


IN THE

# Indiana Supreme Court

Supreme Court Case No. 20S-CR-632

State of Indiana,
*Appellant (Plaintiff below),*

–v–

Conner Katz,
*Appellee (Defendant below).*

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Argued: June 24, 2021 | Decided: January 18, 2022

Direct Appeal from the Steuben Circuit Court
No. 76C01-2005-CM-421
The Honorable Randy Coffey, Magistrate

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**Opinion by Justice Massa**

Chief Justice Rush and Justices David, Slaughter, and Goff concur.

**Massa, Justice.**

In the modern age of social media, when anyone with a phone can instantaneously publish images worldwide, new potential harms arise unimaginable a generation ago. One such unfortunate phenomenon has come to be known as "revenge porn." To punish and deter it, the General Assembly in 2019 enacted Indiana Code section 35-45-4-8, which criminalizes the non-consensual distribution of an "intimate image." In this case, Conner Katz—unbeknownst to his girlfriend—captured cell phone video of her performing oral sex on him, then sent it to another person. He was charged under the statute, and in a pre-trial motion to dismiss, challenged its constitutionality on free speech grounds. The trial court dismissed, finding the entire statute violated the state and federal constitutions. The State disagreed and appealed. Katz cross-appealed, arguing we need not reach the question of constitutionality because dismissal should be upheld for failure to state an offense. Because we conclude the State sufficiently alleged an offense, and because we find the statute constitutional, we reverse and remand.

# Facts and Procedural History

On May 28, 2020, the State charged Katz with distribution of an intimate image as a Class A misdemeanor. *See* Ind. Code § 35-45-4-8(d) (2019). The information alleged: "On or about or between March 12, 2020, and March 15, 2020 . . . 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.]." Appellant's App. Vol. II, p.8. The probable cause affidavit alleged the following sequence of events. On March 12, Katz took a video of his then-girlfriend R.S. performing oral sex on him without her knowledge. This occurred at Katz's college fraternity house in Angola, Indiana. Katz sent

the video to his ex-girlfriend, C.H., via Snapchat.[1] C.H. thought R.S. was aware of the video, but a few days later, Katz told C.H. not to mention "anything about the video he sent through Snapchat" to R.S. Appellee's App. Vol. II, p.6. C.H. then contacted R.S. to let her know what Katz sent. After C.H. informed her about the video, R.S. confronted Katz via text message. Katz admitted to sending the video and was apologetic, stating he knew it was wrong to send the video and should not have sent it without her knowledge. On March 26, R.S.'s lawyer reported the incident to the Angola Police Department. A detective spoke to both R.S. and C.H. later that day. R.S. provided the detective with the text messages of her conversations with C.H. and Katz. C.H. provided additional details, including that the video showed Katz "holding a female's hair while her head went up and down towards [his] penis." *Id.* She also told the detective that the female was clothed, and she "could not see the female's face in the video but assumed it was [R.S.]" *Id.*

After being charged, Katz moved to dismiss on multiple grounds. He argued the State failed to sufficiently allege a violation of the statute because the video did not show the victim's face or his penis. He also argued the statute is unconstitutional under Article 1, Section 9 of the Indiana Constitution and the First Amendment to the United States Constitution. Katz argued this Court has found "that when a statute tends to restrict and inhibit the right of free speech and impose a restraint upon the interchange of thought and opinion," it is invalid under Article 1, Section 9. Appellant's App. Vol. II, p.27 (internal quotation marks omitted). Under the First Amendment, Katz argued the statute is overbroad and a content-based restriction that does not survive strict scrutiny. Katz relied on two state intermediate appellate decisions from Minnesota and Texas that found similar statutes unconstitutional under the First Amendment. *See State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019), *rev'd*, 952 N.W.2d 629 (Minn. 2020), *cert. denied*, 142 S. Ct. 90 (2021);

[1] Snapchat is a "social media application that allows users to post photos and videos that disappear after a set period of time." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2043 (2021).

*Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018), *rev'd*, No. PD-0552-18, 2021 WL 2126172 (Tex. Crim. App. May 26, 2021) (per curiam).

The trial court dismissed the case because it concluded the statute was unconstitutional under Article 1, Section 9 and the First Amendment. Finding "no reason why the logic contained in the Minnesota and Texas decisions would not apply to the Indiana Statute," the trial court adopted the holdings and decisions of *Casillas* and *Ex parte Jones*. Appellant's App. Vol. II, pp. 47–48. For the reasons stated in those cases, the trial court found Indiana Code section 35-45-4-8 was overbroad and unconstitutional under the First Amendment and unconstitutional under the Indiana Constitution without further explanation. It also rejected Katz's other arguments, including that the State failed to allege an offense.

The State appealed directly to this Court under Indiana Appellate Rule 4(A)(1)(b).[2] The State first argues the statute "is not unconstitutionally overbroad because, by its limiting language, the statute does not apply to third persons, which was [Katz's] sole argument below." Appellant's Br. at 12. Second, it argues the statute is a content-neutral restriction on speech that passes intermediate scrutiny. But even if the statute is content based, the State argues it survives strict scrutiny because it "serves the compelling state interest of privacy and is narrowly tailored and the least restrictive means to solve the distribution problem." *Id.* Katz cross-appealed, arguing we need not reach the constitutional issues because "dismissal should be upheld on grounds that the State failed to state an offense." Appellee's Br. at 2, 12. The State responded that the cross-appeal attacks the sufficiency of the evidence, which is an improper basis for a motion to dismiss for failure to state an offense. The Cyber Civil Rights Initiative and Dr. Mary Anne Franks submitted an amicus brief in support of the constitutionality of the statute.

[2] This Court has mandatory and exclusive jurisdiction over appeals of final judgments declaring a statute unconstitutional in whole or in part.

# Standard of Review

We review a "ruling on a motion to dismiss a charging information for an abuse of discretion, which occurs only if a trial court's decision is clearly against the logic and effect of the facts and circumstances." *Gutenstein v. State*, 59 N.E.3d 984, 994 (Ind. Ct. App. 2016), *trans. denied*. "The constitutionality of an Indiana statute is a pure question of law we review de novo." *Horner v. Curry*, 125 N.E.3d 584, 588 (Ind. 2019). "These statutes, however, come to us 'clothed with the presumption of constitutionality until clearly overcome by a contrary showing.'" *Id.* (quoting *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 199 (Ind. 2016)).

# Discussion and Decision

This Court has repeatedly "refused to adjudicate constitutional questions when presented with other dispositive issues." *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 108 (Ind. 1998). Adhering to this doctrine of judicial restraint, we will first determine whether the State sufficiently alleged an offense. *See Bayh v. Sonnenburg*, 573 N.E.2d 398, 402 (Ind. 1991) ("[C]onstitutional issues are to be avoided as long as there are potentially dispositive statutory or common law issues still alive."). Because we conclude the State sufficiently alleged an offense, we will then address the constitutionality of the statute, which we ultimately uphold.

## I. The State sufficiently alleged an offense.

"The purpose of the 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." *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010), *trans. denied*. To be sufficient, an information "generally need[] only contain a statement of the essential facts constituting the offense charged, as well as the statutory citation, the time and place of the commission of the offense, [and] the identity of the victim." *Pavlovich v. State*, 6 N.E.3d 969, 975 (Ind. Ct. App. 2014) (internal quotation marks omitted), *trans. denied*. A court may dismiss a charging information if the "facts stated do

not constitute an offense," but this only occurs when the information is facially deficient in stating an alleged crime. I.C. § 35-34-1-4(a)(5); *Gutenstein*, 59 N.E.3d at 994. In deciding whether a charging "information fails to state facts constituting an offense, we take the facts alleged in the information as true." *Pavlovich*, 6 N.E.3d at 974.

Katz has argued the State failed to allege an offense because R.S. was not identifiable, and "neither R.S.'s mouth nor Katz' [sic] sex organ were [sic] shown." Appellee's Br. at 19. Whether the image sufficiently depicted an "intimate image" is an evidentiary question for the jury at trial; it is not properly raised by a motion to dismiss. *See Schutz v. State*, 275 Ind. 9, 13, 413 N.E.2d 913, 916 (1981) (noting an "information may not be questioned on the ground of insufficient evidence"); *State v. Isaacs*, 794 N.E.2d 1120, 1122 (Ind. Ct. App. 2003) ("Questions of fact to be decided at trial or facts constituting a defense are not properly raised by a motion to dismiss."). Here, the State's charging information alleged that "[o]n or about or between March 12, 2020, and March 15, 2020 . . . 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.]" Appellant's App. Vol. II, p.8. Per Indiana Code section 35-45-4-8(d), a person who "(1) knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the intimate image; and (2) distributes the intimate image; commits distribution of an intimate image." Because the charging information sufficiently alleges the offense, the trial court did not abuse its discretion in denying Katz's motion to dismiss.

## II. The statute is not unconstitutional under Article 1, Section 9 of the Indiana Constitution.

Because we only need to reach the federal constitutional analysis if the Indiana Constitution does not resolve the claim, we begin with Katz's argument under Article 1, Section 9 of the Indiana Constitution. Our free expression clause forbids the General Assembly from passing any law "restraining the free interchange of thought and opinion, or restricting the

right to speak, write, or print, freely, on any subject whatever." Ind. Const. art. 1, § 9. However, this clause is not absolute, and provides that: "but for the abuse of that right, every person shall be responsible." *Id.* Under this freedom-and-responsibility standard, the legislature's "sole authority over expression is to sanction individuals who commit abuse." *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993). To challenge state action as violating this clause, "a claimant must first demonstrate that the state action has, in the concrete circumstances of the case, restricted his or her opportunity to engage in expressive activity." *Whittington v. State*, 669 N.E.2d 1363, 1367 (Ind. 1996). If it has, we "must decide whether the restricted activity constituted an 'abuse.'" *Id.*

### a. There is no "overbreadth analysis" under the Indiana Constitution.

In response to Katz's motion to dismiss and the trial court's order blending overbreadth analysis with cites to the Indiana Constitution, the State asks this Court to find the statute "constitutional under an Article 1, Section 9 overbreadth challenge."[3] Appellant's Br. at 27. This Court has found "no persuasive precedent for the proposition that federal 'overbreadth analysis' has taken root in the jurisprudence of the Indiana Constitution." *Price*, 622 N.E.2d at 958. Instead, "[o]nce an Indiana constitutional challenge is properly raised, a court should focus on the actual operation of the statute at issue and refrain from speculating about hypothetical applications." *Id.* And unless a court concludes "the statute before it is incapable of constitutional application, it should limit itself to vindicating the rights of the party before it." *Id.* These restrictions "are self-imposed in light of our perception of the function of the judicial department of our state government and the special aptitude of courts to decide concrete controversies between interested parties." *Id.* Thus, we only consider whether the statute's application here was constitutional.

[3] Katz's appellate counsel correctly recognized there is no overbreadth analysis under the Indiana Constitution.

## b. Katz's expressive activity is entitled to protection under Article 1, Section 9.

We have not "had many opportunities to explicate the scope of Article I, § 9." *Id.* at 957. "This is because although the Indiana Constitution is a wellspring of civil-liberty guarantees—offering a host of protections independent of the United States Constitution—it often goes untapped by litigants and their legal representatives." Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form a More Perfect Union—Indiana's Story*, 33 Notre Dame J.L. Ethics & Pub. Pol'y 377, 378 (2019). To borrow an analogy from Sixth Circuit Judge Jeffrey Sutton, a basketball player would never just take one of two free throws, yet "we see American lawyers regularly taking just one shot rather than two to invalidate state or local laws . . . on behalf of their clients[.]" Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 7 (2018). Even when a state constitutional claim is unsuccessful, raising it may still "cultivate the independent nature of that state constitutional provision." Rush & Miller, *supra*, at 382. Independent and robust state constitutional law "supplies far-reaching, inter-related benefits: the enrichment of American constitutional jurisprudence and the protection of civil liberties." *Id.* at 380–81.

This case presents a unique opportunity to underscore our constitutional independence, as state constitutions are typically thought of as only providing more protection than the United States Constitution. But "[s]tate constitutions create independent limits on state and local power, limits that may do more **or less** than their counterpart guarantees in the Federal Constitution." Sutton, *supra*, at 173 (emphasis added). Here, Indiana's Constitution ultimately provides less protection to Katz—by way of a lower standard of scrutiny—than the Federal Constitution. But this does not mean the Indiana constitutional claim lacks value. Raising it allows this Court to cultivate its independent nature, so it may then provide a basis for relief in other cases. Rush & Miller, *supra*, at 382. State constitutions must provide protections that stand independent of federal constitutional guarantees for federalism's "protection against overconcentration of authority" to be fully realized. *Id.* at 380.

### i. The "free interchange" clause covers all thoughts and opinions, and all mediums of expressing them—including videos.

For Article 1, Section 9 to apply, the state action must have restricted Katz's opportunity to engage in expressive activity. Given the dearth of Section 9 cases, we have not had the opportunity to engage with the type of expression at issue here. *See Price*, 622 N.E.2d at 957. Our encounters with Article 1, Section 9 have always involved words, thus invoking the "right to speak" clause, which provides that no law shall be passed "restricting the right to speak, write, or print, freely, on any subject whatever." *See State v. Econ. Freedom Fund*, 959 N.E.2d 794 (Ind. 2011) (involving an automated dialing device that delivered prerecorded political messages); *In re WTHR-TV*, 693 N.E.2d 1 (Ind. 1998) (a broadcast interview); *Whittington*, 669 N.E.2d at 1366 (loud speaking during a police investigation); *Price*, 622 N.E.2d at 957 (verbal confrontation with a police officer). But because neither the parties nor the record suggests this video contained any words, the right to speak clause does not apply. Thus, this case presents our first opportunity to interpret the "free interchange" clause of Article 1, Section 9, which provides that "no law shall be passed, restraining the free interchange of thought and opinion." We will first determine what mediums of communication are covered by "free interchange," and then determine whether "thought and opinion" is limited in any way.

"Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it." *Price*, 622 N.E.2d at 957 (citing *State Election Bd. v. Bayh*, 521 N.E.2d 1313 (1988)). We have interpreted the right to speak clause as contemplating a "broad notion of expressive activity." *Whittington*, 669 N.E.2d at 1368. Because it extends to "any subject whatever," it is "difficult to imagine a topic it does not cover." *Id.* "Consequently, we do not recognize a gerrymandering of the set of all expressive activities into those consisting of content that is constitutionally proscribable and those consisting of content that is not." *Id.* at 1368 n.3 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)

(explaining categories of "constitutionally proscribable content" under the First Amendment)). And "because the right to speak clause also provides that expressive activity may be 'freely' performed, the clause reaches every conceivable mode of expression." *Id.* at 1368. Speaking, writing, or printing, freely, on any subject "includes, at least, the projection of any words in any manner." *Id.*

We similarly find the free interchange clause encompasses a "broad notion of expressive activity." *Id*. First, because the free interchange clause also provides for the "free" performance of expressive activity, it reaches "every conceivable mode of expression." *Id.* Turning to the meaning of "interchange," we note that the adoption of Section 9 "was accompanied by neither debate nor amendment." *Price*, 622 N.E.2d at 957. We find the history of Section 9 through its predecessor helpful, as the term "interchange" replaced "communication" from the former Section 9, which provided that the "free communication of thoughts, and opinions, is one of the invaluable rights of man."[4] Ind. Const. art. 1, § 9 (1816). A dictionary published proximate to the adoption of Section 9 defines "communication" as the "act of imparting, interchange, [or] conversation." John Walker, *A Critical Pronouncing Dictionary, and Expositor of the English Language* 112 (1815). These words contemplate both verbal and nonverbal expression. And since the right to speak clause protects all conceivable verbal expression, it confirms that the free interchange clause protects something other than words.

As previously explained, this Court has only encountered verbal expression under Article 1, Section 9. But one of those cases involved a television station that conducted a video interview of a defendant in police custody, without the knowledge of her lawyer, and then broadcast

[4] The full text of Article I, Section 9 from the 1816 Indiana Constitution provided: "That the printing presses shall be free to every person, who undertakes to examine the proceedings of the Legislature. or any branch of Government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts, and opinions, is one of the invaluable rights of man; and every Citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

part of the interview. *WTHR-TV*, 693 N.E.2d at 3. The station was ordered to produce a copy of both the broadcasted interview and any unaired footage. *Id.* The station argued, among other things, that compelled disclosure of the unaired footage without a special showing of need and relevance violates Section 9. *Id.* at 15. In rejecting this argument, this Court assumed without deciding "that the information at stake is entitled to constitutional protection." *Id.* at 15–16. Here, we decide that Section 9 protects videos as a medium under both clauses. Under the right to speak clause, videos are just a new way to publish speech. It would be illogical to protect an interview published in a newspaper, but not one aired or posted by a television station. Whatever the challenges may be "applying the Constitution to ever-advancing technology, the basic principles of freedom of speech . . . do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (internal quotation marks omitted).

As for the free interchange clause, nonverbal expression can arise in almost infinite forms, ranging from photographs and videos to conduct and movement. While the expressive value of the video at issue may be difficult to see, that does not mean it is not expression. Consider a silent film from Charlie Chaplin, or the photo of the Tank Man standing in front of the column of tanks leaving Tiananmen Square—no words are necessary to understand what those men were communicating. A broad interpretation of expressive activity under the free interchange clause is consistent with the broad language of the clause itself and with this Court's interpretation of the rest of Article 1, Section 9. Moreover, this broad interpretation is bolstered by the decisions of the United States Supreme Court examining various mediums. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Brown*, 564 U.S. at 788. While this Court's interpretation of an Indiana constitutional provision is an independent judicial act, decisions from federal courts are "nonetheless persuasive." *City of Indianapolis v. Wright*, 267 Ind. 471, 476, 371 N.E.2d 1298, 1300 (1978).

Even though the Federal Constitution only prohibits the enactment of laws "abridging the freedom of speech," the United States Supreme Court has long interpreted the First Amendment as looking "beyond written or spoken words as mediums of expression." *Hurley v. Irish-Am. Gay, Lesbian*

*and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). Through the last century, the Court has found the First Amendment protects expressive conduct such as displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 369–70 (1931), saluting a flag (and refusing to do so), *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 632 (1943), wearing an arm band to protest a war, *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969), a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966), and burning an American flag during a political demonstration, *Johnson*, 491 U.S. at 406.

As the Supreme Court has explained, these examples show that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569 (internal quotation marks and citation omitted). The Court has instead looked to whether a medium generally communicates ideas as the hallmark of constitutional protection. The Court extended the First Amendment to films because they "are a significant medium for the communication of ideas." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (noting the "importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform"). And "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas," which "suffices to confer First Amendment protection." *Brown*, 564 U.S. at 790. Likewise, the communication of ideas is our hallmark for constitutional protection, and our free interchange clause protects "every conceivable mode of expression." *Whittington*, 669 N.E.2d at 1368.

We now turn to the meaning of "thought and opinion" within our free interchange clause, while keeping in mind the issue posed by this case—whether expression depicting private, sexual conduct is covered by Article 1, Section 9. The dictionary published proximate to the adoption of Section 9 defined "opinion" as a "judgment" or "notion," while "thought" was defined as "the act of thinking, idea, sentiment, opinion." Walker, *supra,* at 362, 511. The text of this provision makes no distinction between the type of expression protected; it does not provide protection for just political

expression, or expression on public concerns. The absence of any limitation on protected thoughts and opinions is consistent with our interpretation that Article 1, Section 9 "contemplates a broad notion of expressive activity." *Whittington*, 669 N.E.2d at 1368. Unlike First Amendment jurisprudence, we do not recognize under either clause of Article 1, Section 9 "a gerrymandering of the set of all expressive activities into those consisting of content that is constitutionally proscribable and those consisting of content that is not." *Id.* at 1368 n.3. Specifically, with expression depicting sexual activity, the Supreme Court spent decades trying to "agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power." *Miller v. California*, 413 U.S. 15, 22 (1973). This type of inquiry has no support under Section 9, as it is "difficult to imagine a topic it does not cover." *Whittington*, 669 N.E.2d at 1368.

The purpose and structure of our Constitution supports this broad interpretation. "The free expression guarantee of the Indiana Constitution is one of thirty-seven provisions in our Bill of Rights and, we may assume, was calibrated consonant with its overall design." *Price*, 622 N.E.2d at 958. "This design reflects the influence of the natural rights paradigm ascendant during Indiana's formative years." *Id.* at 958–59. While this Court long ago determined "that it would not root Indiana constitutional jurisprudence in the shifting sands of philosophical inquiry," in determining the scope of our Bill of Rights, "we are not at liberty to discard the fact that the drafters of those provisions conceived of their handiwork in natural law terms." *Id.* at 959 n.4; *see also Hedderich v. State*, 101 Ind. 564, 566, 1 N.E. 47, 47–48 (1885). This is especially true with Article 1, Section 9 which was adopted with "neither debate nor amendment." *Price*, 622 N.E.2d at 957.

The text of the former Section 9 epitomized this natural rights approach, providing that the "free communication of thoughts, and opinions, is one of the invaluable rights of man." Ind. Const. art. I, § 9 (1816). Natural rights, such as the freedom of speech, were understood to be freedoms "an individual could enjoy as a human in the absence of government." Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 919 (1993). While Section 9 does

enshrine political speech as a core value—something this Court gives heightened protection under the "abuse" inquiry—it would be illogical to understand Section 9 as only protecting expression about politics and the government. Moreover, no limitations on the kind of protected thoughts and opinions were added with the 1851 constitutional revisions. We understand the free interchange clause to encompass the communication of any thought or opinion, on any topic, through "every conceivable mode of expression." *Whittington*, 669 N.E.2d at 1368. Katz's video depicting sexual activity thus receives protection under Article 1, Section 9. This does not end our inquiry, as we still must determine whether the State has placed a direct and substantial burden on Katz's ability to express himself, which is the trigger for Section 9 protection.

### ii. Criminal prosecution is a direct and substantial burden on Katz's ability to express himself, which triggers Article 1, Section 9.

Just as the "trigger of the right to speak clause is the notion of restriction," the trigger of the free interchange clause is the notion of restraint. *See id.* Both clauses focus "on the restrictive impact of state action on an individual's expressive activity." *Id*. This Court has explained that at a minimum, the right to speak "clause is implicated when the State imposes a direct and significant burden on a person's opportunity to speak his or her mind, in whatever manner the speaker deems most appropriate." *Id*. We conclude a similar standard applies to the free interchange clause, which is implicated when the State imposes a direct and significant burden on a person's opportunity to express one's thoughts and opinions, in whatever manner the person expressing himself deems most appropriate. Here, the State's prosecution of Katz more than satisfies this standard of imposing a direct and significant burden on his opportunity to express himself. Therefore, Article 1, Section 9 applies, and we must decide whether Katz's expressive activity reasonably constituted an "abuse."

### c. Katz's expressive activity constituted an "abuse," therefore this statute and this prosecution are constitutional under Article 1, Section 9.

The freedom of expression is qualified, of course, by the responsibility clause found in Article 1, Section 9, which provides that "for the abuse of that right, every person shall be responsible." This "clause expressly recognizes the [S]tate's prerogative to punish expressive activity that constitutes an 'abuse' of the right to speak," or the right to express oneself. *Whittington*, 669 N.E.2d at 1368. In *Price*, this Court defined "abuse" in light of the natural rights philosophy that informs the Indiana Constitution. 622 N.E.2d at 958–59. "Under that philosophy, individuals possess 'inalienable' freedom to do as they will, but they have collectively delegated to government a quantum of that freedom in order to advance everyone's 'peace, safety, and well-being.'" *Whittington*, 669 N.E.2d at 1368 (quoting Ind. Const. art. 1, § 1). Thus, the purpose of state power is "to foster an atmosphere in which individuals can fully enjoy that measure of freedom they have not delegated to government." *Id.*

Applying this philosophy in *Price*, we construed "abuse" as any expressive activity that "injures the retained rights of individuals or undermines the State's efforts to facilitate their enjoyment." 622 N.E.2d at 959. As such, Section 9 "limits legislative authority over expression to sanctioning encroachments upon the rights of individuals or interference with exercises of the police power." *Id.* The promise that Section 9 "shields all expression from penalty save that which impairs a state prerogative may appear illusory, given the broad sweep of those prerogatives." *Id.* "The State may exercise its police power to promote the health, safety, comfort, morals, and welfare of the public." *Id.* (citing *State v. Gerhardt*, 145 Ind. 439, 451, 44 N.E. 469, 473 (1896)). "In furthering these objectives, it may subject persons and property to restraints and burdens, even those which impair 'natural rights.'" *Id.* (quoting *Weisenberger v. State*, 202 Ind. 424, 429, 175 N.E. 238, 240 (1931)). And "courts defer to legislative decisions about when to exercise the police power and typically require only that they be rational." *Id.* (internal citation omitted).

"From this, one might conclude that the Indiana Constitution permits punishing expression any time the courts are willing to indulge the presumption that the statute which penalizes it is rational." *Id.* at 959–60. This fails to recognize that there is a "cluster of essential values" within each provision of our Bill of Rights, "which the legislature may qualify but not alienate." *Id.* at 960. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies. "Accordingly, while violating a rational statute will generally constitute abuse under § 9, the State may not punish expression when doing so would impose a material burden upon a core constitutional value." *Id.* To determine the proper standard of review, we first look to the type of expression at issue. Here, the expression at issue involves private, sexual activity. We must then consider whether Section 9, or another constitutional provision, enshrines this type of expression as a core constitutional value.

Political expression is the one type of expression we have had the opportunity to enshrine as a core constitutional value under Section 9. *Id.* at 963. And because political expression is a core value, it cannot constitute an "abuse" within the police power unless it "inflicts upon determinable parties harm of a gravity analogous to that required under tort law." *Id.* at 964. Thus, one way a claimant can try to meet his burden of proving that the State could not reasonably conclude the restricted expression was an "abuse," is to show that his expressive activity was political. *Whittington*, 669 N.E.2d at 1369. "Expressive activity is political, for the purposes of the responsibility clause, if its point is to comment on government action." *Id.* at 1370. Conversely, "where an individual's expression focuses on the conduct of a private party—including the speaker himself or herself—it is not political." *Id.* Katz concedes, as he must, that he was not engaged in "political speech." Appellee's Br. at 34. We have little difficulty agreeing with him. Katz makes no argument that another constitutional provision enshrines his speech as a core value, nor do we identify any such applicable provision. Thus, Katz's expression does not implicate any core values under the Indiana Constitution.

Because no core constitutional value is implicated, we only need apply rationality review in determining whether the State could reasonably have

concluded that Katz's expressive activity was an "abuse" or was, "in other words, a threat to peace, safety, and well-being." *Whittington*, 669 N.E.2d at 1371. The rationality inquiry under Article 1, Section 9 has "historically centered on whether the impingement created by the statute is outweighed by the public health, welfare, and safety served." *Price*, 622 N.E.2d at 960, n.7. We begin by discussing the problem the statute addresses: nonconsensual pornography, commonly but misleadingly referred to as "revenge porn."[5] "'Nonconsensual pornography' may be defined generally as distribution of sexually graphic images of individuals without their consent." *State v. VanBuren*, 214 A.3d 791, 794 (Vt. 2019) (some internal quotation marks omitted). It encompasses "images originally obtained without consent (e.g., hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent, usually within the context of a private or confidential relationship." *Id.* at 794–95 (internal quotation marks omitted). "Once obtained, these images are subsequently distributed without consent." *Casillas*, 952 N.W.2d at 641 (quoting *People v. Austin*, 155 N.E.3d 439, 451 (Ill. 2019)). This problem "is remarkably common, and the injuries it inflicts are substantial." *VanBuren*, 214 A.3d at 810.

Nonconsensual pornography "is a unique crime fueled by technology." *Austin*, 155 N.E.3d at 451. With the click of a button, these "[i]mages and videos can be directly disseminated to the victim's friends, family, and employers," or posted and "tagged" so they are "particularly visible to members of a victim's own community." *VanBuren*, 214 A.2d at 810. The images are often "posted with identifying information such that they catapult to the top of the results of an online search of an individual's name." *Id.* The distribution of these images on the Internet means they potentially reach thousands, even millions, of strangers. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L.

[5] *See People v. Austin*, 155 N.E.3d 439, 451 (Ill. 2019) (noting the term "revenge porn" is misleading because "revenge" suggests vengeance, but "perpetrators may be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all").

Rev. 345, 350 (2014). "The Internet provides a staggering means of amplification, extending the reach of content in unimaginable ways." *Id.*

"Revenge porn" is featured in "as many as 10,000 websites, in addition to being distributed without consent through social media, blogs, emails, and texts." *Austin*, 155 N.E.3d at 451 (internal quotation marks omitted). There is a demand for private nude and sexually explicit photos that is "unlike the demand for any other form of private information." *Id.* (internal quotation marks omitted). The prevalence, reach, and impact of this crime have "increased in recent years in part because technology and social media make it possible to 'crowdsource' abuse, as well as make it possible for unscrupulous individuals to profit from it." *Id.* (some internal quotation marks omitted). "Dedicated 'revenge porn' sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows." Mary Anne Franks, *"Revenge Porn" Reform: A View From the Front Lines*, 69 Fla. L. Rev. 1251, 1261 (2017). "Making matters worse, this problem is widespread and continuously expanding." *Casillas*, 952 N.W.2d at 642. In 2016, a study found that four percent of "U.S. internet users—roughly 10.4 million Americans—have been threatened with or experienced the posting of explicit images without their consent."[6] *VanBuren*, 214 A.3d at 795 (internal quotation marks omitted).

"[T]he nonconsensual dissemination of private sexual images causes unique and significant harm to victims in several respects." *Austin*, 155 N.E.3d at 461. First, this crime can be connected with domestic and sexual violence. "Perpetrators threaten disclosure to prevent victims from ending relationships, reporting abuse, or obtaining custody of children." *Id.* "Sex traffickers and pimps threaten disclosure to trap unwilling individuals in

[6] These numbers are higher for young adults, with seven percent of internet users under the age of thirty reporting they have been threatened with the nonconsensual distribution of their intimate images, and five percent of this age group reporting their images were actually distributed. Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* Data and Society Research Institute (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf, archived at https://perma.cc/MN66-SMFN.

the sex trade" and rapists "record their sexual assaults to humiliate victims and deter them from reporting the attacks." *Id.* Because victims' private sexual images are often disseminated with or in the context of identifying information, victims are frequently harassed, stalked, extorted, solicited for sex, and even threatened with sexual assault.[7] *Id.*; *see also* Citron & Franks, *supra*, at 353 (noting some anonymous strangers have messaged victims: "First I will rape you, then I'll kill you").

Second, victims of this crime can suffer severe psychological harm, including "post-traumatic stress disorder, anxiety, depression, despair, loneliness, alcoholism, drug abuse, and significant losses in self-esteem, confidence, and trust." *Casillas*, 952 N.W.2d at 642. The effects of this crime are so "profound that victims have psychological profiles that match sexual assault survivors." *Id.* Victims "often require therapy and medical intervention." *Id.* And tragically, "not every victim survives this experience and some commit suicide as a result of their exposure online." *Id.* Those victims "who survive this harrowing experience without significant health consequences still may have their reputations permanently tarnished." *Id.* "Many victims have a scarlet letter affixed to their resumes when applying for jobs or additional educational opportunities." *Id.* Victims have been fired and lost future employment opportunities, *VanBuren*, 214 A.3d at 811, and been forced to change their names, *Austin*, 155 N.E.3d at 461–62. "Even if a victim is fortunate enough to avoid the serious mental, emotional, economic, and physical effects, the person will still suffer from humiliation and embarrassment." *Casillas*, 952 N.W.2d at 642. "The harm largely speaks for itself." *Id.*

In the face of this unique and pervasive crime, the "overwhelming majority of state legislatures have enacted laws criminalizing the nonconsensual dissemination of private sexual images." *Austin*, 155 N.E.3d at 452. New Jersey was the first in 2004, and by 2013, only two

[7] In a survey of nonconsensual pornography victims, in over half the cases, "the nude images were published alongside the victim's full name and social network profile, and over twenty percent of victims reported that their email addresses and telephone numbers appeared alongside the images." *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019).

other states had followed suit. *Id.* But between 2013 and 2021, forty-five other states enacted criminal statutes, bringing the total to forty-eight.[8] And none of these statutes have ultimately been struck down as unconstitutional.[9] *See, e.g.*, *People v. Iniguez*, 202 Cal. Rptr. 3d 237 (Cal. App. Dep't Super. Ct. 2016); *Austin*, 155 N.E.3d at 448–49 (Illinois); *Casillas*, 952 N.W.2d at 634 (Minnesota); *State v. Lamoureux*, 485 P.3d 192 (Mont. 2021); *Ex parte Jones*, 2021 WL 2126172, at *1 (Texas); *VanBuren*, 214 A.3d at 794 (Vermont); *State v. Culver*, 918 N.W.2d 103 (Wis. Ct. App. 2018). "These statutes 'vary widely throughout the United States, each with their own base elements, intent requirements, exceptions, definitions, and penalties.'" *Austin*, 155 N.E.3d at 453 (quoting Christian Nisttáhuz, *Fifty States of Gray: A Comparative Analysis of 'Revenge-Porn' Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 Tex. Tech. L. Rev. 333, 357 (2018)). But the "mass adoption of these statutes by states on opposite sides of the political spectrum reflects the urgency of the problem." *Id.* (internal quotation marks omitted).

Under our rationality inquiry, we have no trouble concluding the impingement created by the statute is vastly outweighed by the public health, welfare, and safety served. In *Whittington*, we dealt with a defendant's disorderly conduct conviction for loudly speaking during a police investigation of a domestic incident. 669 N.E.2d at 1366. Like here, the defendant's expressive conduct was not political, so only rationality review was required in "determining whether the [S]tate could reasonably have concluded that Whittington's expressive activity, because of its volume, was an 'abuse' of the right to speak or was, in other words, a threat to peace, safety, and well-being." *Id.* at 1371. This Court "easily conclude[d]" that the defendant did not negate "'every conceivable basis'

[8] For a list of all forty-eight statutes, see *48 States + DC + One Territory Now Have Revenge Porn Laws*, Cyber Civil Rights Initiative, https://www.cybercivilrights.org/revenge-porn-laws/ (last visited Nov. 10, 2021), archived at https://perma.cc/MC5Q-BM7Z.

[9] The intermediate appellate courts in Texas and Minnesota found their respective statutes unconstitutional, and the trial court heavily relied on those decisions. Both decisions have since been overturned by their states' highest courts.

for the state action" in his case. *Id.* (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)). We observed that "abating excessive noise is an objective our legislature may legitimately pursue." *Id.* (internal quotation marks omitted).

In *Whittington*, we found it "reasonably conceivable that the loud outbursts in the concrete circumstances of [that] case could have agitated other persons in the apartment, sparked additional disruptions of [the police officer's] investigation, or interfered with his ability to manage the medical crew and the alleged crime scene." *Id.* "The noisy tirade could have threatened the safety of Whittington's sister by aggravating her trauma or by distracting the medical personnel tending her injury." *Id.* Finally, we concluded "the volume of the speech undoubtedly made it highly annoying to all present." *Id.* "The [S]tate could therefore have believed Whittington's outbursts constituted an 'abuse' of the right to speak and, as such, fell within the purview of the police power." *Id.*

We easily conclude that Katz's expressive activity was an abuse, and he "has not negated 'every conceivable basis' for the state action in his case." *Id.* (quoting *Collins*, 644 N.E.2d at 80). The legislature has wide "police powers to protect the health, morals, order, safety, and general welfare of the community." *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1277 (Ind. 2014); *see also Edwards v. Hous. Auth. of Muncie*, 215 Ind. 330, 335, 19 N.E.2d 741, 744 (1939). And "it is the province of the [l]egislature to define criminal offenses and to set the penalties for such criminal offenses." *Durrett v. State*, 247 Ind. 692, 696–97, 219 N.E.2d 814, 816 (1966). Compared to "abating excessive noise," *Whittington*, 669 N.E.2d at 1371 (internal quotation marks omitted), the legitimate legislative objectives pursued here are of a much more serious caliber. "The government's interest in preventing any intrusions on individual privacy is substantial; it's at its highest when the invasion of privacy takes the form of nonconsensual pornography." *VanBuren*, 214 A.3d at 811. And the accompanying harms of this crime are all well within the State's power to address. As such, the State's prosecution of Katz for distribution of an intimate image does not contravene Article 1, Section 9 of the Indiana Constitution. And because the Indiana Constitution does not resolve this case, we must evaluate Katz's claim under the First Amendment.

## III. The statute is not unconstitutional under the First Amendment.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting U.S. Const. amend. I). Even though this provision explicitly forbids only the abridgment of "speech," the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Johnson*, 491 U.S. at 404. "In evaluating the free speech rights of adults," the Court has "made it perfectly clear that [s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 874 (1997) (internal quotation marks omitted). The State does not argue that Katz's expressive activity is "obscene," and under the stringent test articulated by the Supreme Court in *Miller v. California*, this expressive activity is not "obscene."[10] 413 U.S. at 24. And the protections of the First Amendment also fully extend to Internet communications. *Reno*, 521 U.S. at 870.

Because Katz's expression is protected by the First Amendment, we first determine whether non-consensually distributed private intimate images are a new category of unprotected speech. Next, we must

[10] The three-part test is: (1) "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (internal quotation marks omitted). In *Miller* itself, the Supreme Court overturned an obscenity conviction for mailing brochures that "primarily [consisted] of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." *Id.* at 18; *see also Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (reversing another obscenity conviction for showing the film "Carnal Knowledge" at a movie theater, which "simply [was] not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in *Miller*"). The Supreme Court has defined a "prurient interest" in sex as a "shameful or morbid interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). Without delving into examples of such morbid, shameful interests, we conclude that the conduct depicted in the instant case does not qualify. The conduct depicted here resembles the depictions held to be non-obscene in *Miller*.

determine whether the statute is a content-neutral restriction subject to intermediate scrutiny, or a content-based restriction subject to strict scrutiny. Because we conclude the latter, we then must determine whether the statute satisfies strict scrutiny by being narrowly tailored and serving a compelling government interest. Finally, we consider the statute under the overbreadth doctrine.

### a. We decline to find a new a category of unprotected speech under the First Amendment.

As a general matter, the First Amendment means that the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (internal quotation marks omitted). "However, this principle, like other First Amendment principles, is not absolute." *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002). The Supreme Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). These unprotected categories have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V.*, 505 U.S. at 382–83 (internal quotation marks omitted).

All the unprotected categories are "well-defined and narrowly limited classes of speech," *Chaplinksy v. New Hampshire*, 315 U.S. 568, 571 (1942), and the Supreme Court has rejected "freewheeling" attempts to "declare new categories of speech outside the scope of the First Amendment," *United States v. Stevens*, 559 U.S. 460, 472 (2010)). The existing categories have generally been confined to those with a "historical foundation in the Court's free speech tradition," *Alvarez*, 567 U.S. at 718, the "prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, 315 U.S. at 571–72. Examples include speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), defamation, *N.Y. Times Co. v.*

*Sullivan*, 376 U.S. 254 (1964), and child pornography, *New York v. Ferber*, 458 U.S. 747 (1982).

While the Court has acknowledged the possibility of additional categories of historically unprotected speech, *Stevens*, 559 U.S. at 472, its reluctance to recognize them is significant. The last additional category the Supreme Court identified was child pornography in 1982, in part because the advertising and sale of such materials is integral to the underlying criminal conduct of their production. *See Ferber*, 458 U.S. at 764. And "[m]ore than once in recent years, the Supreme Court has rebuffed efforts to name new categories of unprotected speech." *VanBuren*, 214 A.3d at 807; *see Stevens*, 559 U.S. at 472 (rejecting depictions of animal cruelty as a new category); *Brown*, 564 U.S. at 794 (depictions of excessive violence in video games for minors); *Alvarez*, 567 U.S. at 722 (false statements).

The Supreme Court has "emphatically rejected" the government's "'startling and dangerous' proposition" of creating new categories of unprotected speech by applying a simple balancing test. *Brown*, 564 U.S. at 792 (quoting *Stevens*, 559 U.S. at 470). Instead, the proponent of an additional unprotected category must present "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Alvarez*, 567 U.S. at 722 (internal quotation marks omitted). Here, the State has not demonstrated that nonconsensual dissemination of private sexual images should constitute a new category of unprotected speech on this basis. The State merely noted that this Court could determine that nonconsensual dissemination of private sexual images is a new category of unprotected speech. But a "history and tradition of regulation are important factors in determining whether to recognize new categories of unprotected speech," and the State presented no evidence regarding these factors. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (internal quotation marks omitted). This Court "leave[s] it to the Supreme Court in the first instance to designate nonconsensual pornography as a new category of speech that falls outside the First Amendment's full protections." *VanBuren*, 214 A.3d at 807 (the Vermont Supreme Court declining to add nonconsensual pornography to the list of speech categorically excluded in part because of the Supreme Court's "recent emphatic rejection of attempts to name previously unrecognized

categories"); *see also Austin*, 155 N.E.3d at 454–55 (explaining a similar decision by the Illinois Supreme Court); *Casillas*, 952 N.W.2d at 637–38 (explaining a similar decision by the Minnesota Supreme Court).

### b. The statute is content-based, and therefore subject to strict scrutiny.

Under the First Amendment, regulations of protected speech receive either intermediate or strict scrutiny, depending on whether the restriction is content neutral, or content based. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Reed*, 576 U.S. at 163. Here, the State argues the statute is a content-neutral time, place, or manner restriction, reviewed under intermediate scrutiny. In the State's view, "it is the **manner** of the image's acquisition and publication, not its content, that is crucial to the illegality of its dissemination." Appellant's Br. at 29 (citing *Austin*, 155 N.E.3d at 457). The State points out that what is unlawful is the image's distribution without the person's consent, as the "same image can be lawfully distributed with consent and fall outside the purview of the distribution statute." *Id.* But this "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). That is why the Supreme Court has "repeatedly considered whether a law is content neutral on its face **before** turning to the law's justification or purpose." *Id.* at 166.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. "The government's purpose is the controlling consideration," as a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* "Government regulation of expressive activity is

content neutral so long as it is "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Some examples of regulations the Supreme Court has deemed content neutral are a noise control ordinance in a public park, *Ward,* 491 U.S. at 792, and an ordinance requiring an individual to obtain a permit before holding an event in a public park with more than fifty people, *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002). The justifications for these regulations had "nothing to do with content." *Boos v. Barry*, 485 U.S. 312, 320 (1988).

Conversely, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)). *S*ome facial distinctions based on a message are "obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id*. at 163–64. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* The Supreme Court found a town's sign code to be content based on its face, as it had categories of "political signs," "ideological signs" and "temporary directional signs," and then subjected each of these categories to different restrictions. *Id.* at 164. The restrictions "that apply to any given sign thus depend entirely on the communicative content of the sign." *Id.*

Here, the distribution statute is plainly a content-based restriction, not a content neutral time, place, or manner restriction. The statute criminalizes the distribution of an "intimate image" without a person's consent, and "intimate image" means a photograph, digital image, or video of an individual that depicts: (1) sexual intercourse, (2) other sexual conduct, or (3) exhibition of the uncovered buttocks, genitals, or the female breast. I.C. § 35-45-4-8(c)(1). "Other sexual conduct" is defined as an act involving "a sex organ of one (1) person and the mouth or anus of another person," or "the penetration of the sex organ or anus of a person by an object." I.C. § 35-45-4-8(c)(1)(B); I.C. § 35-31.5-2-221.5. This statute is an "obvious" facial

distinction based on the message because it defines regulated speech by subject matter—sexual activity and nudity. *Reed*, 576 U.S. at 163. The statute does not penalize all disclosure of visual material without another person's consent, it penalizes only this subset of disclosed images. On its face, this statute "draws distinctions based on the message a speaker conveys." *Id.*

### c. The statute survives strict scrutiny.

Because the statute imposes a content-based restriction on protected speech, it is invalid unless the State can "demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 564 U.S. at 799. The State must specifically identify an "actual problem" in need of solving, *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000), and the "curtailment of free speech must be actually necessary to the solution," *Brown*, 564 U.S. at 799. Here, the State argued the statute survives strict scrutiny because it is narrowly tailored and the state interest is compelling because of the "significant privacy rights at stake, the substantial injuries caused by the distribution of intimate images without consent, and the widespread nature of this problem." Appellant's Br. at 36. Katz concedes the State has a compelling interest and argues only that the statute is not narrowly tailored. The Supreme Court has "emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest," but "those cases do arise." *Williams-Yulee*, 575 U.S. at 444 (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)); *see e.g., Holder v. Humanitarian L. Project*, 561 U.S. 1, 25–39 (2010)). Here, we conclude the statute advances the State's compelling interest in protecting individuals from the unique and significant harms from the nonconsensual distribution of their intimate images, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. "This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny." *Id.*

### i. The statute serves a compelling government interest.

To satisfy strict scrutiny, the State must show that the statute serves a compelling interest. *Brown*, 564 U.S. at 799. This means the State must identify an "actual problem" in need of solving. *Playboy*, 529 U.S. at 822. And the problem being solved "must be paramount" and "of vital importance." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). "In this case, we conclude the 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" through Indiana Code section 35-45-4-8. *Casillas,* 952 N.W.2d at 641 (citing *Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.")). We find a compelling interest based on the substantial privacy interests violated by this crime, the "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." *VanBuren*, 214 A.3d at 808.

The Supreme Court has "long recognized that not all speech is of equal First Amendment importance." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (internal quotation marks omitted). So, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). This is "because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest." *Id.* There is "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship on matters of public import." *Id.* (internal quotation marks omitted). Here, the speech regulated "involves the most private of matters, with the least

possible relationship to matters of public concern."[11] *VanBuren*, 214 A.3d at 810. Because the speech here is of less First Amendment importance, it is easier to find the reasons for regulating it compelling.

The invasion of privacy here, and its substantial accompanying harms, is a compelling governmental interest. "Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner." *Ex parte Thompson*, 442 S.W.3d 325, 348 (Tex. Crim. App. 2014) (citing *Snyder*, 562 U.S. at 459). And the Supreme Court has explained that sexual behavior is "the most private human conduct." *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). We easily conclude that individuals have a substantial privacy interest in keeping intimate images private, and the nonconsensual disclosure of such images is an invasion of privacy in the most intolerable manner. As the Vermont Supreme Court held, "it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area." *VanBuren*, 214 A.3d at 810. "The government's interest in preventing any intrusions on individual privacy is substantial; it's at its highest when the invasion of privacy takes the form of nonconsensual pornography." *Id.* at 811.

The Vermont Supreme Court concluded "the government's interest in preventing the nonconsensual disclosure of nude or sexual images of a person obtained in the context of a confidential relationship is at least as strong as its interest in preventing the disclosure of information concerning that person's health or finances obtained in the context of a confidential relationship; content-based restrictions on speech to prevent

[11] Katz argues "the individual who shared with the media the photographs of the genitalia of disgraced Politician Anthony Weiner could be convicted under Indiana's statute," and this argument does identify one persuasive hypothetical situation in which the statute could be applied to political speech. Appellee's Br. at 29. However, many of the exceptions, like dissemination of the intimate image in connection with a criminal investigation or to report a criminal act, would already limit this possibility. And if the scenario did arise, the situation would properly be dealt with by an as-applied challenge from the person disclosing a public figure's inappropriate images. Katz cannot properly bring this challenge because his intimate image involves purely private matters.

these other disclosures are uncontroversial and widely accepted as consistent with the First Amendment." *Id.* We agree. "Doctors who disclose individually identifiable health information without permission may be subject to a $50,000 fine and a term of imprisonment for up to a year." *Id.* (citing 42 U.S.C. § 1320d-6). Banks are prohibited from disclosing nonpublic, personal information about their customers to third parties "without first giving the customers a chance to 'opt out.'" *Id.* (quoting 15 U.S.C. § 6802(b)). "And nonconsensual disclosure of individuals' [S]ocial [S]ecurity numbers in violation of U.S. law can subject the discloser to fines and imprisonment for up to five years." *Id.* (citing 42 U.S.C. § 408(a)(8)). "In these cases, it is obvious that the harm to be addressed flows from the disclosure of personal information." *Id.* "From a constitutional perspective, it is hard to see a distinction between laws prohibiting nonconsensual disclosure of personal information comprising images of nudity and sexual conduct and those prohibiting disclosure of other categories of nonpublic personal information." *Id.*

Like the previous examples, federal and state statutes criminalizing voyeurism have been generally uncontroversial and are aimed at similar compelling government interests. *See* 18 U.S.C. § 1801; I.C. § 35-45-4-5. Through the Video Voyeurism Prevention Act of 2004, the federal government made it a crime to have the "intent to capture an image of a private area of an individual without their consent, and knowingly do[] so under circumstances in which the individual has a reasonable expectation of privacy." 18 U.S.C. § 1801(a). "[U]nder circumstances in which that individual has a reasonable expectation of privacy" means either "circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the individual was being captured," or "circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place." 18 U.S.C. § 1801(b)(5). The term "capture" "means to videotape, photograph, film, record by any means, or broadcast," which means to "electronically transmit a visual image with the intent that it be viewed by a person or persons." 18 U.S.C. § 1801(b)(1)–(2). And "the term 'a private area of the individual' means

the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual." 18 U.S.C. § 1801(b)(3). The invasion of privacy here is similar to the invasion from nonconsensual pornography—that is, an individual should be able to control and consent to the situations in which their private areas are viewed and captured by another person.

Indiana has also criminalized voyeurism for decades through Indiana Code section 35-45-4-5. Under this section, a person commits voyeurism as a Class B misdemeanor if he knowingly or intentionally: (1) peeps, (2) goes upon the land of another or into an occupied dwelling of another person with the intent to peep, or (3) peeps into an area where an occupant of the area reasonably can be expected to disrobe, including: restrooms, baths, showers, and dressing rooms. I.C. § 35-45-4-5(b). All of this must be done without the consent of the other person. *Id.* However, this offense is a Level 6 felony if "it is knowingly or intentionally committed by means of a camera." I.C. § 35-45-4-5(c)(1). A person commits public voyeurism as a Class A misdemeanor if he intentionally "peeps at the private area of an individual and records an image by means of a camera," without the individual's consent. I.C. § 35-45-4-5(d). "The offense under subsection (d) is a Level 6 felony if the person: (1) publishes the image; (2) makes the image available on the Internet; or (3) transmits or disseminates the image to another person." I.C. § 35-45-4-5(e). This statute reflects a longstanding government interest in preventing the substantial invasion of privacy that occurs when an intimate image is taken and distributed without the individual's consent.

While the image here was allegedly taken without the victim's knowledge or consent, even if the image was originally created and sent with consent, the harm of its nonconsensual distribution is substantial. Consent is contextual, and the "consent to create and send a photo or the consent to be photographed by another is one act of consent that cannot be equated with consenting to distribute that photo to others outside of the private relationship." *Austin*, 155 N.E.3d at 452 (internal quotation marks omitted). The harm comes from the nonconsensual distribution of an individual's intimate images, and as previously explained, the potential harms can be severe, including serious psychological, emotional, economic, and physical harm. *See Casillas*, 952 N.W.2d at 642. The State,

working through its well-recognized authority to safeguard its citizens' health and safety, has a compelling interest in preventing the nonconsensual distribution of intimate images, and all the potential serious harms that accompany this unique crime. Our conclusion is bolstered by the similar conclusions of our sister courts, the numerous and uncontroversial statutes regulating nonconsensual distribution of other private information, and the Supreme Court's jurisprudence regarding substantial invasion of privacy.

### ii. The statute is narrowly tailored to achieve the compelling interest.

To survive strict scrutiny, the statute must also be narrowly tailored, which means that it is "the least restrictive means for addressing" the government's interest. *Playboy*, 529 U.S. at 827. In other words, if a less restrictive alternative would serve the governmental purpose, a legislature must use that alternative. *Id.* at 813. Legitimate ends "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805. While the State has specifically identified an "actual problem" in need of solving, *Playboy*, 529 U.S. at 822, it still must show that the curtailment of free speech is "actually necessary to the solution," *Brown,* 564 U.S. at 799. However, a statute does not need to be "'perfectly tailored'" to survive strict scrutiny. *Williams-Yulee*, 575 U.S. at 454 (quoting *Burson*, 504 U.S. at 209).

For nonconsensual pornography, criminalization is a "vital deterrent," and the alternative of civil remedies would be insufficient and unrealistic.[12] *Austin*, 155 N.E.3d at 464. And because the distribution of

[12] A 2017 survey asked participants who admitted to engaging in the nonconsensual distribution of intimate images what, if anything, would have stopped them from doing so, and the strongest deterrents were registration as a sex offender, imprisonment, and knowing the nonconsensual distribution of sexually explicit materials was a felony. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report* 22 (2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf, archived at https://perma.cc/427N-WVYM.

these intimate images is the "actual problem" in need of solving, *Playboy*, 529 U.S. at 822, the curtailment of this type of expression is "actually necessary to the solution," *Brown*, 564 U.S. at 799. Ultimately, we find this statute to be narrowly tailored because of its many limiting definitions and exceptions. The statute at hand criminalizes distributing an intimate image when a person "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). From the outset, the statute excludes photographs, digital images, or videos that are "distributed: (1) to report a possible criminal act; (2) in connection with a criminal investigation; (3) under a court order; or (4)" to a password-protected location that is intended solely for the storage or backup of personal data. I.C. § 35-45-4-8(a). The statute's potential reach is narrowed further by its definitions and mens rea requirement.

Under the statute, "distribute" means "to transfer to another person in, or by means of, any medium, forum, telecommunications device or network, or Internet web site, including posting an image on an Internet web site or application." I.C. § 35-45-4-8(b). And the images subject to Indiana Code section 35-45-4-8 are precisely defined, with little gray area or risk. "Intimate image" means a photograph, digital image, or video of an individual that depicts: (1) "sexual intercourse," (2) "other sexual conduct," or (3) "exhibition of the uncovered buttocks, genitals," or the female breast. I.C. § 35-45-4-8(c)(1). "Other sexual conduct" means an act involving "a sex organ of one (1) person and the mouth or anus of another person," or "the penetration of the sex organ or anus of a person by an object." I.C. § 35-45-4-8(c)(1)(B); I.C. § 35-31.5-2-221.5. Moreover, the "intimate image" must be taken, captured, or recorded by an individual depicted in the photograph, digital image, or video and given or transmitted directly to the person who distributes it without consent, or be taken, captured, or recorded by the person who distributes it without consent, in the physical presence of an individual depicted in the photograph, digital image, or video. I.C. § 35-45-4-8(c). This removes application to an unknowing third party.

Moreover, distribution is only criminal if the discloser "knows or reasonably should know" that the person depicted in the image "does not

consent" to distribution. I.C. § 35-45-4-8(d). The statute requires the State to prove a defendant's reasonable awareness of the lack of consent to distribute, and if a reasonable person would not realize that consent was not given, the statute does not apply. As previously discussed, the statute also does not apply when consent is given to distribute. This limits the statute to the types of personal, direct communications that are typically involved in an intimate relationship, where consent can be reasonably known. "Individuals are highly unlikely to accidentally violate this statute while engaging in otherwise permitted speech." *VanBuren*, 214 A.3d at 812. This statute is narrowly tailored to serve the State's compelling interest in protecting citizens from the harms of nonconsensual pornography; the statute does not violate the First Amendment.

### d. Even if this Court needed to conduct an overbreadth analysis, the statute is not overbroad.

There are "substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (emphasis omitted). To ensure these costs do not swallow the social benefits of declaring a law "overbroad," the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be **substantial**, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). Invalidation for overbreadth is "strong medicine" that has been employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). 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." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Overbreadth analysis has been "most commonly and sensibly used, in the First Amendment arena, in cases involving regulations directed at unprotected categories of speech." Marc Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and "Scrutiny" Analysis*

*in the Law of Freedom of Speech*, 11 Elon L. Rev. 95, 130 (2019). A perfect example is *Ashcroft v. Free Speech Coalition*, in which the Supreme Court invalidated provisions of the Child Pornography Prevention Act—which deals with an unprotected category of speech—for being overbroad and extending to a substantial amount of protected speech. 535 U.S. 234, 256 (2002). Because the speech involved here is protected speech and requires a scrutiny analysis, it seems unnecessary to also conduct an overbreadth analysis. And because the "logical result of **each** analysis is either constitutional validity or invalidity and because inconsistent outcomes (e.g., a statute satisfies strict scrutiny but is nevertheless facially overbroad) would appear to be impossible, is not the use of both approaches in a single case patently redundant?" Rohr, *supra*, at 111.

The "relationship between the overbreadth doctrine and a scrutiny analysis is unclear." *Casillas*, 952 N.W.2d at 645 (citing Rohr, *supra*, at 109). The Supreme Court has employed both analyses in the same decision. *See Hill*, 530 U.S. at 725, 731. On multiple occasions, the Court has "blended the language of overbreadth and scrutiny analysis." Rohr, *supra*, at 111–18. "Doctrinal confusion has also arisen when a concurring or dissenting Justice speaks the language of facial overbreadth in a case in which the majority opinion relies on scrutiny analysis–or vice versa." Rohr, *supra*, at 118. And perhaps most confusing for courts is *United States v. Stevens*, in which the Third Circuit struck down the statute as a content-based restriction that did not survive strict scrutiny, and the Supreme Court affirmed on overbreadth grounds. 533 F.3d 218 (3d Cir. 2008), *aff'd*, 559 U.S. at 472. The relationship of these two free-speech analyses has "never been adequately explained by the Supreme Court." Rohr, *supra*, at 109.

The Minnesota Supreme Court—when recently upholding a similar statute under strict scrutiny—concluded an "overbreadth analysis is needlessly redundant if a statute has already survived strict scrutiny review." *Casillas*, 952 N.W.2d at 646. We agree. The Minnesota Supreme Court noted the lack of any identifiable precedent in which a statute survived strict scrutiny but was struck down as unconstitutionally overbroad and had "great difficulty imagining such a scenario." *Id.* And since this case involves protected speech, application of the overbreadth doctrine seems illogical. Even if this Court needed to conduct a full

overbreadth analysis, there certainly is not a substantial amount of overbreadth in comparison to the statute's "plainly legitimate sweep." *Williams*, 553 U.S. at 292. Even considering a hypothetical application of the statute to an Anthony Weiner situation, which would be a matter of public and political concern, this alone would not be sufficient to invalidate the statute for overbreadth. 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." *Taxpayers for Vincent*, 466 U.S. at 800.

# Conclusion

Faced with the widespread and growing problem of nonconsensual pornography, the legislature acted within its authority to safeguard the health and safety of its citizens from this unique and serious crime by passing Indiana Code section 35-45-4-8. The State properly charged Katz with violating the statute. And the statute does not violate either the free interchange clause of the Indiana Constitution, or the First Amendment to the United States Constitution. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Rush, C.J., and David, Slaughter, and Goff, JJ., concur.

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