No. 19-____

IN THE

Supreme Court of the United States

BETHANY AUSTIN,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Through social media, millions of people share photographs and information about the intimate details of their lives. In response, forty-six states in recent years adopted laws to combat so-called "revenge porn," the non-consensual dissemination of private sexual images.

This case arises from a decision of the Illinois Supreme Court which upheld that state's revenge porn law even though it is being used to prosecute an individual whose actions had nothing to do with either "revenge" or "porn." The court's review of the law under intermediate scrutiny is plainly inconsistent with recent decisions of this Court requiring strict First Amendment scrutiny of content-based laws, and conflicts with a Vermont Supreme Court ruling, which held the appropriate standard of review of such laws is strict scrutiny.

The decision presents two critical questions of First Amendment law that go to the heart of preserving free expression as new technologies present special challenges, while providing guidance for states that seek to curtail harassment and abuse:

1. Whether strict First Amendment scrutiny applies to a criminal law that prohibits nonconsensual dissemination of non-obscene nude or sexually-oriented visual material?

2. Whether the First Amendment requires a law that prohibits nonconsensual dissemination of non-obscene nude or sexually-oriented visual material to impose a requirement of specific intent to harm or harass the individual(s) depicted?

PARTIES TO THE PROCEEDINGS

The Petitioner, appellee and defendant below, is Bethany Austin, who was charged with violating an Illinois Criminal Code provision prohibiting nonconsensual dissemination of private sexual images, after showing a few family members and friends images that her fiancé's paramour knowingly sent to a cloud account Austin shared with her fiancé, to contradict her fiancé's false account of why their engagement ended.

The Respondent, appellant, and plaintiff below is the State of Illinois, who charged Austin with violating 720 ILCS § 5/11-23.5.

RELATED PROCEEDINGS

1. Circuit Court for the 22nd Judicial Circuit, McHenry County, Illinois

   Illinois v. Austin

   Docket No.: 16 CF 935

   Date of Entry of Judgment: August 8, 2018

2. Supreme Court of Illinois

   People of the State of Illinois v. Austin

   Docket No. 123910

   Date of Entry of Judgment: October 18, 2019

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The decision of the Supreme Court of Illinois for which review is sought will be published in the Northeastern Reporter, 3d, and presently appears at 2019 IL 123910, 2019 WL 5287962 (2019). It is included at 1a.

The decision of the Circuit Court for the 22nd Judicial Circuit, McHenry County, Illinois, which is unpublished, is included at 72a.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 to review the decision of the Supreme Court of Illinois, which issued October 18, 2019. Petitioner sought and Justice Kavanaugh granted an extension of time to petition for certiorari, up to and including February 14, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> 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.

United States Constitution, Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The challenged Illinois law, 720 ILCS § 5/11-23.5, appears in the Appendix pursuant to Rules 14.1(f) and 14.1(i)(v).

INTRODUCTION

Petitioner Bethany Austin is being prosecuted under Illinois' revenge porn law even though she is far from the type of person such laws were intended to punish. These laws proliferated rapidly in recent years because of certain reprehensible practices, such as ex-lovers widely posting images of their former mates to inflict pain for a bad breakup, malicious stalkers seeking to damage an innocent person's reputation, or extortionists using intimate photos to collect ransom. Austin did none of those

things, yet is facing felony charges because she tried to protect her reputation from her former fiancé's lies about the reason their relationship ended.

The Illinois Supreme Court rejected Petitioner's constitutional challenge to the state revenge porn law only because it ignored well-established First Amendment rules: It subjected the law only to intermediate, rather than strict scrutiny, because it incorrectly classified a statute that applies only to sexual images as content neutral; it applied diminished scrutiny because the speech at issue was deemed not to be a matter of public concern; and it held the law need not require a showing of malicious intent to justify criminal penalties, reasoning that such intent can be inferred from the mere fact that the specified images were shared. Each of these conclusions contradicts First Amendment principles recently articulated by this Court, and also is inconsistent with decisions of various state courts, including the Vermont Supreme Court.

Only this Court can settle what level of scrutiny should govern review of such laws to ensure they are consistent with the First Amendment. Failure to do so would have an impact far beyond Petitioner's case. Revenge porn is a byproduct of new communications technologies that permit individuals to speak to a global audience. This ability has had both positive and negative effects, and the Court has cautioned against overreactions that could have far-reaching and long-lasting adverse consequences for freedom of expression. Review of the decision below is necessary to keep the starch in the standards for evaluating laws that could make criminals of countless numbers of Americans.

STATEMENT OF THE CASE

A. The Internet and Free Speech

The Internet is "the most participatory form of mass speech yet developed" that made possible for the first time "a never-ending worldwide conversation." *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzel, J.), *aff'd*, 521 U.S. 844 (1997). In the relatively short duration of their existence, the Internet and social media have become an essential part of most peoples' lives. In 2019, it was estimated that 90 percent of American adults use the Internet, and most use social media, including Facebook (69 percent), YouTube (73 percent), and Instagram (37 percent).[1] As the Court has observed, the Internet is an indispensable place to exchange ideas, because it "offers 'relatively unlimited, low-cost capacity for communication of all kinds.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (quoting *Reno v. ACLU*, 521 U.S. at 870). People use this medium to follow news, participate in politics, engage in commercial transactions, and to communicate about all facets of their lives.

This Court has long recognized that sex "indisputably [has] been a subject of absorbing interest … through the ages," and "is one of the vital problems

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[1] Pew Research Center, *Internet/Broadband Fact Sheet*, June 12, 2019 (https://www.pewresearch.org/internet/fact-sheet/internet-broadband/); John Gramlich, *10 Facts About Americans and Facebook*, May 16, 2019 (https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/).

of human interest and [] concern." *Roth* v. *United States,* 354 U.S. 476, 487 (1957). So it is hardly surprising that people "are using technology to share some of the most intimate aspects of their relationship[s]."[2] A Pew Research Center study found that "[s]exting, or sending sexually suggestive nude or nearly nude photos and videos via cell phone, is practiced by couples and singles alike." *Id.* at 4.

As of 2014, the study found that nine percent of adult cell phone owners reportedly sent a sext of themselves to someone else, a 30 percent increase over the previous two years. The practice is becoming increasingly prevalent. A 2015 study found over 80 percent of adults reported sending or receiving explicit messages or pictures, and that 96 percent of respondents considered it a positive experience.[3]

Because so many people live their lives online—including their intimate lives—it is exceedingly im-

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[2] Amanda Lenhart & Maeve Duggan, *Couples, the Internet, and Social Media*, Feb. 11, 2014, at 18 (https://www.pewresearch.org/internet/2014/02/11/main-report-30/).

[3] American Psychological Association, *How Common is Sexting?*, Aug. 8, 2015 (https://www.apa.org/news/press/releases/2015/08/common-sexting); Emily C. Stasko and Pamela A. Geller, *Reframing Sexting as a Positive Relationship Behavior*, Aug. 8, 2015 (https://www.apa.org/news/press/releases/2015/08/common-sexting); Sasha Harris-Lovett, *In Survey, 88% of U.S. Adults said they had sexted and 96% of them endorsed it*, L.A. TIMES, Aug. 8, 2015 (https://www.latimes.com/science/sciencenow/la-sci-sn-sexting-sexual-satisfaction-20150807-story.html).

portant for this Court to draw clear lines in determining what communications are constitutionally protected and identifying precisely which ones are not. Criminal penalties for speech hang "like the proverbial sword of Damocles," and impose a particularly heavy burden on First Amendment-protected activities. *Reno*, 521 U.S. at 872, 882. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (speech restrictions "enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people").

Given the risk, this Court has counseled great caution, and applied the strictest scrutiny, before upholding laws that could threaten millions of Americans with potential criminal liability. *Reno*, 521 U.S. at 874-75. It has recognized that "the Cyber Age is a revolution of historic proportions" and that "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham*, 137 S. Ct. at 1736.

B. The Problem of Revenge Porn and Proliferation of Laws Targeting It

The bad news about the Internet is precisely the same as the good news: ordinary people can communicate their thoughts to a global audience. While this new medium has been transformative and a boon for most people, as one commentator observed, it also has its costs, because "[p]eople are marvelously inventive in devising new ways to hurt each other." Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY LAW J. 661, 661 (2016). One such hazard is misuse of previously shared intimate thoughts and images as a

means to harass and inflict pain after a relationship has ended. This phenomenon falls under the generic label "revenge porn," but the term encompasses various behaviors facilitated by new media where the unwanted dissemination of sexual images causes harm, whether or not those involved had any prior relationship.

The Illinois Supreme Court described revenge porn as "a unique crime fueled by technology" (App. 8a), and listed various abuses that spurred the passage of state laws across the United States. They include websites that feature revenge porn, unscrupulous individuals who profit from such images, "crowdsourcing" abuse, and nonconsensual distribution via social media, blogs, emails, and texts. (App. 8a.) Advocates of such laws describe the typical scenario as targeted communications and postings by "rejected ex-boyfriends" and note that most victims are women. Koppelman, *supra*, at 661. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 354 (2014) ("Revenge porn is a form of cyber harassment and cyber stalking whose victims are predominantly female.").

This phenomenon led to the rapid proliferation of state laws. As the court below recounted, the first revenge porn law was adopted in New Jersey in 2004. Only three more laws had been passed by 2013, but the pace picked up sharply after that. By 2017, 36 states had adopted revenge porn laws, and

the total today stands at 46 states plus the District of Columbia. (App. 11a.)[4]

"These statutes vary widely throughout the United States, each with their own base elements, intent requirements, exceptions, definitions, and penalties." (App. 11a-12a) (internal quotation marks and citation omitted). The Illinois Supreme Court noted that most such laws require "some form of malicious purpose or illicit motive as a distinct element of the offense." (App. 53a-54a.) The defining feature of all such laws, however, is that they impose criminal penalties for engaging in speech.

C. The Illinois Revenge Porn Law

Illinois Criminal Code 720 ILCS § 5/11-23.5 prohibits the "non-consensual dissemination of private sexual images." *See* Ill. Sen. Tr., 2014 Reg. Sess. No. 90 ("Senate Bill 2694 seeks to act as a deterrent to … what they call 'revenge porn.'"). The statute is not limited to online depictions or dissemination via the Internet, but defines covered "images" as any "photograph, film, videotape, digital recording, or other depiction or portrayal" of another person engaged in a sex act or with their intimate parts exposed. 720 ILCS § 5/11-23.5(a), (b). It does not define the term "disseminate." (App. 122a-126a.)

The law applies to anyone who intentionally disseminates a covered image under circumstances in

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[4] *See States With Revenge Porn Laws*, C.A. Goldberg (http://www.cagoldberglaw.com/states-with-revenge-porn-laws/) (last visited Feb. 11, 2020).

which a reasonable person would know or understand it was to remain private, and where he or she knows, or should have known, the person depicted did not consent to the dissemination. 720 ILCS § 5/11-23.5(b). The person depicted must be identifiable from the image itself or information displayed with it. A violation does not require a showing of intent to harm or harass.

The definition of images covered by the law is broad. It defines depiction of "intimate parts" as including the unclothed or partially or transparently clothed genitals, pubic area, or anus, and for females, a partially or fully exposed nipple. 720 ILCS § 5/11-23.5(a). The definition of sexual acts encompassed by the law is similarly expansive.[5]

The statute exempts dissemination of otherwise covered images for purposes of criminal investigation or reporting unlawful conduct, and for images involving voluntary exposure in a public or commercial setting. *Id.* §§ 5/11-23.5(c)(1)-(3). It also exempts any dissemination that is "otherwise lawful" or that "serves a lawful public purpose," but does not define those terms. *Id.* §§ 5/11-23.5(c)(1), (4).

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[5] "Sexual acts" include sexual penetration or masturbation; the touching or fondling by another person of the sex organs, anus, or breast for purposes of sexual gratification or arousal; any transfer or transmission of semen upon any part of the clothed or unclothed body of another for purposes of sexual gratification or arousal; urination within a sexual context; "sadomasochism abuse" in any sexual context, and any bondage, fetter, or "sadism masochism." 720 ILCS § 5/11-23.5(a).

A violation constitutes a Class 4 felony in Illinois, *id.* § 5/11-23.5(f), carrying a prison sentence of one to three years and fines up to $25,000.

D. The Prosecution of Bethany Austin and the Decisions Below

Petitioner Bethany Austin and her fiancé Matthew dated for several years, lived together with her children, and shared a cloud account that, as both knew, automatically sent Austin copies of all text messages Matthew sent and received. (App. 2a-3a, 74a-75a.) While engaged to Austin, Matthew had a sexual relationship with Elizabeth, one of the couple's neighbors, which was conducted in part via text messages, including verbal exchanges and the neighbor sending Matthew nude photos of herself. (App. 2a-3a, 74a-75a.) These exchanges clearly reflected that both Matthew and Elizabeth were aware Austin would receive their texts. (App. 2a-3a, 74a-75a.)

As one might expect, receipt of the messages that Elizabeth sent to the shared account precipitated the end of Austin's engagement to Matthew. Rather than shoulder responsibility for his philandering, however, the faithless fiancé told friends and family the relationship ended because Austin had gone "crazy," and "no longer cooked or did household chores." (App. 3a.) To defend against these falsehoods, Austin mailed a few select friends and family members a letter to which she attached copies of some of the texts she had been forwarded, containing messages and photos between Matthew and Elizabeth, revealing the true reason for the breakup. (App. 3a.) Matthew learned of the letter and its enclosures, became irate, and contacted police. (App.

3a.) In the ensuing investigation, Elizabeth admitted she knew Austin and Matthew shared the cloud account, yet claimed the nude pictures were private and intended only for Matthew.

The state charged Austin with one count of violating 720 ILCS § 5/11-23.5(b), exposing her to a potential prison term of one to three years. (App. 3a, 69a-70a.) Austin moved to dismiss the indictment on the First Amendment grounds that Section 5/11-23.5 is a facially unconstitutional content-based speech regulation that is not narrowly tailored to serve a compelling government interest, and that the statute is unconstitutionally overbroad. (App. 3a, 76a.)

The trial court agreed, applied strict scrutiny, and held the statute unconstitutional on its face. It found that the law did not "target disgruntled ex-boyfriends posting nude images on the Internet," or limit its coverage to "the stereotypical revenge porn scenarios," and that actual revenge porn "is but a small part of the speech targeted by the statute." (App. 73a, 82a-83a, 111a.) It found that the law prohibited "an entire category of protected speech" and that no "illicit motivation is mentioned in, or required by, the statute." (App. 108a, 119a.)

The Illinois Supreme Court reversed and remanded in a 5-2 decision. (App. 5a, 43a, 63a.) The majority rejected the trial court's use of strict scrutiny, and, notwithstanding the state's concession regarding the appropriate standard of review, held instead that the Illinois revenge porn law is subject to only intermediate scrutiny. (App. 20a.)

The court applied diminished scrutiny because it found the law to be a content-neutral time, place and

manner restriction. *Id.* 20a. It reasoned that the Illinois law restricts dissemination of sexual images based not on their content but on the circumstances of acquisition and dissemination, and on the government's purpose to address "secondary effects" thereof on privacy interests. *Id.* 21a-23a. It also held intermediate scrutiny applies because the statute does not regulate speech on matters of public concern "at the heart" of the First Amendment's protection, but only speech involving "purely private" matters. *Id.* 24a.

The court held the statute survives intermediate scrutiny because it serves a substantial government interest in protecting individual privacy rights, *id.* 28a-33a, which would be served less effectively absent the law, *id.* 33a-38a, and it does not burden substantially more speech than necessary. *Id.* 37a-44a.[6]

Justice Garman dissented, joined by Justice Theis, on grounds that the revenge porn statute is a content-based restriction on speech and thus subject to strict scrutiny. *See id.* 63a-64a. The dissenters concluded the law is neither narrowly tailored nor the least restrictive means of dealing with the problem, and observed that, under the Illinois law, "simply viewing an image sent in a text message and

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[6] The court also held Section 5/11-23.5(b) is neither overbroad, despite its absence of a malicious purpose requirement, nor unconstitutionally vague, despite its failures to define either what it means to "disseminate" covered images, or the "lawful public purpose" exception. *Id.* 44a-63a.

showing it to the person next to you could result in felony charges." (App. 67a.)

This Petition followed.

REASONS FOR GRANTING THE WRIT

First Amendment jurisprudence is premised on the understanding that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," and that the "separation of legitimate from illegitimate speech calls for … sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). This Court has described the line distinguishing protected from unprotected speech as "dim and uncertain," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and has recognized that "[e]rror in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000). For that reason, it has required that "freedoms of expression must be ringed about with adequate bulwarks" in the form of exacting scrutiny requirements and presumptions that err on the side of protecting speech. *Bantam Books*, 372 U.S. at 66; *Playboy Entm't Grp.*, 529 U.S. at 817.

The decision below did just the opposite in reviewing the constitutionality of Illinois Criminal Code 720 ILCS § 5/11-23.5. Contrary to recent authority of this Court, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and notwithstanding the State's concession that strict scrutiny is the appropriate standard of review (App. 20a), the court held the Illinois revenge porn law is content-neutral and subject only to intermediate scrutiny because it is "*justified* without reference to the content of the regulated speech." (App. 21a) (quoting *Ward v. Rock*

Against Racism, 491 U.S. 781, 791 (1989)). This flatly contradicts the holding in *Reed* and a host of other decisions by this Court, and it also conflicts with a Vermont Supreme Court ruling that subjected that state's revenge porn law to strict scrutiny. *Vermont v. VanBuren*, 214 A.3d 791, 799-800 (Vt. 2019).

Likewise, the Illinois Supreme Court's use of intermediate scrutiny on grounds that the speech to be prohibited involves matters of "purely private concern" misconstrues this Court's holdings regarding First Amendment scrutiny. This Court has observed that most of what people say lacks political or social importance but nonetheless is protected by the First Amendment. The cases cited by the court below speak to the relative importance of privacy as a governmental interest, not what level of scrutiny governs criminal sanctions imposed on private speech.

Subjecting speech to *ad hoc* balancing of its public purpose to determine the level of scrutiny, as the Illinois Supreme Court did in this case, would transform First Amendment law and seriously undermine constitutional protections for most communications on social media. It flies in the face of this Court's recent warnings to exercise great caution before altering the constitutional premises protecting the new media that facilitate human interaction.

In addition to diluting the level of First Amendment scrutiny, the decision below erroneously held that revenge porn laws need not include specific intent requirements, and that the requisite *mens rea* may be inferred from the mere communication of proscribed images. This cannot be reconciled with

this Court's holding in *Virginia v. Black*, 538 U.S. 343 (2003), which held the First Amendment does not permit the government to adopt such a presumption. It also conflicts with various state court rulings that revenge porn laws that lack a specific intent to harm requirement are inherently overbroad and unconstitutional.

Review by this Court is essential to ensure that the hard-won protections for freedom of expression, including strict scrutiny of content-based laws and specific intent *mens rea* requirements, are not sacrificed due to outrage about a particular form of abusive speech. Understandable as that outrage may be, the First Amendment principles at issue are what require lawmakers to target the particular evil at bar without threatening freedom of speech more broadly.

This case well illustrates the problems that arise when these guiding principles are overlooked. The Petitioner here is not the type of person that revenge porn laws were designed to stop, and the speech she engaged in is not what proponents of such laws cited as the problem to be solved. But if the relaxed standards approved by the Illinois Supreme Court are not corrected by this Court, Bethany Austin will not be the last person to get caught up by such draconian laws, which will threaten broad swaths of online communication.

I. THIS COURT MUST CLARIFY THAT THE FIRST AMENDMENT REQUIRES CONTENT-BASED LAWS BE SUBJECT TO STRICT SCRUTINY, EVEN IF THEY PURPORT TO REGULATE "ONLY PRIVATE INTERESTS."

This case implicates the "fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (internal quotation marks omitted) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). The Constitution demands that "content-based restrictions on speech be presumed invalid … and that the Government bear the burden of showing their constitutionality." *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012) (quoting *Ashcroft v. ACLU*, 542 U.S. at 660). The State must do so by satisfying strict First Amendment scrutiny, which requires a showing that the law is the least restrictive means of addressing a compelling governmental interest. *Reed*, 135 S. Ct. at 2227.

In *Reed*, this Court found that certiorari review is warranted where lower courts applied the wrong level of scrutiny. *Id.* at 2226 (certiorari granted and judgment reversed where Court of Appeals "applied a lower level of scrutiny … and concluded that the law [at issue] did not violate the First Amendment"). Here, the Illinois Supreme Court's application of only intermediate scrutiny to reject Austin's challenge to the state's revenge porn law creates a split among state courts of last resort that highlights a need for guidance from this Court.

a. This Court has held that content-based laws targeting speech for its "communicative content" must face strict scrutiny, regardless of the regulation's underlying motive. *Reed*, 135 S. Ct. at 2226. A reviewing court must consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227. A "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* This includes "defining regulated speech by particular subject matter," or "by its function or purpose." *Id.* If the law "singles out specific subject matter for differential treatment," it is content based and strict scrutiny applies. *Id.* at 2228-30.

This is true "regardless of" any "benign motive" that the government may assert, or "lack of animus toward the ideas contained in the regulated speech" *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). An "innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* Likewise, the government cannot avoid strict scrutiny of a law that targets particular content by claiming an intention to combat purportedly "neutral" effects.[7]

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[7] The Illinois Supreme Court's alternative suggestion, that the state legislature sought to target only "secondary effects" of revenge porn, is barred by this Court's precedents. (App. 22a) (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)). As explained in *Playboy Entm't Grp.*, 529 U.S. at 815, "lesser scrutiny afforded regulations targeting … secondary effects … has no application to content-based regulations tar-

The Illinois Supreme Court's conclusion that its state's revenge porn law is content-neutral cannot be squared with *Reed*. Under the statute, whether "[a] person commits non-consensual dissemination of private sexual images" and thus faces imprisonment depends at the threshold on whether images include another person, who is identifiable and at least 18 years old, depicted in a sexual act or with intimate parts exposed. 720 ILCS § 5/11-23.5(b)(1). Only if an image fits this description does Section 5/11-23.5 criminalize its nonconsensual dissemination. This requires what *Reed* called an "obvious content-based inquiry." 135 S. Ct. at 2231.

Other images of a person that he or she may find equally "private," or equally unfit for public consumption, are excluded. This is the essence of content-based regulation, and the fact that the content in question relates to sexual matters only underscores the point. *See*, *e.g.*, *Playboy Entm't Grp.*, 529 U.S. at 811 ("The speech in question is defined by its content."); *Stevens v. United States*, 559 U.S. 460, 468 (2010); *Free Speech Coal., Inc. v. United States*, 825 F.3d 149, 160 (3d Cir. 2016); *Ohio v. Althouse*, 2018 WL 1136591, at *3 (Ohio Ct. App. Feb. 14, 2018).

Other state courts have had no difficulty in properly classifying revenge porn laws as content-based. In *VanBuren*, 214 A.3d 791, Vermont's Supreme Court considered a First Amendment

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geting the primary effects of protected speech." *Compare* App. 31a-32a (¶¶ 66-67) (listing impacts of "revenge porn").

challenge to the state revenge porn statute, which criminalizes knowing disclosure of a "visual image of an identifiable person who is nude or … engaged in sexual conduct." *Id.* at 795 (quoting 13 V.S.A. § 2606(b)(1)). The court rejected the State's argument that intermediate scrutiny applied. *Id.* at 807-08 & n.9. *See also id.* at 816 ("Because it is clear the statute criminalizes the distribution of images based on their content," it is "correctly … reviewed as a content-based restriction on speech" subject to strict scrutiny) (Skoglund, J., dissenting).

A Texas intermediate appellate court likewise applied strict scrutiny and held that state's revenge porn law violated the First Amendment. The court explained strict scrutiny was required because, "[i]f it is necessary to look at the content of the speech in question to decide if the speaker violated the law, the regulation is content-based." *Ex Parte Jones*, --- S.W.3d ----, 2018 WL 2228888, at *3-4 (Tex. Ct. App. May 16, 2018), *rev. granted*, No. PD-0552-18 (Tex. Ct. Crim. App. July 25, 2018). That description applies equally to Illinois Section 5/11-23.5.

b. The Illinois Supreme Court's application of intermediate scrutiny on grounds the speech regulated ostensibly does not involve "matters of public concern" (App. 24a-27a), reflects confusion not only about *when* strict scrutiny is required, but as to *how* it applies. The court held Section 5/11-23.5 is subject to intermediate scrutiny "because [it] regulates a purely private matter," which the court contrasted to those of public concern "relating to any matter of political, social, or other concern to the community" or of "general interest … to the public." (App. 20a, 24a, 25a.)

But while the privacy interest cited to justify revenge porn laws defines the magnitude of the governmental interest, the asserted public or private "value" of speech does not determine what standard of review governs. In *Stevens*, 559 U.S. at 479-80, this Court rejected a free-floating test for protecting speech based on the government's assessment of its civic or social importance and applied strict scrutiny to strike down a law that prohibited depictions of animal cruelty.

The government defended the law on grounds it regulated only speech lacking "serious value," based on exceptions built into the statute (as with Illinois' revenge porn law here). But the Court invalidated the law nonetheless, in significant part because its "broad reach" included "many forms of speech that do not qualify [as having] serious-value" but to which the First Amendment nevertheless extends. *Id.* at 480. It explained: "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Id.* at 479.

As the Vermont Supreme Court correctly noted, this Court has not approved intermediate scrutiny "for evaluating content-based restrictions that apply to … purely private speech." *VanBuren*, 214 A.3d at 808 n.9. Moreover, the cases that the Illinois Supreme Court relied on to bypass strict scrutiny for private speech were inaptly applied. (App. 24a-26a) (discussing *Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc.*, 472 U.S. 749 (1985), and *Snyder v. Phelps*, 562 U.S. 443 (2011)). *Dun & Bradstreet* and *Phelps* examined whether tort liability may constitutionally lie for the harm the defendants'

speech was alleged to have caused—not whether state criminal laws proscribing speech violate the First Amendment—or what level of scrutiny should apply. *See Dun & Bradstreet*, 472 U.S. at 757; *Phelps*, 562 U.S. at 451.

As Justice Kennedy has explained, the concept of speech as a matter of public concern was relevant to the *Dun & Bradstreet* plurality in applying defamation law, but it is "questionable" it "has *any place* in the context of truthful, non-defamatory speech." *Trans Union L.L.C. v. FTC*, 536 U.S. 915, 915 (2002) (Kennedy, J., dissenting from denial of cert.) (emphasis added). The fact that intentional infliction of emotional distress was the tort alleged in *Phelps* does not make Justice Kennedy's admonition any less relevant there. *See NSK Corp. v. United States*, 821 F. Supp. 2d 1349, 1355-56 (Ct. Int'l Tr. 2012).

Other decisions of this Court illustrate the extent to which a governmental interest in protecting privacy does not define what level of scrutiny applies. Rather, the privacy interest defines the weight to be accorded the government's interest. Examples include *California Democratic Party v. Jones*, 530 U.S. 567, 584-85 (2000) (privacy interest in confidentiality of party association was not compelling), *Edenfield v. Fane*, 507 U.S. 761, 769 (1995) (protection of potential CPA clients' privacy interests was substantial but did not justify blanket ban on solicitations), and *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (protection of residential privacy was a significant government interest supporting ban on targeted picketing).

The Illinois Supreme Court's approach, which uses the public/private nature of speech to set the

level of First Amendment scrutiny, is an invitation to use *ad hoc* balancing in any case where the government's asserted interest is to protect privacy. Under this theory, if speech is of insufficient "public concern," scrutiny is more relaxed and the government receives greater latitude to regulate speech.

c. There would be profound implications for freedom of expression online if the Illinois Supreme Court were correct and the level of First Amendment scrutiny turns on the degree to which speech relates to matters of public or social concern. It would mean most communications would be subject to a "civics test" in order to qualify for full First Amendment protection. While the Internet enables people to share information on everything "ranging from aardvarks to Zoroastrianism," *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002), it is difficult to say how much of Americans' day-to-day interactions would make the grade.

This Court is acutely aware of this problem, and has appropriately urged extreme caution against judicial interpretations that might diminish the level of First Amendment protection for online speech. It has done so with the understanding that much of what Americans share with one another may be more personal than political, yet this is the stuff of which free speech is made. The Court has observed that "social media in particular" has enhanced our ability to "communicate with one another." While this can—and often does—facilitate communication on matters of public importance, it also affects "how we think, express ourselves, and define who we want to be," which may involve matters of distinctly personal concern. *Packingham*, 137 S. Ct. at 1735-37.

As it turns out, millions of Americans communicate intimate material that could trigger enforcement of laws like Section 5/11-23.5 if such statutes are not drafted with precision and judged with exacting scrutiny. The Illinois Supreme Court's holding opens the door to the possibility that a great deal of online speech that has nothing to do with "revenge porn" could face criminal sanctions if First Amendment standards are relaxed. Only this Court can ensure that such laws are subject to correct constitutional standards.

II. THIS COURT MUST CLARIFY THAT THE FIRST AMENDMENT REQUIRES SPECIFIC INTENT TO CAUSE HARM FOR REVENGE PORN LAWS TO WITHSTAND CONSTITUTIONAL REVIEW.

The Illinois Supreme Court characterized Section 5/11-23.5 as "the country's strongest anti-revenge-porn legislation yet" and noted it has been proposed as a model for federal legislation. (App. 62a.) Among other things, Illinois is one of four states that does not include malice or intent to harm as a distinct element of the offense. (App. 54a.) In holding this law is consistent with First Amendment requirements, the court below ignored this Court's jurisprudence and set the stage for wide-ranging intrusions into protected speech if the Illinois law is used as a model.

The court below acknowledged that most state revenge porn laws expressly require proof of intent to cause harm, but expressed doubt that "a criminal statute necessarily must contain an illicit motive or malicious purpose" to survive a First Amendment overbreadth challenge. (App. 52a-53a.) It concluded

no such element was needed for the Illinois statute, where elements of the crime include the intentional dissemination of sexual images in circumstances where the disseminator knew or should have known consent was lacking. Given these elements, the court held that "wrongful motive or purpose is inherent in the act of disseminating an intensely personal image" without consent, and that the law "*implicitly* includes an illicit motive or malicious purpose." (App. 55a) (emphasis added).

This reasoning flatly contradicts the holding in *Virginia v. Black*, 538 U.S. 343, in which this Court struck down a state ban on cross burning with intent to intimidate where malicious intent was considered to be implicit in the act of burning a cross. The state had defended a prosecution under the law in which the jury was instructed "[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." *Id.* at 364. After construing the instruction as the authoritative interpretation of the statute, this Court held the Virginia law was facially unconstitutional.

Although it held that the state could ban cross burnings done with the requisite intent as a type of "true threat" unprotected by the First Amendment, it concluded the Constitution does not permit treating cross burning itself as "prima facie evidence of an intent to intimidate." *Id.* at 363-65. The Court held "[t]he First Amendment does not permit such a shortcut," and that the state could not presume that the expression was outside its protection. *Id.* at 367.

The absence of a malicious intent requirement violated the First Amendment, this Court

reasoned, because it would permit the state "to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Id.* at 365. Such a law:

> does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers.

Id. at 366. The Court thus found it "apparent" that "the provision as so interpreted 'would create an unacceptable risk of the suppression of ideas.'" *Id.* at 365.

The same problem infects the Illinois revenge porn law, with its assumption that malicious intent is "implicit" in any nonconsensual dissemination of nude or sexual images. It does not distinguish vindictive ex-boyfriends who create revenge porn websites or who make extortionate demands from individuals, like Bethany Austin, who merely seek to protect themselves from slander by a deceitful former fiancé by revealing the truth of his infidelity. Nor does it distinguish between the type of mass dissemination of images specifically intended to cause harm that are frequently touted by proponents of revenge porn laws, from circumstances where sharing images is fleeting or almost inadvertent.

The dissent below observed that under the Illinois law, "simply viewing an image sent in a text

message and showing it to the person next to you could result in felony charges." (App. 67a.) It highlighted this problem in a hypothetical question posed at oral argument:

> Two people go out on a date, and one later sends the other a text message containing an unsolicited and unappreciated nude photo. The recipient then goes to a friend, shows the friend the photo, and says, "look what this person sent me." Has the recipient committed a felony? The State conceded the recipient had, assuming the recipient knew or should have known that the photo was intended to remain a private communication. (App. 69a.)

The hypothetical certainly speaks to the present Petitioner's plight, but even worse scenarios are possible under the Illinois law as approved below. When Bethany Austin was confronted with evidence of her fiancé's betrayal, she would be subject to prosecution even if she had done nothing more than seek counseling from a religious leader, a therapist, or her mother, and shown them the reason for her anguish. She could be subject to the law even if she had simply confronted Matthew with the evidence he had been cheating.

Other state courts to rule on revenge porn laws have noted the extent to which intent requirements are necessary to avoid overbreadth. In *Ex parte Jones*, 2018 WL 2228888, at *7, the Texas Court of Appeals held the Texas revenge porn law was facially invalid in part because the lack of an intent requirement created a criminal prohibition of "alarming breadth." Most recently, the Minnesota Court of Appeals invalidated that state's revenge

porn law as "facially overbroad in violation of the First Amendment as a result of its lack of an intent-to-harm requirement and its use of a negligence mens rea." *Minnesota v. Casillas*, --- N.W.2d ---, 2019 WL 7042804, at *1, *10 (Minn. App. Dec. 23, 2019) ("Although Minn. Stat. § 617.261 has a legitimate harm-preventing purpose, its lack of a specific-intent requirement and use of a negligence *mens rea* allows it to reach protected First Amendment expression that neither causes nor is intended to cause a specified harm.").[8]

Only this Court can ensure that criminal laws that take aim at harmful speech actually focus on their actual targets. It does so through the careful maintenance of First Amendment standards and presumptions that require legislatures to address the particular evil at hand, and no more. This is especially important where, as here, such well-meaning enactments seek to address a real problem, but, if not carefully confined, risk criminalizing a significant number of day-to-day interactions on social media.

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[8] In *VanBuren*, 214 A.3d at 812 & n.10, the Vermont Supreme Court held Vermont's law only reached disclosures made for profit or to harm the person depicted because the statute required a showing of specific intent "to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially." Although the court stopped short of reaching the question of whether the First Amendment *compels* the intent requirement, it remanded the case for a ruling on the defendant's as-applied challenge. *Id.* at 812 & n.10, 814.

CONCLUSION

Just over two decades ago, this Court first grappled with the constitutional status of the Internet, a global medium that enables individuals to share information "as diverse as human thought," and held unanimously that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 870. Three years ago, this Court addressed "the relationship between the First Amendment and the modern Internet," with a particular focus on social media. Once again, it stressed the need for "extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Packingham,* 137 S. Ct. 1736. This case previews the dangers that can arise when legislatures fail to exercise the necessary care and reviewing courts relax the level of scrutiny in this sensitive area.

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

Respectfully submitted,

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