No. 123910

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the
	)	Twenty-Second Judicial Circuit
Plaintiff-Appellant,	)	McHenry County, Illinois
	)	
v.	)	No. 16CF935
	)	
BETHANY AUSTIN,	)	The Honorable
	)	Joel D. Berg,
Defendant-Appellee.	)	Judge Presiding

BRIEF OF DEFENDANT-APPELLEE
BETHANY AUSTIN

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POINTS AND AUTHORITIES

Cases

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STATEMENT OF FACT

Bethany Austin was charged under a one count bill of indictment with non-consensual dissemination of private sexual images. That charge states:

"That on or about August 26, 2016, in McHenry County, State of Illinois, Bethany H. Austin, defendant, committed the offense of NON-CONSENSUAL DISSEMINATION OF PRIVATE SEXUAL IMAGES, in that the said defendant intentionally disseminated an image of another person, Elizabeth Dreher, a person at least eighteen(18) years of age, who was identifiable from the image and whose intimate parts were exposed in the image, and said defendant obtained the image under circumstances in which a person would know or understand that the image was to remain private, and knew or should have known that Elizabeth Dreher had not consented to the dissemination, in violation of Chapter 720, Section 5/11-23.5(b) of the Illinois Compiled Statute."

Bethany was engaged to her boyfriend of seven years, Matthew W. Rychlik. That engagement ended sometime at the end of May and beginning of June, 2016. Bethany ended her engagement with Matthew, in part, due to finding nude pictures on her computer of another woman and, in part, due to Matthew's reluctance to reconcile their relationship.

Bethany and Matthew entered into a romantic relationship sometimes in 2009. During that time they shared a single home. Bethany's three children from her previous relationship also lived with them, the youngest of which is Danica, who is now ten years old. Matthew was the only father figure Danica had in her life.

Bethany knew what she was getting into with Matthew and she knew about his rocky history with women. When she met Matthew, he told her about steroid abuse and that he cheated with every single girlfriend that he had. However, it was different with Bethany. He said he wanted to change, he wanted a family. Bethany, a raised Christian, believed him and appreciated his honesty and passion for change. She brought him into her family. Matthew became Danica's father, a brother and a son to her family. Her older

boys looked up to Matthew and loved him more than their own father. In their seven years together, they only had a handful of arguments.

Sometime in May of 2016, Bethany discovered that Matthew was having an affair with Elizabeth Dreher, a person that lived one block away from them. On or about May 26, 2016, Bethany received unsolicited images, the same images here in question, along with text messages between Elizabeth and Matthew. Those images and text messages ended up on Bethany's IPad because Matthew's phone was connected to his ICloud account, which was further connected to Bethany's IPad. Anytime Matthew sent or received a text or picture, the ICloud would automatically forward it to the IPad, which shared that ICloud account. Matthew was aware of this and was in control of this procedure. Prior to and on May 29, 2016, both Elizabeth and Matthew were aware that their conversations, together with the above stated images, are in Bethany's possession. On May 29, 2016 a conversation thread between Matthew and Elizabeth states as follows – Elizabeth: "*Is this where you don't want to message much Bc of her?*" – Matthew: "*I'm buffing and coating*" – Elizabeth: "*Okay Lova*" – Matthew: "*No I'm fine – someone wants to sit and just keep watching want I'm doing I really do not care I don't know why someone would wanna put themselves through that*" – Elizabeth: "*I don't either. Soooooo baby....*"

Between May and August of 2016, Bethany and Matthew attempted to save their relationship by going to couple's counseling. Both wanted to cancel the wedding until they sorted out their issues. They were in agreement that the wedding needs to be cancelled but disagreed as to how it should be done. Matthew wanted to tell family and friends that the split was mutual. Bethany wanted to tell the truth. Before Bethany said

anything to anyone regarding their relationship, Matthew then proceeded to tell Bethany's family and his family that Bethany is crazy; that she no longer cooks or does house chores; that he is no longer with her because of those reasons and that he is sleeping at another girl's house.

Due to Matthew's attempts to defame Bethany and, through lies, justify cancelation of their wedding, on or about August 25, 2016, Bethany decided to exercise her freedom of speech by sending out a four page letter accompanied with text message printouts and nude photos here in question. That four page letter began by stating:

"I'm sad to have to tell you that the wedding has been cancelled and Matt and I are no longer together. We had an amazing 7 ½ years together. Matt wanted me to tell everyone that this was a mutual split because we were just not getting along, but that's not true and no one would believe that..."

On or about August 28, 2016, Matthew discovered that a cousin of his received a package in the mail that contained a four page letter from Bethany, along with numerous text messages between Matthew and Elizabeth that contained four nude photos of Elizabeth. On or about August 30, 2016, Matthew (not Elizabeth) called Crystal Lake Police Department (hereinafter "CLPD") and reported that his ex-fiancé mailed Xeroxed copied nude pictures of his current girlfriend to members of his family. Matthew stated to Officer Ryan Coutre from CLPD that he did not care about the package that Bethany mailed out, but was concerned that Bethany may do something else in the future. Officer Coutre then spoke with Elizabeth via telephone. Elizabeth advised that she is concerned about Bethany's actions regarding the package. She further stated that she will consider signing a criminal complaint and will contact the officer at a later time.

Two weeks passed and, on September 16, 2016, Elizabeth met with officer Coutre at the police station. She stated to the officer that the pictures were private and only intended for Matthew to view. Officer asked her if she was aware that, at the time she sent the pictures, Matthew's ICloud was connected to an IPad Bethany had in her possession and could access the photos/messages. Elizabeth acknowledged Matthew and her were aware of the ICloud issue, but thought it had been deactivated at the time that she sent the pictures.

It is important to note that at no point between May of 2016 and September 16, 2016 did Elizabeth request of Bethany to delete, purge or otherwise destroy any images.

ARGUMENT

The circuit court's judgment should be affirmed. So called "revenge porn statute" 720 ILCS 5/11-23.5 (hereinafter "revenge porn statute") is a content-based restriction on speech that does not serve a compelling government interest, it is not narrowly tailored, and it does not use the least restrictive means to accomplish the alleged compelling interest. Furthermore, nude images, unconditionally given to another person, are not truly private facts. Even if they are considered private in some circumstances, the right to privacy is not a separate category of unprotected speech and, as such, that right must be balanced against the strict scrutiny, intermediate scrutiny or rational basis standard, depending on the type of speech being restricted.

I. REVENGE PORN STATUTE OUTLAWS PROTECTED CONTENT-BASED SPEECH IN VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION FOUR OF ARTICLE ONE OF THE ILLINOIS CONSTITUTION

A. *Revenge porn statute is a content- based restriction on speech and is therefore presumptively invalid under the First Amendment of the United States Constitution and Section Four of Article One of the Illinois Constitution.*

The First Amendment commands that, "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend I. Section Four of Article One of the Illinois Constitution states that "all persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

The First Amendment is applicable to state actions through the Fourteenth Amendment. *De Jonge v. Orego*, 299 U.S. 353 (1937). Illinois Constitution may provide greater protection to free speech than does its federal counterpart. *People v. DiGuida*, 152 Ill.2d 104, 121 (1992).

Freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002).

The government, however, may not prohibit the expression of thoughts simply because society finds the expressed idea offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In *United States v. Stevens*, the statute in question restricted visual and auditory depiction such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. *Stevens*, 130 S.Ct. at

1584 (2010). As such, it explicitly regulates expression based on content. *Id.* That statute is presumptively invalid, and the Government bears the burden to rebut that presumption. *Id.* The Government argued that "depiction of animal cruelty" should be added to the list of unprotected speech. *Id.* at 1585. The Court rejected the idea and stated that *New York v. Ferber*, 458 U.S. 747 (1982) (a child pornography case) and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. *Id.*

Non-obscene images of nudity are fully protected by the First Amendment. *United States v. Playboy*, 529 U.S. 803, 811 (2000); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 203 (1975); *Jenkins v. Georgia*, 419 U.S. 153, 161 (1974). In *Playboy v. United States*, Playboy offered as a premium channel on cable television adult programming that was not obscene but was sexually explicit. *Id.* The federal statute required cable providers to either fully scramble or fully block the programing for viewers who did not order the station, thereby preventing exposure of such programing to the children. *Id.* The Court stated that the *Playboy* case involved speech alone. *Id.* at 813.

As in *Playboy* and *Stevens*, here too the statute involves speech alone. It criminally restricts and limits the way a person who receives a voluntarily disclosed nude or sexually explicit photograph of another can share that image based solely on the content of the image.

Content-based regulation of protected speech must survive strict scrutiny. Such regulation must have a compelling government interest, must be narrowly tailored and must use least restrictive means to accomplish the compelling interest. *United States v. Eichman*, 110 S. Ct. 2404, 2409 (1990); *Communications of Cal. v. FCC*, 492 U.S. 115,

126 (1989).

B. ***Revenge porn statute does not serve a compelling government interest because the government failed to meet its high burden in identifying an actual problem in need of solving.***

It is rare that a regulation restricting speech because of its content will ever be permissible. *Playboy*, 529 US. at 818. The government bears the burden of proving a compelling interest exists to justify its restriction on speech. *Id.* at 813. In *Playboy*, Playboy offered as a premium channel on cable television adult programming that was not obscene but was sexually explicit. *Id.* The federal statute required cable providers to either fully scramble or fully block the programing and prevent signal bleed for viewers who did not order the station, thereby preventing exposure of such programing to the children. The Court stated that the District Court, through discussion, exposed a central weakness in the Government's proof. *Id.* at 819. There was little evidence of how widespread or how serious the problem of signal bleed is. *Id.* In support of its regulation, the government presented evidence of two city councilors, eighteen individuals, one United States Senator, and the officials of one city who complained about viewing such a signal bleed on their television. *Id.* at 820. Compelled by the District Court, the government presented an expert's findings that 39 million homes with 29.5 million children had the potential to be exposed to such signal bleed. District Court, with which the Court agreed, stated that the government presented no evidence on the number of households actually exposed to such signal bleed and thus has not quantified the actual extent of the problem. *Id.* at 820, 21. The Court stated that such anecdotal evidence is not enough to establish a compelling government interest. *Id.*

This law is unconstitutional because it attempts to create another category of unprotected speech and new categories of unprotected speech may not be added to the list of unprotected speech by a legislature that concludes certain speech is too harmful to be tolerated. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2734 (2011). The State must specifically identify an "actual problem" in need of solving and Illinois nonconsensual dissemination statue does not identify an actual problem in need of solving. *Id.* at 2738. In *Brown*, the State of California prohibited the sale or rental, to minors, of violent video games that portray killing, maiming, dismembering, or sexually assaulting an image of a human being. The State acknowledged that it cannot show a direct causal link between violent video games and harm to others, but claimed that it need not produce such proof because the legislature can make a predictive judgment that such a link exists based on competing psychological studies. *Id.* at 2738, 39. The Court dismissed that argument and clearly stated that the State's burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice. *Id.* The Court further stated that a reliance on a few research psychologists, who either missed the issue that the law was designed to address or based their research on flawed methodology, is not sufficient to prove a compelling government interest. *Id.* at 2739.

Illinois' revenge porn statute, enacted through Public Act 98-1138, is an overbroad legislation derived from three bills: Senate Bill, SB 1009, initially sponsored by Senator John J. Cullerton and described as "False Personation"; Senate Bill, SB 2694, sponsored by Senator Michael E. Hastings and described as "Posting Information on Internet"; and, House Bill, HB 4320, originally sponsored by Representative Scott Drury and described as "Sexual Exploitation".

On March 20, 2014, Rep. Drury presented the HB 4320 in front of the House Judiciary Committee. He can be heard stating that there was a "very long presentation couple of months ago and a professor, Mary Ann Franks, from Miami University, was called to testify." Mary Ann Franks is a law professor at Miami School of Law and Legislative and Tech Policy Director of the Cyber Civil Rights Initiative. Mary Anne Franks. (n.d.). Retrieved March 08, 2018, from https://www.law.miami.edu/faculty/mary-anne-franks. Cyber Civil Rights Initiative (hereinafter CCRI) is a non-for profit organization that lobbies governments to outlaw "nonconsensual pornography" as they describe it. Our Mission. (n.d.). Retrieved March 08, 2018, from https://www.cybercivilrights.org/about/. In 2017, two years after the Illinois non-consensual dissemination statute went into effect, CCRI published survey results in a study called Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration. DR. ASIA A. EATON, DR. HOLLY JACOBS & YANET RUVALCABA, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION. According to this study, it is the "first ever nation-wide study to profile the rates of nonconsensual pornography victimization and perpetration." *Id.* at 4.

The above stated survey selected 3044 participants. *Id.* at 11. Out of those participants, 12.8% answered yes to the question of whether anyone ever shared or threatened to share a sexually-explicit image or video of that participant and without his/her consent; 8% answered yes to the question of whether anyone shared a sexually-explicit image or video of that participant and without his/her consent; 4.8% answered yes to the question of whether anyone ever threatened to share sexually-explicit image or video of the participant and without his/her consent, and without it ever being distributed; and, 5.2% answered yes to the question of whether the participant ever knowingly shared a sexually-explicit image or video of someone without his/her consent. *Id.* It is unclear if

those were the only four questions used; however, the data presented is based on only those four questions. *Id.* To get to the participants, CCRI used Facebook advertisements titled:

> 1. Help us understand more about what Americans think about sharing nude images online. Take our survey and voice your opinion; and,
>
> 2. What do you think about sharing nudes online? We need people 18 and older to share their opinions and help us understand how it affects Americans today. *Id.* at 27.

On March 27, 2014, Rep. Drury was questioned by Rep. Dennis Reboletti as to the extent of the problem the so called "revenge porn" poses. *See Transcript, HB 4320*, Mar. 27, 2014, 3rd Reading, P. 73, 74. In that discussion Rep. Drury stated that New Jersey had "revenge porn" laws on books since 2004. Rep. Drury further explained that the State of New Jersey, in the last ten years, had a relatively low number of prosecutions all together, but could not break down successful ones versus unsuccessful. *Id.*

In a discussion by Senator Hastings (chief sponsor of the Illinois "revenge porn" bill SB 2694) and Diana Pison (a complainant of "possible" photograph dissemination), Sen. Hastings made a statement that "this bill will make it illegal for anyone who posts explicit pictures online a crime. Right now all we have are civil recourses in Illinois, and this will make it a class four felony. Obviously when you post an explicit picture of someone online it has a detrimental effect to that person's life." Diana Pison made a statement that "years ago I was in an abusive marriage and abuse does not always come with broken bones and bloody lips, it can be psychological, it can be mental and that was the kind of marriage I was in. There were times when my husband said do this or else…and participating in certain acts was a preservation tactic. I had to choose the lesser of the evils… So, when I did finally get out of that marriage and stepped away from it,

years later he was upset with me for whatever reason at that time and threatened to post pictures and videos of me during those times. My only recourse at the time was to get an order of protection…unfortunately an order of protection lasts only for two years. Right now I am at risk, being here puts me at risk. Hopefully me taking a chance and risking my livelihood, which it could damage, will protect more people." I. (2014, February 19). Retrieved March 01, 2018, from https://www.youtube.com/watch?v=HY16gHsDyAM.

In an interview by Paul Harris on KTRS Radio, published December 31, 2014, Sen. Hastings can be quoted stating that in passing SB 2694, "we had a lady come and testify in our committee. She got a great reputation as an interior designer and her and her husband took photos and videos…and it was meant to be private…and whenever the husband would ask something of her, he would hang this over her head…" Paul Harris then stated "it seems to me to be common sense, but I know people who are opposed to your bill, who argued that it infringed on the freedom of speech. Their argument seems to be "it's my phone," "it's my camera on my phone," "it's my then girlfriend," "I took a picture," "I own the picture and if I want to put that picture up on the Facebook…or send it to my friend…that's my right." To which Sen. Hasting responded "when they faced me in the committee hearing, we talked about it…the first thing I asked them was "if this was you how would you feel about it," and the first thing they said was "ohh no, I wouldn't want my picture posted online." "Ok, those people are doing their job representing organizations that they are representing, but when the common sense test comes into effect, I think majority people across the country would understand this is the right thing to do….I think the effects of this thing what they call "revenge porn", I think it can be so detrimental to not only their reputation but themselves." (2014, December 31). Retrieved March 01, 2018, from https://www.youtube.com/watch?v=Apo0R3H5g0M

Illinois legislature failed to establish a compelling nature in enacting the Public Act 98-1138, commonly known as the "revenge porn" statute and, therefore, it is unconstitutional. Government presented little to no evidence of how widespread the problem of a person disseminating a nude image of another actually is. As in *Playboy*, where the government presented evidence of two city councilors, eighteen individuals, one United States Senator, the officials of one city, and an expert on "potential exposure," hereto the Illinois legislature presented only opinions of a lobbying group, two House Representatives, a Senator who believes the test for the first amendment is one of common sense, and a lady who may potentially, at some time, if ever, be subject to dissemination of her photographs. *See Playboy*, 529 US. at 818. The evidence presented is *de minimus* and such anecdotal evidence is not enough to establish a compelling government interest. *See Id.* at 820, 21. The government bears the burden of proving a compelling interest exists to justify its restriction on speech and they have failed to do so in Illinois. *See Id.* at 813.

Government presented little to no evidence of how serious the problem of a person disseminating a nude image of another actually is. In *Brown*, the State of California at least attempted to justify their restriction on speech by presenting a few reports from research psychologists. *Id.* at 2739. Here, the State of Illinois only presented evidence of an interior designer and a few vague and unsupported statements by Sen. Hastings regarding mental health impact of so called revenge porn. Here, as in *Brown*, the State failed to identify an actual problem by any type of unbiased and objective standard. *See Id.* at 2738 (stating that the ideas expressed by speech...and not its objective effects, may be the real reason for California's Act). The Court was clear in their *Texas* opinion that

the government may not prohibit the expression of thoughts simply because society finds the expressed idea offensive or disagreeable. *Texas,* U.S. 397, 414 (1989).

CCRI's newest study, as explained above, is biased and based on flawed methodology. One barely has to scratch the surface in reading the study in order to notice its flaws. It is evident that CCRI is attempting to deceive its constituents in believing that 12.8% of nationwide population is victimized by sharing of sexually-explicit image or video. However, they failed to show data as to how many out of 3044 participants never had any issue with their images being shared or otherwise never shared someone's image. If the study only selected what they call "victims" and "perpetrators", then that study is seriously suffering from response bias. Second, it is important to keep in mind that to get to those 3044 participants surveyors asked a question such as "Help us understand more about what Americans think about sharing nude images online." The study neither answers the question of what Americans think about sharing nude images in general nor what they think about sharing those images online. This is exactly the kind of evidence that the Court in *Playboy* and *Brown* refused to consider. *See Playboy*, 529 US. at 820, 21; *Brown,* 131 S. Ct. at 2739. Third, the study is done to advance a lobbying group's agenda. It suffers from serious research bias. The title of the study alone is enough to discredit it – "Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration." Using words such as victimization and perpetration in connection with the subject of sex has no place in a serious scientific research because it can create an appeal to emotion effect to a nonchalant reader. Those words, together with the manipulated numbers above, are wisely calculated in order to get the reader to agree with its agenda.

C. *Revenge porn statute is not narrowly tailored, and does not use the least restrictive means to accomplish the alleged compelling interest.*

The statute is a content-based restriction on speech and is therefore presumptively invalid under the First Amendment and subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct., 2218, 2226 (2015). The statute may be justified only if the government proves that it is narrowly tailored and uses least restrictive means to serve a compelling state interest. *Id.*

Revenge porn statute criminally restricts and limits the way a person who receives a voluntarily disclosed nude or sexually explicit photograph of another can share that image based solely on the content of the image.

Illinois State Senator Michael Hastings, chief sponsor of SB 2694, was quoted by the Daily Northwestern News saying that anyone 18 years or older who disseminates images meant to be private would be subject to punishment under the law. "This is the ultimate form of cyberbullying…This is the ultimate form of online harassment," Sen. Hastings said. Williams, B. (2014, December 06). Illinois General Assembly passes 'revenge porn' bill. Retrieved February 27, 2018, from https://dailynorthwestern.com/2014/12/06/city/illinois-general-assembly-passes-revenge-porn-bill/. Sen. Hastings was further quoted by Chicago Tribune saying "unfortunately, there are situations where a jilted lover who, in an act of vengeance, distributes an image or video that was made in private." Pratt, G. (2015, January 05). Tinley lawmaker hopes new 'revenge porn' law protects privacy. Retrieved February 27, 2018, from http://www.chicagotribune.com/suburbs/naperville-sun/crime/ct-hastings-revenge-porn-tl-0108-20150102-story.html. Clearly, nevertheless still unconstitutional, the intent of the legislature was to stop harassment, threats and coercion by ex-lovers through sexual images.

In the same interview from above by Paul Harris on KTRS Radio, Paul Harris asked Sen. Hastings, in addition to the criminal penalties, whether there are civil remedies that these victims can seek. Sen. Hastings responded that "that's what is on the books right now." "You can actually seek civil remedies whether it be in intentional infliction of emotional distress, harassment...and other things you can go with. But this creates criminal aspect of it. Not everyone has money to obtain an attorney or go through the legal process. This will afford people to go to the police station and say my ex so and so posted something online and I would like them to take it down. I can tell you the bite with this penalty that it has...if it doesn't act as a deterrent I don't know what will." *Id.*

The statute, however, criminalizes an adult complainant's own stupidity at the expense of the First Amendment. The legislature is attempting protect a complainant who him or herself did not impose any duty upon the receiver of the photograph. To be convicted under the statute and suffer consequences of a class four felony, all that needs to be shown is that a reasonable person would think of the material as private. Not even the slightest form of duty, such as contractual duty, fiduciary duty, or even a simple notice, need be established in order to get convicted. Under the Illinois criminal trespass statute, a misdemeanor statute, even a trespasser needs notice that he or she is not welcome. See 720 ILCS 5/21-3.

A similar statute was ruled unconstitutional in Vermont by a Superior Court Judge (Superior Court in Vermont is a court of first instance). Judge, in finding the statute unconstitutional, stated that "the statute criminalizes disclosure by a party who never had any relationship with the complainant and who receives such unsolicited sexual photographs and decides to disclose them to convince the complainant not to send

anymore or out of anger for being the recipient. *State of Vermont v. Rebekah VanBuren*, Docket No. 1144-12-15. It criminalizes that person's spouse who might find such unsolicited images and forward them out of anger and disgust." *Id.* Vermont Supreme Court reversed the judgment however. *State of Vermont v. Rebekag VanBuren*, 2018 VT 95.

The Vermont statute makes it a misdemeanor crime to knowingly disclose a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm. See 13 V.S.A. § 2606.

Illinois revenge porn statute, like the Vermont statute, criminalizes a person's spouse who finds such unsolicited images and decides to disclose them to convince the complainant not to send them anymore. It also criminalizes that person's spouse who might find such unsolicited images and forward them out of anger and disgust.

Unlike the Vermont Statute, the Illinois statute is not limited to disclosures motivated by revenge. The intent of a person for disseminating the image is irrelevant. Only intent that is relevant is that the person intentionally disseminated such a photograph. See 720 ILCS 5/11-23.5. For instance, a photographer could be prosecuted under the statute for negligently sending such material to a third party instead of the complainant. A person could be prosecuted for negligently e-mailing such photographs to another person instead of himself.

Also, and unlike the Vermont Statute, current Illinois law fails to address harassment, intimidation, threat, or coercion altogether, all of which were reasons for passing the law

in the first place. Moreover, there are current and constitutional criminal laws in place that deal with theft, harassment, extortion, blackmail, intimidation and coercion.

The statute is unconstitutional because it does not use the least restrictive means to accomplish the alleged compelling government interest as it creates a class four felony liability for negligent speech. For example, the government could have sponsored a civil tort bill of non-consensual dissemination of private images but has not done so. When legislative goals can be achieved by means that avoid stifling fundamental personal liberties, then that course must be chosen. *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). The Illinois legislature could have achieved their alleged goal by other, less restrictive means that do not risk the possibility of sending a person to prison for three years for mere negligence.

D. ***Revenge porn statute is vague and overbroad.***

While vagueness and overbreadth may be considered in a due process challenge, they are also properly applied in the first amendment context. *People v. Melongo*, 6 N.E.3d, 120, 124, 125 (2014); *People v. Sharpe*, 839 N.E.2d 492 (2005). When a law threatens to inhibit the exercise of constitutionally protected rights such as those protected under the first amendment, the Constitution demands that a more stringent vagueness test be applied. In such a scenario, a statute is void for vagueness if it reaches a substantial amount of constitutionally protected conduct. *Melongo*, 6 N.E.3d at 125.

In interpreting U.S. Supreme Court's several variations of intermediate scrutiny in its free-speech cases, United States Court of Appeals, Seventh Circuit, in *Alvarez* stated that they all share certain essential elements in common. *American Civil Liberties Union of Illinois v. Anita Alvarez,* 679 F.3d 583, 604, 605 (2012). All require (1) content

neutrality; (2) an important public-interest justification for challenged regulation; and (3) a reasonably close fit between the law's means and its ends. *Id.* at 605.

In *Alvarez*, Seventh Circuit held that the State has failed to tailor the statutory prohibition to the important goal of protecting personal privacy. *Id.* at 606. In that case, ACLU challenged the eavesdropping statute's effect on openly audio recording police officers performing their duties in public places and speaking at volume audible to bystanders. *Id* at 605, 606. The court held that the content neutrality element is probably satisfied, but, as applied, the State failed to show any reasonable expectation of privacy. *Id.* The court did not leave it at the second element and it further elaborated the means and ends prong. *Id.* The court held that by making it a crime to audio record any conversation, even those that are not in fact private, the State has severed the link between the eavesdropping statute's means and its end.

In *Melongo*, the Illinois State Supreme Court stated that when a policy criminalizes a wide range of innocent conduct, it cannot be sustained. *Melongo*, 6 N.E. at 120. This decision invalidates the recording and the publishing provision of the Illinois eavesdropping statute. *Id.* at 127. In that case, the Accused surreptitiously recorded three telephone conversations with the Complainant and posted the recordings and transcripts of those conversations on her website. *Id.* at 122, 123. The Court stated that the statute criminalizes the recording of conversations that cannot be deemed private: a loud argument on the street, a political debate on a college quad, etc. *Id.* at 126. The Court further states that even when the recorded conversation is held in private, the statute does not distinguish between open and surreptitious recording. *Id.* The statute burdens substantially more speech than is necessary to serve a legitimate state interest in

protecting conversation privacy. *Id.* at 127.

Here the State has failed to tailor the revenge porn statute to the goal of protecting personal privacy. As in *Alvarez*, where the court held overbroad the eavesdropping statute that made it a crime to audio record any conversation, even those that are not in fact private, here too, revenge porn statute makes it a crime to disclose nude images whether or not they are in fact private. After all, the complainant has relinquished his or her expectation of privacy in the material after its initial unconditional disclosure. Thereafter, the legislature asks us to read the minds of others.

Moreover, the statute criminalizes a wide range of innocent conduct. Most importantly, and in addition to the innocent conduct described in the sections above, the statute completely inalienates the property owner's right to transfer his or her property, given to him or her without any conditions. This might be the only statute, where the property, unconditionally possessed, in and of itself legal and/or legally obtained, cannot be transferred in any meaningful way.

Furthermore, the statute fails to define the word "disseminate". It does not state to whom, what, when, where or how. Merriam Webster Dictionary defines the word "disseminate" as "to spread abroad" or "to disperse throughout". Disseminate, MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/disseminate?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Mar 12, 2018). Under this statute, a person can be charged for merely saving such photographs onto another device, e-mail or electronic folder belonging to that same person.

The statute carves out an exception to dissemination if it serves a lawful public purpose but fails to address what such purpose might be. As in *Melongo* case, where the

Court stated that "rather than knowing that he or she can proceed legally by openly recording a conversation so that all parties are aware of the presence of an operating recording device, the individual must risk being charged with a violation of the statute and hope that the trier of fact will find implied consent," here too, a person must risk being charged with a class four felony and hope that the trier of fact will find lawful public purpose. *See Melongo* 6 N.E. at 127. Such vagueness places a number of people at risk. For example, an attorney may want to attach such photographs as an exhibit to a motion to dismiss but it is unclear whether he or she can do so. In Bethany's case it is unclear whether she can disseminate such photographs to defend defamation and slander. State's Attorney's Office clearly does not think so.

Moreover, the *Melongo* case invalidated implied consent in the eavesdropping statute. *Id.* As in *Melongo*, here too, the entire case or defense may hinge on whether there is expressed or implied consent. *Id.*

II. NUDE IMAGES DISCLOSED TO A THIRD PARTY ARE NOT TRULY PRIVATE FACTS

The State heavily relies on a tort action of public disclosure of private information. It states that "to state a cause of action for this tort, the plaintiff must plead and prove that (1) publicity was given to the disclosure of private facts; (2) the facts were private, and not public, facts; and (3) the matter made public was such as to be highly offensive to a reasonable person." The State then says "the revenge porn statute closely tracks the public disclosure tort." (*Id.*)

However, the State fails to cite to any criminal statute prohibiting such conduct. Second, nude images unconditionally given to another cannot ever be deemed private. Receiver of such material has no legal duty (maybe moral duty in some circumstances) to

keep the images private; after all, those images are her or his property. In Bethany Austin's case, argument can be made that she had a moral duty to actually disclose such information to protect herself, her children, and her family from such people as the alleged "victim" or her new boyfriend. Third, the statute, as written, does not care about publicity of such images. As already explained, it does not care to whom, where, when or for what purpose the images were disseminated. With regards to this issue, *Melongo* case is right on point. See *People v. Melongo*, 6 N.E.3d, 120 (2014).

In summary, revenge porn statute outlaws protected content-based speech in violation of the First Amendment of the United States Constitution and Section Four of Article One of the Illinois Constitution. Nude images, absent certain and well defined categories, are fully protected by the First Amendment, and any regulation restricting such content-based speech must pass strict scrutiny test.

State's argument entirely hinges on expectation of privacy in such images. A person can have an expectation of privacy in his home or papers. However, that person relinquishes his or her expectation of privacy in the material after its initial unconditional disclosure.

Even if there is an expectation of privacy in such images, that expectation of privacy only applies to the compelling interest prong of the strict scrutiny test. If the Court finds that there is a compelling interest in protecting another person's stupidity, the statute nevertheless fails on the other two prongs of the strict scrutiny test.

CONCLUSION

This Court should affirm the judgment of the circuit court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-two pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 5, 2019, the foregoing Brief of Defendant-Appellee, was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by e-mail:

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