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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2018AP2074 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES L. JACKSON, JR.,

Defendant-Appellant.

Appeal of a Judgment and an Order
Entered in the Calumet County Circuit Court,
the Honorable Jeffrey S. Froehlich, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

James Jackson is required to register as a sex offender. A provision of the registry statute, Wis. Stat. § 301.45(2)(a)6m., requires all registrants to disclose certain information about their activities on the internet. Mr. Jackson was convicted of a felony for failing to tell the government about a Facebook account and an email address he used.

1. Did prosecuting Mr. Jackson violate his First Amendment right to anonymous speech?

   The circuit court held this issue waived by Mr. Jackson's guilty plea.

2. Is Wis. Stat. § 301.45(2)(a)6m. unconstitutionally overbroad?

   The circuit court held the statute constitutional.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Jackson would welcome oral argument should this court desire it. Publication will likely be merited, as this case presents constitutional issues of first impression in Wisconsin.

STATEMENT OF THE CASE

The complaint charged Mr. Jackson with one count of failing to update the registry as a repeater. (4:1). Though the formal statement of the charge did not specify which statutory category of information Mr. Jackson had not updated, the body of the complaint explained he had "maintained an email account … and maintained a Facebook account ... and … had not reported either of these internet identifiers to the Wisconsin Department of Corrections." (4:5). The requirement that a person provide internet-related information is found in Wis. Stat. § 301.45(2)(a)6m.

Mr. Jackson pleaded no contest and received a four-year prison sentence. That sentence was stayed in favor of three years of probation, with a condition that he serve six months of jail time, which he has. (1:1; 48:1).

Mr. Jackson filed a postconviction motion asserting that subd. 6m. violates the First Amendment both as applied and, because it is overbroad, on its face. (44; App. 101-111). After briefing, the circuit court denied the motion in a written decision. (52; 54; 57; App. 114-129). Mr. Jackson appeals. (59).

ARGUMENT

I. Introduction, constitutional test, and standard of review

Wis. Stat. § 301.45(2)(a)6m. requires a person on the registry to inform the Department of Corrections of

> [t]he name or number of every electronic mail account the person uses, the Internet address of every Web site the person creates or maintains, every Internet user name the person uses, and the name and Internet address of every public or private Internet profile the person creates, uses, or maintains. The department may not place the information provided under this subdivision on any registry that the public may view but shall maintain the information in its records on the person. This subdivision applies only to an account, Web site, Internet address, or Internet profile the person creates, uses, or maintains for his or her personal, family, or household use.

In turn subs. (4) requires the person to inform the department within ten days if any of this information changes. Failure to do so is a Class H Felony carrying up to six years in prison. Wis. Stat. § 301.45(6)(a)1.

Mr. Jackson's prosecution under Wis. Stat. § 301.45(2)(a)6m. violated the First Amendment, for two reasons. First, as applied to Mr. Jackson: the statute infringed upon his right to communicate anonymously, and did so in a way not narrowly tailored to the government's interest in protecting the public from sex offenders. Second, the statute is

unconstitutional on its face, because it requires the disclosure of a staggering amount of information unrelated to any conceivable threat to the public.

As to the first claim, the parties agreed below that the law is content-neutral, meaning that to be constitutional it must survive intermediate scrutiny—it must be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As to the second, a law is overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 473 (2010).

The burden to show the law constitutional under these standards rests with the state—and it must show it beyond a reasonable doubt. This is because while statutes typically benefit from a presumption of validity, that presumption is reversed where a statute implicates First Amendment rights. In such cases "the burden of proving that the statute is constitutional beyond a reasonable doubt" falls upon the government. *State v. Stevenson*, 2000 WI 71, ¶¶9-10, 236 Wis. 2d 86, 613 N.W.2d 90. This court decides *de novo* whether this burden is met. *Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis.2d 13, 19-20, 580 N.W.2d 156 (1998).

II. Wis. Stat. § 301.45(2)(a)6m. deprives Mr. Jackson of the right to anonymous speech, and his prosecution under that statute violated the First Amendment.

A. The statute is unconstitutional as applied to Mr. Jackson.

The First Amendment protects a person's right to use the internet. Two terms ago, the Supreme Court struck down a North Carolina law barring people on the sex offender registry from using social media. It said that while "in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (citations omitted).

Unlike the statute in *Packingham*, subd. 6m. does not, at least formally, forbid Mr. Jackson to use any part of the internet. What it does is require him to report to the state his use of a much larger portion of the internet than *Packingham*'s "social media"—every email address he uses, every Web site he maintains, every Internet user name he adopts, and every public or private Internet profile he creates, uses, or maintains. He must do so within 10 days of first use or face prison.

The fact that subd. 6m. is formally a reporting requirement, rather than a ban, does not save its

constitutionality. It still violates Mr. Jackson's First Amendment rights by denying him the right to speak anonymously.

The First Amendment guarantees not only the right to communicate, but the right to do so without revealing one's identity. "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society" *Id.* at 357 (citations omitted).

Subdivision 6m., by requiring Mr. Jackson to turn over his email addresses and Facebook account names to the government, prevents him from communicating anonymously. First and most obviously, law enforcement agencies are entitled to receive this information under Wis. Stat. § 301.46(2)(c) (as apparently happened here; see Complaint at 2). Facebook, as the *Packingham* court noted, allows users to

> debate religion and politics with their friends and neighbors or share vacation photos.... Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array

> of protected First Amendment activity on topics "as diverse as human thought."

137 S. Ct. at 1735-36 (citation omitted). But Mr. Jackson is required to give the government his identifying information, meaning that he cannot engage in these protected activities without the threat of law enforcement surveilling his communications.

In *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1229 (D. Colo. 2017), the federal district court considered provisions of Colorado's registry system (called SORA) very similar to subd. 6m—provisions requiring a registrant to disclose internet identifiers to the government. It said that

> SORA's registration requirement does not sweep as broadly in prohibiting the use of the internet and social media as the law struck down in *Packingham*, but it does something the North Carolina law did not. By requiring certain offenders to register email addresses and other internet identities, SORA provides law enforcement a supervisory tool to keep an eye out for registered sex offenders using email and social media.… That aspect of SORA is a "severe restriction" like the provisions in *Packingham*.

Id.

Noting the state's access to "all e-mail addresses, instant-messaging identities, or chat room identities… furthers the ability of state and local authorities to monitor private aspects of a registered sex offender's life and, consequently, chills his or her

ability to communicate freely," the court struck the statute down. *Id.* at 1228.

Like the statute in *Millard*, subd. 6m. gives law enforcement the ability to watch Mr. Jackson online. But unlike that statute, it does not stop there. It is not just law enforcement that may track Mr. Jackson.

Though subd. 6m. says the Department can't put his internet identifiers "on any registry that the public may view," Wis. Stat. § 301.46(2)(e) permits the head of any local law enforcement agency to provide "any of the information to which he or she has access under this subsection" to "members of the general public" if, "in the opinion of the police chief or sheriff" doing so "is necessary to protect the public." Subdivision 301.46(5)(b)4. additionally permits law enforcement to share any information they deem "appropriate" with a requesting member of the public. So, at the discretion of local law enforcement, Mr. Jackson's email addresses and Facebook account can be shared with the public at large. In *White v. Baker*, 696 F. Supp. 2d 1289, 1311 (N.D. Ga. 2010), the court enjoined Georgia's similar statute for this very reason:

> It allows the Internet Identifiers to be released to the community by law enforcement "to protect the public." It is conceivable, if not predictable, that a person in law enforcement might determine that Internet Identifiers for offenders ought to be released so that the public can search for and monitor communications which an offender intends to be anonymous. That these anonymous communications might well be on a

> matter of public policy, political speech, or other protected speech squarely implicates the First Amendment. While this monitoring could lead to the discovery of communications intended to harm children and thus would be a substantial benefit in identifying those making them, this section simply is too broad. It is by definition a violation of the requirement that the state employ the least restrictive means to address its interests. The prospect that Internet Identifiers, as currently defined, may be released to the community has an obvious chilling effect.

Similarly, in *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014), the federal appellate court examined California's registry law, which required registrants to inform the state of any "internet identifiers" they used. Though the law stated that registrants' information "shall not be open to inspection by the public" it contained an exception permitting law enforcement to "provide information to the public … when necessary to ensure the public safety." 772 F.3d at 580.

The *Harris* court held this scheme—basically, confidentiality with loopholes—was not good enough to satisfy the First Amendment. This was because "'[p]ublic safety,—like 'public interest'—is much too broad a concept to serve as an effective constraint on law enforcement decisions that may infringe First Amendment rights." *Id.* at 580–81 (citation omitted). Finding the law had "the inevitable effect of burdening sex offenders' ability to engage in anonymous online speech" because, with their identities exposed, "their speech, even on topics of public importance, could subject them to harassment,

retaliation, and intimidation" the court upheld an injunction against enforcement of the law. *Id.* at 581. Wisconsin's scheme is also "confidentiality with loopholes"—and for the same reasons enunciated in *Harris*, it violates the First Amendment rights of registrants.

Like the statutes in *Millard*, *White*, and *Harris*, then, subd. 6m. imposes a substantial burden on Mr. Jackson's First Amendment rights. It permits government agents to monitor his speech on all manner of topics, but it goes further—at police discretion, it permits the release of his information to the public, so that the public may do the same.

What's more, these burdens are not "narrowly tailored" to the state's interest in protecting the community from sexual violence. To satisfy narrow tailoring, the state must prove subd. 6m. directly advances a significant interest. *Edwards v. D.C.*, 755 F.3d 996, 1003 (D.C. Cir. 2014). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on ... speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (citation omitted). Courts "closely scrutinize challenged speech restrictions to determine if they indeed promote the Government's purposes in more than a speculative way"). *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2002).

The state cannot show that subd. 6m. is narrowly tailored to advance any interest. First, the law applies to all registrants, regardless of whether they have any history of using the internet to commit or facilitate crimes. Thus, Mr. Jackson is required to submit his internet identifiers despite the fact that his sexual offense, (having occurred in 1990), did not involve the use of the internet. *See Millard*, 265 F. Supp. 3d at 1228 (striking down law requiring registrant to provide internet identities "even though there is no evidence that the crime for which he was convicted involved the use of the internet or social media, or that there is any objective danger of his doing so"); *Harris*, 772 F.3d at 563 ("The requirement applies to all registered sex offenders, regardless of their offense, their history of recidivism (or lack thereof), or any other relevant circumstance…. In short, we have a hard time finding even an attempt at narrow tailoring in this section of the Act.").

Second, requiring Mr. Jackson to turn over his email and Facebook information to the state "captures considerable conduct that has nothing to do with the state's legitimate interest in protecting [people] from predators." *Doe v. Prosecutor, Marion Cty., Indiana*, 705 F.3d 694, 697 (7th Cir. 2013) (striking down Indiana statute regulating sex offenders' use of the internet). As the *Packingham* Court recognized, social media sites are, for many, "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."

137 S. Ct. at 1737. And in fact many news outlets—including Mr. Jackson's local Appleton Post-Crescent, Oshkosh Northwestern, and Fond du Lac Reporter—require a Facebook account in order to comment on news stories, and display the account name along with any comments. Subdivision 6m. thus denies Mr. Jackson the ability to participate anonymously in discussions forums (and thus on issues) that are central to civic life.

Importantly, at the time Mr. Jackson was charged, though he was required to register, was not serving any sentence. So, unlike a probationer or parolee, who "is not entitled to the full range of constitutional rights accorded citizens," *State ex rel. Ludtke v. Dep't of Corr.*, 215 Wis. 2d 1, 12, 572 N.W.2d 864 (Ct. App. 1997), Mr. Jackson had "the same First Amendment rights as any other" citizen—he "enjoy[ed] the full protection of the First Amendment." *State v. Oatman*, 2015 WI App 76, ¶17, 365 Wis. 2d 242, 871 N.W.2d 513 (*citing Harris*, 772 F.3d at 570-72 (9th Cir. 2014)).

Requiring Mr. Jackson to expose his internet communications to the Department of Corrections, law enforcement agencies, and potentially the public at large denied him that "full protection." And, permitting the government to keep track of Mr. Jackson's views on local and national news is wholly unrelated to any interest in protecting the community from sexual assault. Subdivision 6m. thus infringes on First Amendment rights and is not narrowly tailored. It is unconstitutional.

B. This court should not apply waiver to Mr. Jackson's as-applied challenge.

The state may argue that Mr. Jackson has waived his as-applied challenge by pleading guilty. This court should decline to apply waiver, for two reasons.

First, while Wisconsin courts have held that a guilty plea waives as-applied constitutional challenges, *see State v. Trochinski*, 2002 WI 56, ¶34, 253 Wis. 2d 38, 644 N.W.2d 891, a recent Supreme Court case calls this notion into question.

In *Class v. United States*, 138 S. Ct. 798 (2018), the defendant pleaded guilty to possessing a gun on the grounds of the U.S. Capitol, after unsuccessfully moving to dismiss the charge on Second Amendment and Due Process notice grounds.[1] The federal court of appeals held his guilty plea had waived these constitutional challenges. *Id.* at 802-03.

The Supreme Court reversed. It held that a guilty plea waives certain constitutional claims: claims having to do with the constitutional rules governing trials or government conduct before trial, and claims that "contradict the admissions necessarily made upon entry of a plea of guilty." *Id.* at 805. But other claims—those that admit the

[1] *Class* was decided after Mr. Jackson filed his postconviction motion, so he filed a letter alerting the circuit court about the case before the state filed its response. (50; App. 112-13).

conduct the government alleges, but "challenge the Government's power to criminalize" that conduct—survive a guilty plea. *Id.*

Mr. Jackson's challenge is of the latter type. He admits to having the email and Facebook accounts and to not informing the government about them. His claim is that a criminal charge for this conduct "is one which the State may not constitutionally prosecute." *Id.* at 801.

To be frank, it's unclear from the *Class* opinion whether the rule it announced is intended to bind the state courts—whether it is founded in constitutional or common law. But this court needn't decide whether it's binding or not, because even under Wisconsin's traditional rule, waiver is not appropriate here.

This court can decline to apply waiver where "the issues are of state-wide importance or resolution will serve the interests of justice and there are no factual issues that need to be resolved." *State v. Tarrant*, 2009 WI App 121, ¶6, 321 Wis. 2d 69, 772 N.W.2d 750. This case satisfies all three criteria: the constitutionality of the sex offender registry statute has importance state-wide; the prosecution of constitutionally-protected speech is contrary to the interests of justice; and all pertinent facts are clear from the complaint.

The circuit court's conclusion to the contrary was misguided. As to the first factor, the court asserted because no one had previously raised a

claim like Mr. Jackson's *in Calumet County*, the issue was not of statewide importance. (57:2; App. 125). Whether a state criminal statute conforms to the federal Constitution is manifestly a question of statewide importance—whether or not it has previously been presented to one of this state's 249 circuit court judges. And resolving such a question surely serves the interests of justice.

Regarding the third factor, the circuit court found that pertinent facts were unknown. That conclusion, too, was ill-founded—what the court did was hypothesize a series of claims that Mr. Jackson is *not* making, and note that there was no evidence for these claims. (57:2-3; App. 125-26). Mr. Jackson has nowhere alleged that the DOC has a "surveillance program" or that it is hacking into his email accounts without a warrant—his claim is that the statute required him to turn over information, and also permits that information to be shared with law enforcement and the general public. The claim is not that his anonymous internet speech has been exposed, but that he was criminally punished for engaging in anonymous speech. All the facts necessary to decide whether this was constitutional are contained in the complaint. This court should decide the question.

III. Wis. Stat. § 301.45(2)(a)6m. infringes on far more speech than can be justified and chills protected speech, and is thus unconstitutionally overbroad.

Even if this court does decide to apply waiver to Mr. Jackson's first, as-applied challenge to the statute, his second claim, that the statute is unconstitutionally overbroad, remains live. An overbreadth claim, as a species of facial challenge, is a jurisdictional issue that cannot be waived, even by a guilty plea. *State v. Thiel*, 183 Wis. 2d 505, 518, 515 N.W.2d 847 (1994); *Trochinski*, 253 Wis. 2d 38, ¶34 n.3.

The overbreadth doctrine is this: while a person challenging the constitutionality of a statute "generally must have a personal and vested interest in the outcome of the litigation, demonstrating the statute's unconstitutional application to their individual conduct," this rule does not apply to First Amendment challenges "due to the gravity of a 'chilling effect' that may cause others not before the court to refrain from constitutionally protected speech or expression." *State v. Oatman*, 2015 WI App 76, ¶6, 365 Wis. 2d 242, 871 N.W.2d 513. Thus, "challengers may champion the free expression rights of others [even] when their own conduct garners no protection." *Id.* Under this doctrine, Mr. Jackson may challenge the statute as infringing the First Amendment rights of others, even if his own conduct was unprotected—though, as discussed above, he does not agree that it was.

The overbreadth doctrine is "strong medicine," to be "employed by the Court sparingly and only as a last resort." *State v. Janssen*, 219 Wis. 2d 362, 373, 580 N.W.2d 260 (1998). The overbreadth of a statute must be both "real" and "substantial," "judged in relation to the statute's plainly legitimate sweep." *Id.* As with the as-applied challenge, the burden is on the state to show constitutionality beyond a reasonable doubt. *Janssen*, 219 Wis. 2d at 371.

Subdivision 6m. is unconstitutionally overbroad because it requires a registrant to turn over to the government a wide array of information not remotely related to any threat to the public. Besides email addresses, the statute requires a registrant to inform the state of "the Internet address of every Web site the person creates or maintains, every Internet user name the person uses, and the name and Internet address of every public or private Internet profile the person creates, uses, or maintains."

Considering only the first clause in the above quote, Mr. Jackson, like any registrant, is required to notify the state regarding any website he maintains. So, for example, a registrant could not create a blog on Tumblr or Wordpress—on any subject—without informing the state about it (and, as discussed above, potentially having agents of the state inform the public about it). Simply put, subd. 6m. makes it a criminal offense for a registrant to blog, or run any other website, anonymously.

In *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012), the court addressed a very similar disclosure statute. It observed that

> The Internet, and blogs in particular, allow any person with a phone line to become a town crier with a voice that resonates farther than it could from any soapbox…. Blogs frequently, and perhaps mostly, involve discussion of matters of public concern. Blogs are by their nature open to the public and pose no threat to children. That sex offenders—perhaps the most reviled group of people in our community—may "blog" threatens no child, but the government reporting requirement—that puts a stake through the heart of the First Amendment's protection of anonymity—surely deters faint-hearted offenders from expressing themselves on matters of public concern. In particular, it substantially deters offenders from criticizing the government and officials of the government, including most especially overzealous prosecutors and cops.
>
> The same thing is true of "Internet sites maintained" by the offender. A site publicly available on the Internet poses no threat to children—after all, every police officer in the world can see it. But the requirement that offenders report to the police regarding the material they post to Internet sites they operate will surely deter offenders in business from maintaining such sites. In short, far too much expressive activity is unnecessarily chilled by this part of the statute.

Id. at 1121. Like the Nebraska statute, subd. 6m. chills a vast amount of speech that poses no conceivable threat to the public.

But it also goes much further. Besides "internet sites," it requires registrants to turn over "every Internet user name" and "every public or private Internet profile" they use. This means, for a start, that if Mr. Jackson wishes to comment on another person's blog or website, he will have to tell the government the name he uses to do so. Even more disturbingly, he must tell the government if he creates an account at the New York Times, or becomes a member of ACLU, or joins the Republican Party. He must do the same if he listens to music or watches movies via iTunes, or buys things on Amazon.com, or uses the web to access his bank account.

Requiring registrants to inform the government of essentially all their internet activity broadly denies them the right to speak anonymously, even in forums that have no conceivable relationship with public protection. Worse, the burden of informing the government of every single internet identifier will likely deter many registrants from participating in the internet's "vast democratic forums" at all. *Packingham*, 137 S. Ct. at 1735. It would be quite rational for a given registrant to decide that using the internet is not worth the risk of a six-year prison term if he should inadvertently neglect to tell the government he had signed up for, e.g., a digital subscription to the newspaper. *See Harris*, 772 F.3d at 573 (reporting requirement would "inevitably burden" registrants' use of the internet because it "imposed an impermissible 'affirmative obligation' and was 'almost certain to have a deterrent effect'").

In sum, "the scope of the internet identifying information required to be reported is not limited to identifiers used in the type of internet communications that enable sexual predators to entice children." *White*, 696 F. Supp. 2d at 1610. Subd. 6m. does not distinguish between genuinely threatening activities and "usernames created to engage in online dialogue over Amazon.com products or Washingtonpost.com news stories." *Packingham*, 137 S. Ct. at 1737. It sweeps in a vast range of conduct having no relationship at all to public protection; like the statute in *Harris*, its scope belies "even an attempt at narrow tailoring." 772 F.3d at 563. It is overbroad, and must be struck down.

CONCLUSION

Because Wis. Stat. § 301.45(2)(a)6m. is unconstitutional as applied to Mr. Jackson, and is also unconstitutionally overbroad, he respectfully requests that this court reverse his conviction and remand with directions that the charge be dismissed with prejudice.

Dated this 14th day of January, 2019.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,320 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of January, 2019.

Signed:

_____

ANDREW R. HINKEL
Assistant State Public Defender

APPENDIX

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