IN THE
INDIANA SUPREME COURT

No. 15A01-1110-CR-550

DANIEL BREWINGTON, Appellant (Petitioner Below), v. STATE OF INDIANA, Appellee (Respondent Below).	Appeal from the Dearborn Superior Court II, No. 15D02-1103-FD-0084, Hon. Brian Hill, Special Judge.

STATE'S BRIEF IN RESPONSE TO PETITION TO TRANSFER

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STATE'S BRIEF IN RESPONSE TO PETITION TO TRANSFER

This Court should grant Brewington's petition to transfer, but affirm his convictions for intimidation, attempted obstruction of justice, and perjury. The Court of Appeals' decision below is overbroad and decides questions of important freedom of speech issues unnecessarily. Similarly, Brewington and the amici curiae urge this Court to decide broad constitutional issues that are tangential to the dispositive issues presented by this case. Our courts should decide First Amendment issues, especially as they involve criminal conduct, narrowly and incrementally, because those issues are always highly fact-sensitive. The Court should transfer jurisdiction and decide this appeal under that careful approach. Ind. Appellate Rule 57(H)(6).

In so doing, the Court should affirm Brewington's convictions. While the Court of Appeals reasoned that Brewington's intimidation convictions were proper because he threatened his victims with exposure to hatred, contempt or ridicule—which he did—it should have affirmed upon the narrower and constitutionally-clear ground that Brewington threatened violence against his victims, which placed them in fear of violent reprisal for their lawful actions. Brewington communicated to his victims that he knew their spouses, had uncovered private information about them that was completely unrelated to their professional actions, was learning

how to use a gun, and had contemplated arson, stalking, and battery against them. Such speech is truly threatening, and therefore is not protected.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

Dan Brewington's wife Melissa petitioned to divorce him. *Brewington v. State*, 981 N.E.2d 585, 590 (Ind. Ct. App. 2013). During the divorce, the parties agreed to have Dr. Edward Connor serve as a custody evaluator. *Id.* Dearborn Circuit Court Judge James Humphrey eventually presided over the proceedings as special judge. *Brewington*, 981 N.E.3d at 591.

During the proceedings, Dr. Connor issued his custody evaluation report. *Brewington*, 981 N.E.2d at 590. Brewington did not agree with it. *Id.* He wrote Dr. Connor "a torrent of abusive letters," demanding, among other things, that Connor release the entire file, filed motions, and additionally made postings on the internet accusing Connor of unethical behavior, abusing his power, dishonesty, malice, and criminal behavior. *Id.* Brewington's writings to and about the doctor would continue until charges were brought against him for intimidation and obstruction of justice. In one writing, well after Brewington's communications to and about the doctor commenced, Brewington wrote about beating a "hypothetical" custody evaluator as follows:

> You wouldn't lose your children because you criticized a plumber would you? You post a blog about a plumber and write things like: "Those lousy sons of bitches tracked dirt all over my house. They made me so mad I wanted to beat them senseless. The dirty pieces of Shit would not honor their contract . . . Every time I see the stains in my carpet it makes me want to punch them in the face" If you showed that to a social worker psychologist or judge they would say there is no way I would ever use that drain service. But if you wrote: "that lousy SOB Dr. Custody Evaluator, lied in his report. He made me so mad I wanted to beat him / her senseless. The dirty piece of shit would not honor his / her contract . . . everytime I think about the evaluation report that contained numerous errors and oversights it makes me want to punch doctor custody evaluator in the face."

(Ex. 177).

Brewington attended at least one other trial at which Dr. Connor testified, accused him of intentionally hurting children, learned where he kept his mortgage, accused him of being a pervert, and wrote that he had been to Connor's subdivision ("there are some nice houses on his street"). (Exs. 199, 200, 178, 180, 181). In their evaluation of Brewington, Dr. Connor and his wife Dr. Jones-Connor, who assisted Connor, had noted Brewington's possession of firearms (Ex. 9). The evaluation concluded that Brewington showed some signs of paranoia, saw enemies or conflict where none were present, and found Brewington's writings resembled those of people who have inflicted harm on their families when things did not go their way (Ex. 9). When the Connors discovered that Brewington had publicized their street, and remarked about some "nice looking houses on [their] street", and proved he knew their bank, Dr. Jones-Connor's heart 'just sank' (Tr. 205). She was extremely frightened when Brewington talked about beating the "evaluator" senseless (Tr. 205).

As a result, the Connors notified the Children's Home where Dr. Connor worked as a volunteer, and instructed them to notify the police immediately if Brewington ever appeared; contacted the police; informed their own children about Brewington, showing them a photograph of Brewington; and instructed their staff to call the police immediately if Brewington ever showed up (Tr. 164-167, 203-205). Dr. Connor did not seek a protective order because he did not want to incite Brewington (Tr. 176, 190, 191). He refrained from filing a defamation suit for the same reason (Tr. 191).

Brewington also focused his anger on Judge Humphrey. Brewington claimed the judge's rulings were like playing with fire, and that he, Brewington, was quite the accomplished pyromaniac (Tr. 241). Judge Humphrey issued his final order and dissolution decree on August

17, 2009 (Ex. 140). Following the order, Brewington filed a motion for relief from judgment that asserted that:

- Dr. Connor and Judges Taul and Humphrey had "conspired to obstruct [his] access to evidence," (State's Ex. 142, p. 1);
- Judge Humphrey had "conducted himself in a willful, malicious, and premeditated manner" and had "caused irreparable damage to [the children] in [that] the Court mandated child abuse," *id.* at 9;
- Brewington would be "posting this pleading and ... letter" to his websites and "w[ould] be disturbing [sic] the information to the public through many avenues." *Id.*

Brewington, 981 N.E.2d at 591. Brewington attached as an exhibit a letter wherein he asked all readers: "Please copy this letter and send the letter along with your own personal comments and opinions to the Ethics & Professionalism Committee Advisor located in Dearborn County." (State's Ex. 142, attachment, p. 6).

Brewington then posted on his internet page the name of Heidi Humphrey, who is Judge Humphrey's wife, and the Humphreys' home address, although he did not identify Mrs. Humphrey as the judge's wife or the address as their residence. *Brewington*, 981 N.E.2d at 591. Mrs. Humphrey had served as an advisor on the Indiana Supreme Court's Judicial Ethics and Professionalism Committee, but it does not manage complaints about judicial performance. *Id.* The committee's website did not post Mrs. Humphrey's home address, nor did it suggest the public should contact individual committee members with concerns about specific cases. *Id.*

As a result of Brewington's writings the Humphreys received mail at their home address, from people they did not know complaining about Brewington's case. *Id.*; (Tr. 251; Exs. 71, 87, 77, 78). Judge Humphrey feared the naming of his wife and home address: he served as an elected prosecutor of dangerous criminals before becoming a judge responsible for sentencing them (Tr. 250). The Humphreys took the following precautions:

- unlocked and repaired Humphrey's firearm;
- added a security system;
- had police escorts to and from work;
- had law enforcement at their residence;
- notified one son's school and provided information about Brewington;
- notified another son's campus police;
- kept a photograph of Brewington and description of his vehicle; and
- received firearms training.

(Tr. 255, 263, 285). This was the first time Judge Humphrey had been put in fear like this and the first time his home address had been published (Tr. 255-256), and Mrs. Humphrey still fears for the safety of her sons ("I am a mother") (Tr. 286).

A grand jury convened to investigate Brewington's communications involving Connor and Humphrey. *Brewington*, at 592. Brewington testified before the grand jury and asserted that he did not know that Heidi Humphrey was Judge Humphrey's wife. *Id.*

The grand jury returned these indictments against Brewington: intimidation as a Class A misdemeanor in relation to Dr. Connor (Count I); intimidation as a Class D felony in relation to Judge Humphrey (Count II); intimidation as a Class A misdemeanor in relation to Mrs. Humphrey (Count III); attempted obstruction of justice as a Class D felony in relation to Dr. Connor (Count IV); perjury as a Class D felony for falsely stating during grand jury proceedings that he did not know that Mrs. Humphrey was Judge Humphrey's wife (Count V); unlawful disclosure of grand jury proceedings as a Class B misdemeanor (Count VI). (App. 21-27).

On October 6, 2011, a jury found Brewington guilty of intimidation, attempted obstruction of justice, and perjury while finding him not guilty of unlawful disclosure of grand jury proceedings. (App. 27-35). On October 24, 2011, the court sentenced Brewington to one year for Count I, two years for Count II, six months for Count III, two years for Count IV, and one year for Count V. (App. 27-36). The court ordered Brewington to serve sentences for intimidation of the Humphreys concurrently (Counts II and III), and the sentences of intimidation

and obstruction relating to Dr. Connor (Counts I and IV) concurrently to each other but consecutively with the other counts, for an aggregate term of five years. (App. 35-36).

Brewington appealed, arguing that the intimidation and obstruction of justice convictions violated double jeopardy, the trial court erred in empaneling an anonymous jury, the intimidation statute criminalized constitutionally protected speech, insufficient evidence supported Brewington's perjury conviction, and that the court erred in instructing the jury. *Brewington*, 981 N.E.2d at 592.

In pertinent part, the State argued that Brewington committed intimidation against his victims through multiple kinds of threats: (1) threatening to expose his victims to hatred, contempt, or ridicule; (2) threatening the reputations of his victims; (3) threatening harm to person or property; and (4) threatening to commit a crime against them. *Appellee's Br. at 21-24, 28, 30-32.* The State argued that Brewington's communications conveyed to his victims the threat that he would injure them by battery or subject them to the crimes of battery and arson, because of the writings about beating the "hypothetical" custody evaluator and about being a pyromaniac. *Id. at 23.*

The Court of Appeals affirmed in part and reversed in part, vacating Count I, intimidation of Dr. Connor, as the convictions for counts I and IV violated double jeopardy. *Id.* at 594-96. It reversed Brewington's conviction on Count III, intimidation of Heidi Humphrey, finding the statements made on the internet did not rise to the level of a threat under the intimidation statute. *Id.* at 599. The Court affirmed in all other respects, upholding the conviction for intimidating Judge Humphrey on grounds that Brewington threatened to expose the Judge to hatred, contempt, disgrace or ridicule, and held that such an application of the intimidation statute does not violate the First Amendment. *See id.* at 597 ("the State [has] argued that Brewington issued

several different types of threats . . . We focus our analysis on whether Brewington threatened Judge Humphrey by expressing an intent to expose him "to hatred, contempt, disgrace, or ridicule"). Brewington now seeks transfer.

ARGUMENT

I. This Court should affirm Brewington's convictions for intimidation.

This Court should affirm Brewington's conviction for intimidation because Brewington's communications to and about the judge were truly threatening communications, conveying the threat that he would injure the Judge or commit a crime against him. The State has *always* maintained that Brewington's speech included these very kinds of constitutionally *un*-protected speech acts. *Appellee's Br.* at 21-23, 25, 27-28, 30-32; *see also* Oral Argument, *Brewington v. State*, No. 15A01-1110-CR-550 (Ind. Ct. App. Nov. 21, 2012).

Brewington and his supporting *amici curiae* make much of the First Amendment's constitutional protections of political speech. The State supports such constitutional protections. The protections afforded by the First Amendment are not absolute, however, and 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). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-572 (1942). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of 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.'" *Black*, 538 U.S. at 358-59 (*quoting R.A.V. v. City of St. Paul*, 505 U.S. 377,

382-383 (1992), and *Chaplinsky*, 315 U.S. at 572). Among those limited areas of unprotected speech are "true threats."

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 358 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("political hyberbole" is not a true threat), and *R.A.V.*, 505 U.S. at 388). The exclusion of true threats "'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* The speaker need not even actually intend to carry out the threat. *Black*, 538 U.S. at 359-60. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Brewington communicated "true threats" to Judge Humphrey, although he cleverly attempted to disguise them. Brewington's communications to and about the judge included communications that both indicated Brewington's capacity for setting things on fire (Tr. 241), as well as communications that made clear to the judge that Brewington knew where the judge lived, and knew where the judge's wife lived. *Brewington*, 981 N.E.2d at 591-2. On one occasion, Brewington indicated a capacity for violence, specifically stating that the divorce proceedings, over which Judge Humphrey presided, were like playing with gas and fire, and that anyone who has seen Brewington with gas and fire knows that he is "quite the accomplished pyromaniac." (Tr. 241). The *substance* of this specific communication is relevant in cases involving true threats, such as those brought under Indiana's intimidation statute for threats of violence. The *timing* of it, however, is not.

Every communication made by Brewington is relevant in the case against him for making truly threatening communications to and about the judge, as this Court must consider the communications "in light of their entire factual context, including the surrounding events and the reaction of the listeners." *United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002). When reviewing courts determine whether language is truly threatening, and thus not subject to First Amendment protections, they may apply the following non-exhaustive list of considerations, which include: (1) the reaction of the listener or recipient; (2) the reaction of other listeners; (3) whether the speaker has communicated directly with the victim; (4) the speaker's past interactions with the victim or recipient of the communication; and (5) whether the victim, listener, recipient, has reason to believe that the speaker could or would engage in violence. *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996). Even the publication of a public official's home address is relevant to the determination that a speaker made truly threatening communications against the recipient. *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

Brewington was not so foolish as to announce explicitly that he would intimidate, stalk, batter, shoot, or otherwise harm Judge Humphrey or the other victims. Instead, he danced about each allusion to such violent and criminal acts. But those communications, regardless of their place along the time-line, remain just as relevant. *Hanna*, 293 F.3d at 1087-88. Most of the relevant considerations, if not all of them, show how and why all of Brewington's collective communications—not only to and about Humphrey, but as known by Humphrey—were truly threatening.

Judge Humphrey had every reason to believe that Brewington was truly threatening him with little or no reason to conclude otherwise. Other listeners clearly understood Brewington's

ongoing and unrelenting onslaught of communications to be threatening: one visitor to Brewington's blog, who went by the online name of "Anonymous," posted "I'll bet you really scared the ____ out of them didn't you" (Ex. 195). That was a posting to one of Brewington's writings titled "No More Dr. Edward J. Connor."

The reactions of the Humphreys to Brewington's voluminous and disgusting writings is relevant as well: (1) Judge Humphrey unlocked his firearm; it had been on safety lock for so long – since their children were born – that it needed repair; (2) they added a security system at home; (3) they had police escorts to and from work; (4) they had law enforcement at their residence; (4) they notified one son's high school and provided information about Brewington, and notified another son's campus police at college; (5) they kept a photograph of Brewington and a description of his vehicle in their home; (6) they received firearms training (Tr. 255, 263, 285). According to Judge Humphrey, this was the first time he had been put in fear like this and the first time his home address had been published (Tr. 255-256). No one had ever caused him to take the actions that Brewington caused him to take (Tr. 257). The Humphreys feared Brewington (Tr. 257, 286), and Mrs. Humphrey still fears for the safety of her sons ("I am a mother") (Tr. 286). And of course, Brewington communicated in many instances directly to the judge, even in his postings, as when he wrote directly to Judge Humphrey the "father's day" gift of keywords: making clear that Brewington was going to use his internet expertise to make sure that Humphrey's children and grandchildren would find Humphrey's name whenever they googled "child abuse" (Ex. 174).

Brewington also gave the judge many reasons to believe that he was capable of violence. Brewington contacted Melissa Brewington's attorney, Amy Loechel, in order to ask her where he might learn to use his firearm (Ex. 140). Humphrey presided over the divorce proceedings

and all persons involved in that action thus learned of Brewington's encounter with Loechel; Humphrey knew that Brewington was armed, therefore, and was reminded of it because of Dr. Connor's report (Ex. 9). He also knew from Dr. Connor's evaluation that Brewington was dangerous (Ex. 9).

Brewington was transparent about his anger over the divorce proceedings and the judge's rulings. His writings, which were made public, included communications in which he used phrases like "This is not going to end well" (Ex. 188), "you can count on me to continue to do what I do" (Ex. 135), "it's a dangerous game" (Tr. 191), "[Dr. Connor] seemed rather surprised to see me . . . he seemed a little nervous. He probably should have been. As a psychologist he probably believes that aggression or violence would be a common reaction for parents who had their children ripped from them . . ." (Ex. 200). Brewington claimed in that particular posting, where he bragged about un-nerving the doctor at another trial, that he did not fit the demographic of people that would want to cause physical harm to someone who lied to hurt their children. (Ex. 200). Yet Connor's evaluation, which was part of the record at the proceedings presided over by Judge Humphrey, indicated that Brewington's writings did bear resemblance to people who harm others (Ex. 9). Brewington wrote that if people (like Humphrey and Connor) abuse children, Brewington's job was to make sure that they never do it again, wrote about their home addresses, and made communications that at the very least alluded to battery, stalking, and arson. (Tr. 158-59, 241; Ex. 177).

That Brewington made it known to all involved in his divorce proceeding that he was seeking firearms training is also relevant. Brewington wrote about beating Dr. Connor by writing, circuitously, about *not writing* about beating his hypothetical doctor's face in (Ex. 177). But Connor and Judge Humphrey knew who Brewington meant because the language

("numerous errors and oversights") was lifted directly from Brewington's and Connor's correspondence during the divorce trial (Exs. 26-51; Tr. 158-9). And while Brewington refrained with equal care from using the legal term "stalking," he made clear to both of his victims that he knew where they lived, and had either been to the home or obtained its address (Ex. 199); *Brewington*, at 591.

While Brewington's intent to carry out these threats are irrelevant to the "true threat" analysis, *Black*, 538 U.S. at 359-60, Brewington made clear when he wrote in one of his many postings that his "*is not a situation where you just let the courts decide*" (Ex. 187) (emphasis added). What matters is not whether Brewington ever intended to use that gun that his victims knew about, after the training they knew he was seeking, or whether he intended actually to set fire to something, or beat someone, or continue to stalk the residence of either victim; it is the *possibility* that such threatened violence can occur that matters most. *Id.* A prohibition on threatening speech not only protects the citizenry from the fear of violence, but, as in this case, protects us all from the disruption that such fear engenders. *Id.* A reasonable person on the receiving end of such a communication, particularly a judge, has but one logical conclusion to draw about the extent to which a speaker will go. Judge Humphrey had every reason to believe that Brewington would solve his "Humphrey" and "Connor" problem by non-judicial, if not also non-legal, means.

Brewington strains to define the context of Brewington's communications as innocent. His interpretation ignores (1) the fact the State has always argued for affirmance on grounds that Brewington truly threatened his victims by placing them in fear of crime or violence; and (2) the combined effect of Brewington's communications about gun use, battery, stalking a person's

private residence, and setting things on fire. Taken together, such allusions refute the naïve characterization of the "context" of his speech as simply inarticulate political opinion.

Given Brewington's thinly-veiled true threats of violence toward Judge Humphrey and Dr. Connor, speech that is unprotected by the state and federal Constitutions—it was unnecessary for the Court of Appeals to analyze Brewington's speech under any other provision of the intimidation statute. Similarly, it is unnecessary to consider Brewington's arguments (and those of his supporting amici curiae) regarding his as-applied constitutional challenge to the statute. The Court of Appeals should have limited its opinion to the "true threat" of violence analysis and affirmed. This Court should do so now.

The fact that cross-burning can constitute political-symbolic speech began, but did not end, the enquiry in *Black*. *Black*, 538 U.S. at 361. Just as the cross-burners in *Black* did not state explicitly their intent to do violence, Brewington also masked his threats. But both messages are clearly threatening and find no refuge in the First Amendment.

It is a disappointing irony that Brewington, who is no friend of free speech when it is spoken by his victims, now takes refuge in the First Amendment. Doctor Connor had a right to issue his evaluation without fear of violent reprisal. Judge Humphrey had a right to issue his final order without fear of violent reprisal. Brewington does *not* have the First Amendment right to place them in fear of such violent reprisals for their speech, so his conviction is constitutional and the intimidation statute's prohibition of truly threatening communications is constitutional.

II. Brewington's remaining arguments warrant no consideration on transfer.

Transfer is not warranted in this case with respect to Brewington's remaining claims. They assert mere error. This Court may consider a transfer petition that does not fall within any of the Appellate Rule 57(H) categories. The State believes it is unnecessary here, and thus

primarily relies upon its Brief of Appellee and the correct opinion of the Court of Appeals on these points.

CONCLUSION

This Court should grant the petition to transfer, but affirm Brewington's convictions for intimidation, attempted obstruction of justice, and perjury.

Respectfully submitted:

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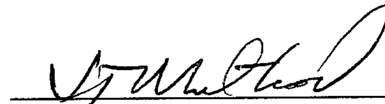

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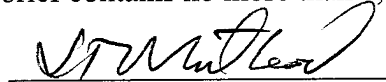
WORD COUNT CERTIFICATE

I certify pursuant to Appellate Rule 44(F) that this brief contains no more than 4,200 words.



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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on March 11, 2013, I served upon the opposing counsel in the above-entitled cause two copies of this document by causing the same to be deposited in the United States mail first-class postage prepaid, addressed as follows:

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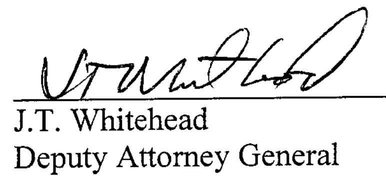

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