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 *AMICUS CURIAE* WOODHULL FREEDOM FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTERESTS OF *AMICUS CURIAE*[1]

Woodhull Freedom Foundation ("Woodhull" or the "Foundation") respectfully submits this Brief as *Amicus Curiae* in support of Petitioner Bethany Austin ("Petitioner"). Woodhull is a non-profit organization that works to advance the recognition of sexual freedom, establish gender equality, and end sexual violence. The Foundation's name was inspired by the Nineteenth Century suffragette and women's rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. The Foundation's advocacy has included a wide range of human rights issues including reproductive justice, anti-discrimination legislation, sexual expression, and the right to define ones' own family. The Foundation is also dedicated to addressing widespread sexual abuse and harassment endured especially by, though not exclusively by, women. Woodhull is concerned that denial of certiorari review in this case will harm victims of sexual abuse and harassment and will authorize criminal prosecution for distribution of protected sexual expression. Allowing the Illinois Supreme Court decision to stand

[1] Pursuant to Supreme Court Rule 37.6 no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the Petitioner and Respondent have received timely notice of the intent to file this amicus brief under Supreme Court Rule 37(2)(a), and have consented to the filing of this brief.

will further result in confusion regarding the applicable standard of review for content-based restrictions on speech. On behalf of its Board, the Executive Director of Woodhull has authorized the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

Few would dispute that victims of sexual harassment and abuse have a right to speak out, share their experiences, and seek assistance from friends, family, counselors, and legal advisors. Yet the state of Illinois enacted a law, 720 ILCS § 5/11-23.5 (the "Statute"), which criminalizes these attempts to seek help and call attention to this form of abuse. While presumably well-intentioned, the Statute is too broad in its reach, and ensnares purely innocent conduct by abuse victims.

Sexually-oriented speech is frequently targeted by lawmakers based on its content and the strong emotions associated with human sexuality. However, this Court, and numerous other courts, regularly strike such prohibitions down as unconstitutional when they restrict speech protected by the First Amendment. The Statute represents yet another example of an unconstitutional prohibition on sexual expression.

All speech is presumed to be protected unless it falls into narrowly-defined categories such as defamation, obscenity, child pornography, incitement to violence, fighting words, and threats to national security. This Court has rejected numerous attempts to expand

this list for decades, despite a variety of social goals and policy interests advanced by the government. The Statute singles out sexually-oriented speech for different treatment when it is circulated by someone who knows or should have known the speech should remain private. While victims of non-consensual intimate content distribution are entitled to legal remedies, any legislative solution must be consistent with fundamental First Amendment rights. The Statute does not pass constitutional muster since it is overbroad, content-based, and fails to meet strict scrutiny analysis.

Victims of cyber-flashing, online harassment, and various other forms of sexual abuse will be subjected to arbitrary and erratic prosecutions under the Statute given its broad scope, lack of malicious intent element, and vague exemptions. Even participants in the widely-publicized #MeToo movement can be criminally prosecuted if they share evidence of their abuse with employers, lawyers, pastors, family, or friends. Numerous hypothetical examples demonstrate how the Statute can easily be misused against victims of harassment engaged in constitutionally protected expression. Even the facts of the underlying case demonstrate how the Statute can be applied to seemingly innocent conduct. Absent intervention by this Court, the Statute will continue to chill the expressive rights of victims – and allow for their criminal prosecution.

In upholding the Statute, the Illinois Supreme Court applied the wrong constitutional analysis and effectively created a new category of unprotected speech, in violation of this Court's precedent. If the

Petition is denied, the confusion will reign in the lower courts, which are considering a rash of new "revenge porn" laws similar to the Statute. This Court should grant the Petition and subject the Statute to the proper strict scrutiny analysis as a content-based restriction on speech.

ARGUMENT

A. Sexually-Oriented Speech is Frequently Subjected to Unconstitutional Restrictions

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted) (citation omitted). One particular category of speech that has been the focus of frequent censorship attempts is speech involving human sexuality. This Court has recognized that "(s)ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957). Yet, sexually-oriented expression has been targeted by a wide assortment of governmental restrictions and prohibitions. Human sexuality evokes significant passion, both in public discourse and in legislation. As a result, the government

often overreaches in its efforts to restrict this category of speech in violation of the First Amendment.

For example, the government's first reaction to the Internet was to censor it by prohibiting sexual expression online. In 1996, Congress passed Title V of the Communications Decency Act which prohibited all indecent online communications. This Court declared the law unconstitutional on First Amendment grounds in a unanimous decision. *Reno v. ACLU*, 521 U.S. 844, 849-52 (1997).

The government also attempted to restrict indecent programming on cable television, by requiring operators to fully scramble or block sexually-oriented communications through Section 505 of the Telecommunications Act of 1996. This Court likewise struck down this prohibition as a content-based restriction on speech which failed the strict scrutiny test. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000).

Another federal statute, the Child Pornography Prevention Act of 1996, sought to criminalize sexually-oriented speech involving young looking adults. The law sought to define such materials as child pornography, though no children were involved in the production. Again, this Court invalidated the prohibition on First Amendment grounds, finding the statute overbroad. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

State and federal courts have likewise struck down numerous other governmental attempts to restrict sexually-oriented content. *See ACLU v. Mukasey*,

534 F.3d 181 (3d Cir. 2008); *Am. Book Sellers Found. for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002), *aff'd in part, modified in part*, 342 F.3d 96 (2d Cir. 2003) (sexually-explicit online communications); *PSI Net, Inc. v. Chapman*, 167 F.Supp.2d 878 (W.D. Pa. 2001), *question certified*, 317 F.3d 413 (4th Cir. 2003) (same); *Cyberspace Commc'n, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001) (same); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (same); *Am. Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997) (same); *Ctr. for Democracy & Tech. v. Pappert*, 337 F.Supp.2d 2006 (E.D. Pa. 2004) (same); *Se. Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773 (D.S.C. 2005) (same); *Ex parte Lo*, 424 S.W.3d 10 (Tex. Ct. App. 2013) (sexual communication with minors); *Ex parte Thompson*, 414 S.W. 3d 872 (Tex. Ct. App. 2013) (improper photography with the intent to arouse sexual desire).

These varied efforts to censor sexual expression were seemingly motivated by good intentions, such as protecting children or unwilling participants. However, in each instance the state or federal governments overreached, intruded into the realm of protected speech, and enacted defective legislation. The challenged Illinois Statute suffers from the same constitutional infirmities. The Statute is overbroad, fails strict scrutiny analysis, and omits the essential element of malicious intent. In its zeal to protect individuals against nonconsensual dissemination of sexually-oriented expression, the government has once again infringed on the First Amendment.

B. The Speech Prohibited by the Statute is Presumed to be Protected by the First Amendment Requiring Strict Scrutiny Analysis

Non-obscene, sexually oriented expression is presumed to be protected by the First Amendment. *Reno*, 521 U.S. at 874; *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989). The Illinois Statute is not limited to obscene materials but includes within its prohibitions any depiction of another person engaged in a sex act or with their intimate parts exposed. 720 ILCS § 5/11-23.5(a), (b). As such, the specific category of speech selected for different treatment under the law is sexual expression. While the Statute only applies to sexual expression that is disseminated under circumstances in which a reasonable person would know or understand it was to remain private, and where he or she knows, or should have known that the person depicted did not consent to the dissemination, this type of speech does not fall within the historical and narrowly-defined speech exceptions which this Court has identified. This Court summarized the major exceptions to the First Amendment in *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 791 (2011) and reiterated that the list was unlikely to grow any longer:

> 'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *United States v. Stevens*, 559 U.S. 460, 468, (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992)). These limited areas – such as

> obscenity, *Roth v. United States*, 354 U.S. 476, 483 (1957), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-449 (1969) *(per curiam)*, and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) – represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.*, at 571-572.

Since the speech at issue does not fall into one of the limited exceptions,[2] it is presumptively protected by the First Amendment and the Statute is presumed to be invalid as a content-based restriction on speech. *See United States v. Alvarez*, 567 U.S. 709, 716-17 (2012); *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). The Illinois Supreme Court erred in relying on intermediate scrutiny to uphold the Statute and ignored this Court's binding precedent mandating strict scrutiny analysis. *People of the State of Ill. v. Austin*, ___ N.E.3d ___, 2019 IL 123910, ¶ 43 (2019) (concluding "the statute is a content-neutral time, place, and manner restriction" which "regulates a purely private matter" and is therefore "subject to an intermediate level of scrutiny").

The Statute presumably seeks to protect those whose intimate images have been circulated without

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[2] *See* Clay Calvert, *Revenge Porn and Freedom of Expression*, 24 Fordham Intell. Prop. Media & Ent. L.J. 673, 684 ("Revenge porn, of course, is a new form of expression for which there is no historical lack of protection. This means, in turn, that state governmental entities will bear the burden of proving their revenge porn criminal statutes pass constitutional muster.").

their consent. However, the Statute must face strict scrutiny analysis regardless of the regulation's underlying motive. *Reed*, 135 S.Ct. at 2222. For example, a federal statute imposing criminal penalties in connection with various age verification and records-keeping obligations on producers of sexually explicit media was recently invalidated for failing to pass strict scrutiny muster despite the government's asserted interest in protecting minors who could not consent to involvement with pornographic productions. *Free Speech Coal. v. Sessions*, 314 F.Supp.3d 678 (E.D. Penn. 2018). That decision came after remand from the Third Circuit which held that the law must survive strict scrutiny analysis. *Free Speech Coal., Inc. v. Att'y Gen.*, 825 F.3d 149, 158 (3d Cir. 2016) (citing *Reed*). The state's interest in protecting individuals from nonconsensual dissemination of intimate images does not remove the Statute from the ambit of strict scrutiny review. This Court should grant the Petition to ensure that the rash of new laws[3] dealing with dissemination of intimate images is subjected to the correct constitutional analysis.

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[3] Carla Bayles, *With Online Revenge Porn, The Law Is Still Catching Up*, LAW360 (Mar. 1, 2020, 8:02 PM), https://www.law360.com/articles/1247863/with-online-revenge-porn-the-law-is-still-catching-up.

C. This Court Has Repeatedly Rejected the Creation of New Categories of Unprotected Speech

The narrow categories of speech that this Court has deemed to be unprotected by the First Amendment have been unchanged for almost four decades. *Brown*, 564 U.S. at 791; *see also New York v. Ferber*, 458 U.S. 747 (1982) (recognizing that child pornography does not enjoy First Amendment protection). In *Stevens*, Chief Justice Roberts reaffirmed the finite set of unprotected speech categories. *Stevens*, 559 U.S. at 468. However, state and federal lawmakers have been unable to resist the temptation to encourage this Court to add to the list. *See*, *e.g.*, *Ashcroft v. Free Speech Coal.* (sexually-explicit content depicting youthful-looking models); *Brown* (violent video games); *Stevens* (animal cruelty videos); *Alvarez* (false claims of military decorations). This Court has roundly rejected these repeated invitations despite a variety of asserted social justifications. Notably, this Court disavowed any "free-floating test for First Amendment coverage," prohibiting the state from using "ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470. Yet, the Illinois Supreme Court waded into these waters by attempting to justify the content-based Statute with various social goals and policies. Failing to grant the Petition will encourage the lower courts to continue adding to the list of unprotected speech categories, using any number of theories to justify new prohibitions.

The Illinois Supreme Court argued that "the nonconsensual dissemination of private sexual images

'seems to be a strong candidate for categorical exclusion from full First Amendment protections' based on '[t]he broad development across the country of invasion of privacy torts, and the longstanding historical pedigree of laws protecting the privacy of nonpublic figures with respect to matters of only private interest without any established First Amendment limitations." *Austin*, 2019 IL 123910, ¶ 36 (citing *State v. VanBuren*, 2018 VT 95, ¶ 43, 214 A.3d 791, 806-07 (Vt. 2019), as supplemented (June 7, 2019)). However, as the Vermont Supreme Court noted in *VanBuren*, this Court has been repeatedly reluctant "to adopt broad rules dealing with state regulations protecting individual privacy as they relate to free speech." *VanBuren*, 214 A.3d at 807. "[E]xisting First Amendment precedents would have to be substantially stretched" to support the argument that privacy restrictions on speech are categorically constitutional, and doing so would "make the doctrine loose enough to give new support to many other restrictions," including "campus speech codes[,] restrictions on online business discussion or consumer complaints[,] restrictions on online distribution of information about encryption, explosives, or drugs[,] and many more."[4] A categorical privacy right exception specifically limited to nonconsensual dissemination of

[4] Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049 (concluding that "the unintended consequences of various justifications for information privacy speech restrictions . . . are sufficiently troubling that I must reluctantly oppose such information privacy rules.").

private sexual images triggers similar concerns and is unnecessary.

Existing civil laws already offer a superior remedy for violation of victims' rights without reference to the content of the speech, under numerous tort theories including public disclosure of private information, intrusion on seclusion, publicity rights, and intentional infliction of emotional distress.[5] Injunctions can be sought to prevent continued harassment or disclosure.[6] Statutory damages can be sought under copyright law, and the Digital Millennium Copyright Act, 17 U.S.C. § 512(c), offers an easy process for many of these images to be removed from the Internet.[7] Existing state

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[5] Adam Candeub, *Nakedness and Publicity*, 104 Iowa L. Rev. 1747 (arguing the rights of publicity offers a superior remedy over criminal "revenge porn" laws); *see also Patel v. Hussain*, 485 S.W.3d 153, 176 (Tex. App. 2016) (removing damages for gap-filler intentional infliction of emotional distress claim as unnecessary, since victim's privacy interests were legally protected under claims for intrusion on seclusion and public disclosure of private facts); *see also* Nick Madigan and Ravi Somaiya, *Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker*, THE NEW YORK TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html.

[6] Eric Goldman and Jin Angie, *Judicial Resolution of Non-consensual Pornography Dissemination Cases*, 14 I/S: J. L. & Pol'y for Info. Soc'y 283.

[7] Ann Bartow, *Copyright Law and Pornography*, 91 Or. L. Rev. 1 (arguing copyright law offers effective remedies against "revenge pornography"); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 NYU J. Intell. Prop. & Ent. L. 422 (arguing copyright law provides sufficient remedies including takedown procedures and civil liability for uploaders and websites, and acts as a preventative by threatening monetary damages); Kaitlan M. Folderauer, *Not All Is Fair (Use) in Love and*

criminal laws are enforceable against those individuals or websites that extort victims using private sexual images, that surreptitiously record victims in private situations, or that engage in harassing and stalking behavior.[8] Federal criminal charges can be brought under 18 U.S.C. § 2261A(2)(b) for using the Internet to cause substantial emotional distress. Numerous guilty pleas have already been obtained for hacking private sexual images under 18 U.S.C. § 1030,[9] and the Federal Trade Commission has effectively used deceptive trade

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War: Copyright Law and Revenge Porn, 44 U. Balt. L. Rev. 321 (arguing that copyright law "provides a more lucrative and reliable avenue for victims of revenge porn to seek damages for the harm inflicted upon them" than do "solutions from a criminal law standpoint.").

[8] *See* Calvert at 701 (citing James Temple, *Limiting Intimate Posts Used as Revenge*, S.F. CHRON. (Aug. 28, 2013), https://www.pressreader.com/usa/san-francisco-chronicle/20130828/282076274530147).

[9] Andrew Blankstein, *Pennsylvania Man is Charged in Celebrity Hack, Reaches Plea Deal*, NBC NEWS (Mar. 15, 2016 4:48 PM), https://www.nbcnews.com/news/us-news/pennsylvania-man-arrested-will-plead-guilty-celebrity-hacking-n539166; Jason Meisner, *Chicagoan gets prison for 'Celebgate' nude-photo hacking that judge calls 'abhorrent'*, CHICAGO TRIBUNE (Jan. 24, 2017, 5:42 PM), https://www.chicagotribune.com/news/breaking/ct-celebgate-hacking-scandal-sentencing-met-20170123-story.html; *Hacker of celebrity photos gets 8 months in prison*, ASSOCIATED PRESS (Aug. 29, 2018), https://apnews.com/eed74fa9aaf24a2aa6db3068975a5244/Hacker-of-celebrity-photos-gets-8-months-in-prison; Ray Kelly, *Connecticut man pleads guilty to hacking Jennifer Lawrence, celebrity accounts for nude photos*, MASS LIVE (Jan. 30, 2019), https://www.masslive.com/entertainment/2018/04/connecticut_man_pleads_guilty.html; *Former Hanover teacher sentenced in 'Celebgate' nude photo hacking*, WTVR (Mar. 1, 2019, 11:01 AM), https://wtvr.com/2019/03/01/christopher-brannan-sentenced/.

practices laws to shut down sites that traffic in nonconsensual content.[10] While all such remedies must be applied consistently with the First Amendment, they are not targeting the content of protected expression.

Intimate speech that has been disseminated without consent, such as is prohibited by the Statute, does not fall within any of the boundaries of unprotected speech established by this Court. The Illinois Supreme Court disingenuously denies creating a new unprotected category of speech outright, and instead attempts to achieve the same result by manipulating standards of review. In applying intermediate scrutiny to nonconsensual dissemination of private sexual images, the Illinois Supreme Court carves out such speech from the protections for sexually-explicit speech guaranteed by the Constitution. Sexually-explicit speech does not become subject to content-based restrictions simply because it has been circulated without consent. Insofar as additional legislation is needed to fill the gaps between the multiple remedies already available to victims of nonconsensual dissemination of private sexual images, such legislation must adequately address free speech concerns and survive strict scrutiny. *Reed*, *supra*.

This Court should grant the Petition and subject the Statute to constitutionally-required strict scrutiny.

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[10] Press Release, Federal Trade Commission, Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos (Jan. 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges.

Doing so will reaffirm the well-established boundaries of First Amendment protected expression and provide clarity to both lawmakers and lower courts when considering new content-based restrictions on speech.

D. Enforcement of the Statute Harms Victims of Harassment

Failing to grant certiorari and invalidate the Statute will expose victims of defamation, cyber-flashing, online harassment, sexual abuse and assault, and other atrocious acts to felony prosecution. Even the victims of the crime at issue in this case could face three years in prison and be fined $25,000 for sharing evidence of the offense if the perpetrator is also depicted in the images. 730 ILCS § 5/5-4.5-45.

The Statute's failure to include a malicious intent element further expands the scope of the law and exacerbates its harmful impact on potential victims of harassment. In reviewing the constitutionality of similar statutes criminalizing the nonconsensual dissemination of private sexual images, the overbreadth analysis of multiple state supreme courts has turned on whether the statute includes a malicious intent requirement to prevent unconstitutional applications of the law to protected speech. *See Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018), *petition for discretionary review granted* (July 25, 2018) (concluding the statute's exclusion of an intent to harm element unconstitutionally "creates [an] 'alarming breadth' that is 'real' and 'substantial' ")

(citing *Stevens* at 474*; Ferber*, 458 U.S. at 770); *see also State v. Casillas*, 938 N.W.2d 74, 87-88 (Minn. Ct. App. 2019) (concluding the statute's exclusion of a specific intent requirement unconstitutionally "allows it to reach protected First Amendment expression that neither causes nor is intended to cause a specified harm . . . go[ing] beyond the legitimate state interest justifying the proscription of otherwise protected First Amendment expressions."); *VanBuren*, 214 A.3d at 812 (concluding the statute's inclusion of specific intent requirement, along with other necessary elements, makes it "highly unlikely" that an individual will "accidentally violate this statute while engaging in otherwise permitted speech").

Without a scienter element to filter out instances where the disseminator's free speech rights outweigh the depicted individual's privacy rights, police and prosecutors can criminalize the circulation of protected speech. The scope of the Statute can be unconstitutionally expanded to those who justly seek the aid, assistance, and guidance of parents, teachers, coaches, mentors, religious advisors, lawyers, university personnel, employers, spouses, family members, and countless other people outside the traditional legal process that can and should be there to listen to victims during the hardest times of their lives.

Lower courts have frequently explained that it is easy to imagine hypotheticals where similar revenge porn laws can be unconstitutionally applied to prohibit a substantial amount of protected expression, and those courts often provide their own examples.

Casillas, 938 N.W.2d at 89 ("It is not difficult to envision a substantial number of situations in which a person . . . further disseminates an image without knowing the subject of the image did not consent to the original dissemination, without knowing that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy, and without intending to cause a specified harm.); *Jones*, 2018 WL 2228888 at *5-6 (providing examples of innocent re-dissemination after an original malicious dissemination); *Austin*, 2019 IL 123910, ¶ 134 (Garman, J., dissenting) (citing a hypothetical where the recipient of an unsolicited nude photo forwards the image to a friend and says "look what this person sent me"). In addition to the example provided by Justice Garman in his dissent, the scenarios where this Statute can be misapplied against those victims the state should seek to protect are abundant.

1. A manager sends his employee an email with pictures of his genitalia attached. She forwards the email to the human resources department. The manager is fired and reports the issue to police. The employee is found guilty, despite only having the innocent intention to report inappropriate workplace behavior.

2. A classmate is cyber-stalking a college student he briefly dated. He creates anonymous accounts quicker than she can block them and sends links to intimate videos they recorded together. Afraid to attend class, she shares the links and depictions with the university

conduct committee and consults with a lawyer. She sends the classmate a final warning, noting that she has alerted the university and her attorney. The classmate notifies the police, and the college student is found guilty, despite only seeking legal advice and reporting online harassment to an academic institution.

3. A husband receives a private message on Twitter containing a password and a link. He opens the link and recognizes his wife engaging in sexual activities with her ex-boyfriend. The husband alerts his wife by sending her a screenshot. Rightfully incensed, she sends a text to her ex-boyfriend, demanding he delete the video. Angry that the husband disclosed the video to his wife, the ex-boyfriend contacts police. Despite only having the benevolent intention to inform his wife of a crime committed against her, the husband has violated the Statute.

4. A journalist publishes a photo depicting a victim of a terrorist attack stripping the clothes off her badly burned body for cleaning and treatment in a public square. The journalist is found guilty, despite only seeking to inform the public of a newsworthy event.

5. A landlord discovers his handyman set up a spy cam in a tenant's shower. He fires the handyman, notifies the tenant, and gives her the only existing recording of the incident. Distressed and distraught, she files a police report. The handyman is rightfully arrested for his voyeuristic crimes, and the landlord is

> arrested for disseminating the recording. The malicious handyman faces Class 4 felony charges, three years in prison, and fines of up to $25,000 for his heinous act of unauthorized video recording in a residence without consent under 720 ILCS 5/26-4. The landlord, who had no intention of sharing the recording with any third party and only sought to notify the tenant that she had been victimized by the handyman, now faces the same punishments for a Class 4 felony under the Statute.

While limited exemptions apply, 720 ILCS § 5/11-23.5(c), these hypotheticals highlight how those exemptions are vague and fail to inform a reasonable person what disclosures of intimate images are permissible. *United States v. Harriss*, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("This ordinance is void for vagueness . . . because it encourages arbitrary and erratic arrests and convictions.") (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937)). As written, the Statute is unconstitutionally open to interpretation as to what constitutes "dissemination" and the applicability of the exemptions.

The Statute provides an exemption for reporting unlawful conduct. 720 ILCS § 5/11-23.5(c)(2). However, the Statute does not sufficiently define "reporting" or to whom the report must be made. The Statute does

not provide fair notice on whether the exemption applies (i) only in instances where the dissemination is made *to a law enforcement authority*, or (ii) also in instances where the dissemination is made *to some non-government official or body* to report unlawful conduct in an organizational, employment, academic, or other setting. Nor does it state whether the reported conduct must be criminal in nature for the exemption to apply. This vagueness will encourage erratic arrests and punishment for constitutionally protected expression.

The facts of the underlying case illustrate the vagueness of this exemption. The nonconsensual dissemination by the Defendant was necessary to salvage her reputation after her ex-fiancé made defamatory statements about the Defendant to his cousin. In other words, the Defendant was a victim of defamation who reported unlawful conduct committed against her to her ex-fiancé's cousin. Yet the exemption gave her no safety to speak out. The Statute also provides an exemption for the purposes of a lawful criminal investigation. 720 ILCS § 5/11-23.5(c)(1). However, the Statute does not sufficiently define the boundaries of that exemption. Specifically, it does not provide fair notice on whether the exemption applies (i) only in instances where the dissemination is made *to a law enforcement authority*, (ii) also in instances where the dissemination is made *to a private lawyer or investigator* to determine if a criminal report should be made to police, or (iii) also in instances where the dissemination is made to a private lawyer or investigator *merely for advice on the civil remedies available to the victim*,

when the victim has no intention of pressing criminal charges.

While the Statute criminalizes the intentional *dissemination* of a private sexual image of another identifiable person, it does not define "dissemination." The Statute therefore fails to provide fair notice on whether (i) dissemination requires sharing the actual image, or (ii) dissemination occurs when a link to or screenshot of that image is shared. Likewise, the Statute criminalizes intentional dissemination of a private sexual image *of another identifiable person*, but the Statute does not state whether the image must be disseminated *to another person*. The Statute does not provide fair notice on whether (i) dissemination requires sharing the image with an undepicted third party, or (ii) dissemination occurs when the image is shared with the victim.

Finally, the Statute provides an exception for voluntary exposure in public or commercial settings, 720 ILCS § 5/11-23.5(c)(3), but it does not sufficiently define "voluntary." Sexually-oriented images are routinely disseminated online by individuals and commercial enterprises. The exemption only applies if the commercial exposure was voluntary, however a reasonable person cannot be expected to know whether such depictions were supported by knowing and voluntary releases of rights, and the exemption is not clear whether a violation can occur if the subject of the depiction later revokes any initial voluntary consent. Citizens are left to guess whether the exemption would apply in many commercial circumstances. The Statute

also provides an exemption for lawful public purposes. 720 ILCS § 5/11-23.5(c)(4). However, the Statute does not sufficiently define the boundaries of that exemption. As highlighted by the third and fifth examples above, the Statute does not provide fair notice on whether informing the victim that a crime has been committed against her constitutes a lawful public purpose. A reasonable person is not given fair notice of when the exemption applies.

Further, given the broad prohibitions in the Statute and vagueness of these exemptions, the mere existence of the law creates an unconstitutional chilling effect that will prevent victims from speaking out. *Reno*, 521 U.S. at 845 ("The vagueness of such a content-based regulation, coupled with its increased deterrent effect as a criminal statute, raise special First Amendment concerns because of its obvious chilling effect on free speech.") (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991); *Dombrowski v. Pfister*, 380 U.S. 479 (1965)). The First Amendment must guarantee victims the right to share their experiences and seek help, both in the courtroom and outside of it.

Fortunately, more women are becoming empowered to share their stories of abuse, and the law should not prohibit this expression. In early October 2017, actress Ashley Judd accused now-convicted rapist[11] Harvey Weinstein of sexual misconduct in the New York

[11] *Full Coverage: Harvey Weinstein Is Found Guilty of Rape*, THE NEW YORK TIMES, https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html (Last Updated Mar. 3, 2020).

Times.[12] In response, actress Alyssa Milano tweeted "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet,"[13] parroting a phrase coined by Tarana Burke more than a decade prior.[14] The ensuing responses heralded in the #MeToo movement as hundreds of thousands of women began sharing their stories of sexual misconduct, harassment, abuse, and rape online, in print, on television, and in every medium imaginable.[15]

As more victims find their voice and overcome the social pressures which previously enforced their silence, it will become more commonplace for victims to engage in innocent behavior that can trigger misapplication of the Statute. During the same month that the #MeToo movement began, a survey by YouGov found that 41% of all millennial women have been sent an unsolicited photograph of a man's private parts,

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[12] Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, THE NEW YORK TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[13] Alyssa Milano (@alyssa_milano), TWITTER (Oct. 15, 2017), https://twitter.com/alyssa_milano/status/919659438700670976.

[14] *#MeToo, a timeline of events*, CHICAGO TRIBUNE, https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (Last Updated Mar. 11, 2020, 10:28 AM).

[15] *Id.*

colloquially referred to as a "dick pic."[16] Sending images like this is also known as "cyber-flashing."[17]

Some of these victims have publicly posted the unsolicited images they have received as proof of their sexual harassment and to raise awareness of the issue. "It is not uncommon for women uncomfortable with such unsolicited images to publicize these images in an effort to shame or deter the sender, often revealing identifying details about the sender."[18] For example, musician Laura Lux has forwarded the unsolicited "dick pics" she receives to the girlfriends of the senders.[19] After publicly shaming her cyber-flasher on Twitter,[20] model Emily Sears said "[t]he message we really

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[16] Matthew Smith, *Four in ten female millennials have been sent an unsolicited penis photo*, YOUGOV (Feb. 15, 2018, 7:00 PM), https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic.

[17] *See* Laura Thompson, *Exposing Yourself is Illegal So Why Should the Law Tolerate Cyber-Flashing on Online Dating Apps?*, INDEPENDENT (Feb. 4, 2016, 9:36 AM), https://www.independent.co.uk/life-style/love-sex/exposing-yourself-is-illegal-so-why-do-online-dating-app-users-think-cyber-flashing-is-ok-a6852761.html.

[18] Mary Anne Franks, "*Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251 at fn. 56, citing John Paul Titlow, *This Woman Wants Facebook To Ban Unsolicited Dick Pics*, FAST COMPANY (June 7, 2016, 6:30 PM), https://www.fastcompany.com/3060703/this-woman-wants-facebook-to-ban-unsolicited-dick-pics.

[19] Rossalyn Warren, *A Model Is Alerting Girlfriends Of The Men Who Send Her Dick Pics*, BUZZFEED (Jan. 29, 2016, 8:03 AM), https://www.buzzfeed.com/rossalynwarren/a-model-is-alerting-girlfriends-of-the-men-who-send-her-dick#.ub36Q9JP5.

[20] Emily Sears (@emilysears), TWITTER (Jan. 17, 2016), https://twitter.com/emilysears/status/688933605318328320.

want to send is that this happens to so many women, not just models with a following."[21] These women explain that public shaming is necessary to show that "women aren't making this stuff up."[22] Such innocent attempts to share evidence of cyber-harassment are criminalized by the Statute and not covered by the exemptions. Any journalist or academic that includes links or citations to such tweets in their articles or research could also violate the law. As a result, the Statute is overbroad and harmful to victims who should be empowered instead of silenced by fear of felony prosecution.

Victims of "revenge porn" and other nonconsensual disclosure of intimate images are entitled to protection and usable legal tools to battle this grotesque invasion of privacy. However, lawmakers must use sensitive tools when legislating in the area of protected speech. *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) ("[T]he separation of legitimate from illegitimate speech calls for sensitive tools.") (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Any such legislation must not create more harm than it seeks to remedy. The Statute does precisely that. While offering a remedy to some victims, the Statute contemporaneously ensnares many innocent acts as demonstrated by the facts of the case

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[21] Cavan Sieczkowski, *Model Responds To Dudes Who Send Her Dick Pics By Telling Their Girlfriends*, HUFFPOST (Jan. 29, 2016, 1:42 PM), https://www.huffpost.com/entry/model-responds-to-dudes-who-send-her-dick-pics-by-telling-their-girlfriends_n_56ab99ece4b0010e80e9cebd.

[22] Warren, *supra*.

below. Granting certiorari in this case is essential to clarify the level of scrutiny afforded by the First Amendment when the government seeks to restrict fundamental free speech rights.

CONCLUSION

For these reasons, Amicus Woodhull respectfully requests that this Court grant the Petition.

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