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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 RESPONSE TO AMICUS CURIAE BRIEF

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SUMMARY OF ARGUMENT

Although non-consensual distribution statutes have been upheld in some States where First Amendment challenges have been made, Indiana's statute is different. Amici concedes that Ind. Code § 35-45-4-8 does not meet all Cyber Civil Rights Initiatives' (CCRI's) recommended specifications for a non-consensual distribution statute but proposes that this Court save the statute by reading any necessary elements into it. Amici's proposal crosses the line from a reasonable statutory construction to an unconstitutional re-writing of the statute. It also requires this Court to create a new privacy exception to strict scrutiny analysis.

ARGUMENT

I. Defense of privacy rights does not overcome First Amendment limitations on restrictions on speech.

Amici CCRI and Dr. Mary Anne Franks[1] argue that Ind. Code § 35-45-4-8 is "a privacy measure with a plainly legitimate sweep, and unauthorized 'sexually explicit publications concerning a private individual' are not 'afforded First Amendment protection.'" *Amicus Br.*, pp. 15-16 (citing an 1891 U.S. Supreme Court case concerning whether a female negligence plaintiff could be required to make herself available for a medical examination by defendant's physician in the presence of her own physician).[2]

[1] As a matter of clarification, amicus Franks is an attorney and law professor who has a doctor of philosophy degree.
[2] Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251-52 (1891).

Amici thus ask this Court to adopt a new exception to established First Amendment jurisprudence[3] -- that content-based criminal restrictions on speech, if intended to protect privacy or to regulate purely private matters, are not subject to strict scrutiny. There are no U.S. Supreme Court precedents to support such an approach; the cases cited by Amici do not do so. Justice Scalia's statement in Barnes is simply dictum in a concurring opinion. *Amicus Br.*, p. 18 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571-81 (1991)). In San Diego v. Roe, 543 U.S. 77 (2004), a public employment termination case, the Supreme Court found that videos sold by a police officer showing him masturbating were "detrimental to the mission and functions of the" San Diego Police Department. *Amicus Br.,* p. 18 (citing Roe, 543 U.S. at 84). The Court's statement that the videos did not involve a matter of "public concern" was addressed to a narrow issue specific to public employment—whether a public employee may be disciplined for speaking out on a matter of "public concern." The Court found that he could, solely "in the context of restrictions by governmental entities on the speech of their employees." Id. at 84-85.

Snyder v. Phelps, 562 U.S. 443 (2011), also does not support the creation of a privacy exception to the rule that regulation of content-based speech must be subject to strict scrutiny. *Amicus Br.*, p. 18, 27. In Snyder, the plaintiff sued for intentional infliction of emotional distress, traditionally unprotected speech. In addition, that tort claim subjected the defendant only to money damages.

[3] The U.S. Supreme Court has held that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." Brown v. Entertainment Ass'n, 564 U.S. 786, 791 (2011).

Ind. Code § 35-45-4-8, at issue here, is a criminal statute with criminal penalties, including incarceration. Amici ignore the U.S. Supreme Court's clear ruling in Reed v. Town of Gilbert, that

> [a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech . . . .

576 U.S. 155, 165 (2015).

The absence of a privacy exception to the rule that content-based restrictions on speech are subject to strict scrutiny does not prevent legislatures from enacting laws to protect certain types of private information, such as medical records, genetic information, and educational records. It simply means that the constitutionality of such content-based laws, intended to protect privacy, must be assessed under the same "strict scrutiny" standards as other content-based restrictions. While the constitutionality of such privacy-protective content-based laws must survive strict scrutiny, courts may and do consider the privacy-protective purpose in evaluating whether the statute is necessary and narrowly-tailored to serve a compelling state interest. See, e.g., Tschida v. Moti, 924 F.3d 1297, 1303-04 (9th Cir. 2019) (state statute imposing confidentiality requirement on ethics complaints against state elected officials and employees was "content-based," and therefore subject to strict scrutiny requiring the State to show a compelling interest in protecting this form of private information); and Cahaly v. Larosa, 796 F.3d 399, 405-06 (4th Cir. 2015).

A privacy exception to the strict scrutiny rule would undermine free speech far afield from the private nude or sexual images that Ind. Code § 35-45-4-8 seeks to criminalize. Much contained in media reports may be considered private or personal by their subjects. Indeed, many of the communications individuals make to each other—especially over the Internet and through electronic means such as texts and emails—concern what the participants might consider private or personal, notwithstanding their communication mode. A legislature may not criminalize publishing lawfully-obtained personal financial information about a public official or private person; non-obscene sexually-related texts (not images) exchanged between persons in an intimate relationship; or news about a public official's or private person's adulterous relationship. Applying Amici's reasoning, any such content-based speech restrictions would be subject only to intermediate scrutiny because they were intended to protect privacy. Under Reed, though, all such content-based speech restrictions are subject to strict scrutiny. While a privacy-protective legislative intent is relevant to determining whether the legislative purpose was compelling and the means chosen necessary and narrowly tailored to that interest, it does not change the level of scrutiny required.

Amici's argument has serious implications because it permits criminalizing any invasion of privacy committed by private individuals. The examples cited by Amici are those of professionals, such as doctors and banks, who have a duty to their clients. *Amicus Br.*, p. 25, 28. But, we trust our friends, partners and family with secrets all the time. Under Amici's argument, a statute criminalizing secret-retelling is only subject to an intermediate level of

scrutiny. Thus, if the government has an interest in protecting individuals from emotional harm, Amici says this can be regulated. The legislature could then criminalize a husband posting on his Facebook page his wife's cancer diagnosis without her consent or a friend blogging about another's friend flunking an exam without consent.

However, strict scrutiny is the required and necessary analysis. Not every hurtful invasion of privacy should justify the curtailing of free speech. See, e.g., State v. Bishop, 787 S.E.2d 814, 819 (N.C. 2016) (holding that "The State's justification for the cyberbullying statute 'cannot transform [this] facially content based law into one that is content neutral.'"). Under a strict scrutiny analysis, any criminalization of secret-retelling would have to be narrowly tailored to a compelling interest beyond annoyance or embarrassment. Id. at 822 (there is "no compelling interest in protecting minors from "online annoyance.").

II. Ind. Code § 35-45-4-8 is content-based on its face and therefore requires the application of strict scrutiny.

Contending that the "law restricts only how and when purely private information may be disclosed, without any attempt to disfavor a particular perspective" (*Amicus Br.*, p. 17), Amici claim that the statute is not content-based but rather a time, place and manner regulation. They are wrong in both respects.

Time, place and manner

A speech restriction can only be justified as a permissible regulation of the "time, place, and manner" of speech if (1) the restriction is justified without

reference to the content of the regulated speech, (2) the restriction is narrowly tailored to serve a significant governmental interest, and (3) the restriction leaves open ample alternative channels for communication of the information. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Because Ind. Code § 35-45-4-8 is both content-based and fails to permit alternative channels of communication, it cannot be upheld as simply a time, place and manner regulation.

Content-neutrality

That Ind. Code § 35-45-4-8 criminalizes only posting nude or sexual images, but not other images that a depicted person may strongly desire to keep private—wearing a Nazi uniform, appearing (fully-clothed) with a paramour, eating food forbidden by his or her religious beliefs, or simply appearing in a disheveled, inebriated, or otherwise unflattering way—proves its lack of content-neutrality.

Another way to demonstrate the statute's lack of content-neutrality is to compare a nude image published without consent and a clothed image of the same person, with the same facial expression, standing or sitting in the same way, in the same setting, published without consent. Both lacking consent, dissemination of the nude image is criminalized by the statute; dissemination of the opaquely-clothed image without consent is not.

Because the statute criminalizes the publication of non-obscene nude or sexual images without consent but does not criminalize the publication of clothed images without consent or the other embarrassing images described above, the statute is, on its face, content-based and requires strict scrutiny.

United States v. Stevens, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content based); United States v. Playboy Entm't. Grp., Inc., 529 U.S. 803, 811 (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based.").

III. The Court should not rewrite the statute to correct the statute's deficits.

"It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." Sable Communications of Cal., Inc. v. FCC, 492 US 115, 126 (1989). This Court should not rewrite Ind. Code § 35-45-4-8 to carefully tailor it to the State's compelling interest in ways the Legislature failed to do so.

In Katz's Brief, he argued that:

> Indiana's intimate image statute fails to comport with [CCRI's] 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.

Id. at p. 23 (citing Guide for Legislatures, pp. 5, 6, 9, at p. 6). Amici concedes that Indiana's statute does not include all their recommended specifications for a robust constitutional statute,[4] but proposes that this Court can cure the

[4] Amici claim that Katz' reliance on their scholarly work is a "self-serving mischaracterization." *Amicus Br.*, p. 33. In support, Amici cites to one instance - Katz's assertion that CCRI advocated for a reckless standard rather than negligence. *Amicus Br.*, p. 34. Although CCRI's Guide for Legislatures cites to the recklessness standard, it is true that the author stated that that the "element should be no higher than recklessness." Guide, p. 6, at https://www.cybercivilrights.org/guide-to-legislation/. To the extent

problem by construing Ind. Code § 35-45-4-8 to apply only those matters of a private concern and to address "any remaining concerns." Id. at pp. 27-29. In Calvin v. State, 87 N.E.3d 474 (Ind. 2017), this Court explained:

> Separation of powers is explicit in our Constitution. Ind. Const. art. 3, § 1. And the power to legislate "is vested exclusively in the Legislature under Article 4, Section 1 of the Indiana Constitution." Paul Stieler Enters. v. City of Evansville, 2 N.E.3d 1269, 1277 (Ind. 2014). We accordingly cannot rewrite statutes:
>
> > The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers.

Id. at 478 (quoting R.R. Comm'n of Ind. v. Grand Trunk W. R.R., 179 Ind. 255, 263-64, 100 N.E. 852, 855 (1913)). Appellate courts should "adopt a saving construction as long as there is a reasonable interpretation that avoids the constitutional problem," but may not "effectively rewrit[e] a statute to save it from constitutional infirmity." State v. I.T., 4 N.E.3d 1139, 1145 (Ind. 2014).

Amici fails to offer any reasonable interpretation of the statute from which this Court could construe a legitimate or public concern exception or restrict the statute to only private matters. This Court would have to write into the statute an exception that does not otherwise exists. See Ind. Code § 35-45-4-8(a) (listing exceptions).

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undersigned counsel misunderstood the author's intent, it was a reasonable mistake.

Amici also argues that a "reasonable expectation of privacy" provision is unnecessary because of Indiana's narrow definition of "intimate image." *Amicus Br.*, pp. 37-38. But the definition does not limit an intimate image to only those taken in a private situation. It includes public sex acts or exhibition of uncovered buttocks, genitalia and breasts. Ind. Code § 35-45-4-8(c). Thus, the definition of "intimate image" does not alleviate the need for a statutory provision limiting the statute to only those images taken with a reasonable expectation of privacy.[5] Nor does Amici provide a reasonable interpretation of the statute limiting it to only those situations in which the alleged victim had a reasonable expectation of privacy.

In the Appellee's Brief, Katz argued that interpreting Ind. Code § 35-45-4-8 to require the victim to be identifiable from the image could avoid a First Amendment violation. Katz Br., p. 17. But in hindsight, that is not enough.[6] For Ind. Code § 35-34-4-8 to be construed as constitutional, this Court would have to interpret it to include an identifiable victim, a legitimate or public

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[5] Katz was unable to find a statute that has survived a constitutional challenge and did not require an expectation of privacy or similar element. See, e.g., State v. Casillas, 952 N.W.2d 629 (Min. 2020); People v. Austin, 155 N.E.3d 439 (Ill. 2020); State v. Van Buren, 214 A.3d 791, 813 (Vt. 2019); Wisconsin v. Culver, 918 N.W.2d 103 (Wis. Ct. App. 2018); California v. Iniguez, 202 Cal. Rptr. 3d 237 (Cal. App. Super. Ct. 2016). Instead when arguing that such an element is not required, Amici relies on a civil case regarding the tort of invasion of privacy. *Amicus Br.*, p. 38 (citing disaffirm such a reading Pohle v. Cheatham, 724 N.E.2d 655, 660-61 (Ind. Ct. App. 2000).

[6] Katz also argued that the statute was not narrowly tailored to serve the State's interest because it included images taken in public and disseminated for legitimate public concern. *Katz's Br.*, p. 28-30.

concern exception and a reasonable expectation of privacy provision. In other words, this Court would effectively have to rewrite the statute.

Finally, Amici characterizes these problems with the statute as overbreadth issues that can be addressed on a case-by-case basis. *Amicus Br.*, pp. 36-38. But Katz did not raise these concerns solely in an overbreadth challenge. He primarily raised them to show the statute is not narrowly tailored to serve the compelling interest of protecting against substantial reputational harm arising from an invasion of privacy. There are many ways the legislature could have tailored the statute to address the harm and the invasion of privacy. The legislature could have included an element of harm,[7] intent to harm or profit,[8] an identifiable victim, a reasonable expectation of privacy or it could have expanded the exceptions to assure the statute is not overly broad. Because Indiana's statute has none of these provisions, it is not narrowly tailored to serve the Government's compelling interest to protect against the harm that Amici so thoroughly describes in its Brief. Indiana's statute includes situations, like here, where the alleged victim was unidentifiable in an image sent to one person that lasted two seconds.

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[7] There should be harm beyond annoyance and embarrassment. Id; see also People v. Marquan, 24 NY 3d 1 (N.Y. 2014) (New York's highest court striking down cyberbullying law because speech about private sexual matters with intent to annoy or taunt the subject of the speech was not sufficiently malicious since "the First Amendment protects annoying and embarrassing speech.").
[8] "[A]dding a mens rea requirement can sometimes limit the scope of a criminal statute." State v. Bishop, 787 S.E.2d 814, 821 (N.C. 2016).

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,

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VERIFICATION OF WORD COUNT

I verify that this Appellee's Brief, including footnotes, contains no more than 4,200 words according to the word count function on the Microsoft word processing program used to prepare this Reply to Amicus Curiae Brief.

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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 Eric Hylton, Attorney for Amicus Curiae, and Jodi Kathryn Stein, Deputy Attorney General of Indiana, this 7th day of May, 2021.

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