No. 19-1029

In the Supreme Court of the United States

BETHANY AUSTIN, PETITIONER,

v.

ILLINOIS, RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether prohibiting the nonconsensual, public dissemination of private sexual images, which the defendant knew or should have known were intended to remain private, violates the First Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Secondary Sources:

BRIEF IN OPPOSITION

The nonconsensual dissemination of private sexual images exposes victims to a wide variety of serious harms that affect nearly every aspect of their lives. The physical, emotional, and economic harms associated with such conduct are well-documented: many victims are exposed to physical violence, stalking, and harassment; suffer from emotional and psychological harm; and face limited professional prospects and lowered income, among other repercussions. To address this growing problem and protect its residents from these harms, Illinois enacted section 11-23.5, 720 ILCS 5/11-23.5. Petitioner—who was charged with violating section 11-23.5 after she disseminated nude photos of her fiancé's paramour without consent—asks this Court to review the Illinois Supreme Court's decision rejecting her First Amendment challenge. This request should be denied.

To begin, this case does not satisfy the criteria for certiorari. Petitioner asserts that the Illinois Supreme Court created a split in lower court authority by applying intermediate scrutiny, as opposed to strict scrutiny. But as petitioner acknowledges, only one other state court of last resort has addressed the constitutionality of a nondissemination statute, and that court engaged in a very similar analysis to the Illinois Supreme Court to uphold the statute. The other two decisions cited by petitioner are intermediate appellate court opinions that have been accepted for further review by their respective high courts, and thus do not present a final adjudication of the issue in those States.

In any event, the petition for certiorari should be denied because section 11-23.5 is constitutional under any standard of review, including strict scrutiny. The theory petitioner presses—that the statute is not sufficiently tailored because it does not include a requirement that the defendant intended to harm the victim—ignores that the harms associated with nonconsensual dissemination occur regardless of whether the content was shared to harm another or for notoriety, entertainment, or monetary gain. Accordingly, section 11-23.5 is narrowly tailored to serve the state interest in protecting *all* victims of this conduct.

Finally, this case is a poor vehicle to decide the question presented. The split identified by petitioner on the proper standard of review is shallow at best, and its resolution will not affect the outcome of this case. The case, moreover, comes to the Court at an interlocutory posture. Because petitioner has not yet had a trial, it is impossible to know whether her conduct even violated section 11-23.5.

STATEMENT

1. Petitioner Bethany Austin was living with her fiancé, Matthew, when she learned of his infidelity with a neighbor, who is the victim in this case. Pet. App. 2a. Because petitioner and Matthew shared an Apple iCloud account, all text messages sent to or from Matthew's iPhone also appeared on petitioner's iPad. *Ibid.* One day, a series of text messages between Matthew and the victim appeared on petitioner's iPad. *Ibid.* The messages included nude photos that the victim sent of herself to Matthew. *Ibid.* The engagement was called off, and, a few months later, the couple separated. *Id.* at 3a. Matthew "began telling family and friends that their relationship had ended because petitioner was crazy and no longer cooked or did household chores." *Ibid.* In response, petitioner sent a letter to an unknown number of recipients and attached four nude photos of the victim taken from petitioner's iPad, as well as the accompanying text messages. *Ibid.* Among the recipients was Matthew's cousin, who informed Matthew about petitioner's letter. *Ibid.* Matthew reported the letter and photos to police, and petitioner was charged with nonconsensual dissemination of private sexual images pursuant to section 11-23.5. *Ibid.*

2. Illinois enacted section 11-23.5 in 2015 to criminalize the "non-consensual dissemination of private sexual images" in circumstances where a person "intentionally disseminates an image of another person" who is at least 18 years of age, is identifiable from the image or associated information, and "is engaged in a sexual act or whose intimate parts are exposed." 720 ILCS 5/11-

23.5(b)(1). To be convicted under this provision, a person must obtain "the image under circumstances in which a reasonable person would know or understand that the image was to remain private" and also must have "know[n] or should have known that the person in the image has not consented to the dissemination." *Id.* 5/11-23.5(b)(2)-(3). The statute exempts dissemination for criminal investigations, to report unlawful conduct, where the images involve voluntary exposure in public or commercial settings, or for lawful public purposes. *Id.* 5/11-23.5(c).

3. Petitioner moved to dismiss the charges, arguing (as relevant here) that the statute violates the free speech provisions of the First Amendment to the United States Constitution. Pet. App. 76a. The trial court agreed. *Id*. at 87a, 89a, 119a. Specifically, the trial court found that section 11-23.5 restricted speech*, id*. at 91a, based on its content*, id.* at 92a; that the restricted speech is protected by the First Amendment, *id.* at 105a; and that the statute could not survive strict scrutiny*, id*. at 117a, because the State offered "no compelling justification for the . . . statute*," id*. at 113a, and because, in any event, the statute is not narrowly tailored to the State's justification*, id*. at 117a.

4. Shortly thereafter, the State directly appealed to the Illinois Supreme Court from the trial court's order declaring section 11-23.5 facially unconstitutional. See Ill. S. Ct. R. 603 (providing for direct appeal as of right when a state statute has been held unconstitutional). Before the Illinois Supreme Court, the State argued that the trial court erred in finding section 11-23.5 unconstitutional because the public distribution of truly private facts is not constitutionally protected. Pet. App.

4a. In the alternative, the State asserted that even if such speech is protected, section 11-23.5 is constitutionally valid because it is narrowly tailored to serve a compelling government interest. *Ibid.*

5. The Illinois Supreme Court reversed the trial court and remanded for further proceedings. It cited with approval the Vermont Supreme Court's opinion in *State v. VanBuren*, 214 A.3d 791 (Vt. 2019), which recognized 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.'" *Id.* at 17a (quoting *VanBuren*, 214 A.3d at 807). But the court ultimately "decline[d] the State's invitation to identify a new category of speech that falls outside of first amendment protection." *Ibid.*

The court went on to consider the appropriate level of scrutiny and concluded "that section 11-23.5(b) is subject to an intermediate level of scrutiny" because (1) "the statute is a content-neutral time, place, and manner restriction," and (2) "the statute regulates a purely private matter." *Id.* at 20a. The court further concluded "that section 11-23.5 serves a substantial government interest" because it protects the health and welfare of Illinois citizens and their individual rights to privacy, *id.* at 28a-33a, and that "section 11-23.5 is narrowly tailored to further the important governmental interest identified by the legislature," *id.* at 43a. Finally,

the court determined that section 11-23.5 is not overbroad or vague. *Id.* at 47a, 57a-63a.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for at least three reasons. First, there is no split in authority regarding the First Amendment constitutionality of statutes prohibiting the nonconsensual dissemination of private sexual images, and, even if there were, further percolation is needed before this Court decides whether to weigh in on this nascent area of the law. Second, while petitioner identified a divergence between the Illinois Supreme Court and one other state high court over the applicable standard of review, this 1:1 "split" doesn't warrant this Court's intervention because Illinois's statute is constitutional under any standard, including strict scrutiny. Finally, this case is a poor vehicle to decide the question presented because it comes to the Court at an interlocutory posture. Petitioner has not yet had a trial, making it is impossible to know whether her conduct even violated section 11-23.5.

I. Petitioner Identifies No True Split.

Petitioner contends that certiorari review is warranted because the Illinois Supreme Court opinion creates a split among state courts on the appropriate level of scrutiny for First Amendment challenges to state laws prohibiting the nonconsensual dissemination of private sexual images. Pet. 18-19. According to petitioner, the Illinois Supreme Court's application of intermediate scrutiny "is inconsistent with decisions of various state courts." *Id.* at 3. But petitioner

identifies only three decisions addressing the constitutionality of nondissemination laws, two of which are decisions of state intermediate appellate courts in cases that have been accepted for further review. And the third—a decision by the Vermont Supreme Court—ultimately reached the same result as the Illinois Supreme Court after engaging in a very similar analysis. Thus, there is no split in authority for this Court to resolve.

Petitioner relies heavily on the Vermont Supreme Court's decision in *VanBuren*, *id.* at 3, 14, 18, which she asserts "conflicts with" the decision below, *id.* at 14. This is incorrect. Like the Illinois Supreme Court, the Vermont Supreme Court—the only other state high court to rule on the constitutionality of a nondissemination statute to date—found Vermont's nonconsensual dissemination statute constitutional. *VanBuren*, 214 A.3d at 814. This result is consistent with decisions of at least two other intermediate appellate courts upholding similar statutes. See*, e.g.*, *State v. Culver*, 918 N.W.2d 103, 110-111 (Wis. Ct. App. 2018); *People v. Inguez*, 247 Cal. App. 4th Supp. 1, 7-8 (Cal. App. Ct. 2016).

There is also no meaningful distinction between the analyses applied by the Illinois and Vermont Supreme Courts, let alone a divergence warranting this Court's review. Although the Vermont Supreme Court rejected the State's request to apply intermediate scrutiny, it noted that "as a practical matter, . . . application of strict scrutiny to restrictions on nonconsensual pornography may not look significantly different than an intermediate scrutiny analysis." *VanBuren*, 214 A.3d

at 808 n.9. That is so, the court explained, because of the "relatively lower constitutional value ascribed" to purely private matters. *Ibid.*

Indeed, the reasoning applied by the two courts is remarkably similar. Just as the Illinois Supreme Court found a substantial government interest in protecting the health, welfare, and privacy interests of Illinois citizens from the nonconsensual dissemination of private sexual images, Pet. App. 18a-33a, the Vermont Supreme Court found a compelling state interest in protecting Vermont citizens from the same harms, *VanBuren*, 214 A.3d at 810-11. And each court held that its State's law was narrowly tailored to that interest. *Compare* Pet. App. 43a ("Based on the statutory terms set forth above, section 11-23.5 is narrowly tailored to further the important governmental interest identified by the legislature.") *with VanBuren*, 214 A.3d at 814 ("For the above reasons, the statute is narrowly tailored to advance the State's interests.").

Nor do the intermediate appellate court decisions identified by petitioner—*Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018), and *State v. Casillas*, 938 N.W. 2d 74 (Minn. Ct. App. 2019)—support her request for review. Pet. 19, 27. In *Ex Parte Jones*, an intermediate court of appeals struck down the Texas nonconsensual dissemination statute, *Ex Parte Jones*, 2018 WL 2228888, at *8, but the Texas Supreme Court has granted discretionary review in that case, *Ex Parte Jones*, No. PD-0552-18, and another intermediate appellate court in Texas reached a contrary conclusion, *Ex Parte Lopez*, No. 09-17-00393-CR, 2019 WL 1905243, at *5 n.40 (Tex. App. Mar. 27, 2019). So, it is far from clear that

Texas will ultimately diverge from the Illinois and Vermont high courts. Furthermore, the court in *Ex Parte Jones* interpreted the statute at issue there to include situations where the defendant had no reason to know that the images were intended to be private. 2018 WL 2228888, at *6-7. Section 11-23.5, by contrast, requires that knowledge. The Minnesota Supreme Court has similarly granted review in *Casillas*, where the intermediate appellate court struck down Minnesota's nonconsensual dissemination statute. *State v. Casillas*, 938 N.W. 2d 74 (Minn. Ct. App. 2019); Order at 1, *State v. Casillas*, No. A19-0576 (Minn. Mar. 17, 2020) (granting review). Thus, there is reason to believe that the Minnesota high court will not part ways from its counterparts in Illinois and Vermont, either.

The lack of a true split in authority on the question presented distinguishes this case from *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), on which petitioner places significant weight. See Pet. 13-14, 16-18. Relying on *Reed*, petitioner asserts that "certiorari review is warranted where lower courts applied the wrong level of scrutiny." *Id.* at 16. But *Reed* says nothing about why the Court granted certiorari in that case. And at the time the Court decided *Reed*, eight circuits had weighed in on the issue the Court resolved (the proper test for determining whether a sign ordinance is content neutral) over a period of three decades. See Petition for Certiorari at 18-27, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (No. 13-502), 2013 WL 5720386. *Reed* thus cannot be cited for the proposition that certiorari review is warranted whenever a court applies the wrong standard of review; instead, *Reed*

resolved a deep, longstanding split of the sort that is absent here. See 576 U.S. at 165-166 (resolving split in favor of text-based approach).

Even though the few cases to have assessed the constitutionality of nonconsensual dissemination statutes have not meaningfully diverged, petitioner asserts that this Court's failure to "settle what level of scrutiny should govern review of such laws . . . would have an impact far beyond Petitioner's case." Pet. 3. There is no indication, however, that this is true. In the 16 years since the first nonconsensual dissemination law was enacted, 46 States and the District of Columbia have adopted such statutes.[1] Yet petitioner identifies only a handful of cases that have addressed the constitutionality of these statutes. Given this legal landscape, petitioner's constant refrain that these statutes "could make criminals of countless numbers of Americans," Pet. 3; see also *id.* at 6, 7, 23, is a significant overstatement.

But even if petitioner were correct about the potential effects of the alleged split, further percolation would be warranted. Again, at most, petitioner has identified a modest divergence on the level of scrutiny between the Illinois Supreme Court's decision and one other state high court and two intermediate appellate courts. Even waiting until those two cases are adjudicated by their state high courts would double the number of States to reach a final determination on this

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[1] See *46 States + DC + One Territory Now Have Revenge Porn Laws*, Cyber Civil Rights Initiative, https://tinyurl.com/yaazgzyn. All websites were last visited July 5, 2020.

question. Thus, even if the constitutionality of nondiscrimination laws raised a close question under the First Amendment (and it does not), now—when so few lower courts have weighed in on the subject—is not the time for certiorari review.

II. Illinois's Law Is Constitutional Under Any Standard of Review.

As discussed, the petition fails to identify a developed split on whether intermediate or strict scrutiny should apply to First Amendment challenges to nonconsensual dissemination statutes. But even if it had, the petition should be denied for the additional reason that resolution of the proper standard of review would not affect the outcome of this case, because section 11-23.5 is constitutional under any level of scrutiny. See, *e.g.*, *VanBuren*, 214 A.3d at 808 n.9 (explaining that "as a practical matter, . . . application of strict scrutiny to restrictions on nonconsensual pornography may not look significantly different than an intermediate scrutiny analysis"). Although the Illinois Supreme Court applied intermediate scrutiny to uphold Illinois's statute, it likely would have reached the same conclusion had it applied strict scrutiny: the court recognized the compelling interests at stake, Pet. App. 33a, and determined that "section 11-23.5 is narrowly tailored to further the important governmental interest identified by the legislature," *id.* at 43a. Moreover, the state court reached the correct result, and its analysis is consistent with this Court's precedents.

A. Section 11-23.5 is narrowly tailored to serve compelling state interests.

Illinois's nonconsensual dissemination statute satisfies strict scrutiny because it is justified by the compelling government interests in protecting the

health, safety, and privacy of victims, and it is narrowly tailored to achieve those interests. See *Burson v. Freeman*, 504 U.S. 191, 199, 206 (1992).

To begin, the Illinois Supreme Court correctly recognized that the State has a "compelling" interest in "protecting the privacy of personal images of one's body that are intended to be private—and specifically, protecting individuals from the nonconsensual publication on websites accessible by the public." Pet. App. 33a. It also rightly explained that Illinois, like dozens of other States, enacted its nondissemination law to protect victims from "the plight" of revenge porn and related crimes. *Ibid.* As its colloquial name suggests, "revenge porn" often serves no purpose other than to harm the victim. But regardless of intent, the nonconsensual dissemination of private, sexually explicit images creates in its victims a pervasive fear of unlawful physical violence, emotional distress, and social and professional harms.

Indeed, in a survey of "revenge porn" victims, 93% said they had "suffered significant emotional distress."[2] Eighty-two percent of victims "said they suffered significant impairment in social, occupational, or other important areas of functioning."[3] And fully one-half reported being stalked online or harassed by users

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[2] Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators* (Nov. 2, 2015), at 11, https://tinyurl.com/y76sdk4z; see also Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, Oxford Journal of Legal Studies (2017), pp. 1-28 at 12, https://tinyurl.com/ycoj96rw (finding that 80% of victims suffered "severe emotional stress and anxiety").

[3] Franks, *supra* n.2, at 12.

who had seen the disseminated material.[4] Nor is the harm felt solely online. Often the distributed images are accompanied by identifying information—"a practice known as 'doxing'"—and unsubstantiated allegations about the victim.[5] Perhaps because of this, nearly one-third of victims said that they experienced harassment or stalking that extended beyond the Internet.[6] And more than half have had suicidal thoughts due to the dissemination of the sexually explicit images.[7]

The damage is not limited to psychological or emotional harm. The professional costs to victims are also potentially severe. Many are dismissed from their current employment "as a result of an online presence dominated by private sexual images and abuse."[8] Victims often find themselves unemployable due to the disclosure, or may withdraw from online life entirely, to the detriment of their job prospects and careers.[9] In the most serious cases, victims suffer significant physical harm. In one case, a woman was raped at knifepoint by a stranger after her ex-boyfriend posted her photograph and contact information online.[10] Furthermore, the threat of nonconsensual dissemination of sexual images can play a role in

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[4] *Ibid.*

[5] McGlynn & Rackley, *supra* n.2, at 12.

[6] Franks, *supra* n.2, at 12.

[7] *Id.* at 13.

[8] McGlynn & Rackley, *supra* n.2, at 12.

[9] Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1, 8-10 (2009)

[10] Caroline Black, *Ex-marine Jebediah James Stipe Gets 60 Years for Craigslist Rape Plot*, CBS NEWS (June 29, 2010), https://tinyurl.com/p3us2hg.

domestic violence, with abusive partners using that threat to keep their victims from leaving or reporting the abuse to law enforcement.[11] Sex traffickers also use the threat of dissemination to trap unwilling victims in the sex trade.[12] And some rapists record their assaults on their victims, both to inflict additional pain and humiliation and to discourage the victim from reporting the crime.[13]

And the harm extends beyond the individual victims to society generally. When directed at women, revenge porn "sends a message to all women that they are not equal, that they should not get too comfortable, . . . that it might happen to them."[14] As one example, when Marines posted more than 130,000 explicit photos of female service members online without their permission, the message to women in uniform was that they were not equal to their male colleagues or safe in their professional lives.[15] This conduct thus "legitimates the attitudes of those who might not yet have participated directly in the abuse but who have similar attitudes

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[11] Jack Simpson, *Revenge Porn: What is it and how widespread is the problem?*, The Independent (July 2, 2014), https://tinyurl.com/y8aze8bs; Annmarie Chiarini, "*I was a victim of revenge porn. I don't want anyone else to face this*," The Guardian (Nov. 19, 2013), https://tinyurl.com/nadwv5z.

[12] Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 818 (2008); Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC Chicago (Feb. 22, 2013), https://tinyurl.com/c76vc4f.

[13] See, *e.g.*, Tara Culp-Ressler, *16 Year-Old's Rape Goes Viral on Twitter: 'No Human Being Deserved This'*, Think Progress (July 10, 2014), https://tinyurl.com/yd84t7y2.

[14] McGlynn & Rackley, *supra* n.2, at 13.

[15] David Martin, *Secret military site posts explicit images of female service members*, CBS News (Mar. 9, 2018), https://tinyurl.com/y8hnqxyc.

towards women, or who think that the abuse is 'just a bit of fun' and that it is therefore acceptable to disregard the dignity of the individual."[16]

Given the severity and well-documented nature of these harms, Illinois enacted section 11-23.5 to serve its compelling interests in deterring nonconsensual dissemination of private, sexual images and protecting the privacy, health, and safety of its residents. Pet. App. 18a-33a. Moreover, the statute, which includes important limitations and exceptions, is narrowly drawn to achieve those goals.

In particular, section 11-23.5(b), which defines the elements of the offense, narrows its application in five important ways, so as not to burden more speech than necessary. First, the images must be "private sexual images," which means they depict a person whose intimate parts are exposed or who is engaged in a sexual act as defined in the statute. 720 ILCS 5/11-23.5(a), (b)(1)(C). Therefore, the scope of the statute is restricted to truly private images. See *Culver*, 918 N.W.2d at 109 (observing that the "private representation" element in Wisconsin's nonconsensual dissemination statute, which is similar to the definition of "private sexual images" in section 11- 23.5(b), narrows the statute's application). Second, the person portrayed in the image must be identifiable from the image or information displayed in connection with the image. 720 ILCS 5/11-23.5(b)(1)(A)-(B). Accordingly, the statute only applies where a specific person is identifiable and thus subject to the harm the State is guarding against. Third, the image must have been

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[16] McGlynn & Rackley, *supra* n.2, at 13-14.

obtained under circumstances in which a reasonable person would know or understand that it was to remain private. *Id.* 5/11-23.5(b)(2). This ensures that the statute is inapplicable if the image was obtained under circumstances where disclosure to another is a natural and expected outcome. Fourth, the person who disseminates such an image must have known or should have known that the person portrayed in the image has not consented to the dissemination. *Id.* 5/11-23.5(b)(3). This limits application of the statute to acts that go to the core of its protective purpose. Fifth, and finally, the statute specifically requires that the dissemination of private sexual images be intentional. *Id.* 5/11-23.5(b)(1). Therefore, the probability that a person will inadvertently violate section 11-23.5 while engaging in otherwise protected speech is minimal.

In addition, section 11-23.5(c) of the statute exempts from its reach dissemination for criminal investigations, to report unlawful conduct, where the images involve voluntary exposure in public or commercial settings, or for lawful public purposes. *Id.* 5/11-23.5(c). These exemptions shield from criminal liability any dissemination of a private sexual image that advances the collective goals of ensuring a well-ordered system of justice and protecting society as a whole or where public disclosure has been sanctioned based on the public or commercial nature of the image. Thus, under section 11-23.5, "[p]eople remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images. Moreover, they remain free to criticize or complain about fellow citizens in ways

that do not violate the privacy rights of others."[17] Indeed, petitioner cannot show how her speech would have been in any way stifled by not attaching the victim's private sexual images to her letter. Nor can she explain how she would have been prevented from seeking counseling from a religious leader or therapist, see Pet. 26, if she could not show them the victim's private sexual images.

Notwithstanding section 11-23.5's narrow tailoring, petitioner asserts that it is unconstitutional because it does not require an intent to cause harm. *Id.* at 23-27. This is incorrect for at least two reasons: (1) the First Amendment does not require a specific intent to cause harm, and (2) section 11-23.5 could not be more narrowly tailored and still achieve the compelling governmental interest in protecting *all* victims.[18]

As an initial matter, the constitutionality of a nondissemination statute does not turn on the question of motive. "[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (Roberts, C.J., joined by Alito, J.); see also *id.* at 492 (Scalia, J., concurring in part

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[17] Mary Anne Franks, *"Revenge Porn" Reform: A View From the Front Lines*, 69 Fla. L. Rev. 1251, 1326 (2017).

[18] In a footnote, petitioner suggests that the inclusion of an intent-to-harm element was relevant to the Vermont Supreme Court's decision to uphold that State's nondissemination statute. See Pet. 27 n.8. On the contrary, the court emphasized that it "express[ed] no opinion as to whether this narrowing element is essential to the constitutionality of the statute." *VanBuren*, 214 A.3d at 812 n.10.

and concurring in the judgment) (agreeing that motivation is "ineffective to vindicate the fundamental First Amendment rights" of speakers).

Thus, First Amendment scholars agree that there is no doctrinal basis for the notion that, to withstand First Amendment scrutiny, a law aimed at protecting privacy must include an intent-to-harm element. Professor Erwin Chemerinsky observes that there is nothing "in the First Amendment that says there has to be an intent to cause harm to the victim," as it suffices that the private information "is intentionally or recklessly made publicly available. . . . Imagine that the person is putting the material online for profit or personal gain. That should be just as objectionable as to cause harm to the victim."[19] Similarly, Eugene Volokh has written that "[r]evenge porn is bad because it's nonconsensual—at least one of the participants didn't agree to the distribution of the material—and not because its purpose is revenge."[20] Accordingly, "[f]or purposes of legal analysis, there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person."[21]

Furthermore, a requirement that the State prove that the defendant intended to harm to his victim would leave unprotected the many victims who are

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[19] CCRI, *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, Cyber Civil Rights Initiative (Oct. 6, 2017), https://tinyurl.com/ybyn8oxt.

[20] Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. Rev. 1366, 1405-1406 (2016).

[21] *Ibid.*

harmed by perpetrators motivated by a desire to entertain, to make money, or to gain notoriety. Indeed, many perpetrators of nonconsensual dissemination of private sexual images disclaim any intent to harm their victims. For instance, when it was discovered that members of a fraternity had uploaded photos of unconscious, naked women to a members-only Facebook page, a fraternity brother explained that the conduct "wasn't intended to hurt" the victims—indeed, the perpetrators undoubtedly would have preferred that the victims never learned of their conduct at all—but rather was intended to be "funny" to the members.[22] But the perpetrators' intent in no way diminishes the harm to the victims, or the State's interest in protecting them from it.

Indeed, a Cyber Civil Rights Initiative study found that the vast majority of perpetrators—nearly 80%—report being motivated by something other than the desire to hurt the victim.[23] Domestic abusers threaten to disclose intimate photos to keep a partner from leaving or from reporting abuse to law enforcement;[24] sex traffickers use compromising images to keep unwilling individuals in the sex trade; rapists record attacks to discourage victims from reporting assaults;[25] and "revenge

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[22] Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity*, Philadelphia Magazine (Mar. 18, 2015), https://tinyurl.com/or2hjq3.

[23] CCRI, Frequently Asked Questions, https://tinyurl.com/ybzo4fqu.

[24] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 351 n.2 (2014).

[25] Franks, *supra* n.17, at 1258.

porn" site owners traffic in unauthorized sexually explicit photos and videos to make money or to attain notoriety.[26]

Petitioner's contrary argument fundamentally misunderstands the harms caused by nonconsensual dissemination of private sexual images and mischaracterizes First Amendment doctrine. While an intent to cause harm may be a meaningful factor in offenses such as harassment or disorderly conduct, it is irrelevant in offenses proscribing privacy violations because the harm inflicted does not depend on the motive of the discloser. For these reasons, section 11-23.5 is narrowly tailored to achieve the State's compelling interest in protecting victims from the harms associated with the nonconsensual dissemination of private sexual images. Thus, the Illinois Supreme Court's holding that the statute is not facially unconstitutional was correct, even if strict scrutiny were applied.

The state court's rejection of petitioner's overbreadth argument, Pet. 15, 23, also was correct, Pet. App. 52a-56a, and for similar reasons. While any statute that regulates speech must avoid constitutional overbreadth, such concerns "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The overbreadth doctrine thus "strike[s] a balance between competing social costs." *United States v. Williams,* 553 U.S. 285, 292 (2008). Specifically, the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its

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[26] *'Revenge Porn' Website has Colorado Women Outraged*, CBS Denver (Feb. 3, 2014), https://tinyurl.com/y8oppoou.

applications is perfectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech." *Ibid.* And, "[i]n order to maintain an appropriate balance," this Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.* Moreover, in determining whether a statute's overbreadth is substantial, the Court considers a statute's application to real-world conduct, not fanciful hypotheticals. See *id.* at 301-302.

As demonstrated, Illinois's statute is narrowly tailored to apply to cases that advance the State's substantial interests. The overwhelming majority of the statute's applications are constitutional because by requiring that a defendant have intentionally disclosed private sexual images under circumstances where the defendant knew or should have known the images were intended to remain private and the victim did not consent to dissemination, subject to the exceptions in section 11-23.5(c), the statute will in the vast majority of, if not all, circumstances advance the State's compelling interests in protecting its residents from the physical, emotional, and economic harms associated with such dissemination. See *supra* pp. 15-17. And given the sheer magnitude of nonconsensual disseminations of private sexual images that continues to occur, even if one could hypothesize a scenario in which section 11-23.5 penalizes speech without advancing the State's compelling interests, the "strong medicine" of the overbreadth doctrine would be inappropriate. *Virginia v. Hicks,* 539 U.S. 113, 119-120 (2003). Such applications will be relatively

rare, if they arise at all, and are sufficiently protected by prosecutorial and judicial discretion, as well as the availability of as-applied challenges. See *id.* at 124.

Finally, petitioner's argument that the Illinois Supreme Court's overbreadth analysis is inconsistent with *Virginia v. Black*, 538 U.S. 343 (2003), see Pet. 24-25, misdescribes the state court's analysis. Contrary to petitioner's suggestion, the Illinois Supreme Court did not hold that Illinois's statute implicitly includes the element—an intent to harm—that petitioner believes is constitutionally required. In fact, the court noted that the Illinois statute does *not* include an intent-to-harm element, unlike some other States' statutes. Pet. App. 53a-54a. But, the court explained, the lack of an intent-to-harm element does not make the statute constitutionally infirm because the statute's other elements ensure that its reach does not extend substantially beyond the conduct that Illinois's legislature legitimately targeted. *Id.* at 54a-56a. In other words, the state court merely asked whether the fit between the State's interest and the statute was sufficiently close to survive First Amendment scrutiny. That reasoning is entirely appropriate, and further demonstrates that Illinois's nonconsensual dissemination statute survives strict scrutiny (and is not overbroad), even in the absence of an intent-to-harm element.

B. Section 11-23.5 is a content-neutral statute that governs matters of purely private concern.

Because section 11-23.5 satisfies strict scrutiny, it is not necessary to resolve the proper level of scrutiny. But, in any event, the Illinois Supreme Court's application of intermediate scrutiny was not inconsistent with this Court's

precedents because section 11-23.5 regulates matters of purely private concern and is content neutral.

For starters, this Court has held that First Amendment protections are less rigorous where matters of purely private significance are at issue:

> That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import.

Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 760). "While such speech is not totally unprotected by the First Amendment, its protections are less stringent." *Dun & Bradstreet*, 472 U.S. at 760.

Moreover, it is the private nature of the images in question, rather than their content alone, that brings them under the purview of section 11-23.5. In this way, the statute is similar to the regulation at issue in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). That case dealt with the validity of a city zoning ordinance regulating the location of adult movie theaters. This Court observed that the ordinance "does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters," but the regulations appeared to be "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." *Id.* at 47. As a result, the Court held that "the Renton ordinance is completely

consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Id.* at 48 (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976) (emphasis added by *Renton* court).

Similarly, the Illinois statute does not fit neatly into either the content-based or content-neutral category. To be sure, it applies only to private, sexually explicit images, much like the Renton ordinance applied only to adult theaters. And like the Renton ordinance, the Illinois statute is not aimed at the sexual content of those images, but at the effect of the nonconsensual dissemination of those private images on the victims. Petitioner's footnote effort to distinguish *Renton* because section 11-23.5 purportedly does not target "secondary effects," Pet. 17-18 n.7, misdescribes how the statute operates. In *Renton*, this Court observed that "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." 475 U.S. at 48. Similarly, here, if the State had been concerned with restricting the dissemination of sexual images it would have prohibited their dissemination generally. Instead, the restriction applies only where a reasonable person would know that the image was intended to remain private and that the person depicted had not consented to the dissemination.

Reed does not alter that analysis. As petitioner points out, see Pet. 17, this Court stated in *Reed* that content-based laws targeting speech for its "communicative content" must face strict scrutiny, regardless of the regulation's

underlying motive. 576 U.S. at 163. But that applies only where the Court has decided there is a content-based law, and it is not true that every regulation of speech that makes *any* reference to content is "content-based." The Court's cases have been less rigid than that. For example, in *Members of City Council of Los Angeles v. Taxpayers for Vincent* 466 U.S. 789 (1984), which *Reed* did not overrule, the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. *Id.* at 792 n.1, 804-810 (upholding ordinance under intermediate scrutiny). And this, of course, has to be the case, given the many examples of regulations that protect the public health and safety by referencing communicative content, "but where a strong presumption against constitutionality has no place." *Reed*, 576 U.S. at 177-178 (Breyer, J. concurring) (discussing, inter alia, statutes requiring certain content on labels for consumer electronics and prescription drugs and those requiring pilots to brief passengers on specified flight procedures).

In *Reed*, the Court did not call into question such regulations, or the Court's prior decisions holding First Amendment protections are less rigorous where matters of purely private significance are at issue. Illinois's nondissemination statute thus is merely another example of a regulation that references the content of the speech being communicated but where application of strict scrutiny would be inappropriate. Accordingly, the Illinois Supreme Court's decision to apply intermediate scrutiny was not contrary to this Court's precedent.

C. The First Amendment does not protect the public distribution of truly private facts.

Finally, the Illinois Supreme Court declined the State's invitation to find a new category of unprotected speech. Pet. App. 17a. But, it acknowledged, like the Vermont Supreme Court, 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."

Ibid. (quoting *VanBuren*, 214 A.3d at 806-807). This is yet another reason to affirm the decision below, regardless of the applicable level of scrutiny.

This Court has recognized that there may be "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such." *United States v. Stevens*, 559 U.S. 460, 472 (2010). This includes speech that "is part of a long (if heretofore unrecognized) tradition of proscription." *United States v. Alvarez*, 567 U.S. 709, 722 (2012). States have long been allowed to proscribe the publication of truly private facts without violating the First Amendment. See *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975); see also Samuel D. Warren & Louis D. Brandeis*, The Right to Privacy*, 4 Harv. L. Rev. 193, 215 (1890) (describing well-established tradition of allowing the government to regulate publication of truly private facts dating back more than a century). This Court has never invalidated a statute that regulates only such speech, and has reserved

judgment on whether First Amendment protections would even apply. See, *e.g.*, *Time Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).

In sum, whether strict or immediate scrutiny is applied, or because purely private facts are not subject to First Amendment protections, the Illinois Supreme Court reached the correct result when it upheld section 11-23.5 against petitioner's facial challenge.

III. This Case Is a Poor Vehicle for Addressing Petitioner's Claims.

Even if the question presented otherwise warranted certiorari, this case is poor vehicle for resolving it. Not only is the purported split in authority shallow at best, *supra* pp. 6-11, but resolution of the question on which courts are purportedly split (that is, the applicable standard of review) would not affect the outcome of this case, *supra* pp. 11-23.

This case is a poor vehicle for the additional reason that petitioner asks this Court for certiorari review at an interlocutory stage. Petitioner challenged section 11-23.5 before trial and, because the trial court agreed that the statute was unconstitutional, petitioner's appeal lay directly to the Illinois Supreme Court. See Ill. S. Ct. R. 603. As a result, the facts of petitioner's case have not been established. And absent factual findings at a trial, it is impossible to know whether petitioner's conduct violated Illinois law. Section 23-11.5 requires the State to prove that the defendant knew or should have known that the images were intended to remain private. If, for example, petitioner was aware that the victim knowingly sent the images to an account that petitioner could access (as the petition suggests,

see Pet. 10), petitioner could argue—and a jury may believe—that the victim did not intend the images to remain private.

To be sure, petitioner's challenge is a facial one, so the facts of her individual case are not relevant to the Court's analysis. But because there has been no trial, it is impossible to assess the truth of petitioner's assertions that she did not attempt to inflict pain on her former partner, to extort the victim with private sexual photographs, or seek to damage an innocent person's reputation. Pet. 2. It is likewise not clear at this stage whether in fact petitioner "is facing felony charges because she tried to protect her reputation from her former fiancé's lies about the reason their relationship ended." *Id.* at 3.

Because (1) the facts of petitioner's case have not yet been established at trial and it thus is unclear whether the challenged law is even applicable to her conduct, (2) petitioner identifies no true split of authority, and (3) to date, only two state high courts have had an opportunity to weigh in on the constitutionality of similar provisions, this case presents a poor vehicle for resolving the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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