No. 16-8052

In the Supreme Court of the United States

Mark Minnis,

Petitioner,

v.

Illinois,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether a statute violates the First Amendment on its face where it requires a class of people to regularly inform the government of where and under what name they have uttered any speech on the Internet, on threat of criminal punishment, and that information is then freely shared with the public.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case interests Cato in that it involves the First Amendment right to anonymous speech and how that impacts the marketplace of ideas.

SUMMARY OF ARGUMENT

Our country was founded by people speaking anonymously or using pseudonyms. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[E]ven the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names."). Yet Illinois has abolished all anonymous speech for certain individuals. These people must report to the government a list of every website they access, everything they read and write online. Even the contents of every Google search must be disclosed. It sounds like Big Brother, but this is quite real.

Such disclosures go far beyond the state's interest in preventing crimes. Instead, as the court below noted, the purpose of the statute is to enable people to avoid interactions with post-release sex offenders.

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[1] Rule 37 statement: Both parties received timely notice and consented to the filing of this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

This shows that the purpose of the statute is to exclude this class of people from the marketplace of ideas. This is constitutionally prohibited because it reaches far beyond the state's legitimate power.

The court below determined that the standard of review for abolishing all anonymous speech was only intermediate scrutiny. Its decision completely ignored the precedent on compelled disclosures, which requires exacting scrutiny. The court below also dismissed the issue of speaker-based discrimination, even though the statute was intended to allow people to avoid communicating with disfavored speakers. Still this case presents one of the most expansive required disclosures ever presented and thus a unique opportunity for the Court to clarify the standard of review.

Compelled disclosures to the government present unique problems in chilling speech. The possibility of wielding the power of investigations and other such official retaliation can easily chill speech critical of the government. In this case, the people affected are especially "unpopular individuals," so it is especially important that their First Amendment right to anonymous speech must be protected lest they be entirely removed from the marketplace of ideas.

The Founders understood these problems. They lived in an era when harassment for speech was a common occurrence. But even under the worst of colonial rule, people were still allowed to speak anonymously. Even in seditious libel cases, publishers were not com-

pelled to disclose authors to the government. Mr. Minnis only asks to do what Founding-era citizens did routinely: speak anonymously without fear.

ARGUMENT

I. Requiring Disclosure of All Accessed URLs Is Overbroad

To consider if a statute is overbroad, it is important to first understand what it requires of the individual. In this case, Mr. Minnis failed to report updating his Facebook profile picture—and so to start we must consider what he was required to disclose to the police.

While Mr. Minnis was indicted only for failing to inform the government of a website to which he uploaded content, the court below correctly found that he bases his facial challenge to the entire Internet disclosure provision on First Amendment overbreadth grounds. *People v. Minnis*, 67 N.E.3d 272, 282 (Ill. 2016). For this reason, the entire disclosure provision, including Internet identifiers and URL disclosure requirements, are within the scope of his challenge. *Id.* URL-disclosure is the most expansive of the disclosure requirements and so is worth focusing on.

The statute required Mr. Minnis to inform the government of "all Uniform Resource Locators (URLs) . . . used." 730 ILCS 150/3(a). Just reporting "facebook.com" would not be enough because this is a domain name and not a URL. *See* David Lindsay, *International Domain Name Law: ICANN and the UDRP* 12 (2007). To get an idea of how many URLs are used in updating a profile picture, one undersigned counsel accessed Facebook and updated his profile picture while recording every URL used in the process. In total, updating this profile picture involved 426 URLs. *See URLs Used to Change Facebook Profile Picture*, http://bit.ly/2niuBvr (document on *amicus*'s server).[2]

Updating a profile picture is actually a rather basic operation, requiring only six steps by the user. Many Internet operations are not so simple. In each page, on average among the top 1000 websites in 2014, there are 112 different objects each with a unique URL that must be accessed to view the page. *Average Web Page Breaks 1600K*, July 18, 2014, WebsiteOptimization.com, http://bit.ly/2n6TdHO. Most people don't even realize how many URLs they are using. Just keeping track of that many URLs and reporting them to the government is quite a burden on all online speech.

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[2] Many of the URLs used during this process are accessed automatically by the browser as it loads the correct page, leaving many people to not even know all the URLs they are using. Every picture, JavaScript file, and Cascading Style Sheet (describing page layout) are usually stored at different locations and require different URLs. Each time a person accesses his profile on Facebook, the URLs are slightly different, so the URLs that Minnis should have reported would not be the exact same. Still, this experiment gives a rough idea of the kind and volume of URLs he should have reported.

It's also important to understand that a URL doesn't just contain metadata about what webpage to access, but can also include content. Take, for instance, a Google search. If someone were to search for "Private Information" in Google, the result-page URL would include "https://www.google.com/search?q=Private+Information." If this URL must be reported, then the statute requires that the government know the content of that person's every Google search. The URLs can include some very private information. Some of the things revealed would include private medical conditions, legal or financial affairs, and sexual orientation. All of this private information is then disclosed to the public under the statute. 730 ILCS 152/120.

A statute is overbroad if it "does not aim specifically at the evils within the allowable area of state control but . . . sweeps within its ambit other [constitutionally protected] activities." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1939). According to the Illinois Supreme Court, the purpose of this statute is to prevent crimes, *Minnis*, 67 N.E.3d at 290, which is indisputably a compelling government interest. But this interest necessarily justifies only a narrow set of regulations, prohibiting only the criminal acts and communications facilitating those acts. These are the "evils within the allowable area of state control." *Thornhill*, 310 U.S. at 97.

The purpose of the Illinois statute is not limited to these criminal acts and instead identifies the "locations on the internet" where sex offenders have "engaged in communication" and disclose this so that the public can "avoid such interactions." *Minnis*, 67 N.E.3d at 290. The very purpose of this statute is to "drive certain . . . viewpoints from the marketplace" of

ideas which is unconstitutional. *See Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The reason that content-based discrimination is suspect is because of fears that the purpose of the government regulation is to drive out the viewpoints of certain individuals. *Id.* Yet a purpose behind the Illinois statute is the same reason why content-based discrimination is suspect.

With this purpose of allowing people to "avoid . . . interactions" with sex offenders, the Illinois Supreme Court held that "any communication by a sex offender with the public is related to the statutory purpose." *Minnis*, 67 N.E.3d at 290. In many ways, the state's justification is similar to that in *Simon & Schuster*, where this Court rejected that justification. In that case, New York pointed at the compelling interest in "ensuring that victims of crime are compensated by those who harm them" and in "ensuring that criminals do not profit from their crimes." 502 U.S. at 118-19. These justifications are similar to Illinois's justification in this case to "prevent sex crimes against children."

But Illinois goes beyond this limited interest, just like New York did in *Simon & Schuster*. New York tried to apply its crime-prevention interest to the context of storytelling. Here, Illinois applies it to the context of all future online communication. Illinois, like the New York board, "has taken the effect of the statute and posited that effect as the State's interest." *Id.* at 120. Allowing the public to "avoid such interactions" is no doubt the effect of the law, but it cannot be a valid interest. *See id.* ("If accepted, this sort of circular defense can sidestep judicial review of almost any stat-

ute, because it makes all statutes look narrowly tailored."). It is only with this circular reasoning that the disclosure of all URLs can be seen as limited in scope and related to the statutory purpose.

The Illinois Supreme Court had to expressly reject the holding of several other courts, including the Ninth Circuit, to come to this conclusion, claiming that the other courts "failed to recognize the breadth necessary to protect the public" and how expansive the "public purpose" was. *Minnis*, 67 N.E.3d at 290-91. Instead, these other courts recognized the circular nature of this expanded public purpose and refused to go down that rabbit hole.

II. This Case Presents an Opportunity To Clarify the Standard of Review for Anonymous Speech

Never before has a state or the federal government required an individual to inform it of so much of what he or she reads and writes. The closest analogous cases deal with anonymous speech in the context of required disclosure of election-campaign materials or contributions. "[A]n author generally is free to decide whether or not to disclose his or her true identity." *McIntyre*, 514 U.S at 341. The Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). For this reason, the Court has "closely scrutinized disclosure requirements" and required that "the governmental interest must survive exacting scrutiny." *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). The Court has required exacting scrutiny in those contexts,

while the lower court applied only intermediate scrutiny here. *Minnis*, 67 N.E.3d at 287. This case thus presents an ideal vehicle for the Court to elaborate on the appropriate level of review for disclosure laws and anonymous speech.

In addition to the Illinois Supreme Court's failure to even discuss other compelled-disclosure cases, the court incorrectly characterized this regulation as "content neutral"—even as this Court has stated unequivocally that the decision to remain anonymous is a question of core speech. *McIntyre*, 514 U.S. at 342. ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

The court below also incorrectly dismissed the problems of speaker discrimination in this statute that would raise the standard of judicial scrutiny. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to *distinguish among different speakers*, which may be a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 312 (2010) (emphasis added). As the Court noted in *Turner Broadcasting*, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 658 (1994). The court below notes that, "[a]dmittedly, the provision does single out sex offenders as a category of speakers." *Minnis*, 67 N.E.3d at 287. The court recognizes that these kinds of distinctions can be

"subtle means of exercising a content preference," but insists that isn't happening here. *Id.*

The court below also notes that aversion to what disfavored speakers say is the purpose of the statute: "These disclosures empower the public, if it wishes, to make the informed decision to avoid such interactions" with the disfavored speakers. *Id.* at 290. Because of this communication-avoidance goal, aversion to what the disfavored speakers have to say is a core purpose of this statute—which is improper. "Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). *See also Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as [anonymous speech] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.").

III. Compelling Individuals to Inform the Government of What They Read and Write Online Threatens to Undermine the Market of Ideas

"Awareness that the Government may be watching chills associational and expressive freedoms." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). Revealing to the government a "substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)). "I for one doubt that people

would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year." *Id. at 418*. Yet that's exactly what Illinois is doing here.

More than 60 years ago, Justice Douglas ominously described the situation that would exist if the government's position were to prevail now:

> A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular what the "powers that be" dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and

> subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the menace of the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law.

United States v. Rumely, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring).

"Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. California*, 362 U.S. 60, 64 (1960). Without the ability to criticize the government, some may be unable to criticize at all, preventing the disclosure to the public of harmful actions.

Furthermore, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," and thus a speaker's "decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S.at 342. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on

freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). The Illinois statute would reveal a significant amount of the affected individuals' affiliations with groups engaged in advocacy, undermining these individuals' ability to freely associate for the purposes of free speech.

By protecting anonymous speech, society protects unpopular individuals from retaliation and their ideas from suppression. *McIntyre*, 514 U.S. at 357. ("Anonymity is a shield from the tyranny of the majority. *See generally* J. Mill, *On Liberty and Considerations on Representative Government* 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society."). Indeed, it's hard to find more "unpopular individuals" than sex offenders, so it is especially important that their First Amendment right to anonymous speech be protected.

"The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. Concerns about social ostracism or retaliation seems especially important in the context of sex offenders who already suffer these kinds of harassment. It's important that the Court carefully consider the implications of a system like this because of the potential harm to the marketplace of ideas.

IV. Anonymous Speech Was Protected From Government Observation in the Colonial and Founding Eras

"Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts." *Talley v. California*, 362 U.S. 60, 64-65 (1960). "The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government." *Id.*

1. One example of English government harassment of writers and why anonymity was so important was the 1735 trial of John Peter Zenger, which laid out the principles later incorporated in the First Amendment. Peter A. Davis, *From Androboros to the First Amendment* 131 (2015). Americans of the era, referred to the trial as, "If it is not law it is better than law, it ought to be law, and will always be law wherever justice prevails." *Id.* at 132. The American colonists were suffering under an abusive governor forced upon them, and they wanted to speak out. 1 Scott Patrick Johnson, *Trials of the Century* 11-12 (2011). They did so in a newspaper that Zenger printed, but only Zenger's name as printer was used, not the author of the articles. Richard Kluger, *Indelible Ink: The Trials of John Peter Zenger and the Birth of America's Free Press* (2016). They knew if that if they used their own name they would be harassed and attacked by the governor. *Id.*

Zenger reproduced some of the great writers including those written by the pseudonym "Cato"—from which the name of the Cato Institute derives. Heather

E. Barry, *A Dress Rehearsal for Revolution* 33 (2007). On February 18, 1733, Zenger reproduced Cato's Letter No. 15, which begins: "Without freedom of thought, there can be no such thing as wisdom; and no such thing as [public] liberty, without freedom of speech: Which is the right of every man, as far as by it he does not hurt and control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know." *Id. See also* John Trenchard, Cato's Letters, vol. 1 November 5, 1720 to June 17, 1721 (Ronald Hamowy ed., Liberty Fund 1995) (1724).

Zenger refused to name the anonymous authors who criticized the colonial governor. Norman Pearlstine, *Off the Record: The Press, the Government, and the War Over Anonymous Sources* 78 (2007). Without evidence of who the authors were the government instead prosecuted Zenger. *Id.* The American colonists in the jury refused to convict despite threats by the judge to jail to the jury. Barry, *supra*, at 70. Zenger was set free and was not forced to disclose the names of the people who wrote for his newspaper. Without the ability to speak anonymously, in a way that the government didn't know who wrote what, the American colonists would not have felt as free from reprisal to speak unfavorably about English policies.

2. Another example of revolutionary anonymous writing was Thomas Paine's pamphlet *Common Sense*. Like many others before the revolution, that work didn't include the author's name; its title page only said that it was "written by an Englishman." Craig Nelson, *Thomas Paine: Enlightenment, Revolution, and the Birth of Modern Nations* (2007). Had the government known who had written the tract, Thomas Paine could have been prosecuted or harassed. The

First Amendment was designed to protect exactly this kind of speech by not requiring people to inform the government what they write.

3. The New Jersey upper legislative chamber in 1779 had asked Isaac Collins, the publisher of the New Jersey Gazette, for the identity of the author of an article written by the pseudonym "Cincinnatus." Collins refused stating "were I to comply . . . I conceive I should betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press." *Selections from the Correspondence of the Executive of New Jersey, from 1776 to 1786* 199 (1848). The New Jersey Assembly agreed with Collins and refused to force him to reveal his source. *Id.*

4. In early American history almost all political writing was published anonymously or pseudonymously. "Between 1789 and 1809 six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names." Note, *The Constitutional Right to Anonymity*, 70 Yale L.J. 1085 (1961). These great men would have thought the idea that they could be forced to reveal themselves to be abhorrent. *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring) (The "historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'").

It is this "practice in America" that was important for the First Amendment. James Madison, *Report on the Virginia Resolutions* (1800). The practice of freedom of the speech and press in America was more ex-

pansive than in England, which allowed things like seditious libel prosecutions. *Id.* Yet even under colonial America, people like the authors of articles that Zenger printed, or Thomas Paine, were allowed to print anonymously without government interference.

CONCLUSION

The disclosures required in this case go far beyond any legitimate state interest and instead are designed to enable the public to avoid interactions with certain kinds of speaker. Such purposes violate the First Amendment.

Moreover, this case presents an opportunity to clarify the standard of review in anonymous speech cases. The Court should at least consider the exacting scrutiny standard used in other compelled disclosure cases.

For the foregoing reasons, and those stated by the petitioner, the Court should grant a writ of certiorari and ultimately reverse the Illinois Supreme Court.

Respectfully submitted,

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