Received: 4/6/2021 3:19 PM

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,
Honorable Randy Coffey,
Magistrate.

AMICUS CURIAE BRIEF OF THE CYBER CIVIL RIGHTS INITIATIVE AND DR. MARY ANNE FRANKS IN SUPPORT OF APPELLANT

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Cyber Civil Rights Initiative and Dr. Mary Anne Franks (jointly, "CCRI") submit this brief as amicus curiae in support of the State of Indiana and the constitutionality of Indiana Code § 35-45-4-8, entitled "Distribution of intimate image."

Cyber Civil Rights Initiative ("CCRI") is the leading U.S.-based non-profit organization addressing the growing problem of unauthorized distribution of intimate images. Since 2013, CCRI has provided support to more than 4,000 victims through a 24-hour crisis helpline, created model statutes and guidance for legislators, and conducted the first nationwide study of nonconsensual pornography victimization and perpetration.

CCRI's board includes the two foremost legal experts on nonconsensual pornography in the United States, Dr. Mary Anne Franks (President), Professor of Law and Dean's Distinguished Scholar at the University of Miami Law School, and Danielle Keats Citron (Vice-President), Jefferson Scholars Foundation Schenck Distinguished Professor of Law at the University of Virginia School of Law. Professors Franks and Citron co-authored the first law review article on the criminalization of "revenge porn" in 2014. Dr. Franks, who is also CCRI's Legislative & Tech Policy Director, authored the first model criminal statute on nonconsensual pornography in 2013, which has been used as a template for many of the 48 U.S. jurisdictions that now criminalize this form of abuse and for the federal Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act, now part of

the Violence Against Women Reauthorization Act of 2021. Dr. Franks also served as Reporter for the Uniform Law Commission's 2018 Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act.

The experience and expertise of CCRI and Dr. Franks have particular relevance in this case because they are cited in the briefs of both Appellee Katz and the State in support of their respective positions. Accordingly, CCRI and Dr. Franks file this brief for two purposes. The first is to provide the Court with empirical and scholarly research on the invasion of privacy often referred to as "revenge porn" but more accurately described as "nonconsensual pornography." The second is to provide perspective on the First Amendment and privacy issues raised by this case while correcting Katz's misrepresentations of the work of CCRI and Dr. Franks.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision below holding that Ind. Code § 35-45-4-8 (2021)—this state's law criminalizing the unauthorized distribution of intimidate images—violates the First Amendment. The trial court's analysis of the law's constitutionality was based almost entirely on a now-overruled decision from the intermediate appellate court from another state. The trial court failed to appreciate both the harms associated with this particularly insidious form of abuse, as well as the proper application of First Amendment principles to the kind of privacy legislation codified in I.C. § 35-45-4-8.

Laws like I.C. § 35-45-4-8 now exist in the vast majority of states. This Court should reject Appellee Katz's challenge here and should instead follow the lead of several other states' highest courts in upholding the constitutionality of such legislation. As we explain in greater detail below, I.C. § 35-45-4-8 was enacted to address the broad and growing problem of nonconsensual pornography, which can be personally and professionally ruinous for its victims. Like the statutes upheld by other state supreme courts, I.C. § 35-45-4-8 is a narrowly tailored measure that survives under any standard of constitutional scrutiny.

Katz's efforts to shore up the trial court's misguided decision are all unavailing. Contrary to his arguments, Katz does not have a constitutional right to distribute intimate images of others without their consent. Criminalizing such conduct is fully consistent with basic First Amendment principles and a contrary conclusion would cast doubt on the constitutionality of other Indiana laws protecting privacy.

Moreover, I.C. § 35-45-4-8 does not suffer from overbreadth. Instead, it is properly tailored to address the problem of nonconsensual pornography—including instances where a perpetrator is motivated by reasons other than "revenge" or an intent to harm. To the extent Katz is able to identify any circumstances in which the application of I.C. § 35-45-4-8 might raise constitutional concerns, those can be addressed through as-applied challenges or reading the statute to avoid those concerns. The strong medicine of facial invalidation would be wholly inappropriate.

ARGUMENT

I. Nonconsensual pornography is an invasion of privacy that causes devastating and often irreparable harm, especially to vulnerable groups.

Nonconsensual pornography is "the distribution of sexually graphic images of individuals without their consent."[1] As of March 2021, forty-six state legislatures, the District of Columbia, the territory of Guam, and the Uniform Code of Military Justice have recognized the devastating impact of this form of privacy violation through criminal statutes,[2] and bipartisan federal criminal legislation on the issue has passed

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[1] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

[2] CCRI, 46 States + DC Have Revenge Porn Laws, https://www.cybercivilrights.org/revenge-porn-laws/ (collecting state statutes). In two additional states—Mississippi and Wyoming—legislation has been passed and is currently awaiting signature by the states' governors. *See* Miss. Senate Bill 2021, http://billstatus.ls.state.ms.us/documents/2021/pdf/SB/2100-2199/SB2121SG.pdf; Wyo. House Bill 85, https://www.wyoleg.gov/Legislation/2021/HB0085.

the House of Representatives as part of the Violence Against Women Reauthorization Act of 2021.[3]

Nonconsensual pornography can be created from images voluntarily exchanged with another person within the context of a private relationship, as well as from images originally created or obtained without consent (e.g., through hacking, surreptitious filming, or recordings of sexual assaults). No matter the motive or how the images are originally created, the unauthorized disclosure of such highly sensitive, private information can cause immediate, devastating, and in many cases irreparable harm. With the click of a button, these images can be made accessible to millions of strangers or transmitted directly to the victim's family members, employers, and peers. The exposure of such sensitive intimate images wreaks havoc on victims' personal, professional, educational, and family life.[4]

Victims often find themselves unemployable due to the disclosure, or may withdraw from online life entirely, to the detriment of their job prospects and careers.[5] Victims can spend thousands of dollars in an often-futile attempt to get the

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[3] Rep. Jackie Speier, *Speier and Katko Amendment to Address Online Exploitation of Private Images Included in Violence Against Women Reauthorization Act* (Mar. 17, 2021), https://speier.house.gov/press-releases?ID=FB99CA92-BFA3-4E6A-AA97-56AE155C46E3.

[4] Citron & Franks, *supra* note 1 at 350–54.

[5] Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 8–10 (2009); Citron & Franks, *supra* note 1 at 352.

material removed from the internet,[6] or in legal fees pursuing judgments that, even if awarded, they may never collect.[7]

Victims frequently experience serious emotional and psychological distress, including depression, anxiety, agoraphobia, difficulty maintaining intimate relationships, and posttraumatic stress disorder.[8] Victims have been stalked, harassed, threatened with sexual assault, defamed as sexual predators, terminated from employment, expelled from their schools, or forced to change their names. Some victims have committed suicide.[9]

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[6] Ian Sherr, *Forget being a victim. What to do when revenge porn strikes,* CNET, May 13, 2015 (noting that a typical case "can cost as much as $10,000."), https://www.cnet.com/news/forget-being-a-victim-what-to-dowhen-revenge-porn-strikes/.

[7] Tracy Clark-Flory, *Criminalizing 'revenge porn,'* SALON, Apr. 6, 2013 https://www.salon.com/2013/04/07/criminalizing_revenge_porn/.

[8] 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, 38–39 (2017).

[9] Citron & Franks, *supra* note 1 at 372. *See also* Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE, Sept. 17, 2013, http://www.rollingstone.com/culture/news/sexting-shame-and-suicide20130917; BBC News Serv., *Tiziana Cantone: Suicide following years of humiliation online stuns Italy*, Sept. 16, 2016 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral), http://www.bbc.com/news/world-europe-37380704; Emily Bazelon, *Another Sexting Tragedy*, SLATE, Apr. 12, 2013 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated), https://slate.com/human-interest/2013/04/audrie-pott-and-rehtaeh-parsonshow-should-the-legal-system-treat-nonconsensual-sexts.html; Kate Briquelet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, THE DAILY BEAST, June 20, 2016 (15-year-old girl shoots herself in the head after ex-boyfriend posts nude photo on social media), https://www.thedailybeast.com/nude-snapchat-leak-drove-teen-girl-to-suicide.

The prevalence and impact of nonconsensual pornography has been exacerbated by rising domestic violence rates,[10] stay-at-home orders, increased time online, and the shift to online education and work-from-home using unfamiliar and insecure communication technology due to the COVID-19 pandemic.[11]

A. Scale of the Problem

In 2017, CCRI researchers studied a sample of 3,044 American adults who use social media.[12] This study found that 1 in 8 participants had been victimized by or threatened with nonconsensual pornography.[13] Nearly half of all victims' intimate images were distributed by text message and the rest were distributed through social media, in person, or the internet.[14] Snapchat is a particularly popular platform for nonconsensual pornography, as evidenced by categories such as "Snapchat revenge porn" on pornographic sites. While the platform boasts that photos sent through Snapchat "disappear" after a short time, "[t]here are dozens of apps in the App Store and Google Play that allow you to easily save incoming photos and videos without the

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[10] M.B. Pell & Benjamin Lesser, *Researchers warn the COVID-19 lockdown will take its own toll on health*, REUTERS, Apr. 3, 2020, https://www.reuters.com/investigates/special-report/health-coronavirus-usacost/.

[11] Jessica M. Goldstein, *'Revenge porn' was already commonplace. The pandemic has made things even worse*, WASH. POST, Oct. 29, 2020. https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html

[12] Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report 11* (2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017- Research-Report.pdf.

[13] *Id.* at 11.

[14] *Id.* at 21.

other person knowing,"[15] and photos often "resurface online as screenshots posted by vindictive exes."[16]

As many as 10,000 websites feature "revenge porn,"[17] some dedicated solely to this content.[18] These easily accessible, largely anonymous platforms connect profit-driven purveyors with voyeuristic consumers. These sites frequently display personal information about victims (e.g., name, age, address, employer, email address, and links to social media profiles) alongside the images, making it easy for strangers to harass and threaten victims.[19]

Some of these sites are known as "slutpages," defined as "digitally created groups, websites, or email listservs intended to share nude or semi-nude photos of others, usually girls and women, generally without their knowledge or consent, and with the ability for users to comment on their appearance, sexuality, and sexual experiences."[20] A 2021 survey found men who—like Appellee Katz—belong to

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[15] Karissa Bell, *Why Stealthily Saving Snapchat Photos Is So Easy*, MASHABLE, Oct 10, 2014, https://mashable.com/2014/10/10/saving-snapchat-photos-easy/.

[16] Claire Lampen, *Snapchat Sexting Is Being Used As a Vehicle for Revenge Porn — and It's Hard to Stop*, MIC, Feb. 24, 2016, https://www.mic.com/articles/136070/snapchat-sexting-is-still-a-vehicle-for-revenge-porn-here-s-why-it-s-impossible-to-stop.

[17] This figure is based on takedown requests made available to CCRI.

[18] *Revenge Porn: Misery Merchants,* The Economist, July 5, 2014, https://www.economist.com/international/2014/07/05/misery-merchants.

[19] Citron & Franks, *supra* note 1 at 350–51.

[20] Megan K. Maas et al., *Slutpage Use Among U.S. College Students: The Secret and Social Platforms of Image-Based Sexual Abuse*, ARCHIVES OF SEXUAL BEHAVIOR (2021), https://link.springer.com/content/pdf/10.1007/s10508-021-01920-1.pdf.

fraternities or play college sports are the most likely to visit and post to these sites: nearly 60% of fraternity members and more than half of male college athletes had visited such sites at least once, and that between 15% and 20% of these men had posted nude photos without consent.[21]

Many revenge porn sites and slutpages are searchable by name, town, or school. As one popular porn "reviewer" explains,

> You want real sluts exposing themselves. No, not that fake "amateur" stuff either. Nudes, videos, and gifs of real women baring it all. Pics you were probably never meant to see. That's the good sh*t. It feels wrong in all the right ways.
>
> Ex-wives, girlfriends, college parties, and all other kinds of failed relationships result in nudes, flicks, and so much more. It's the classic love story. Girlfriend cheats on the boyfriend and he gets petty and all of her glorious nudes are put up online.…
>
> You can go through these boards and find your area code, city, or state and share pics of hookups, exes, wives, whatever you want.[22]

These search features, as well as the ability to comment on posts, make it possible for victims to be identified even if they are not immediately identifiable in the image itself or by information that accompanies the original posting.

B. Perpetrator Motives and Potential Deterrents

Contrary to what the colloquialism "revenge porn" suggests, many perpetrators of nonconsensual pornography are not motivated by personal vindictiveness, but by motives such as greed, voyeurism, and self-aggrandizement.

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[21] *Id.*

[22] PornDude.com, https://theporndude.com/3397/anonsharer.

Indeed, the CCRI study found that the vast majority of perpetrators—nearly 80%—report being motivated by something other than the desire to hurt the victim.[23] Domestic abusers threaten to disclose intimate photos to keep partners from leaving or reporting abuse to law enforcement;[24] sex traffickers use compromising photos to coerce unwilling individuals to stay in the sex trade; rapists record attacks to discourage victims from reporting assaults;[25] nursing home workers post naked photos of vulnerable patients to social media for entertainment;[26] and "revenge porn" site owners traffic in unauthorized sexually explicit images to make money or to attain notoriety.[27]

CCRI's study asked participants who admitted to engaging in this abuse what, if anything, would have stopped them from doing so. As illustrated below, the most common answers relate to criminal enforcement: registration as a sex offender, imprisonment, and knowing that the nonconsensual distribution of sexually explicit materials was a felony.[28]

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[23] CCRI, *Frequently Asked Questions,* https://www.cybercivilrights.org/faqs/.

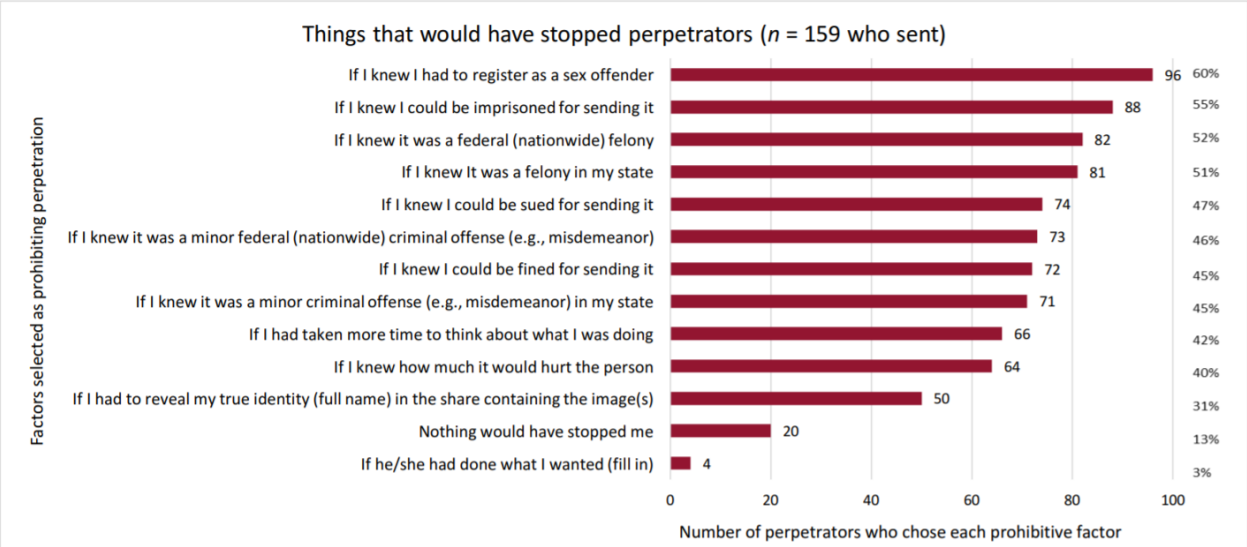
[24] Citron & Franks, *supra* note 1 at 351.

[25] Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1258 (2017).

[26] Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*, PRO PUBLICA, Dec. 21, 2015, https://www.propublica.org/article/nursing-home-workers-share-explicitphotos-of-residents-on-snapchat.

[27] *'Revenge Porn' Website has Colorado Women Outraged*, CBS DENVER, Feb. 3, 2014, http://denver.cbslocal.com/2013/02/03/revenge-porn-website-hascolorado-woman-outraged/.

[28] Eaton et al., *supra* note 12 at 22.



C. Nonconsensual pornography disproportionately harms vulnerable groups, especially women.

Nonconsensual pornography exacerbates gender inequality. Women are more likely to be victims of this abuse, while men are more likely to be perpetrators.[29] Available evidence also indicates that women and girls face more serious consequences as a result of victimization.[30] "Revenge porn" websites feature more women than men, and most reported cases to date involve female victims and male perpetrators.[31] Nonconsensual pornography often plays a role in crimes that disproportionately affect women, including intimate partner violence, sexual abuse,

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[29] *Id.* at 12, 15.

[30] Citron & Franks, *supra* note 1 at 353–54.

[31] Anastasia Powell et al., *The Picture of Who Is Affected by 'Revenge Porn' Is More Complex Than We First Thought*, CONVERSATION, May 7, 2017, https://theconversation.com/the-picture-of-who-is-affected-byrevenge-porn-is-more-complex-than-we-first-thought-77155.

sexual assault, and sex trafficking. It also helps to "sustain a culture . . . in which sexual consent is regularly ignored."[32]

The disclosure or threatened disclosure of intimate images chills women's speech, expression, and professional ambition. Those who are targeted frequently withdraw from various spheres of meaningful activity: work, school, social media, and personal relationships. The chilling effects of nonconsensual pornography include deterring women from vocations such as politics and journalism.[33]

D. The Legislature enacted I.C. § 35-45-4-8 to protect Indiana's residents from the harms caused by nonconsensual pornography.

In February 2019, a single mother from Hamilton County stood before lawmakers in the Indiana House and recounted her experience of abuse at the hands of her ex-husband:

> I am a mom. I have a 17-year-old daughter, a 12-year-old daughter and an 8-year-old son. I am a teacher and I am also a victim of revenge porn. In retaliation for me leaving he hacked my Facebook page and posted inappropriate photos of me on that page and it did not stop there. I thought my entire world was crumbling before me. I thought I was going to lose everything.

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[32] Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. OF L. STUDIES 534 (2017).

[33] National Democratic Institute, *#NotTheCost: Stopping Violence Against Women in Politics* 19 (2017), https://www.ndi.org/sites/default/files/not-the-cost-program-guidancefinal.pdf; Jill Filipovic, *Wondering why more women don't run for office? Look what happened to Katie Hill*, GUARDIAN, Nov. 2, 2019, https://www.theguardian.com/commentisfree/2019/nov/02/katie-hill-resignation-women-politics-sexuality.

After she discovered that "there was no law my ex had broken," she decided to do what she could to change the law, despite being terrified of how her ex-husband might retaliate:

> I know if I do not speak up maybe nobody will and nothing will change. This won't change my situation but it will help others. When we know better we should do better. I speak on behalf of myself and many others who feel powerless in this situation. We are asking for your help to hold these people accountable for their actions.[34]

In the wake of her testimony, the Legislature unanimously passed the legislation now codified as Ind. Code § 35-45-4-8 (2021). As the witness noted, the law came too late to help her, as it came too late for Colene Speckman, who was a teenager when her intimate photos posted to porn sites in 2017 by a boy she refused to date in high school;[35] for Chelsea Newerth, whose ex-boyfriend distributed sexual photos and videos taken during their relationship to her new fiancée, brother-in-law, and others;[36] and for countless others.

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[34] Kevin Rader, *Lawmakers hear emotional testimony from revenge porn victim*, WTHR, Feb. 19, 2019, https://www.wthr.com/article/news/local/lawmakers-hear-emotional-testimony-revenge-porn-victim/531-a36f7d38-bf92-482e-846f-79db34d9e5aa.

[35] Sandra Chapman, *Revenge porn soon to be a crime in Indiana, victims getting two new laws to fight back*, WTHR, Apr. 24, 2018, https://www.wthr.com/article/news/investigations/13-investigates/revenge-porn-soon-be-crime-indiana-victims-getting-two-new-laws-fight-back/531-18226104-2cd4-4d26-87aa-d81e90004902.

[36] Kayla Sullivan, *Woman falls victim to revenge porn shortly before new Indiana law takes effect*, CBS 4, June 28, 2019, https://cbs4indy.com/news/crime/woman-falls-victim-to-revenge-porn-1-week-before-new-indiana-law-takes-effect/.

After I.C. § 35-45-4-8 passed in 2019, Indiana was finally able to begin holding nonconsensual pornography perpetrators accountable. But if the ruling below is left to stand, Indiana will become the first state to go backwards on this issue. It will rejoin the ignominious handful of states where abusers are free to use private, intimate information to ruin lives, dismissing the pleas of victims like the Hamilton County witness and casting doubt on the constitutional validity of its other privacy laws.

The trial court below ruled that I.C. § 35-45-4-8 is unconstitutional based on its wholesale adoption of opinions from intermediate courts in Minnesota and Texas —even though at the time of its ruling both decisions had already been taken up for review, and even though every challenge to a nonconsensual pornography law that had reached termination in the state courts has resulted in the laws being upheld.[37] Moreover, the Minnesota appellate court decision on which the trial court relied so heavily was unanimously overturned by that state's Supreme Court in December 2020.[38] For the reasons explained below, this Court should have little trouble reaching the same conclusion here and should affirm the constitutional validity of I.C. § 35-45-4-8.

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[37] *People v. Austin*, 155 N.E.3d 439, 453–72 (Ill. 2019), *cert. denied*, 141 S.Ct. 233 (2020); *State v. VanBuren*, 214 A.3d 791 (Vt. 2019); *State v. Culver*, 918 N.W.2d 103 (Wis. App. 2018), *review denied*, 923 N.W.2d 165 (Wis. 2018); *People v. Iniguez*, 202 Cal. Rptr. 3d 237 (Cal. App. Dep't Super. Ct. 2016). *But see Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018), *petition for discretionary review granted* (July 25, 2018).

[38] *State v. Casillas*, 952 N.W.2d 629 (Minn. 2020).

II. I.C. § 35-45-4-8 is a valid privacy regulation that responds to the serious harm of nonconsensual pornography without violating the First Amendment.

As the U.S. Supreme Court observed more than century ago, "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow," and to "compel any one … to lay bare the body…without lawful authority, is an indignity, an assault, and a trespass."[39] Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one's body. These laws rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person's consent not only inflicts dignitary harms upon the individual observed, but also inflicts a social harm serious enough to warrant criminal prohibition and punishment.[40]

Katz, however, claims that invading someone's privacy in this manner is his constitutional right. He contends that I.C. § 35-45-4-8 restricts protected speech, is subject to strict scrutiny, and must be struck down.[41] He is wrong in every particular. The law does not burden protected speech at all, much less a substantial amount of it. The law is a privacy measure with a plainly legitimate sweep, and unauthorized "sexually explicit publications concerning a private individual" are not "afforded First

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[39] *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251–52 (1891).

[40] *See*, *e.g.*, National District Attorneys Association, *Voyeurism Statutes*, (July 2010), https://ndaa.org/wp-content/uploads/Voyeurism-2010.pdf.

[41] Appellee's Br. at 24, 31 & 39.

Amendment protection."[42] Whatever small degree of overbreadth that might be imagined to exist in the law should be cured, not through the "strong medicine" of facial invalidation, but through as-applied challenges by those who can legitimately claim their conduct was constitutionally protected.[43]

A. There is no First Amendment right to invade a person's privacy by distributing private, intimate images of them without authorization.

Like many other federal and state privacy laws, I.C. § 35-45-4-8 protects against the unauthorized disclosure of sensitive information. These laws protect the right of individuals to keep a wide array of information private: medical records, social security numbers, student educational records, drivers' license information, genetic information, even video rental information.[44] Some of these laws are broad in scope; some impose serious criminal as well as civil penalties; and some permit the imposition of liability based on negligence. Yet the U.S. Supreme Court has never struck down a privacy regulation that restricted purely private speech on First Amendment grounds. Indeed, most privacy laws have never faced serious First

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[42] *United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014); *see also United States v. Petrovic*, 701 F.3d 849, 855-56 (8th Cir. 2012) (distributing a victim's private nude photos without consent "may be proscribed consistent with the First Amendment).

[43] *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008).

[44] Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 971–72 (2003).

Amendment challenge at all.[45] As constitutional law scholar Erwin Chemerinsky has succinctly stated, the "First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."[46]

B. I.C. § 35-45-4-8 is a narrow, content-neutral protection of the right to privacy that regulates speech on matters of purely private concern.

I.C. § 35-45-4-8 is a content-neutral time, place, and manner restriction that addresses a specific harm to Indiana's citizens and protects the state's compelling interest in health and public safety. The law restricts only how and when purely private information may be disclosed, without any attempt to disfavor a particular perspective or to drive unpopular ideas from the marketplace of ideas. It relies on reasonable, objective assessments about consent rather than vague and arbitrary assessments of subjective motives or responses. Indiana's statute does not prohibit the production or distribution of any particular kind of content, or the consensual dissemination of sexually explicit imagery.

As a result, I.C. § 35-45-4-8 easily satisfies constitutional scrutiny.[47] Its restriction on the unauthorized disclosure of private, sexually explicit images treads

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[45] Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1199–200 (2005).

[46] Office of Congresswoman Jackie Speier, *Press Release: Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn*, July 14, 2016, https://speier.house.gov/2016/7/congresswoman-speier-fellow-members-congress-take-nonconsensual

[47] *Austin*, 155 N.E.3d at 457–58.

in territory far removed from the core concerns of the First Amendment.[48] Katz's conduct—distributing sexually explicit videos of the victim without consent—should not receive the full measure of the First Amendment's protection.[49] Rather, this Court should have "no difficulty in concluding" the distribution of homemade sexually explicit material "does not qualify as a matter of public concern under any view."[50] Prohibiting the nonconsensual disclosure of intimate images therefore poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas."[51]

C. Even if the statute were subjected to strict scrutiny, it would survive because it is narrowly tailored to address compelling government interests

We have described the many ways in which victims of nonconsensual pornography suffer, from the trauma and humiliation of having the most intimate and private details of their lives placed on display to job loss, severe harassment and threats, serious reputational harm, and suicide. Preventing these harms is a compelling governmental interest.[52]

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[48] *Id.* at 458–59.

[49] *Id; see also Barnes v. Glen Theatre, Inc*, 501 U.S. 560, 571–81 (1991) (Scalia, J., concurring) (reasoning that Indiana's public indecency statute did not regulate expressive conduct and did not implicate First Amendment protections).

[50] *San Diego v. Roe*, 543 U.S. 77, 84 (2004).

[51] *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation omitted).

[52] *See Casillas*, 952 N.W.2d at 641–42 ("[T]he State has identified an "actual problem" of paramount importance in the nonconsensual dissemination of private sexual images and is working within its well-recognized authority to safeguard its citizens' health and safety . . . ."); *VanBuren*, 214 A.3d at 808 ("We base this (*continued. . .*)

Even in the absence of actual harm, I.C. § 35-45-4-8 also protects personal privacy, which is an important governmental interest in its own right.[53] Privacy is instrumental in fostering the relationships and values crucial in an open society. People rely on the confidentiality of transactions in other contexts all the time: they trust doctors with sensitive health information; salespeople with credit card numbers; lawyers with their private affairs. They are able to rely on the confidentiality of these transactions because society takes it as a given that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information.[54] It would be remarkable to suggest that the protection of a private

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conclusion on the U.S. Supreme Court's recognition of the relatively low constitutional significance of speech relating to purely private matters, evidence of potentially severe harm to individuals arising from nonconsensual publication of intimate depictions of them, and a litany of analogous restrictions on speech that are generally viewed as uncontroversial and fully consistent with the First Amendment.").

[53] *See Bartnicki v. Vopper*, 532 U.S. 514, 532–33 (2001); *see also Culver*, 918 N.W.2d 103, 110–11 ("No one can challenge a state's interest in protecting the privacy of personal images of one's body that are intended to be private—and specifically, protecting individuals from the nonconsensual publication on websites accessible by the public"); *Iniguez*, 202 Cal.Rptr.3d at 243 (government has an "important interest in protecting the substantial privacy interests of individuals from being invaded ... through the distribution of photos of their intimate body parts").

[54] *See*, *e.g.*,18 U.S.C. § 1832(a)(2) (criminalizing the unauthorized disclosure of trade secrets); 42 U.S.C. § 1320d-6(a)(3) (criminalizing unauthorized disclosure of individually identifiable health information); 5 U.S.C. § 552(a)(i)(1) (criminalizing the disclosure of agency records containing individually identifiable information to any person or agency not entitled to receive it).

individual's sexual information against unauthorized disclosure is entitled to any less respect.

Further, by protecting Indiana residents against the disclosure of intimately private images without their consent, I.C. § 35-45-4-8 advances the government's interest in safeguarding important aspects of speech and expression. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[55] Although privacy laws do, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public."[56] This is particularly true when the potential threat of dissemination is "widespread," as it is with images that can be shared over the internet.[57]

To suggest that none of these is a compelling governmental interest would immediately call into question a host of privacy protections under of Indiana law, including criminal laws against voyeurism,[58] restrictions on disclosures of private medical information,[59] and prohibitions on the disclosure of confidential information by government officials.[60] This Court should recognize that protecting a person's

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[55] *Hurley*, 515 U.S. at 573.

[56] *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

[57] *Id.*

[58] I.C. § 34-45-4-5.

[59] *Id.* § 16-39-2-6.

[60] *Id.* § 6-1.1-35-12.

bodily privacy and right to consent to disclosure of nude and sexually explicit pictures is a compelling government interest.

D. The absence of an intent-to-harm element does not render I.C. § 35-45-4-8 unconstitutional.

Katz argues that I.C § 35-45-4-8's lack of an intent-to-harm element runs afoul of the First Amendment. But this fundamentally misunderstands the harm of nonconsensual pornography and mischaracterizes First Amendment doctrine. While motive may be a meaningful factor in offenses such as harassment or disorderly conduct, it is irrelevant in privacy violations because the harm inflicted does not depend on the motive of the discloser. Nor does the constitutionality of privacy violations turn on the question of motive. Intent requirements are more likely to create First Amendment vulnerabilities than to solve them.

1. Privacy harms are not dependent on subjective motives or responses

Many people who disclose private, sexually explicit images without consent do so without any personal motivation to harm the victim. The invasion of sexual privacy is no less harmful for lack of a personally vengeful motive. Acknowledging this fact, nearly a dozen state laws criminalizing nonconsensual pornography do not include motive as an element of the offense.[61] Nor does the 2018 Uniform Law Commission's Civil Remedies for the Unauthorized Disclosure of Intimate Images Act,[62] the provision of the Uniform Code of Military Justice addressing nonconsensual

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[61] *See, e.g.*, 720 ILCS 5/11-23.5; Wash. Rev. Code § 9A.86.010.

[62] *See*, *e.g.*, Colo. Rev. Stat. § 13-21-1401 et seq..

pornography,[63] or the bipartisan federal criminal legislation against nonconsensual pornography that passed the House in March 2021.[64]

As the Illinois Supreme Court observed in upholding that state's law, motive is fundamentally irrelevant to the crime:

> [T]he motive underlying an intentional and unauthorized dissemination of a private sexual image has no bearing on the resulting harm suffered by the victim. A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective. Therefore, the question of the disseminator's motive or purpose is divorced from the legislative goal of protecting the privacy of Illinois citizens. The explicit inclusion of an illicit motive or malicious purpose would not advance the substantial governmental interest of protecting individual privacy rights, nor would it significantly restrict its reach.[65]

The analysis applies with equal force here. "[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection."[66] First Amendment scholars agree that there is no doctrinal basis for the assertion that a law aimed at protecting privacy must include an intent-to harm element to withstand First Amendment scrutiny. Professor Chemerinsky observes that there is nothing "in the First Amendment that says there has to be an intent to cause harm to the victim," and that "profit or personal gain" is

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[63] 10 U.S.C. § 917a.

[64] SHIELD Act, *supra* note 3.

[65] *Austin*, 155 N.E.3d at 47fr.

[66] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007).

equally objectionable as a motive."[67] Echoing this view, First Amendment scholar Eugene Volokh writes, "For purposes of legal analysis, there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person."[68]

2. Intent-to-harm requirements tend to create, rather than resolve, First Amendment vulnerabilities

Far from being required by the First Amendment, intent-to-harm elements can create constitutional infirmities. The Texas Court of Criminal Appeals struck down an improper photography law requiring "the intent to arouse or gratify the sexual desire of any person,"[69] in part because the intent elements "exacerbate[] the First Amendment concerns."[70] In invalidating the law, it pointed to *Texas v. Johnson*, where the Supreme Court found that Texas's flag-burning statute "was content based because it punished mistreatment of the flag that was intentionally designed to seriously offend other individuals."[71] Cyberbullying laws in North Carolina and New

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[67] CCRI, *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, *Cyber Civil Rights Initiative*, Oct. 6, 2017, https://www.cybercivilrights.org/2017-cybercrime-symposium/.

[68] Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1405-06 (2016).

[69] Tex. Penal Code § 21.15(b)(1) (2015).

[70] *Ex parte Thompson*, 442 S.W.3d 325, 337-38 (Tex. Crim. App. 2014).

[71] *Thompson*, 442 S.W.3d at 347 (quoting *Texas v. Johnson*, 491 U.S. 397, 411 n.7 (1989)).

York with specific intent requirements have been struck down on the grounds that phrases such as "harass" are unconstitutionally vague.[72]

In addition, singling out certain bad purposes may constitute viewpoint discrimination, and create chilling effects for speakers who are unsure of how they will be able to demonstrate a legitimate versus an illegitimate purpose.[73] Moreover, when a statute "punishes some speech on the grounds that the speech undermines a compelling interest, and fails to punish other speech that undermines the interest to the same extent, the law is generally seen as unconstitutionally underinclusive."[74] Requiring an intent-to-harm requirement for § 35-45-4-8 would run the same risk, as it would punish the unauthorized dissemination of private, sexually explicit images only when it was done for the purpose of harming the person depicted, while allowing the same act to be committed for any other purpose.

E. I.C. § 35-45-4-8 is not unconstitutionally overbroad.

Katz claims that the statute is overly broad based on a number of characteristics. In support of these arguments, Katz purports to rely on the expertise of CCRI and Dr. Franks.[75] As we explain below, this is a self-serving mischaracterization of our scholarly work and advocacy. We reject it entirely.

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[72] *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016); *People v. Marquan M.*, 19 N.E.3d 480, 486 (N.Y. 2014).

[73] Volokh, *supra* note 71 at 1386.

[74] *Id.* at 1418.

[75] Appellee's Br. at 22.

CCRI has consistently emphasized that avoiding misguided motive requirements, discussed above, is an essential aspect of an effective and constitutionally sound law, as is a mens rea *no higher* than recklessness. The Indiana law fulfills both of these recommendations. While the Indiana law may not include all of CCRI's recommended specifications, this does not render it overly broad, especially in light of I.C. § 35-45-4-8's highly restrictive definition of "intimate image," the law's use of definitions and standards common in other Indiana laws, and principles of statutory construction that call for laws to be read narrowly to avoid constitutional issues.

1. The "knows or reasonably should know" mens rea standard does not render I.C. § 35-45-4-8 unconstitutionally overbroad.

Katz argues that I.C. § 35-45-4-8's use of a "negligence mens rea" renders the statute unconstitutional.[76] But the "knows or reasonably should know" standard—also known as a reasonable person standard—is a common fixture in the law. Indiana courts have explicitly accepted that an objective reasonableness standard "is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct," and it also "provides a constraining and intelligible enforcement guideline for police and prosecutors."[77]

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[76] *Id.* at 31.

[77] *Price v. State,* 622 N.E.2d 954, 967 (Ind.1993); *Morgan v. State*, 22 N.E.3d 570, 576-77 (Ind. 2014).

Katz claims that "[e]ven the scholars at CCRI advocate for a recklessness mens rea for consent rather than negligence" in its *Guide for Legislators*.[78] But Dr. Franks, the author of the *Guide*, does not advocate for recklessness mens rea for consent rather than negligence, but only recommends that "[t]he mens rea for the second element *should be no higher than recklessness*…."[79]

As the Minnesota Supreme Court observed, all a person has to do to avoid committing the crime of nonconsensual pornography is to ask for consent before disclosing an intimate image: "[I]t is not difficult to obtain consent before disseminating a private sexual image. Simply ask permission. We cannot imagine an emergency situation that requires the immediate dissemination of a private sexual image."[80] This is all the more true given that I.C. § 35-45-4-8's definition of "intimate images" is restricted to those taken, captured, or recorded by either "an individual depicted in the photograph, digital image, or video and given or transmitted directly to" the distributor or by a distributor "in the physical presence of an individual depicted in the photograph, digital image, or video."[81] That is, only individuals who receive an intimate image directly from a person who both took and appears in the image, or those individuals who themselves took, captured, or recorded an intimate

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[78] Appellee's Br. at 23 (citing Mary Anne Franks, *Drafting An Effective "Revenge Porn" Law: A Guide for Legislators* (2016), https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf).

[79] Franks, *supra* note 25 at 6.

[80] *Casillas*, 952 N.W.2d at 644 n.9.

[81] I.C. § 35-45-4-8(c)(2).

image while in the physical presence of an individual depicted in the image, can violate the statute. The statute only reaches individuals closely connected to the original creation of the intimate image—not third parties who have little or no way of knowing the circumstances in which the image was taken or distributed.

2. Properly construed, I.C. § 35-45-4-8 reaches only purely private matters, not communications involving matters of public concern.

Katz argues that the Indiana law is unconstitutionally overbroad because it does not include an express exception for matters of public concern. But this Court can construe I.C. § 35-45-4-8 to apply only to images of purely private concern and not to images that implicate matters of public concern.

"It is a familiar canon of statutory interpretation that statutes should be interpreted so as to avoid constitutional issues."[82] As this Court has held, "We may not 'effectively rewrit[e] a statute to save it from constitutional infirmity'—but we will generally adopt a saving construction as long as there is a reasonable interpretation that avoids the constitutional problem."[83]

Here, construing I.C. § 35-45-4-8 to reach communications that involve matters of private concern would eliminate potential doubts about its constitutionality. As the Supreme Court recently observed, "speech on matters of public concern . . . is at the heart of the First Amendment's protection."[84] Heightened protection for such speech

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[82] *City of Vincennes v. Emmons*, 841 N.E.2d 155, 162 (Ind. 2006).

[83] *State v. I.T.*, 4 N.E.3d 1139, 1145 (Ind. 2014).

[84] *Snyder*, 562 U.S. at 451–52 (internal citations and quotations omitted).

sweeps broadly, extending to "any matter of political, social, or other concern to the community" or any "subject of legitimate news interest."[85] Reading I.C. § 35-45-4-8 to apply only to matters of private concern is fully consistent with narrowing constructions that courts have applied in other cases where the absence of such a construction would raise constitutional concerns.[86]

In any event, if the statute implicates a tiny fraction of arguably impermissible applications to images of public concern, overbreadth "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[87]

3. Inserting a requirement of "reasonable expectation of privacy" in I.C. § 35-45-4-8 is not necessary to avoid overbreadth.

Katz also claims that I.C. § 35-45-4-8 is overbroad because the statute does not include a "reasonable expectation of privacy" provision. But such a provision is

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[85] *Id.* at 453 (internal citations and quotations omitted).

[86] *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 188–90 (2012) (construing federal employment discrimination laws to include an implicit "ministerial exception" so as to avoid conflict with the First Amendment); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (holding that, in order to avoid First Amendment concerns, a federal prohibition on election-related "expenditures" must be limited to communications that expressly advocate the election or defeat of a candidate); *United States v. CIO*, 335 U.S. 106, 120–21 (1948) (reading a federal ban on corporate an union election-related "expenditures" to exclude a union's communications with its own members).

[87] *New York v. Ferber*, 458 U.S. 773, 774 (1982).

unnecessary and inappropriate.[88] The legislature has made clear that I.C. § 35-45-4-8 only applies to private images by providing a narrow definition of what constitutes an "intimate image" and enumerating exceptions. Any remaining concerns can and should be addressed either on an as-applied basis or with a reading of the statute that avoids constitutional concerns—not with the "strong medicine" of wholesale invalidation.[89]

CONCLUSION

For the foregoing reasons, the Cyber Civil Rights Initiative respectfully requests that this Court uphold the constitutionality of I.C. § 35-45-4-8 and reverse the trial court's order.

Respectfully submitted,

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[88] *Pohle v. Cheatham*, 724 N.E.2d 655, 660–61 (Ind. Ct. App. 2000) (explaining that Fourth Amendment standards for a "reasonable expectation of privacy" are not appropriate for privacy claims involving the unauthorized distribution of intimate images).

[89] *Wash. State Grange*, 552 U.S. at 450 n.6.

CERTIFICATE OF WORD COUNT

I verify that this Brief, including footnotes, contains 6,784 words according to the word count function of the Microsoft Word word-processing program used to prepare this brief.

/s/Eric M. Hylton
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CERTIFICATE OF SERVICE

I certify that on April 6, 2021, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I further certify that on April 6, 2021, the foregoing document was served upon counsel for Appellant and Appellee via IEFS.

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