No. 123910

In the Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellant*, v. BETHANY AUSTIN, *Defendant-Appellee.*	)	Appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois No. 16 CF 935 The Honorable Joel D. Berg, Judge Presiding

BRIEF OF *AMICUS CURIAE* CYBER RIGHTS INITIATIVE

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POINTS AND AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The Cyber Civil Rights Initiative ("CCRI") submits this brief as *amicus curiae* in support of the State of Illinois and its defense of section 11-23.5 of the Illinois Criminal Code, entitled "Non-consensual dissemination of private sexual images." 720 ILCS 5/11-23.5. CCRI files this brief with two purposes in mind. The first is to provide the Court with empirical and scholarly research on the form of privacy violation colloquially referred to as "revenge porn" but more accurately described as "nonconsensual pornography." The second purpose is to offer perspective on the First Amendment issues raised by this case.

CCRI is the leading U.S.-based non-profit organization addressing the growing problem of unauthorized distribution of intimate images. Since its founding in 2013, CCRI has provided support to more than 4,000 victims of this abuse through its 24-hour crisis helpline, its collaboration with the Cyber Civil Rights Legal Project to provide pro bono services, its efforts to educate and assist legislators in drafting laws to address nonconsensual pornography, and its work with social media and technology companies to develop policies to prevent the unauthorized distribution of intimate images and other forms of online abuse.

The President and Legislative and Tech Policy Director of CCRI is Dr. Mary Anne Franks, J.D., D.Phil., who is a Professor of Law at the University of Miami School of Law. Professor Franks is a constitutional law scholar who assisted in the drafting of the federal Intimate Privacy Protection Act introduced by Congresswoman Jackie Speier in 2016,[1] and served as the reporter for the 2018 Uniform Law Commission (ULC) Model Civil Remedies for the Unauthorized Disclosure of Intimate Images Act. Professor Franks drafted the first model "revenge porn" law in 2013, which has been used as a template for many states that have passed legislation protecting sexual privacy. Illinois began its efforts to address the problem in 2013, reaching out to Professor Franks for assistance during the drafting and hearing process. CCRI considers section 11-23.5 a model statute.[2]

ARGUMENT

I. Nonconsensual Pornography Causes Devastating and Often Irreparable Harm

The Supreme Court of the United States insists that trial courts have a special obligation to apply the law carefully when it involves new technology.

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[1] H.R. 5896, 114th Cong. (2017), https://www.congress.gov/bill/114th-congress/house-bill/5896/text.

[2] Carrie Goldberg, *Seven Reasons Illinois is Leading the Fight Against Revenge Porn*, Cyber Civil Rights Initiative, Dec. 31, 2014, https://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn/.

It is incumbent on appellate courts to step in when trial courts rule without an understanding of the technology, or in this case, its harms. When courts apply "unchanging constitutional principles" to new technology or modern practices, they "should proceed with caution."[3] Indeed, they "should make every effort to understand the new technology."[4] In doing so, courts "should not hastily dismiss the judgment of legislators, who may be in a better place than [courts] are to assess the implications of new technology."[5] While section 11-23.5 is not a statute limited to new technology, its creation is directly related to advanced innovations in photography: in particular, the ease with which high-resolution images can be captured and distributed without consent and even without knowledge.

Nonconsensual pornography is "the distribution of sexually graphic images of individuals without their consent."[6] Forty-three state legislatures have criminalized nonconsensual pornography to address this invasion of privacy and the grave and often irreparable harm it causes its victims.[7]

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[3] *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 806 (2001) (Alito, J., concurring).

[4] *Id.*

[5] *Id.*

[6] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014).

[7] *See* CCRI, *43 States + DC Have Revenge Porn Laws*, https://www.cybercivilrights.org/revenge-porn-laws/ (collecting state statutes).

Nonconsensual pornography is not limited to images voluntarily exchanged with another person within the context of a private or confidential relationship; it also includes images that have originally been created or obtained without consent (*e.g.*, footage from hidden cameras, hacked photos, or recordings of sexual assaults). And, contrary to what the colloquialism "revenge porn" might suggest, perpetrators of nonconsensual pornography can be inspired by a range of motivations, from personal vindictiveness to greed to providing "entertainment." To be sure, ex-partners have disclosed private, sexually explicit material as a means of vengeful punishment. But such images are also used as a means of coercion, such as where domestic abusers threaten to disclose intimate photos to keep a reluctant partner from leaving or from reporting abuse to law enforcement,[8] where sex traffickers have used nonconsensual pornography to keep unwilling individuals in the sex trade, or where rapists recorded their attacks to discourage their victims from reporting sexual assaults.[9] Some perpetrators have also disclosed nonconsensual pornography for amusement, like nursing home workers who

[8] Citron & Franks, *supra* note 6 at 351.

[9] *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251, 1258 (2017).

posted nude photos of elderly and disabled patients to social media.[10] And many "revenge porn" site owners traffic in unauthorized sexually explicit photos and videos to make money or to attain notoriety.[11]

No matter the motive of the perpetrator or how the images are originally obtained, the unauthorized disclosure of such highly sensitive, private information causes immediate, devastating, and in many cases irreparable harm. Within days or even minutes of being uploaded to an internet website, these images can dominate an internet search of the victim's name. Images are also often disclosed without consent through emails, text messages, and mobile applications, in ways that directly target and reach the victim's family, workplace, and friends. The exposure of such sensitive and private intimate images wreaks havoc on victims' personal, professional, educational, and family life.[12] Victims frequently experience emotional distress as well as depression, anxiety, agoraphobia, difficulty maintaining intimate

[10] *See* Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat,* Pro Publica, Dec. 21, 2015, https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat.

[11] *Revenge Porn' Website has Colorado Women Outraged*, CBS Denver, Feb. 3, 2014, http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/.

[12] *See* Citron & Franks, *supra* note 6 at 350–54.

relationships, and post-traumatic stress disorder.[13] Some victims have been stalked, harassed, threatened with sexual assault, defamed as sexual predators, terminated from employment, expelled from their schools, or forced to change their names. Some victims have committed suicide.[14]

In addition to the trauma of having the most intimate and private details of their lives displayed to the public, and the harassment and threats they receive because of the disclosure, victims also frequently endure significant economic harm. Victims' images are often discovered by or disclosed to their employers, leading them to be fired.[15] Because employers will frequently

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[13] Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 Feminist Criminology 22, 38–39 (2017).

[14] Citron & Franks, *supra* note 6 at 372. *See also* Nina Burleigh, *Sexting, Shame and Suicide*, Rolling Stone, Sept. 17, 2013 (describing the story of 15-year-old Audrie Pott, who took her own live after a group of boys posted photos of themselves assaulting Audrie and drawing on her body with markers), http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917; BBC News Serv., *Tiziana Cantone: Suicide following years of humiliation online stuns Italy*, Sept. 16, 2016 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral), http://www.bbc.com/news/world-europe-37380704; Emily Bazelon, *Another Sexting Tragedy*, Slate, Apr. 12, 2013 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated), http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html; Kate Briquelet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, The Daily Beast, June 20, 2016 (15-year-old girl shoots herself in the head after ex-boyfriend posts nude photo on social media), http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html.

[15] *See* Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1, 8–10 (2009); *see also Warren City Bd. of Educ.*, 124 Lab. Arb. Rep (BNA) 532, 536–37 (2007) (arbitration

conduct online searches of the names of prospective employees, victims of nonconsensual pornography whose images turn up in search results may be unable to find jobs.[16] To avoid further abuse or humiliation, victims may withdraw from online life entirely, which can be detrimental to their job prospects and careers.[17] Victims often spend thousands of dollars on takedown services or online reputation management services in an often-futile attempt to get the damaging material removed from the internet.[18] Victims who seek legal help face tens of thousands of dollars in fees pursuing judgments that, even if awarded, they may never collect.[19]

A. The scale of the problem

In 2017, CCRI researchers studied a sample of 3,044 American adults who use social media.[20] That research shows that private, sexually explicit

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decision upholding the termination of a teacher fired because an ex-spouse distributed nude images to co-workers and school officials).

[16] *See* Citron & Franks, *supra* note 6 at 352.

[17] *See id.*

[18] *See* Ian Sherr, *Forget being a victim. What to do when revenge porn strikes*, CNET, May 13, 2015 (noting that a typical case "can cost as much as $10,000."), https://www.cnet.com/news/forget-being-a-victim-what-to-do-when-revenge-porn-strikes/.

[19] *See* Tracy Clark-Flory, *Criminalizing 'revenge porn,'* Salon, Apr. 6, 2013 ("It can cost tens of thousands before even proceeding to a judgment… Even in the case of a default judgment… These defendants are often judgment proof."), https://www.salon.com/2013/04/07/criminalizing_revenge_porn/.

[20] Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report* 11 (2017) (attached as an addendum

material is being shared in large volumes: about half of all adults age 18 to 26 have *sent* nude or seminude photographs of themselves to others, while two-thirds of adults in the same age group have *received* sexually explicit photographs of others.[21] This research also shows that 1 in 8 participants had been the victims of or threatened with nonconsensual pornography. Approximately 8% reported that intimate images of them had been distributed without consent, while another 4.8% reported that someone had threatened to distribute their nude photographs without consent.[22]

As many as 10,000 websites feature "revenge porn,"[23] and many of the thousands of websites that feature nonconsensual pornography are dedicated

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to this brief). Defendant-Appellee Austin repeatedly attacks the methodology and integrity of this study, going so far as to claim that it is intentionally deceptive and based on "manipulated" data. (Appellee's Br. at 13.) It skirts, if not crosses, the bounds of acceptable zealous advocacy to hurl such accusations, with no support whatsoever, against the academic researchers who conducted the study. At any rate, Austin is simply wrong that the study's methodology does not conform to academic standards. The full study was recently published in a peer-reviewed publication of the American Psychological Association. *See* Yanet Ruvalcaba & Asia A. Eaton, *Nonconsensual Pornography Among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men*, Psychology of Violence (Feb. 4, 2019), http://faculty.fiu.edu/~aeaton/wp-content/uploads/2019/02/Ruvalcaba-Eaton-2019.pdf.

[21] Eaton et al. *supra* note 20 at 3–4.

[22] *Id.* at 11.

[23] This figure is based on takedown requests made available to CCRI.

solely to this material.[24] These sites are popular because they provide an easily accessible, largely anonymous platform that connects profit-driven purveyors with voyeuristic consumers. These sites frequently post personal information about the victims (*e.g.*, name, age, address, employer, email address, and links to social media profiles) alongside the images, making it easy for online mobs to contact, threaten, and harass the victims.[25]

But the unauthorized dissemination of private, intimate images is not restricted to the Internet. In fact, CCRI's 2017 study found that only 10% of private images were distributed via websites. Nearly half of all victims' intimate images were distributed by text message and the rest were distributed through social media or in person.[26]

B. Perpetrator motives and potential deterrents

The term "revenge porn," though frequently used, is misleading. While some perpetrators weaponize intimate photographs to harm the person pictured in them, many have other motivations. Researchers have identified multiple motivations for distributing intimate photographs without the

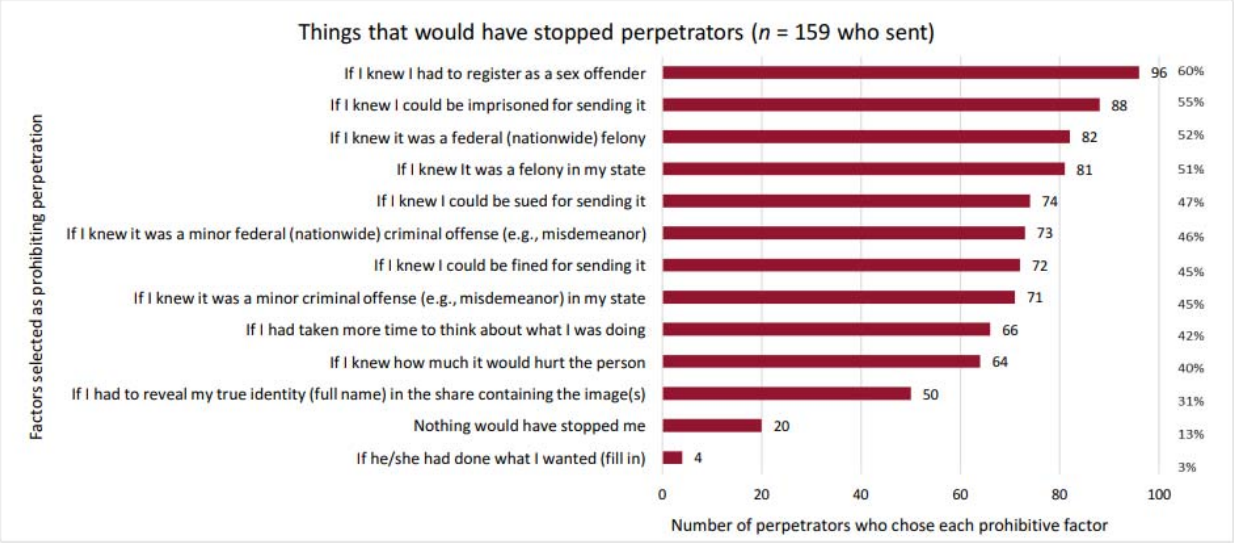
[24] *See Revenge Porn: Misery Merchants*, The Economist, July 5, 2014, http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be.

[25] *See* Citron & Franks, *supra* note 6 at 350–51.

[26] Eaton et al., *supra* note 20 at 21.

depicted person's consent. Those range from revenge, to bragging, to arousal, to amusement. Indeed, the CCRI study found that the vast majority—nearly 80%—of perpetrators report being motivated by something other than the desire to hurt the victim.[27]

CCRI researchers also asked those who admitted to perpetrating nonconsensual pornography if anything would have stopped them.[28] Participants could choose multiple factors, and most chose five factors.[29] Below are the results of that question:



The most common answers relate to criminal enforcement: registration as a sex offender, imprisonment, and knowing that the nonconsensual distribution

[27] CCRI, Frequently Asked Questions, https://www.cybercivilrights.org/faqs/.

[28] Eaton et al., *supra* note 20 at 22.

[29] *Id.*

of sexually explicit materials was a felony.

C. Nonconsensual pornography disproportionately harms women and girls

CCRI's research shows that women were more likely to be victims of this abuse, while men were more likely to be perpetrators.[30] The available evidence also indicates that women and girls face more serious consequences as a result of their victimization.[31] "Revenge porn" websites feature far more women than men, and the majority of court cases and news stories to date involve female victims and male perpetrators.[32] Nonconsensual pornography often plays a role in crimes that disproportionately affect women, including intimate partner violence, sexual abuse of minors, sexual assault, and sex trafficking. And, the disclosure of intimate images, or the threat of such

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[30] *Id.* at 12, 15.

[31] Citron & Franks, *supra* note 6 at 353–54.

[32] *See* Anastasia Powell et al., *The Picture of Who Is Affected by 'Revenge Porn' Is More Complex Than We First Thought*, Conversation, May 7, 2017 (noting that "there are many more sites and platforms dedicated to sharing women's nude or sexual images without their consent than men's"), https://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155; *see also* Abby Whitmarsh, *Analysis of 28 Days of Data Scraped from a Revenge Pornography Website*, WordPress.com, Apr. 13, 2015 (finding that of 396 posts to a revenge porn website, 378 depicted women versus 18 men), https://everlastingstudent.wordpress.com/2015/04/13/analysis-of-28-days-of-data-scraped-from-a-revenge-pornography-website/; Data & Soc'y Research Inst., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn* 4 (2016) (finding that one in ten women under the age of thirty had been threatened with disclosure of intimate images), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf.

disclosure, is often used to punish and discourage outspoken or successful women.[33]

D. The harm: examples

Nonconsensual pornography turns the most private and intimate moments of a person's life into sexual entertainment for strangers. Once uploaded onto the web, images are viewable by thousands, even millions, of people. In just a few days, search engines will "hit" on those images anytime someone searches a victim's name. Intimate images can also be sent to family members, employers, co-workers, and peers. Given the breadth of the exposure, nonconsensual pornography harms victims in dramatic ways. Below are a few examples of how this abuse has affected Illinois residents.

Illinois state representative Nick Sauer resigned in August 2018 after a former girlfriend filed a complaint with the Office of the Legislative Inspector General alleging that Sauer created a fake Instagram account using nude photos of her, stating that Sauer used the account "to catfish other men using my privately shared naked photos. Nick would use this account to direct message men with my photos to engage in graphic conversations of a sexual

[33] Emma Gray, *The Emma Watson Threats Were A Hoax, But Women Face Similar Intimidation Online Every Day*, Huffington Post, Sept. 26, 2014, https://www.huffingtonpost.com/2014/09/26/emma-watson-hoax-women-online-threats_n_5887712.html.

nature. The men believed they were communicating with me and Nick shared private details of my life."[34] In January 2019, a 12-count indictment was issued against Sauer by a Lake County grand jury on charges that he posted nude photos of not one, but two women on a fake social media account.[35] The statute under which Sauer has been charged is section 11-23.5.

A two-month long NBC 5 investigation discovered that a notorious revenge porn website called Anon-IB, which has featured hacked photos of nude celebrities and women targeted in the Marines United scandal, also contained online threads soliciting, posting, and trading photos of what appear to be former high school students from at least 67 high schools in Illinois.[36] In the threads, which date back to at least 2014, users ask for women's photos by name and graduating class. One woman found her photo on a thread along with the logo of her alma mater, St. Charles North High School, her full name, and graduating class. She stated, "I feel angry. I feel violated and disgusted.

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[34] Shia Kapos, *Illinois lawmaker accused of releasing nude photos of ex-girlfriend resigns*, Politico, Aug. 1, 2018, https://www.politico.com/story/2018/08/01/illinois-lawmaker-nude-photos-754563.

[35] Lee Filas & Russell Lisau, *Former state Rep. Nick Sauer indicted on charges he posted nude photos of 2 women*, Daily Herald, Jan. 9, 2019, https://www.dailyherald.com/news/20190109/former-state-rep-nick-sauer-indicted-on-charges-he-posted-nude-photos-of-2-women.

[36] Katie Kim et al, *Chicago-Area High Schools Listed on Website Trading Nude Photos*, NBC, May 16, 2017, https://www.nbcchicago.com/investigations/Chicago-Area-High-Schools-Listed-on-Website-Trading-Nude-Photos-422581224.html.

It never crossed my mind that this could happen … This is my life ... I'm a person. This isn't a game."[37] A similar site called Anon World asks, "ever wanted to see your crush naked or wondered if your new girlfriend was a slut well if she was chances are she is inside our members area archives. You want real sluts exposing themselves right?. Not that fake 'amateur' stuff either. Anon World has Nudes, videos, and gifs of real women baring it all. That's the good shit. It feels wrong in all the right ways."[38] Users can search the images on the site by state, including Illinois.

In February 2018, an Effingham man was sentenced to 30 months in prison after pleading guilty to violating section 11-23.5. According to prosecutors, Tristan Durre sent a copy of a sex video involving a former partner to a website and then sent links to it the victim's family and friends. In a letter to the court, the victim wrote of how the experience had "caused her to have problems with trust and anger and caused her to drop out of high school"; "I get constant ridicule whenever I go home … I feel sick and afraid after rewatching the video and seeing Tristan smirk before he turned off the

[37] Anon-IB was seized by Dutch police in April 2018 in the course of an investigation into an allegation of nonconsensual pornography. *See* Andrew Liptak, *Dutch police have shut down Anon-IB in the course of a revenge porn investigation*, The Verge, April 29, 2018, https://www.theverge.com/2018/4/29/17299020/anon-ib-the-netherlands-dutch-police-revenge-porn-shut-down.

[38] Anon World, http://anonworld.org/.

video and stopped recording."[39]

In September 2015, only a few months after Illinois's law was enacted, a University of Illinois student informed police that her phone had been stolen. Shortly after, the student and people in her phone contacts list began receiving messages from the stolen phone, including nude images of the student. In October 2015, her ex-boyfriend was charged by the Champaign County State Attorney with stealing the student's phone and violating section 11-23.5.[40]

In 2017 in Chicago, a group of teenage boys broadcast themselves on Facebook's livestream service gang-raping a 15-year-old girl they had lured into a basement. Forty people viewed the assault as it was happening on the social media platform, none of whom called police. According to the girl's mother, individuals began menacing their home in the aftermath of the crime, and police have stated that the girl became the target of social media harassment.[41]

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[39] Graham Milldrum, *30 months in 'revenge porn' case*, Effingham Daily News, Feb. 21, 2018, https://www.effinghamdailynews.com/news/local_news/months-in-revenge-porn-case/article_5df18d1b-c272-57d8-ae35-5bd51ee37de1.html.

[40] Johnathan Hettinger, *19-year-old charged with 'revenge porn'*, The News Gazette, Oct, 15, 2015, http://www.news-gazette.com/news/local/2015-10-15/19-year-old-charged-revenge-porn.html.

[41] Heather Schroering, *Prosecutors: Boys threatened Facebook Live sex assault victim with dog attack*, Chicago Tribune, April 4, 2017, https://www.chicagotribune.com/news/local/breaking/ct-facebook-live-sex-assault-charge-met-20170404-story.html.

The impact of nonconsensual pornography on teenagers, especially teenage sexual assault victims, is particularly concerning. Several such victims have committed suicide.[42] In a 2012 California case, several boys took pictures of themselves sexually assaulting a 15-year-old girl named Audrie Pott at a party and drawing on her body with markers. When Audrie woke up the next morning, she did not know where she was or what had happened to her. Through Facebook conversations, Audrie learned what the boys had done to her and that pictures of her naked body and of the assault were circulating around her school. A week later, Audrie asked to come home early from school. When Audrie's mother checked on her 20 minutes after they arrived at home, the bathroom door was locked and there was no answer from inside. Audrie's mother forced open the door and found Audrie hanging from a belt attached to the showerhead. Attempts to revive Audrie were unsuccessful.[43]

Courageous victims and advocates have educated lawmakers about the grievous harm suffered by victims of nonconsensual pornography, prompting

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[42] *See, e.g.*, BBC News Serv., *supra* note 14 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral); Bazelon, *Another Sexting Tragedy*, *supra* note 14 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated); Briquelet & Zavadski, *supra* note 14 (15-year-old girl shoots herself in the head after ex-boyfriend posts nude photo on social media).

[43] Burleigh, *supra* note 14.

a strong legislative response. As of March 1, 2019, 43 states and Washington D.C. have passed laws criminalizing the practice, and bipartisan federal legislation on the issue is pending in Congress.[44]

II. This Court Should Uphold Section 11-23.5 as a Privacy Regulation that Responds to the Serious Harm of Nonconsensual Pornography Without Violating First Amendment Values

Simply put, there is no First Amendment right to invade a person's privacy by distributing private, intimate images of them without authorization.[45] Section 11-23.5 is a straightforward privacy regulation, and as such, should be subjected to no more scrutiny than laws prohibiting the unauthorized disclosure of other forms of private information, such as medical records (410 ILCS 50/3), biometric data (740 ILCS 14/15), or social security numbers (5 ILCS 179/10). Invalidating Illinois' nonconsensual pornography statute would cast into doubt the constitutionality of these and other statutes that currently protect the privacy rights of Illinois residents.

Even if the statute is analyzed under strict scrutiny, however, it should

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[44] *See* Intimate Privacy Protection Act, *supra* note 1; Ending Nonconsensual Online User Graphic Harassment ("ENOUGH") Act, S. 21262, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/2162/text.

[45] *See United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014) (concluding that unauthorized "sexually explicit publications concerning a private individual" are not "afforded First Amendment protection"); *United States v. Petrovic*, 701 F.3d 849, 855–56 (8th Cir. 2012) (distributing a victim's private nude photos without consent "may be proscribed consistent with the First Amendment").

survive because it is narrowly drawn and targeted at a compelling government interest. As the Vermont Supreme Court stated in upholding that state's similar nonconsensual pornography law under strict scrutiny, "United States legal history supports the notion that states can regulate expression that invades individual privacy without running afoul of the First Amendment."[46] This Court should uphold the constitutionality of section 11-23.5 because the statute is tailored to prevent the serious privacy harm caused by nonconsensual pornography, and does so without treading on the core values protected by the First Amendment.

A. There is no First Amendment right to invade a person's privacy by distributing private, intimate images of them without authorization

Like other privacy laws, section 11-23.5 is concerned with the unauthorized disclosure of private information. Various state and federal laws protect the right of individuals to keep a wide array of private information out of the public eye, including medical records, social security numbers, student educational records, drivers' license information, genetic information, biometric data, geolocation data, even video rental information.[47] Some of

[46] *State v. VanBuren*, 2018 VT 95, ¶ 31 (2018).

[47] "On the statutory side of the law, there is a panoply of federal and state statutes that limit disclosures of personal data. A number of federal statutes restrict disclosure of information from school records, cable company records, video rental records, motor

these laws are very broad in scope; some impose serious criminal as well as civil penalties; and some permit the imposition of liability based on negligence as well as recklessness, knowledge, and purpose.

For example, Illinois' Biometric Privacy Information Act ("BIPA"), which regulates the collection, retention, and disclosure of certain sensitive biological data, creates a right of action against entities who intentionally, recklessly, or *negligently* violate the provisions of the act. 740 ILCS 14/20. BIPA has been hailed as a model privacy regulation by influential civil liberties groups such as the American Civil Liberties Union, the Electronic Frontier Foundation, and the Center for Democracy and Technology.[48]

The vast majority of privacy laws have never been seriously challenged on First Amendment or other constitutional grounds.[49] The U.S. Supreme Court has never struck down a law for restricting disclosures of information

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vehicle records, and health records. . . . Various states have also restricted the disclosure of particular forms of information, such as data about health, alcohol and drug abuse, sexual offense victims, HIV status, abortion patients, and mental illness." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 971–72 (2003) (internal citations omitted).

[48] *See* Edward Ruse, *Illinois' Supreme Court Should Affirm that Six Flags Violated the State's Biometric Privacy Law*, Center for Democracy and Technology, July 11, 2018. https://cdt.org/blog/illinois-supreme-court-should-affirm-that-six-flags-violated-the-states-biometric-privacy-law/.

[49] "[P]rivacy and speech have coexisted harmoniously throughout the overwhelming majority of nondisclosure rules, which have never raised constitutional issues." Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1199–200 (2005).

relating to matters of purely private concern nor declared privacy torts unconstitutional despite multiple opportunities to do so. As the eminent constitutional law scholar Erwin Chemerinsky has written, the "First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."[50]

B. The statute is subject at most to intermediate scrutiny, which it easily satisfies

The court below was wrong to categorize the law as a content-based restriction that triggers so-called "strict scrutiny" analysis, the most exacting level of review. The court reasoned that the law discriminates on the basis of content "because it doesn't target all pictures, videos, depictions, and portrayals, but only those showing nudity or sexual activity." (A21). But by that logic, every law that singles out certain kinds of information for restriction or protection is also content-based in a way that offends the First Amendment. The prohibition of child pornography, for example, is content-based, as it does not target all sexually explicit imagery, but only certain kinds of such imagery featuring minors. Laws prohibiting perjury do not target all lies, but only lies told under oath. And virtually every privacy law ever

[50] Office of Congresswoman Jackie Speier, *Press Release: Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn*, July 14, 2016, https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual.

written—from those that protect medical records to Social Security numbers to driver's license information—is content-based in the same way. The entire body of privacy law is built on the recognition that some kinds of information are more sensitive than others and that disclosures of such information can and should be regulated. That is precisely what the Illinois law does: it regulates, not prohibits, the intentional disclosure of a certain kind of private information. A person can disclose all the sexually explicit images of another person he likes, so long as he gets consent to do so.

The Supreme Court has "long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection,'" whereas "speech on matters of purely private concern is of less First Amendment concern."[51] Sexually explicit images intended either for no one's viewing or only for viewing by an intimate partner are matters of purely private concern. While the disclosure of some matters of private concern may qualify for First Amendment protection, there must be some legitimate public interest in these matters for this to be the case.[52] Prohibiting the nonconsensual disclosure of

[51] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–60 (1985) (internal citations omitted).

[52] *Connick v. Myers*, 461 U.S. 138, 147 (1983). The Court has observed that while it endorses the "absolute defense of truth 'where discussion of public affairs is

private, sexually explicit images of individuals poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."[53]

Generally speaking, it "is true enough that content-based regulations of speech are presumptively invalid."[54] The U.S. Supreme Court has recognized, however, that "[t]he rationale of the general prohibition . . . is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[55] There are "numerous

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concerned,'" it has left "unsettled the constitutional implications of truthfulness 'in the discrete area of purely private libels'" and have "pointedly refused to answer even the less sweeping question 'whether truthful publications may ever be subjected to civil or criminal liability' for invading 'an area of privacy'" given its respect for "the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society…" *The Fla. Star v. B.J.F.*, 491 U.S. 524, 532–32 (1989) (internal citations omitted).

[53] *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (suggesting that a matter is "purely private" if it does not contribute to "the free and robust debate of public issues" or the "meaningful dialogue of ideas.") (internal citations omitted); *see also State v. Culver*, 918 N.W.2d 103, 110 (Wis. App.) (rejecting a criminal defendant's overbreadth challenge to Wisconsin's nonconsensual pornography statute and observing that "the statute's restriction on such postings or publications does not raise a 'realistic possibility that official suppression of ideas is afoot'") (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)), *review denied*, 385 Wis. 2d 206 (Wis. 2018).

[54] *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("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.").

[55] *Id.* (citations and quotation marks omitted).

situations in which that risk is inconsequential, so that strict scrutiny is unwarranted."[56] So even if Illinois' nonconsensual pornography law is considered to be content-based, it should not trigger strict scrutiny.

As relevant here, strict scrutiny should not be applied to legal protections against the unauthorized disclosure of matters of private concern. The First Amendment's limits on state action are "often less rigorous" in matters of purely private significance.[57] That is truer still when the government seeks to protect against unauthorized disclosure of private information, not because of any disagreement with the message or viewpoint conveyed by the disclosure, but because "[p]rivacy of communication" is itself "an important interest."[58] The "core value of privacy" has constitutional underpinnings that reflect the critical importance of allowing people to shield their most intimate and private experiences from public scrutiny.[59]

The high social value placed on privacy is further illustrated by scores of state and federal laws prohibiting the unauthorized distribution of private information—from trade secrets to medical records to drivers' licenses to

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[56] *Id.*

[57] *Snyder*, 562 U.S. at 452.

[58] *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001).

[59] *Lawrence v. Texas*, 539 U.S. 558, 564–67 (2003) (describing privacy interests protected by Due Process Clause).

social security numbers to video rentals—that have never been deemed unconstitutional or even challenged on constitutional grounds.[60] On the rare occasions when privacy protections have been challenged, courts generally apply intermediate, rather than strict, scrutiny to evaluate their constitutionality.[61] "[W]hen 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."[62]

The U.S. Supreme Court has also endorsed a reduced level of scrutiny for the regulation of sexually explicit material. As the Court has explained, even when sexually explicit material does not rise to the level of obscenity, the First Amendment nevertheless offers such speech protection "of a wholly different, and lesser magnitude."[63] More specifically, when reviewing laws that address the secondary effects of sexually explicit material, courts have routinely applied intermediate scrutiny and upheld restrictions on these materials, provided the restrictions are designed to serve a substantial

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[60] *See* Daniel Solove, *A Brief History of Information Privacy Law,* in Proskauer on Privacy Law (2006).

[61] *See, e.g.*, *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949–52 (7th Cir. 2015) (applying intermediate scrutiny to reject a First Amendment challenge to a federal statute criminalizing the disclosure of personal information from motor vehicle records).

[62] *Culver*, 918 N.W.2d at 110–11 (upholding Wisconsin's nonconsensual pornography law against First Amendment challenge).

[63] *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

government interest, are narrowly tailored to serve that interest, and do not unreasonably limit alternative avenues of communication.[64]

Section 11-23.5's restriction on the unauthorized disclosure of private, sexually explicit images treads in territory far removed from the core concerns of the First Amendment. The defendant's conduct—posting nude photos of the victim without consent—should not receive the full measure of the First Amendment's protection. Rather, this Court should have "no difficulty in concluding" the distribution of homemade sexually explicit material "does not qualify as a matter of public concern under any view."[65] Prohibiting the nonconsensual disclosure of intimate images therefore poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas."[66]

U.S. Supreme Court precedent should not be construed to mandate the most searching scrutiny of statutes that protect victims from nonconsensual publication of these deeply private images. Certainly, the high Court has

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[64] *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-50, 54 (1986) (upholding a zoning ordinance restricting the location of adult theaters); *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (same with regard to a measure requiring male performers in adult films to wear condoms); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) (same with regard to an ordinance limiting the hours of operation for adult bookstores).

[65] *San Diego v. Roe*, 543 U.S. 77, 84 (2004).

[66] *Snyder*, 562 U.S. at 452 (quotation omitted).

signaled its commitment to vigorous enforcement of the First Amendment's free speech guarantee.[67] The Supreme Court has not, however, considered a statute like section 11-23.5, nor has it grappled with the grievous harm caused by nonconsensual pornography. The publication of nude or sexually explicit pictures of a person without the person's consent is not a part of our nation's historical traditions.[68] The dissemination of these intimate and private images without consent conflicts with other rights engrained in our constitutional traditions—rights *not* to speak and to maintain one's privacy (including bodily privacy) against unwarranted intrusions.[69]

Accordingly, assuming some degree of constitutional scrutiny of section 11-23.5 is required,[70] the proper standard would be intermediate

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[67] *See, e.g.*, *Reed*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.") (quotation omitted); *see also Brown*, 564 U.S. at 804 (holding unconstitutional California's ban on selling violent video games to minors); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (holding unconstitutional federal statute banning depictions of animal cruelty).

[68] *Cf. Brown*, 564 U.S. at 792 (observing that legislative restrictions on speech must be consistent with long tradition of proscription).

[69] *Cf. Lawrence*, 539 U.S. at 567 (describing sexual conduct as "the most private human behavior"); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

[70] Noted First Amendment scholar Frederick Schauer has observed that many content-based regulations do not trigger First Amendment scrutiny at all; "the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud,

review. After all, section 11-23.5's prohibition on distributing sexually explicit images of individuals without their consent does not implicate any concern that the government is trying to inhibit debate on issues of public concern or "drive certain ideas or viewpoints from the marketplace."[71] On the contrary, section 11-23.5 is aimed at the protection of highly personal private information and the prevention of harmful secondary effects—including financial, reputational, and emotional injuries—that predictably attend the disclosure of sexually explicit depictions of individuals without their consent.[72] The standard of intermediate scrutiny provides sufficient protection for any First Amendment interests at stake.

The ultimate inquiry under intermediate scrutiny is "one of reasonableness," which section 11-23.5 satisfies easily.[73] That is, the defendant's First Amendment challenge should fail because section 11-23.5 promotes a substantial government interest, is narrowly tailored, and does not

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conspiracy law, the law of evidence, and countless other areas of statutory and common law do not, at the least, present serious First Amendment issues." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1768 (2004).

[71] *Davenport*, 551 U.S. at 188 (quotation omitted).

[72] *See Dahlstrom*, 777 F.3d at 949–52 (applying intermediate scrutiny to restrictions on the disclosure of personal information); *Vivid Entm't*, 774 F.3d at 580–81 (applying intermediate scrutiny to restrictions directed at the secondary effects of sexually explicit depictions).

[73] *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 439–41 (6th Cir. 1998).

unreasonably limit alternative avenues of communication.[74]

C. Even if the statute were subjected to strict scrutiny, it would survive because it is narrowly tailored to address compelling government interests

Even if the Court applies strict scrutiny, the Court should uphold section 11-23.5 because it is narrowly tailored to address compelling government interests.

1. The governmental interests served by section 11-23.5 are not only significant, but compelling

Most obviously, section 11-23.5 seeks to vindicate the government's interest in preventing the real-life harms of nonconsensual pornography. As the U.S. Supreme Court observed more than century ago, "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow," and to "compel any one … to lay bare the body … without lawful authority, is an indignity, an assault, and a trespass."[75] Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one's body. These laws rest on the commonly accepted notion that observing a person in a state of undress or engaged in sexual activity without that person's

[74] *See City of Renton*, 475 U.S. at 47–50.

[75] *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251–52 (1891).

consent not only inflicts dignitary harms upon the individual observed, but inflicts a social harm serious enough to warrant criminal prohibition and punishment.[76]

We have already described in the pages above the many ways in which victims of nonconsensual pornography suffer, from the trauma and humiliation of having the most intimate and private details of their lives placed on display to job loss, severe harassment and threats, and serious reputational harm. There should be little question that preventing these harms is a legitimate as well as compelling governmental interest.

Even in the absence of actual harm, section 11-23.5 also protects personal privacy, which is an important governmental interest in its own right.[77] As a Wisconsin appellate court held recently in upholding that state's nonconsensual pornography law against First Amendment challenge:

> In prohibiting the knowing publication of intentionally private depictions of another person who is either nude, partially nude, or engaged in sexually explicit conduct, the statute serves to protect an important state interest—individual privacy. No one can challenge a state's interest in protecting the privacy of personal images of one's body that are intended to be private—and specifically, protecting individuals from the nonconsensual

[76] *See generally* National District Attorneys Association, *Voyeurism Statutes 2009*, https://ndaa.org/wp-content/uploads/Voyeurism-2010.pdf.

[77] *See Bartnicki*, 532 U.S. at 532–33.

publication on websites accessible by the public.[78]

Privacy is also instrumental in fostering the relationships and values that are crucial in an open society. People rely on the confidentiality of transactions in other contexts all the time: they trust doctors with sensitive health information; salespeople with credit card numbers; lawyers with their closely guarded secrets. They are able to rely on the confidentiality of these transactions because society takes it as a given that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information.[79] It would be remarkable to suggest that the protection of a private individual's sexual information against unauthorized disclosure is entitled to any less respect.

Further, by protecting Illinois residents against the disclosure of intimately private images without their consent, section 11-23.5 advances the

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[78] *Culver*, 918 N.W.2d at 110–11; *see also People v. Iniguez*, 202 Cal.Rptr.3d 237, 243 (Cal. App. 2016) (government has an "important interest in protecting the substantial privacy interests of individuals from being invaded ... through the distribution of photos of their intimate body parts").

[79] *See, e.g.*, 18 U.S.C. § 1832(a)(2) (criminalizing the unauthorized disclosure of trade secrets); 18 U.S.C. §§ 2721–25 (imposing criminal fines for unauthorized disclosure of personal and other information obtained in connection with a motor vehicle record); 42 U.S.C. § 1320d-6(a)(3) (criminalizing unauthorized disclosure of individually identifiable health information).

government's interest in safeguarding important aspects of speech and expression. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[80] Although privacy laws do, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public."[81] This is particularly true when the potential threat of dissemination is "widespread," as it is with images that can be shared over the internet.[82] The fear that private, intimate information might be exposed to the public discourages individuals from engaging not only in erotic expression, but also from other kinds of expressive conduct. Many victims report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed.

To suggest that none of these is a compelling governmental interest would cast into doubt many widely accepted legal restrictions for the

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[80] *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

[81] *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

[82] *Id.*

protection of privacy. For example, accepting the circuit court's rationale for declaring section 11-23.5 unconstitutional would immediately call into question the validity of state restrictions on disclosing private medical information, [83] restrictions on the disclosure of genetic test results, [84] restrictions on the unauthorized disclosure of biometric identifiers like fingerprint or retinal scan information,[85] and the tort of publication of private information.[86] This Court should recognize that protecting a person's bodily privacy and right to consent to disclosure of nude and sexually explicit pictures is a compelling government interest..

2. Under any level of scrutiny, section 11-23.5 is narrowly tailored to advance its purposes

Section 11-23.5 is narrowly drawn to protect the fundamental right to privacy without infringing upon freedom of speech. It prohibits only the intentional dissemination of sexually explicit visual images without the consent of an identifiable, depicted person, and only when the image was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private and the person disseminating

[83] 410 ILCS 50/3.

[84] 410 ILCS 513/30.

[85] 740 ILCS 14/15.

[86] *Miller v. Motorola, Inc*., 202 Ill. App. 3d 976 (1st Dist. 1990); *see also Green v. Chi. Tribune Co*., 286 Ill. App. 3d 1 (1st Dist. 1996).

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

As noted above, 43 states and the District of Columbia have criminal laws against this conduct—the oldest dates back to 2003, and Illinois's has been in effect since 2015. The circuit court below could point to not even one acutal case illustrating the "alarming breadth" of any nonconsensual pornography law, to say nothing of Illinois's in particular. Instead, the circuit court's analysis was based on the very kind of "fanciful hypotheticals" that are insufficient to support an overbreadth challenge.[87] This strongly suggests that any potential overbreadth in the statute is more imagined than real, and that any "marginal applications" of the law could readily be addressed through narrowing constructions or as-applied challenges.[88] While no statute will "satisfy those intent on finding fault at any cost,"[89] the Constitution does not

[87] *United States v. Williams*, 553 U.S. 285, 301 (2008); *see also Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[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.").

[88] *Parker v. Levy*, 417 U.S. 733, 760 (1974); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008) (explaining that facial challenges are "disfavored" because they risk the "premature interpretation of statutes on the basis of factually barebones records," "run contrary to the fundamental principle of judicial restraint" that courts should not "anticipate a question of constitutional law in advance of the necessity of deciding it," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution") (citations and quotation marks omitted).

[89] *U.S. Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 579 (1973).

require the satisfaction of an impossible standard. The First Amendment requires that statutes be narrowly tailored, not "perfectly tailored."[90]

The circuit court was troubled that "no illicit motive is required to violate the statute, claiming that "[m]otive matters when the government seeks to suppress any speech of any kind." (A32) This claim is false on its face, as evidenced by the multiple privacy statutes cited throughout this brief that make no reference to motive. What is more, the court offers no citation or support for the claim that identical conduct causing identical harm should be treated differently based solely on the interior thoughts of the actors. The circuit court misapprehended that "revenge porn—as it's commonly understood—is but a small part of the speech targeted by the statute." (*Id.*). As noted above, the majority of people who disclose private, sexually explicit images without consent do so with motivations other than intent to harm the victim. Examples include the operators of "revenge porn" sites; male Marines in a closed Facebook group exchanging hundreds of nude and sexually explicit photos of female Marines without their knowledge or consent;[91]

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[90] *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)).

[91] Katie Van Syckle, *How Two Marines Helped Bring Down Revenge Porn on Facebook*, Rolling Stone, May 5, 2017, http://www.rollingstone.com/culture/features/facebook-revenge-porn-how-two-marines-helped-stop-it-w478930.

California law enforcement officers passing around intimate pictures of female arrestees as a "game";[92] fraternity brothers uploading photos of unconscious, naked women to a members-only Facebook page for entertainment purposes; and several of the Illinois examples noted above.[93]

For that very reason, several state laws criminalizing nonconsensual pornography law on the books do not include such motive elements.[94] Neither does the 2018 Uniform Law Commission's Civil Remedies for the Unauthorized Disclosure of Intimate Images Act,[95] the recent amendment to the Uniform Code of Military Justice addressing nonconsensual pornography,[96] nor the proposed bipartisan federal criminal legislation against nonconsensual pornography.[97]

Because the harm of nonconsensual pornography is unaffected by the

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[92] Matthias Gafni & Malaika Fraley, *Warrant: CHP officer says stealing nude photos from female arrestees 'game' for cops*, Contra Costa Times, Oct. 24, 2014, http://www.contracostatimes.com/my-town/ci_26793090/warrant-chp-officer-says-stealing-nude-photos-from.

[93] Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity, Philadelphia*, Mar. 18, 2015, http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/.

[94] *See, e.g.*, 720 ILCS 5/11-23.5; Minn. Stat. § 617.261; Wash. Rev. Code § 9A.86.010.

[95] https://www.uniformlaws.org/committees/community-home?CommunityKey=668f6afa-f7b5-444b-9f0a-6873fb617ebb.

[96] Protecting the Rights of Individuals Against Technological Exploitation ("PRIVATE") Act, Pub.L. 115-91, 131 Stat. 1389 (2017) (codified at 10 U.S.C. § 917a).

[97] ENOUGH Act of 2017, *supra* note 44.

motive of the perpetrator, a narrowly tailored law need not include a motive element. As a Wisconsin appellate court observed in upholding that state's nonconsensual pornography law against a First Amendment challenge:

> Although the requirement of wrongful intent would have a limiting effect on a statute, the breadth of a statute can be effectively limited or curtailed through a variety of other criteria, elements, and conditions . . . A wrongful intent is inherent in the act of publishing a profoundly personal image intended to be and known to be private and without consent. Adding an express intent to harm element would hardly, if at all, reduce the scope of the statute.[98]

According to Professor Chemerinsky, the view that liability for nonconsensual pornography laws must be limited to those who intend to cause harm to the victim is simply wrong:

> I don't see anything in the First Amendment that says there has to be an intent to cause harm to the victim. If the material is intentionally or recklessly made publicly available, I think that is sufficient, and I don't think it should just be about intent to cause harm to the victim. Imagine that the person is putting the material online for profit or personal gain. That should be just as objectionable as to cause harm to the victim.[99]

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[98] *Culver*, 918 N.W.2d at 111; *see also* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 U.C.L.A. L. Rev. 1366, 1405–06 (2016) (explaining that narrow restrictions on nonconsensual pornography are justifiable and need not be limited to circumstances where the disclosure is intended to harm the victim).

[99] CCRI, Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography, Cyber Civil Rights Initiative, Oct. 6, 2017, https://www.cybercivilrights.org/2017-cybercrime-symposium/; *see also New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (explaining that "actual malice" in the context of public officials recovering damages for defamation means "with knowledge that it was false or with reckless disregard of whether it was false or not").

Echoing this view, the renowned First Amendment scholar Eugene Volokh has written that "[r]evenge porn is bad because it's nonconsensual—at least one of the participants didn't agree to the distribution of the material—and not because its purpose is revenge. The label 'revenge porn' stuck because it's vivid, and because most nonconsensual porn probably is motivated by revenge. But for purposes of legal analysis, there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person."[100]

Nevertheless, Defendant-Appellee Austin contends that the absence of an intent-to-harm requirement in section 11-23.5 renders the statute unconstitutional. To support this claim, Austin contrasts section 11-23.5 with Vermont's nonconsensual pornography statute upheld by the state supreme court in *VanBuren*, *supra*. (Appellee's Br. at 15–17.) The *VanBuren* court, however, based its holding on the privacy interests protected by the statute, not on the statute's intent-to-harm requirement. The court in fact went out of its way to emphasize that it "express[ed] no opinion as to whether [an intent-to-harm] element is essential to the constitutionality of the statute."[101]

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[100] Volokh, *supra* note 98 at 1405–06.

[101] *VanBuren*, 2018 VT 95, ¶ 62 n.10 (citing Citron & Franks, *supra* note 6 at 387); *see also Culver*, 918 N.W.2d at 110–11 (rejecting defendant's claim that the absence of an intent-to-harm element rendered Wisconsin's nonconsensual pornography law unconstitutional).

Not only is there no doctrinal basis for the assertion that the inclusion of a motive requirement is needed to ensure a law's constitutionality, but the opposite may be true. Prohibiting the dissemination of private, sexually explicit images for the purpose of harming the person depicted while allowing the same act to be committed for other purposes makes the law vulnerable to First Amendment challenges on vagueness, underinclusiveness, and viewpoint discrimination grounds. Cyberbullying laws in North Carolina and New York that included motive requirements have been struck down on the grounds that phrases such as harass, torment, and embarrass are unconstitutionally vague.[102] The Texas Court of Criminal Appeals noted that intent elements can "exacerbate[] the First Amendment concerns."[103] In striking down Texas's improper photography law, which required defendants to act with "the intent to arouse or gratify the sexual desire of any person,"[104] it pointed to *Texas v. Johnson*, where the Supreme Court found that Texas's

[102] *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016) (striking down on First Amendment grounds statute that "prohibits anyone from posting forbidden content with the intent to 'intimidate or torment' a minor"); *People v. Marquan M.*, 19 N.E.3d 480, 486 (N.Y. 2014) (striking down on First Amendment grounds statute that criminalizes " 'any act of communicating ... by mechanical or electronic means ... with no legitimate ... personal ... purpose, with the intent to harass [or] annoy ... another person'"); *see also* Franks, *supra* note 9 at 1287–88.

[103] *Ex parte Thompson*, 442 S.W.3d 325, 337–38 (Tex. Crim. App. 2014).

[104] Tex. Penal Code § 21.15(b)(1) (2015).

flag-burning statute "was content based because it punished mistreatment of the flag that was intentionally designed to seriously offend other individuals."[105]

As a final matter, section 11-23.5 is tailored to survive constitutional scrutiny because it does not amount to a complete ban on expression.[106] Illinois residents remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images.[107] Where the provenance of a sexually explicit image is in doubt, would-be disclosers always have the option of seeking authorization, as is standard practice by photographers[108] and required in many cases by copyright law.[109] Moreover, the people of Illinois remain free to criticize or complain about private citizens in ways that do not violate the privacy rights of others. The narrowly tailored prohibition in section 11-23.5 does not come close to stopping the countless ways in which people publicize their ideas, viewpoints, or feelings online. The First

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[105] *Ex parte Thompson*, 442 S.W.3d at 347 (quoting *Texas v. Johnson*, 491 U.S. 397, 411 n.7 (1989)).

[106] *See Vivid Entm't*, 774 F.3d at 578.

[107] *See id.* at 582.

[108] "When people permit their photograph to appear in a publication or advertisement, they typically consent to the publisher's use of their image through a model release." Jessica L. Williams-Vickery, *A (Thigh) Gap in the Law: Addressing Egregious Digital Manipulation of Celebrity Images*, 34 Ga. St. U. L. Rev. 795, 798 (2018).

[109] 17 U.S.C. § 506.

Amendment protects free-ranging, raucous, and often unpleasant and offensive debate. The First Amendment does not, however, protect the nonconsensual dissemination of nude or sexually explicit images that are deeply personal, never intended to be made public, and unrelated to matters of public concern.

D. Other conclusions by the circuit court below about section 11-23.5 are erroneous

The circuit court's unsubstantiated intuitions about "stereotypical revenge porn scenarios" (A15) ignore the considerable body of empirical and scholarly research into the unauthorized dissemination of private, sexually explicit imagery. As noted above, this research shows conclusively that the majority of perpetrators do not act with the motive to harm their victims and that this dissemination is by no means limited to the Internet. The court also ignored the freely available evidence, some of which is described above, supporting the state's contention that victims of nonconsensual pornography suffer serious harms, including fear of violence, emotional distress, serious physical risks, attacks by third parties, coercion, and sexual assault. (A31).

The court below also attempts to apply a Fourth Amendment analysis to the concept of "reasonable expectation of privacy." But of course, the Fourth Amendment applies to the government; it does not govern the boundaries of privacy among private individuals. The much-criticized Fourth

Amendment "third party doctrine"—according to which one's reasonable expectation of privacy in information is defeated as soon as such information is revealed to another person —is being challenged even in the Fourth Amendment context, and has never been used by the Supreme Court to assess the validity of privacy statutes. (A35). Indeed, were the Supreme Court to do so, it would likely spell the end of privacy regulation, as there are few pieces of information that are kept truly secret, particularly in the digital age.

The circuit court below also claims that the fact that the statute contains multiple narrowing exceptions, including an exception for disseminations made for lawful public purposes, is a sign of the statute's overbreadth because these exceptions constitute "affirmative defenses." (p. 28). But First Amendment defenses are effectively always affirmative defenses, and such exceptions are commonplace in privacy laws, including the Illinois privacy statutes cited in this brief.

The court suggests that section 11-23.5 offends the First Amendment more than the tort of publication of private information. (A26). Such a claim, however, is not supported by First Amendment doctrine. If nonconsensual pornography is protected under the First Amendment, it should be no more permissible to restrict it using civil means as it is to use criminal means. As the Supreme Court has held, "What a State may not constitutionally bring

about by means of a criminal statute is likewise beyond the reach of its civil law. . . ."[110]

In any event, the assumption that the civil provision is not only constitutional, but less restrictive than the criminal provision, conflicts with the U.S. Supreme Court's indication in the opposite direction. The Court has noted that criminal statutes afford more safeguards to defendants than tort actions, suggesting that civil regulation of conduct raises First Amendment issues at least as serious as criminal regulation.[111]

Civil protections are not, standing alone, sufficient to protect the state's compelling interest in protecting the privacy of Illinois residents. Civil actions are costly, time-consuming, and often result in greater invasions of the victim's privacy. Average victims will not be able to afford the tens of thousands of dollars it may cost to bring a civil action, especially if they have just lost their jobs, have been forced to leave their homes, or are seeking psychological help due to being victimized. Even those victims who are able to obtain legal representation and obtain favorable judgments are frequently

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[110] *Sullivan*, 376 U.S. at 277.

[111] *See id.* ("Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.").

faced with judgment-proof defendants.[112] Even successful civil actions cannot truly address the irreparable harm caused by nonconsensual pornography, as it is nearly impossible in most cases to completely remove images from the internet after the fact.[113] As CCRI's study indicates, the only effective deterrent against this abuse is the threat of criminal penalties.[114]

Beyond factual and doctrinal errors, the circuit court's commentary about the victim and the harm in this case suggests a view of privacy not as a right, but as a privilege. The court repeatedly insinuates that the defendant was justified in her actions, and the victim not truly injured, because the victim was engaged in an extramarital affair with the defendant's husband. (A26-27. But privacy rights are not reserved for the virtuous. First Amendment doctrine is clear that privacy rights only give way in the face of countervailing public interest, which has never been so expansively interpreted as to mean a mere desire to moralize.

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[112] *See* Citron & Franks, *supra*, note 6 at 349; Civil actions require money, time, and resources that many victims simply do not have, and the chances of success are low.

[113] Franks, *supra* note 9 at 1300.

[114] Eaton et al., *supra* note 20 at 22.

CONCLUSION

This Court should reverse the judgment of the circuit court.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in 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 is 12,049 words.

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CERTIFICATE OF SERVICE

The foregoing Brief of *Amicus Curiae* Cyber Civil Rights Initiative was filed electronically on March 13, 2019 with the Supreme Court of Illinois using the Court's electronic filing system and that the same was emailed to the following counsel of record.

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Within five days of acceptance by the Court, the undersigned also states that she will cause thirteen copies of the Brief to be mailed with postage prepaid addressed to:

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Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this notice of filing and certificate of service are true and correct.

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