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 OF THE CATO INSTITUTE AND DKT LIBERTY PROJECT AS *AMICI CURIAE* SUPPORTING PETITIONER

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March 20, 2020

QUESTION PRESENTED

1. Whether strict First Amendment scrutiny applies to a criminal law that prohibits nonconsensual dissemination of non-obscene nude or sexually oriented visual material?

2. Whether the First Amendment requires a law that prohibits nonconsensual dissemination of non-obscene nude or sexually oriented visual material to impose a requirement of specific intent to harm or harass the individual(s) depicted?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. It espouses vigilance against government overreach of all kinds, but especially those that restrict individual civil liberties.

This case concerns *amici* because it is an example of both rampant overcriminalization and overly speech-restrictive statutes.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amici* alone funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

A picture is worth a thousand words and, according to Illinois, a prison sentence. When Bethany Austin received sexually explicit images from her then-fiancé's paramour, she quietly ended the relationship. That upset the now-ex-fiancé, so he lied to Ms. Austin's friends and family, claiming that he ended their relationship because she was crazy and would not cook and clean for him. Ms. Austin's name had been smeared in a classic "he-said-she said" situation, but what "she said" was backed by hard proof. Ms. Austin attached her proof to a heartfelt letter to friends explaining her side of the story. The ex-fiancé now seeks to silence her, and the awesome power of the state is happy to oblige. Illinois bans the dissemination of private sexual images, but its law violates the First Amendment.

Despite concluding that the restriction discriminates between different types of speech, the court below erroneously applied intermediate scrutiny. The court distinguished between public and private speech outside of tort law and misunderstood the relevant precedent concerning content-neutral "time, place, and manner" restrictions. In so doing, the court incorrectly concluded that intermediate scrutiny applied. In fact, the statute must survive strict scrutiny.

The lower court was also incorrect to suggest that private speech is less protected than speech on matters of public concern. That distinction was based on an improper inference from this Court's precedents balancing First Amendment protection with traditional tort law. Speech on matters of public concern is

not the only speech that matters. And even if that distinction continues, it surely can apply only in civil disputes. Criminal penalties for private speech go far beyond Court precedent. Furthermore, a distinction between public and private speech would need to be rethought for the information age, which has blurred the lines between the public and private spheres.

Nor can this law survive appropriate scrutiny based on the legislature's presumed good intentions. Despite recognizing that the law is content-discriminatory, the court below held that a non-content-based motive could save the statute. This flatly conflicts with the standard recently clarified in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which held that courts may only look to the legislative motive of restrictions impacting speech when the law is facially neutral. Well-meaning legislatures cannot save content-based discrimination with good intentions.

Finally, even if this Court—unlike the court below—finds that the statute does not regulate protected speech on its face, the statute is still overbroad. There are legitimate reasons to have statutes that criminalize nonconsensual dissemination of sexual imagery, as exemplified by laws in many other states. But unlike Illinois, those states cabin their statutory schemes to punish only malicious nonconsensual dissemination. The prosecution below, where the victim of an affair is targeted by her former fiancé for telling her story, is enough to demonstrate that this statute's

lack of a specific intent requirement renders it impermissibly overbroad and therefore unconstitutional.

ARGUMENT

The court below found that the Illinois law is content based. Pet. App'x 21a–22a. Nevertheless, it applied intermediate scrutiny to uphold the law. The court erred for two reasons. First, the court below improperly applied a distinction between private and public speech to minimize the level of judicial scrutiny, even though that distinction comes from the extension of the First Amendment into classic libel and tort law. Second, despite this Court's recent clarification of the law in *Reed v. Town of Gilbert*, the lower court applied the now-defunct framework of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) to hold that this law was a content-neutral time, place, and manner restriction. Further, this law lacks an intent requirement common in many other states, which allows it to chill speech far outside its legitimate sweep.

I. THE "PURELY PRIVATE MATTERS" TEST IS LIMITED TO TRADITIONAL CATEGORICAL EXCEPTIONS TO FIRST AMENDMENT PROTECTION AND DOES NOT APPLY IN CRIMINAL LAW

The First Amendment does not have inclusions, it has exceptions: if speech does not fall within an exception, it is protected. There are very few categorical exceptions to First Amendment protection. Pet. App'x 15a. "These categories include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting some grave and immi-

nent threat the government has the power to prevent." Pet. App'x 16a. In one of these unprotected categories—defamation—the Court has recognized a nested exception that increases the burden in a defamation action if the libelous speech is about a matter of public concern. The court below misconstrued this specific, context-dependent expansion of First Amendment protection.

Whether the government deems a matter public or private should have no bearing on the level of scrutiny applied to criminal speech prohibitions. The court below, however, "conclude[d] that section 11-23.5(b) is subject to an intermediate level of scrutiny also because the statute regulates a purely private matter." Pet. App'x 24a. That cannot be so.

A. The Public-Private Distinction Is a Misconception of Past Extensions of First Amendment Protection

Assuming for the sake of argument that it still applies anywhere, the supposed constitutional distinction between speech about matters of public concern versus matters of private concern employed by the court below certainly does not apply here. The court below drew an erroneous inference from the reasoning in *Snyder v. Phelps* to support a conclusion that the First Amendment is generally less protective of speech on private matters as compared with public matters. Pet. App'x 24a. *Snyder* affirmed the dismissal of a state tort verdict for an intentional infliction of emotional distress ("IIED") claim. 562 U.S. 443, 450–51 (2011). Because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," the

First Amendment stepped into this private dispute to extend its protection. *Id.* at 452; *see also* Pet. App'x 24a (referencing same). Here, the lower court mistakenly inferred that this perceived "hierarchy" placed speech on private matters in a second class and accordingly lowered the *government's* standard for restricting private speech by criminalizing it. But this public-private speech distinction exists only in settings where the First Amendment ordinarily would have no presence at all.

That this occurs so rarely presumably explains why the lower court could only point to a single plurality opinion from this Court to suggest that the First Amendment's "protections are less stringent" for speech on private matters. Pet. App'x 25a (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760 (1984)). But this language is plucked from the narrow subset of cases balancing the First Amendment with the longstanding law of defamation. Considered in context, the *Dun & Bradstreet* plurality limits the First Amendment's protection only in suits *between private parties* over private matters, and does not supply any persuasive doctrinal support for the private-public distinction created by the court below.

That's because in the context of defamation suits, a primary concern is with public figures using litigation to silence the press from reporting on matters of public concern—yet the reasoning is being used here to silence Ms. Austin. The law of defamation existed largely unaltered in this country from the Founding until 1964, when this Court increased the standard for prevailing in a defamation action when the alleged libel was about a matter of public concern. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281–82 (1964)

(holding the First Amendment required a qualified and limited "privilege" against the traditional common-law libel action for those engaged in "criticism of official conduct"). A follow-on case cabined this privilege to defamation actions implicating public officials and matters of public concern. *Gertz v. Robert Welch*, 418 U.S. 323, 347–48 (1973). *Gertz* also restricted the available damages in defamation cases by private parties where the libel was on a matter of public concern. *Id.* at 349–50.

Against this backdrop, *Dun & Bradstreet* held that normal defamation actions—solely between private parties concerning matters that are not of public concern—would not implicate the *Sullivan* or *Gertz* enhanced standards. *Dun & Bradstreet*, 472 U.S. at 761 (plurality). This line of cases did not create a general hierarchy of speech to be used in all settings. Instead, the cases reflect a delicate balance between the values expressed in the First Amendment and the states' interest in preserving the traditional common-law remedies for defamation. *Id.* at 757.

In short, the "less stringent" protections afforded to speech on matters of private concern is limited to a specific context. Although speech on matters of public concern will justify this Court's interference with traditional rules of common-law defamation, this Court has declined to alter defamation law when the dispute between private individuals concerns private mat-

ters. But this unwillingness to extend further protections in one instance does not then imply a limit on protection in all instances.

Here is where the misunderstanding of *Snyder* arises. Although state tort claims can sometimes involve doctrinal compromises outside the usual bounds of the First Amendment, this Court expanded First Amendment protection to state IIED claims. *See Snyder*, 562 U.S. at 458. Matters of public concern enjoy "special protections" that allow courts to interfere in private disputes that effect speech. But generally, matters of public concern are first among equals receiving First Amendment protection.

B. This Court Should Clarify That There Is No Distinction Between Public and Private Speech in Criminal Law

Even if the private-public distinction escapes the narrow confines of libel law where it was born, as might be inferred from *Snyder*, it must be limited to actions between private parties.

Per *Snyder*, the key balancing factor in extending the First Amendment to a private lawsuit is the threat of tort liability imposing "self-censorship on matters of public import." 562 U.S. at 452. An IIED claim or a defamation suit certainly have the potential to chill speech with the threat of a substantial damages award against a speaker. But the line must be drawn between criminal and civil claims. While considering separate state laws—enacted after-the-fact to regulate the type of speech giving rise to the IIED claim—*Snyder* distinguished laws violating the First Amendment from torts violating the First Amendment. *See id.* at 456–57 ("To the extent these

laws are content neutral, they raise very different questions from the tort verdict at issue in this case."). There is no way a libel or IIED claim alone could send a defendant to prison.

But prison is exactly what awaits Ms. Austin. A conviction of under this statute is a class four felony. 720 Ill. Comp. Stat. 5/11-23.5. Class four felonies carry a mandatory minimum sentence of one year in prison.[2] 730 Ill. Comp. Stat. 5/5-4.5-45(a). Unlike the potential civil damages at issue in *Snyder* and *Dun & Bradstreet*, this is a criminal penalty that is not merely likely to chill but is in fact designed to silence any presumptively protected speech, not merely speech on matters of public concern.

Criminal statutes like this one threaten to chill all speech because they carry "severe penalties." *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). The First Amendment protects public and private conversations alike from criminal penalties. This Court made no distinction between public and private statements when invalidating the Stolen Valor Act: "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public *and private* conversation, expression the First Amendment seeks to guarantee." *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (emphasis added). Lying about military honors is protected from criminal

[2] For comparison, other class four felonies include: acquiring 30,000 milligrams of ephedrine or pseudoephedrine (methamphetamine precursors) in a 30-day period, 720 Ill. Comp. Stat. 648/40(a)(1)(C); organizing dogfighting, *id.* at 5/48-1; or several varieties of fraud, *id.* at 5/17-1.

penalty whether done during an election campaign or while bragging at the bar.

Even when private speech is abhorrent, it is protected from criminal sanction. Mere possession of images of animal cruelty can hardly be called a matter of public concern. *See United States v. Stevens*, 559 U.S. 460 (2010) (invalidating criminal prohibition of "possession of certain depictions of animal cruelty."). Nor can creating virtual child pornography be considered a matter of public concern. *See Free Speech Coal.*, 535 U.S. at 258 (invalidating a statute prohibiting creation of virtual child pornography). Neither type of speech can be considered a matter of public concern, except in the sense that the public may be concerned with the mental well-being of the people who possess such images.

That is because the First Amendment prohibits the use of government power to suppress speech. This is the underlying basis for the private-public distinction in tort. This Court has long opposed private use of the courts to achieve ends antithetical to our constitutional values. Public officials in their private capacity may not use the courts as a mechanism to silence the free press even when the press gets something wrong. *N.Y. Times*, 376 U.S. at 271–75. Similarly, private violations of the Fourteenth Amendment may rely on the power of the courts. *See Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (finding a Fourteenth Amendment violation when state courts make the "full coercive power of government" available to enforce racially restrictive covenants). There can be a First Amendment violation in civil cases, not for the

private attack on speech, but for the courts' role as an instrument of that attack.

But in criminal contexts, the courts are not mere instruments of private parties, but weapons of a coercive government. This private-public distinction cannot be allowed to escape its original protective context only to serve as an excuse for speech suppression.

C. Any New Distinction Between Private and Public Speech Cannot Survive in the Information Age

The public-private distinction articulated in the court below does not exist in criminal case law, and courts should not create any broader distinction without considering the grave technological consequences of doing so. It is axiomatic that advances in communications technology have rendered ever more tenuous what may once have seemed a clear line between the public and private spheres.

As a result, privacy determinations can no longer rely on the stark difference between Polly sending Ann a sealed letter, on one hand, and Martin Luther nailing his missive to the front door of a church. When lines of communication are numerous and varied, when does a missive cross from being private to public? If Polly wants to give a message to Ann, she may: whisper in Ann's ear; speak to her alone; speak to her in a crowded room; send her an encrypted message on WhatsApp; send an unencrypted text on iMessage; put her message into a group chat with mutual friends; post on the wall of a private Facebook group; post on Ann's Facebook wall; post on Facebook's timeline and tag Ann; send the message to an iCloud ac-

count Ann shares with others; write a letter to the editor hoping Ann reads it; and, of course, nail the message to Ann's door.

This merger of public and private spheres is neither hyperbole nor mere conjecture. A viral post ("tweet") on Twitter from a relatively unknown user can (and routinely does) explode into a major news story seen around the world. A legal doctrine that tries to distinguish between speech on public and private matters must account for the fact that the "public" from which the "private" is purportedly to be distinguished is inevitably context dependent. Each individual scrap of information needs to be judged based on which "public" saw the message and which "public" is concerned. These relevant contextual milieus change by the day and the activity. For instance, a college vlogger's family troubles may be of great concern to her 20,000 YouTube followers and of no concern to her organic chemistry classmates.

Equally inchoate is the ability of the reasonable person to infer whether speech is to remain private. However alarming or distasteful to earlier generations, the transmission of sexual images to other people is fraught with rapidly evolving social, cultural, and technological mores.

Against that backdrop, consider that the statute at issue here requires the perpetrator to have "obtain[ed] the image under circumstances in which a reasonable person would know or understand that the image was to remain private." 720 Ill. Comp. Stat. 5/11-23.5(b)(2). With modern technology, what should the reasonable person expect is intended to remain private? The line must be somewhere between private

boudoir photographs delivered by hand and subject to a written non-disclosure agreement and posting images of one's nude body to any of the myriad internet sites that permit—or even welcome—such expression.

What is the recipient meant to infer from a message that is somewhere in between? For instance, Millennials have developed an app called Snapchat. This app allows a person to send sexually explicit images—and others—to other users that will be deleted within a few seconds of being seen. *See* Jennifer M. Kinsley, *First Amendment Sexual Privacy: Adult Sexting and Federal Age Verification*, 45 N.M. L. Rev. 1, 27, 29 (2014). Obviously, there is an increased expectation that images sent via an app that ensures they will self-delete will remain private, but the existence and common usage of such an app necessarily limits the expectation of privacy in traditional image-sharing messages that are more permanent and sharable. What is someone supposed to infer from images sent through regular texting? Suppose a person were to send enduring (as opposed to self-deleting) images not only to a romantic partner's private email account but to an account known to be shared with a former romantic partner? Can the sender reasonably expect privacy in images sent to an account shared by the exact person most likely to be upset by them?

Those issues converge on this case. Ms. Austin received images that were somewhere between being personally delivered by one paramour to another in a sealed envelope and being deliberately posted on a public YouTube channel by the person depicted. Moreover, knowing Ms. Austin possessed images that would discredit his attack, her ex-fiancé disseminated a false and hurtful narrative about their breakup. The

termination of a wedding engagement will generally be of interest to one's social circle, whether one's last name is Austin or Kardashian. The Constitution protects the rights of people to discourse with their social circle—there "public" large or small—free from the fear of criminal charges.

II. THE LOWER COURT'S APPLICATION OF "TIME, PLACE, AND MANNER" REVIVES A MISCONCEPTION THIS COURT CORRECTED IN *REED V. TOWN OF GILBERT*

Illinois's law cannot survive as a content-neutral "time, place, and manner" restriction. The court below also applied intermediate scrutiny because of a misunderstanding of the required content neutrality for a legitimate time, place, and manner restriction. Speech restrictions cannot be "based upon either the content or subject matter of speech." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 648 (1981). In fact, the First Amendment requires that "content-based restrictions on speech be presumed invalid" and "the Government bear[s] the burden of showing their constitutionality." *Alvarez*, 567 U.S. at 716–17. Any restrictions must "serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Heffron*, 452 U.S. at 648. This does not allow for a content-based distinction between sexual and non-sexual images to survive simply because it is accompanied by non-content restrictions.

To illustrate, if a state ban on flag-burning would clearly be unconstitutional. *See Texas v. Johnson*, 491 U.S. 397 (1989). It does not, however, violate the First Amendment to ban setting fire (manner) to any items

on public sidewalks (place) during business hours (time). This reasonably limits the time, place, and manner of speech with no reference to the expressive content of the item burned or the act of burning. Would it then be constitutional to ban burning the Illinois flag—and only the Illinois flag (content)—in front of the state capitol (place) between nine and five o'clock (time)? No. If the statute allowed burning of other flags, or items, it would still be a content-based rule regardless of the time and place restriction.

The statute here is not content-neutral. This Court recently clarified the test for content neutrality in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). *Reed* invalidated a town sign code that organized types of signs into categories—ideological, political, and event signs—based on content but regulated the time, place, and manner of display for all signs within the same category equally. *Id.* at 2224–25. The content discrimination in establishing the sign categories violated the First Amendment. *Id.* at 2227. Content discrimination is no less content based for being a step removed from a time, place, or manner regulation.

The statute here is similarly content-based. It creates four categories of speech based on two questions: one content based, the other neutral. First, do the disseminated images display sexual activity or intimate parts? 720 Ill. Comp. Stat. 5/11-23.5(b)(1)(C). The image's content provides the answer to this first question. After this content determination, the image falls into one of two categories: (1) non-sexual, and (2) sexual. If the image is in category (1), the image may still be prohibited because the statutory definition is broad enough to include nonsexual nude imagery. 720 Ill.

Comp. Stat. § 5/11-23.5(a).(b). If the image is in category (2), the next question is whether it was "obtain[ed] . . . under circumstances in which a reasonable person would know or understand that the image was to remain private." *Id.* 5/11-23.5(b)(2). The court below considered this second question to be a neutral restriction based on the "manner of the image's acquisition." Pet. App'x 23a (emphasis removed).

But the merits of that conclusion are irrelevant because of the first question. This manner restriction only comes into being after an improper content determination in contradiction of *Reed*. The essence of the time, place, and manner restriction doctrine is that the restriction applies evenly regardless of the content of the speech. But the court below concluded that this content discrimination was acceptable.

That reasoning relied on a misapplication of the holding in *Ward. v. Rock Against Racism*, 491 U.S. 781 (1989), which this Court corrected in *Reed*. 135 S. Ct. at 2228–29. In *Reed*, the lower court had understood *Ward* to mean "that a government's purpose is relevant even when a law is content based on its face." *Id.* at 2228. Similarly, the court below recognized "that section 11-23.5(b) on its face targets the dissemination of a specific category of speech—sexual images," but, as the regulation serves a purpose unrelated to the content being expressed, it held the statute to be neutral. Pet. App'x 21a–22a. This revival of the misunderstanding of *Ward* undermines this Court's clear guidance in *Reed*.

If the Court does not take this case, then *Reed*'s clarification of the content-neutrality standard will not apply to Illinois. *Reed* clarified the ambiguity in

Ward, which seemed to allow a content-discriminatory statute passed with a benign motive. 135 S. Ct. at 2229. But *Ward* held that a discriminatory intent will invalidate an otherwise content-neutral statute. *Id.* If the statute is facially content-based, then the question of legislative purpose should not be broached. *Id.* Nevertheless, when the court below recognized "that section 11-23.5(b) on its face targets the dissemination of a specific category of speech," it continued to question the motive. Pet. App'x 21a.

However pure the legislative motive here, it cannot save a facially content-based statute. *Reed* explained the danger: future governments with less clean motives may use content-based regulations to penalize unpopular views. For example, states have used statutes "prohibiting 'improper solicitation' by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People." *Reed*, 135 S. Ct. at 2229 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Finally, the decision below cannot be justified based on the cases concerning zoning restrictions on adult cinemas. *See* Pet. App'x 21a–22a (citing *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986)). *Renton* is inapposite for two reasons. First, it predates both *Ward* and *Reed* and does not have the benefit of this Court's clarification of content neutrality. Second, *Renton* concerned a circumscription on where adult theaters may speak, not a ban on the speech itself. *Id.* at 48. Absent a similar ban, *Renton* serves mainly as an example of an appropriate restriction that did not prevent any speech. Even still, this case provides the

Court with the opportunity to clarify any lingering ambiguity in *Renton*, as it did with *Ward* in *Reed*.

III. STATES ARE SPLIT OVER WHETHER THE FIRST AMENDMENT ALLOWS THE CRIMINALIZATION OF NONCONSENSUAL DISSEMINATION OF NUDITY BASED ON CONSTRUCTIVE KNOWLEDGE

Even if similar content-based restrictions could survive judicial scrutiny, this one lacks a basic limiting principle—a *mens rea* requirement—making the statute facially overbroad. Under the decision below, a person may go to prison if she "obtain[ed] the image under circumstances in which a reasonable person would know or understand that the image was to remain private." 720 Ill. Comp. Stat. 5/11-23.5(b)(2); Pet. App'x 47a. Because the law uses the "reasonable person" standard, actual knowledge isn't required.

A. Other State Appellate Courts Require an Intent Element Beyond Constructive Knowledge

Illinois currently allows constructive knowledge to replace the illicit intent required by other states. As Ms. Austin notes, this is contrary to the majority of state nonconsensual nudity laws, which require some kind of illicit intent element. Cert. Pet. 23–26. An illicit intent element is necessary to cure the chilling effect this statute has on protected speech.

An illicit-intent element has been crucial to other state courts reviewing similar statutes. An intermediate appellate court in Minnesota invalidated a similar statute recently for failure to limit its *mens rea*. *See State v. Casillas*, No. A19-0576, 2019 Minn. App.

LEXIS 400 (Minn. Ct. App., Dec. 23, 2019). The Minnesota court distinguished the Illinois court's opinion below, because, unlike Illinois, Minnesota case law required an illicit intent to survive a First Amendment overbreadth challenge. *Id.* at *24–25 (citing *State v. Curtis*, 921 N.W.2d 342, 343 (Minn. 2018)). This Court can remedy this discrepancy by requiring every state court consider the intent element of a statute in an overbreadth challenge as Minnesota does.

And Minnesota is not alone in requiring an illicit intent. The Vermont Supreme Court upheld a similar statute, precisely because it was limited by an illicit intent requirement. *State v. VanBuren*, 214 A.3d 791, 812 (Vt. 2018). Crucially, the statute at issue did "not reach even knowing, nonconsensual disclosures of images falling within the narrow statutory parameters unless disclosure would cause a reasonable person to suffer harm." *Id.* This made it unlikely the statute in that case would sweep up protected speech as the Illinois statute has here.

B. Without an Intent Element This Statute's Sweep Is Shockingly Vast

This case is the most obvious example of the broad sweep of Illinois's law. The statute is being weaponized to punish a woman for telling her side of the story of a break-up. The law is clearly not intended to be used this way, yet it is here. And as Ms. Austin, other *amici*, and the dissent below show, this statute leads to absurd results.

The majority below does not and cannot answer the following hypothetical posed by the dissent. In an increasingly technological age, people are more likely

than ever to receive sexual images they know are intended to remain private but would really prefer not to see. This statute would bind recipients to the intentions of senders. As the dissent suggests:

> Two people go out on a date, and one later sends the other a text message containing an unsolicited and unappreciated nude photo. The recipient then goes to a friend, shows the friend the photo, and says, "look what this person sent me." Has the recipient committed a felony? The State conceded that the recipient had.

Pet. App'x 69a (Garman, J., dissenting).

Likewise, as the petitioner notes, this law makes it difficult for Ms. Austin to seek solace and healing even if she remains silent on her side of the break-up story. If she sought therapy or the comfort of a friend to overcome her fiancé's betrayal, she would be a criminal for showing that person the source of her unhappiness. Cert. Pet. 26. In fact, if the images were sent to a mutual friend, that friend could be imprisoned for showing them to Ms. Austin.

The statute goes even further. Although it provides exceptions for dissemination to report unlawful or criminal conduct, it provides no allowance for victims of criminal conduct who seek healing or remedies at a lower level than criminal charges. *See* 720 Ill. Comp. Stat. 5/11-23.5(c). Much like Ms. Austin, a hypothetical victim of sexual harassment is barred from being fully open with her therapist. She cannot show a professional the images that caused her trauma unless she wants to file an official report. This all-or-nothing attitude drastically limits the options available to victims. And the exception for dissemination

that serves a nebulous "lawful public purpose" give no comfort. There is no explanation of this exception and so a hypothetical victim—fearing the kind of retaliation charge on full display below—would be chilled from expressing her protected speech.

These chilling effects could be avoided if the Illinois law, like many others, was limited by an illicit-motive requirement. Ms. Austin is not a criminal under any meaningful definition of the term. This Court should clarify that these types of laws need intent requirements.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, the petition should be granted.

Respectfully submitted,

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