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, McHenry County, Illinois
Plaintiff-Appellant,	)	
v.	)	No. 16 CF 935
BETHANY AUSTIN,	)	The Honorable Joel D. Berg,
Defendant-Appellee.	)	Judge Presiding

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

Defendant, Bethany Austin, was charged with non-consensual dissemination of private sexual images under 720 ILCS 5/11-23.5 (also known as the "revenge porn" statute). C13.[1] The indictment alleged that 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 . . . defendant obtained the image under circumstances in which a reasonable 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.

Id.

Defendant filed a motion to dismiss, alleging that 720 ILCS 5/11-23.5 violates (1) due process under the Fourteenth Amendment of the United States Constitution and the Illinois Constitution because it lacks an adequate *mens* rea, (2) freedom of speech under the First Amendment of the United States Constitution and Article I, Section 4 of the Illinois Constitution, and (3) equal protection under the Fourteenth Amendment of the United States Constitution because it treats individuals differently than certain telecommunications entities. C54-85. The Circuit Court of McHenry County held that 720 ILCS 5/11-23.5 does not violate due process, C136, or equal

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[1] "C_" denotes the common law record; "R_" denotes the report of proceedings.

protection principles, C138, but that the statute is "an unconstitutional content-based restriction on speech." C157. The People appealed directly to this Court. C159-160.

ISSUE PRESENTED

Whether prohibiting the public dissemination of private sexual images, which the defendant knew or should have known were intended to remain private, violates the First Amendment to the United States Constitution, and Article I, Section 4 of the Illinois Constitution.

JURISDICTION

The People filed a timely notice of appeal from the circuit court's judgment declaring an Illinois statute unconstitutional. Accordingly, this Court has jurisdiction pursuant to Supreme Court Rules 302, 603, and 612(b).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Criminal Code at the time of defendants' crimes provided as follows:

§ 11-23.5. Non-consensual dissemination of private sexual images.

(a) Definitions. For the purposes of this Section:

"Computer", "computer program", and "data" have the meanings ascribed to them in Section 17-0.5 of this Code.

"Image" includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body.

"Intimate parts" means the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.

"Sexual act" means sexual penetration, masturbation, or sexual activity.

"Sexual activity" means any:

(1) knowing touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or
(2) any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; or
(3) an act of urination within a sexual context; or
(4) any bondage, fetter, or sadism masochism; or
(5) sadomasochism abuse in any sexual context.

(b) A person commits non-consensual dissemination of private sexual images when he or she:

(1) intentionally disseminates an image of another person:
(A) who is at least 18 years of age; and
(B) who is identifiable from the image itself or information displayed in connection with the image; and
(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination.

(c) The following activities are exempt from the provisions of this Section:

(1) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is made for the purpose of a criminal investigation that is otherwise lawful.

(2) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct.

(3) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the images involve voluntary exposure in public or commercial settings.

(4) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination serves a lawful public purpose.

(d) Nothing in this Section shall be construed to impose liability upon the following entities solely as a result of content or information provided by another person:

(1) an interactive computer service, as defined in 47 U.S.C. 230(f)(2);

(2) a provider of public mobile services or private radio services, as defined in Section 13-214 of the Public Utilities Act; or

(3) a telecommunications network or broadband provider.

(e) A person convicted under this Section is subject to the forfeiture provisions in Article 124B of the Code of Criminal Procedure of 1963.

(f) Sentence. Non-consensual dissemination of private sexual images is a Class 4 felony.

720 ILCS 5/11-23.5 (West 2015).

STATEMENT OF FACTS

After a seven-year relationship, defendant and her boyfriend, Matthew, were engaged to be married, when defendant learned of Matthew's infidelity with a woman named Elizabeth. C129.[2] Because defendant and Matthew shared an Apple iCloud account, all text messages sent to or from Matthew's iPhone also appeared on defendant's iPad. One day, a series of text messages between Elizabeth and Matthew appeared on defendant's iPad. *Id.* The messages included nude photos of Elizabeth. *Id.* The engagement was called off, and, a few months later, the couple split. C130. Matthew began "telling everyone they split because [defendant] was crazy and no longer cooked or did chores." *Id.* Defendant then sent a letter to an unknown number of recipients and attached four nude photos of Elizabeth. *Id.* Among

[2] The details of this factual account come from defendant's motion in the circuit court.

the recipients was Matthew's cousin, who informed Matthew about the letter. Matthew reported the letter and photos to police, who then charged defendant with non-consensual dissemination of private sexual images. *Id.*

Defendant filed a motion to dismiss, arguing that the statute violates due process, equal protection, and the free speech provisions of the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution. C54-85. The circuit court rejected the due process and equal protection arguments, but found the statute unconstitutional on free speech grounds. C136, 138, 157. Specifically, the circuit court found that the statute restricted speech, C139, based on its content, C140; that the targeted speech is protected by the First Amendment, C148; and that the statute could not survive strict scrutiny, C156, because the State offered "no compelling justification for the . . . statute," C152, and, in any event, the statute is not narrowly tailored to the State's justification, C156.

ARGUMENT

The circuit court's judgment should be reversed on one of two bases. First, to the extent that the dissemination of private sexual images raises First Amendment concerns, those concerns must be balanced against the victim's privacy interest. Here, the balance struck by the statute is constitutional because, like the tort of publication of private information, the

statute applies only to private information that is not of legitimate public concern. Second, even applying strict scrutiny, the statute is constitutional because it is narrowly tailored to serve a compelling government interest.

I. First Amendment Principles and Standard of Review

The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). But that proscription is not absolute: the Court has long recognized that States may regulate certain categories of speech. *Virginia v. Black*, 538 U.S. 343, 358 (2003). Regulations directed at speech falling outside of those categories are constitutional only if they are narrowly tailored to serve a compelling government interest. *R.A.V.*, 505 U.S. at 395.

The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). But striking down a statute that also has legitimate applications because of its potential to punish or chill protected expression is a drastic

remedy. The Supreme Court has therefore instructed that courts should employ this remedy "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *People v. Williams*, 235 Ill. 2d 178, 200 (2009) ("Invalidation for overbreadth is strong medicine that is not to be casually employed.") (internal quotations omitted)). A statute should be invalidated as unconstitutionally overbroad only if "a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010); *People v. Minnis*, 2016 IL 119563, ¶ 44, and no reasonable limiting construction would render the statute constitutional, *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Minnis*, 2016 IL 119563, ¶ 21. "Substantial overbreadth" requires a showing of actual or serious potential encroachments on fundamental rights:

> [T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.
>
> * * *
>
> [T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800–801 (1984) (internal citations and footnote omitted). The burden of establishing the statute's

overbreadth rests on the party challenging it. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *Minnis*, 2016 IL 119563, ¶ 21.

Review of issues involving the constitutionality of a statute is *de novo*. *People v. Sharp*e, 216 Ill. 2d 481, 486-87 (2005). "A court must construe a statute so as to affirm its constitutionality, if reasonably possible." *In re Lakisha M.*, 227 Ill. 2d 259, 263 (2008); *see also People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 290-91 (2003); *People v. Greco*, 204 Ill. 2d 400, 406 (2003); *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). If a statute's "construction is doubtful, the doubt will be resolved in favor of the validity of the law attacked." *People v. Fisher*, 184 Ill. 2d 441, 448 (1998) (internal quotations omitted).

II. The First Amendment Does Not Protect the Public Distribution of Truly Private Facts.

The First Amendment tolerates the regulation of public disclosure of private information where that information is not of legitimate concern to the public. The Supreme Court has recognized that there may be "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such." *Stevens*, 559 U.S. at 472. Like the categories already identified by the Court, this would include speech of "such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality."

Black, 538 U.S. at 358-59. "Before exempting a category of speech from the normal prohibition on content-based restrictions, . . . the Court must be presented with persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *United States v. Alvarez*, 567 U.S. 709, 722 (2012).

Here, history supports the conclusion that States may regulate speech that invades individual privacy without violating the First Amendment. As the Supreme Court has recognized, there is "tension between the right which the First Amendment accords . . . , on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other." *The Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989). "Thus, the dissemination of non-newsworthy private facts is not protected by the first amendment." *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981); *see also Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975) ("[U]nless it be privileged as newsworthy . . ., the publicizing of private facts is not protected by the First Amendment.").

The Supreme Court has never invalidated a restriction of speech like the one at issue in this case, which regulated only speech on purely private matters that protected a private individual from an invasion of privacy or

similar harms. Rather, the Court has always reconciled the tension between the right to privacy and freedom of expression by employing an analysis of the specific privacy claims and the public interest in the communications at issue. *See*, *e.g.*, *Time Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (declining to announce categorical rule on whether truthful publication of revelations so intimate as to shock community's notions of decency could be constitutionally proscribed); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (same).

In *Florida Star*, the Court declined to adopt an across-the-board rule that a truthful publication may never be punished consistently with the First Amendment, instead concluding that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." 491 U.S. at 532-33; *see also Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (same). And in *Bartnicki*, the Court recognized that "some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself." 532 U.S. at 533. The Court expressly reserved the question of whether the government's interest in protecting privacy is strong enough to justify regulation of speech when it involved "trade secrets or domestic gossip or

other information of purely private concern." *Id.* *See also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest[.]").

The principles that emerge from these decisions are that speech on matters of private concern that threatens the privacy interests of nonpublic figures does not enjoy the same degree of First Amendment protection as speech on matters of public concern or relating to public figures, and that state laws protecting individual privacy rights have long been established, and are not necessarily subordinate to the First Amendment's free speech protections.

Indeed, a celebrated law review article from 1890 confirms that there is a well-established tradition in American law allowing the government to protect individual privacy interests. In the article, future Supreme Court justice Louis Brandeis and his co-author argued for the development of an invasion of privacy tort because the then-existent causes of action were inadequate to protect privacy interests in a changing world. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). More than a century ago, the authors detailed how

> [r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the housetops. For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons.

Id. at 195 (footnote and quotation omitted). Reviewing common-law principles and cases of that time, the authors concluded that existing causes of action had long been used to protect privacy interests but were inadequate to fully meet that need in a changing world — where, among other things, "the latest advances in photographic art have rendered it possible to take pictures surreptitiously." *Id.* at 211. The authors recognized that the right to privacy does not prohibit publication of matters of public interest, so, for example, publishing that a "modest and retiring individual" has a speech impediment or cannot spell may be proscribed, but commenting on the same characteristics in a candidate for Congress could not. *See id.* at 215.

In the century since this article appeared, several distinct causes of action have been created to protect the interests of an individual in leading, to a reasonable extent, "a secluded and private life, free from the prying eyes, ears and publications of others." *See* Restatement (Second) of Torts § 652A, cmt. b. Most relevant here is the tort of public disclosure of private

information, which does not run afoul of First Amendment concerns where it excludes facts that are of legitimate concern to the public. "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." *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 978 (1st Dist. 1990); *see also Green v. Chi. Tribune Co.*, 286 Ill. App. 3d 1, 5 (1st Dist. 1996) (stating claim for public disclosure of private facts requires pleading that (1) defendant gave publicity (2) to plaintiff's private, not public, life; (3) matter publicized was highly offensive to reasonable person; and (4) matter publicized was not of legitimate public concern). While the First Amendment bars punishing the publication of truthful information about matters of public significance, no such obstacle exists where the information is not of legitimate public concern. *See Green*, 286 Ill. App. 3d at 13.

The "revenge porn" statute at issue here closely tracks the public disclosure tort. Dissemination, or publicity, is an element of the crime, as is the requirement that the images were intended to remain private. Contrary to the circuit court's conclusion, *see* A18-26, publication and dissemination have nearly identical definitions. *Merriam-Webster*'s online dictionary

defines "to publish" as "to make generally known," or "to disseminate to the public." *Publish* (2019), (online), available at: https://www.merriam-webster.com/dictionary/publish (accessed Jan. 18, 2019). As the circuit court pointed out, the tort requires publication to the public at large or to a group with a special relationship to the plaintiff. C145, *citing Miller*, 202 Ill. App. 3d at 980-81. Like the authors of the 1890 law review article, we live in an era in which the traditional causes of action are inadequate to meet the needs of a changing world and, particularly in light of changes in technology, dissemination to a single person of a digital image can be viewed as the equivalent of publishing that image to the public at large. But if necessary to preserve the constitutionality of the statute, it would not be unreasonable to construe the statute to similarly require dissemination to the public at large or to a group with a special relationship to the plaintiff. After all, dissemination's dictionary definition is "to spread abroad as though sowing seed" and "to disperse throughout," both of which are amenable to an understanding beyond sharing with a single recipient. *Disseminate* (2019), (online), available at: https://www.merriam-webster.com/dictionary/disseminate (accessed Jan. 18, 2019).

Furthermore, the statute deals only with private "sexual images," the non-consensual dissemination of which is highly offensive to reasonable

people. Subsection (c)(4) of the statute, which exempts any dissemination "that serves a lawful public purpose" from penalty, can reasonably be read to encompass the exemption for matters of "legitimate public concern" in the public disclosure tort. *See People v. Hernandez*, 2016 IL 118672, ¶ 10 (courts must construe statute to preserve constitutionality where reasonably possible). In short, because the First Amendment tolerates the tort of public disclosure of truthful private facts, it similarly tolerates the crime of "revenge porn." *See People v. Woodrum*, 223 Ill. 2d 286, 306 (Ill. 2006) (First Amendment considerations apply equally to civil and criminal cases).

The broad adoption of invasion of privacy torts across the country, and the longstanding historical pedigree of laws protecting the privacy of nonpublic figures with respect to matters of only private interest, distinguish the well-established type of privacy-protecting law at issue here from the newly crafted law prohibiting depictions of animal cruelty at issue in *Stevens*, for example. *See* 559 U.S. at 469 ("[W]e are unaware of any similar tradition excluding depictions of animal cruelty from 'the freedom of speech' codified in the First Amendment[.]").

III. Even Under Strict Scrutiny, the Statute Survives Because It Is Narrowly Tailored to Serve a Compelling Government Interest.

So far, in cases involving a potential clash between the government's interest in protecting individual privacy and the First Amendment's free

speech protections, the Supreme Court has avoided explicitly identifying speech about truly private matters as lying beyond First Amendment protection. It has generally reconciled the tension between free speech and privacy in favor of free speech in the context of speech about matters of public interest, while expressly reserving judgment on the proper balance in cases where the speech involves purely private matters.

If this Court declines to categorically exclude such speech, the same considerations should carry great weight in its strict scrutiny analysis. Generally, the First Amendment subjects content-based restrictions on speech to strict scrutiny. *People v. Alexander*, 204 Ill. 2d 472, 476 (2003). Strict scrutiny requires a court to find that the restriction is justified by a compelling government interest and is narrowly tailored to achieve that interest. *People v. Sanders*, 182 Ill. 2d 524, 530 (1998). The revenge porn statute survives strict scrutiny because it is justified by the compelling government interest in protecting the health and safety of victims, and because it is narrowly tailored to achieve that interest.

In *Ferber,* 458 U.S. at 763, the Court held that content-based restrictions on child pornography satisfy strict scrutiny because child pornography is "intrinsically related" to child sexual abuse and states have a compelling interest in safeguarding the physical and psychological health of

children. *See Alexander*, 204 Ill. 2d at 477 (discussing *Ferber*). And the value of child pornography is "exceedingly modest, if not *de minimis*." *Ferber,* 458 U.S. at 762. Just so here. As with child pornography, any value of "revenge porn" is *de minimis*. *See, e.g.*, *State v. Culver*, 918 N.W.2d 103, 110-11 (Wis. Ct. App. 2018) (upholding Wisconsin's "posting or publishing private depictions of a person" statute because there is a compelling state interest "in protecting the privacy of personal images of one's body that are intended to be private" and "when purely private matters are the subject at hand, free speech protections are less rigorous because such matters do not implicate the same constitutional concerns as limiting matters of public interest") (internal quotations omitted).

And the State has a compelling interest in safeguarding the physical and psychological health of the victims. As the name suggests, so-called "revenge porn" — the dissemination of private, sexually explicit images of another without their consent — serves no purpose other than to harm the victim, and it creates in its victims a pervasive fear of unlawful physical violence. In a survey of revenge porn victims, 93% said they had "suffered significant emotional distress." Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators* (Nov. 2, 2015), http://www.cybercivilrights.org/guide-to-legislation/ (last visited Jan. 22,

2019). Another study, by the US Cyber Civil Rights Initiative, found that 80% of victims suffered "severe emotional stress and anxiety." Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, Oxford Journal of Legal Studies (2017), pp. 1-28 at 12, https://tinyurl.com/ycoj96rw (last visited Jan. 22, 2019). Eighty-two percent of victims "said they suffered significant impairment in social, occupational, or other important areas of functioning." Franks, *supra.* Half of all "revenge porn" victims reported being stalked online or harassed by users who had seen the disseminated material. *Id.* Nor is the harm felt solely online. Often the distributed images are accompanied by identifying information about the victim — "a practice known as 'doxing'" — and unsubstantiated allegations about the victim. McGlynn & Rackley, *supra*, at 12. Indeed, nearly one-third of victims said that harassment or stalking extended beyond the Internet. Franks, *supra.* And more than half of victims have had suicidal thoughts due to the dissemination of the sexually explicit images. *Id.*

Nor is the damage limited to psychological or emotional harm. "The professional costs to victim-survivors are also potentially severe. Many are dismissed from their current employment . . . as a result of an online presence dominated by private sexual images and abuse." McGlynn & Rackley, *supra*, at 12. In the most serious cases, victims suffer significant

physical harm. In one case, a woman was raped at knifepoint after her ex-boyfriend posted her photograph and contact information online. Caroline Black, *Ex-marine Jebediah James Stipe Gets 60 Years for Craigslist Rape Plot*, CBS NEWS (June 29, 2010), http://www.cbsnews.com/news/ex-marine-jebidiah-james-stipe-gets-60-years-for-craigslist-rape-plot/ (last visited Jan. 22, 2019). Furthermore, nonconsensual pornography can play a role in domestic violence, with abusive partners using the threat of dissemination to keep their victims from leaving or reporting the abuse to law enforcement. Jack Simpson, *Revenge Porn: What is it and how widespread is the problem?*, The Independent (July 2, 2014), https://tinyurl.com/y8aze8bs (last visited Jan. 22, 2019); Annmarie Chiarini, *"I was a victim of revenge porn. I don't want anyone else to face this,"* The Guardian (Nov. 19, 2013), https://tinyurl.com/nadwv5z (last Jan. 22, 2019).

Sex traffickers and pimps also use the threat of revenge porn to trap unwilling victims in the sex trade. Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 818 (2008); Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC Chicago (Feb. 22, 2013), https://tinyurl.com/c76vc4f (last visited Jan. 22, 2019). And some rapists now record their assaults on the victims, both to inflict additional pain and humiliation and to discourage the victim from reporting

the crime. *See*, *e.g.*, Tara Culp-Ressler, *16 Year-Old's Rape Goes Viral on Twitter*, Think Progress (July 10, 2014), https://tinyurl.com/qbzc2pk(last visited Jan. 22, 2019). The State thus has a compelling interest in protecting victims from the non-consensual dissemination of their private sexual images.

Moreover, the harm extends beyond the individual victims to society generally. Revenge porn "sends a message to all women that they are not equal, that they should not get too comfortable, . . . that it might happen to them." McGlynn & Rackley, *supra*, at 13. When Marines posted more than 130,000 explicit photos of female service members online without their permission, the message to women in uniform was that they were not equal to their male colleagues or safe in their professional lives. David Martin, *Secret military site posts explicit images of female service members*, CBS News (Mar. 9, 2018), https://www.cbsnews.com/news/hoes-hoin-website-sharing-explicit-photos-of-marines/ (last visited Jan. 22, 2019). When the conduct is not adequately deterred by exercise of the People's police power, "[i]t legitimates the attitudes of those who might not yet have participated directly in the abuse but who have similar attitudes towards women, or who think that the abuse is 'just a bit of fun' and that it is therefore acceptable to disregard the dignity of the individual." McGlynn & Rackley, *supra*, at 13-14.

Perhaps that is why a year after the so-called "Marines United" scandal was first discovered, a new website was discovered with nearly 300 more explicit photos of servicewomen. Martin, *supra.* As former Marine Erin Kirk Cuomo said, "One year later and not much has changed." *Id.*

Nor could the statute be more narrowly tailored and still achieve that compelling governmental interest. For example, a requirement that the State prove that the defendant intended to cause distress to his victim would leave unprotected the many victims who are harmed by perpetrators motivated by a desire to entertain, to make money, or to gain notoriety. When it was discovered that members of the Penn State chapter of the Kappa Delta Rho fraternity had uploaded photos of unconscious, naked women to a members-only Facebook page, a fraternity brother explained that the conduct "wasn't intended to hurt" the victims — indeed, the perpetrators undoubtedly would have preferred that the victims never learned of their conduct at all — but rather was intended to be "funny to some extent" to the members. Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity*, Philadelphia Magazine (Mar. 18, 2015), http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/ (last visited Jan. 22, 2019). But the perpetrators' intent in no way diminishes the harm to the victims, or the State's interest in protecting them from it.

Similarly, a heightened *mens rea* requirement would undermine the State's compelling interest in protecting victims from the immense harms associated with this crime. For example, if the statute required a *reckless* disregard for the victim's intent that the image remain private, as opposed to mere negligence, it would exempt from criminal liability anyone whose biases caused him to assume the victim did not care if her images were disseminated, or indeed anyone who simply acted too impulsively to have formed a conscious disregard for the likelihood that the victim did not intend for her images to be disseminated. Therefore, a substantial amount of conduct relevant to the State's compelling interest in protecting victims from this crime could escape prosecution under a recklessness standard, especially as technology has evolved to enable thoughtless, impulsive, or careless dissemination of private sexual images. Indeed, the recent amendment to the Uniform Code of Military Justice addressing nonconsensual pornography adopts a similar negligence standard. *See* 18 U.S.C. § 917a(a)(2).

Nor could the statute achieve its goal if it were restricted to offenses by current or former intimate partners. Friends, co-workers, and strangers can inflict just as much harm by publicly disseminating private sexual images. The statute necessarily covers the distribution of images obtained through hacking or theft, such as the 2014 release of explicit images of female

celebrities stolen from iCloud accounts. Paul Ferrell, *Nude photos of Jennifer Lawrence and others posted online by alleged hacker*, The Guardian (Aug. 31, 2014), https://www.theguardian.com/world/2014/sep/01/nude-photos-of-jennifer-lawrence-and-others-posted-online-by-alleged-hacker (last visited Jan. 22, 2019). Jennifer Lawrence accurately equated the impact of having her private sexual images stolen and disseminated to a sex crime. *Jennifer Lawrence Calls Photo Hacking a Sex Crime*, Vanity Fair (Nov. 2014), https://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover (last visited May 22, 2018). "Revenge porn," while it resonates with the public, is a problematic term to describe the criminal conduct in question. It refers to only a small subset of cases in which private sexual images are disseminated against the victim's will, and it focuses on the defendant's motive rather than the harm to the victim. McGlynn & Rackley, *supra*, at 3. That is why some researchers advocate for a more accurate term, such as "image-based sexual abuse." *Id.* Regardless of its colloquial designation, the statute clearly could not achieve its goal if it were restricted to dissemination by current or former intimate partners or cases where the perpetrator intended to cause harm.

In sum, the statute is narrowly tailored to achieve the State's compelling interest in protecting victims from the harm associated with the public dissemination of private sexual images. This is especially so given the

exceptions listed in subsection (c), which exempt dissemination for criminal investigations, to report unlawful conduct, where the images involve voluntary exposure in public or commercial settings, or for lawful public purposes. Even if one could hypothesize a scenario in which the statute penalizes speech that is not exempted under subsection (c) without advancing the State's compelling interest, that alone would not demonstrate that the statute is overbroad. While any statute that regulates speech must avoid constitutional overbreadth, such concerns "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Because the statute serves a compelling government interest and is narrowly tailored to that interest, it survives strict scrutiny under the First Amendment.

CONCLUSION

This Court should reverse the judgment of the circuit court.

January 29, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 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-six pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

APPENDIX

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APPEAL TO THE ILLINOIS SUPREME COURT
FROM THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 123910
Circuit Court No: 2016CF000935
Trial Judge: JOEL D BERG

v.

BETHANY AUSTIN
Defendant/Respondent

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Plaintiff/Petitioner

Reviewing Court No: 123910
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Trial Judge: JOEL D BERG

v.

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Defendant/Respondent

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DIRECT APPEAL TO THE SUPREME COURT OF ILLINOIS
FROM THE CIRCUIT COURT
OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 16 CF 935
	)	
BETHANY AUSTIN,	)	The Honorable
	)	Joel D. Berg
Defendant.	)	Judge Presiding.

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Illinois Supreme Court

(2) Name and address of appellant's attorney on appeal.
Name: The People of the State of Illinois
Address: Garson Fischer
Assistant Attorney General
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Chicago, Illinois 60601
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(3) Date of judgment or order: August 8, 2018

(4) If appeal is not from a conviction, nature of order appealed from: Opinion declaring 720 ILCS 5/11-23.5(b) unconstitutional.

(5) A copy of the court's opinion is appended to the notice of appeal.

August 15, 2018

Respectfully submitted,

Lisa Madigan
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VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Garson S. Fischer
Garson S. Fischer
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that on August 15, 2018, the foregoing **Notice of Appeal** was filed with the Clerk of the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois, and a copy was served upon the following by email:

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Garson S. Fischer
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Fischer

In the Circuit Court for the 22nd Judicial Circuit
McHenry County, Illinois

No. 16 CF 935

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

BETHANY AUSTIN,

Defendant.

ORDER

People are—in increasing numbers—using their cell phones to record nude or sexually explicit photos and videos that are, in turn, shared with their lovers. But when a given relationship goes south, as most do, those pictures and videos remain in the hands of the ex. Some spurned lovers lash out by posting the videos and pictures on the Internet for all to see, including family, friends, and prospective employers. It's sometimes called revenge porn, which has a better ring than the more accurate non-consensual dissemination of sexually explicit images. Whichever you call it, more than three dozen states have made it a crime. Illinois is one of those states.

More than three years ago, Illinois enacted the Non-consensual Dissemination of Private Sexual Images statute. 720 ILCS 5/11-23.5. Rather than target disgruntled ex-boyfriends posting nude images on the Internet, though, the General Assembly enacted a statute that criminalizes all manner of dissemination of all manner of nude or sexually explicit pictures and portrayals for any purpose whatsoever.

The question presented is whether such a broad statute is compatible with due process, equal protection, and free speech.

I. Facts

Bethany Austin is charged in a one-count indictment with violating the Non-consensual Dissemination of Private Sexual Images statute. 720 ILCS 5/11-23.5(b). She filed a Motion to Dismiss in

which she argues the statute is unconstitutional both facially and as applied to the facts in her case. She never develops an as-applied argument, though, so it's not addressed here.

Notice of Ms. Austin's Motion was given to the Illinois Attorney General. *See* Ill. S. Ct. Rule 19. The Attorney General has thoroughly briefed and argued the issues raised in the Motion.

Ms. Austin's Motion alleges numerous facts not already of record in the case. But this she may do—even if the Motion only raises issues of law—and the State's failure to admit or deny those allegations results in them being accepted as proven for purposes of the Motion. *See* 725 ILCS 5/114-1(c)(stating that "[i]f the motion [to dismiss] alleges facts not of record in the case the State shall file an answer admitting or denying each of the factual allegations of the motion"). Regardless of whether admitted or denied, only properly pled, relevant factual allegations are considered.

The State filed a Response in support of the statute's constitutionality. The State also raises numerous factual allegations not of record in the form of anecdotal evidence found on various websites. Because not denied by Ms. Austin, those factual allegations will also be addressed.

The facts are simple. Ms. Austin dated Matthew for more than seven years. She, her three children, and Matthew lived together. Though Matthew was a self-confessed serial womanizer, Ms. Austin loved him and believed he was being faithful. They were engaged to be married.

Matthew's use of Apple products proved to be the couple's undoing. All data sent to or from Matthew's iPhone went to his iCloud, which was in turn connected to Ms. Austin's iPad. As a result, all texts sent by or to Matthew's iPhone automatically showed up on Ms. Austin's iPad. Matthew was aware of this data sharing arrangement and could have ended it at any time. But he didn't, which is how Ms. Austin found out about Matthew's relationship with Elizabeth.

One day, text messages between Elizabeth and Matthew popped up on Ms. Austin's iPad. Some of the texts included nude photos of Elizabeth. Three days later, both of them aware Ms. Austin had received the pictures and text messages on her iPad, Matthew and Elizabeth again texted each other. "Is this where you don't want to message [because] of her?" Elizabeth asked. Matthew replied, "No, I'm fine. [S]omeone wants to sit and just keep watching want [*sic*] I'm doing I really do not care. I don't know why someone would

wanna put themselves through that." Elizabeth texted, "I don't either. Soooooo baby . . . ."

The wedding was called off and Ms. Austin and Matthew spent the next three months trying to repair their relationship. The counseling didn't take, though, and they broke up. Matthew wanted to tell family and friends the split was mutual; Ms. Austin wanted to tell the truth. Matthew beat her to the punch by telling everyone they split because Ms. Austin was crazy and no longer cooked or did chores around the house.

In response to Matthew's claims, Ms. Austin wrote a letter with her version of events. In support, she attached to the letter four of the naked pictures of Elizabeth and copies of the text messages between Matthew and Elizabeth. The record doesn't specify how many copies of the letter went out and to whom they were sent. But at least one person—Matthew's cousin—received the letter, the texts, and the pictures.

Upon hearing from his cousin, Matthew reported the letter and its contents to the local police. Investigation commenced, and Elizabeth was interviewed. At first, Elizabeth said she was concerned about Ms. Austin's actions, and she would consider signing a criminal complaint. When next interviewed, she said the pictures were private and only intended for Matthew to see. Yet Elizabeth admitted both she and Matthew "were aware of the iCloud issue, but thought it had been deactivated at the time she sent the pictures." Still, Elizabeth never asked Ms. Austin to delete or otherwise dispose of any of the nude pictures.

Because she mailed the nude pictures of Elizabeth, Ms. Austin is charged with violating the Non-consensual Dissemination statute.

II. Analysis

Ms. Austin raises three challenges to the Non-consensual Dissemination statute. First, she claims the statute offends the Due Process Clauses of the United States Constitution and the Illinois Constitution because it doesn't have an adequate *mens rea* element. U.S. CONST. Amend. XIV § 1; ILL. CONST. OF 1970 Art. I § 2. Second, she claims the statute violates the Equal Protection Clause of the Federal Constitution. U.S. CONST. Amend. XIV § 1. Third, she claims the statute is a content-based restriction of speech in violation of the Federal and State Constitutions. U.S. CONST. Amend. I; ILL. CONST. OF 1970 Art. I § 4.

A. Initial Considerations

Two steps precede the constitutional analyses. Step one, construe the Non-consensual Dissemination statute. After all, "a court cannot determine whether the statute reaches too far without first knowing what the statute covers." *People v. Minnis*, 2016 IL 19563 ¶ 25. Step two, determine whether Ms. Austin's alleged conduct violates the statute as construed. If her conduct doesn't offend the statute, the court need not reach the constitutional issues. *See, e.g., People v. Lee*, 214 Ill.2d 476, 482 (2005)(courts should avoid addressing constitutional issues where the case can be decided on other grounds).

1. Statutory Interpretation

The Non-consensual Dissemination statute reads as follows:

§ 11-23.5. Nonconsensual dissemination of private sexual images.

(a) Definitions. For the purposes of this Section:

"Computer", "computer program", and "data" have the meanings ascribed to them in § 17-0.5 of this Code.

"Image" includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body.

"Intimate parts" means the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is a female, a partially or fully exposed nipple, including exposure through transparent clothing.

"Sexual act" means sexual penetration, masturbation, or sexual activity.

"Sexual activity" means any:

(1) knowing touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or
(2) any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; or
(3) an act of urination within a sexual context; or
(4) any bondage, fetter, or sadism masochism; or

(5) sadomasochism abuse in any sexual context.

(b) A person commits non-consensual dissemination of private sexual images when he or she:

(1) Intentionally disseminates an image of another person:
(A) who is at least 18 years of age; and
(B) who is identifiable from the image itself or information displayed in connection with the image; and
(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
(3) knows or should have known that the person in the image has not consented to the dissemination.

(c) The following activities are exempt from the provisions of this Section:

(1) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is made for the purpose of a criminal investigation that is otherwise lawful.
(2) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct.
(3) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the images involve voluntary exposure in public or commercial settings.
(4) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination serves a lawful public purpose.

(d) Nothing in this Section shall be construed to impose liability upon the following entities solely as a result of content or information provided by another person:

(1) an interactive computer service, as defined in 47 U.S.C. 230(f)(2);
(2) a provider of public mobile services or private radio services, as defined in § 13-214 of the Public Utilities Act; or
(3) a telecommunications network or broadband provider.

(e) A person convicted under this Section is subject to the forfeiture provisions in Article 124B of the Code of Criminal Procedure of 1963.

(f) Sentence. Non-consensual dissemination of private sexual images is a Class 4 felony.

720 ILCS 5/11-23.5. Enacted with an effective date just over three years ago, no case has yet been reported from the Illinois Appellate Court or Supreme Court interpreting the statute.

When construing a statute, the court's main goal is to determine and give effect to the General Assembly's intent. *Minnis* at ¶ 25. Though many factors apply, which will be addressed as they arise, "[t]he most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *Id.* Most importantly, the court is obligated, when reasonably possible, to construe the statute in a manner that upholds the statute's constitutional validity. *People v. Relerford*, 2017 IL 121094 ¶ 30 (*Relerford II*).

As its title suggests, the statute is aimed at prohibiting the dissemination of sexually explicit images of another without that other person's consent. The slang term for it is revenge porn, though neither revenge nor any other motivation is mentioned in the statute. Stereotypical revenge porn scenarios involve a couple using their cell phone to record their sexual congress or one sending naked pictures to the other via phone, tablet, or computer. Both participants undoubtedly hope at the time the images are created that the other will never share them with the world. Yet when their relationship ends, they are frequently posted on the Internet for the world to see. The person depicted is often embarrassed and sometimes the victim of harassment, stalking, threats of sexual assault, lost employment, and so on. These are very real and serious ramifications, and the majority of victims are female. Andrew Koppelman, *Revenge*

Pornography and First Amendment Exceptions, 65 EMORY L.J. 661, 661 (2016).

To address these concerns, Sen. Michael Hastings introduced Senate Bill 2694. The original legislation was aimed mostly at the stereotypical scenarios: It "[p]rovide[d] that a person who knowingly places, posts, or reproduces on the Internet a photograph, video, or digital image of a person in a state of nudity, in a state of sexual excitement, or engaged in any act of sexual conduct or sexual penetration, without the knowledge and consent of that person, is guilty of a Class 4 felony." 98th General Assembly, *Bill Status of SB 2694*, Illinois General Assembly, http://www.ilga.gov/legislation/BillStatus.asp?GA=98&DocTypeID=SB&DocNum=2694 &GAID=12&SessionID=85&LegID=78395 (last visited July 19, 2019). Many amendments were proposed: an intent to inflict emotional harm element; a definition of dissemination consistent with widespread public release; and the limitation to only images consisting of photographs, videos, and digital images. *Id.* Most obviously discarded on the road from original proposal to enacted statute was any reference whatsoever to the Internet. *Id.* So it's obvious the finished product—the statute ultimately enacted—is aimed at far more than the stereotypical revenge porn scenarios.

To prevail under the Non-consensual Dissemination statute, the State must prove beyond a reasonable doubt eight elements. Those are that the defendant (1) intentionally (2) disseminated (3) an image of another person who was (4) at least 18 years old, (5) identifiable from the image itself or from information displayed in connection with the image, and (6) who is engaged in a sexual act or whose intimate parts are exposed in whole or in part; and (7) the defendant obtained the image under circumstances in which she should have reasonably known or understood the image was to remain private; and (8) the defendant knew or should have known the person in the image has not consented to the dissemination. 720 ILCS 5/11-23.5(b). Many of these elements are straightforward, but a few need to be fleshed out.

The first, third, fourth, fifth, seventh, and eighth elements are simple. The first element, "intentional" is defined by statute, 720 ILCS 5/4-4; the third, fourth, fifth, sixth,[1] seventh, and eighth elements mean what they say.

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[1] Under 720 ILCS 5/11-23.5(a)(4), sexual activity includes "any bondage, fetter, or sadism masochism", but has no reference to a sexual context. So all photographs showing someone fettered or in

A glitch arises in the second element, which requires dissemination. According to the dictionary, something is disseminated when it is scattered widely or promulgated. *Disseminate*, THE AMERICAN HERITAGE DICTIONARY (2nd college ed. 1985). According to the State, though, dissemination occurs if the image is shared with only one additional person. So in the State's view, if Jane emails a naked selfie to her boyfriend John, then he disseminates the image when he shows it to his best friend Paul. But showing the picture to one person is not scattering it widely, though it can have that effect if Paul gets a copy and forwards the copy to a friend who forwards a copy and so on. The State's urged reading of the statute is thus consistent with the legislative intent and also explains why the original definition of dissemination and the requirement that the image be posted on the Internet disappeared during the legislative process: The General Assembly wanted the statute to cast a wide net.

Finally, the statute does not prohibit all dissemination of all nude or sexually explicit images. The statute lists four exempt activities. 720 ILCS 5/11-23.5(c). All four exemptions are affirmative defenses to the charged elements set forth in 720 ILCS 5/11-23.5(b). *People v. Tolbert*, 2016 IL 117846 ¶ 14 (noting that exemptions not descriptive of the offense need not be alleged in the complaint and proven by the State; they are affirmative defenses).

2. Statutory Application to the Facts Here

Based even on her version of events, a jury could find Ms. Austin guilty of violating the Non-consensual Dissemination statute. She (1) intentionally (2) mailed to Matthew's cousin (3) four photos of Elizabeth. In each of the photos, Elizabeth (4) is at least 18 years old, (5) can be identified from each photo, and (6) is nude. Further, because the nude selfies were accompanied by text messages directed at Matthew, (7) Ms. Austin obtained the photos under circumstances in which she should have reasonably known or understood they were to remain private between Elizabeth and Matthew. Finally, (8) Ms. Austin knew or should have known that Elizabeth had not consented to the dissemination. Malicious and mocking as Elizabeth and Matthew's text exchange may have been three days

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bondage—such as news photos of arrestees and prisoners, historic photos of slaves, and publicity posters of escape artists—would be included. This was probably not the General Assembly's intent, but it's not necessary to the analysis here.

after Ms. Austin got the photos, nothing in those texts can be construed as granting Ms. Austin permission to publish the pictures.

Because the State can thus prevail in a prosecution, the constitutional challenges must be addressed.

B. The Due Process Analysis

Ms. Austin argues that two of the Non-consensual Dissemination statute's *mens rea* requirements—those in 720 ILCS 5/11-23.5(b)(2)-(3)—offend due process. Under the challenged provisions, Ms. Austin can be convicted if, in relevant part, she *should have reasonably known or understood* that Elizabeth intended the disseminated images to remain private, 720 ILCS 5/11-23.5(b)(2), and she knew or *should have known* that Elizabeth had not consented to the dissemination. 720 ILCS 5/11-23.5(b)(3). The italicized terms, she argues, don't pass constitutional muster because they constitute a mere negligence standard. In support, she cites the Illinois Appellate Court's decision in *People v. Relerford*, 2016 IL App (1st) 132531 ¶¶ 26-33 (*Relerford I*).

In *Relerford I*, the Appellate Court reviewed certain provisions of the stalking, 720 ILCS 5/12-7.3(a)(1)-(2), and cyberstalking, 720 ILCS 5/12-7.5(a)(1)-(2), statutes. The challenged provisions allowed conviction if, in part, the defendant knew or should have known his conduct would distress a reasonable person; it was irrelevant whether the defendant was actually aware his conduct was causing distress. Relying mainly on *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Appellate Court held that the reasonable person standard of intent in a criminal case violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, U.S. CONST. Amend. XIV § 1, and struck down the challenged portions of the two statutes. *Relerford I* at ¶¶ 27, 31, 33.

Ms. Austin's due process arguments fail, though. The Appellate Court's ruling was appealed to, and affirmed by, the Illinois Supreme Court, but only after the latter expressly rejected the Appellate Court's interpretation of *Elonis* and its due process analysis. *Relerford II* at ¶¶ 19-22. "Contrary to the views adopted by the [A]ppellate [C]ourt," the Supreme Court wrote, "substantive due process does not categorically rule out negligence as a permissible mental state for imposition of criminal liability, and *Elonis* does not suggest such a categorical rule." *Id.* at ¶ 22.

In her Reply, Ms. Austin urges the Supreme Court to reconsider its position. And this the Supreme Court is free to do. But unless and until such time as that occurs, *Relerford II* binds all Illinois trial

and appellate judges. A negligent *mens rea* in a criminal statute thus satisfies due process.

C. The Equal Protection Analysis

Ms. Austin next argues the Non-consensual Dissemination statute offends equal protection. Under the statute, individuals can be punished for non-consensual dissemination, but internet service providers, telecommunications and broadband providers, and the like are immune from prosecution. 720 ILCS 5/11-23.5(d). In response, the State argues equal protection is not offended because individuals subject to criminal liability are not similarly situated to the exempted communications entities. *See In re Derrico G.*, 2014 IL 114463 ¶ 92 (noting that equal protection doesn't apply to classifications of dissimilar entities).

Neither argument is precisely correct. Ms. Austin argues that she is similarly situated to communications entities because the exemption is absolute. In other words, because Verizon is exempt as a mobile service provider, Ms. Austin claims it cannot be prosecuted for violating the statute even if it meets all other elements of the offense by, for example, intentionally posting nude pictures of customers on its Facebook page. But that's not true: The exemption applies only when dissemination is "the result of content or information provided by another person," 720 ILCS 5/11-23.5(d), and the legislative intent seems clear that this applies only to Verizon acting as the conduit of—rather than active participant in—the prohibited dissemination. The exemption only extends to the classic revenge porn scenario where Verizon can't be held liable when its cell phone service is the unknowing carrier of the nude images of the individual's girlfriend.

The State, in turn, misses the one situation in which the exemptions permit something approaching active participation in the dissemination. Communications entities are mere conduits used by individuals to post revenge porn, the State claims. Individuals thus act intentionally when they disseminate the pictures, but communications entities don't because they don't even know they are disseminating pictures. Yet what about the revenge porn websites—and there are apparently dozens of them—who expressly encourage non-consensual dissemination in violation of the statute? They are active participants acting intentionally, and in an arguably far more egregious manner because their sites may reach millions. Still, they are expressly exempt as interactive computer services. 720 ILCS 5/11-23.5(d)(1); *see also* 47 U.S.C. § 230(f)(2) (defining interactive computer service). Ms. Austin is thus correct that some revenge

porn websites may escape punishment. But that's because the United States Congress has preempted the states from punishing these internet service providers. 47 U.S.C. § 230(e)(3).

The individuals subject to prosecution by the Non-consensual Dissemination statute are thus not similar to the exempted entities. Unlike the conduits, individuals charged know the nature of the images they are disseminating; and unlike the websites, individuals charged are not exempt from prosecution by Federal preemption.

The Non-consensual Dissemination statute thus does not violate equal protection.

D. The Free Speech Analysis

The main argument—and the one on which both parties focused their attention in their pleadings and during arguments—is that the Non-consensual Dissemination statute is an unconstitutional content-based restriction of speech.

The First Amendment prohibits any law that abridges the freedom of speech. U.S. CONST. Amend. I. The Illinois Constitution is even broader, insuring everyone's right to "speak, write, and publish freely, being responsible for the abuse of that liberty." ILL. CONST. OF 1970 Art. I § 4. A violation of the former always constitutes a violation of the latter.

Ms. Austin's argument is in three parts. The Non-consensual Dissemination statute is a content-based speech restriction and thus subject to strict scrutiny; the statute serves no compelling government interest; and even if it does serve a compelling government interest, the statute is not narrowly tailored to serve that interest. The statute is thus facially invalid.

The State responds that Ms. Austin's argument fails for three reasons. The Non-consensual Dissemination statute governs only speech that constitutes a true threat or fighting words, as a result of which the governed speech has no constitutional protection; if that's wrong, then the First Amendment still gives no right to disseminate truly private facts; and if that's also wrong, then the statute is narrowly tailored to serve a compelling government interest.

1. Is Speech Restricted?

The first and most obvious issue is whether the Non-consensual Dissemination statute constitutes a restriction of speech. Under the statute, persons can be convicted for intentionally disseminating prohibited images, which appears to prohibit conduct rather than speech. But giving someone a picture or video constitutes speech

within the meaning of the First Amendment if the purpose of the delivery is to provide the recipient with the speech contained therein. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (noting that delivery of a tape recording, a handbill, and a pamphlet are all protected speech when the purpose of delivery is to provide the recipient with the speech contained within). Prohibiting the delivery of a nude or sexually explicit picture or video is thus a restriction of speech. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (applying the First Amendment freedom of speech to a statute barring photos and videos of animal cruelty); *United States v. Playboy Entertainment Grp.*, 529 U.S. 803, 811 (2000) (applying the First Amendment freedom of speech to Federal regulations aimed at sexually explicit television programming).

The Non-consensual Dissemination statute restricts speech rather than conduct because the purpose of delivery is to provide the audience with the speech contained therein—the nude or sexually explicit images.

2. Is This A Content-Based Restriction?

The next question is whether the speech restriction here is content-based. A government regulation of speech is content based where it targets (1) speech defined by specific subject matter; (2) speech defined by its function or purpose; or (3) speech restrictions that appear content-neutral, but cannot be justified without regard to the content of the regulated speech. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The first type—speech defined by specific subject matter—is the easiest and most common, and it's applicable here.

In *Reed*, the town's ordinance "identifie[d] various categories of signs based on the type of information they convey, then subject[ed] each category to different restrictions." 135 S. Ct. at 2224. Ideological signs, for example, could be twenty square feet in area and placed in all zoning districts without time limit, but political signs could only be sixteen square feet in area if placed on residential property and couldn't be in place for more than seventy-five days. *Id.* at 2224-25. The District Court and the Court of Appeals found the sign ordinance content-neutral—and upheld its constitutionality—because enforcement required no inquiry into the substance of the ideologies or politics being advanced; the ordinance treated communists and conservatives alike. *Id.* at 2226. The Supreme Court disagreed with the content-neutral categorization. Because the ordinance created sign categories based on subject matter

and then treated the categories differently, the Court held the ordinance imposed a content-based regulation of speech. *Id.*

Similarly, the regulation in *Playboy Entertainment* was a content-based restriction because it targeted only sexually explicit movies rather than all movies. 529 U.S. at 811.

Likewise, the criminal statute in *Stevens* was a content-based restriction because it prohibited only photos and videos depicting animal cruelty rather than all photos and videos. 559 U.S. at 468.

Similarly, the Non-consensual Dissemination statute is a content-based speech restriction because it doesn't target all pictures, videos, depictions, and portrayals, but only those showing nudity or sexual activity.

3. Is The Targeted Speech Protected?

But as the State points out, not all content-based restrictions trigger First Amendment protections. Categories of unprotected speech include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Stevens*, 559 U.S. at 468-69 (citations omitted). The parties agree that the images prohibited by the Non-consensual Dissemination statute don't fit into any of those unprotected categories—the most notable for purposes here being the obscenity category. *See, e.g., Miller v. California*, 413 U.S. 15, 24 (1973)(defining obscene speech as that which, when taken as a whole, appeals to the prurient interest, portrays sexual activity in a patently offensive way, and has no serious literary, artistic, political, or scientific value).

The State alleges, however, that the prohibited images are constitutionally unprotected true threats or fighting words. The State isn't clear which applies because it conflates two distinct categories of unprotected speech. Speech "qualifies as a true threat if it contains a 'serious expression of an intent to commit an act of unlawful violence.'" *Relerford II*, 2017 IL 121094 ¶ 37. Fighting words, on the other hand, are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). The former threatens violence on a listener or third party, while the latter provokes a violent reaction by the listener or third party. Credibly threatening to murder or beat someone is thus a true threat; hurling racial slurs at a minority constitutes fighting words.

In support of whichever argument it makes—and the court will consider both—the State asserts several unfounded presumptions. First, the State claims that "the dissemination of sexually explicit images of another without their consent serves no purpose other than to intimidate the victim." State's Response at 10. But that's demonstrably untrue, as the facts here attest. Ms. Austin didn't disseminate Elizabeth's nude pictures to intimidate Elizabeth; she did it to defend herself from Matthew's slander—to convince friends and family that Matthew's philandering, rather than her alleged craziness and laziness, was the reason for the couple's broken engagement. And where Matthew had already labeled her crazy, those photos were arguably the best evidence to end the argument. After all, who would believe the conspiracy theories of a crazy person? Take the more typical scenario, too. A girlfriend texts nude selfies to her boyfriend who, in turn, shows them to his buddies. The boyfriend has violated the statute, but he did it to brag rather than to bully.

Is non-consensual dissemination of prohibited images *sometimes* done with the intent to intimidate? Sure. But the statute here doesn't require it.

Second, the State alleges non-consensual dissemination of prohibited images "serves no purpose other than to cause fear and suffering in its victims." State's Response at 14. Also untrue. What if the person depicted is an exhibitionist? They may not have consented, but they're not harmed; they're delighted by the dissemination. Or what if the person depicted is deceased? For example, John rummages through Grandma's attic after she dies and comes across a sketchbook containing nude drawings of Grandma by Grandpa. The statutory definition of image includes depictions and portrayals, which encompass works of art. *See Depict*, THE AMERICAN HERITAGE DICTIONARY (defining depict as to represent in picture, sculpture, or words). And the sketchbook is hidden in the attic, so the trier of fact can reasonably infer that Grandma wanted the images to remain private and never consented to their release. As a result, if John shows the artwork to other family members, he violates the statute. But how has Grandma suffered where she's dead?

Again, does non-consensual dissemination of prohibited images *sometimes* cause fear and suffering. To be sure. But again, the statute neither inquires into nor requires any such harm.

a. True Threats

After asserting the above presumptions, the State cites *Virginia v. Black*, 538 U.S. 343 (2003), which illustrates the constitutional peril of presumptive harm or purpose. In *Black*, the Supreme Court analyzed a Virginia law that criminalized cross burning with the intent to intimidate, but where the mere act of cross burning was *prima facie* evidence of intimidation. *Id.* at 347-48. Cross burning has long been used to intimidate, as in the case of the Ku Klux Klan burning it in the front lawn of a home. *Id.* at 365. Because of that "long and pernicious history as a signal of impending violence," the Court wrote, Virginia could constitutionally prohibit cross burning when done with the intent to intimidate. *Id.* at 362-63. But presuming intent to intimidate from the mere act of burning a cross is another thing.

The Virginia statute's *prima facie* evidence provision created a rebuttable presumption that any time a cross was burned it was with the intent to intimidate. *Id.* at 365. Conviction was thus permitted in all cross-burning cases where defendants exercise their constitutional right to not present evidence to rebut the presumption of improper purpose. *Id.* Even where defendants present a defense, the rebuttable presumption "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Id.* By far the biggest problem with the *prima facie* evidence provision was its infringement on protected speech. To be sure, cross burning has a long history of being used to intimidate. Yet cross burning has other purposes, like symbolizing an ideology—the Klan burns it at their meetings to symbolize common purpose—and artistically depicting history, as in the movie *Mississippi Burning*. *Id.* at 365-66. Both are constitutionally protected uses of cross burning that cannot be chilled or stifled, as a result of which the *prima facie* evidence provision was unconstitutional on its face. *Id.*

Sure, *Black* is distinguishable. *Black* permits criminalizing historically intimidating speech when done with the purpose to intimidate; the Non-consensual Dissemination statute criminalizes unthreatening speech that has no violent history when done for any purpose whatosever. So if it can't be done in *Black*, how can it be done under the statute here? To be sure, disseminating the pictures can cause the persons depicted to suffer embarrassment and ridicule, but there is no threat of actual and unlawful violence. *See, e.g., Relerford II* at ¶ 38 (pointing out that the State offered "no cogent argument as to how a communication to or about a person that neg-

ligently would cause a reasonable person to suffer emotional distress . . . constitutes a 'serious expression of an intent to commit an act of unlawful violence'"). Even if suffering embarrassment and ridicule is sufficient to constitute a true threat, the statute doesn't require proof of intent to inflict that harm. Rather, as the State points out, the statute presumes ill intent. Under *Black*, that's a problem.

Also, as in *Black*, the Non-consensual Dissemination statute chills protected speech. For example, what if the pictures depict sexual activities on school grounds between a principal and her underling—as allegedly occurred in one of the cases cited in the State's Response—or in the Oval Office between the President of the United States and his intern? Dissemination of those images would probably serve "a lawful public purpose" and be thus exempt from criminal liability. 720 ILCS 5/11-23.5(c)(4). Yet the exemptions are affirmative defenses that must be raised by defendants and deemed applicable by a jury. *Tolbert*, 2016 IL 117846 ¶ 14. So just like the rebuttable presumption clause in *Black*, the exemptions here aren't raised unless defendants forego their constitutional right to not present evidence; juries can still disregard the affirmative defense and convict based on protected speech; and protected speech will thus be chilled by fears of prosecution and conviction.

The Non-consensual Dissemination statute is not aimed at true threats. If it were, it would be unconstitutional pursuant to *Black*.

b. Fighting Words

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court considered whether a cross burning statute was constitutional where it was limited to conduct amounting to fighting words. (Maybe this explains why the State conflated the categories of true threats and fighting words: Both can apply to the same speech.) Initially, the Court noted that even speech that may be regulated because of its constitutionally proscribable content is not "entirely invisible to the Constitution." *Id.* at 383. So "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." Id. at 386. For example, the government can outlaw slander, but it can't outlaw *only* slander against the government. *Id.* at 384. Likewise, the St. Paul ordinance was facially unconstitutional because it didn't prohibit all fighting words, but implicitly targeted only those that "insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender.'" *Id.* at 391. And that is both a content- and viewpoint-based restriction of speech in violation of the First Amendment. *Id.* at 391-92.

In *R.A.V.*, the Court also disregarded any distinction between the type of speech being regulated, on the one hand, and the injury caused on the other. Justice Stevens's concurrence asserted that the challenged ordinance "regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the *harm* the speech causes." *Id.* at 433 (Stevens, J., concurring) (emphasis in original). But that's wordplay, the Court held. What differentiates the harm caused by the prohibited speech from the harm caused by other fighting words is the distinctive idea being conveyed by the distinctive message. *Id.* at 392-93. Racial slurs may cause more harm than insulting your mother, but that's because racial slurs are a more odious type of fighting words than mother jokes.

Though distinguishable, much of *R.A.V.* applies here. First and most obviously, the Non-consensual Dissemination statute does not target fighting words. The State claims that because the prohibited images injure the person depicted, they are fighting words. But fighting words injure or provoke violence in the *audience* of the speech, not the *subject* of the speech. And the audience—those who see naked or sexual pictures—are rarely injured or incited to violent reaction.

Second, even if the prohibited pictures are fighting words, they aren't always prohibited. Remember, no crime occurred here when Elizabeth first sent the nude pictures to Matthew. So why can Ms. Austin be prosecuted for defending herself from slander by showing someone Elizabeth's nude picture, but Elizabeth can't be prosecuted for intentionally disseminating the same picture to Matthew? Or, to change the facts a bit, why can Elizabeth send the pictures to Matthew to attempt to entice him out of his relationship with Ms. Austin, but Ms. Austin cannot, upon discovering the pictures, show them to Elizabeth's husband to shame her into staying away from Matthew? This is thus a forbidden viewpoint-based restriction. *R.A.V.* was clear: The government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

The Non-consensual Dissemination statute is not aimed at fighting words. If it were, it would be unconstitutional pursuant to *R.A.V.*

4. May The State Still Restrict The Targeted Speech?

Restricting the dissemination of nude or sexual images still complies with the First Amendment, the State next argues, because

those images are not of legitimate concern to the public. In support, the State equates the statute to the civil tort of public disclosure of private information.

In *Green v. Chicago Tribune Co.*, 286 Ill. App. 3d 1 (1st Dist. 1996), the Appellate Court discussed the public disclosure tort. To prevail, the plaintiff must prove the defendant (1) publicized (2) the plaintiff's private, not public, life, and that the matter publicized was (3) highly offensive to a reasonable person and (4) not of legitimate public concern. *Id.* at 5. Thus, the Chicago Tribune could be held liable for entering a dying child's hospital room without permission, photographing his dead body, overhearing his mother whisper her last words to him, and subsequently publishing the pictures and the mother's last words in its newspaper. *Id.* at 12-13.

Compare those tort elements to the Non-consensual Dissemination statute. The tort requires broad dissemination to the public at large, RESTATEMENT (SECOND) OF TORTS § 652D comm. a, or to a group with a special relationship to the plaintiff, like all fellow employees. *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 980-81 (1st Dist. 1990). In *Green*, for example, the pictures and last words were published in a newspaper with massive circulation, which was sufficient to meet the first tort element. 286 Ill. App. 3d at 6. The statute here, on the other hand, requires only dissemination to one person.

Second, the fourth tort element expressly excludes matters of public interest. *Green*, 286 Ill. App. 3d at 5. The burden is thus on the plaintiff to negate dissemination for a public purpose. The statute here makes public purpose an affirmative defense, though, which shifts the burden of proof to the defendant.

Third, and most obvious, the tort only results in a money judgment for broadly publishing private facts. The statute here permits imprisonment for showing one person a picture.

The State also cited *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981), the facts of which undermine the State's position. In *Gilbert*, the plaintiff was a doctor whose name, photograph, and other personal facts were published as part of an article about two cases in which the doctor appeared to have committed malpractice. *Id.* at 306-07. Though the 10th Circuit held that non-newsworthy private facts are not protected by the First Amendment, newsworthy private facts do enjoy such protections. *Id.* at 308. And, as relevant here, the court noted that the plaintiff's photograph "strengthened the impact and credibility of the article," *id.*, just as Ms. Austin's dissemination of Elizabeth's texts and pictures undoubtedly

proved to all recipients that Matthew had lied about the cause of the break up. A picture is, after all, worth a thousand words.

Green, *Miller v. Motorola*, and *Gilbert* all relied on the tort of public disclosure of private information as proposed in RESTATEMENT (SECOND) OF TORTS § 652D (1977). A quick look at § 652D demonstrates the tenuous nature of using a civil tort to validate a criminal statute. "This Section provides for tort liability involving a judgment for damages for publicity given to true statements of fact," the Special Note reads. "It has not been established with certainty that liability of this nature is consistent with free-speech and free-press provisions of the First Amendment to the Constitution." *Id.* This uncertainty is exacerbated where the Supreme Court has disavowed any notion that its proscription of limited areas of speech—like fighting words and true threats—establishes "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. *Stevens*, 559 U.S. at 472. So if a type of speech—like showing someone truthful, if private, nude or sexual images—is not already proscribed, it's not likely to be proscribed anytime soon.

To the contrary, the Supreme Court Court has repeatedly refused "to answer categorically whether truthful publication may ever be punished consistent with the First Amendment." *Bartnicki*, 532 U.S. at 529. The Court has, however, consistently refused to recognize a privacy restriction on truthful speech. In *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989), a Florida rape shield law made it unlawful for a newspaper to print or publish the name of a sex assault victim. *Id.* at 526. A newspaper trainee lawfully obtained an unredacted police report of a rape. *Id.* at 527. The newspaper printed a brief article about the incident, including the victim's full name. *Id.* The victim sued under the rape shield law; the newspaper defended by claiming the imposition of sanctions under the law offended the First Amendment. *Id.* at 528. The trial judge denied the newspaper's motion for directed verdict, holding the statute struck an appropriate balance between the victim's privacy rights and the First Amendment rights at issue. *Id.* The judge then directed verdict against the newspaper and in favor of the victim on the issue of liability. *Id.* at 528-29. The Florida Appeals Court affirmed; the State Supreme Court denied discretionary review; and the United States Supreme Court reversed. *Id.* at 529. "[W]here a newspaper has published truthful information which it has lawfully obtained, punish-

ment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order;" and that wasn't present in the case. *Id.* at 541.

Nor is *Florida Star* an outlier. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court reversed a civil damages award against a newspaper that had published the lawfully obtained name of a rape-murder victim. In *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977), the Court found unconstitutional a trial court's order prohibiting a newspaper from publishing the name and photograph of a child involved in a juvenile proceeding. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court found unconstitutional the criminal prosecution under a state statute of two news agencies that had lawfully obtained, and then published, the name of a juvenile court defendant. Finally, in *Bartnicki*, 532 U.S. at 517-18, the Court held that the First Amendment precluded civil liability for breach of privacy where a radio station broadcast tapes of illegally intercepted cell phone conversations concerning a matter of public interest where the radio station, though aware of the illegal interception, was not party to any illegal activity.

The Court has thus invalidated a string of laws protecting the privacy of rape victims, juveniles, and those illegally spied upon. How is Elizabeth's privacy interest in a nude image she created and initially disseminated more sacrosanct than a rape victim's privacy interest?

The Court has thus far only recognized limited civil recourse, which highlights the constitutional infirmities of the Non-consensual Dissemination statute. In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991), the Court held the First Amendment didn't preclude suing a newspaper under a theory of promissory estoppel where the newspaper breached its promise to keep an informant's name private in exchange for information. The reasoning was simple: Laws of general application don't violate the First Amendment just because they have an incidental effect on reporting the news. *Id.* at 669. Same goes for speech restrictions, where "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R.A.V.*, 505 U.S. at 385. But suing—or prosecuting—based on contract theory requires proof of a meeting of the minds or detrimental reliance on a promise of privacy. That's not required by the statute here.

Take away the tort justification and what's left is the State's argument that "the First Amendment tolerates the regulation of the public disclosure of private information where that information is not of legitimate concern to the public." State's Response at 14. But the whole point of the First Amendment is that the government doesn't get to decide what speech is important and what isn't. There is no "test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." *Stevens*, 559 U.S. at 471. After all, "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *Id.* at 479 (emphasis in original).

The speech targeted here enjoys First Amendment protections.

5. Content-Based Free Speech Analysis

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. This is usually referred to as strict scrutiny. And the State argues the Non-consensual Dissemination statute survives strict scrutiny.

a. Is There A Compelling Interest?

The State claims the Non-consensual Dissemination statute serves a "compelling government interest in protecting the health and safety of the victims." State's Response at 16. In support, the State cites *New York v. Ferber*, 458 U.S. 747 (1982), in which the State claims the United States Supreme Court "held that content-based restrictions on child pornography satisfy strict scrutiny." State's Response at 17. But that's wrong. In *Ferber*, the Court never reached a strict scrutiny analysis. Rather, the Court held that—like true threats, fighting words, and obscenity already discussed above—child pornography is not entitled to First Amendment protection. *Ferber*, 458 U.S. at 765.

In *Ferber*, the Court cited five reasons why child pornography didn't merit First Amendment protection. First, states have long been recognized as having a compelling interest in protecting the physical and emotional well-being of minors, and using children as the subjects of pornography harms their physiological, emotional, and mental health. *Id.* at 756-58. Second, the distribution of child pornography is intrinsically related to the sexual abuse of minors

in two ways: One, it creates a permanent record of their abuse; and two, the production of child pornography, and thus the abuse of the minors depicted, will continue if distribution is not prohibited and prevented. *Id.* at 759-61. Third, by taking away the economic motive for producing child pornography, the abuse of the children involved in its production ends. *Id.* at 761-62. Fourth, "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest." *Id.* at 762. If needed for artistic purposes, the Court noted, someone over age 18 could be used. *Id.* at 763. Fifth, "because it bears so heavily and pervasively on the welfare of children engaged in its production," finding no First Amendment protection for child pornography is compatible with the Court's jurisprudence on proscribed speech. *Id.* at 763-64.

None of those justifications apply here. First, no minors are protected by the Non-consensual Dissemination statute, which expressly applies only to those pictured who are over 18 years of age. 720 ILCS 5/11-23.5(b)(1)(A). The compelling government interest in preventing the exploitation of minors—those who by legal definition need protection from exploitation—doesn't extend to preventing exploitation of adults.

Second, the non-consensual dissemination of prohibited images under the statute is not intrinsically tied to the production of those images. Child pornography cannot be produced without abusing a child; child pornography can thus be banned so children don't suffer abuse in its production. The images at issue under the statute, though, are willingly produced by consenting adults.

Third, there is no economic motive targeted by the Non-consensual Dissemination statute. Rather, the State argues, the statute is directed at dissemination motivated by revenge, intimidation, or humiliation—though no such illicit motivation is mentioned in, or required by, the statute.

Fourth, sexually explicit pictures of children are far different from sexually explicit pictures of adults. The Court has repeatedly held that, where the subjects are adults, non-obscene nude or sexually explicit photos, videos, drawings, paintings, and the like enjoy the full protection of the First Amendment. *Playboy Entertainment Group*, 529 U.S. at 811 (where sexually explicit programming wasn't alleged to be obscene, "adults have a constitutional right to view it" and Playboy has the First Amendment right to transmit it).

Fifth, the Non-consensual Dissemination statute doesn't bear "heavily and pervasively on the welfare of children engaged in its production." *Ferber*, 458 U.S. at 763-64. Again, by its terms the statute doesn't apply to children. And prohibiting non-obscene nude or sexually explicit images is incompatible with the Court's First Amendment jurisprudence on proscribed speech. *Miller v. California*, 413 U.S. at 27 (holding that no one can be prosecuted for showing obscene materials unless the materials depict "patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed").

Compare *Ferber* to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Supreme Court examined a statute that prohibited sexually explicit images that purported to depict minors, but were produced without any children. *Id.* at 239. By its terms, the Court noted, the statute criminalized Renaissance paintings depicting scenes from classical mythology and movies, "filmed without any child actors, if a jury believes an actor 'appears to be' a minor engaging in 'actual or simulated . . . sexual intercourse.'" *Id.* at 241. Neither involves actual children, so no children are harmed in producing the images. *Id.* Still, Congress found those materials pose a harm to children because they may be used to goad children into sexual activity and they may arouse pedophiles. *Id.* Yet these proposed harms, unlike those justifying the proscription in *Ferber*, spring from the content—rather than the production—of the images. *Id.* at 242. What's more, pedophiles may use "cartoons, video games, and candy [to lure children,] yet we would not expect those to be prohibited because they can be misused." *Id.* at 251. The Court struck down the statute because "[t]he mere tendency of speech to encourage unlawful acts is not sufficient reason for banning it." *Id.* at 253.

Ferber and *Free Speech Coalition* thus illustrate how narrowly the Supreme Court defines unprotected speech and compelling government interests, which does nothing to save the broadly drafted statute here.

Continuing to insist that the Non-consensual Dissemination statute targets revenge porn, though, the State makes unsubstantiated claims about the effects of the targeted speech. Revenge porn, the State claims, "creates in its victims a pervasive fear of unlawful violence, . . . causes significant emotional distress . . . , and can pose serious physical risks, including suicide, . . . attacks by third parties who view the disseminated images[, and i]t has been used to coerce

victims to endure domestic violence, rape, and unwilling participation in the sex trade." State's Response at 17. No source is cited to substantiate the existence and extent of these dangers, though. The claims are little more than speculation. The State has thus not shown "an 'actual problem' in need of solving" and the need to curtail free speech to actually solve the identified problem. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). Legislative and academic predictions of harm do not show a compelling government interest; only unambiguous proof will suffice. *Id.* at 799-800.

Even if what the State claims is true—many who see the prohibited images will be driven to break the law—that's not a compelling reason to ban dissemination of the images. Remember, the claim that virtual child pornography only "whets the appetites of pedophiles and encourages them to engage in illegal conduct," was—even if true—insufficient justification for a statute. *Free Speech Coalition*, 535 U.S. at 253. Same here. No one is harmed in the making of the images. And if someone is harmed in their dissemination, then Illinois already has laws punishing intimidation, extortion, domestic violence, sexual assault, eavesdropping, and the like.

Another problem with the State's claim that the Non-consensual Dissemination statute targets revenge porn is that no illicit motive is required to violate the statute. Remember the fate of the cross burning statute in *Black*? 538 U.S. at 365-66 Motive matters when the government seeks to suppress any speech of any kind. Yet the statute here wholly disregards motive. So revenge porn—as it's commonly understood—is but a small part of the speech targeted by the statute.

Consider actions punishable by the Non-consensual Dissemination statute. Here, for example, Ms. Austin is being prosecuted for sharing pictures she lawfully received to defend herself from slander. She could also be prosecuted, the State contended, for showing Elizabeth's husband the pictures to inform him of the affair. Where is the government's compelling interest in restricting speech to permit slander and to shield extramarital affairs?

Ponder, too, the artistic implications. Those racy pictures Grandpa drew of Grandma discussed above? The State argued that disseminating the drawings—including selling them as part of the estate sale—may violate the statute. Even if Grandpa was Pablo Picasso or—as in the dissemination of the secretly and privately created Helga Paintings—Andrew Wyeth.

On the other hand, what if a statute prohibited dissemination—whether by word of mouth or the Internet—of a person's past sexual promiscuity (President Clinton), criminal record (Pee-wee Hermann), racist (Paula Deen) or sexist (Sen. Al Franken) comments, radical political views (Alger Hiss), or reputation for dishonesty (President Nixon)? Millions have suffered embarrassment, humiliation, job loss, and social ostracism when their secrets got out, but the First Amendment protects the right to truthfully spread those secrets, even if the subject isn't already famous. The government, likewise, has no compelling interest in shielding those secrets from employers and neighbors. How is revenge porn any different? Because it is pictorial and thus more convincing than a whisper?

By not also outlawing oral or typewritten dissemination of private secrets, however, the Non-consensual Dissemination statute is underinclusive, which belies its claimed justifications. In *Brown*, 564 U.S. at 789, the state banned children from purchasing violent video games. The state claimed the ban served a compelling interest in preventing the harm caused to minors by violent video games. *Id.* at 799. But the state didn't ban oft-violent "Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns." *Id.* at 801-02. That alone was sufficient to defeat the statute because "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 802.

The same applies to the statute here. If the government has a compelling interest in prohibiting the dissemination of nude or sexually explicit images by one party in a relationship, then the government should also prohibit that party from orally describing—be it bragging or belittling—the other partner's nude image or their sexual activities together. Words are, after all, an audible depiction.

The State thus offers no compelling justification for the Non-consensual Dissemination statute.

b. Is The Statute Narrowly Tailored?

Content-based speech restrictions must also be narrowly tailored to serve the government's compelling interest. *Reed*, 135 S. Ct. at 2231. Turning the requirement on its head, the State claims the Non-consensual Dissemination statute's overinclusiveness supports a finding that the statute is narrowly tailored.

For example, the State discounts the need for a motive element because requiring proof that "the defendant intended to cause distress to his victim would leave unprotected victims harmed by perpetrators motivated by a desire to entertain, to make money, or to gain notoriety." State's Response at 18. There are two problems with that claim. First, the State presumes the person depicted in the prohibited image is harmed, but the statute requires no such showing. After all, Paris Hilton's career only got better after her sexually explicit tapes showed up on the Internet. So by not requiring injury, the statute chills speech where no demonstrable or proven harm occurs. In this way, the statute is overinclusive—and thus not narrowly tailored—because it's preventing speech that doesn't serve the compelling interest asserted. *Brown*, 564 U.S. at 804. Second, as in the numerous examples above, the statute also punishes certain artistic expression and innocent spouses. In *Black*, 538 U.S. at 365-66, the Klan could not be punished for burning a cross at one of its rallies even if a third party inadvertently stumbled across the scene and was insulted or became fearful; the Klan only violated the statute when it burned the cross with the specific intent to intimidate a third party. Motive mattered because it differentiated between protected speech and speech with illicit purpose—and the same speech can be both depending on the motivation. *Id.* at 366. Again, the statute is overinclusive—and thus not narrowly tailored—because it lacks an illicit motive element.

The State also argues that the Non-consensual Dissemination statute cannot serve the government's compelling interest if limited to offenses only by current and former intimate partners. State's Response at 19. Curious, since the State relies so heavily on revenge porn elsewhere only to now discard this, the central feature of revenge porn. The State is right, though: "Friends, co-workers, and strangers can inflict just as much harm by publicly disseminating private sexual images." *Id.* But that assertion only highlights another problem with the statute—its' presumption of privacy.

Both the State and the Non-consensual Dissemination statute implicitly presume the person depicted intended the image to remain private. But conviction can occur where the defendant "obtains the image *under circumstances* in which a *reasonable* person would know or *understand* that the image was to remain private." 720 ILCS 5/11-23.5(b)(2)(emphasis added). This is rife with problems.

One, the statute requires the defendant to speculate on the inner thoughts of another—"I wonder . . . did she want me to keep this between us?" Guessing wrong can result in three years in prison.

Two, the statute requires no showing the person depicted actually wanted the image to remain private; all that matters is whether a reasonable person would *believe* they wanted it to remain private. This, in turn, leads to the default conclusion that of course they wanted it to remain private, because what reasonable person wants their naked pictures posted all over the Internet?

Three, the statute presumes a privacy intent where privacy cannot reasonably be expected. Reasonable expectations of privacy are thoroughly analyzed in Fourth Amendment jurisprudence, as is the third-party rule. Under the third-party rule, someone who shares information with a third party gives up any expectation of privacy in the shared information regardless of whether she intended the third party to keep the secret. *Carpenter v. United States*, 201 L. Ed. 2d 507, 523-24 (2018). Applied here, when a girlfriend texts a nude selfie to a third party—her boyfriend—she gives up all expectations of privacy in the images. And if she cannot reasonably expect that the image remain private, then didn't the act of sharing it in the first place demonstrate she never *intended* the image to remain private?

The presumption of privacy thus leads to application of the statute where no actual intention of privacy exists. As with the presumption of harm and absence of an illicit motive element, this means the statute is overinclusive and thus not narrowly tailored to serve only the government's compelling interest. *Brown*, 564 U.S. at 804. Nor is the overinclusiveness in combating the government's claimed compelling interest cured by the underinclusiveness of the speech targeted by the Non-consensual Dissemination statute. "Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny." *Id.* at 805.

The exemptions, however, are far and away the greatest concern with the Non-consensual Dissemination statute. Remember, four activities are exempt from the speech criminalized by 720 ILCS 5/11-23.5(b). Those activities include dissemination for a lawful public purpose, 720 ILCS 5/11-23.5(c)(4), and dissemination of images involving voluntary exposure in public or a commercial setting. 720 ILCS 5/11-23.5(c)(3). Keep in mind, though, the exemptions are affirmative defenses. So unless the State's evidence raises the issue, the defendant must present evidence to raise the affirmative defense before the burden shifts back to the State to disprove

the affirmative defense by proof beyond a reasonable doubt. *People v. Reddick*, 123 Ill.2d 184, 195-96 (1988).

The Non-consensual Dissemination statute thus permits prosecution and imprisonment for disseminating for any reason whatsoever any nude or sexually explicit image. The State can prosecute someone for disseminating prohibited images for a lawful public purpose—like publishing pictures of a politician and his mistress—and it's the speaker's obligation to present evidence that the dissemination was for a lawful public purpose. Woodward and Bernstein beware. Ms. Austin beware, too, because it's left to a jury to decide whether publicly defending yourself from public slander serves a lawful public purpose.

Scarier still, prosecution is also possible for disseminating *any* picture or video depicting nudity, including a clipping from Playboy Magazine or any one of countless movies or programs broadcast on Netflix that depict a bare female breast. Keep in mind, it's the speaker's—not the government's—burden to present at least some evidence that the depiction was the result of (1) voluntary exposure (2) in a public or commercial setting. Put another way, the statute presumes all nude and sexually explicit images—including Hollywood movies and famous works of art—are subject to prosecution, and it's the defendant's burden to prove otherwise.

Using affirmative defenses to avoid broad application of the Non-consensual Dissemination statute—and thereby avoid restricting protected speech—is fraught with peril because it chills speech. In *Free Speech Coalition*, 535 U.S. at 255, the government defended the statute against an overbreadth challenge by arguing the affirmative defense in the statute merely shifted to the speaker the burden of proving his speech was not unlawful. That burden shifting, the Court wrote, "raises serious constitutional difficulties" because it commences only "after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." *Id.* And proving—or even presenting sufficient evidence to raise—the affirmative defense is no trivial matter: "Where the defendant is not the producer of the work, he may have no way of establishing the identity . . . of the actors" or the circumstances under which the prohibited images were created. *Id.*

Same here. How can anyone who comes into possession of a nude or sexually explicit image determine the circumstances under which it was made, particularly where the statute already implic-

itly presumes privacy? Don't forget the movie The Blair Witch Project, which was successful, in large part, because it so realistically depicted a homemade movie. Imagine trying to prove that it wasn't homemade. Most speakers will never take the chance, preferring to "self-censor rather than risk the perils of trial." *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004). That chills speech. *Black*, 538 U.S. at 365 (finding such considerations relevant when determining whether protected speech is chilled).

Nor can the State be counted on to narrowly enforce the Non-consensual Dissemination statute to avoid these pitfalls. To the contrary, the State has, at every turn, urged a broad reading of the statute and its authority under the statute. Even were that not the case, though, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. [Courts cannot] uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

So the Non-consensual Dissemination statute restricts an entire category of protected speech—non-obscene nude and sexually explicit depictions—because it resembles revenge porn. But "[t]he [State] may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Free Speech Coalition*, 535 U.S. at 255.

The Non-consensual Dissemination statute, 720 ILCS 5/11-23.5(b), thus violates the First Amendment of the United States Constitution and Article I, § 4 of the Illinois Constitution of 1970 and is facially unconstitutional.

c. Can The Court Avoid A Constitutional Decision?

Unfortunately, the court cannot construe the Non-consensual Dissemination statute to preserve its constitutional validity. A court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Stevens*, 559 U.S. at 481. Yet nothing about the statute here can be limited to avoid the constitutional pitfalls. Sure, disseminate can be construed more broadly rather than as the State insists, but that does nothing to avoid the statute's infringement on artistic speech and an entire category of protected speech. Nor can the court strike altogether the inclusion of drawings, paintings, sculptures, and similar art in the statutory definition of images, which was expanded in the legislative process to include "depictions and portrayals."

Nor may courts rewrite legislation to bring it in constitutional compliance; that's the General Assembly's exclusive domain. *Id.* And narrowing the Non-consensual Dissemination statute's scope requires significant re-writing: an illicit intent element; a requirement that the intent of privacy be proven rather than presumed; an actual showing of harm; and moving the affirmative defenses into the elements required to be charged and proven.

The court thus has no means of preserving the validity of the Non-consensual Dissemination statute.

III. Conclusion

Lives are all too often ruined by nine simple words: It seemed like a good idea at the time. Caught up in the whirlwind of love, couples often engage in behavior they soon regret, like making and sharing nude or sexually explicit images. People are hurt and lives sometimes ruined when those images become public. The Non-consensual Dissemination statute here—more precisely 720 ILCS 5/11-23.5(b)—laudably tries to prevent those bad consequences. But a laudable goal is not necessarily a compelling one, and the statute unnecessarily restricts protected speech by restricting the dissemination of constitutionally protected nude and sexually explicit images. The statute is thus an unconstitutional content-based restriction of speech. Because Ms. Austin cannot be prosecuted for violating an unconstitutional statute, her Motion to Dismiss is

GRANTED.

IT IS SO ORDERED.

DATED this 8th day of August, 2018.

JOEL D. BERG, Judge

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 January 29, 2019, the foregoing **Brief and Appendix of Plaintiff-Appellant**, was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

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