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Free Speech: Analyzing Indiana's Revenge Porn Statute, 56 UIC L. Rev. 181 (2022)

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ANALYZING INDIANA'S REVENGE PORN STATUTE: BALANCING PROTECTING PEOPLE AND PROTECTING SPEECH

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I. INTRODUCTION

"We are asking for your help to hold these people accountable for their actions."[1] These are the words of an Indiana resident who stood before legislators and petitioned them to criminalize revenge porn.[2] Her decision to speak out came after she fell victim to revenge porn at the

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1. Kevin, Rader, *Lawmakers hear emotional testimony from revenge porn victim*, WTHR (Feb. 19, 2019), www.wthr.com/article/news/local/lawmakers-hear-emotional-testimony-revenge-porn-victim/531-a36f7d38-bf92-482e-846f-79db34d9e5aa [perma.cc/P45F-XNDT].

2. *Id.* This Indiana resident, who asked to remain nameless, stood before the Indiana House on February 19, 2019, and provided personal testimony about the trauma she experienced as a revenge porn victim. *Id.* As an Indiana resident, a mother, and teacher, this brave advocate served as a close to home example as to why Indiana needed to criminalize revenge porn. *Id.*

hands of her ex-husband.[3] She explained to legislatures that police did all that they could, but "there was no law [her] ex had broken."[4] Moved by this woman's personal account of the trauma of revenge porn, the Indiana House unanimously passed Indiana's distribution of an intimate image statute, Ind. Code §35-45-4-8.[5] However, a recent Indiana case, *Indiana v. Katz*,[6] threatened the hard work of legislators and revenge porn victim advocates.

In *Katz*, a Trine University student distributed a sexually explicit video of another student, his then-girlfriend, via Snapchat.[7] This video was not only distributed without the victim's consent, but she was also unaware that the video was taken.[8] The victim learned of the video's existence after the recipient of the video texted her three days later and informed the victim of what she had received.[9] The victim then retained an attorney and went to the police.[10]

In May 2020, Conner Katz was charged with a Class A misdemeanor under Indiana's revenge porn statute, Ind. Code §35-35-4-8.[11] However, Katz's case was later dismissed after a Steuben County Magistrate ruled Indiana's revenge porn statute was "unconstitutionally overbroad" and thus ran afoul of the First Amendment.[12] The State then filed a direct appeal to the Indiana Supreme Court.[13] Indiana, and the rest of the legal community, anxiously awaited the Indiana Supreme Court's ruling. In fact, before the Indiana Supreme Court ruled, the fate of Indiana's revenge porn statute was so uncertain that the Cyber Civil Rights Initiative[14] had

3. *Id.*

4. *Id.*

5. Amicus Curiae Brief of the Cyber Civil Rights Initiative and Dr. Mary Anne Franks in Support of Appellant at 22, Indiana v. Conner Katz, No. 20S-CR-00632 (Ind. filed Nov. 4, 2020) [hereinafter Amicus Curiae Brief]. The formal name of IND. CODE §35-45-4-8 is, "Distribution of an intimate image." IND. CODE. ANN. §35-45-4-8 (West 2019). However, this section is commonly referred to as Indiana's "revenge porn" statute or "nonconsensual pornography" statute due to the conduct it criminalizes. Brief for the Appellant at 13, *Indiana v. Katz*, No. 20S-CR-00632 (Ind. filed Nov. 4, 2020). Thus, for the remainder of this comment, I will often refer to IND. CODE. ANN. §35-45-4-8 (West 2019) as "Indiana's revenge porn statute."

6. Indiana v. Katz, No. 20S-CR-00632 (Ind. argued June 24, 2021).

7. Mike Marturello, *Indiana's revenge porn law rule unconstitutional in Steuben case*, HERALD REPUBLICAN (Nov. 6, 2020), www.kpcnews.com/heraldrepublican/article_d67bfc4b-6dec-5d62-bf53-5d8b57b63590.html [perma.cc/K37H-JYUC].

8. Brief for the Appellant, *supra* note 5, at 9.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Indiana v. Katz, No. 20S-CR-00632 (Ind. argued June 24, 2021).

14. "Cyber Civil Rights Initiative is the leading U.S.-based non-profit organization addressing the growing problem of unauthorized distribution of intimate images." Amicus Curiae Brief, *supra* note 5, at 10. "CCRI's board includes the two foremost legal experts on nonconsensual pornography in the United States, Dr. Mary Anne Franks (President) . . . and Danielle Keats Citron (Vice-President)." *Id.* Together, Dr. Franks and Citron co-authored "the first law review article on the criminalization of 'revenge porn' in 2014." *Id.* Dr. Franks has also authored "the first model criminal statute on

joined forces with the State and filed an amicus brief in support of Indiana's statute.[15] The Cyber Civil Rights Initiative ("CCRI") feared that "if the ruling [of the Steuben Court] [was] left to stand, Indiana [would] become the first state to go backwards on this issue."[16] Thankfully, on January 18, 2022, the Indiana Supreme Court issued their opinion, reversing the Steuben County Magistrate's ruling that the statute was unconstitutional, and thus saving Indiana's revenge porn statute.[17]

This Comment will argue that Indiana's revenge porn statute is constitutional and thus the Indiana Supreme Court made the correct decision in its ruling. Part II will define revenge porn, describe the impact technology and the Internet has had on it, as well as explain the harms revenge porn has on its victims. Additionally, this section will provide a glimpse of Indiana's statute, Ind. Code §35-34-4-8, and the United States Supreme Court precedent which guides First Amendment analysis. Part III will explain the various approaches the Indiana Supreme Court could have taken when analyzing the constitutionality of Indiana's revenge porn statutes. Part IV will explain the proper analysis that the Indiana Supreme Court applied and why the court correctly addressed the constitutionality of Indiana's revenge porn statute. Lastly, Part V will briefly conclude and reemphasize the importance of Indiana's revenge porn statute.

II. BACKGROUND

A. Revenge Porn – What is it?

Nonconsensual pornography involves the distribution of sexually explicit pictures or videos of an individual without their consent.[18] "This includes images originally obtained without consent (e.g., hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent, usually within the context of a private or confidential relationship."[19] The term "revenge porn" has become a popular shorthand for nonconsensual pornography.[20] Consequently, the

nonconsensual pornography in 2012, 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." *Id.*

15. Amicus Curiae Brief, *supra* note 5, at 22.

16. *Id*.

17. State v. Katz, 179 N.E.3d 431, 439 (Ind. 2022).

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

19. *Id.* (demonstrating that the term "revenge porn" is frequently used as shorthand for all forms of nonconsensual pornography and therefore electing to use the term revenge porn interchangeably with the term nonconsensual pornography).

20. State v. VanBuren, 214 A.3d 791, 794 (Vt. 2019) ("Revenge porn is a popular label describing a subset of nonconsensual pornography published for vengeful purposes.").

two terms are often used interchangeably.[21] However, this practice has become controversial as some find the term "revenge porn" to be too limiting.[22]

Courts and nonconsensual pornography victim advocates argue that the use of the term "revenge porn" is misleading, specifically because of the connotation that there must be a vengeful motive.[23] While revenge is a common reason for the distribution of nonconsensual pornography, it is just one reason a perpetrator might share sexually explicit images.[24] In addition to revenge, "perpetrators may also be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all."[25] Therefore, the term nonconsensual pornography is more encompassing and thus more clearly covers all situations where sexually explicit images are shared without consent.[26]

However, because of its widespread use, the term "revenge porn" will be used interchangeably with nonconsensual pornography throughout this Comment. Its use is not to refer to a subsection of nonconsensual pornography, but instead as shorthand.

B. The Evolution of Revenge Porn

The exchange of sexually explicit images is not a new concept for society. Throughout history, people have exchanged sexually explicit images through media available to them.[27] However, as technology and the Internet have advanced, the ability to take and share sexually explicit images has rapidly evolved. With the development of the smartphone, people are now equipped with a camera and the Internet at their fingertips.[28] With this power in the peoples' pockets, society has seen nonconsensual pornography become increasingly common and sinister.[29]

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21. *Id.*

22. Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1257 (2017).

23. *See e.g.*, *id.* at 1257 (describing "revenge porn" as misleading); People v. Austin, 2019 IL 123910, ¶18, 155 N.E.3d 439, 451 (Ill. 2019) (explaining how the term revenge porn "obscures the gist of the crime."); State v. Casillas, 952 N.W.2d 629, n7 (Minn. 2020) (explaining that the term "revenge porn" is misleading).

24. Katherine Gabriel, *Feminist Revenge: Seeking Justice for Victims of Nonconsensual Pornography Through "Revenge Porn" Reform*, 44 VT. L. REV. 849, 852 (2020).

25. Franks, *supra* note 22, at 1258.

26. *Id.*

27. Aviva Majerczyk, *A Brief, Dirty History of Sexting*, LINK (Mar. 5, 2019), www.thelinknewspaper.ca/article/a-brief-dirty-history-of-sexting [perma.cc/LXA8-3X4G]. The exchange of sexually explicit images can be traced back as far as the 17th Century. *Id.* King Charles II was known to commission "nude paintings of his long-time mistress." *Id.* The invention of the camera simplified the process of capturing of sexually explicit images; specifically, the Polaroid which provided "unparalleled intimacy." *Id.*

28. *Id.*

29. Charlotte Alter, '*It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (June 13, 2017), www.time.com/4811561/revenge-porn/

Perpetrators can now not only send sexually explicit images via text or email, but can also publish them on the Internet or on social media to "crowdsource abuse" and even potentially profit from it.[30]

A 2014 study revealed that as many as 3,000 websites featured nonconsensual pornography.[31] Just three years later, that number had already increased to as many as 10,000.[32] This problem has not gone away. More recently, in June 2021, dozens of women sued Pornhub alleging that the website had profited from their nonconsensual pornography.[33] Nonconsensual porn websites continue to grow in popularity due to the anonymity they offer perpetrators.[34] Some are particularly disturbing as they not only post the sexually explicit images but will also include a victim's personal information.[35]

Social media has also been a driving force in the spread of nonconsensual pornography. For years, social media platforms did not devote resources to combating the spread of nonconsensual porn.[36] However, after pressure from Mary Anne Franks, a top legal advocate for revenge porn reform, social media platforms have begun to take action.[37] In 2015, Reddit, Twitter, Instagram, Facebook, Microsoft, Google, along with others, finally instituted a ban on nonconsensual pornography and implemented reporting procedures.[38] While these policies and procedures are essential to the regulation of nonconsensual pornography, a notable shortcoming is that many social media platforms do not proactively flag these images.[39] Therefore, by the time a

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[perma.cc/T5GV-CX95].

30. Franks, *supra* note 22, at 1261.

31. *Id.*

32. *Id.* The author of this article, Dr. Mary Anne Franks, indicated that this figure is based on the number of takedown requests which were available to the Cyber Civil Rights Initiative. *Id.*

33. Moira Ritter, *Pornhub sued for allegedly serving nonconsensual sex videos,* CNN BUSINESS (June 18, 2021), www.cnn.com/2021/06/17/tech/pornhub-lawsuit-filed/index.html [perma.cc/U77H-MC3K] ("The civil complaint alleges that Pornhub parent company MindGeek, one of the largest online pornography companies, is a "classic criminal enterprise" with a business structure created to monetize nonconsensual sexual content.").

34. 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, 336 (2018).

35. Aaron Minc & Alexandra Arko, *How to Permanently Remove Content From Revenge Porn Websites*, MINC (Sept. 24, 2020), www.minclaw.com/remove-posts-revenge-porn-websites/ [perma.cc/8JB5-U8ZP].

36. Franks, *supra* note 22, at 1270.

37. *Id.*

38. *How To Report Revenge Porn on Social Media*, C.A. GOLDBERG VICTIMS' RIGHTS LAW FIRM, www.cagoldberglaw.com/how-to-report-revenge-porn-on-social-media/ [perma.cc/37AQ-AZU6] (last visited Oct. 10, 2021).

39. Franks, *supra* note 22, at 1273. The CCRI strongly advocates for social media platforms to implement preventative measures. *Id.* The CCRI proposes that this be done through the use of a technology called PhotoDNA. (PhotoDNA, "calculates the particular characteristics of a given digital image—its digital fingerprint or 'hash

nonconsensual pornography victim discovers their image has been posted, screenshot, shared, or saved, and they request its removal, "it may have already been downloaded, forwarded and posted by hundreds or even thousands of users."[40]

Even with many social media platforms implementing bans on nonconsensual pornography, the spread of these sexually explicit images is still a huge issue on social media. For example, in 2017, after Facebook's ban on nonconsensual pornography, Facebook still assessed nearly 52,000 potential cases of revenge porn.[41] Furthermore, many nonconsensual pornography cases have originated from Snapchat.[42] Snapchat presents unique challenges when it comes to regulating nonconsensual pornography.[43] This is a direct result of Snapchat's "delete is our default" concept.[44] On Snapchat, all images are automatically deleted after being viewed by the recipients.[45] However, there is always the potential that someone could screenshot an image or save it using another form of technology before the image is deleted.[46] While victims of nonconsensual pornography do have the option to "report abuse on Snapchat," the harm has already occurred.

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value'—to match it to other copies of that same image"…images are then given signatures, "those signatures can be shared with online service provides, who can match them against the hashes of photos on their own services, find copies of the same photos and remove them.") (quoting *New Technology Fights Child Porn by Tracking its "PhotoDNA"*, MICROSOFT, news.microsoft.com/2009/12/15/new-technology-fights-child-porn-by-tracking-its-photodna [perma.cc/Z86T-TG7M] (last visited Oct. 10, 2021) (internal quotation marks omitted).)

40. *Id.*

41. Nicole Hopkins & Olivia Solon, *Facebook flooded with 'sextortion' and 'revenge porn', files reveal*, GUARDIAN (May 2, 2017), www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal [perma.cc/D28K-JC84] ("Facebook had to assess nearly 54,000 potential cases of revenge pornography and 'sextortion' on the site in a single month.").

42. *See generally Indiana v. Katz*, No. 20S-CR-00632 (Ind. argued June 24, 2021) (depicting a case of revenge porn where the distribution of a sexually explicit video was done via Snapchat); Nisttáhuz, *supra* note 34, at 334 (describing a revenge porn case which arose from a sexually explicit image captured and distributed via Snapchat); Claire Lampen, *Snapchat Sexting is Being Used As A Vehicle for Revenge Porn – and It's Hard to Stop*, MIC (Feb. 24, 2016), www.mic.com/articles/136070/snapchat-sexting-is-still-a-vehicle-for-revenge-porn-here-s-why-it-s-impossible-to-stop [perma.cc/9HC3-VEYW] (explaining that there is a "sea of revenge porn sites sourcing material from Snapchat.").

43. Nisttáhuz, *supra* note 34, at 334.

44. *When does Snapchat delete Snaps and Chats?*, SNAPCHAT SUPPORT, support.snapchat.com/en-US/article/when-are-snaps-chats-deleted [perma.cc/AA72-26V2] (last visited Oct. 10, 2021) (breaking down into categories the multiple ways in which users may communicate on Snapchat and at what point those messages get deleted by Snapchat servers).

45. *Id.*

46. *Id.*

C. Revenge Porn – Who it Harms and How

Society has seen highly publicized cases of nonconsensual pornography including those involving public figures like Kim Kardashian, Rihanna, Dave Portnoy, and even mass collections like Celebgate[47]. However, the harmful spread of nonconsensual pornography is in no way limited to celebrities. Social media has made it possible for "any person to be dragged before the eyes of the world."[48] A startling statistic revealed that "4% of internet users–one in 25 online Americans–have either had sensitive images posted without their permission or had someone threaten to post photos of them."[49] For women under thirty, that number rose to one in ten.[50]

While victims can try to have their images removed from the Internet, their efforts are usually met with little to no avail. "[T]he internet is permanent."[51] Thus, it is nearly impossible to guarantee that an image removed from one site has not already been shared or saved elsewhere.[52] One nonconsensual pornography victim explained that the effects of revenge porn are, "humiliating, degrading, and life-altering."[53] Another nonconsensual pornography victim stated that it was "like having an incurable disease;" it never goes away.[54]

Consequently, victims often internalize shame and worry about who has viewed their images.[55] A study conducted by CCRI revealed that ninety-three percent of revenge porn victims experienced emotional distress after the distribution of their intimate images.[56] This emotional distress typically manifests itself through "depression, anxiety,

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47. "Celebgate" refers to the 2014 massive iCloud hack which resulted in hundreds of celebrity nude photos being leaked online. Abby Ohlheiser, *The shockingly simple way the nude photos of 'Celebgate' were stolen*, WASH. POST (May 24, 2016), www.washingtonpost.com/news/the-intersect/wp/2016/03/16/the-shockingly-simple-way-the-nude-photos-of-celebgate-were-stolen/ [perma.cc/UMP5-QKSX]. *See* Department of Justice, *Lancaster Man Pleads Guilty to Hacking Apple and Google E-Mail Accounts Belonging To More Than 100 People, Mostly Celebrities*, U.S. ATT'YS OFF. MIDDLE DIST. PA. (May 24, 2016), www.justice.gov/usao-mdpa/pr/lancaster-man-pleads-guilty-hacking-apple-and-google-e-mail-accounts-belonging-more-100 [perma.cc/LNV9-GRK6] (explaining the criminal outcome of Celebgate).

48. Amber Heard, *Amber Heard: Are We All Celebrities Now?*, N.Y. TIMES (Nov. 4, 2019), www.nytimes.com/2019/11/04/opinion/amber-heard-revenge-porn.html [perma.cc/3MB7-WV6V].

49. Amanda Lenhart et al.*, Nonconsensual Image Sharing: One in 25 Americans Has Been A Victim Of "Revenge Porn"*, DATA & SOC'Y (Dec. 13, 2016), www.datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/ [perma.cc/3W7W-WH55].

50. *Id.*

51. Alter, *supra* note 29.

52. *Id.*

53. Heard, *supra* note 48.

54. Alter, *supra* note 29 (internal quotation marks omitted).

55. Citron & Franks, *supra* note 18, at 364.

56. Cyber Civil Rights Initiative, *Power In Numbers*, CYBER C.R. INITIATIVE (Jan. 3, 2014), www.cybercivilrights.org/revenge-porn-infographic/ [perma.cc/24EZ-GMY7].

agoraphobia, difficulty maintaining intimate relationships, and posttraumatic stress disorder."[57] Additionally, a staggering fifty-one percent of revenge porn victims reported suffering suicidal thoughts.[58] In the midst of dealing with the initial emotional trauma, nonconsensual pornography victims are often fearful of becoming victims again.[59] This fear is not without cause, as forty-nine percent of victims reported being "harassed or stalked online by users who saw their material."[60]

In conjunction with their emotional turmoil, victims of nonconsensual pornography also commonly face professional challenges.[61] As a result of their sexually explicit images being posted and shared online, many victims have lost their jobs or struggle to find employment.[62] This is frequently a direct result of perpetrators posting a victim's identifying information alongside their sexually explicit images.[63] Thus, with a quick internet search, a victim's chance at employment could potentially be ruined. "The simple but regrettable truth is that after consulting search results, employers don't call revenge porn victims to schedule interviews or to extend offers."[64] In the instance where a nonconsensual pornography victim is able to keep their job, they still face challenges in the workplace as they are forced to have uncomfortable conversations with their bosses and co-workers.[65]

D. Indiana Attempts to Protect Hoosiers

In response to the growing concern for revenge porn, forty-eight states, the District of Columbia, and Guam have enacted criminal revenge porn statutes.[66] Indiana's revenge porn statute was unanimously passed by state legislators in February 2019.[67] The statute then became effective on July 1, 2019.[68] Indiana's revenge porn statute provides:

> (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

57. Amicus Curiae Brief, *supra* note 5, at 15.
58. *Id.*
59. Alix Iris Cohen, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300, 340 (2015).
60. Cyber Civil Rights Initiative, *supra* note 56.
61. Citron & Franks, *supra* note 18, at 352.
62. *Id.*
63. Cyber Civil Rights Initiative, *supra* note 56.
64. Citron & Franks, *supra* note 18, at 352.
65. Alter, *supra* note 29.
66. Carter Chance, *An Update on the Legal Landscape of Revenge Porn*, NAT'L ASSOC. ATT'YS GEN., www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/ [perma.cc/MUU2-25UM] (last visited Feb. 25, 2022).
67. Amicus Curiae Brief, *supra* note 5, at 22.
68. IND. CODE. ANN. §35-45-4-8 (West 2019).

(2) distributes the intimate image;

commits distribution of an intimate image, a Class A misdemeanor. However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section.

While Indiana lawmakers clearly intended to protect Hoosiers from the distribution of nonconsensual pornography with the criminalization of revenge porn, Indiana's revenge porn statute was recently at risk. In 2020, a Steuben County Magistrate held that Indiana's revenge porn statute was "unconstitutionally overbroad" and in violation of the First Amendment.[69] That decision was reviewed by the Indiana Supreme Court in the case, *State v. Katz*, and rightfully reversed on January 18, 2022.[70]

E. Analyzing a First Amendment Challenge

Indiana's revenge porn statute was not the first statute of its kind to be challenged on First Amendment grounds. Revenge porn statutes across the country have faced similar challenges from defendants who claim revenge porn statutes run afoul the First Amendment.[71] The First Amendment, as applied to the states through the Fourteenth Amendment, provides, "Congress shall make no law . . . abridging the freedom of speech."[72] The government therefore "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[73]

However, First Amendment protection is not absolute.[74] The United States Supreme Court "has long recognized that the government may regulate certain categories of expression consistent with the Constitution."[75] These well-known categorical exceptions to full First Amendment protection include: speech that incites imminent lawless action, obscenity, defamation, fighting words, child pornography, true threats, and speech presenting grave and imminent threat which the government has the power to protect.[76] When regulated speech falls

69. Marturello, *supra* note 7.

70. *Katz*, 179 N.E.3d at 439.

71. Evan Ribot, *Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?,* 2019 U. CHI. LEG. FORUM 521, 522 (2019).

72. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance."). *See* Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

73 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791-2 (2011) (quoting Ashcroft v. Am. C.L Union, 535 U.S. 564, 573) (internal quotation marks omitted).

74. Ashcroft v. Am. C.L. Union, 535 U.S. 564, 573 (2002) (explaining that although the First Amendment reads "Congress shall make no law" that there are still situations where regulations are appropriate).

75. *Id.* (quoting Virginia v. Black, 538 U.S. 343, 358 (2003)) (internal quotation marks omitted).

76. *See* U.S. v. Alvarez, 567 U.S. 709, 717 (2012) (internal citations omitted)

outside these categorical exceptions, a court must then determine whether the statute before it is content-neutral or content-based.[77] Based on that determination, a court may then apply the appropriate level of scrutiny.

The principle inquiry in determining whether a statute is content-based or content-neutral is understanding the government's purpose for the regulation.[78] Government regulation is content-neutral when the restriction is "justified without reference to the content of the regulated speech."[79] A statute is still deemed content-neutral even if "it has an incidental effect on some speakers or messages but not others."[80] When a statute is determined to be content-neutral, the appropriate level of scrutiny is intermediate scrutiny.[81] Conversely, "[g]overnment regulation of speech is content-based if a law applies to a particular speech because of the topic discussed or the idea or message expressed."[82] The Supreme Court has consistently held that content-based restrictions are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[83] Therefore, for a statute to survive under this heightened level of scrutiny, the state must prove that there are no less restrictive means to serve the government's purpose.[84]

III. ANALYSIS

In reviewing the constitutionality of Indiana's revenge porn statute, the Indiana Supreme Court first had to determine the appropriate First Amendment analysis to apply.[85] In doing so, the Indiana Supreme Court looked at the speech Indiana's statute regulated to determine the level of First Amendment protection that speech should receive.[86] The Indiana Supreme Court ultimately concluded that strict scrutiny was the appropriate analysis to apply to the statute.[87] However, prior to the

(providing detailed Supreme Court rulings on categorical exceptions to the First Amendment).

77. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) (demonstrating that when speech falls outside of the "well-understood exceptions" different levels of scrutiny apply based on whether the regulation is content-neutral or content-based and thus this must be determined before a level of scrutiny may be applied).

78. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 463 U.S. 288 (1984) (internal quotation marks omitted).

79. *Id.*

80. *Id.*

81. U.S. v. O'Brien, 391 U.S. 367, 377 (1968). *See Turner Broad. Sys., Inc.*, 512 U.S. at 662 (applying O'Brien's intermediate scrutiny test).

82. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015).

83. *Id.*

84. *Id.*

85. *Katz*, 179 N.E.3d at 451-56 (analyzing which analysis Indiana's revenge porn statute should be reviewed under).

86. *Id.*

87. *Id.* at 455 (determining that Indiana's revenge porn statute should be analyzed under a strict scrutiny analysis because the statute "imposes a content-based

court's decision, it was difficult to predict which approach the Indiana Supreme Court would take.[88] This was largely due to the lack of uniformity amongst state courts when analyzing the constitutionality of their respective nonconsensual pornography statutes.[89] An explanation of the various approaches the Indiana Supreme Court could have taken when analyzing the constitutionality of Indiana's revenge porn statute will be discussed in sections A through C.

A. Categorical Exceptions

As mentioned above, in section II-E, the United States Supreme Court "has long recognized that the government may regulate certain categories of expression consistent with the Constitution" and thus categorical exceptions have been established.[90] Therefore, if the Indiana Supreme Court had determined that the speech regulated in Indiana's revenge porn statute was deserving of full First Amendment protection; the court could have proceeded under a categorical exception analysis, such as obscenity.

1. Pre-Existing Categorical Exception – Is Nonconsensual Pornography Obscene?

States have frequently argued that nonconsensual pornography is obscene[91] and thus should not receive full First Amendment protection.[92]

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restriction on protected speech.").

88. Franks, *supra* note 22, at 1312.

89. *Compare VanBuren*, 214 A.3d at 800-01, 807-814 (applying strict scrutiny analysis to Vermont's revenge porn statute and acknowledging the arguments for categorical exceptions), *and Ex parte* Ellis, 609 S.W.3d 332, 336-37 (Tex. Ct. App. 2020) (holding Texas's nonconsensual pornography statute is content-based and thus deserving of strict scrutiny analysis), *and Casillas*, 952 N.W.2d at 641 (applying strict scrutiny analysis to Minnesota's nonconsensual pornography statute), *with Austin*, 2019 IL 123910, ¶43, 155 N.E.3d at 457 (holding Illinois's nonconsensual pornography statute is subject to an intermediate scrutiny analysis and addressing categorical exceptions).

90. *Ashcroft*, 535 U.S. at 573 (quoting Virginia v. Black, 538 U.S. 343, 358 (2003)) (internal quotation marks omitted); *Infra* section II subsection E (listing the existing categorical exceptions).

91. In the landmark case, Miller v. California, 413 U.S. 15, 24 (1973), the United State Supreme Court "define[d] the standards that must be used to identify obscene material that a State may regulate without infringing on the First Amendment."

92. *See e.g.*, *VanBuren*, 214 A.3d at 800-01 (analyzing the state's argument that Vermont's nonconsensual pornography statute "categorically regulates obscenity and is thus permissible under the First Amendment."); *Casillas*, 952 N.W.2d at 638-39 (addressing the state's claim, and the district court's holding, that Minnesota's nonconsensual pornography statute regulates unprotected obscene speech); *Ex parte* Jones, No. 12-17-00340CR, 2018 WL 2228888 *4 (Tex. App. May 16, 2018) (analyzing the state's argument that Texas's nonconsensual pornography statute regulates "unprotected speech because it is contextually obscene.").

For speech to be considered obscene, a trier of fact must consider the following principles provided by *Miller v. California*:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[93]

Currently, all state courts who have applied *Miller's* test to nonconsensual pornography statutes have determined that the statutes fail under the "patently offensive"[94] prong.[95] This is largely because the type of images which nonconsensual pornography statutes seek to regulate do not reach the patently offensive threshold.[96] However, state courts and legal scholars alike have acknowledged that the dissemination of nonconsensual pornography could be considered "patently offensive" although this concept falls outside of the "typical obscenity assessment."[97] Thus, in order for the dissemination of nonconsensual pornography to equate to obscenity, the categorical exception would need to be expanded.[98] Currently, no state court confronted with this issue has elected to expand the contours of obscenity since the United States Supreme Court has declined to do so.[99]

2. Creating a New Categorical Exception

Rather than expanding a pre-existing categorical exception, the Indiana Supreme Court could have also elected to create a new categorical

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93. *Miller*, 413 U.S. at 24.

94. The United States Supreme Court has provided a few plain examples of what constitutes patently offensive to "fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject such a determination." Jenkins v. Georgia, 418 U.S. 153, 161 (1974). These examples include, "(a) [p]atently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or stimulated" and "(b) [p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.*

95. *See e.g.*, *VanBuren*, 214 A.3d at 800-01 (holding that Vermont's nonconsensual pornography statute covers more speech than that which is "patently offensive."); *Casillas*, 952 N.W.2d at 639 (explaining that there are situations when images shared would not reach "patently offensive" but would fall under Minnesota's statute).

96. *VanBuren*, 214 A.3d at 801. *See also Jenkins*, 418 U.S. at 161 (1974) (explaining that "nudity alone is not enough to make material legally obscene under the Miller Standards.").

97. *VanBuren*, 214 A.3d at 800-01. *See also Franks*, *supra* note 22, at 1313-14 (explaining the challenges of classifying nonconsensual pornography as obscenity).

98. *VanBuren*, 214 A.3d at 800-01.

99. *See, e.g.*, *VanBuren*, 214 A.3d at 801 (holding that the court "recognize[d] that some of the characteristics of obscenity that warrant its regulation also characterize nonconsensual pornography" but the court takes its "cues from the Supreme Court's reluctance to expand the scope of obscenity on the basis of a purpose-based analysis."). *See also Brown*, 564 U.S. at 794 (rejecting "shoehorn speech about violence into obscenity.").

exception for nonconsensual pornography. Nonconsensual pornography is thought to be "a strong candidate for categorical exclusion from full First Amendment protection" by state courts and legal scholars alike.[100] While the United States Supreme Court has shown reluctance in declaring new categorical exceptions to full First Amendment protection, it nonetheless recognized that there may be "categories of speech that have been historically unprotected, but have not been specifically identified or discussed as such in our case law."[101] However, at this time, multiple state courts have declined to create a new categorical First Amendment exception without guidance from the Supreme Court.[102]

B. Scrutiny Analysis

The Indiana Supreme Court also had the option to analyze Indiana's statute using a scrutiny analysis. This is appropriate if the court concludes that the speech which Indiana's revenge porn statute regulates is deserving of First Amendment protection. Under First Amendment scrutiny analysis, the Indiana Supreme Court would first determine if Indiana's revenge porn statute is content-neutral or content-based.[103] Then, based on this determination, the Indiana Supreme Court would know the appropriate level of scrutiny to apply.

In the case that was before the Indiana Supreme Court, *Katz*, the State and Katz argued, both by brief and oral argument, for the Indiana Supreme Court to apply a scrutiny analysis.[104] However, each side

100. *Austin*, 2019 IL 123910, ¶43, 155 N.E.3d at 455 (quoting *VanBuren*, 214 A.3d at 802); *accord* Ribot, *supra* note 71, at 536-37 (explaining that the United State Supreme Court should create a new categorical exception for nonconsensual pornography); Cohen, *supra* note 59, at 346-47 (concluding that nonconsensual pornography should not be protected speech under the First Amendment).

101. United States v. Stevens, 559 U.S. 460, 472 (2010) ("Our decision in Ferber and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them.").

102. *See e.g.*, *VanBuren*, 214 A.3d at 802 (explaining "although many of the State's arguments support the proposition that the speech at issue in this case does not enjoy full First Amendment protection, we decline to identify a new categorical exclusion from the full protections of the First Amendment when the Supreme Court has not addressed the question."); *Austin*, 2019 IL 123910, ¶43, 155 N.E.3d at 455 (holding the court "decline[d] to identify a new categorical first amendment exception when the United States Supreme Court has not yet addressed the question.").

103. *Turner Broad. Sys., Inc*., 512 U.S. at 642 (demonstrating that when speech falls outside of the "well-understood exceptions" different levels of scrutiny apply based on whether the regulation is content-neutral or content-based and thus this must be determined before a level of scrutiny may be applied).

104. *See generally* Brief for the Appellant, *supra* note 5, at 27-38 (arguing scrutiny analysis); Brief for the Appellee at 23-34, *Indiana v. Conner Katz*, No. 20S-CR-00632 (Ind. filed Nov. 4, 2020) (arguing scrutiny analysis); Oral Argument, *Indiana v. Katz*, No. 20S-CR-00632 (Ind. argued June 24, 2021),

advocated for a different level of scrutiny to be applied.[105] The following subsections will cover the two levels of scrutiny available to the Indiana Supreme Court, as argued by the State and Katz.

1. Intermediate Scrutiny

Intermediate scrutiny is to be applied to a statute when the statute's regulation of speech is content-neutral.[106] Government regulation of speech is content-neutral when the restriction is justified without reference to the content of the regulated speech.[107] In *Katz*, the State argued that Indiana's revenge porn statute is content-neutral, and thus intermediate scrutiny should be applied.

In support of its argument, the State relied heavily on the Illinois Supreme Court's decision in *People v. Austin*[108].[109] In *Austin*, the Illinois Supreme Court held Illinois's revenge porn statute was subject to intermediate scrutiny because the statute was a time, place, and manner restriction justified by privacy concerns.[110] Looking at the language of the statute,[111] the *Austin* court determined that the regulation of this speech

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mycourts.in.gov/arguments/default.aspx?&id=2565&view=detail [perma.cc/QJY3-VUF7] (arguing scrutiny analysis before the Indiana Supreme Court) [hereinafter Katz Oral Argument].

105. *Compare* Brief for the Appellant, *supra* note 5, at 29-31 (arguing for the Indiana Supreme Court to apply an intermediate scrutiny analysis), *with* Brief for the Appellee, *supra* note 104, at 27-32 (arguing for the Indiana Supreme Court to apply a strict scrutiny analysis).

106. Turner Broad. Sys., Inc., 512 U.S. at 662.

107. *Id.*

108. *Austin*, 2019 IL 123910, ¶1 155 N.E.3d at 439. In *Austin*, the defendant was charged under Illinois's nonconsensual pornography statute, 720 ILL. COMP. STAT. ANN. 5/11-23.5(b) (West 2015), after she distributed nude pictures of the victim without consent. *Id.* An Illinois circuit court initially dismissed the charge and concluded that Illinois's nonconsensual pornography statute was "facially unconstitutional as an impermissible restriction on the right to free speech as guaranteed by the United States and Illinois Constitutions." *Id.* The State then filed a direct appeal to the Illinois Supreme Court challenging the lower court's ruling. *Id.* On appeal, the Illinois Supreme Court conducted a review of Illinois's nonconsensual pornography statute under an intermediate scrutiny analysis. *Id.* at 459. After a careful review of the statute's language, the Illinois Supreme Court determined that Illinois's nonconsensual pornography statute survived intermediate scrutiny. *Id.* at 459-66. Ultimately, the Illinois Supreme Court reversed the lowered court's decision and held Illinois's nonconsensual pornography statute to be constitutional. *Id.* at 474.

109. Brief for the Appellant, *supra* note 5, at 9.

110. *Austin*, 2019 IL 123910, ¶49-50, 155 N.E.3d at 457-58.

111. The language that Illinois looked to is contained in 720 ILL. COMP. STAT. ANN. 5/11-23.5(b) (West 2015) and reads as follows:

> (b) A person commits non-consensual dissemination of private sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
>
> (A) who is at least 18 years of age; and
> (B) who is identifiable from the image itself or information displayed in

was not based on the content of the image, but instead on "[t]he manner of the image's acquisition and publication."[112] The *Austin* court further reasoned that intermediate scrutiny was appropriate because the statute governed a purely private matter and thus did not pose any dangers to one's freedom of expression.[113] As it stands, the *Austin* court is the only state court to have analyzed a nonconsensual pornography statute under this lower level of scrutiny.[114]

The State in *Katz* followed the *Austin* court's analysis with respect to content-neutrality.[115] The State argued that Indiana's revenge porn statute is analogous to the Illinois statute, in that it criminalizes the distribution of images sent without consent.[116] However, the State argued that the same image distributed with consent "fall[s] outside the purview of the distribution statute."[117] Turning to the State's privacy argument, the State asked the court to take a "nuanced" approach.[118] The State suggested that the Indiana Supreme Court need not even get to the content-neutrality analysis because a "threshold inquiry" allows purely private matters to be analyzed under intermediate scrutiny.[119] Notably, no state high court has "taken this precise path."[120]

If the Indiana Supreme Court found that Indiana's statute was content-neutral, the court would then determine whether the statute could survive under intermediate scrutiny. "Generally, to survive intermediate scrutiny, the law must serve an important or substantial governmental interest unrelated to the suppression of free speech" and "must be narrowly tailored to serve that interest without unnecessarily interfering with the first amendment freedoms."[121]

The State in *Katz* argued that Indiana's revenge porn statute can

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connection with the image; and
(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination.

112. *Austin*, 2019 IL 123910, ¶49-50, 155 N.E.3d at 457-58.

113. *Id.* at 53.

114. Katz Oral Argument, *supra* note 104, at 4:30-4:40. During the State's oral argument in *Katz*, Indiana Supreme Court Chief Justice Loretta H. Rush emphasized that only one court, the Illinois Supreme Court in *Austin*, has applied intermediate scrutiny to its nonconsensual pornography statute while the rest of state courts have reviewed their nonconsensual pornography statutes under strict scrutiny.

115. Brief for the Appellant, *supra* note 5, at 29-34.

116. *Id.*

117. *Id.*

118. Katz Oral Argument, *supra* note 104, at 5:57-6:10.

119. *Id.* at 3:30-4:00.

120. *Id.* at 6:10-6:15.

121. *Austin*, 2019 IL 123910, ¶59, 155 N.E.3d at 459 (citing *Turner Broad. Sys., Inc.*, 512 U.S. at 662).

survive under this standard.[122] Conversely, Katz argued that it cannot.[123] If the Indiana Supreme Court had applied intermediate scrutiny analysis to Indiana's revenge porn statute, the court would have had to carefully review the language of Indiana's statute, and the speech it regulates, to determine if it can survive this test.

2. Strict Scrutiny

The Indiana Supreme Court also had the option to analyze Indiana's revenge porn statute under a strict scrutiny analysis. Strict scrutiny is applied to content-based government regulations. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[124] Katz argued that Indiana's revenge porn statute is "content based on its face" and thus a heightened level of scrutiny is justified.[125]

In support of his argument, Katz encouraged the Indiana Supreme Court to follow the majority of state courts who have applied this heightened level of scrutiny to their nonconsensual pornography statutes.[126] To illustrate, in *Ex parte Ellis*[127] a Texas court applied a strict scrutiny analysis to the state's revenge porn statute.[128] The court's decision to apply strict scrutiny came after reviewing the Texas statute's language[129] and determining that the statute "on its face" drew

122. Brief for the Appellant, *supra* note 5, at 31-33.

123. Brief for the Appellee, *supra* note 104, at 8.

124. *Reed*, 576 U.S. at 163.

125. Brief for the Appellee, *supra* note 104, at 25-26.

126. *Id.*

127. *Ellis*, 609 S.W.3d at 332. In *Ellis*, the defendant was charged under Texas' nonconsensual pornography statute, TEX. PENAL CODE ANN. §21.16 (West 2019). Ellis then "filed an Application for Writ of Habeas Corpus arguing that Section 21.16(b) [was] unconstitutional on its face." *Id.* at 335. "The trial court denied relief." *Id.* Ellis subsequently filed an appeal to the Court of Appeals of Texas, Waco. *Id.* In reviewing Texas's nonconsensual pornography statute, the *Ellis* court determined that the statute was a content-based restriction and thus a strict scrutiny analysis was warranted. *Id.* at 336-37. The court then reviewed the language of Texas's statute to ensure that the speech it regulated was "(1) necessary to serve a (2) compelling state interest and (3) narrowly drawn." *Id.* at 337. Ultimately, the court concluded that Texas' nonconsensual pornography statute could survive this heightened level of scrutiny. *Id*. at 338. Consequently, the *Ellis* court affirmed the lower court's decision agreeing that Texas' nonconsensual pornography statute was in fact constitutional. *Id.* at 339.

128. *Id.* at 336-38.

129. The language which Texas looked to is contained in TEX. PENAL CODE ANN. §21.16 (West 2019) and reads as follows:

> (b) A person commits an offense if:
>
> (1) without the effective consent of the depicted person and with the intent to harm that person, the person discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
>
> (2) at the time of the disclosure, the person knows or has reason to believe that the visual material was obtained by the person or created under

distinctions based on the message the speaker conveyed.[130] "The statute defines speech based upon the subject matter, intimate images, and also restricts speech based upon its function and purpose, causing harm."[131] The *Ellis* court further explained that the Texas law made it necessary to look at the content of the speech when determining whether the speaker violated the law.[132]

Katz's argument before the Indiana Supreme Court was analogous to the court's ruling in *Ellis*. Katz argued that Indiana's revenge porn statute is in fact content-based because "the content of the image is critical to its application."[133] Katz further argued that Indiana's statute "does not criminalize the non-consensual distribution of all private images, but only 'intimate' images that depict sexual intercourse, sexual conduct, or nudity."[134]

If Indiana's revenge porn statute is content-based, the court would then have to determine if it can survive strict scrutiny analysis. To survive strict scrutiny, the government must prove that the speech restrictions within the statute are "narrowly tailored to serve compelling state interests."[135] Furthermore, the Indiana Supreme Court must find that there are no less restrictive means to serve the government's purpose.[136]

In *Katz*, the State and Katz have opposing views as to whether Indiana's revenge porn statute would survive under this heightened level of scrutiny.[137] The State argued that Indiana's statute will survive, because there is both a compelling interest and the statute is narrowly tailored.[138] Conversely, Katz argued the statute will fail because while there is a compelling interest, Indiana's revenge porn statute is not "narrowly drawn to protect individuals from social consequences" and thus there were ways in which the Legislature could have further

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> circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
>
> (3) the disclosure of the visual material causes harm to the depicted person; and
>
> (4) the disclosure of the visual material reveals the identity of the depicted person in any manner, including through:
>
> > (A) any accompanying or subsequent information or material related to the visual material; or
> > (B) information or material provided by a third party in response to the disclosure of the visual material.

130. *Ellis*, 609 S.W.3d at 337.
131. *Id.*
132. *Id.*
133. Brief for the Appellee, *supra* note 104, at 26.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Compare* Brief for the Appellee, *supra* note 104, at 32, *with* Brief for the Appellant, *supra* note 5, at 34.
138. Brief for the Appellant, *supra* note 5, at 34, 36.

narrowed the statute.[139]

The Indiana Supreme Court ultimately elected to apply strict scrutiny analysis to Indiana's revenge porn statute.[140] Therefore, the Indiana Supreme Court was subsequently tasked with carefully reviewing Indiana's revenge porn statute and determining whether the statute regulates speech in a manner allowable under the strict scrutiny test.

IV. PROPOSAL

As demonstrated by the above section, revenge porn statutes pose unique First Amendment challenges for courts. Without guidance from the United States Supreme Court, state courts are forced to make their own decisions regarding the appropriate First Amendment analysis to apply to their respective statutes. This has led to a lack of uniformity across state courts and a difficulty predicting which approach any given state court may take when analyzing a First Amendment challenge to their statute.[141] As previously noted, the Indiana Supreme Court ultimately analyzed Indiana's revenge porn statute under a strict scrutiny analysis.[142] Given the speech which Indiana's statute regulates, this was the appropriate level of scrutiny to apply. The following subsections will explain why the Indiana Supreme Court's decision was correct and how, even under this heightened level of scrutiny, Indiana's revenge porn statute can survive constitutional muster.

A. Why Scrutiny Analysis?

When analyzing Indiana's revenge porn statute, the Indiana Supreme Court was correct in applying a scrutiny analysis. Scrutiny analysis is appropriate when the regulated speech falls outside of a categorical exception and thus receives full First Amendment protection.[143] The speech which revenge porn statutes regulate does not

139. Brief for the Appellee, *supra* note 104, at 28.

140. *Katz*, 179 N.E.3d at 455 (determining that Indiana's distribution statute is "plainly a content-based restriction" and thus is valid only if it passes strict scrutiny analysis).

141. *Compare VanBuren*, 214 A.3d at 800-01, 807-814 (applying strict scrutiny analysis to Vermont's revenge porn statute and acknowledging the arguments for categorical exceptions), *and Ellis,* 609 S.W.3d at 336-37 (holding Texas's nonconsensual pornography statute is content-based and thus deserving of strict scrutiny analysis), *and Casillas*, 952 N.W.2d at 641 (applying strict scrutiny analysis to Minnesota's nonconsensual pornography statute), *with Austin*, 2019 IL 123910, ¶43, 155 N.E.3d at 457 (holding Illinois's nonconsensual pornography statute is subject to intermediate scrutiny analysis and addressing categorical exceptions). *See also Franks*, *supra* note 22, at 1312 (explaining "[i]t is difficult to say with confidence what any court will do when faced with a question about the constitutionality of a given nonconsensual pornography statute.").

142. *Katz*, 179 N.E.3d at 451-56.

143. Well-known categorical exceptions to full First Amendment protection include: speech which incites imminent lawless action, obscenity, defamation, fighting

fall squarely into any existing categorical exception.[144] Thus, for the Indiana Supreme Court to apply a categorical exception to Indiana's statute, the court would have been required to either expand an existing categorical exception or create a new one.[145] As state courts and legal scholars alike have pointed out, there is an array of policy reasons to support revenge porn receiving its own categorical exception.[146] However, the Indiana Supreme Court correctly noted that it would be inappropriate for the Indiana Supreme Court to "step ahead" of the United States Supreme Court.[147] This is especially true given the United States Supreme Court's notable hesitation in expanding and creating new categorical exceptions.[148] Therefore, because revenge porn does not fit within an existing categorical exception, the Indiana Supreme Court correctly chose to analyze Indiana's revenge porn statute under scrutiny analysis.

B. What Level of Scrutiny – Intermediate or Strict?

Before the Indiana Supreme Court could apply a scrutiny analysis to Indiana's revenge porn statute, the court first had to determine the appropriate level of scrutiny to apply, intermediate or strict. The court's decision turns on whether the court finds the statute to be content-based or content-neutral. This issue was heavily litigated in *Katz* in both briefs and oral arguments of Appellant and Appellee.

Again, looking to the decisions of other state courts, a majority have determined that their respective revenge porn statutes are content-

words, child pornography, true threats, and speech presenting grave and imminent threat which the government has the power to protect. U.S. v. Alvarez, 567 U.S. 709, 717 (2012).

144. *Supra*, discussion, section III.A.1 (analyzing why revenge porn does not fit within a pre-existing categorical exception).

145. *Supra*, discussion, section III.A.2 (analyzing why revenge porn would need its own categorical exception, or an expansion of a pre-existing categorical exception).

146. *Austin*, 2019 IL 123910, ¶43, 155 N.E.3d at 455 (quoting *VanBuren*, 214 A.3d at 802); *accord* Ribot, *supra* note 71, at 536-37 (explaining that the United States Supreme Court should create a new categorical exception for nonconsensual pornography); Cohen, *supra* note 59, at 346-47 (concluding that nonconsensual pornography should not be protected speech under the First Amendment).

147. *Katz*, 179 N.E.3d at 453-54 ("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 protections.'") (quoting *VanBuren*, 214 A.3d at 807). *See also* Ribot, *supra* note 71, at 536 (explaining that Vermont and Texas state courts have been "rightly reluctant to step ahead of the Supreme Court" when it comes to creating a new categorical exception for revenge porn and provided detailed analysis as to why a categorical exception for revenge porn should be created).

148. *See Stevens*, 559 U.S. at 472 (demonstrating that the United States Supreme Court refused to create a First Amendment categorical exception for depictions of animal cruelty).

based.[149] In fact, only one, Illinois in *Austin*, has determined otherwise.[150] When analyzing revenge porn statutes, state courts look to the language of the statutes to determine if the speech regulated is determinate on the content or the message the speaker conveyed.[151] The Indiana Supreme Court followed this same analysis.[152]

In reviewing Indiana's revenge porn statute, the Indiana Supreme Court correctly held that Indiana's statute is a content-based regulation.[153] Indiana's revenge porn statute criminalizes the nonconsensual distribution of "intimate images."[154] The statute defines intimate images to mean a "photograph, digital image, or video" that depicts "(A) sexual intercourse; (B) other sexual conduct (as defined in Ind. Code 35-31/5-2-221.5[155]); or (C) exhibition of the uncovered buttocks, genitals, or female breast."[156] Thus, the content of the image is at the heart of the statute's application. Without looking to the content of the images, one would be unable to determine if the statute applied. Because the application of Indiana's statute heavily relies on the content of the images, strict scrutiny is the correct level of analysis to apply.

C. Applying Strict Scrutiny Analysis to Indiana's Revenge Porn Statute

For Indiana's revenge porn statute to survive strict scrutiny, the statute must be "narrowly tailored to serve compelling state interests."[157] In applying this heightened standard to Indiana's revenge porn statute, the statute is able to meet these stringent demands. Therefore, the Indiana Supreme Court was correct in holding Indiana's revenge porn

149. *See, e.g., VanBuren*, 214 A.3d at 800-01, 807-814 (applying strict scrutiny analysis to Vermont's revenge porn statute because it was determined to be a content-based regulation); *Ellis*, 609 S.W.3d at 336-37 (holding Texas's nonconsensual pornography statute is content-based and thus deserving of strict scrutiny analysis).

150. *See Austin,* 2019 IL 123910, ¶46, 155 N.E.3d at 457 (holding Illinois's nonconsensual pornography statute is subject to an intermediate scrutiny analysis because the statute is a content neutral time, place, and manner restriction).

151. *See Ellis*, 609 S.W.3d at 336-37 (applying a thorough analysis of Texas's revenge porn statute to determine if the statute was content-neutral or content-based).

152. *Katz*, 179 N.E.3d at 455 (analyzing whether Indiana's revenge porn statute was content-neutral or content-based).

153. *See id.* (holding that Indiana's revenge porn statute "on its face" "draws distinctions based on the message a speaker conveys.").

154. IND. CODE §35-45-4-8.

155. *See* IND. CODE §35-31.5-2-221.5 (defining "other sexual conduct" to mean "an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object. . .") (internal quotations omitted).

156. IND. CODE §35-45-4-8.

157. *Reed*, 576 U.S. at 163 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest.").

statute constitutional.[158]

1. Does Indiana Have a Compelling Interest?

To begin the strict scrutiny analysis, one starts with the compelling state interest. The state "must identify an 'actual problem' in need of solving."[159] Indiana has a compelling state interest in regulating the nonconsensual distribution of intimate images due to the privacy concerns that such distribution presents. Privacy rights are "plainly rooted in the traditions and significant concerns of our society."[160] Privacy constitutes a compelling state interest when the privacy interest is substantial, and the invasion occurs in an intolerable manner.[161]

Indiana has a clear argument that the criminalization of nonconsensual pornography serves to protect its residents and their privacy. In fact, the argument is so clear that the Appellee in *Katz* actually conceded this point.[162] Furthermore, every state court who has addressed this issue held the same way, finding that states have a compelling state interest in protecting a person's privacy and thus prohibiting intimate images from being shared without consent.[163]

Additionally, "it is difficult to imagine something more private than images of an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area, that the person has not consented to publicly sharing."[164] It is not uncommon for victims to have personal information shared along with these intimate images intensifying the privacy concerns and harm to the victims.[165] Clearly, the Indiana legislatures understood these harms and the compelling state interest in protecting Indiana residents when they proposed the law and subsequently passed Indiana's revenge porn statute. Further, the speech which Indiana's revenge porn statute regulates is only regulated in furtherance of protecting these compelling state interests.

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158. *Katz*, 179 N.E.3d at 460.

159. *Id.* at 456 (quoting *Playboy*, 529 U.S. 803, 822-23 (2000)).

160. The Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).

161. Snyder v. Phelps, 562 U.S. 443, 459 (2011).

162. Brief for the Appellee, *supra* note 104, at 27.

163. *See, e.g.*, *Ellis,* 609 S.W.3d at 338 (holding that privacy is a "compelling government interest when the privacy interest is substantial and occurs in an intolerable manner" such as the disclosure of intimate material without consent); People v. Iniguez, 202 Cal. Rptr. 3d 237, 243 (Cal. Super. App. Dept. 2016) (explaining that the government has an interest in protecting the "substantial privacy interests of individuals from being invaded in an intolerable manner"); *VanBuren*, 214 A.3d at 800-01 (acknowledging that the state's interest in the case focuses on "protecting the privacy, safety, and integrity of the victim subject to nonconsensual public dissemination of highly private images"); *Casillas*, 952 N.W.2d at 638 (addressing the developments in law and society which may merit a "reevaluation of privacy interests within the context of the First Amendment.").

164. *VanBuren*, 214 A.3d at 810.

165. Minc & Arko, *supra* note 35.

2. Is Indiana's Statute Narrowly Tailored?

Indiana's revenge porn statute is also narrowly tailored to serve the compelling state interest. Meaning, it is the "least restrictive means for addressing the government's interest."[166] To begin, subsection (a) of Indiana's statute, clearly lays out four exceptions in which the statute would not apply.[167] These exceptions include when explicit images 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 location that is (A) intended solely for the storage or back up of personal data, including photographs, digital images, and video; and (B) password protected."[168] The statute lays out these exceptions to narrowly tailor the regulation to only matters that align with the State's interest, the concern for privacy and harm to Hoosiers.

Next, in subsections (b) and (c), the statute narrowly defines the language used. First, subsection (b) defines "distribute" to mean transferring to another "by means of, any medium, forum telecommunications device or network, or Internet website" which includes posting on the Internet or an application.[169] Therefore, this subsection limits what constitutes distribution and thus when the statute may be applicable.

Further, subsection (c) defines "intimate image" to include only "photographs, digital images, or video" that depict sexual intercourse, other sexual conduct (as defined by Ind. Code 35-31.5-2-221.5), or "exhibition of the uncovered buttocks, genitals, or female breast of an individual."[170] By narrowly defining an intimate image, Indiana has tailored the statute so that only images meeting these exact definitions would be protected. Indiana's statute is not so broad as to regulate a wide array of constitutionally protected speech. Instead, the statute leaves a wide range of speech unregulated and only focuses on a very specific group of images which present privacy concerns and harm to Indiana residents. Continuing with subsection (c), the statute states that only individuals who receive the image from the subject of the images, or individuals in the physical presence of the subject of the image may face criminal liability.[171] Therefore, this subsection limits the statute's

166. *Katz*, 179 N.E.3d at 458 (quoting *Playboy*, 529 U.S. 803 at 827) (internal quotations omitted).

167. IND. CODE §35-45-4-8.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (Indiana's revenge porn statute states that it is applicable to when the intimate images is "taken, captured, or recorded by: (A) an individual depicted in the photograph, digital image, or video and given or transmitted directly to the person described in subsection (d); or (B) the person described in subsection (d) in the physical presence of an individual depicted in the photograph, digital image, or video.").

applicability so that unknowing third parties cannot face criminal prosecution.

Turning to subsection (d), this section further restricts to whom Indiana's revenge porn statute applies. That is, any individual who "knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the intimate image; and distributes the intimate image."[172] Thus, for a person to be criminally liable, the government must prove "a defendant's reasonable awareness of the lack of consent to distribute."[173] This standard is not particularly easy for a state to meet and further proves that the statute is narrowly tailored. The state must prove, under a heavy burden, that a reasonable person would have known there was no consent. Consequently, individuals who participate in a voluntary exchange of intimate images with consent are not included in this statute.

Taking all these requirements into consideration, it is clear that Indiana has narrowly crafted its revenge porn statute to apply only in very specific situations. Primarily, in the situations where there is a heightened risk of harm to victims and where privacy is of the utmost concern. Because Indiana's revenge porn statute can survive strict scrutiny, the statute is in fact constitutional. Thus, the Indiana Supreme Court was correct in its holding.

V. CONCLUSION

The Indiana Supreme Court's decision regarding the constitutionality of Indiana's revenge porn statute is not only important for all Hoosiers, but for the entire legal community. Revenge porn is not going away. Instead, it will continue to grow with technology and social media. While revenge porn statutes pose First Amendment challenges, they are necessary to protect the safety and privacy of citizens across the country. Further, the First Amendment challenges posed by revenge porn statutes would ideally be resolved by revenge porn receiving its own categorical exception to full First Amendment protection. However, the legal community is still waiting for guidance from the United States Supreme Court on that issue. Without that guidance, the Indiana Supreme Court was proper in reviewing Indiana's revenge porn statute under a strict scrutiny analysis and ultimately holding that it is constitutional.

172. *Id.*
173. Brief for the Appellant, *supra* note 5, at 38.