sex offender, (720 ILCS 5/11-24(b)(3) (2016)), which makes it unlawful for a child sex offender to knowingly photograph a child without the consent of the child's parent or guardian. *People v. Rollins*, 2021 IL App (2d) 181040. The court erred in finding that the legislative restriction was not content-based and erred in going on to apply intermediate review to this content-based statute to find the statute constitutional. This Court should review the appellate court's holding because the Illinois statute criminalizes speech in direct contravention of this Court's jurisprudence with respect to the First Amendment to the United States Constitution. U.S. Const. Amend I; U.S. Const. Amend XIV.

Your Honors long have held that the First Amendment protects the right of an individual to take or disseminate non-obscene, non-pornographic photographs. *Kaplan v. California*, 413 U.S. 115, 119-20 (1973). Furthermore, it is axiomatic that convicted sex offenders "have the same First Amendment rights as any other." *Doe v. Harris*, 772 F.3d 563, 570-72 (9th Cir. 2014).

When reviewing a constitutional challenge to a statute that infringes upon a fundamental right, courts must apply a "strict scrutiny" standard, which requires that a statute be "narrowly tailored" to a "compelling government interest." *In re R.C.*, 195 Ill.2d 291, 303 (2001); *Reed v. Town of Gilbert*, 576 U.S. 155, 162 (2015). The trial court here

correctly determined that the statute imposed content-based restrictions, thereby subjecting it to "strict scrutiny review." (C. 313) However, the appellate court rejected the trial court's determination that the statute, which "specifically restricts only photographs of children taken by sex offenders," was content-based. *Rollins*, 2021 IL App (2d) 181040, ¶ 18. According to the appellate court, because "there is no indication here that section 11-24 is motivated by a desire to suppress ordinary pictures of children," because "not all pictures of children are restricted," and because "the concern motivating the legislature appears to have been how the picture was produced," the statute is content-neutral and subject to intermediate scrutiny review. 2021 IL App (2d) 181040, ¶ 19.

Analogizing this statute to the "revenge porn" statute the Illinois Supreme Court had recently found constitutional as a "content-neutral time, place, and manner restriction" regulating a "purely private matter" in *People v. Austin*, 2019 IL 123910, ¶ 43, the appellate court determined it was the *manner* of the image's acquisition and publication, and not its content, that made its dissemination illegal. *Rollins,* 2021 IL App (2d) 181040, ¶ 25-26. The appellate court focused on the lack of consent and concluded that the statute was constitutional because the court limited the application of the statute by applying a limiting construction– *i.e.*, that the statute prohibits the taking of photographs of a child only where the child is the "focus" of the photograph– that does not appear in the statute. However, that limitation is not meaningfully distinct from the Wisconsin statute found unconstitutional in *State v. Oatman*, 2015 WI App 76. As the trial court correctly concluded, the statute is not content-neutral because it specifically restricts only photographs of children taken by sex offenders. (C. 313) Consequently, contrary to the appellate court's decision, the statute's regulatory purpose here is content-based, and must be given strict scrutiny review.

Rather than the "revenge porn" statute addressed by the Illinois Supreme Court in *Austin*, the Wisconsin case of *Oatman* is more instructive and applicable to the statute at bar. In *Oatman*, the appellate court invalidated, as unconstitutionally overbroad, a statute, (WIS. STAT. § 948.14), that was substantially similar to the statute here. The Wisconsin statute prohibited a "sex offender" from "intentionally captur[ing] a representation of any minor without the written consent of the minor's parent legal custodian, or guardian." The statute here differs in that, unlike the Wisconsin statute, it applies only to child sex offenders, rather than all sex offenders, and its requisite parental consent need not be written. Those distinctions, however, do not save the statute from a challenge on First Amendment grounds.

Oatman was convicted of the intentional photographing of a minor by a registered sex offender without the parent's consent, in violation of the Wisconsin statute. Both the trial court in the present case and the Wisconsin appellate court in *Oatman* correctly determined that, because the statutes regulated only images of children, they were not content-neutral and, therefore, were subject to strict scrutiny review. Such content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). To satisfy strict scrutiny, a statute "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Furthermore, "it is the rare case in which...a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Consistent with this Court's holdings, the court in *Oatman* concluded that the Wisconsin statute was unconstitutional, as it neither protected a compelling state interest, nor was it narrowly drawn. 2015 WI App 76, ¶ 12.

Your Honors often have mandated that strict scrutiny review must be applied to

criminal laws restricting speech based on content, *Reno v. ACLU*, 521 U.S. 844, 872 (1997), because such measures "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). The image at issue here is content-based because the prohibition is based on the presence of the minor, and the petitioner is no less protected by the First Amendment than are others. See *Doe*, 772 F.3d at 570-72.

The statute here is not limited to forbidding the creation of obscene or pornographic images, or even to restricting images created with the intent to facilitate the commission of some other criminal offense. The plain language of the statute forecloses anyone who previously was convicted of a child sex offense, absent the requisite consent, from photographing or video recording *any child in any situation*. 720 ILCS 5/11-24(b)(3) (2016).

The prohibition set forth in the Illinois statute is unconstitutional on its face and as applied to the petitioner because it substantially restricts and burdens his right to engage in expression protected by the Constitution. The statute is overbroad in that it authorizes criminal punishment for a wide range of otherwise protected expression. It substantially restricts the right of individuals who previously were adjudicated as child sex offenders to engage in commonplace expressive activities available to other citizens. As applied here, the statute is unconstitutional because it punishes the otherwise protected form of expression exercised by those previously convicted of a child sex offense, including the petitioner.

The statute here also does not protect a compelling government interest. In *Oatman*, the Wisconsin court recognized the "undeniable" compelling State interest in protecting children. However, the court concluded that the statute "does little, if anything, to further

that interest," and could even potentially cause "more harm than good" by requiring registered sex offenders to approach a child and inquire about the identity and whereabouts of the child's parents. 2015 WI App 76, ¶ 13.

The court in *Oatman* correctly relied upon this Court's conclusion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240, 256 (2002), that children are not harmed by non-obscene, non-pornographic photographs taken in public places. In *Ashcroft*, your Honors invalidated the Child Pornography Prevention Act as unconstitutionally overbroad because it prohibited the possession or distribution of images that were neither obscene nor pornographic where those images appeared to depict minors but, in fact, were produced without using real children. *Ashcroft*, 535 U.S. at 239. Unlike child pornography, the prohibited virtual images did not harm any children in the production process, so the act unconstitutionally "prohibit[ed] speech that records no crime and creates no victims by its production." 535 U.S. at 250.

This Court also rejected the argument that the images might encourage child abuse, holding "[t]he prospect of crime, however, by itself does not justify laws suppressing protected speech." *Ashcroft,* 535 U.S. at 245. Your Honors explained, "[w]hile the Government asserts that the images can lead to actual instances of child abuse,... the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified-potential for subsequent criminal acts." 535 U.S. at 250. Your Honors again "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." 535 U.S. at 251.

The court in *Oatman* also concluded that, "[i]n addition to failing to protect any

compelling State interest, [the statute] was not narrowly tailored." Because the statute's prohibition extended "to all images of children, otherwise regardless of content," it was difficult for the Court "to imagine a content-based regulation that would be more broadly tailored." 2015 WI App 76, ¶ 17. That the statute applied only to registered sex offenders did not sufficiently narrow it where "those citizens have the same First Amendment rights as any other." 2015 WI App 76, ¶ 17, citing *Doe*, 772 F.3d 563 at 570-72. Because the statute applied to the "capture of nearly all images of children in public places," the court "unreservedly reject[ed]" any claim that the statute failed to prohibit "a substantial amount of constitutionally protected communicative conduct." 2015 WI App 76, ¶ 18.

By contrast, in applying intermediate scrutiny review to the statute here, the Illinois Appellate Court concluded that the legislature "was clearly acting to advance an interest of sufficient magnitude," the "substantial (compelling even)" governmental interest in protecting children from sex offenders, when it enacted the statute. *Rollins*, 2021 IL App (2d) 181040, ¶ 30. However, the "harm" anticipated by the appellate court is precisely the type of tenuous potential harm that your Honors have concluded to be an insufficient basis for restricting First Amendment protections.

The Illinois Appellate Court attempted to distinguish this Court's holding in *Ashcroft* by claiming that "in this case, an actual convicted child-sex offender took a photograph of an actual child." *Rollins*, 2021 IL App (2d) 181040, ¶ 45. However, this rationale not only fails to articulate any harm allegedly caused by the non-obscene, non-pornographic photo, but it also ignores this Court's longstanding directive that the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private

thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). Nor may government "prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Ashcroft*, 535 U.S. at 253.

The Illinois Appellate Court concluded that the statute "does not burden a substantial amount of protected speech" because it was permissibly limited by the phrase "of a child." According to the court, only "a photograph in which the child is the object or focus of the photograph comports with the plain meaning of the word 'of.'" *Rollins,* 2021 IL App (2d) 181040, ¶¶ 42, 54. The court explained that, "a child who is incidentally caught in the background likely was not knowingly included in the photograph," and therefore the photographer would not be prosecuted under the statute. 2021 IL App (2d) 181040, ¶ 42.

The appellate court's analysis is either naive or disingenuous. The vast majority of photography is now digital and produced on cell phones. Digital photography is easily manipulated and subjects routinely are cropped, enlarged, and enhanced, usually with photographic software contained on the phone. It is neither difficult nor uncommon to take a photograph of a group of people or objects, and later zoom in on a particular object or individual, to the exclusion of the others, in that photograph. Indeed, this would be more likely in cases of surreptitious photographs, where concerns over precision in composition might be secondary. Furthermore, this Court has emphasized that "the First Amendment protects against the government; it does not leave us at the mercy of *noblesse oblige*," and that your Honors "would not uphold an unconstitutional statute merely because the government promised to use it responsibly." *United States v. Stevens,* 559 U.S. 460, 480 (2010).

In sum, the criminal statute at issue here substantially burdens the freedom of the

petitioner to engage in common forms of creative expression. Even though the petitioner is now classified as a child sex offender, he retains his First Amendment right to take and publish non-obscene, non-pornographic photographs in public places, even if those photographs include children. The Illinois Appellate Court's determination that the statute is content-neutral and thereby subject to intermediate review, as well as its conclusion that the statute is permissibly limited to serve an important government interest, is contrary to decades of established First Amendment jurisprudence. Therefore, the petitioner respectfully requests that this Honorable Court grant *certiorari*.

CONCLUSION

For the foregoing reasons, petitioner, Gregory A. Rollins, respectfully prays that this Honorable Courrt issue a writ of *certiorari* to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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