No. 123910

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. BETHANY AUSTIN, Defendants-Appellees.	)	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.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

The People's opening brief established that the statute prohibiting nonconsensual dissemination of private sexual images is constitutional for either of two reasons. First, the First Amendment tolerates the prohibition of public disclosure of truly private information. While this category of speech has not yet been specifically identified or discussed by the United States Supreme Court as an unprotected category of speech, it has been historically unprotected. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (noting that there may be some categories of unprotected speech that have not yet been identified or discussed as such by the Court). Indeed, the Court has never invalidated a law that restricts only speech on truly private matters to protect a private individual from an invasion of privacy. This well-established American legal tradition of protecting privacy interests has been recognized for nearly 130 years. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Indeed, the so-called "revenge porn" statute closely tracks the tort of public disclosure of private information (one of the civil causes of action that has arisen in the years since Warren and Brandeis wrote on the right to privacy). *See*, *e.g.*, *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 978 (1st Dist. 1990) (identifying elements of a claim under public disclosure tort).

Second, even if this Court declines to specifically identify publication of purely private information as an unprotected category of speech, the same privacy considerations would carry great weight in the Court's strict scrutiny analysis of the statute. The revenge porn statute is justified by the State's compelling interests in protecting the health, safety, and privacy rights of its citizens, and the statute is narrowly tailored to achieve those interests. For either of these reasons, this Court should uphold the nonconsensual dissemination of private sexual images statute.

I. Public Disclosure of Truly Private Information Is an Unprotected Category of Speech under the First Amendment.

Nothing in defendant's brief suggests a contrary outcome. Defendant argues that the government may not prohibit the expression of thoughts simply because society finds the ideas expressed disagreeable. Def. Br. 5.[1] And, relying on *Stevens*, defendant argues that the State does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." Def. Br. 6. But the State is not asking the Court to declare a new category of speech unprotected by the First Amendment. In

[1] "Peo. Br." denotes the People's opening brief before this Court; "Def. Br." denotes Defendant-Appellee's brief before this Court; and "Am. Br." denotes the Amicus Curiae Cyber Rights Initiative brief before this Court.

Stevens, the Court recognized the history of prohibitions on cruelty to animals, but observed that there was no history of prohibitions on the depiction of such cruelty. 559 U.S. at 469. So, the government relied instead on the argument that a category of speech could be banned by balancing its value against its societal cost. *Id.* at 470. The Court rejected the government's proposed balancing approach, but not the historical analysis approach. *Id.* at 470-72.

Here, the People rely solely on the historical analysis approach approved in *Stevens* to ask this Court to recognize a category of speech that has not been protected as a historical matter. As the People's opening brief explained, States may regulate the publication of truly private facts without violating the First Amendment, Peo. Br. 10-16, and multiple federal circuits have recognized as much, *see Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975). The United State Supreme Court has never invalidated a statute that only regulates such speech, and for more than fifty years has repeatedly reserved judgment on whether truthful revelations so intimate as to shock the community's notions of decency were unprotected by the First Amendment. *See, e.g.*, *Time Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967). Indeed, scholars recognize a well-establish tradition of allowing the government to regulate

such speech dating back more than a century. *Warren & Brandeis* at 215. Since Warren and Brandeis wrote about protecting the individual right to privacy in a changing world, numerous causes of action have been created to protect that right, including one — public disclosure of private information — that closely tracks the elements and limitations on the revenge porn statute.

The adoption of invasion of privacy torts across the country and the longstanding historical pedigree of such laws distinguish this historically unprotected category of speech from new ones, such as the prohibition on the depiction of cruelty to animals at issue in *Stevens*. The State cannot create new categories of unprotected speech, but this Court can recognize a category of speech as being unprotected by the First Amendment, even where it has not been specifically identified or discussed in this way before, if a historical analysis demonstrates that such an unidentified category of unprotected speech has always existed under the First Amendment. Here, the People merely ask the Court recognize a long-standing category of unprotected speech.

II. The State Has a Compelling Interest in Protecting Its Citizens' Health, Safety, and Right to Privacy.

Defendant argues that the revenge porn statute does not serve a compelling government interest "because the government failed to meet its

high burden in identifying an actual problem in need of solving." Def. Br. 7. Defendant is incorrect.

The State has a compelling interest in protecting the health and safety of its citizens. *See New York v. Ferber*, 458 U.S. 747, 763 (1982); *People v. Alexander*, 204 Ill. 2d 472, 477 (2003). Defendant dismisses that interest here because she claims that the State has failed to present evidence showing how widespread the revenge porn problem is. Def. Br. 12. Defendant's reliance on *United States v. Playboy*, 529 U.S. 803 (2000), for this point is misplaced. In *Playboy*, the Court held that "the government must present more than anecdote and supposition" while noting that "[t]his is not to suggest that a 10,000-page record must be compiled in every case or that the government must delay in acting to address a real problem[.]" *Id.* at 822. Here, the State does not rely on mere anecdote and supposition to establish the existence of the widespread problem of revenge porn. As the Cyber Civil Rights Initiative's amicus brief highlights, nearly one in ten respondents to a recent survey said that their intimate images had been disseminated without their consent. Am. Br. at 8 (*citing* Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report* 11 (2017)). Another five percent of survey respondents said that they had been threatened with such dissemination, and the same number

indicated that they themselves had knowingly disseminated a private sexual image without consent. *Id.* Defendant acknowledges this study, Def. Br. 9, but claims that it "is biased and based on flawed methodology," *id.* at 13. That claim is without support. To the contrary, the study's publication in a peer-reviewed journal of the American Psychological Association demonstrates that it complied with academic standards. *See* Am. Br. 7-8 n.20. Unlike in *Playboy*, the scope of the problem the State is addressing with the revenge porn statute is supported by quantitative, academic research.

Nevertheless, defendant would still dismiss the State's interest here, claiming that the State "presented little to no evidence of how serious the problem of a person disseminating a nude image of another actually is." Def. Br. 12. And yet, the People's opening brief extensively detailed the psychological and physical harm to victims of revenge porn, as well as the harm to society of allowing such behavior to go unchecked. Peo. Br. 18-22. Moreover, beyond the extensive evidence linking the nonconsensual dissemination of private sexual images to extensive psychological and physical harm to the victim, the State has a compelling interest in protecting its citizens' right to privacy. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 532-33 (2001). Indeed, this interest has been recognized by courts in other States

when upholding similar nonconsensual pornography statutes. *See State v. Culver*, 918 N.W. 2d 103, 110-11 (Wis. Ct. App. 2018) (recognizing individual privacy as compelling State interest while upholding non-consensual pornography statute); *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 243 (Cal. App. Dep't Super. Ct. 2016) (recognizing compelling State interest in individual privacy rights while upholding criminal prohibition on distributing private image).

Contrary to defendant's arguments, the People plainly met their burden of demonstrating compelling government interests in preventing harm to the health, safety, and privacy rights of its citizens caused by the nonconsensual dissemination of private sexual images.

III. The Revenge Porn Statute Is Narrowly Tailored to Promote These Interests.

Nor could the revenge porn statute be more narrowly tailored and still achieve these compelling government interests. Defendant argues that the statute is not narrowly tailored because it prohibits dissemination as long as a reasonable person would have known that the image was intended to remain private and the victim had not consented to dissemination. Def. Br. 15. Defendant argues that the statute thus "criminalizes an adult complainant's own stupidity." *Id.* Additionally, defendant contends that the

statute could be more narrowly tailored by requiring that the perpetrator be motivated by a desire to seek revenge. *Id.* at 16. Defendant is incorrect.

As detailed in the People's opening brief, Peo. Br. 22-23, many perpetrators of "revenge porn" act for reasons other than revenge, such as profit, entertainment, or notoriety. There is no basis for concluding that the State has any less of an interest in protecting the victims of these acts from harm when they are motivated by factors in addition to, or other than, revenge. Nor could the State as effectively advance its compelling interests if the statute required a heightened *mens rea*. Indeed, even requiring a reckless disregard for the victim's intent that the image remain private would exempt from prosecution a defendant whose biases caused him to unreasonably assume that his victim did not care about dissemination of his or her private sexual images. A substantial amount of conduct related to the State's interests would be unpunishable, especially as technology makes it increasingly easy to thoughtlessly, carelessly, or impulsively disseminate these images. Indeed, likely as a result of such concerns, many state and federal jurisdictions have adopted the same negligence standard for this kind of crime. *See, e.g.*, Minn. Stat. § 17.261; Wash. Rev. Code § 9A.86.010; 18 U.S.C. § 917a(a)(2).

To the extent that the dissemination of private sexual images raises First Amendment concerns at all, 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. Even applying strict scrutiny, the statute is constitutional because it is narrowly tailored to serve a compelling government interest. Therefore, the circuit court's judgment should be reversed.

CONCLUSION

For these reasons, and those stated in the People's opening brief, this Court should reverse the judgment of the circuit court.

April 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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. 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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is nine pages.

/s/ Garson S. Fischer
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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 April 17, 2019, the foregoing **Reply Brief of Plaintiff-Appellant** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

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