No. 19-1029

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

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE AUTHORS GUILD, INC., COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, MEDIA COALITION FOUNDATION, INC., AND NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, AS *AMICI CURIÆ*, IN SUPPORT OF PETITIONER

Michael A. Bamberger
Counsel of Record
Richard M. Zuckerman
DENTONS US LLP
1221 Avenue of the Americas
New York, N.Y. 10020
(212) 768-6756
michael.bamberger@dentons.com

Counsel for Amici Curiæ

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

United States Constitution

Statutes

INTEREST OF *AMICI*[1]

American Booksellers Association, Association of American Publishers, Inc., The Authors Guild, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, Media Coalition Foundation, Inc., and National Press Photographers Association respectfully submit this Brief as *amici curiae* in support of Petitioner, Bethany Austin.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of their speech. *Amici* are particularly concerned with the chilling effect of any test that undermines the rule that content-based restrictions are presumptively unconstitutional.

American Booksellers Association ("ABA"), founded in 1900, is a trade organization devoted to meeting the needs of its core members — independently owned bookstores with storefront locations nationwide — through education, information dissemination, business products and services, and advocacy. ABA represents more than 1,887 bookstores operating in 2,554 locations throughout the country. ABA exists to protect and promote the interests of independent retail book

---

[1] No counsel for a party authored this brief in whole or in part, and no party and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Counsel for the parties were given timely notice of the intent to file this brief, and granted their consent to its filing.

businesses, and to promote and protect the free exchange of ideas, particularly those contained in books.

Association of American Publishers, Inc. ("AAP"), a not-for-profit organization, represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's members range from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, educational, and religious books produced in the United States, some of which include images of nudity or sexual conduct. Its members are active in all facets of print and electronic media, including publishing a wide range of electronic products and services. Additionally, members of AAP maintain websites featuring and offering for sale their publications, some of which include images of persons engaged in specific sexual activities or in a state of nudity, as defined by the Act. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment.

The Authors Guild, Inc. (the "Guild") was founded in 1912, and is a national non-profit association of more than 10,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists

and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment rights of the comic book industry. CBLDF represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Freedom to Read Foundation ("FTRF") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

Media Coalition Foundation, Inc. (the "Foundation") is a not-for-profit corporation, established in 2015 by The Media Coalition, an association representing individuals and organizations engaged in communication through

both traditional and electronic media. The Foundation monitors potential threats to freedom of speech and engages in litigation and education to protect First Amendment rights. The Foundation strives to educate policymakers and the public about ever-evolving free speech and censorship issues, and aims to fulfill the vision of an informed American public engaged in free speech causes.

National Press Photographers Association ("NPPA") is a 501(c)(6) nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of speech and the press in all its forms, especially as it relates to visual journalism.

SUMMARY OF ARGUMENT

By inserting a privacy exception into the well-settled rule that content-based restrictions on speech are subject to strict scrutiny, by holding that "time, place, and manner" restrictions on speech are permissible even if such restrictions are content-based, and by approving a negligence standard for criminal liability for engaging in speech—all contrary to controlling decisions of this Court—the Supreme Court of Illinois rejected a constitutional challenge to an Illinois statute that criminalizes (and imposes up to three-years' incarceration for) the non-

consensual dissemination of non-obscene nude and sexual images.

That decision (App. 1a-63a) undermines the First Amendment rights of all Americans, and poses a particularly grave threat to the free speech of mainstream media. Most media — both electronic and print — are distributed nationally. As a practical matter, any posting on the Internet by an individual or an entity is available nationally. When media are chilled by a state criminal statute from publishing images (or engaging in other speech) protected by the First Amendment—as they inevitably will be—the chill will affect publication nationwide, and not merely in the state with the unconstitutional law. And the use of a negligence standard invites the judge and jury to displace the editors and publishers, and second-guess editorial judgment.

The threat to free speech presented by this state supreme court decision is not limited to "revenge porn" or "private" images statutes similar to the state statute at issue here. If the decision below is left standing, its fundamental errors could well lead other courts to make the same errors when evaluating challenges to other content-based restrictions on speech.

Amici respectfully submit that this Court's First Amendment jurisprudence on these issues is clear. But apparently it is not clear enough. *Amici* ask that the writ be granted so that this Court can reiterate that:

- Content-based restrictions on speech are subject to "strict scrutiny," and there is no privacy exception to that principle, *Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2228 (2015);

- "Time, place, and manner" restrictions on speech are subject to strict scrutiny unless they can be "justified without reference to the content of the regulated speech," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); and

- A restriction on speech cannot survive strict scrutiny unless it is "narrowly tailored to serve compelling state interests," *Reed*, 135 S.Ct. at 2226; *R.A.V. v. St. Paul,* 505 U.S. 377, 395, (1992).

Here, strict scrutiny requires, among other things, assessing whether knowledge and malicious intent must be elements of the criminal offense of non-consensual dissemination of intimate images.

ARGUMENT

—

THIS COURT SHOULD GRANT THE WRIT TO REITERATE AND CLARIFY THE STANDARDS FOR EVALUATING CONTENT-BASED RESTRICTIONS ON SPEECH

I. The decision of the Supreme Court of Illinois dangerously distorts this Court's First Amendment jurisprudence, and poses a particular threat to mainstream media

The decision of the Illinois Supreme Court, which, contrary to controlling First Amendment

jurisprudence, (a) engrafted a privacy exception onto the well-settled principle that content-based restrictions on speech are subject to strict scrutiny, (b) held that "time, place, and manner" restrictions are permissible even if content-based, and (c) approved a negligence standard for criminal liability for engaging in speech, undermines the free speech rights of all Americans under the First and Fourteenth Amendments.

The decision poses a particularly grave threat to the speech of mainstream media, for two reasons.

First, all media that has a presence on the Internet is, as a practical matter, disseminated throughout the country—and much printed media (newspapers, magazines, books, etc.) is similarly distributed throughout the country. In deciding what to publish, media must take into account whether they will be threatened with civil or criminal liability as a result of the publication in any state in which the media is distributed and in which they are subject to personal jurisdiction. If any state's laws impose criminal liability for speech that is protected by the First Amendment, there is a serious risk that media will refrain from such speech, with the result that the state whose courts apply the narrowest view of First Amendment protection will chill free speech throughout the country. The chill is particularly strong when, as here, the criminal liability may result in three-years' incarceration, together with fine and forfeiture.

Second, the Illinois Supreme Court's approval of a negligence standard for criminal liability for

speech—basing liability on what "a reasonable person would know" or what the defendant "should have known"—further guts the First Amendment. Such a standard invites a judge and jury to enter the newsroom or the editorial offices, and second-guess editors' and publishers' judgment. Such a standard, in effect, puts the burden on editors and publishers to prove that their editorial process is objectively reasonable.

Through this distortion and misapplication of this Court's First Amendment jurisprudence, the Illinois Supreme Court upheld the constitutionality of a state statute that criminalizes the "non-consensual dissemination" of non-obscene nude or sexual images. 720 ILCS § 5/11-23.5 ("Section 11-23.5") (App. 122a-126a). Although enacted to address what "is colloquially referred to as 'revenge porn'" (App. 6a), Section 11-23.5 is not limited to malicious invasions of privacy. Neither "revenge" nor "porn" is an element of the offense.

Section 11-23.5 terms the restricted images "private sexual images," but the statutory definition of that term is expansive enough to include nude or partially nude images that are neither obscene nor even sexual, as well as partially-, transparently-, or fully-clothed sexual images that are not obscene. 720 ILCS § 5/11-23.5(a),(b). Because the statutory definition of "image" includes not only a "photograph, film, videotape, [or] digital recording" but a "depiction or portrayal of … a human body," it appears to encompass paintings, drawings, computer-generated images, and other non-

photographic images, as long as the person in the image is "identifiable." *Id.*

Under Section 11-23.5(f), dissemination of such non-obscene nude and non-obscene sexual images is a Class 4 felony, even if the defendant intended no harm, as long as the defendant was negligent—that is, if "a reasonable person would know or understand that the image was to remain private" and the defendant "knows or should have known" that the person depicted did not consent to the "dissemination." 720 ILCS § 5/11-23.5(b)(3).

The distinction between "revenge porn" and the conduct criminalized by this statute is of constitutional moment. Displaying a non-obscene image of nudity or sexual conduct without the consent of a person pictured is simply not equivalent to a malicious invasion of privacy. Such a generalization does violence to First Amendment principles.

The Illinois Supreme Court should have subjected the statute to strict scrutiny, as two dissenting Justices in that court recognized was necessary (App. 63a-71a). Applying strict scrutiny, those Justices concluded that the statute is facially unconstitutional as a content-based regulation of protected non-obscene speech that is "neither narrowly tailored nor the least restrictive means of dealing with the nonconsensual dissemination of private sexual images." (App.64a). "Content-based prohibitions, enforced by severe criminal penalties, 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). Such prohibitions and regulations "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.,* 468 U. S. 641, 648-49 (1984) (citations omitted).

II. This Court should reiterate and clarify its First Amendment jurisprudence on the application of strict scrutiny and the limited role played by "time, place, and manner" restrictions

In evaluating whether the statute is constitutional, the Illinois Supreme Court failed to apply settled First Amendment law.

A. The decision below improperly adds a privacy exception to the principle that content-based restrictions on speech are subject to strict scrutiny

The Illinois Supreme Court conceded that Section 11-23.5 "targets the dissemination of a specific category of speech" (App. 21a)—nude or sexual images—thus finding that it is facially content-based. But instead of subjecting the statute to strict scrutiny, as is required for content-based restrictions on speech, *Reed*, 135 S.Ct. at 2228 (2015), the court created a new exception to that rule, holding that content-based restrictions on speech, if intended to protect privacy or to regulate purely private matters, are subject only to intermediate scrutiny. (App. 20a-25a). This mode of analysis is barred by *Reed*, which held that:

> A law that is content based on its face is subject to strict scrutiny regardless of the

> government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained' in the regulated speech . . . ."

135 S.Ct. at 2228. Therefore, as a content-based restriction, the Illinois statute should have been subject to strict scrutiny.

The opinion below cites *Snyder v. Phelps*, 562 U.S. 443 (2011) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) as supporting its new rule providing less protection for "private" speech. However, neither case supports the creation of a privacy exception to the rule that regulation of content-based speech must be subject to strict scrutiny. In both cases, this Court was considering speech in categories that it had already deemed to be unprotected or less protected by the First Amendment. *Dun & Bradstreet* was a defamation case. 472 U.S. at 752. In *Snyder*, the plaintiff sued for intentional infliction of emotional distress. 562 U.S. at 450. Thus, both cases were tort claims, subjecting the defendant only to money damages. The Illinois statute at issue here is a criminal statute with criminal penalties, including incarceration.

The absence of a privacy exception to the rule that content-based restrictions on speech are subject to strict scrutiny does not prevent legislatures from enacting laws to protect certain types of private information, such as medical records. It simply means that the constitutionality of such content-based laws, intended to protect privacy, must be assessed under the same "strict scrutiny" standards

that apply to other content-based laws. Courts, in applying strict scrutiny, should and do consider the intent to protect privacy in evaluating whether the statute is necessary to serve a compelling state interest and is narrowly-tailored for that purpose. *See, e.g., Tschida v. Moti,* 924 F.3d 1297, 1303-1304 (9th Cir. 2019) (holding that state statute imposing confidentiality requirement on ethics complaints against state elected officials and employees was "content-based," and therefore subject to strict scrutiny, and addressing whether "State has a compelling interest in protecting certain kinds of private information about unelected officials."); *Cahaly v. Larosa,* 796 F.3d 399, 405-406 (4th Cir. 2015) (holding that state statute that restricts "robocalls" promoting a political campaign was "content-based" and therefore subject to strict scrutiny, and addressing whether "government interest … to protect residential privacy … is compelling" and whether statute is "narrowly tailored to serve it").

The Illinois Supreme Court offers no valid reason—and *amici* respectfully submit that there is none—to replace this settled First Amendment jurisprudence with a "privacy" exception to the rule that content-based restrictions on speech must be subject to strict scrutiny. Doing so would be a dangerous step towards adding "private speech" to the limited categories of speech—such as defamation and obscenity—that historically are not protected by the First Amendment. Indeed, the Illinois Supreme Court acknowledged that it was creating the privacy exception to strict scrutiny because it believed that "consideration of individual privacy would support

the articulation of a first amendment categorical exclusion in this case." (App. 18a) (lower case in original). And that is directly contrary to *Connick v. Myers,* which held that:

> We in no sense suggest 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.

461 U.S. 138, 147 (1983). *See also United States v. Stevens,* 559 U.S. 460, 468 – 472 (2010); *Brown v. Entm't Merchs. Ass'n.,* 564 U.S. 786, 791 (2011) ("new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."); *United States v. Alvarez,* 567 U.S. 709, 717 (2012).

Creating a privacy exception to the rule that content-based restrictions on speech are subject to strict scrutiny would undermine free speech far afield from the issue of "private [nude or] sexual images" that is the subject of the Illinois statute at issue here. Much of what is reported by the media may be considered private or personal by those who are the subject of such media reports. Indeed, much of the communications made by individuals to each other—especially over the Internet and through other electronic means, such as texts and emails—concerns what the participants might consider to be private or personal, notwithstanding their mode of communications. May a legislature criminalize the publication of lawfully-obtained personal financial

information of a public official, or of a private person? May a legislature criminalize the publication of lawfully-obtained sexually-related texts exchanged between persons in an intimate relationship? May a legislature criminalize publication of news about a public official's adulterous relationship? What about an ordinary person's adulterous relationship? Under the decision below, all such content-based restrictions on free speech would be subject only to intermediate scrutiny because they were intended to protect privacy. Under *Reed*, all such content-based restrictions on speech must be subject to strict scrutiny, with the statutory intent to protect privacy considered in applying strict scrutiny—determining whether that intent was a compelling state interest, and whether the statute was both necessary and narrowly-tailored for that purpose.

This Court should grant the writ to reiterate and clarify that there is no privacy exception to the principle that content-based restrictions on speech are subject to strict scrutiny, and that a intent to protect privacy may only be considered in determining whether a content-based restriction serves a compelling state interest and is narrowly-tailored to do so.

B. The decision below improperly treats the Illinois statute as a permissible "time, place, and manner" restriction, even though the statute is content-based

The Illinois Supreme Court also held that strict scrutiny need not be applied because the Illinois statute should be treated as a "time, place, and manner" restriction, stating:

> Section 11-23.5(b) distinguishes the dissemination of a sexual image not based on the content of the image itself but, rather, based on whether the disseminator obtained the image under circumstances in which a reasonable person would know that the image was to remain private and knows or should have known that the person in the image has not consented to the dissemination. 720 Illinois Comp. Stat 5/11-23.5(b)(2), (b)(3) (West 2016). There is no criminal liability for the dissemination of the very same image obtained and distributed with consent. The *manner* of the image's acquisition and publication, and not its *content*, is thus crucial to the illegality of its dissemination.

(App. 22a-23a) (emphasis in original).

The relevant comparison is not between a nude image published without consent and the same image published with consent, but is instead between a nude image published without consent and a clothed image of the same person, with the same facial expression, standing or sitting in the

same way, in the same setting, published without consent. To be more precise, the comparison could be made between two images of the same fully clothed person, taken at the same time, and identical in all respects except that the lighting in one image was strong enough to render the clothing transparent so that pubic hair, or a woman's nipple, could be discerned. Both lacking consent, dissemination of the nude (or transparently-clothed) image is criminalized by the statute; dissemination of the opaquely-clothed image without consent is not. That distinction, and thus that restriction, is content-based. Justice Garman (joined by Justice Theis), dissenting in the Illinois Supreme Court, properly recognized:

> Contrary to the majority's belief, the content of the image is precisely the focus of section 11-23.5. It is not a crime under this statute to disseminate a picture of a fully clothed adult man or woman, even an unflattering image obtained by the offender under circumstances in which a reasonable person would know or understand the image was to remain private and he knows or should have known the person in the image had not consented to its dissemination. However, if the man or woman in the image is naked, the content of that photo makes it a possible crime. Thus, one must look at the content of the photo to determine whether it falls within the purview of the statute. See *Reed*, 576 U.S. at ——, 135 S.Ct. at 2227 ("Government regulation of speech is content based if a law applies to

> particular speech because of the topic discussed or the idea or message expressed.").

(App. 65a).

Because the statute criminalizes the publication of non-obscene nude or sexual images without consent, but does not criminalize the publication of clothed images without consent, the statute is, on its face, content-based. *Stevens,* 559 U.S. at 468 (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *United States v. Playboy Entm't. Grp., Inc.,* 529 U.S. 803, 811 (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based.").

Section 11-23.5 thus stands in stark contrast to the sound amplification guideline at issue in *Ward,* 491 U.S. at 784 (upon which the Illinois Supreme Court relied (App. 21a, 27a, 34a, 38a, 58a)), which this Court held to be a legitimate "time, place, and manner" regulation. The guideline in *Ward*—which required that performers at a bandshell located in New York City's Central Park use both sound-amplification equipment and a sound technician provided by the city—applied to all performers or all musical genres. 491 U.S. at 784. This Court held:

> The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification

> for the guideline "ha[s] nothing to do with content," *Boos v. Barry,* [485 U.S. 312, 320 (1988)], and it satisfies the requirement that time, place, or manner regulations be content neutral.

491 U.S. at 792.

In contrast, here the Illinois statute has everything to do with content. The statute does not apply to all images published without consent, or to all images obtained under circumstances where a reasonable person would expect the image to remain private; it applies only to nude or sexual images. The Illinois statute cannot be "justified without reference to the content of the regulated speech." 491 U.S. at 790. As this Court stated in *Reed*:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.

135 S.Ct. at 2228. Had the sound amplification guideline in *Ward* applied only to rock music (and not to other musical genres) just as the Illinois statute here applies only to nude and sexual images (and not to other images), it would have been held to be content-based, and could not have been sustained as a "time, place, and manner" restriction.

This Court should grant the writ to reiterate and clarify that content-based restrictions on speech cannot be justified as "time, place, and manner" restrictions.

III. The Illinois statute must be subjected to strict scrutiny, including assessing the failure to include, as elements of the offense, that the defendant knew that the person depicted did not consent and that the defendant intended to harm or harass the person depicted

As the dissent in the Illinois Supreme Court correctly recognized:

> "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Arizona,* 576 U.S. ——, ——, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015); see also *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (noting the presumed invalidity of content-based restrictions on speech and the government's burden of showing their constitutionality); *People v. Alexander*, 204 Ill. 2d 472, 476, 274 Ill.Dec. 414, 791 N.E.2d 506 (2003) (stating content-based restrictions on speech must survive strict scrutiny, which "requires a court to find that the restriction is justified by a compelling government interest

> and is narrowly tailored to achieve that interest").

(App. 64a).

Under strict scrutiny, the prohibition or regulation "must be narrowly tailored to promote a compelling Government interest" which cannot be served through a "less restrictive alternative." *Playboy*, 529 U.S. at 813. "To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Id.*

Here, subjecting the statute to strict scrutiny requires, among other things, assessing whether the statute—which contains neither an actual knowledge of lack of consent, nor an intent to harm, as an element of the offense—was narrowly tailored.

The statute's reach is vastly expanded by its criminalization of the disclosure of restricted images where the individual "should have known" she lacked the consent of a depicted person. 720 ILCS § 5/11-23.5(b)(2), (b)(3) (West 2016). This is a negligence standard. The First Amendment prohibits the use of negligence-based standards in regulating speech. *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967) ("A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it… ."); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) ("[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.").

Without specific intent and knowledge as elements of the offence, to narrow the statute's reach, providers of constitutionally-protected speech are at risk.

Photographers, authors, editors, publishers, and media should not have to worry about encountering felony charges for doing their jobs. Yet, under the Illinois statute, they all must. None of them secures individualized consent from each depicted person, as the statute requires. Nor do they investigate the circumstances behind each photograph they print; to do so would be a crippling use of resources, if not impossible. If the Illinois statute included both actual knowledge and a malicious intent as elements of the offense, it is far less likely that the statute would pose this threat to mainstream media.

When legislatures criminalize speech, loaded phrases such as "revenge porn" and "animal cruelty" cannot justify a law whose text does not reflect the intentional and harmful conduct claimed as motivation for the restriction. *Stevens*, 559 U.S. at 474 ("We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a 'depiction of animal cruelty' nowhere requires that the depicted conduct be cruel."). In short, criminalizing speech is an area of legislation that demands precision. The Illinois General Assembly used no such precision in drafting this statute.

Nor can the statute be defended based on a supposition that the State of Illinois would not bring prosecutions absent knowledge and an intent to

harm. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

This Court should grant the writ so that the statute is subjected to strict scrutiny.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL A. BAMBERGER
Counsel of Record
RICHARD M. ZUCKERMAN
DENTONS US LLP
1221 Avenue of the Americas
New York, N.Y. 10020
(212) 768-6756
michael.bamberger@dentons.com

Counsel for Amici Curiæ

March 18, 2020