Filed: 3/8/2021 9:36 PM

IN THE INDIANA SUPREME COURT
CAUSE NO. 20S-CR-632

STATE OF INDIANA,	**)**	**Appeal from Steuben Circuit Ct**
Appellant,	**)**	
	)	
v.	**)**	**Trial No.: 76C01-2005-CM-421**
	)	
CONNER KATZ,	**)**	**The Honorable Randy Coffey,**
Appellee.	**)**	**Judge.**

APPELLEE'S BRIEF

Stacy R. Uliana
#20413-32
5 N. Baldwin Street
P.O. Box 744
Bargersville, IN 46106
(317) 422-1686
Fax (317) 732-1830
stacy@ulianalaw.com

Attorney for Katz

TABLE OF CONTENTS

TABLE OF AUTHORITIES……………………………………………………………3

STATEMENT OF ISSUE………………………………………………………………6

STATEMENT OF CASE………………………………………………………………6

STATEMENT OF FACTS……………………………………………………………6

SUMMARY OF ARGUMENT…………………………………………………………9

ARGUMENT……………………………………………………………………………11

I. The trial court's dismissal should be upheld on grounds that the State failed to state an offense……………………………………………………12

II. The trial court properly granted the motion to dismiss, finding that the statute was unconstitutional……………………………………………………20

A. Katz did not waive any arguments and all arguments are available on appeal……………………………………………………………………20

B. Indiana's statute is the broadest in the country……………………21

C. Indiana's broad intimate image statute violates the First Amendment and Katz's freedom of speech……………………………23

1. Federal Constitution………………………………………………23

2. Indiana Constitution………………………………………………34

D. Indiana's expansive intimate image statute is overbroad…………35

1. Federal Constitution………………………………………………36

2. Indiana Constitution………………………………………………39

CONCLUSION………………………………………………………………………39

VERIFICATION OF WORD COUNT………………………………………………40

CERTIFICATION OF SERVICE……………………………………………………40

TABLE OF AUTHORITIES

CASES

Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 80 L. Ed. 688, 56 S. Ct. 466(1936)....................12

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).......31

Donahue v. St. Joseph County, 720 N.E.2d 1236 (Ind. Ct. App. 1999)......11, 20

E.M. v. K.N., 19 N.E.3d 765 (Ind. Ct. App. 2014)....................11

Ex Parte Ellis, 609 S.W.3d 332 (Tx. Ct. App. 2020)....................25, 26, 28, 30

Ex Parte Jones, 12-17-346-CR, 2018 Tex. App. LEXIS 3439 (Tx. Ct. App. May 16, 2018), trans. granted....................8, 9

Ex Parte Thompson, 414 S.W.3d 325 (Tx. Crim. Ct. App. 2014)....14, 26, 27, 38

Johnson v. State, 87 N.E.3d 471 (Ind. 2017)....................11

Indiana Wholesale Wine & Liquor Co. v. State ex rel. Indiana Alcoholic Bev. Comm'n, 695 N.E.2d 99 (Ind. 1998)....................11

Littleton v. State, 954 N.E.2d 1070 (Ind. Ct. App. 2011)....................11

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)....................36

Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990).........14

People v. Austin, 155 N.E.3d 439 (Ill. 2020)....................25, 34

People v. Iniguez, 247 Cal. App. 4th Supp. 1 (2016)....................28, 33

Police Dep't of Chicago v. Mosley, 408 U. S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)....................24

Price v. State, 622 N.E.2d 954 (Ind. 1993)....................34, 39

Prosser v. J.M. Corp, 629 N.E.2d 904 (Ind. Ct. App. 1994)....................17

Reed v. Town of Gilbert, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)....................24, 25, 27

Rogers v. United States, 422 U.S. 35 (1975)..31

Smith v. State, 867 N.E.2d 1286 (Ind. 2007)..14

Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011)....27

State v. Bariteau, 884 N.W.2d 169 (S.D. 2016)..7

State v. Casillas, 952 N.W.2d 629 (Min. 2020)...................................8, 32, 34

State v. Casillas, 938 N.W.2d 74 (Minn. Ct. App. 2019)..................................8

State v. D.M.Z., 674 N.E.2d 585 (Ind. Ct. App. 1996)...........................14, 15, 19

State v. Riley, 980 N.E.2d 920 (Ind. Ct. App. 2013)...11

State v. Thompson, 687 N.E.2d 225 (Ind. Ct. App. 1997).................................11

State v. Van Buren, 214 A.3d 791 (Vt. 2019)....................................17, 25, 33

Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)...33

Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967)............31

Townsend v. State, 750 N.E.2d 416 (Ind. Ct. App. 2001)..................................16

United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)..27

United States v. Stevens, 559 U.S. 460; 130 S. Ct. 1577; 176 L. Ed. 2d 435 (2010)...24, 27, 36-38

Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)..32

Ward v. State, 50 N.E.3d 752, 756 (Ind. 2016)...20

Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)..36

Whittington v. State, 669 N.E.2d 1363 (Ind. 1996)..34

Williams-Yulee v. Fla. Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015)..27

Wisconsin v. Culver, 918 N.W.2d 103 (Wis. Ct. App. 2018).......................22, 33

STATUTES

Ind. Code § 35-45-4-8……………………………………………8, 13, 16, 29, 37

Ind. Code § 35-31.5-2-221.5…………………………………………13, 14, 16, 17

2019 Tex. HB 98, Sec. 2…………………………………………………………9, 33

11 Del. C. § 1335……………………………………………………………………22

Minn. Stat. § 617.261………………………………………………………………22

Neb. § 28-311.08……………………………………………………………………22

NJ § 2C:14-9…………………………………………………………………………22

RULES

Indiana Rule of Appellate Procedure 9(D)……………………………………6, 12

Ind. Rule of App. Proc. 50(B)……………………………………………………7

CONSTITUTIONS

Ind. Const. Art. 1, § 9……………………………………………………………34

U.S. Const., Amend. I……………………………17, 20, 23, 24, 33, 36, 38

SECONDARY SOURCES

Amicus Brief by American Booksellers Association, Association of American Publishers, Media Coalition Foundation and National Press Photographers Association filed in the Minnesota Supreme Court in State v. Casillas, Case No. A-19-0576……………………………………………………………………………21

Christian Nisttáhuz, Fifty States of Gray: A Comparative Analysis of "Revenge Porn" Legislation Throughout the United States and Texas's Relationship Privacy Act, 50 Tex. Tech L. Rev. 333 (2018)……………………………23, 25, 33

Mary Anne Franks, Drafting an Effective "Revenge Porn" Law: A Guide for Legislators, CYBER C.R. INITIATIVE 11 (Sept. 22, 2016), https://www.cybercivilrights.org/wp-content/guide-to-legislation/ [hereinafterGuide for Legislators])…………………………………………23, 31

STATEMENT OF ISSUE

Whether the Court should affirm the trial court's Order dismissing the charge of non-consensual dissemination of an intimate image because:

1. The State failed to allege an offense where the image did not depict the alleged victim in an identifiable manner;

2. Ind. Code § 35-45-4-8, which criminalizes the non-consensual distribution of an intimate image, impermissibly impinges on the freedom of speech under the United States and Indiana Constitutions; and

3. Indiana's intimate image statute is overbroad, potentially criminalizing a substantial amount of expressive conduct.

STATEMENT OF CASE

Katz adopts the State's Statement of Case as accurate. However, under Indiana Rule of Appellate Procedure 9(D), Katz adds that he is cross-appealing the trial court's denial of his claim that the charges should be dismissed because the State failed to state an offense.

STATEMENT OF FACTS

On May 28, 2020, the State charged Katz with distributing an intimate image of his then girlfriend, R.S. App. Vol. 2, p. 8. On July 22, 2020, Katz filed a motion to dismiss to which he attached two exhibits, including a supplemental narrative by law enforcement. App. Vol. 2, pp. 22-32; Appellee's

App. Vol. 2, p. 6.[1] In the supplemental narrative, another woman, Catherine, explains how Katz sent her the image which is the basis of the charges against him.

Catherine used to date Katz and the two still talked. Appellee's App. Vol. 2, p. 6. Over Snapchat,[2] Katz and Catherine were discussing having a four-way sexual encounter involving Katz, R.S., Catherine and her boyfriend. Id. During the Snapchat conversation, the two got into a competition, exchanging images of each other in sex acts. Id. Katz sent Catherine a video of what she assumed was R.S. performing oral sex on Katz. Catherine could not see the woman's face or Katz' penis. Id. The video showed Katz holding a fully-clothed woman's hair while her head went up and down towards his penis. Id. The video lasted only a few seconds over Snapchat. Id. Catherine did not save the video. Katz also sent a two-second video of him shaking R.S.'s buttocks. R.S. was wearing shorts. Id.

---

[1] In violation of Ind. Rule of App. Proc. 50(B), which addresses contents of appendices in criminal appeals, the State's Appendix does not include the portion of Ex. B, i.e., the supplemental narrative that was critical to Katz' Motion to Dismiss. Katz has included the omitted Exhibit in Appellee's appendix.

[2] Snapchat is "the proprietary name of an image messaging service and application, through which users can share images that may be private and temporary or public and stored for retrieval." Snapchat, Dictionary.com, https://www.dictionary.com/browse/snapchat?s=t (last visited March 8, 2021). "Snapchat is an image messaging mobile phone application in which a user can send a photograph or text message with a set time to expire. The receiving user can only view the text message or photograph for one to ten seconds before the image or text message expires and is automatically deleted from the mobile phone." State v. Bariteau, 884 N.W.2d 169, 172 n.1 (S.D. 2016).

Katz later contacted Catherine and told her that he and R.S. had broken up and that R.S. thought he was cheating with Catherine. Id. Katz warned Catherine that R.S. may be calling and asked her to assure R.S. that he did not cheat. Katz also asked Catherine not to tell R.S. that he sent the videos. Id. When Catherine learned that R.S. did not know about the videos or about the possible foursome, Catherine texted R.S. and told her about both the videos and her sexual conversation with Katz. Id.

R.S. texted Katz, confronting him about the videos. Appellee's App. Vol. 2, p. 5. Katz apologized and told her he knew it was wrong and he should not have sent them without her permission. Id. R.S. hired an attorney, who filed a civil lawsuit against Katz and contacted the police. Id.

In support of his Motion to Dismiss, Katz argued, in part, that the State failed to allege an offense under Ind. Code § 35-45-4-8 (hereinafter referred to as the "intimate image statute") because the video did not depict an identifiable individual or other sexual conduct, which involves a sex organ and mouth of another. App. Vol. 2, pp. 24-25. Katz also argued that the intimate image statute impermissibly restricted his freedom of speech under the First Amendment and Article I, Section 9 of the Indiana Constitution and was overbroad. Id. at 25-26. Katz cited to State v. Casillas, 938 N.W.2d 74 (Minn. Ct. App. 2019),[3] which found Minnesota's intimate image statute overbroad, and Ex Parte Jones, 12-17-346-CR, 2018 Tex. App. LEXIS 3439 (Tx. Ct. App.

---

[3] Since the trial court's Order, the case has been overruled by State v. Casillas, 952 N.W.2d 629, 640-41(Min. 2020).

May 16, 2018), holding Texas' statute impermissibly restricted freedom of speech. Id. at 26-27.

The trial court granted the Motion to Dismiss, adopting the logic of the Texas and Minnesota courts. The trial court noted that although Ex Parte Jones was pending on transfer, the Texas Legislature had amended the statute in light of the case.[4] App. Vol. 2, pp. 45-46. The trial court rejected Katz' argument that the State failed to allege an offense. App. Vol. 2, pp. 61-62. The trial court concluded that Katz failed to prove that R.S. or the sex act was unidentifiable because he did not file an affidavit in support of the motion to dismiss. Id.

SUMMARY OF ARGUMENT

ISSUE ONE: STATUTORY CONSTRUCTION

The Court can avoid the constitutional challenge to Indiana's intimate image statute by narrowly construing the statute to only those images in which the individual depicted is identifiable. This interpretation is not only reasonable, but tailors the statute to the harm against which it is to protect. Sharing an image of an unidentifiable person in a sexual manner may be wrong and cause embarrassment, but it does not create the reputational damage or humiliation that has spurred legislation across the country. Because the

[4] In 2019, the Legislature amended the statute to require the defendant to intend to harm the depicted person and "know or have reason to believe the image was obtained under circumstances the depicted person had a reasonable expectation that the visual material would remain private." 2019 Tex. HB 98, Sec. 2.

undisputed evidence is that the image here only showed the back of a woman's head, the State has failed to state an offense.

ISSUE TWO: FREEDOM OF SPEECH

If this Court does not narrowly construe the statute to require an identifiable person, the statute is one of the broadest in the country. It does not require a showing of harm, an intent to harm or even an identifiable person. Nor is it limited to private matters. It includes images captured in public or distributed for legitimate or innocent reasons. Not every invasion of privacy is substantial or done in an intolerable manner justifying restrictions on freedom of speech. Although the State has a compelling interest in regulating the non-consensual disclosure of sexual images, Indiana's intimate images statute is not narrowly tailored to serve that interest and violates the First Amendment.

The intimate image statute also violates Katz's right to speak under the Indiana Constitution. Katz did not abuse his right to speak by sending an image in which the person in it is unidentifiable.

ISSUE THREE: OVERBREATH

The intimate image statue also violates the First Amendment because of its broad sweep. It penalizes a substantial number of applications beyond non-consensual disclosure of private sexual images that result in emotional turmoil and reputational harm. It includes the distribution of images of women on the beach in skimpy bikinis, naked children playing in a bathtub or even a nude model posing for an art class. Almost every other statute in the country

requires the alleged victim to have a reasonable expectation of privacy and that there be some type of harm or the person identifiable. Without these limitations, Indiana's statue is unconstitutionally overbroad.

ARGUMENT

An appellate court reviews a trial court's grant of a motion to dismiss a charging information for an abuse of discretion. Littleton v. State, 954 N.E.2d 1070, 1075 (Ind. Ct. App. 2011). Under an abuse of discretion standard, the courts "reverse only where the decision is clearly against the logic and effect of the facts and circumstances." Id.

The appellate court "will affirm the trial court's grant of a motion to dismiss if it is sustainable on any theory or basis found in the record." Donahue v. St. Joseph County, 720 N.E.2d 1236, 1241, (Ind. Ct. App. 1999); see also State v. Riley, 980 N.E.2d 920, 922-23 (Ind. Ct. App. 2013) (reviewing record for any basis to affirm trial court's motion to dismiss); State v. Thompson, 687 N.E.2d 225, 229 (Ind. Ct. App. 1997) (defendant arguing the motion to dismiss was justified for a reason different than that given by the trial court); E.M. v. K.N., 19 N.E.3d 765, 770 (Ind. Ct. App. 2014) (affirming the trial court's dismissal of a paternity action on grounds different than that relied upon by the trial court).

The appellate courts interpret statutes de novo. Johnson v. State, 87 N.E.3d 471, 472 (Ind. 2017). Reviewing courts should use the power to declare a statute unconstitutional sparingly. Indiana Wholesale Wine & Liquor Co. v. State ex rel. Indiana Alcoholic Bev. Comm'n, 695 N.E.2d 99, 106 (Ind. 1998).

The doctrine of judicial restraint can be traced back to a 1936 concurring opinion by Justice Brandeis. Id. (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (1936)). Justice Brandeis explained, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction, . . . the Court will decide only the latter." Id. at 106 (cleaned up). And before finding a statute unconstitutional, the courts should "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" Id. (cleaned up).

I. The trial court's dismissal should be upheld on grounds that the State failed to state an offense.

Katz cross appeals the trial court's denial of the Motion to Dismiss for failure to state an offense. Ind. Rule of App. Procedure 9(D). Although the standard of review of a trial court's denial of a motion to dismiss is generally an abuse of discretion, an appellate court should uphold the trial court's grant of the motion to dismiss on any grounds in the record. This Court can avoid addressing the constitutionality of the intimate image statute in this case by interpreting the statute to require the individual's identity to be shown in the image. If the statute is so interpreted, the State has failed to state an offense because it is undisputed that R.S. was not identifiable and Catherine only assumed it was her.

The legislature has criminalized the distribution of an intimate image as follows:

(a) This section does not apply to a photograph, digital image, or video that is distributed:

(1) to report a possible criminal act;

(2) in connection with a criminal investigation;
(3) under a court order; or
(4) to a location that is:
(A) intended solely for the storage or backup of personal data, including photographs, digital images, and video; and
(B) password protected.

(b) As used in this section, "distribute" means to transfer to another person in, or by means of, any medium, forum, telecommunications device or network, or Internet web site, including posting an image on an Internet web site or application.

(c) As used in this section, "intimate image" means a photograph, digital image, or video:
(1) that depicts:
(A) sexual intercourse;
(B) other sexual conduct (as defined in IC 35-31.5-2-221.5); or
(C) exhibition of the uncovered buttocks, genitals, or female breast of an individual; and
(2) taken, captured, or recorded by:
(A) an individual depicted in the photograph, digital image, or video and given or transmitted directly to the person described in subsection (d); or
(B) the person described in subsection (d) in the physical presence of an individual depicted in the photograph, digital image, or video.

(d) A person who:
(1) knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the intimate image; and
(2) distributes the intimate image;
commits distribution of an intimate image, a Class A misdemeanor. However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section.

Ind. Code § 35-45-4-8.

Whether the image Katz briefly disclosed to Catherine constituted an "intimate image," despite the fact that R.S. was not recognizable, depends on

the meaning of the word "depicts." To constitute an intimate image, the photograph, video or digital image must "*depict*. . . other sexual conduct ((as defined in IC 35-31.5-2-221.5))" (emphasis added). Other sexual conduct is, in part, an act involving "a sex organ of one (1) person and the mouth or anus of another person." Id. Moreover, the photograph, digital image or video must be captured by "the person described in subsection (d) in the physical presence of an individual *depicted* in [it]." Id. (emphasis added).

When determining the meaning of "depict," the court must apply the rules of statutory construction. "The federal constitution affords the states broad authority to narrowly construe a statute to avoid a constitutional violation." Ex Parte Thompson, 414 S.W.3d 325, 339 (Tx. Crim. Ct. App. 2014) (citing Osborne v. Ohio, 495 U.S. 103, 115 n.12, 119-121, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990)). "A long-cherished principle of the American justice system is that a citizen may not be prosecuted for a crime without clearly falling within the statutory language defining the crime." Smith v. State, 867 N.E.2d 1286, 1287 (Ind. 2007). "In construing a statute, courts must assign words their plain, ordinary, and usual meanings in everyday speech, unless the statute itself provides definitions to the contrary." Id. at 1288.

"When the legislature defines a word, the courts are bound by that definition." State v. D.M.Z., 674 N.E.2d 585, 587 (Ind. Ct. App. 1996). "However, the statute may still be ambiguous where the wording of the statute arguably supports either of the competing interpretations advocated by the

parties." Id. The court's "examination of a penal statute requires that language be construed strictly against the State and in favor of the accused." Id.

In D.M.Z., the defendant moved to dismiss a sexual misconduct against a minor charge, arguing that he was not a "custodian" of the child as required by the statute. A "custodian" was defined as "any person responsible for a child's welfare who is employed by a public or private residential school or foster care facility." Id. (quoting Ind. Code § 35-42-4-7). The court considered the phrase "responsible for a child's welfare" ambiguous because liberally construed, "it could encompass virtually anyone responsible for the supervision of a child." Id. at 588. If narrowly construed, it could encompass only those who act as persons *in loco parentis*. Id. Construing the statute in favor of the defendant, the Court of Appeals found that a custodian must be one who acted *in loco parentis*, and that D.M.Z., an hourly worker who had limited supervision over children in a shelter home, was not such a person. Id. at 589.

Just as there were multiple interpretations of "any person responsible for a child's welfare" in the sexual misconduct with a minor statute, there are multiple constructions of the word "depict" in the intimate image statute. Cambridge Dictionary defines "depict" as "to represent or show something in a picture or story."[5] The distinction between representing or showing an act or person is important.

[5] https://dictionary.cambridge.org/dictionary/english/depicted (last visited 3/8/21).

A liberal construction of "depicts" would include any image that *represents* an individual in a sexual act or exposing certain part of his or her body even if that person's identity cannot be deciphered. Like here, it can include a video of the back of a female's head. The recipient of the video could not tell who the woman was and only assumed it was R.S. Appellee's App. Vol. 2, p. 6. In addition, a liberal construction would include any image that represents a sex act or nudity. For instance, it would include a photograph of a clothed woman on the bed eating a banana in a manner that one can interpret to represent oral sex. It could even include an image that is of such bad quality it is indecipherable, if the sender admits the image is of sexual intercourse, other sexual conduct or the exhibition of uncovered genitalia.

On the other hand, a narrow construction of "depicts" would require the photo, video or digital image to *show* the viewer the individual who is nude or engaged in a sex act. The term "show" means "to cause or permit to be seen: as to put on view" or to make "visible; exhibit; display." Townsend v. State, 750 N.E.2d 416, 418 (Ind. Ct. App. 2001) (quoting Webster's Dictionary). An image does not show an individual if it is impossible to know who the individual is. If Katz had accompanied the photograph with a message "here is R.S. performing oral sex," she would be the individual shown. But without that identifying information, it is impossible to identify R.S. as the individual shown in the photograph. Likewise, if a sex act must be shown, not just represented, a real sex act must be occurring and it must be decipherable from the image.[6]

[6] At the trial level, Katz argued that the statute requires the image to depict "other sexual conduct (as defined in IC 35-31.5-2-221.5)." Ind. Code § 35-45-4-8 (c)(1). Thus, the image would have to show a sex organ of one (1) person

This Court should construe the statute narrowly to require the photo, video or image to show the individual's identity for two reasons. First, the statute at hand is not only a penal statute but one that implicates free speech. For the reasons argued below, if the statute does not require an image from which the individual can be identified, it is not sufficiently tailored to survive a First Amendment challenge. State v. Van Buren, 214 A.3d 791, 813 (Vt. 2019) (construing Vermont's non-consensual pornography statute narrowly to exclude any images taken or distributed in public to avoid a First Amendment violation).

Second, this narrow construction is consistent with the Legislature's intent. Prosser v. J.M. Corp, 629 N.E.2d 904, 907 (Ind. Ct. App. 1994) (in construing an ambiguous statute, the court may look to the object of the statute and consider the goals sought to be achieved and the reasons and policy underlying the statute). As the State argues throughout its Brief, the non-consensual distribution of intimate images can be devasting to a person's mental health, employment and reputation. The disclosure can lead to "public shame and humiliation, inability to find new romantic partners, depression and anxiety, job loss or problems securing new employment, and offline harassment and stalking." State's Br., p. 15. But for the person to suffer these

---

and the mouth or anus of another person." Ind. Code § 35-31.5-2-221.5. As such, an image of a woman's head going up and down near a man's penis would not qualify as an intimate image. Although requiring the image to show the mouth on the penis may be more restrictive than the Legislature intended, the plain language of the statute supports the argument. The Legislature defined an intimate image as depicting other sexual conduct, not a person engaging in other sexual conduct. Even though Katz is not focusing on this argument, he is not abandoning it.

harms, the person and the sex act must be decipherable. Even the State recognizes that the harm comes from a person's photograph being associated with his or her name. State's Br., p. 32. An image of a person in a sex act when either the sex act or the person is not identifiable does not inflict the same threat to public health and safety to which the State refers.[7]

When rejecting Katz's argument that the State failed to state an offense, the trial court did not construe the statute, but instead found that Katz failed to submit an affidavit swearing to the contents of the video. App. Vol. 2, p. 61. Although the trial court is correct that Ind. Code § 35-34-1-8 states that if a motion to dismiss "is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts," Katz relied on the investigating officer's supplemental narrative report to prove the necessary facts. Appellee's App. Vol. 2, p. 6. The police officer swore under oath that his narrative was true and accurate for purposes of establishing probable cause. Appellee's App. 2, p. 4. Both the narrative and supplemental narrative were written on the same day around the same time about the same case by the same officer. Appellee's App. Vo. 2, pp. 5-6. It defies common sense that the officer's narrative is trustworthy enough to support a charge but the supplemental narrative is not sufficiently trustworthy to consider in a motion to dismiss.

---

[7] Arguably, Katz did not distribute the image to Catherine, because it was sent via Snapchat in a form that it disappeared after a few seconds. Catherine no longer has access to the image. However, the record is not developed about how the video was sent and whether Catherine could have saved it.

Regardless, the statute also allows a defendant to "submit documentary evidence tending to support the allegations in the motion." Ind. Code § 35-41-1-8(a). Indiana courts have long interpreted this provision to permit trial courts to go beyond the text of the charging information and "hear and consider evidence in determining whether or not a defendant can be charged with the crime alleged." D.M.Z., 674 N.E.2d at 586. "It is one function of a prosecuting attorney to make certain that a person is not erroneously charged. In considering a motion to dismiss, the trial court has that same obligation." Id. (citation omitted). Thus, even if the supplemental narrative is not considered an affidavit, it is other documentary evidence supporting the motion to dismiss.

Moreover, the State never contested the officer's description of the video as given to him by Catherine, the only person other than Katz who saw it. At the hearing, the prosecutor argued that the statute did not require R.S. to be identifiable or that the actual sex act be seen. Tr. Vol. 2, p. 11.

Overall, it was undisputed that R.S. was unidentifiable in the video. Catherine merely assumed it was R.S. It is also undisputed that although "other sexual conduct" is defined as involving the mouth of one person and the sex organ of another, neither R.S.'s mouth nor Katz' sex organ were shown. As such, the State has failed to state an offense.

II. The trial court properly granted the motion to dismiss, finding that the statute was unconstitutional.

If this Court finds that the trial court properly rejected Katz' claim that the State failed to allege an offense, this Court must consider the constitutionality of Indiana's intimate image statute.

A. Katz did not waive any arguments and all arguments are available on appeal.

The State erroneously argues that Katz waived all arguments other than an overbroad argument under the United States Constitution. Katz argued and the trial court agreed that the intimate image statute violated his right to freedom of speech in the First Amendment. App. Vol. 2, pp. 25-26, 45-46 (adopting the Texas Court of Appeals' reasoning that the statute was an impermissible restriction on the freedom of speech). Katz also separately argued the Indiana Constitution, citing authority. Id. To the extent Katz's argument at trial would not preserve the Indiana constitutional issue if made on appeal, trial attorneys are not held to the same standards as appellate attorneys. Ward v. State, 50 N.E.3d 752, 756 (Ind. 2016). In fact, the prosecutor at trial did not even file a memorandum or response to Katz' motion to dismiss.

Regardless of the preservation of error, this Court is to affirm the trial court's order on any ground in the record. Donahue, 720 N.E.2d at 1241. Moreover, the State was on notice of the arguments and responded to them in its Appellant's Brief.

B. Indiana's statute is the broadest in the country.

The State is correct that "[f]orty-six states, the District of Columbia, and Guam have all criminalized nonconsensual pornography." State's Br., p. 10. But Indiana's statute is one of, if not the broadest, in the country. Indiana's statute does not require an intent to harm or even any ill intent.[8] Nor does it require a showing of harm to the person depicted in the image. In 32 states (and Guam), the law includes ill intent as an offense element.[9] In four additional states, the law requires proof that the victim sustained harm.[10] In three additional states, it is an element that harm was intended or foreseeable.[11]

---

[8] Indiana's civil cause of action requires the plaintiff to prove intent to harass, intimidate, threaten, coerce, embarrass, gain profit at the expense of, or cause physical or financial injury or serious emotional distress to the depicted person. Ind. Code § 34-21.5-3-1(a)(2).

[9] Amicus Brief by American Booksellers Association, Association of American Publishers, Media Coalition Foundation and National Press Photographers Association filed in the Minnesota Supreme Court in State v. Casillas, Case No. A-19-0576, p. 20 (citing Ala. Code §13A-6-240; Alaska Stat. §11.61.120; Ariz. Rev. Stat. Ann. §13-1425; Ark. Code Ann §5-26-302; Colo. Rev. Stat. §18-7-107; Fla. Stat. §784.049; Ga. Code §16-11- 90; Guam Code Ann, Tit. 9 §28.102; Haw. Rev. Stat. §711-1110.9; Idaho Code §18- 6609(3); Iowa Code §708.7(1)(a)(5); Kan. Stat. Ann. §21-6101(8); Ky. Rev. Stat. Ann. §531.120; La. Rev. Stat. Ann. §14:283.2; Me. Rev. Stat. Ann., tit. 17-A, §511-A; Md. Code Ann., Crim. Law §3-809; Mich. Comp. Laws §750.145e; Mo. Rev. Stat. §573.110; Mont. Code Ann. §45-8-213; N. H. Rev. Stat. Ann. §644:9-a; N. M. Stat. Ann. §30-37A1; N.Y. Penal Law §245.15; Nev. Rev. Stat. 200.780.; N. C. Gen. Stat. Ann. §14-190.5A; Ohio. Rev. Code Ann. §2917.211; Or. Rev. Stat. §163.472; Pa. Cons. Stat. Ann. tit. 18 §3131; S.D. Codified Laws. Ann. §22-21-4; Tenn. Code Ann. §39-17-318; Vt. Stat. Ann. tit. 13, §2606; Va. Code Ann. §18.2-386.2; D. C. Code Ann. §22-3052; W. Va. Code Ann. §61-8-28A).

[10] Id. (citing Cal. Penal Code §647(j)(4); Conn. Gen. Stat. Ann. §53a-189c; N.D. Cent. Code §12.1-17-07.2; Tex. Penal Code. §21.16.1)

[11] Id. (citing Okla. Stat. tit. 21 §1040.13b; R.I. Gen. Laws §11-64-1; Wash. Rev. Code §9A.86.010).

Of the nine states that do not require an intent to harm or any harm, many require proof that the accused knew the person depicted did not consent to the disclosure, intended the image to be private and/or had a reasonable expectation of privacy. Wisconsin v. Culver, 918 N.W.2d 103, 109 (Wis. Ct. App. 2018); Neb. § 28-311.08; NJ § 2C:14-9. Katz could only find two jurisdictions where a defendant can be found guilty based on what he or she should have reasonably known and without any ill intent or harm. See 11 Del. C. § 1335; Minn. Stat. § 617.261.

In addition, if this court interprets the intimate image statute to include images of individuals who are not identifiable, Indiana's statute may be the broadest in the country. Most statutes, including those in Minnesota and Texas, require that the depicted person be identifiable from the image itself or from information available in connection with the image. See State's Br., p. 20, n. 13 (setting forth the statutes from Minnesota and Texas).

Finally, unlike forty states, Indiana does not have a legitimate or public concern exception to the statute.[12] Nor does Indiana require the image to be captured under circumstances where the depicted individual has a reasonable expectation of privacy. As such, Indiana's statute extends to images captured in public.

Professor Franks and Citron, experts who through the Cyber Civil Rights Initiative ("CCRI") advocate for the criminalization of revenge porn, authored a

[12] For a list of the statutes from around the country, see 46 States + DC + One Territory NOW have Revenge Porn Laws | Cyber Civil Rights Initiative (last visited 3/7/21).

Guide to Legislatures for creating a robust, but narrow law that does not infringe on the First Amendment.[13] Indiana's intimate image statute fails to comport with the professors' recommendations in significant ways: it fails to require the person be identifiable, it does not include exceptions for images captured in a public setting or disclosed for a legitimate public purpose and it has an expansive definition of nudity, including uncovered buttocks. Guide for Legislatures, pp. 5, 6, 9, at p. 6.

Although the professors recommend against an intent to harm element, there is a "general consensus in state legislation throughout the United States that the offender should act with a malicious motive or that only those who suffer harm merit protection." Fifty States of Gray, 50 Tex. Tech L. Rev. at 360-61 (2018). Without any requirement of an intent to harm, harm or even that the alleged victim be identifiable or the image taken under circumstance in which the depicted person had a reasonable expectation privacy, Indiana's statute is an anomaly. The implications of Indiana's broadly written statute set forth below render it unconstitutional.

C. Indiana's broad intimate image statute violates the First Amendment and Katz's freedom of speech.

1. Federal Constitution

[13] Christian Nisttáhuz, Fifty States of Gray: A Comparative Analysis of "Revenge Porn" Legislation Throughout the United States and Texas's Relationship Privacy Act, 50 Tex. Tech L. Rev. 333, 349 (2018) (discussing Mary Anne Franks, Drafting an Effective "Revenge Porn" Law: A Guide for Legislators, CYBER C.R. INITIATIVE 11 (Sept. 22, 2016), https://www.cybercivilrights.org/wp-content/guide-to-legislation/ [hereinafterGuide for Legislators]).

"The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.' '[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" United States v. Stevens, 559 U.S. 460, 468; 130 S. Ct. 1577, 1583; 176 L. Ed. 2d 435, 443 (2010) (cleaned up). Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 2286 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226 (2015). Laws that are content-neutral are subject to a lower, intermediate level of scrutiny. Id.

The State does not dispute that the intimate image statute regulates protected speech, but instead argues that the statute is narrowly tailored to the government's substantial interest in regulating the distribution of the images. In so arguing, the State makes two errors: 1) the State concludes the statute is content-neutral, applying an intermediate level of scrutiny; and 2) the State fails to consider that Indiana's statute is uniquely expansive, extending beyond protecting a person's privacy or curtailing the harm associated with the distribution of the image.

First, the State applies the wrong standard, incorrectly concluding that the statute is content-neutral. Relying on People v. Austin, 155 N.E.3d 439 (Ill. 2020), the State argues that the statute is content neutral because it criminalizes the means of acquiring and distributing the images, not the content, and that the State has a legitimate interest in regulating private matters like the ones at hand. As an initial matter, most commentators and courts disagree with Austin, and have found that the intimate images statutes, like Indiana's, are content based, requiring strict scrutiny. See, e.g., State v. Van Buren, 214 A.3d 791 (Vt. 2019) (applying a strict scrutiny analysis); Ex Parte Ellis, 609 S.W.3d 332, 336 (Tx. Ct. App. 2020); and Fifty States of Gray, 50 Tex. Tech L. Rev. at 351-52.

The Austin Court "found that an intermediate level of scrutiny was appropriate because the distribution statute 'regulates a purely private matter,' the second prong under the analysis." State's Br., p. 30. But whether a restriction is content based is a one-step test. The "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Reed, 135 S.Ct. at 2227. In Reed, the Supreme Court explained:

> 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 towards the ideas contained' in the regulated speech.... In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.
>
> That is why we have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose.

Id., 135 S.Ct. at 2228 (citations omitted). The State is putting the cart before the horse. A court must first determine whether the statute is content based before considering the government's interest in regulating the speech. The government's interest in regulating private matters is irrelevant in determining whether the statute is content based. Ex Parte Ellis, 609 S.W.3d at 336 (rejecting the same argument and finding that Texas' intimate image statute is subject to strict scrutiny).

The intimate image statute is content based on its face because the content of the image is critical to its application. The statute does not criminalize the non-consensual distribution of all private images, but only "intimate images" that depict sexual intercourse, sexual conduct or nudity. Under Indiana's intimate image statute, a boyfriend who photographs his girlfriend doing something offensive, like being in black face, or simply not looking her best in the comfort of her own home, could not be convicted for distributing the image, even if she told him to keep it private and that she did not consent to its distribution. Contrary to the State's argument, the sexual content of the image is critical to its illegality. In fact, the State admits this content restriction when it argues "intimate image is narrowly defined… as a kind of sexual image" and that it must have "sexual content." State's Br., pp. 23, 37 (arguing that the statute is narrowly tailored to certain sexual images).

Where, as here, the statute regulates certain types of images, the statute is content based. Ex parte Thompson, 442 S.W.3d at 347 (a statute prohibiting the taking of photographs without consent was content based because it

prohibited photographs of people, not objects); United States v. Stevens, 130 S. Ct. 1577, 559 U.S. 460, 573 (2010) (a statute restricting "'visual [and] auditory depiction[s], . . ., depending on whether they depict conduct in which a living animal is intentionally harmed" regulated speech based on content).

It is rare that a statute restricting speech because of its content will survive constitutional scrutiny. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 818, 120 S. Ct. 1878 (2000)). Because the statute is content based, the statute is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." Reed, 576 U.S. at 163. "Under a strict scrutiny analysis, narrow tailoring means that the statute must be the least restrictive means for addressing the government's interest." Playboy Ent. Grp., Inc., 529 U.S. at 827. A statute, however, does not need to be "perfectly tailored" to survive strict scrutiny. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 454, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015). "To satisfy strict scrutiny, a law that regulates speech must be: (1) necessary to serve (2) a compelling state interest and (3) narrowly drawn." Ex Parte Thompson, 442 S.W.3d at 344.

Katz concedes that intimate image statutes can be necessary to serve a compelling state interest. "Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner." Snyder v. Phelps, 562 U.S. 443, 459, 131 S. Ct. 1207, 1220 (2011). As the State points out, intimate images can be "posted with identifying information such that they catapult to the top of the results of an online search for an individual's name." State's Br., p. 31. The State enacted

the statute "to prevent the permanent and severe harms caused by the nonconsensual distribution of intimate images." State's Br., p. 38. There can be consequences in the individual's community, including humiliation, harassment, a ruined reputation and even loss of employment.

However, Katz disputes that the Indiana's statute is narrowly drawn to protect individuals from the social consequences. There were many recommended and common ways the Legislature could have narrowed the statute to include only private matters that created significant harm beyond just embarrassment. But the Legislature did none of them.

Recently, the Texas Court of Appeals found its statute, as amended, was narrowly drawn to protect privacy interests because it contained language tailored to privacy. In re Ellis, 609 S.W.3d at 338. The amended statute requires: 1) "the visual material was obtained or created under circumstances in which the depicted person had a reasonable expectation of privacy"; 2) the image "reveals the identity of the depicted person rather than broadly prohibiting disclosure of all intimate images"; and 3) "the disclosure of the visual material causes harm to the depicted person." Id.[14]

As discussed above, Indiana's statute has none of the language that the Texas statute includes. Because it does not exclude photographs taken in public or require that the image be created under circumstances in which the

[14] Casillas, 952 N.W.2d at 643 (Minnesota's statute survived strict scrutiny, in part, because it was limited to an image with an identifiable person with a reasonable expectation of privacy); People v. Iniguez, 247 Cal. App. 4th Supp. 1, 8, 202 Cal. Rptr. 3d 237, 243 (2016) (requiring an identifiable person and an intent to do harm).

depicted person has a reasonable expectation of privacy, the intimate image statute includes photographs or videos taken anywhere.

To compound the problem, Indiana's intimate image statute does not have a legitimate public purpose exception. For instance, the individual who shared with the media the photographs of the genitalia of disgraced Politician Anthony Weiner could be convicted under Indiana's statute. So too could the photographer who took the Pulitzer Prize- winning photograph of the Napalm girl in Vietnam. Also, the exceptions do not protect against accidental disclosure because distribution includes backing up an intimate image on a cloud-based program that is not password protected. Ind. Code § 35-45-4-8(a).

The State argues the statute requires "discrete and personal" sexual matters beyond just sexually suggestive materials. State's Br., p. 37. But the statute also includes "exhibition of the uncovered buttocks, genitals, or female breasts." Ind. Code § 35-45-4-8(c)(1)(C). There are bathing suits (i.e., thongs) designed to leave the buttocks uncovered and low-cut shirts exposing the vast majority of a woman's breasts. Under Indiana's intimate image statute, it is illegal to distribute photographs of women in thongs on the beach without their consent.

In addition to not restricting the statute to only private situations, the Legislature did not limit the statute to those who had ill intent or intent to harm or who caused harm. Not every distribution of an image depicting nudity or sexual conduct is an attempt to humiliate, hurt or make money from the person depicted in the image. Nor does every distribution of such image harm the person depicted in a substantial and intolerable manner justifying the

government's encroaching on the freedom of speech. Indiana is one the few states that the statute does not explicitly state the person must be identifiable. An unidentifiable person does not suffer the social consequences against which the statute is meant to protect. There will be no repercussions at work or school. The image does not harm one's reputation because no one knows who it is.

Without requiring either identification or harm, the statute is not narrowly tailored to it purpose. In re Ellis, 609 S.W.3d at 338 ("While it may be difficult to prove harm to the depicted person, this requirement narrows the statute to only criminalize intentional disclosures that cause harm to the depicted person."). Because the statute does not require any intent to harm, it applies to many innocent activities, such as posting photographs of young children in a bathtub, a nude model posing for a portrait or a girlfriend in an extremely revealing bathing suit.

Finally, the State argues that Indiana's statute is limited to "the first receiver [and] the actual maker of the image without consent" and argues this removes the risk of an unknowing third party being prosecuted. State's Br., p. 13, 37. But that is not true. Catherine received the image from Katz, who took the photograph of himself engaging in a sex act. Under subsection (c)(2)(A), Catherine could be criminally liable for further distribution.

And according to the State, "the statute requires the State to prove a defendant's reasonable awareness of the lack of consent to distribute, which is a heavy burden." State's Br., p. 38. However, the statute only requires that the defendant "reasonably should know" there was no consent. This is not a

heavy burden, but rather a negligence standard. Generally, negligence is not a criminal burden, especially when dealing with statutes regulating speech. The First Amendment prohibits negligence-based regulations of protected speech. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it… ."); Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) ("we should be particularly wary of adopting such a standard for a statute that regulates pure speech"). Even the scholars at CCRI advocate for a recklessness mens rea for consent rather than negligence. "[R]ecklessness is the conscious disregard of a 'substantial and unjustified risk.' It is based on actual knowledge of the risk of the offender, as opposed to negligence, which is based on what the offender should have known." Guide to Legislatures, p. 6.[15]

Not every invasion of privacy is substantial and intolerable, justifying an intrusion on the freedom of speech.[16] For instance, the intimate image statute could not and does not criminalize Katz describing in a text to Catherine his sexual encounters with R.S. Katz could circulate a dirty limerick about R.S. identifying her and describing intimate details, or even write a hit song about having sex with her. Words could destroy R.S.'s reputation. She could lose her job, relationships and self-esteem. Non-consensual dissemination of words

[15] https://www.cybercivilrights.org/guide-to-legislation/

[16] "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all person in its jurisdiction." Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

that identify the person in a sexual situation can be more harmful than an image that does not identify the person.

Overall, the State has a compelling interest in regulating the non-consensual distribution of intimate images, but the First Amendment requires more. It requires that the Legislature narrowly tailor the statute to serve that purpose. Indiana's Legislature failed to do that in basic ways that renders the statute unconstitutional. The Legislature did not use the least restrictive means to protect one's privacy interests and the harm of exposure because the statute neither requires private conduct nor harm. It includes situations that are not private or that result in less harm than a partner posting a detailed summary about his or her sexual encounters.

Even if this Court were to find that the statute was content-neutral, it does not survive intermediate scrutiny. Content-neutral restrictions are constitutional if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." State v. Casillas, 952 N.W.2d 629, 640-41 (Min. 2020). "Under an intermediate scrutiny analysis, narrow tailoring means that the restriction is 'not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.'" Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 800, 109 S.Ct. 2746 (1989)).

Indiana's intimate image statute is broader than necessary to achieve the government's interest. As argued above, a person can be convicted of

distributing an image from which it is impossible to know who is committing a sex act or is exposing her buttocks or breasts, or even if a sex act or nudity is occurring. Although some may view the decision by an ex-lover to send such a picture amoral or even a betrayal, such an image does not create the harm that necessitated the statute in the first place. Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533 (1989) ("The First Amendment reflects the "bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Moreover, when considered with the fact that Indiana's statute applies to public exhibition and regardless of a person's intent or purpose, the statute is far broader than necessary to achieve the government's interest of protecting privacy. There are no alternative channels for distributing images taken in public or for public purposes that qualify as intimate images.

In at least two states, the legislature amended their non-consensual pornography statutes due to a court's ruling finding the statutes unconstitutional.[17] In Vermont, the Supreme Court narrowly construed the statute to avoid a First Amendment violation. Van Buren, 214 A.3d at 813. And of the states that have upheld their statutes, Katz was unable to find any statute as broad as Indiana's. California v. Iniguez, 202 Cal. Rptr. 3d 237, 243 (Cal. App. Dep't. Super. Ct. 2016); Wisconsin v. Culver, 918 N.W.2d 103, 109 (Wis. Ct. App. 2018) ("the statute pertains only to those images that the publisher *knows* are private"). Even the Illinois and Minnesota statutes require

[17] Fifty Shades of Gray, 50 Tex. Tech L. Rev. at p. 360 (discussing Arizona's statute); 2019 Texas HB 98, Sec. 2.

an identifiable person and the image be obtained under circumstances a reasonable person would understand that the image was to remain private. Austin, 155 N.E.3d at 453; Casillas, 952 N.W.2d at 636. Thus, Indiana's intimate images statute unconstitutionally restricts the First Amendment freedom of speech.

2. Indiana Constitution.

"No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." Ind. Const. Art. 1, § 9. When reviewing a claim under Article I, Section 9, there is a two-step process. "First, a reviewing court must determine whether state action has restricted a claimant's expressive activity. Second, if it has, the court must decide whether the restricted activity constituted an 'abuse' of the right to speak." Whittington v. State, 669 N.E.2d 1363, 1367 (Ind. 1996). For non-political speech, the courts "evaluate the constitutionality of any state-imposed restriction of the expression under standard rationality review." Id. at 1370. The court is to "determin[e] whether the state could reasonably have concluded that [the] expressive activity . . . was an 'abuse' of the right to speak or was, in other words, a threat to peace, safety, and well-being." Id. at 1371. "Abuse is the use of a thing in a manner injurious to the order or arrangement from which it derives its function." Price v. State, 622 N.E.2d 954, 958 (Ind. 1993).

Although Katz concedes that the sharing of an intimate image in this case was not clearly political speech, the sharing was also not an abuse of his

right to speak. When determining whether there was an abuse of the right to speak, the courts look to the injury from the speech. Although there are many times that non-consensual disclosure of an intimate image will cause substantial injury, Katz' disclosure did not. Katz shared a video with one person that implied oral sex. The woman in the video was not identifiable. The video was sent over Snapchat in a form that lasted just seconds. There is no evidence that the fleeting image is anywhere on the internet or had been seen by anyone other than Catherine for a few seconds.

The State argues that "Defendant's expressive activity of distributing the video of R.S.' sexual activity was a threat to the peace, safety, and well-being of R.S. . . [T]he significant and life-long damage to victims of nonconsensual pornography is now well-documented and widely accepted by courts and scholars." State's Br., p. 40. But many of those same scholars and courts assume that the person is identifiable from the image or text associated with the image. The fact that the public can recognize the person in the image as the victim is the nexus between the crime and the harm.

In this case, where the individual involved is not identifiable in the image that lasted only briefly in a Snapchat conversation, the disclosure was not a threat to the well-being of a person to the extent that it reasonably justifies criminal punishment. Katz did not abuse his right to speak, and criminalizing his conduct violates Article I, Section 9 of the Indiana Constitution.

D. Indiana's expansive intimate image statute is overbroad.

1. Federal Constitution

A law may be invalidated as "overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" Washington v. Glucksberg, 521 U.S. 702, 740, n. 7, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997) (Stevens, J., concurring). "There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." Stevens, 559 U.S. at 474. In Stevens, the U.S. Supreme Court invalidated a statute criminalizing the creation, sale or possession of certain depictions of animal cruelty. Id., 559 U.S. at 464. The statute prohibited much more than just images of animal cruelty. Id. at 474. It banned any depiction in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." Id. A wounded or killed animal does not suggest cruelty. Although the depiction also had to show illegal conduct, legality varies between jurisdictions and often does not relate to cruelty but rather regulation of hunting and endangered species, etc. Id. Nor was the statute's constitutionally narrowed by exempting from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." Id. at 478. "Most of what we say to

one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." Id. at 479-80.

Like the statute that broadly defined animal cruelty to include ordinary and lawful activities, the definition of intimate image includes much more than private sexually explicit photographs and videos. As argued above, the statute includes: 1) images taken in public places; 2) images of bare buttocks or breasts; 3) images distributed for any purposes, even those of public concern; 4) disclosures where a person only reasonably should have known there was no consent; and 5) images in which the identity of the person is not decipherable from the image or words associated with the image.

Because of the broad nature of Indiana's statute, the statute criminalizes "constitutionally protected expression in a substantial number of applications when considered in relation to its plainly legitimate sweep." Stevens, 559 U.S. at 473. Here, the State concentrates on the fact that the statute is limited only to a person who captured the image or directly receives it from an individual depicted in the image. State's Br., p. 24. The State argues an unknowing third party, like Catherine, would not be included in its scope. Katz disagrees. Because Catherine received the image from Katz who is an individual in the image also engaged in a sex act, the image falls under Ind. Code 35-45-4-8(c)(2)(A). There is no evidence that Katz authorized Catherine to share the image with anyone. In fact, he sent it in a format in which Catherine would have to save the image quickly or it would be lost forever. Just like an individual who sends a naked image to another to solicit a sexual encounter,

Katz sent the image at issue to solicit Catherine and her boyfriend to engage in a sex act with him and R.S. Catherine would have been subject to the same penalties as Katz had she saved the image on the cloud without a protected password or sent it to another person.

This scenario illustrates the need for more than a negligence standard. If the statute required the State to prove that the defendant knew the individual sending the photograph did not consent to further distribution, Catherine would not be subject to liability unless Katz told her not to share the image. But considering the circumstances of Katz' transmission of the video, there is a strong argument she should have known that Katz did not want the image distributed.

Moreover, in an overbreath challenge, the court is to compare the sweep of the statute to its intended purpose. In Stevens, the animal cruelty statute went beyond its intended purpose of criminalizing sexual animal fetish videos and animal fighting depictions by also criminalizing hunting videos and magazines. Similarly, Indiana's intimate image statute sweeps broader than preventing non-consensual disclosure of private sexual images. Id. at 472. It criminalizes the distribution of photographs of women's cleavage or bare buttocks in public places. Ex Parte Thompson, 442 S.W.3d at 349 (holding that a statute criminalizing photographing people with the intent to sexually arouse oneself violates the First Amendment). It criminalizes posting photographs of children in bathtubs. It also criminalizes photographs where the person cannot even be identified and therefore does not suffer the reputational harm.

Although Indiana's statute criminalizes images of a person in comprising private sexual situations that could cost that person his or her reputation, job, friends and other relationships, Indiana's criminal statute also penalizes other protected speech and acts that, even if disagreeable, do not create the harm it was enacted to prevent and are not private.

2. Indiana's Constitution

If this Court concludes that the intimate image statute is capable for constitutional application, "it should limit itself to the vindicating the rights of the party before it." Price, 622 N.E.2d at 928 (holding there is no overbreath analysis under the Indiana Constitution). Katz has argued above that the application of the statute to him is a violation of his right to speech under the Indiana Constitution.

CONCLUSION

WHEREFORE, the Appellee, Conner Katz, by counsel, respectfully requests this Court affirm the trial court's judgment dismissing the cause, and for all other relief just and proper in the premises.

Respectfully submitted,

__/s/ Stacy Uliana
Stacy R. Uliana #20413-32
stacy@ulianalaw.com
Attorney for Appellee

VERIFICATION OF WORD COUNT

I verify that this Appellee's Brief, including footnotes, contains no more than 14,000 words according to the word count function on the Microsoft word processing program used to prepare this Appellee's Brief.

__/s/ Stacy Uliana
Stacy R. Uliana #20413-32
stacy@ulianalaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been delivered through E-service using the Indiana E-filing System to Jodi Kathryn Stein, Deputy Attorney General of Indiana, this 8th day of March, 2021.

___/s/_Stacy Uliana

Stacy R. Uliana, 20413-32
stacy@ulianalaw.com
Attorney for the Appellee