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IN THE
INDIANA SUPREME COURT

No. 20S-CR-632

STATE OF INDIANA,
Appellant-Plaintiff,

v.

CONNER KATZ,
Appellee-Defendant.

Appeal from the Steuben Circuit Court,

No. 76C01-2005-CM-000421,

The Honorable Randy Coffey,
Magistrate.

AMENDED BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

Whether the trial court erroneously granted Defendant's motion to dismiss the charge against him, after finding that Indiana Code Section 35-45-4-8, the statute defining the offense of distribution of an intimate image, was unconstitutional in violation of the First Amendment of the United States Constitution and Article 1, Section 9 of the Indiana Constitution.

STATEMENT OF THE CASE

Nature of the Case

The State appeals the trial court's order dismissing the charge of Class A misdemeanor distribution of an intimate image against Conner Katz ("Defendant"), pursuant to Indiana Code Section 35-38-4-2(1).

Course of Proceedings

The State charged Defendant with Class A misdemeanor distribution of an intimate image on May 28, 2020 (App. Vol. II at 8). On July 22, 2020, Defendant filed a motion to dismiss the charge with a supporting memorandum (App. Vol. II at 22-31). The trial court held a hearing on the motion on September 24, 2020, and took the matter under advisement (App. Vol. II at 33; Tr. Vol. II at 5-28). On October 5, 2020, the trial court issued a written order granting Defendant's motion to dismiss (App. Vol. II at 38-48).

The State filed a Notice of Appeal on November 4, 2020 (Docket), which was subsequently transferred to this Court under Indiana Appellate Rule 4(A)(1)(b). The notice of completion of clerk's record was filed on November 6, 2020, while the

notice of completion of transcript was filed on December 15, 2020 (Docket). The State's Brief of Appellant is due on or before January 14, 2021.

STATEMENT OF THE FACTS

The probable cause affidavit supporting Defendant's charge of Class A misdemeanor distribution of an intimate image alleges that on March 12, 2020, Defendant took a video of his then-girlfriend, R.S., performing oral sex on him (App. Vol. II at 9-10). The video was taken without R.S.'s knowledge, and Defendant distributed that video via Snapchat to a third person, C.H., on that day without R.S.'s knowledge or consent (App. Vol. II at 9-10). Three days later, R.S. learned about the video through C.H. (App. Vol. II at 9-10). R.S. confronted Defendant about making and distributing the video, and he admitted to R.S. that it was wrong to distribute the video without her consent (App. Vol. II at 9-10).

The State charged Defendant with Class A misdemeanor distribution of an intimate image under Indiana Code Section 35-45-4-8, a new statute effective July 1, 2019 (App. Vol. II at 8). The charging information provided:

> On or about or between March 12, 2020, and March 15, 2020, in Steuben County, State of Indiana, Conner Katz, being a person who knows or reasonably should know that [R.S.] did not consent to the distribution of an intimate image of her, did distribute the intimate image of [R.S.].

(App. Vol. II at 8). Indiana Code Section 35-45-4-8(d) provides, in part, that:

> 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.

Defendant filed a motion to dismiss the charge, the relevant portion of which claimed that the statute was overbroad under the First Amendment of the United States Constitution and Article 1, Section 9 of the Indiana Constitution because it included a mens rea of negligence (App. Vol. II at 22-32). At the hearing on the motion, Defendant argued that the statute was unconstitutionally overbroad because the "knows or reasonably should know" language in the statute encompasses innocent third parties, like C.H., who receive an intimate image and distribute it without knowledge of the consent of the person in the image (Tr. Vol. II at 8-9). Defendant also raised a new constitutional challenge on the basis that the statute was a content-based restriction under the First Amendment that could not survive strict scrutiny review (Tr. Vol. II at 7-8).

The State responded that the statute was a content-neutral restriction because it is not the intimate nature of the image that is criminalized (Tr. Vol. II at 12-13). It is the act of distributing the intimate image without the person's consent that is prohibited, which serves the compelling state interest of privacy (Tr. Vol. II at 12-15). The State further argued that the statute was not overbroad because the language of the statute does not extend to third persons, such as C.H., because of the limiting language in Subsection (c)(2), which provides:

> (c) As used in this section, "intimate image" means a photograph, digital image, or video:

> * * *
> (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.

I.C. 35-45-4-8(c)(2). Thus, only persons who receive the intimate image directly from the person depicted in the image (Subsection (c)(2)(A)) or persons who are taking the image in the presence of the person depicted in the image (Subsection (c)(2)(B)) can be prosecuted under the statute (Tr. Vol. II at 17).

After taking the matter under advisement, the trial court issued a written order granting Defendant's motion to dismiss (App. Vol. II at 38-48). The trial court found that the statute was unconstitutionally overbroad under *State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019) and *Ex Parte Jones*, ___ S.W.3d ___, No. 12-17-00346-CR, 2018 WL 2228888 (Tx. Ct. App. 2018), *review granted* (2018) (App. Vol. II at 46-48). Both decisions found unconstitutional overbreadth in the respective nonconsensual pornography statutes because the statutes allowed the prosecution of a third party who could not know the consent of the person depicted in the image. *Casillas*, 938 N.W.2d at 88-89; *Jones*, 2018 WL 2228888 at *7. The trial court did not reach a decision on Defendant's claim that the Indiana statute was an unconstitutional content-based restriction under the First Amendment (App. Vol. II at 38-48).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion by finding the distribution of an intimate image statute unconstitutional after misinterpreting the law under both the First Amendment to the United States Constitution and Article 1, Section 9 of the Indiana Constitution. The Indiana distribution statute is not unconstitutionally overbroad because, by its limiting language, the statute does not apply to third persons, which was Defendant's sole argument below. Moreover, the distribution statute is a content-neutral restriction on free speech because the prohibition is the distribution, not the creation, of the intimate image, and it survives intermediate scrutiny. Even if interpreted as a content-based statute, the statute survives strict scrutiny. The statute serves the compelling state interest of privacy and is narrowly tailored and the least restrictive means to solve the distribution problem.

Defendant waived both his overbreadth and free speech challenge under Article 1, Section 9 of the Indiana Constitution by not making a separate argument for either issue to the trial court below. Waiver aside, the distribution statute is not unconstitutionally overbroad because it is capable of constitutional application, and Defendant's conduct falls squarely under the purview of the statute. Last, even though Defendant's act of distribution of the intimate image of R.S. falls within Section 9, it was not political speech, and the statute survives rationality review. The damage to the public health, welfare, and safety by the nonconsensual distribution of an intimate image is well-documented and recognized by legislatures and courts throughout this country. The trial court should have found the

distribution statute constitutionally sound, and this Court should reverse the trial court's erroneous decision and remand for further proceedings.

ARGUMENT

The distribution of an intimate image statute is constitutional.

The trial court abused its discretion by finding the distribution of an intimate image statute unconstitutional and, therefore, erred by dismissing the charge against Defendant. The statute is not unconstitutionally overbroad because it does not apply to third persons, and the statute is capable of constitutional application under Article 1, Section 9. Moreover, the statute survives First Amendment scrutiny because it is the distribution of a private matter without consent that is prohibited, which serves the compelling state interest of privacy. The statute is narrowly tailored to specific images distributed by either the first receiver or the actual maker of the image without consent. Defendant's free speech claim under our state constitution also fails because the image does not implicate political speech and survives rationality review.

A. The distribution statute addresses the escalating problem of "revenge porn."

The Indiana distribution of an intimate image statute ("the distribution statute"), Indiana Code Section 35-45-4-8, is commonly referred to as a "nonconsensual pornography" or "revenge porn" statute because it criminalizes the dissemination of explicit material without the consent of the subject. Although not requiring "revenge" or actual pornography, the term revenge porn

> involves the distribution of sexually graphic images of individuals without their consent. This includes images originally obtained without consent (e.g., hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent, usually within the context of a private or confidential relationship (e.g., images consensually given to an intimate partner who later distributes them without consent, popularly referred to as "revenge porn").[1]

"Nonconsensual pornography" is defined as a "user-generated image of a person in a state of nudity or engaged in sexually explicit conduct . . . that is distributed to third parties without consent of the person depicted in the photograph or video and without a legitimate purpose (such as a law enforcement investigation)."[2] The key difference in the terms is "one of motive, not effect: revenge porn is often intended to harass the victim, while any image that is circulated without the agreement of the subject is nonconsensual porn."[3]

The crux of revenge porn or nonconsensual pornography is the distribution and the fact that the victim did not consent to its distribution, though the victim may have consented to the taking of the photo or video itself.[4] Distribution often

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

[2] *See* Jessica Magaldi, Jonathan Sales & John Paul, *Revenge Porn: The Name Doesn't Do Nonconsensual Pornography Justice and The Remedies Don't Offer the Victims Enough Justice*, 98 Or. L. Rev. 197, 199 (2020) (citation omitted).

[3] *See* Katherine Gabriel, *Feminist Revenge: Seeking Justice of Victims of Nonconsensual Pornography Through "Revenge Porn" Reform*, 44 Vt. L. Rev. 849, 867-76 (2020).

[4] *See* 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, 337 (2018).

involves the submission of these intimate images to revenge porn websites, which can include forums that allow others to leave derogatory or salacious comments.[5] This phenomenon is "remarkably common," *see State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019) (noting that, as of 2014, the estimated number of revenge porn websites was 3,000), and is now considered a "national epidemic."[6] Because of the prolific advances in technology by the commonality of cell phones and the ease of access to the internet, "this form of predatory conduct is especially harmful since it reaches an unlimited audience in perpetuity."[7]

The emotional and mental health impact of nonconsensual pornography is devastating to the victim. 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 are all common.[8] In response, all but four states have enacted some version of legislation prohibiting nonconsensual pornography, which vary in terms of elements, intent requirements, exceptions,

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[5] Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 Feminist Criminology 22, 23 (2017).

[6] *See* Magaldi, Sales, and Paul, 98 Or. L. Rev. at 201 (stating a 2016 study showed that 4% of Americans have been victims of revenge porn and 6% of women between the ages of 15 and 29 reported being victims, which is "evidence of a national epidemic").

[7] *Id.* at 217.

[8] *See* Bates, 12 Feminist Criminology at 23, 26-27; *see also* Gabriel, 44 Vt. L. Rev. at 854-55; Magaldi, Sales, and Paul, 98 Or. L. Rev. at 206-07 (noting that "suicide is the most serious consequence to victims of nonconsensual pornography").

definitions, and penalties. *See People v. Austin*, 155 N.E.3d 439, 453 (Ill. 2019), *cert. denied* (2020).[9] All statutes share a "similar actus reus: causing the distribution, posting, or dissemination of private images of a victim in a state of nudity or engaged in some sexually explicit conduct without the consent of the victim."[10]

The Indiana legislature acted in 2019. The Indiana distribution statute, effective July 1, 2019, provides, in entirety:

> (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.

[9] *See* http://www.cybercivilrights.org/revenge-porn-laws (showing all but four states have enacted a version of revenge porn prohibition) (last visited January 6, 2021).

[10] Magaldi, Sales, and Paul, 98 Or. L. Rev. at 217 (noting that the states differ widely in the scienter requirements and other elements for a conviction).

> (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.

I.C. § 35-45-4-8.[11]

B. The standard of review.

This Court reviews a trial court's ruling on a motion to dismiss a charging information for an abuse of discretion. *State v. Larkin*, 100 N.E.3d 700,

[11] Indiana Code Section 35-31.5-2-221.5 defines "other sexual conduct," in relevant part, as "an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person," which encompasses the sexual activity at issue here.

703 (Ind. 2018) (citing *State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017)). A trial court abuses its discretion when it misinterprets the law. *Larkin*, 100 N.E.3d at 703.

Generally, a statute is presumed constitutional until the party challenging the statute clearly overcomes this presumption by a contrary showing. *Sims v. U.S. Fid. & Guar. Co.*, 782 N.E.2d 345, 349 (Ind. 2003) (citing *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996)). This Court may nullify a statute on constitutional grounds only where such a result is clearly rational and necessary. *Id.* Whether a statute is constitutional on its face is a question of law. *State v. Moss-Dwyer,* 686 N.E.2d 109, 110 (Ind. 1997). When the issue presented on appeal is a question of law, this Court reviews the matter de novo. *Id.*

This Court's primary goal in interpreting statutes is to determine and give effect to the Legislature's intent. *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012) (citing *State v. Oddi–Smith,* 878 N.E.2d 1245 (Ind. 2008)). Courts must consider the goals of the statute and the reasons and policy underlying the statute's enactment. *Hall Drive Ins, Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). The best evidence of legislative intent is a statute's text. *Adams*, 960 N.E.2d at 798. The first step is therefore to decide whether the Legislature has spoken clearly and unambiguously on the point in question. *Id.* (citing *Sloan v. State*, 947 N.E.2d 917 (Ind. 2011)). When a statute is clear and unambiguous, this Court must apply the plain and ordinary meaning of the language, and there is no need to resort to any other rules of statutory construction. *Adams*, 960 N.E.2d at 79.

C. The trial court's order on the overbreadth issue was erroneous.

Defendant's motion to dismiss included one constitutional challenge, which was that the statute was overbroad because "it contains a negligent mens rea and any person who received an intimate image and further disseminated it could also be charged" (App. Vol. II at 22-32; Tr. Vol. II at 8-9). The trial court agreed by explicitly adopting the reasoning in two cases: *Casillas*, 938 N.W.2d 74, and *Jones*, 2018 WL 2228888 (App. Vol. II at 46-48). The trial court erred in this regard as both decisions have been vacated by the final appellate court in their respective states. In *State v. Casillas*, ___ N.W.2d ___, No. A19-0576, slip op. at 25 (Minn. December 30, 2020), the Minnesota Supreme Court found that the Minnesota nonconsensual pornography statute, Minnesota Statute § 617.261, survived strict scrutiny analysis and was therefore not unconstitutionally overbroad. Thus, the rationale employed by the Minnesota Court of Appeals in that case, and relied upon by the trial court, is no longer good law in Minnesota nor persuasive. *Jones*, 2018 WL 2228888, suffers a similar fate. The Texas Court of Criminal Appeals, the highest court in Texas for criminal cases, granted discretionary review of *Jones* on July 25, 2018, and has not yet issued a decision.[12]

[12] *See* http://www.search.txcourts.gov/Case.aspx?cn=PD-0552-18&coa=coscca (last visited January 6, 2021). Moreover, a different panel of the Texas Court of Appeals in *Ex parte Ellis*, 609 S.W.3d 332, 339 (Tex. Ct. App. 2020), *petition for review pending*, found the same Texas revenge porn statute not unconstitutionally overbroad. The trial court erred in finding that the statute had been substantively amended by the time *Ellis* was decided (App. Vol. II at 46-47).

Moreover, the trial court did not conduct any comparison of the text of the Indiana statute to the Minnesota and Texas statutes, which would be a necessary step to find another's states finding of statutory overbreadth persuasive authority (App. Vol. II at 46-48). If the trial court had performed this necessary comparison, it would not have found either decision persuasive. The Minnesota statute at issue in *Casillas* and the Texas statute at issue in *Jones* are/were substantially broader different than our statute.[13] In this way, the trial court's express reliance on *Casillas*, 938 N.W.2d at 88-90, as to the "knows or reasonably should have known"

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[13] Minnesota Statute § 617.261(1) provides:

> It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:
> (1) the person is identifiable:
> (i) from the image itself, by the person depicted in the image or by another person; or
> ii) from personal information displayed in connection with the image;
> (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and
> (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.

Texas Penal Code § 21.16(b) provided at the time of *Jones*:

> A person commits an offense if:
> (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
> (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
> (3) the disclosure of the visual material causes harm to the depicted person; and
> (4) the disclosure of the visual material reveals the identity of the depicted person in any manner . . .

language in the Minnesota statute, was incorrect. Minnesota Statute § 617.261(1) contains no limitation similar to the Indiana statute on application of the statute to third persons who receive the image, which was at the heart of the *Casillas* Court of Appeals' decision. *Id.* Even with this more expansive language, the Minnesota Supreme Court overturned the Court of Appeals and found the statute not unconstitutionally overbroad. *Casillas*, slip op. at 25.

The Texas statute at issue in *Jones* and *Ex parte Ellis*, 609 S.W.3d 332, 338 (Tex. Ct. App. 2020), *petition for review pending*, did not contain the challenged "knows or reasonably should have known" language at all; in fact, that language was added to the statute by the Texas legislature in 2019. Thus, the trial court's finding that it was the "knows or reason to believe" language that rendered the Texas statute unconstitutionally overbroad was simply incorrect. *See* Texas Penal Code §21.16(b) (compare the 2015 and 2017 versions of the statute with the 2019 version). Because neither state statute contained the language of Subsection (c)(2) in the Indiana statute, which limits the application of the statute to a person who directly receives the image from the person depicted in the intimate image or to a person who themselves takes the intimate image in the physical presence of the person depicted in the intimate image, the trial court erred by granting Defendant's motion to dismiss on this basis. Moreover, as argued below, it is the limiting language in Subsection (c)(2) that eliminates inadvertent third party distribution that defeats Defendant's overbreadth claim.

D. The distribution of an intimate image statute is not unconstitutionally overbroad under the federal or state constitutions.

Defendant has failed to demonstrate that the distribution of an intimate image statute is unconstitutional under the federal or state constitutions. Although Defendant did not specifically argue a basis under either analysis, the State addresses below how both challenges fail.

1. The statute is not unconstitutionally overbroad under the United States Constitution.

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 (2010) (citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). According to the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. *United States v. Williams*, 553 U.S. 285, 292-93 (2008). The doctrine seeks to strike a balance between competing social costs. *Williams*, 553 U.S. at 293 (citing *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003)).

> On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects.

Id. In order to maintain an appropriate balance, the United States Supreme Court has vigorously enforced the requirement that a statute's overbreadth be *substantial*,

not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. *Id.* (citations omitted). "Invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *Id.* (citing *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)). Importantly, the overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact," that substantial overbreadth exists. *Hicks*, 539 U.S. at 122 (quoting *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 14 (1988)). Similarly, "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).

Defendant failed to sustain his burden in the trial court of showing substantial overbreadth in the distribution statute. 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. *Williams*, 553 U.S. at 293. The distribution statute criminalizes the distribution of an intimate image in limited circumstances. "Intimate image" is narrowly defined in Subsection (c)(1) by the kind of sexual image and in Subsection (c)(2) by the person who takes the actual image. Thus, the intimate image must contain both narrowly defined sexual content and be taken by one of two persons: 1) the person depicted in the image and given directly to the person being prosecuted; or 2) the person

being prosecuted in the physical presence of the person in the image. This definition thus narrows the application of the statute to the first person who received the image from the one depicted or to the person who actually took the image.

The statute further narrows application to the person being prosecuted if they "know[] or reasonably should know" that the person depicted in the intimate image does not consent to its distribution. I.C. § 35-45-4-8(d). This consent element removes application of the statute to the situation where consent to distribute has been given by the person depicted in the image. And the statutory language places a heavy burden on the State to show that the defendant knew or should have known that the person depicted in the image *did not* consent to distribution. The language thus errs in favor of a defendant who claims that the depicted person never told him to keep the intimate image private or to not distribute it.[14]

There are also four broad exceptions to application of the statute, including 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 intended solely for the storage or backup of personal data and password protected. I.C. § 35-45-4-8(a). These exceptions thus remove some protected speech from the statute's application. The statute itself is thus narrowly drawn and limited in scope.

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[14] This statutory language does not, however, favor Defendant here, who recorded the video without R.S.'s knowledge; R.S. could not therefore have consented to the recording of the video, much less the distribution of it.

The second step in the overbreadth analysis is to determine whether the statute criminalizes a substantial amount of protected expressive activity. *Williams*, 553 U.S. at 297. In other words, the statute is overbroad if it impermissibly restricts constitutionally protected expression in a substantial number of applications when considered in relation to its plainly legitimate sweep. *Stevens*, 559 U.S. at 473. Defendant's entire argument in this regard was that the statute allows the prosecution of unknowing third persons, like C.H. in this case, who receives an intimate image and does not "know[] or reasonably should know" that the person depicted in the intimate image does not consent to its distribution (App. Vol. II at 26; Tr. Vol. II at 8, 23). The plain language of the statute, however, eliminates application of the statute to third persons, regardless of whether they know or reasonably should know that the person depicted consented to distribution of the intimate image. In this way, the distribution statute limits prosecution for distribution to the original distributor/perpetrator and third parties are excluded from the statute's reach. The statute does not restrict a substantial amount of expressive activity in relation to the statute's sweep to protect individual privacy interests. The distribution statute is not unconstitutionally overbroad, and this Court should reverse the trial court's erroneous decision.

2. The statute is not unconstitutionally overbroad under the Indiana Constitution.

Defendant did not make a separate analysis of unconstitutional overbreadth under the Indiana Constitution, nor did the trial court make any specific findings in this regard (App. Vol. II at 25-27; Tr. Vol. II at 8, 23). Failure to provide a separate

analysis for each constitutional claim constitutes waiver. *See South Bend Tribune v. Elkhart Circuit Court*, 691 N.E.2d 200, 202 n.6 (Ind. Ct. App. 1998), *trans denied* (finding that claims under Article 1, Section 9, of the Indiana Constitution were waived for failure to make any separate argument). Moreover, a party generally waives appellate review of an issue or argument unless that party presented that issue or argument before the trial court. *See Dedelow v. Pucalik*, 801 N.E.2d 178, 183 (Ind. Ct. App. 2003). Neither Defendant's written motion nor his oral argument to the trial court presented a separate Indiana constitutional analysis. Defendant thus waived this issue.

Waiver aside, the statute is not unconstitutional. Article 1, Section 9 of the Indiana Constitution provides:

> 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.

Overbreadth analysis under the United States Constitution is different than the analysis under the Indiana Constitution. *Klein v. State*, 698 N.E.2d 296, 299 (Ind. 1998); *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993). Unless the statute in question is incapable of constitutional application, an Indiana court should limit itself to vindicating the rights of the party before it. *Price*, 622 N.E.2d at 958. Once an Indiana constitutional challenge is properly raised, the Court should first determine whether the statute is capable of constitutional application and then determine whether it was constitutional as applied in this case. *Helton v. State,* 624 N.E.2d 499, 507 (Ind. Ct. App. 1993), *trans. denied* (citing *Price*, 622 N.E.2d at 958).

Defendant offered no argument that the distribution statute was incapable of constitutional application under the Indiana constitution. Under the unambiguous language, the statute applies to a limited scope of distribution – those under a strict definition of "intimate image" and under the limited "knows or reasonably should know" consent element. The statute is therefore capable of constitutional application, as argued more fully below. Moreover, the statute is constitutionally applicable to Defendant. Defendant falls under Subsection (c)(2)(B); he took the video of R.S. performing oral sex on him (thus meeting the physical presence requirement) without her knowledge or consent (App. Vol. II at 9-10). Defendant then distributed the video to C.H. without R.S.'s consent in violation of Subsection (d) (App. Vol. II at 9-10). *See* I.C. 35-45-4-8. Defendant's conduct falls squarely within the purview of the distribution statute, and he is not one of the hypothetical third persons that he is concerned will be improperly prosecuted. This Court should find the distribution statute constitutional under an Article 1, Section 9 overbreadth challenge.

E. The distribution statute does not violate constitutional free speech protections.

At the hearing, Defendant made an additional argument that the Indiana statute was an unconstitutional content-based restriction of free speech (Tr. Vol. II at 8-9). The trial court made no decision on this issue (App. Vol. II at 46-48).

1. The statute does not run afoul of the First Amendment.

The distribution statute does not violate the First Amendment. The First Amendment's command that Congress shall make no law abridging the freedom of

speech or the right of the people to peaceably assemble has been incorporated into the Fourteenth Amendment and thus applies to all States. *Helton*, 624 N.E.2d at 505). The creation and dissemination of information are speech within the meaning of the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Accordingly, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used or disseminated.'" *Sorrell*, 564 U.S. at 568 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). Moreover, First Amendment protections for speech extend fully to Internet communications. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

The statute is content-neutral and so it is subject to intermediate scrutiny. To determine the proper standard for evaluating the distribution statute under the free speech provision of the First Amendment, this Court must determine: (1) whether the dissemination statute is content neutral; and, (2) what type of forum is involved. *State v. Economic Freedom Fund*, 959 N.E.2d 794, 801 (Ind. 2011).

The First Amendment requires heightened scrutiny – strict scrutiny – whenever the government creates "a regulation of speech because of disagreement with the message it conveys," a content-based law. *Sorrell*, 564 U.S. at 566 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). A content–neutral regulation is the government regulation of expressive activity that is justified without reference to the content of the regulated speech. *Ward,* 491 U.S. at 79. A law is content neutral if it regulates only the time, place, or manner of speech

irrespective of content. *See State v. Econ. Freedom Fund*, 959 N.E.2d 794, 802 (Ind. 2011) (citing *Ward*, 491 U.S. at 791); *Harris v. State*, 985 N.E.2d 767, 774 (Ind. Ct. App. 2013), *trans. denied*. Content-neutral laws are subject to an intermediate level of scrutiny, which affords the government more leeway in meeting its legitimate regulatory objectives. *WPTA-TV v. State*, 86 N.E.3d 442, 448 (Ind. Ct. App. 2017) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

As the State argued below, the statute is content-neutral and satisfies intermediate scrutiny. Laws that "impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broadcasting System*, 512 U.S. at 643. As the Illinois Supreme Court recently found in *Austin*, 155 N.E.3d at 456-59, distribution statutes are a content-neutral time, place, and manner restriction that regulates purely private matter. Noting that the Illinois distribution statute on its face targeted sexual images – a specific category of speech – the Court found that the statute is content-neutral because it is the *manner* of the image's acquisition and publication, not its content, that is crucial to the illegality of its dissemination. *Id.* at 457. "There is no criminal liability for the dissemination of the very same image obtained and distributed with consent." *Id.*

The same holds true for the Indiana distribution statute; what is unlawful is the distribution of the image without the person's consent. The same image can be lawfully distributed with consent and fall outside the purview of the distribution statute. "A regulation that serves purposes unrelated to the content of expression is

deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986)). The purpose to be served here is privacy. *Austin*, 155 N.E.3d at 457-58. "The entire field of privacy law is based on the recognition that some types of information are more sensitive than others, the disclosure of which can and should be regulated." *Id.* at 458.

Moreover, 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. *Id.* While speech on public issues occupies the highest position of the hierarchy of first amendment values and is entitled to special protection, purely private matters do not implicate the same constitutional concerns. *Id.* (citing *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011)). "[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous," because there is "no threat to the free and robust debate of public issues," "no potential interference with a meaningful dialogue of ideas," and no risk of "a reaction of self-censorship on matters of public import." *Snyder*, 562 U.S. at 452 (internal quotations and citations omitted).

The *Austin* Court concluded that the nonconsensual distribution of the victim's private sexual images was not an issue of public concern, as "the public has no legitimate interest in the private sexual activities of the victim or in the embarrassing facts revealed about her life." *Id.* at 459 (citing *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (finding in the context of interstate

stalking statute that the distribution of sexual images of the victim "may be proscribed consistent with the First Amendment"); *see also VanBuren*, 214 A.3d at 808 (finding that nonconsensual pornography "has no connection to matters of public concern" and "involves the most private of matters").

> In the constellation of privacy interests, it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area, that the person has not consented to sharing publicly.

VanBuren, 214 A.3d at 810. The Indiana statute, like the Illinois and Vermont statutes, serve the overall purpose of protecting privacy of a purely private matter.

Because the distribution statute is content-neutral and regulates a purely private matter, the statute should be subject to an intermediate level of scrutiny. Generally, to survive intermediate scrutiny, the law must serve an important or substantial governmental interest unrelated to the suppression of free speech and must be narrowly tailored to serve that interest without unnecessarily interfering with first amendment freedoms, which include allowing reasonable alternative avenues of communication. *Austin*, 155 N.E.3d at 459 (citing *Turner Broadcasting System*, 512 U.S. at 662; *Ward*, 491 U.S. at 791; *City of Renton*, 475 U.S. at 50).

The distribution statute serves the substantial government interest of protecting individual privacy rights from the unique and significant harm to victims from the distribution of intimate images. *See Austin*, 155 N.E.3d at 460; *Casillas*, slip op. at 15-18; *VanBuren*, 214 A.3d at 810-11. "Images and videos can be directly disseminated to the victim's friends, family, and employers; posted and "tagged" (as in this case) so they are particularly visible to members of a victim's own

community; and posted with identifying information such that they catapult to the top of the results of an online search of an individual's name . . . The personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress." *VanBuren*, 214 A.3d 810; *see also Casillas*, slip op. at 16-18 (detailing the significant harm caused to victims of nonconsensual pornography); *Austin*, 155 N.E.3d at 461 (same). The enactment of laws in now 46 states and the District of Columbia also demonstrate an overall recognition of the "plight of victims of this crime and their need for protection." *Austin*, 155 N.E.3d at 462. The Indiana distribution statute serves a substantial government interest in privacy that is unrelated to the suppression of speech.

Indiana's statute is also narrowly tailored to serve this substantial government interest without unnecessarily interfering with free speech. The "narrowly tailored" requirement of intermediate scrutiny is satisfied so long as the law promotes a substantial government interest that would be achieved less effectively absent the law. *Id.* (citing *Turner Broadcasting System*, 512 U.S. at 662). Absent the distribution statute, the substantial government interest of protecting citizens from the distribution of intimate images would be achieved less effectively. The legislature has a wide range of discretion under its police powers to protect the health, morals, order, safety, and general welfare of the community. *Paul Stieler Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269, 1277 (Ind. 2014); *Edwards v. Housing Authority of City of Muncie*, 215 Ind. 330, 335, 19 N.E.2d 741, 744 (1939). It is the province of the legislature to define criminal offenses and to set the

penalties for such criminal offenses. *Durrett v. State*, 247 Ind. 692, 696-97, 219 N.E.2d 814, 816 (1966). Criminalization is a vital deterrent, and the alternative of civil remedies would be insufficient and unrealistic. *Austin*, 155 N.E.3d at 463 (citing Diane Bustamante, *Florida Joins the Fight Against Revenge Porn; Analysis of Florida's New Anti-Revenge Porn Law*, 12 Fla. Int'l. U. L. Rev. 357, 368 (2017)). The distribution statute thus serves the same substantial government interest recognized by all but four states in the nation.

The distribution statute also does not burden substantially more speech than necessary. Subsection (a) offers four broad exceptions to application of the statute, the last of which allows a person to distribute an intimate image for personal storage with password protection. I.C. § 35-45-4-8(a). Subsection (c) narrowly defines an "intimate image" to those portraying sexual intercourse, statutorily defined other sexual conduct, or nudity of the buttocks, genitals, or breast. This leaves unregulated a wide-range of images of other conduct – sexual, merely suggestive, or otherwise. Application of the statute is further narrowed under Subsection (c) to persons who either receive the image from the person depicted in the image or is taken by the person in the physical presence of the person in the image. This removes application of the statute to an unknowing third party. Last, the person prosecuted must "know[] or reasonably should know" that the person depicted in the image "does not consent" to distribution. I.C. § 35-45-4-8(d). The lack of consent to distribute is the core of the statute and its protective purpose. Thus, it requires a reasonable awareness of the lack of consent to distribute. If

consent is given, the statute does not apply. The distribution statute is narrowly tailored, and Defendant offered no argument to the trial court that his speech would have been stifled in any way by not distributing the video of R.S. performing oral sex on him to C.H. This Court should find that the distribution statute survives an intermediate level of scrutiny and does not violate the First Amendment.

But, even if this Court determines that one must look at the visual material to determine if the statute is violated, *see Reed v. Town of Gilbert*, 576 U.S. 155, 163, (2015) (stating that a content-based restriction is one "that target[s] speech based on its communicative content"), the distribution statute survives strict scrutiny and does not violate the First Amendment. Content-based restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Casillas*, slip op. at 14 (citing *Reed*, 576 U.S. at 163).

The compelling state interest underlying the distribution statute is the protection of a person's privacy from the distribution of intimate images without consent. This proscribed speech has no connection to matters of public concern and is deeply private. Privacy rights, no less than First Amendment freedoms, are "plainly rooted in the traditions and significant concerns of our society." *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). The right to personal privacy incorporates both a right to seclusion and a right to bodily integrity and sexual privacy. *Ex parte Metzger*, 610 S.W.3d 86, 103 (Tex. Ct. App. 2020), *petition for review pending*. Moreover, privacy constitutes a compelling government interest

when the privacy interest is substantial and the invasion occurs in an intolerable manner. *Ellis*, 609 S.W.3d at 338. Such is the case here, where distributing intimate images of a nonconsenting person invades that person's privacy in profound ways. *Id.* *See also Austin*, 155 N.E.3d at 460 (stating that "[i]t is well established that government can protect individual privacy rights").

Victims of nonconsensual pornography are "deeply and permanently scarred by the experience," *see Casillas*, slip op. at 16, as the harms to the victims "can be substantial." *VanBuren*, 214 A.3d at 810. Post-traumatic stress disorder, anxiety, depression, despair, loneliness, alcoholism, drug abuse, and significant losses of self-esteem, confidence, and trust are common, as the images are disseminated to friends and family, co-workers and employers, and community members. *Casillas*, slip op. at 16-17; *VanBuren*, 214 A.3d at 810 (stating that the "personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress"); *see also Austin*, 155 N.E.3d at 461-62. "The government's interest in preventing any intrusions on individual privacy is substantial; it's at its highest when the invasion of privacy takes the form of nonconsensual pornography." *VanBuren*, 214 A.3d at 811.

Moreover, the nonconsensual pornography problem is "widespread and continually expanding." *Casillas*, slip op. at 18 (noting statistical frequency and that there are thousands of websites featuring nonconsensual pornography, as well as social media platforms); *see VanBuren*, 214 A.3d at 810 (noting the 2014 estimate of 3,000 websites featuring nonconsensual pornography and that a recent survey

showed that two percent of all U.S. internet users had been the victim of revenge porn). Because of the significant privacy rights at stake, the substantial injuries caused by the distribution of intimate images without consent, and the widespread nature of this problem, the criminalization of distributing intimate images under our state statute is supported by a compelling state interest. *See Casillas*, slip op. at 18 (finding the analogous Minnesota statute to serve a compelling government interest); *VanBuren*, 214 A.3d at 811 (finding the analogous Vermont statute to serve a compelling government interest); *Ellis*, 609 S.W.3d 3at at 338 (finding the analogous Texas statute to serve a compelling state interest); *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 243 (Cal. Ct. App. 2016) (finding the analogous California statute to serve a compelling public interest under a vagueness and overbreadth challenge).[15]

The statute is narrowly tailored and the least restrictive means to solve the distribution problem. *See Reed*, 576 U.S. at 163. A statute does not need to be "perfectly tailored" to survive strict scrutiny. *Casillas*, slip op. at 14 (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992))). As discussed above, the Indiana distribution statute is narrowly tailored to address privacy concerns for private speech. Subsection (a) offers four broad exceptions to application of the statute. I.C. § 35-45-4-8(a). These broad exceptions are designed to exclude from the statute's reach distributions that

[15] The State was unable to find any state court decision that did not find a revenge porn statute to serve a compelling state interest.

do implicate First Amendment concerns – those being those made in the public interest – or are merely intended to remain private by the receiver or taker of the image by distribution to secure storage.

Second, Subsection (c) narrowly defines an "intimate image" to those portraying sexual intercourse, statutorily defined other sexual conduct, or nudity of the buttocks, genitals, or breast. This leaves a wide-range of images of other conduct – sexual, merely suggestive, or otherwise – unregulated. The scope of the statute can fairly be characterized as being of a discreet and personal nature. The clear definition of intimate image leaves little gray area or risk of sweeping constitutionally protected speech into the statutory prohibition.

Application of the statute is further narrowed under Subsection (c) to persons who either receive the image from the person depicted in the image or is taken by the person in the physical presence of the person in the image. This removes application of the statute to an unknowing third party. Further, the statute prohibits only nonconsensual distribution. An intimate image can be taken between adults, and that same intimate image can be consensually distributed. It is the narrow circumstances of nonconsensual distribution that the statute criminalizes. The statute thus protects the privacy interest at stake while limiting criminal liability to intentional distribution of the image.

Last, the person prosecuted must "know[] or reasonably should know" that the person depicted in the image "does not consent" to distribution. I.C. § 35-45-4-8(d). The lack of consent to distribute is the core of the statute and its protective

purpose. Thus, the statute requires the State to prove a defendant's reasonable awareness of the lack of content to distribute, which is a heavy burden. If consent is given, the statute does not apply. If a reasonable person would not realize that consent was not forthcoming, the statute does not apply. This requirement limits the statute to the types of personal, direct interactions or communications that are typically involved in a close or intimate relationship where consent can be reasonably known.

As with the other 45 states that have enacted nonconsensual pornography legislation, the Indiana distribution statute was enacted to prevent the permanent and severe harms caused by the nonconsensual distribution of intimate images.[16] Because the statute proscribes only private speech that is intentionally distributed without consent, the statute includes numerous statutory definitions that limit its scope, and the statute provides several exceptions, this Court should find that the distribution statute survives a strict level of scrutiny and does not violate the First Amendment.

2. The statute does not violate Article 1, Section 9.

As with his overbreadth challenge, Defendant did not make a separate analysis under the Indiana Constitution that the distribution statute unconstitutionally infringed on his State constitutional right to free speech under Article 1, Section 9, nor did the trial court make any specific findings in this regard

[16] *See* Gabriel, 44 Vt. L. Rev. at 867-76.

(App. Vol. II at 46-48; Tr. Vol. II at 8, 23). Defendant has thus waived this issue. *South Bend Tribune*, 691 N.E.2d at 202 n.6; *Dedelow*, 801 N.E.2d at 183.

Courts employ a two-step inquiry for challenges under Article 1, Section 9. *McGuire v. State*, 132 N.E.3d 438, 444-45 (Ind. Ct. App. 2019), *trans. denied*. "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).

As to the first part, the State may ultimately restrict Defendant's expression if he is convicted of unlawfully distributing an intimate image based on his act of distributing the video of R.S. performing oral sex on him to C.H. without R.S.'s consent. *See Whittington*, 669 N.E.2d at 1368 (stating that the State constitutional protection extends to any subject matter and reaches every conceivable mode of expression). Defendant's challenge, however, fails on the second part of the inquiry.

The second part of the inquiry – abuse of speech – hinges on whether the restricted expression constituted political speech. *Whittington*, 669 N.E.2d at 1370. Speech is political "if its point is to comment on government action, whether applauding an old policy or proposing a new one, or . . . criticizing the conduct of an official acting under color of law." *Id.* If the expression was political speech, this Court applies a higher level of review. *Id.* Expressive activity is political if its aim is to comment on government action, including criticism of an official acting under color of law. *Blackman v. State*, 868 N.E.2d 579, 585 (Ind. Ct. App. 2007) (citing

U.M. v. State, 827 N.E.2d 1190, 1192 (Ind. Ct. App. 2005)). However, where the individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political. *Id.*

Defendant's expressive activity was not political – it included a video of his former girlfriend performing oral sex on him (App. Vol. II at 9-10). This video was focused on himself and R.S., two private individuals engaged in a private activity. Moreover, Defendant's act of distributing it to an unknowing third party would serve no political purpose as it was not a comment on government action. Defendant thus failed to sustain his burden of showing that the activity was a comment or criticism of government action or an official acting under color of law. *Whittington*, 669 N.E.2d at 1370 (finding that the burden of proof is on the claimant to demonstrate that his or her expression would have been understood as political)

If not political speech, this Court "evaluate[s] the constitutionality of any state-imposed restriction of the expression under standard rationality review." *Id.* Under this lower level of review, this Court determines whether the legislature could reasonably have concluded that the expressive activity was a threat to peace, safety, and well-being. *Id.* at 1371; *see Price*, 622 N.E.2d at 961 n.6 (stating that the rationality inquiry has historically centered on whether the impingement created by the statute is outweighed by the public health, welfare, and safety served). Defendant's expressive activity of distributing the video of R.S.'s sexual activity was a threat to the peace, safety, and well-being of R.S. As detailed above, the significant and life-long damage to victims of nonconsensual pornography is now

well-documented and widely accepted by courts and scholars. Indiana's distribution statute serves to protect persons, like R.S., from expressive conduct, like Defendant's, that serves only to harm others by an invasion of privacy of the most private of matters. The distribution statute is not unconstitutional under Article 1, Section 9 of the Indiana Constitution.

CONCLUSION

This Court should find Indiana Code Section 35-45-4-8 to be constitutional, reverse the trial court's order, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this Brief, including footnotes, contains no more than 14,000 words according to the word count function of the Microsoft Word word-processing program used to prepare this brief.

/s/ Jodi Kathryn Stein
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CERTIFICATE OF SERVICE

I certify that on January 14, 2021, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I further certify that on January 14, 2021, the foregoing document was served upon opposing counsel, via IEFS, addressed as follows:

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