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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.

STATE'S REPLY BRIEF/BRIEF OF CROSS-APPELLEE

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The trial court properly denied Defendant's motion to dismiss based on the failure to state an offense. The charging information tracked the statutory language in the distribution statute, so it was sufficient to put Defendant on notice of both the nature of the offense and any defense available to him. Moreover, the basis of Defendant's claim, that the image did not show the victim's identity or his penis, is a sufficiency attack on the evidence, which is an improper basis for a motion to dismiss for failure to state an offense. This Court should affirm the trial court's order in this regard.

Appeal Issue

The distribution statute is not overbroad under the federal constitution because it does not cover a substantial amount of protected speech. It only applies to the non-consensual distribution of intimate images and excludes application to unsuspecting third parties. The statute is also not overbroad under our state constitution because it is capable of constitutional application.

Defendant's First Amendment rights are not violated because the content-neutral statute serves the uncontested compelling state interest in the right to privacy while narrowly applying only to intimate images that are distributed without consent. Defendant admits that he was not engaged in political speech, and the harm suffered by the victim occurred when Defendant distributed the video of

her performing oral sex on him to a person known to both of them. This Court should reverse the trial court's order dismissing the charge against Defendant.

ARGUMENT

Cross-Appeal Issue

The trial court properly denied Defendant's motion to dismiss the information based on the failure to state an offense.

The State tracked the language of the statute in alleging that Defendant violated it. Defendant was put on notice of the conduct that the State alleged violated the statute. Defendant now simply claims that the State will be unable to prove its allegations. Defendant's claim is one for trial and not for a motion to dismiss; the trial court properly denied the motion.

Indiana Code Section 35-34-1-4 provides that "[t]he court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds: . . . (5) The facts stated do not constitute an offense." Ind. Code § 35-34-1-4(a)(5). Defendant specifically argued below that the evidence "did not support a violation" of the distribution of an intimate image statute because the image taken by Defendant of R.S. performing oral sex on him did not show R.S.'s face nor Defendant's penis (App. Vol. II at 24; Tr. Vol. II at 6-7). This Court reviews a trial court's denial of a motion to dismiss for an abuse of discretion. *Ceaser v. State*, 964 N.E.2d 911, 918 (Ind. Ct. App. 2012), *trans. denied* (citing *State v. Durrett*, 923 N.E.2d 449, 453 (Ind. Ct. App. 2010)).

The trial court did not abuse its discretion in denying Defendant's motion to dismiss because the charging information tracked the language of the statute and

put Defendant on notice of the charge. The distribution statute 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.

Ind. Code § 35-45-4-8. 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). The information facially alleged the offense of distribution of an intimate image and tracked that statutory language, as the trial court found (App. Vol. II at 45). The information stated an offense.

The trial court did not abuse its discretion in denying the motion to dismiss. "It is only when an information is facially deficient in stating an alleged crime that dismissal for failure to state an offense is warranted." *Gutenstein v. State*, 59 N.E.3d 984, 994 (Ind. Ct. App. 2016) (citing *Pavlovich v. State*, 6 N.E.3d 969, 974 (Ind. Ct. App. 2014), *trans. denied*); *see also Semon v. State*, 158 Ind. 55, 62 N.E. 625, 626 (1902) (stating that an indictment or information is sufficient if the charge is made substantially in the language of the statute defining the offense). Defendant has never claimed that he was not on notice from the information or the

probable cause affidavit as to the nature of the charge against him or that he is unable to prepare a defense based on the allegation in the information. *See State v. Sturman*, 56 N.E.3d 1187, 1196 (Ind. Ct. App. 2016) (stating that the purpose of a charging information is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense).

Moreover, the essence of Defendant's claim was that the image did not show R.S.'s face or his penis so the evidence would not be sufficient to support a conviction.[1] "[A]n indictment or information may not be questioned on the ground of insufficient evidence. The sufficiency of the evidence is decided at trial." *Schutz v. State*, 275 Ind. 9, 13, 413 N.E.2d 913, 916 (1981) (citing *Hubbard v. State*, 262 Ind. 176, 313 N.E.2d 346 (1974); *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932)). It is a question of fact and for the jury alone to determine if the image sufficiently depicted an "intimate image" as specifically defined by the legislature in the distribution statute. And if the charge against him is reinstated, Defendant can certainly focus his defense on attacking the image as an insufficient depiction to support a conviction. Because the information stated the offense by statutory language and Defendant's attack on the information alleges insufficiency of the evidence, the trial court properly denied Defendant's motion to dismiss.

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[1]A majority of Defendant's argument on this issue, that this Court should read an element into the statute that the image show the victim's identity, is based not on whether the information stated an offense through its statutory language, but on overbreadth and free speech implications (Appellee's brief, p. 16-18). Those arguments are addressed below. But even if identity were required, Defendant's arguments continue to be a claim that the State will be unable to prove identity at trial. That argument does not provide a proper basis for a motion to dismiss.

Appeal Issue

The distribution of an intimate image statute is constitutional.

This Court should reverse the trial court's order granting Defendant's motion to dismiss the information. Defendant has conceded several points on appeal:

- any constitutional problem is solved by this Court's interpretation of "depict" to require the image to reveal the victim's identity (Appellee's brief, p. 12-19);

- the distribution statute serves a compelling state interest (Appellee's brief, p. 27); and,

- Defendant was not engaged in political speech under Article I, Section 9 (Appellee's brief, p. 34).

These concessions narrow the issues for this Court's consideration. Moreover, Defendant's initial attack on the distribution statute as being the "broadest in the country" because it does not include various elements is unpersuasive. Of the forty-eight jurisdictions (forty-six states, the District of Columbia, and Guam) that have enacted criminal statutes to deter and punish nonconsensual pornography, there are "significant differences in the construction" of the criminal statutes, particularly regarding essential elements. Sales and Magaldi, 57 Am. Crim. L. Rev. at 1500.[2] Jurisdictions even vary on the existence of the two elements that Defendant alleges

[2] Jonathan S. Sales and Jessica A. Magaldi, *Deconstructing the Statutory Landscape of "Revenge Porn": An Evaluation of the Elements That Make an Effective Nonconsensual Pornography Statute*, 57 Am. Crim. L. Rev. 1499, 1500 (2020). *See* https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/05/57-4-Sales-and-Magaldi-Deconstructing-the-Statutory-Landscape-of-22Revenge-Porn22.pdf

are necessary to make our distribution statute constitutional: 1) a reasonable expectation of privacy; and 2) harm to/identity of the victim. Only thirty statutes include an essential element of a reasonable expectation of privacy of the victim. *Id.* at 1524-25. Other states, like Indiana, address this element through an explicit element of consent. *Id*. at 1519. Thirty-three statutes do not include a separate element requiring proof of harm to the victim, indicating that the unauthorized dissemination of an intimate image is *per se* harmful. *Id*. at 1522. And, over one-half of the statutes (twenty-seven) do not include an identification element. *Id*. at 1527. Indiana's statute is similar to Wisconsin, Iowa, and New Jersey. *Id*. at 1541-42. No other jurisdiction's statute has been struck down as unconstitutional by its highest court. *See People v. Austin*, 155 N.E.3d 439, 453-72 (Ill. 2019) *cert. denied* (2020); *State v. VanBuren*, 214 A.3d 791 (Vt. 2019); *State v. Culver*, 918 N.W.2d 103 (Wis. Ct. App. 2018), *review denied*; *State v. Casillas*, 952 N.W.2d 629 (Minn. 2020). Defendant's suggestion that Indiana's statute should be struck down because it is "the broadest in the country" falls flat (Appellee's Br. at 21). Indiana's distribution statute serves the legislature's intent and purpose without violating the constitutional right of free speech.

A. Defendant fails to show substantial overbreadth.

Defendant's overbreadth challenge to the distribution statute is premised on the idea that the statute will result in unrestrained mischief, such that a prosecutor will file charges against anyone who distributes an image of a woman on a public beach in a bathing suit that displays cleavage or is wearing a thong. That

hypothetical, as well as others proffered by Defendant, fall outside the limited language of our distribution statute, and even if they were covered by the statute, do not show substantial overbreadth.

Providing only a few examples of the potential infringement of protected speech will not suffice under a First Amendment overbreadth challenge; substantial overbreadth must exist, which is Defendant's burden to prove. *See Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003); *State v. Culver*, 918 N.W.2d 103, 108 (Wis. Ct. App. 2018), *rev. denied*. In determining whether a law is facially invalid, this Court must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)).

The distribution statute is narrowly drawn, as it criminalizes the distribution of an intimate image in limited circumstances. *See* Ind. Code § 35-45-4-8. "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.

There are 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). The law enforcement exceptions are very broad and will encompass many public concern situations. *See VanBuren*, 214 A.3d at 812-13 (noting that the exclusions limit the statute to purely private matters where the State's interest are the strongest and First Amendment concerns are weakest).

Defendant's hypothetical of distributing an image taken in public of cleavage and thongs is dispelled by the definition of "intimate image" (Appellee's brief, p. 29, 37). Cleavage and a thong bikini bottom are excluded from the definition of "uncovered buttocks, genitals, or female breast" in Subsection (c)(1)(C) because neither the breasts nor the buttocks are "uncovered" in that hypothetical.

"Uncovered" means having "no cover or covering."[3] A thong bikini bottom has some, albeit not much, coverage, as does a bathing suit top that covers only a portion of the female breasts. Thus, a person who distributes an image of a woman on a public beach in a bathing suit that has a thong bikini bottom or shows cleavage does not run afoul of the statute.

The absence of a separate public concern exception does not render the statute unconstitutionally overbroad. First, the existing exceptions in the statute cover much of what would fall under a separate public concern exception. Second, the statute allows other means of communicating the content of an intimate image of public concern. The statute requires actual distribution in the form of a *transfer* of the image to another person. *See* I.C. § 35-45-4-8(b) (defining the term "distribute" as "to transfer to another person"). Under this narrow definition, intimate images of public concern can be shared with and viewed by other persons or the media from the device itself or from a printed photograph. Thus, the sharing an image of public concern by simply allowing it to be viewed without it be being transferred is not prohibited by the statute; it is only the "distribution" of the image—the transfer of the image to another person—that is prohibited because it is that act that allows the wide-spread invasion of privacy. The statute is thus not overbroad in this respect as to intimate images of public concern because it allows

[3] *See* https://www.dictionary.com/browse/uncovered?s=t (last visited March 24, 2021).

for other means of communicating about the image outside of a transfer to another person.

Third, the statute only prohibits non-consensual distribution of the intimate image. An intimate image of public concern, then, can be distributed with consent. Defendant's argument assumes that all intimate images of public concern will be non-consensual and fall within the statute. But that assumption is not based on fact or evidence.

Last, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *United States v. Williams*, 553 U.S. 285, 303 (2008) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984)). The Anthony Weiner and Napalm girl examples could be such examples (provided the circumstances met all of the requirements in the statute), but those images exemplify a very small component of the statute's primary scope and purpose. The purpose of the statute is the deterrence of and punishment for the distribution of intimate images of a non-consenting individual. *See Austin*, 155 N.E.3d at 469 (noting that, in addressing concerns of public images, that the court "consider[s] the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or the other"). Compared to the narrow scope and purpose of the statute, neither example shows *substantial* overbreadth. Further, individual cases involving intimate images of public concern can still be addressed on an as-applied basis. *See Williams*, 553 U.S. at 302-03

(finding that the suggestion of a documentary showing atrocities in foreign countries "could of course be the subject of an as-applied challenge" under the child pornography statute and finding that "[i]n the vast majority of its applications, this statute raises no constitutional problems whatever"); *Austin*, 155 N.E.3d at 469 (finding the Andrew Wyeth example "rare" and could be addressed on a case-by-case basis) (citing *New York v. Ferber*, 458 U.S. 747, 773-74 (1982) (holding that impermissible applications that do not amount to more than a small fraction of materials within the statute's reach should be cured through case-by-case analysis)). Thus, a defendant charged in such a rare situation has a means by which to raise his First Amendment defense.

Defendant's use of Catherine as an example of a third person who could be unknowingly snared under the scope of the statute does not show the statute's overbreadth. Defendant is correct that Catherine is *not* an unknowing third party to the intimate image of Defendant engaged in oral sex sent by him to her. Defendant took that image of himself and sent it to Catherine. She had the ability to determine if she knew or reasonably should know if Defendant consented to her further distribution of that image based on her interaction with Defendant, and Defendant concedes that "there is a strong argument that [Catherine] should have known that [Defendant] did not want the image distributed" (Appellee's brief, p. 37-38). Depending on what Catherine did with the image, she could be prosecuted under the statute with respect to Defendant.

But Catherine would be an unknowing third party if she received the intimate image from Defendant and it depicted *just* R.S.; R.S. did not take the image of herself; Catherine did not receive the image from R.S.; nor did Catherine take that image in R.S.'s presence. Catherine could not be prosecuted for distributing the image with respect to R.S. that she received from Defendant. The statutory language narrows application of the statute to the first person who received the image from the one depicted in it or to the person who actually took the image. By its construction, the statute does not cover unsuspecting third parties. The statue's limitation of defendant recognizes that as the person receiving the image is farther removed from the source of the image, the more difficult it is for the person receiving the image to have knowledge about consent. As to Defendant's other two overbreadth challenges, that being the consent element and identity of/harm to the victim, both are addressed more fully below because that argument addresses actual elements of the statute.

The distribution statute has none of the overbreadth concerns as the animal cruelty statute in *United States v. Stevens*, 559 U.S. 460, 465-82 (2010). The distribution statute has narrow application to a defendant who receives or takes an intimate image from the victim and distributes it with knowledge or where he reasonably should know that the victim does not consent to that distribution. This serves the narrow interest at stake, which is privacy of the victim. The exceptions are broad, and unusual circumstances can be addressed on a case-by-case basis. Defendant's overbreadth challenge shows "no realistic danger" that the distribution

statute will "significantly compromise" First Amendment protections. *See Vincent*, 466 U.S. at 801.

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

1. The statute does not run afoul of the First Amendment.[4]

This Court should find that the proper level of scrutiny is intermediate because the statute's proscription of distribution is content-neutral and the statute limits distribution of sexual images that are a purely private matter. Contrary to Defendant's suggestion, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) is the wrong paradigm to apply (Appellee's brief, p. 25-27). The distribution statute is content-neutral because it is the image's publication without consent that is crucial to the illegality of the distribution. Like the regulation at play in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986), where the ordinance did not ban all adult theaters but only those in certain locations, the distribution statute does not ban the distribution of all intimate images, just those distributed without consent. It is therefore "properly analyzed as a form of time, place, and manner regulation." *Id.* At the heart of the distribution statute is the secondary effects (the invasion of privacy) of the non-consensual distribution of these intimate images on the victim,

[4] The Court could determine that nonconsensual dissemination of private sexual images is a category of speech like incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and speech presenting some grave and imminent threat the government has the power to prevent. *See U.S. v. Alvarez*, 567 U.S. 709, 717 (2012) (collecting cases). But the State recognizes that the United States Supreme Court has not yet identified this as a category of unprotected speech.

not the content of the image itself even if the statute only governs sexual images. *See Renton,* 475 U.S. 47 (affirming the district court's finding that the ordinance was aimed not at the content of the films but the *secondary effects* of such theaters on the surrounding community) (emphasis in original); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (finding that the interest in protecting morals and public order in the public indecency statute was unrelated to the suppression of free expression and justified incidental limitations on First Amendment freedoms); *Austin*, 155 N.E.3d at 457 (finding the protection of privacy to be the justification for the statute). The sign code in *Reed*, on the other hand, singled out specific subject matter for different treatment, such that it was a content-based restriction on free speech that warranted strict scrutiny. *Reed*, 576 U.S. at 171. Because the distribution statute is content-neutral, it is subject to intermediate level of scrutiny. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

Further, the distribution statute regulates purely private speech, unlike *Reed* that regulated public speech. Speech on matters of purely private concern have less First Amendment protection because there is no threat to the free and robust debate of public issues. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985) (citations omitted); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Speech of public concern, on the other hand, is the something that is a subject of general interest and of value and concern to the public at the time of publication. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). *Reed* concerned a First Amendment challenge to a town's sign code, which was a matter of public

concern and thus warranted a higher degree of First Amendment protection. There is no dispute that the kind of speech at issue in the distribution statute is purely private speech that warrants less First Amendment protection. *Reed* does not control.

The distribution statute does not prohibit but rather regulates the distribution of a certain type of private information. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (stating that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions"). The federal government regulates the unauthorized disclosure of personal information through a variety of statutes, such as the Driver's Privacy Protection Act (18 U.S.C. §2721), Privacy Act of 1974 (5 U.S.C. §552), Children's Online Privacy Protection Act (15 U.S.C. §6502), Health Insurance Portability and Accountability Act (P.L. 104-91), and Gramm Leach Bliley Act (15 U.S.C. §6802). The State of Indiana does so as well through various statutes addressing health records (Ind. Code §16-39 *et seq.*), Bureau of Motor Vehicle information (Ind. Code §9-14-13-2), and the privacy rights of personalities (Ind. Code §32-36-1 *et seq.*). "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." *Austin*, 155 N.E.3d at 458. The invalidation of the kind of private speech at issue in the distribution statute would call into the question the state's ability to protect privacy rights under all of these statutes.

Defendant agrees that the distribution statute serves a compelling state interest in privacy (Appellee's brief, p. 27). The right to privacy, the nonspeech element that the state is seeking to regulate, is unrelated to the suppression of free speech. Thus, while distribution of the intimate, private image has a communicative element in the sharing of it, it is the distribution without consent that is at the heart of the regulation. By rendering it unlawful to distribute an intimate image without consent, the statute prevents the disclosure of private information. Much like banning nude dancing does not implicate significant First Amendment interests because it regulated conduct (nudity) and minimal expression (dancing), *Barnes*, 501 U.S. at 564-72, the distribution statute bans the distribution without consent, but not the intimate image itself. *See Price v. State*, 622 N.E.2d 954, 966 (Ind. 1993) (stating that government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, (1989)). As such, the distribution statute is a time, place, and manner regulation that should be subject to intermediate scrutiny. As argued in the Appellant's brief and below, the incidental restriction on First Amendment freedom is no greater than essential to further the state's interest in privacy.[5]

[5] If this Court finds that strict scrutiny is appropriate, the State relies on the argument in the Appellant's Brief (p. 34-38) as to application of that analysis to the distribution statute.

Level of scrutiny aside, Defendant's argument that the statute is broader than necessary because the statute does not require a reasonable expectation of privacy and identity of/harm to the victim is meritless, because the distribution statute implicitly addresses both privacy and identity and should not include actual harm as an essential element.

a. The distribution statute is narrowly tailored as it only covers private images.

The distribution statute protects private images. As noted above, only thirty-one statutes out of forty-eight include as an essential element that the victim had a reasonable expectation of privacy when the image was obtained or created. Sales and Magaldi, 57 Am. Crim. L. Rev. at 1524-25. Defendant's concern, centered on a belief that the lack of such an explicit element will result in prosecution for "photographs or videos taken anywhere," misses the target (Appellee's brief, p. 29). The distribution statute addresses the privacy concern by its plain language in two ways. First, "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:

> (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.

I.C. § 35-45-4-8. Thus, the nature of the image—sexual intercourse, sexual conduct, or uncovered buttocks, genitals, or breasts—is extremely private. Moreover, the statute only applies to a person who received the image from the depicted person directly or captured the image him or herself in the presence of the depicted person. I.C. § 35-45-4-8(c)(2). The nature of the images produce a privacy interest.

Second, Indiana, like other states, address the privacy element through an explicit element of consent. Sales and Magaldi, 57 Am. Crim. L. Rev. at 1518-19. Consent and a reasonable expectation of privacy are interchangeable elements derived to achieve the same purpose, which is to ensure that the victim intended the image to remain private. Subsection (d)(1) of the distribution statute requires an element that the defendant "knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the intimate image." I.C. § 35-45-4-8(d)(1). 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, *e.g.*, commercially produced pornography. "States' essential element of whether a victim consented to the dissemination of images to third parties comprises the essence of [nonconsensual pornography] statutes." Sales and Magaldi, 57 Am. Crim. L. Rev. at 1518.

Between the nature of the image, the person taking the image, and the consent element, the distribution statute is narrowly tailored to protect the distribution of private images. The private nature of the images and the requirement of consent exclude from the statute those intimate images that have been consensually exposed and/or distributed to the public. Requiring as an element that the person portrayed in the image have an expectation of privacy would be redundant and not further narrow the scope of the statute.

"The redundant nature of the numerous essential elements … creates a risk of undermining the stated purpose of the statutes, which is to deter perpetrators of [nonconsensual pornography] from victimizing their subjects and punishing those engaged in [nonconsensual pornography] violations." *Id*. at 1540. Defendant fails to specifically identify how the inclusion of this explicit element would right his perceived wrong and results in a more narrow statute that still serves the uncontested compelling state interest in the victim's right to privacy.

b. The distribution statute requires the identity of the victim to operate, even if it is not an element.

Defendant concedes on appeal that any constitutional problem with the distribution statute can be solved by this Court's interpretation of "depict" to require that the image reveal the victim's identity (Appellee's brief, p. 12-19, 30), which appears to be a main thrust of his constitutional attack. But because of the narrow application of the statute to images taken by the victim and sent to the defendant and images taken by the defendant in the presence of the victim, the identity of the victim will always be known, even if the image itself does not clearly

depict the victim's face. In other words, attendant circumstances will identify the victim, as was done here by Defendant's distribution of the video to Catherine, a person known to and who knew R.S., under circumstances where Catherine knew the person was R.S. from her conversation with Defendant (Appellee's App. Vol. II at 6).[6] Moreover, the defendant who distributes this kind of image will always know the identity of the victim, as he either will have received the image from the victim or will have captured it himself. There will not be a situation under the statute where a defendant will be prosecuted for distributing an image of an unknown victim.

Further, the inclusion of a separate identity element is based on "the implication that if the victim is not recognizable from the image, then anxiety and humiliation will not follow." Sales and Magaldi, 57 Am. Crim. L. Rev. at 1526. But distribution of an intimate image under our statute causes *per se* harm because the victim is identifiable from the circumstances surrounding the image. Even if R.S. suffered anxiety and humiliation solely from Catherine's exposure to the video, Defendant caused that anxiety and humiliation by distributing the video via Snapchat, and its existence in perpetuity on the internet will cause her further

[6] Defendant is correct that the State inadvertently omitted a portion of Defense Exhibit B to the motion to dismiss in the Appellant's Appendix. Exhibit B in the Appellee's Appendix is a true and accurate copy of that exhibit in full.

anxiety and humiliation.[7] The fact that a vast majority of the people viewing this video on the internet will not know it depicts R.S. specifically has nothing to do with Defendant's right to free speech but has everything to do with protecting R.S.'s right to privacy. In other words, no additional speech would be protected by the addition of this element but the statute would be less effective in deterring this kind of conduct.

c. An intent to harm or actual harm element is not required for the statute to be narrowly tailored.

Defendant also advocates that the distribution statute have an intent to harm element or an element that requires "significant harm beyond just embarrassment" (Appellee's brief, p. 28-30). An intent to harm element, however, would "exclude[] from prosecution significant harmful conduct committed by a wide array of actors." Sales and Magaldi, 57 Am. Crim. L. Rev. at 1520. It would narrow the statute to miss conduct the statute is meant to cover without protecting any free speech interest. Motives range from harassment, stalking, and classic revenge porn to sharing images with friends for fun, profit, notoriety, entertainment, or for no specific purpose. But "the damage to the victim is essentially the same regardless of whether the perpetrator was motivated to damage the victim" because images posted to the internet are available to the general public. *Id.* at 1501-02. And if the statutory purpose is to prohibit and *deter* the distribution of intimate images and

[7] Images sent over Snapchat can be saved. *See* https://www.businessinsider.com/how-to-save-snapchat-videos (last visited March 24, 2021).

the resulting damage to the victim, then "the inclusion of a harassment scienter element substantially undermines its purpose and efficacy." *Id*. at 1520. This is likely why sixteen states' statutes omit an intent to harm element. *Id*. Further, this requirement confuses *mens rea* with motive, and cuts against long-standing Indiana law that the State does not have to prove motive for a crime. *See Houser v. State*, 678 N.E.2d 95, 103 (Ind. 1997). The legislature did not include motive as an element in this statute. In light of the serious impact on the effectiveness of the statute, this Court need not include an element of intent to harm the victim to protect the right to free speech.

As for Defendant's contention that the distribution statute include an element of *actual* harm, this would squarely defeat the legislative intent to *prevent* the kind of harm that cannot be undone. A majority (thirty-three) of the statutes do not include proof of harm to the victim or the defendant's knowledge that distributing the image would cause harm, which recognizes that the "unauthorized dissemination of the image" is "per se harmful." Sales and Magaldi, 57 Am. Crim. L. Rev. at 1522; *see Culver*, 918 N.W.2d at 111-12 (stating that the unconsented publication of a private representation of a person while nude, semi-nude, or engaged in sexually explicit activity is presumptively distressing and harmful). The distribution statute is akin to violations of the Health Insurance Portability and Accountability Act (HIPAA), which provides both civil and criminal penalties for the knowing disclosure of personal information with no intent to harm or proof of actual harm. *See* 42 U.S.C. §§ 1320d–5, d–6; *In re C.B.*, 865 N.E.2d 1068, 1072 (Ind. Ct.

App. 2007), *trans. denied* (stating that HIPAA protects individuals from unwarranted dissemination of medical and mental health records by restricting access to such records without the individual's direct consent). The invasion of privacy is the harm that the statute is intended to prevent, and a requirement of actual harm goes unnecessarily beyond it without adding any additional First Amendment protection. An actual harm element would also have a chilling effect on victims to report this invasion of privacy, as they would, after suffering extensive psychological effects of the distribution on the internet, then have to testify in open court as to that harm, which would amount to a secondary attack on privacy.

d. The mens rea of the statute is narrowly tailored to the State's compelling interest.

Last, Defendant briefly attacks the "reasonably should know" element of the distribution statute as an insufficient *mens rea* to protect his free speech interests (Appellee's brief, p. 30-31). Criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Ferber*, 458 U.S. at 765. The distribution statute provides that a person who "knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the intimate image" and distributes the intimate image commits distribution of an intimate image. I.C. § 35-45-4-8(d). Defendant either "knows" by being "aware of a high probability" that the victim does not consent, *see* Indiana

Code Section 35-41-2-2, or he "reasonably should know" that the victim does not consent—a constructive knowledge standard.[8]

This statutory language allows for an explicit expression of no consent (a defendant "knows" that the victim does not consent) and also allows the State to show evidence of attendant circumstances under which a defendant "reasonably should know" that the victim does not consent, like here where R.S. did not have any knowledge of the video in the first place and therefore could not have consented to distribution of it. Both *mens rea* exempt innocent or inadvertent conduct from the scope of the statute. *See United States v. Featherston*, 461 F.2d 1119, 1121 (5th Cir. 1972), *cert. denied* (finding the *mens rea* of "knowing or having reason to know" not unconstitutionally vague); *Stoltz v. Commonwealth*, 831 S.E.2d 164, 170 (Va. 2019) (finding the phrase "knows or has reason to believe" not unconstitutionally vague). In *Casbah, Inc. v. Thone*, 651 F.2d 551, 561 (8th Cir. 1981), *cert. denied*, the Court noted that there are "many statutes which utilize a 'reasonably should know' or similar standard and which have withstood constitutional attack." Indeed, other federal courts have outright rejected Defendant's suggestion that the "reasonably should know" phrase is a mere negligence standard:

> This court has held that the phrase "reasonably should know" does not permit a conviction for negligent conduct. *Florida Businessmen For Free Enterprise v. City of Hollywood,* 673 F.2d 1213, 1219 (11th Cir.1982). "The 'reasonably should know' standard does not punish innocent or inadvertent conduct but establishes a scienter requirement that the defendant acted in bad faith." *Id.* This court has noted that

[8] Roughly eleven states have the "knows or reasonably should know" language in regard to the consent element. *See* Sales and Magaldi, 57 Am. Crim. L. Rev. at Appendix.

> "proof that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge." *Id.*

United States v. Biro, 143 F.3d 1421, 1429-30 (11th Cir. 1998). Similarly, in *State v. Schaefer*, 668 N.W.2d 760, 774 (Wis. Ct. App. 2003), *rev. denied*, the Wisconsin Court of Appeals rejected the suggestion that "reasonably should know" creates a civil negligence standard in the possession of child pornography statute. The Court noted that the United States Supreme Court has approved scienter expressed as "reason to know" and "a belief or ground which warrants further inspection or inquiry" as a sufficient level of scienter in statutes criminalizing obscenity. *Id.* (citing *Ginsberg v. New York,* 390 U.S. 629, 643-44 (1968); *Mishkin v. New York,* 383 U.S. 502, 510-11 (1966)). The Court concluded that "'reasonably should know' is less than actual knowledge but still requires more than the standard used in civil negligence actions," thus, the State must show that "the defendant had an awareness of certain facts and information that would have caused a reasonable person to conclude that the persons depicted in the materials were minors." *Id*. at 775.

This Court should similarly reject Defendant's suggestion that the "reasonably should know" *mens rea* unconstitutionally amounts to negligence and find that the term requires less than actual knowledge (which is covered by the "knows" statutory language) but requires an awareness of certain facts and information that would have caused a reasonable person to conclude that the victim did not consent to distribution of the intimate image. The present facts are a clear

cut example of when a defendant "reasonably should know" that the victim does not consent—a victim was unaware the image was taken and in no way suggested that she consented to its distribution. This level of *mens rea* is sufficient to limit prosecution to those defendants who had actual knowledge of, or an awareness of facts showing, lack of consent to distribute but still serve the State's compelling state interest. This Court should find that the distribution statute does not violate the First Amendment.

2. The statute does not violate the Indiana Constitution.

Defendant did not challenge the statute under the Indiana Constitution, nor did the trial court make any specific findings in this regard (App. Vol. II at 46-48; Tr. Vol. II at 8, 23). Waiver aside, Defendant did not below, nor does he on appeal, claim that the distribution statute is incapable of constitutional application (Appellee's brief, p. 39). And the distribution statute is constitutional as applied to Defendant, as argued in the Brief of Appellant and below (Appellant's brief, p. 26-27).

Further, Defendant concedes that he was not engaged in political speech under Article I, Section 9 (Appellee's brief, p. 34). Defendant's claim, however, that his distribution of the intimate image of R.S. engaging in oral sex with him caused her no harm because she was not identifiable from the image offers him no constitutional protection. As argued above, the nature and circumstances of the taking of the intimate image combined with the person who distributes it will always make the victim identifiable, and distribution under these limited

circumstances is *per se* harm. Defendant, who secretly recorded the image, and Catherine, who received the image from Defendant, knew that the victim was R.S., and Catherine was the one who reported the distribution to R.S. R.S. was not a phantom victim whose identity could be determined and who thus could not be harmed. Moreover, Defendant's reliance on the fleeting nature of the Snapchat videos to show no or limited harm is unpersuasive (Appellee's brief, p. 35). It is possible to save videos and photos sent by Snapchat. Images on Snapchat and other social media sites remain on the internet in perpetuity.[9] The fact that Catherine alleged to law enforcement that she did not save the video does not render Defendant's clear violation of the statute lawful, nor does it mean that Defendant does not still possess the video. Defendant made a secret video of R.S. performing oral sex on him and he distributed that video online to a third person without R.S.'s consent, which was a threat to the peace, safety, and well-being of R.S. This Court should find the distribution statute constitutional.

[9] *See* https://abcnews.go.com/Technology/deleted-snapchat-photos/story?id=23657797 (last visited March 25, 2021); https://www.business2community.com/social-media/how-long-do-your-online-posts-stay-on-the-internet-0474996 (last visited March 25, 2021).

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
Jodi Kathryn Stein

CERTIFICATE OF SERVICE

I certify that on April 7, 2021, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I further certify that on April 7, 2021, the foregoing document was served upon opposing counsel, via IEFS, addressed as follows:

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