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

REPLY BRIEF OF PETITIONER

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ARGUMENT

The Brief in Opposition ("Opp.") illustrates both the Illinois revenge porn law's extreme overbreadth and why the failure below to cabin it within careful constitutional limits poses a grave threat to First Amendment jurisprudence. Respondent frankly admits that under intermediate scrutiny and without a specific-intent *mens rea* requirement, Bethany Austin would have been subject to the law even if she had only shared the images documenting her fiancée's betrayal when seeking help from her mother, a therapist, or clergy. Opp. 17 (Petitioner could seek counselling only if she did not "show them the victim's private sexual images").

And Austin is far from alone. As various amici point out, under the lax constitutional standards approved below, Illinois Criminal Code 720 ILCS § 5/11-23.5(b) could be used to prosecute victims of sexual harassment who do nothing more than show unsolicited images they received to a friend or support group, or even members of the press in covering newsworthy events.[1] These are the concerns that led the dissent below to conclude the law "casts the net of criminality too far." App. 69a.

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[1] Brief of the Cato Institute and DKT Liberty Project as *Amici Curiae* ("Cato Br.") 20-21; Brief of *Amicus Curiae* Woodhull Freedom Foundation ("Woodhull Br.") 17-19, 22-26; Brief of American Booksellers Association, *et al.* ("Am. Booksellers Br.") 13-14, 20-21.

This Court consistently has warned that criminal laws restricting speech based on content must be subject to strict scrutiny, *Reno v. ACLU*, 521 U.S. 844, 872 (1997), because such measures "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). This is particularly true when criminal sanctions can result from social media posts, where most people share details of their lives. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-37 (2017). The constitutional standards articulated by the Illinois Supreme Court leave millions of Americans at risk. Pet. 4-8.

Respondent would have this Court forestall review because Austin has yet to be tried, claiming "it is impossible to know whether [her] conduct violated Illinois law" until after trial. Opp. 27. But that is cold comfort indeed, as prosecution can itself "cause incalculable harm" given "the risk of public obloquy as well as the expense of court preparation and attorneys' fees." *ACLU v. Reno*, 929 F. Supp. 824, 855-56 (E.D. Pa. 1996) (Sloviter, J.), *aff'd*, 521 U.S. 844. Avoiding that is the very point of heightened scrutiny.

Because "risk of criminal sanctions 'hovers over each content provider, like the proverbial sword of Damocles,'" *Reno*, 521 U.S. at 882 (quoting 929 F. Supp. at 855-56), this Court adopted strict scrutiny for content-based restrictions, *Ashcroft*, 542 U.S. at 660, and placed the burden to meet it firmly on the government. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("a law imposing criminal penalties on protected speech is a stark example of speech suppression").

Respondent's suggestion that it is "impossible to know" whether a person's speech is presumptively protected by the First Amendment until *after* a criminal trial is intolerable. It contradicts this Court's well-established First Amendment jurisprudence, and is why review here is imperative.

I. ILLINOIS PROPOSES A "STARTLING AND DANGEROUS" LOOSENING OF FIRST AMENDMENT PROTECTIONS

The State's attempt to recast the questions presented seeks to avoid the serious doctrinal issues raised below by asking only whether Illinois' revenge porn law survives constitutional review as a general matter. It seeks to evade the questions Petitioner actually posed: whether strict scrutiny applies because revenge porn laws are content-based, and whether they must require specific intent. By this gambit, Illinois tries to bypass the questions that have split courts, including the Illinois' and Vermont's highest courts, and it offers a theory of the First Amendment that is strikingly at odds with this Court's free speech doctrine.

a. The State argues, for example, that "the First Amendment does not protect the public distribution of truly private facts," and that "[t]his is [a] reason to affirm … regardless of the applicable level of scrutiny." Opp. 26. Drawing on the decision below, Respondent's position is that revenge porn—and *any other speech that is not of public concern*—should constitute a new category of unprotected speech. This is the same approach to First Amendment reasoning that this Court repeatedly rejected as "startling and dangerous." *Stevens v. United States*, 559 U.S. 460, 470 (2010). *See also United States v. Alvarez*, 567

U.S. 709, 717 (2012); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791-92 (2011); *Snyder v. Phelps*, 562 U.S. 443, 451 n.3 (2011).

The claim that the level of constitutional scrutiny doesn't matter because "revenge porn" falls within a new unprotected category gets things exactly backward: if speech is unprotected, it is *more* essential that the Court clearly articulate the proper level of scrutiny. *E.g.*, *Roth v. United States*, 354 U.S. 476, 489-90 (1957) (overturning test in *Regina v. Hicklin*, 3 Q.B. 360 (1868)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) ("freedoms of expression must be ringed about with adequate bulwarks"); *Speiser v. Randall*, 357 U.S. 513, 525 (1958 ("the line between speech unconditionally guaranteed and speech which may legitimately be regulated … calls for … sensitive tools").

In any event, the dissemination of purely private facts is a particularly poor candidate for a new category of unprotected speech. It would leave broad swaths of everyday communication without First Amendment protection. As noted in *Stevens*, "*[m]ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value,'" yet is fully protected even though it may not be of obvious public import or concern. 559 U.S. at 479.[2] The rule the State defends

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[2] *See also* Woodhull Br. 7-8, 10-12; Brief of *Amici Curiae* First Amendment Lawyers Association, *et al.* ("FALA Br.") 11-12 ("Interpersonal communication must be as free as public communication, lest we invite the government into the 'realm of personal liberty' to which they may not enter.").

would give it "latitude to punish *most* of what we say and write." Brief of Institute of Justice as Amicus Curiae ("IJ Br.") 2. The public-import/private-concern "distinction" is also unduly amorphous, and "would oblige the courts to pass value judgments in many—even most—First Amendment cases." *Id.* 11.

Dissemination of purely private facts is hardly a "well-defined and narrowly limited class[] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Brown*, 564 U.S. at 791 (citing cases involving traditionally recognized categories of unprotected speech). This Court has pointedly reaffirmed that its cases "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" that the First Amendment leaves it unprotected. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

The State does not respond to detailed arguments of amici, who explain why it is illegitimate to create a "privacy exception" to the First Amendment. Amici American Booksellers show how neither *Snyder*, 562 U.S. 443, nor *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), support such an exception. Am. Booksellers Br. 10-14. Respondent also overlooks the Institute of Justice's explanation of why the public-concern test may be workable in tort and public employment cases, IJ Br. 9-10, but not as a rule for analyzing a statute's constitutionality. *See id.* 6-8 (privacy exception "has surfaced in three contexts only: public-employee speech and suits for defamation and intentional infliction of emotional distress"). *See also* Cato Br. 8-11 ("purely private matters" exception is inapplicable to criminal prohibitions).

b. The State urges the Court to forgo review even though the error below is the same as this Court corrected in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The Illinois Supreme Court subjected the revenge porn law to intermediate scrutiny under *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) by finding it "'*justified* without reference to the content of the regulated speech.'" App. 21a (quoting *Ward*, 491 U.S. at 791). However, as clarified in *Reed*, the reviewing court must consider "whether [the] regulation … 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 163-64. *See* Pet. 13-18. *See also* Am. Booksellers Br. 15-19; Cato Br. 14-17; IJ Br. 2-3; FALA Br. 4-5.

Meanwhile, the bases on which Respondent urges the Court to deny review radically depart from basic First Amendment doctrine.

i. The State disputes whether *Reed* illustrates that "'review is warranted where lower courts applied the wrong level of scrutiny,'" claiming "*Reed* says nothing about why the Court granted certiorari in that case," and thus "cannot be cited for the proposition that certiorari review is warranted whenever a court applies the wrong standard of review." Opp. 9 (quoting Pet. 16). Petitioner never advanced any such theory of "automatic" certiorari where a lower court applies the wrong standard of review, but that does not change the fact that this Court often grants review if lower courts apply the wrong level of scrutiny. *See*, *e.g.*, *Expressions Hair Design v. Scheiderman*, 137 S. Ct. 1144 (2017) (review of appeal after grant of preliminary injunction and denial of motion to dismiss in 975 F. Supp. 430 (S.D.N.Y. 2013)); *Erznoznik v. City of Jacksonville*,

422 U.S. 205 (1975); *Kaplan v. California*, 413 U.S. 115 (1973).

ii. The State does not really reply at all to the reasons why strict scrutiny should have applied below, opting instead to try to show its revenge porn statute survives any level of scrutiny. Opp. 11-22.

The closest it comes is attempting to rely on pre-*Reed* decisions of this Court as somehow suggesting *Reed* does not mean what it says. *See* Opp. 25 (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 792 n.1 (1984)). It also tries to narrow the reach of *Reed* by citing Justice Breyer's concurrence, *id.* (citing 576 U.S. at 177-78) (Breyer, J., concurring)), which, of course, is not the holding of the Court. This Court's most recent decision in *Barr v. Am. Ass'n of Political Consultants*, 2020 WL 3633780 (U.S. July 6, 2020), illustrates the rather straight-forward manner in which *Reed* applies. *See id.* at *5.

iii. The claim that the decision below was correct on grounds the First Amendment does not protect public dissemination of truly private facts, Opp. 26-27, is addressed above and in the amicus briefs. It is notable, however, that the State does not respond to the analysis of this issue in the Petition. Pet. 20-22.

iv. There is no doctrinal support for applying intermediate scrutiny on grounds that the Illinois revenge porn law targets "secondary effects," like adult-entertainment zoning laws. Opp. 23-24; App. 21a-22a (each citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)). As previously explained, this Court has held the "lesser scrutiny afforded regulations targeting … secondary effects … has no application to content-based regulations

targeting the primary effects of protected speech" as does the statute here. Pet. 17-18 n.7 (quoting *Playboy Entm't Grp.*, 529 U.S. at 815). Amici FALA, *et al.*, expand on this, explaining in detail the secondary effect doctrine's history and limited application. FALA Br. 5-7.

The State did not engage on the issue, and merely restated the Illinois Supreme Court's reliance on the doctrine. Contrary to the reasoning below, this Court has never applied "secondary effects" analysis outside the zoning context, and has made clear that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 321 (1988).

c. The State's claim that "the First Amendment does not require a specific intent to cause harm," Opp. 17, and the Illinois revenge porn law's use of only a negligence, "should have known" standard, 720 ILCS § 5/11-23.5(b)(3), have no basis in First Amendment law. Respondent cites not a single case to support its position that absence of a specific intent *mens rea* is of no constitutional significance.[3] It thus cannot overcome Petitioner's showing that *Virginia v. Black*, 538

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[3] The State relies on law reviews as "authority," and more specifically, isolated passages from them, including one by Eugene Volokh to the effect that "there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person." Opp. 17-20 & nn.19-26 (quoting, *inter alia*, Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. Rev. 1366, 1405-06 (2016). But as *amici* illustrate, Professor Volokh has strong concerns with

U.S. 343, 363-67 (2003), makes it a basic First Amendment principle that speech cannot be barred without a showing of specific intent, which cannot be inferred. Pet. 24-25.

The State's only response (in the context of trying to explain away the statute's overbreadth) is to deny that the court below found an implicit intent-to-harm element in the law. It claims the court instead found "the statute's *other* elements" compensate for the admitted lack of an intent requirement. Opp. 22 (emphasis added) (citing App. 54a-56a). This has two fatal flaws.

First, it simply is false. The Illinois Supreme Court was crystal clear in holding the law "implicitly includes an illicit motive or malicious purpose" because it concluded "a wrongful motive or purpose is inherent in the act of disseminating an intensely personal image without the consent of the person portrayed." App. 55a. This mirrors the factor that rendered Virginia's cross-burning ban unconstitutional in *Virginia v. Black*, 538 U.S. at 364. *See* Pet. 24.

Second, the decision below (and Respondent's defense of it) is contrary to this Court's long line of cases placing the burden on the government to establish *mens rea* when regulating speech. *E.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-72 (1994); *Mishkin v. New York*, 383 U.S. 502, 511 (1966) ("The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally

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information privacy laws, a category into which revenge porn statutes fall. *See* Woodhull Br. 11 n.4; IJ Br. 4-5.

protected material ...."); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("wrongdoing must be conscious to be criminal"). The First Amendment prohibits presuming evidence of the necessary intent. Pet. 24 (quoting *Virginia v. Black*, 538 U.S. at 363-65, 367).

Finally, the Opposition is utterly nonresponsive to the reasons review is necessary on this point, which is that courts are split on the need for specific intent requirements in revenge porn statutes. *See* Cato Br. 18-19 (discussing divergence of authority on necessity of illicit-intent element in revenge porn laws).

II. THIS CASE OFFERS AN EXCELLENT VEHICLE FOR ADDRESSING A SIGNIFICANT LEGAL ISSUE OF NATIONAL IMPORTANCE

Respondent does not attempt to deny the issues in this case are of vital importance for millions of people who share intimate information online. Nor does it dispute that these people face possible criminal liability if the constitutional rules applicable to revenge porn laws are unclear. *See* Pet. 4-10.

Rather than address the importance of these legal issues, the State claims this is not the right vehicle by questioning whether there is a "real" split of authority. Opp. 27. However, it does so primarily by ignoring the actual questions presented. *See supra* 3, 7. The level of First Amendment scrutiny that revenge porn laws must face is a serious doctrinal question on which state courts of last resort in Vermont and Illinois are split. *See* Pet. 16, 18-19; *accord* Opp. 6. Given that such laws are content-based by definition, it is a question on which lower courts need this Court's guidance.

Additionally, there is significant uncertainty over the role of and necessity for a specific intent requirement. *See* Pet. § II. The Illinois law is only one of four in the nation that lack an intent-to-harm requirement, and is touted as a model for possible federal legislation. *Id.* 23. This case thus serves as an important test for whether these laws will be subject to traditional First Amendment limits.

Finally, Respondent offers a litany of reasons why the Court should deny review, ranging from lack of factual findings, Opp. 27, questions regarding Austin's knowledge, *id.*, and that of the asserted "victim," *id.* 28, and questions about Austin's intent (notwithstanding that the law lacks a specific intent provision). *Id.* However, the State admits that "petitioner's challenge is a facial one, so the facts of her individual case are not relevant to the Court's analysis." *Id.* There is thus no need to await the outcome of a trial.

The provisions of Illinois' revenge porn law are not going to change, and its Supreme Court has definitively construed its application. And perhaps most vitally, the purpose of constitutional protection is to prevent forcing citizens to defend their exercise of fundamental rights under improper standards. *See supra* 2-3.

Respondent suggests resolution of the level-of-review question would not affect the outcome of this case, Opp. 27, but obviously cannot know that. It certainly affected the outcome in the trial court, and the dissent below found choice of scrutiny dispositive. App. 65a-67a, 69a-71a (Garman, J., dissenting). If the level of scrutiny made no difference, the Illinois' Supreme Court could have applied strict scrutiny and

found it was satisfied, as did the court in *Vermont v. VanBuren*, 214 A.3d 791, 807-14 (Vt. 2019). But it did not, thus creating the doctrinal question presented here. *See* IJ Br. 12-16.

The State suggests the issues should be allowed to percolate further in lower courts, Opp. 28, but cannot explain how doing so would sharpen the issues for this Court. As the Institute for Justice observes, the reasoning below did not turn on any particular feature of Illinois' law. IJ Br. 11-12. The level-of-scrutiny question and that of a malicious intent requirement are fully developed, making further development unnecessary to flesh out the constitutional issues. *See id.* 12-13.

CONCLUSION

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

Respectfully submitted,

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