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IN THE SUPREME COURT OF IOWA
Supreme Court No. 25–1465
Franklin County No. FECR506960

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN HAROLD GREEN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FRANKLIN COUNTY
THE HON. GREGG ROSENBLADT, JUDGE

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. A three-year-old disclosed that his teacher made him "pet" the teacher's "wiener" until it "got big," then "put it in [his] mouth a bunch of times, and then icky green stuff came out." The child's mother heard that disclosure and reported it. In her deposition, she testified that the disclosure caused her to re-evaluate two earlier statements that she had thought were just her child "being silly." One was that the boy had said: "my teacher pooped in my mouth today." The other was a response to a question about why he was (reportedly) having accidents at daycare; he said "I didn't pee my pants. My teacher peed my pants." The child's disclosure of abuse made her view those statements differently, in retrospect.

The State moved to admit evidence of the statement that described oral sex as an initial disclosure of abuse, under section 622.31B. Green objected. He argued that one of the earlier statements was *the* initial disclosure under *Sievers*. The trial court ruled that, in order to be a "disclosure of . . . a sexual offense against the victim" under section 622.31B, a statement "needs to be detailed enough and clear enough for the person on the receiving end of it to understand what it is and know what is going on." So it ruled that the child's statement that revealed and described an act of oral sex (for the first time) was the initial disclosure under *Sievers*, and it overruled Green's objection and admitted testimony about that disclosure under section 622.31B. Did it err?

ROUTING STATEMENT

Green requests retention. *See* Def's Br. at 8. The State concurs. After *Sievers*, Iowa courts have to determine which of a child victim's statements was the first that could count as a "disclosure" so that they can admit *only* the very first disclosure under section 622.31B's hearsay exception. *See State v. Sievers*, 20 N.W.3d 203, 208–11 (Iowa 2025). This case presents an issue of first impression, requiring this Court to adopt some rubric for determining which statements are detailed/clear enough to qualify as disclosures. The law in this area is unclear, and the stakes are high. *See* Iowa R. App. P. 6.1101(2)(c), (d), & (f). So retention is proper.

Of course, State warned of this in *Sievers*: the statute that was intended "to allow in more evidence of reliable statements that disclose abuse" is now a trap for prosecutors and courts—and the error alleged has nothing to do with the reliability of the statements or the fairness of the trial. *See Sievers*, 20 N.W.3d at 216 (Waterman, J., dissenting). *Sievers* was incorrect for the reasons identified in that dissent. This case illustrates the problems with *Sievers*'s reading of section 622.31B. As such, the State requests retention so that this Court can overrule *Sievers*.

NATURE OF THE CASE

Benjamin Harold Green appeals from his convictions on three counts of second-degree sexual abuse, a Class B felony, in violation of Iowa Code section 709.3(1)(b) (2014). Each count involved a different child who went to the daycare that employed Green. All three testified that Green touched their genitals. The jury found Green guilty as charged. At sentencing, the court imposed a 25-year term of incarceration with 70% minimum before parole eligibility on each count, then set two of them to run consecutively to each other (with one to run concurrently). *See* D0229, Sentence (9/4/25); D0230, Nunc Pro Tunc (9/8/25); D0252, Sent. Tr. (9/4/25), 32:6–36:22.

On appeal, Green argues that the trial court erred when it ruled that the mother of one of those children could testify about the first statement from her son that described an act of oral sex with Green and alerted her to the fact that he was being abused. Green argues it was error to rule that the toddler's earlier statements were not "disclosures" and did not displace this later statement as "the initial disclosure" under *Sievers*. Green is incorrect. No prior statement was "detailed enough [or] clear enough for the person on the receiving end of it to understand." *See* D0255, Trial Tr. vol. 2 (7/1/25), 23:18–27:15. The trial court was correct that any statement that no listeners can understand is not a "disclosure" of anything—the abuse remains secret.

Courts need guidance how to apply section 622.31B, and this Court should provide it. But if it finds this was not an "initial disclosure," it should still affirm because the statement was admissible as residual hearsay, under Rule 5.807. Green was given the requisite notice, and the trial court (correctly) found "sufficient safeguards of reliability." *See* Iowa Code § 622.31B(3). And the statement was the most probative evidence of the acts of sexual abuse that the child was disclosing (because it contained key details about sex acts that were missing from his recollection when he testified during trial). *See* Iowa R. Evid. 5.807; *State v. Veverka*, 938 N.W.2d 197, 204 (Iowa 2020).

As a last resort, this Court should overrule *Sievers*. This case illustrates *Sievers'* flaws: the Legislature did not envision admission of vague statements and not the first clear one. If Green is correct, *Sievers* interpreted section 622.31B to an absurd result. And if reversal is the penalty for picking the wrong incremental disclosure as "*the* initial disclosure," that threat deters use of section 622.31B, making it all but useless. The Legislature did not likely intend this. This Court should overturn *Sievers*. Otherwise, prosecutors will likely foreswear 622.31B evidence.

STATEMENT OF THE CASE

From 2013 through 2019 (except for "a couple of months" in 2017), Green worked at Hampton Community Christian Daycare in Hampton, Iowa. *See* D0254, Trial Tr. vol. 3 (7/2/25), 112:19–120:20. For most of 2018, Green was staffing the room for two-year-olds ("Little Lambs"); one of the children under his care during that time was Herschel.[1] *See id.* at 119:19–120:20.

Herschel's mother (Stephanie) testified that, through most of 2018, their family primarily used an in-home daycare that the children preferred. But on days when the in-home provider "wasn't available," Stephanie took Herschel and his older brother to Hampton Community Christian Daycare. Stephanie's family continued to use HCCD "sporadically" throughout 2019. *See* D0255, Trial Tr. vol. 2, 131:11–134:8. Sometimes, at drop-off, Stephanie noticed that Green "seemed excited to see [Herschel]" and "greeted [him] as Prince H----." She could tell that Herschel "did not like that." His reaction to seeing Green was to try to avoid him. *See id.* at 142:15–144:4 & 148:11–20.

The initial disclosure: "[Herschel] just told me that … he had been sexually assaulted at the daycare."

Stephanie would typically pick up both children, at the end of the day. *See id.* at 136:9–16. On September 13, 2019, Stephanie picked up Herschel

[1] "Herschel" is a pseudonym chosen arbitrarily from names that begin with the correct letter, to avoid confusion with other pseudonymous victims.

and asked "how [his] day was," like she always did. *See id.* at 144:9–148:25. Herschel "started to get upset" as he began answering Stephanie's question:

> [Herschel] told me that he petted Prince Wednesday's wiener and that it got big and that then he ate it.
>
> … [A]fter that I said, "Oh, what do you mean by that?" And he said, "Prince Wednesday is big like Daddy, and his wiener got big like Daddy, and he put it in my mouth a bunch of times, and then icky green stuff came out of it."
>
> […]
>
> **STATE**: Did [Herschel] tell you on this day what he had to do after the stuff was in his mouth?
>
> **STEPHANIE**: Yeah. He said that he had to wash his mouth out and brush his teeth and that then Prince Wednesday put the toothbrush in his pocket.

See id. at 148:2–149:24. Herschel was three-and-a-half years old. *See id.* at 147:3–19. Stephanie kept driving and tried to remain calm. Herschel told Stephanie that this had happened "in Prince Wednesday's bathroom." *See id.* at 149:10–150:24. Herschel seemed "matter of fact" about this, "like he was sharing some normal thing with [her]." *See id.* at 153:3–16.

When they got home, Stephanie called HCCD and told someone there "that [Herschel] just told [her] that … he had been sexually assaulted at the daycare." *See id.* at 152:5–16. She called the police, too. *Id.* at 152:17–25. Stephanie found a picture of Green on Facebook. She showed it to Herschel. Herschel said: 'That's Prince Wednesday.'" *See id.* at 155:16–156:17.

That evening, Stephanie took Herschel to the emergency room for a physical examination and to a Child Protective Center for an interview. *See id.* at 153:14–154:22. While at the emergency room, Herschel said "that he could not tell the doctor or anyone what had happened to him because his teacher would be mad at him, and his teacher had said that he would hurt [them] if [Herschel] told." He clarified that the "teacher" who said that was the same person who did the other things. *See id.* at 166:19–167:10.

Green's objection, based on Herschel's earlier statements—which did not actually "disclose" sexual abuse.

After that September 2019 disclosure, Stephanie realized that there were two prior instances where Herschel said things that seemed like silly toddler tales at the time, but might actually have been related to sexual abuse. *See id.* at 163:19–164:4; D0189, Court Ex. 33, 6:22–7:15. Stephanie did not express certainty as to which of these two instances was first. In one of them:

> I just was like, "[Herschel], you know, I've noticed you seem to be having a lot of accidents at day care." And his potty training had been going pretty well at home, so it was odd to me. And he said, "I didn't pee my pants. My teacher peed my pants." And I was like, "What?" I was like, "You're so silly." I just thought he didn't want to fess up to me that he was having accidents.

D0189, Court Ex. 33, 7:16–8:7. The other instance:

> It was just kind of out of the blue, and [Herschel]'s like, "Mom, my teacher pooped in my mouth today." And I was like, "What?" Of course … my older one, is in the car, and he's very

> vocal and is like, "Huh-uh." And it's kind of what I thought too. I was like, "What the heck? Why would anyone do that?"

Id. at 8:8–15. Stephanie said these "very likely" happened "in late 2018 or in 2019." Herschel turned three years old in early 2019. *See id.* at 8:16–9:3. Neither of those statements caused Stephanie to suspect any sexual abuse—her view of those statements only changed after Herschel's disclosure "that he petted Prince Wednesday's wiener." *See id.* at 9:6–10:13 ("That did not sneak by me. There was no misunderstanding that.").

The State provided notice of its intent to offer Stephanie's testimony about Herschel's statements on September 13, 2019, as an initial disclosure of sexual abuse under section 622.31B. *See* D0105, Notice (5/7/25); D0108, Amended Notice (6/17/25). Green objected. He argued that, under *Sievers*, "[t]hose two [prior statements] were the initial disclosures" because "the case doesn't say that the person has to recognize it at the time." *See* D0255, Trial Tr. vol. 2, 13:14–15:22. The State replied that the September 13 statement was the first time Herschel gave "specifics" and the first true "disclosure." *See id.* at 18:11–19:22. The court's ruling was thorough. In part, it said:

> It appears that there were a couple of occasions prior to the 13th of September when [Herschel] made some comments that were different or interesting or odd, however you want to phrase it, that his mom thought about a little bit.
>
> […]
>
> The question that I kind of have is when we talk about disclosure, the actual definition of "disclosure" that I'm looking

> at here from — I think it's the Oxford dictionary — is the action of making new or secret information known.
>
> So I think for it to be a disclosure that it has to be clear enough and detailed enough that somebody else knows that you're making a disclosure and knows what you're talking about. Clearly on the 13th of September that was satisfied because the mom knew at that point that, oh, something specific happened.
>
> […]
>
> [I] think the disclosure needs to be detailed enough and clear enough for the person on the receiving end of it to understand what it is and know what is going on. And I think these other initial comments were, in hindsight, you know, you can look back and say, Well, that makes a little more sense now, and I think maybe now I know what it was about. But I think until this statement on the 13th of September, those things weren't known.

Id. at 21:1–27:20. It also found that the timing, content, and circumstances surrounding the statement supported its reliability and admissibility. *See id.*

Herschel's testimony at trial, six years after that disclosure

Herschel—now nine years old—identified Green at trial and testified that he referred to Green as "Prince Wednesday." *See* D0254, Trial Tr. vol. 3, 19:7–21:14. He testified that Green would take him into the bathroom at the daycare and touch his "private parts," then "tell [him] to brush his teeth." *See id.* at 21:17–22:6; *accord id.* at 28:6–8 (identifying those specific parts). He remembered telling his mother about what happened, and he was sure that he had told her the truth. *See id.* at 22:7–25. He could remember that Green told him to keep this a secret. *See id.* at 23:19–24. But he could not remember whether Green ever put anything into his mouth. *See id.* at 23:9–14. So none

of the details about the act of sexual abuse that Herschel had described in his disclosure to Stephanie were available from any source other than testimony recounting that disclosure. *See* D0255, Trial Tr. vol. 2, 148:2–149:24.

Testimony from the other two victims about how Green touched their vaginas while supervising them at HCCD

Two 11-year-old girls (pseudonymously, Chaya and Mayim) testified about incidents where Green would tell the two of them to follow him to a secluded spot, where he would touch their vaginas. *See id.* at 202:23–208:16 (Chaya: "It was recess. He took us behind the building, and he touched us. … He said don't tell anybody."); D0254, Trial Tr. vol. 3, 64:16–70:4 (Mayim: "[H]e touched us, he touched me in a place that I did not like. … My vagina. … [J]ust used his hands and just rubbed them."). Chaya had felt "shocked" when it happened, but she did not tell anybody—because Green said not to, and she "was supposed to listen to grownups." *See* D0255, Trial Tr. vol. 2, 208:17–209:8. Mayim did not tell anybody for the same reason, and because she "didn't know it was wrong." *See* D0254, Trial Tr. vol. 3, 69:22–71:7.

While Chaya's family used HCCD, Chaya's parents started noticing that Chaya "frequently touched herself in her genital area" with her fingers, "usually when she was by herself." *See* D0255, Trial Tr. vol. 2, 185:2–19. Mayim's parents noticed similar behaviors from Mayim—she was "using her hand to touch her vagina" in a way similar to "masturbation" as a form

of "self-soothing," around the same time. *See* D0254, Trial Tr. vol. 3, 46:14–48:4. Mayim had also begun telling her mother that she was "very scared" of Green, but she didn't reveal why. *See id.* at 43:25–45:11. Mayim used to break down in tears whenever it was time for her to go to HCCD:

> … [Mayim] would cling to [her preschool teacher] and say, "Don't send me there," and she would cry and cry and cry.
>
> She went to preschool during the morning hours and then would go to daycare in the afternoon hours. And she would say, "Please don't send me back over there. Please don't send me over there."

See id. at 48:8–49:13. Mayim's mother mentioned this to the chief of police, which led to Mayim's parents bringing her to the CPC for a forensic interview. *See id.* at 48:8–52:3. When Chaya's name came up, police told her parents. Chaya, too, was interviewed at the CPC. *See* D0255, Trial Tr. vol. 2, 186:18–190:3; *accord* D0253, Trial Tr. vol. 4 (7/3/25), 78:12–79:25. The videos were not offered as evidence. *But see* D0109, Notice Pursuant to 5.807 (6/20/25).

Chaya and Mayim remembered each other. They were friends when they were little girls at daycare. But they weren't in contact anymore at the time of trial, and their families didn't maintain any ongoing contact with each other. *See* D0255, Trial Tr. vol. 2, 183:8–184:19; *id.* at 191:17–193:5; D0254, Trial Tr. vol. 3, 45:12–46:13; *id.* at 53:23–64:16; *id.* at 76:24–77:4.

HCCD only kept video footage for 90 days. But timesheets confirmed Green worked at HCCD on days when Herschel was there (and ruled out Green's mistaken-identity theory).

There were CCTV cameras at HCCD, installed in April 2019. But the system's hard drive had limited storage; it deleted the footage automatically after 90 days. *See* D0254, Trial Tr. vol. 3, 133:10–134:10; *id.* at 142:24–143:19. When Herschel disclosed the abuse in September 2019, police reviewed the then-existing footage. They found some incidents where Green briefly kissed other children, and one where he snuggled with a child under blankets. *See* D0253, Trial Tr. vol. 4, 75:18–77:18; D0203–D0205, State's Ex. 30–32. All footage from more than 90 days earlier was already lost forever. *See* D0254, Trial Tr. vol. 3, 160:8–18. But timesheets and attendance records confirmed that Herschel was at HCCD while Green was working there, on many dates in 2018 and 2019. *Id.* at 119:19–120:20; D0253, Trial Tr. vol. 4, 80:1–81:3.

At trial, Green suggested that another male who worked at HCCD and shared some characteristics with Green might have sexually abused Herschel (and Herschel made a mistaken identification, when he named Green). *See, e.g.*, Trial Tr. vol. 3, 137:14–138:7 & 141:9–24. But timesheets and attendance records from HCCD showed Herschel and that other male employee "would never have crossed paths" because they were never present at HCCD at the same time. *See* D0253, Trial Tr. vol. 4, 88:14–89:12 ("Not even one day.").

Green's interview and his testimony

Police spoke to Green. He remembered Herschel and said that he had been calling him "Prince H----" ever since he was a baby. But he said that he never went into the bathroom alone with Herschel. *See id.* at 30:6–31:20.

Green testified that Herschel was "never there" for "the full day," and was "just, like, a drop-in once every blue moon." *See* D0249, Trial Tr. vol. 5 (7/7/25), 54:16–55:16. He said that Herschel was never potty-trained when he was at HCCD. He said that he took Herschel into the bathroom, but only to wash his hands. He said the door to the bathroom was always open. *See id.* at 55:17–57:1. He also claimed that he never took Herschel inside during outdoor playtime to change his diaper, because Herschel "usually did good outside." *See id.* at 57:2–19. Green admitted that he used to brush his teeth during the day, so he kept his toothbrush with him in the classroom. *See id.* at 60:21–62:18. He said that, at one point, the two-year-old room tried having the kids brush their teeth, too. But he said that he had never helped Herschel brush his teeth, even then. *See id.* at 60:21–63:3.

Green knew Chaya. Like Herschel, she was in the two-year-old room while Herschel was staffing it. He said that he was never alone with Chaya, either. *See id.* at 67:7–68:2. He said that he did not remember Mayim. *See id.* at 68:14–69:10. He said that "Prince Wednesday" was not him; he said it

was the drag persona of the other male who once worked at HCCD (who was never present while Herschel was there). *See id.* at 70:17–71:24. Green denied ever touching Herschel, Chaya, or Mayim in the ways that they had described. *See id.* at 79:23–80:24. But he admitted that he would be able to enter any empty room/area with any child during outside time, if he said he was taking them inside to use the bathroom (and that other staff would have simply relied on what he said he was doing, over the walkie-talkies). *See id.* at 83:8–87:19. And he agreed (but only after being shown video) that he had been alone with various children at various times. *See id.* at 93:15–96:6.

Count I charged Green with performing a sex act with Herschel. *See* D0211, Jury Instr. 15. Count II pertained to Chaya. *See* D0211, Jury Instr. 16. Count III pertained to Mayim. *See* D0211, Jury Instr. 17. The jury found Green guilty as charged, on all three counts. *See* D0213, Verdict (7/22/25).

ARGUMENT

I. The district court did not abuse its discretion in admitting evidence of Herschel's initial disclosure to Stephanie.

Preservation of Error

Error was preserved by the ruling that admitted Stephanie's testimony about Herschel's disclosure, over Green's objection under *Sievers*. *See* D0255, Trial Tr. vol. 2, 21:1–27:20.

Standard of Review

Iowa courts generally "apply a correction-of-errors-at-law standard both to evidentiary rulings about hearsay … and to district court rulings on questions of statutory interpretation." *See Sievers*, 20 N.W.3d at 208.

Merits

A. A "disclosure" is a statement that reveals something. Any statement that does not reveal *to a listener* that abuse occurred is not a disclosure of abuse.

Section 622.31B(2) authorizes the admission of statements that would otherwise be hearsay, when those statements are "an initial disclosure of an offense charged for … a sexual offense against the victim." *See* Iowa Code § 622.31B(2). *Sievers* held that "an initial disclosure" means only "the *first* disclosure of the offense." *See Sievers*, 20 N.W.3d at 208–11. Green argues that one of Herschel's earlier statements—one that was not a clear description of sexual abuse and wasn't understood that way by Stephanie—was the *first*

disclosure of sexual abuse, and that the court erred when it instead admitted Herschel's disclosure that unambiguously described an act of sexual abuse. But that argument relies on a definition of "disclosure" that has no support in the statute's text and frustrates its purpose—it would require courts to admit statements that do not really disclose or describe anything, in place of statements that do. *See* Def's Br. at 36–40. This Court should hold that a statement that either does not reveal abuse to a listener or does not include a discernible description of abuse is not a "disclosure" under section 622.31B.

1. To qualify as a disclosure of an offense, a statement must reveal abuse or make abuse known to someone.

When *Sievers* construed the term "initial" in section 622.31B, it relied on dictionary definitions, ordinary usage, and meaning afforded to the term in other statutes. *See Sievers*, 20 N.W.3d at 209–10. Here, all three support the trial court's ruling that any statement that did not actually reveal abuse to any listener was not a "disclosure" under section 622.31B.

Dictionary definitions: The trial court was correct that the first definition of "disclosure" in the New Oxford American Dictionary is: "the action of making new or secret information known." *See* D0255, Trial Tr. vol. 2, 24:12–16; *Initial, New Oxford American Dictionary* (3d ed. 2010). Black's Law Dictionary offers a similar definition—a disclosure is "[t]he act or process of making known something that was previously unknown; a

revelation of facts." *Disclosure*, BLACK'S LAW DICTIONARY (12th ed. 2024). Without disclosing abuse, without *the effect* of revealing that abuse, it cannot be a disclosure of abuse.

Green's brief offers one dictionary definition: a disclosure is "the act of making something known or the fact that is made known." *See* Def's Br. at 30 (quoting Cambridge Dictionary, URL omitted). The first half of that definition is correct, applicable, and consistent with other definitions. The second half classifies the *fact described in the statement* as a disclosure—but only if that fact "is made known." Here, too: a fact that isn't "made known" cannot be a disclosure; only facts that are *disclosed* can be disclosures.[2]

Green cites *State v. Carmello*, 558 P.3d 439, 441–42 (Or. App. 2024) for the proposition that "[s]ynonyms for disclose include words like 'report,' 'complaint,' or 'allegation.'" *See* Def's Br. at 30. *Carmello* was about the use of the term "disclosure" by witnesses at trial, to refer to a child's statements that revealed abuse—and whether calling them "disclosures" was vouching. It held that using the term "disclosure" isn't necessarily vouching, because it expresses no belief in the truth or falsity of the information disclosed—it

[2] This fact-as-disclosure definition isn't a great fit for section 622.31B because the statute asks whether a certain statement "made by the victim" was "an initial disclosure." Because the statute is about *statements* that are disclosures, only definitions that can apply to statements are pertinent.

only means "that the information was not previously shared." *See Carmello*, 558 P.3d at 441–42. Implicit in that definition—so obvious that it didn't need to be stated—was that such a "disclosure" must actually share the information that had not previously been shared. And *Carmello* relied on *State v. Solano*, where the Oregon Court of Appeals rejected a similar challenge by quoting a dictionary "defining 'disclose' as 'to expose to view' or 'to make known' or 'open up to general knowledge.'" *See State v. Solano*, 551 P.3d 938, 943–44 (Or. Ct. App. May 22, 2024) (quoting *Webster's Third New Int'l Dictionary* 645 (unabridged ed. 2002)); *accord Carmello*, 558 P.3d at 441.

Every pertinent dictionary definition for "disclose" or "disclosure" includes some element of revelation, exposure, or making known. So any statement that reveals nothing and makes nothing known to any listener cannot be a disclosure—it falls outside any accepted definition of the term.

Ordinary usage: Here, it is critical to note that section 622.31B applies to statements that are "an initial disclosure *of* [*an*] *offense*." *See* Iowa Code § 622.31B(2). There are various filings, forms, and documents that are labeled "disclosures," without reference to their effectiveness (or lack thereof) at imparting information to lay readers. But "disclosure of X" is commonly used and understood to mean a statement that reveals X—and it never refers to a statement that *doesn't* or *wouldn't* reveal X. *See, e.g.*,

Josh Russell, *NYC Seeks to Scrap Police Union Challenge to Disclosure of Officers' Disciplinary Records*, COURTHOUSE NEWS SERV. (Jul. 13, 2026); Joe Gallinaro, *Effective August 1st, Creators of Louisiana Political Ads Must Provide Disclosure of AI Usage*, LOUISIANA RADIO NETWORK (Jul. 13, 2026); Masanori Mori et al., *Patient-Centered, Family-Based Approach to Disclosure of Cancer Diagnosis*, 9(4) JAMA NETWORK OPEN (Apr. 30, 2026), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2848409; *accord Richmond v. Jefferson County Attorney*, 34 N.W.3d 827, 831–33 (Iowa 2026) (explaining that "disclosure of information in a particular case" is how prosecutors discharge *Brady*/*Giglio* duties to make evidence known to defendants and to not "withhold evidence that is favorable").

To say that a statement is a "disclosure of the offense" of sexual abuse when it fails to reveal or make it known that any act of sexual abuse occurred "would not simply be bizarre; it would be false." *See Sievers*, 20 N.W.3d at 209. So Green's effort to broaden the term "disclosure" to include statements that disclose nothing fails that ordinary-usage test and should be rejected.

Meaning in other provisions: Generally, when the Iowa Code uses the term "disclosure," it refers to a statement or filing that either reveals or publishes something, or otherwise makes something known to others. *See*, *e.g.*, Iowa Code § 321N.10 (stating that transportation network companies

"shall not disclose a … rider's personal information to a third party" unless done under specified conditions); *id.*, § 198.15 (providing Secretary of State's annual publication on commercial feed "shall not disclose the operations of any person"); *id.*, § 9E.8 (prohibiting "disclosure of [a person's] address" if that person is a participant in Iowa's Address Confidentiality Program); *id.*, § 679C.104 (outlining privilege by which parties "may refuse to disclose, and may prevent any other person from disclosing, a mediation communication"); *id.*, § 203C.25 (requiring anyone making "shrinkage adjustments" for scale weight of grain must "post on the business premises in a conspicuous place notice of the rate of adjustment," and stating "[t]he person who fails to make this disclosure commits a simple misdemeanor"); *id.*, § 455K.5 (specifying conditions under which a court or officer in an administrative hearing "may require disclosure of a portion of an environmental audit report," including multiple conditions relating to public need for information to be disclosed).

Perhaps only chapter 659A defines the term "disclosure," which creates a civil remedy for unauthorized disclosure of intimate images—defined as "transfer, publication, or distribution" of an intimate image "to another person." *See id.,* § 659A.2(3). But if an image is sent to nobody—or if garbled data is sent instead—no disclosure occurs.

Section 228.7A authorizes and requires mental health professionals to disclose specific information to law enforcement when "[t]he disclosure is necessary to prevent or lessen a serious and imminent threat." *See id.*, § 228.7A(1). It envisions civil and/or criminal liability for a "failure to disclose" information about any imminent threat against a clearly identifiable victim. *See id.*, § 228.7A(2). But even if there was a "failure to disclose," the statute shields a professional who "discharges [their] duty to disclose … by making reasonable efforts to communicate the threat to … law enforcement." *See id.*, § 228.7A(3). The takeaway is that efforts to communicate information do not count as "disclosure" of that information if those efforts fail; that counts as a "failure to disclose" (albeit one where the professional may be shielded from liability, under subsection (3)). So a "disclosure" must reveal or communicate the fact to be disclosed—or there is no disclosure at all.

Repeatedly, "disclosure" is used to describe communications that make some information known to someone who didn't already know it. *See id.*, § 679C.109 (requiring mediators to determine if there are any facts that might affect their impartiality, and to "[d]isclose any such known fact to the mediation parties as soon as is practicable"); *id.*, § 915.43 (allowing disclosure of convicted offender's HIV test results to offender, victims, and few others—

and stating that "[a] person to whom disclosure of … test results is authorized … shall not disclose the results to any other person for whom disclosure is not authorized"); *id.*, § 232.151 (specifying criminal penalty for "[a]ny person who knowingly discloses … information derived directly or indirectly from [juvenile court] records," except "when such person or entity discloses such information to another person or entity also authorized to receive or inspect the confidential information, or discloses to a witness … the date, time, and nature of a court proceeding … to secure the appearance of the witness"); *id.*, § 622.11 ("A public officer cannot be examined as to communications made to the public officer in official confidence, when the public interests would suffer by the disclosure."); *id.*, § 533C.607 (outlining the conditions under which superintendent of banking or staff "may disclose information" obtained in the course of official duties, to specific entities or to the public); *id.*, § 554A.1 (absolving livestock sellers of applicable implied warranties "if the following information is disclosed to the prospective buyer or the buyer's agent in advance of the sale"); *id.*, § 523I.301 (specifying information that a cemetery "shall disclose, prior to the sale of interment rights"). And there is no example of an instance where any gibberish/incomprehensible statement would qualify as a disclosure—much less disclosure "of" any fact.

Whether this Court relies on dictionary definitions, ordinary usage, or inference from the term's use in other code provisions, the result is the same. The term "disclosure of [an] offense" can only describe a statement that reveals an offense to the listener. A statement made in a forest where nobody can hear it is no disclosure—it reveals nothing to anyone. A statement describing sexual abuse in a language that nobody understands is not a disclosure—it reveals nothing and makes nothing known (no matter what it might mean, as intended/contemplated by the speaker). And Herschel's statements that were not and could not have been understood as descriptions of real abuse—his statements that "my teacher peed my pants" and "my teacher pooped in my mouth," which seemed like ordinary toddler silliness to Stephanie—disclosed no offense for the same reason: they didn't reveal abuse or make any act of abuse known. Stephanie heard those statements, and she remained unaware that abuse had occurred until Herschel's actual disclosure of an offense: his statement to Stephanie that clearly described sexual abuse, which revealed abuse and made it known (and thus was properly admitted). *See* D0255, Trial Tr. vol. 2, 21:1–27:20; D0189, Court Ex. 33, 9:6–10:13. So the trial court did not err in ruling that his prior statements—which *did not* reveal abuse or make abuse known to anyone—did not count as "disclosure[s] of an offense" or supplant his

statement that revealed the abuse as the initial disclosure (and the only admissible statement under *Sievers*).

2. Green's claim that unintelligible statements become disclosures when made by young children is untenable.

Green's definition of "disclosure of an offense" starts off well enough. It begins from the definition that Texas courts use for identifying the proper outcry witness: a disclosure of an offense is "a statement which provides a discernible description of physical or sexual abuse." *See* Def's Br. at 30–31; *accord, e.g.*, *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Ct. Crim. App. 1990) ("[T]he outcry witness must be the first person … to whom the child makes a statement that in some discernible manner describes the alleged offense."). But neither of Herschel's prior statements did that—they weren't discernible descriptions of the sex abuse that he later described, in his actual disclosure. So Green must add: "What constitutes a discernable description must take into account the speaker's age and development." *See* Def's Br. at 31, 36–40. That argument has no basis in the text of section 622.31B. It has no support in any of the persuasive authority Green cites. It would put trial courts in an impossible position (especially after *Sievers*). And it would act counter to the legislature's intent to make a child's statements admissible when they are reliable disclosures of abuse.

a. The text of section 622.31B disclaims Green's approach.

Courts "may not—under the guise of statutory construction—enlarge or otherwise change the terms of a statute as the legislature adopted it." *Sievers*, 20 N.W.3d at 211 (quoting *Bridgestone Ams., Inc. v. Anderson*, 4 N.W.3d 676, 685 (Iowa 2024)). Green's brief points to no textual hook in section 622.31B supporting his view that courts "must take into account the speaker's age and development" in determining whether a statement is a disclosure of abuse. *See* Def's Br. at 31, 36–40. The legislature knows how to include that as a factor to be considered, when it wants to. Indeed, it did so in a different part of the same statute—the part that lists factors that an eventual finder of fact should consider in "determin[ing] the weight and credibility to be given to the statement," *after* its admission. *See* Iowa Code § 622.31B(4). The deliberate choice to *exclude* that as a factor in rulings on admissibility must be given effect. *See State v. Lind*, No. 25–0819, 2026 WL 1765364, at *8 (Iowa June 19, 2026) (quoting *State v. Macke*, 933 N.W.2d 226, 235 (Iowa 2019)) ("[W]hen the legislature includes particular language in some sections of a statute but omits it in others, we presume [it] acted intentionally."). So Green's gloss is not just atextual—it is antitextual.

b. Persuasive authority supports the "discernible description" definition. None supports Green's extra gloss.

Green correctly focuses on Texas for persuasive authority. *See* Def's Br. at 32–36. Texas has an outcry statute that authorizes admission of statements about the charged offense "made to the first person … to whom the child made a statement about the offense." *See* Tex. Code Crim. Proc. art. 38.072(2)(a)(2) (2026). This requires Texas courts to adjudicate objections to evidence offered under that statute, where an objector argues that an earlier statement by the child (to someone else) was "a statement about the offense" that precludes admission of the subsequent disclosure. In *Garcia*, the Texas Court of Criminal Appeals construed the statute this way:

> [T]he outcry witness must be the first person, 18 years old or older, to whom the child makes *a statement that in some discernible manner describes the alleged offense*. We believe that the statement must be more than words which give a general allusion that something in the area of child abuse was going on. In picking the particular wording of the "first person" requirement, the legislature was obviously striking a balance between the general prohibition against hearsay and the specific societal desire to curb the sexual abuse of children. … [T]he societal interest in curbing child abuse would hardly be served if all that "first person" had to testify to was a general allegation from the child that something in the area of child abuse was going on at home. Thus we decline to read the statute as meaning that any statement that arguably relates to what later evolves into an allegation of child abuse against a particular person will satisfy the requisites of Sec. 2(a)(2). The statute demands more than a general allusion of sexual abuse.

See Garcia, 792 S.W.2d at 91 (emphasis added). Therefore, "[i]n order to be designated as the outcry witness by the trial court, one element that must be clearly shown … is that the victim described the offense to that witness." *Id.*

If the victim does not describe the offense to the witness, that person is not the outcry witness for that offense. *See Tear v. State*, 74 S.W.3d 555, 559 (Tex. Ct. App. 2002) (holding that a prior statement about defendant putting fingers in the child's bottom, made to child's foster mother, did not prevent therapist from being outcry witness and testifying to later statement because the later statement was "the first time [the child] made a statement about [the defendant] putting [child's] penis in his mouth"). Green is right to note that "[t]he proper outcry witness is not to be determined by comparing the statements the child gave to different individuals and then deciding which person received the most detailed statement about the offense." *See* Def's Br. at 34 (quoting *Thomas v. State*, 1 S.W.3d 138, 141 (Tex. Ct. App. 1999)). But the next sentence in that case explains that "the first person to whom the child *described the offense in some discernible manner* [may] testify about the statements the child made." *See Thomas*, 1 S.W.3d at 141 (citing *Garcia*, 792 S.W.3d at 91). If the prior statement does not describe the offense in some discernible manner, it is not a disclosure/outcry and it cannot affect the admissibility of a subsequent statement that *does* describe the offense.

Green is also correct that Texas courts generally find that a statement counts as an outcry/disclosure of the abuse when the child describes "how, when, and where [the defendant] had touched them." *See Reed v. State*, 974 S.W.3d 838, 842 (Tex. Ct. App. 1998); Def's Br. at 33. Neither of Herschel's earlier statements to Stephanie did that. Moreover, this version (like all the other formulations that Texas courts use) is still about the actual content of the outcry/disclosure statement—the "age and development" of the child that Green offers as gloss on section 622.31B is never part of the analysis.[3]

The most instructive case Green discusses is *Bradshaw v. State*, where the child's mother "asked the child victim if Bradshaw did anything to her" and "[t]he child victim pointed to her mouth but did not say anything." *See Bradshaw v. State*, 675 S.W.3d 78, 81 (Tex. Ct. App. 2023); Def's Br. at 34. Later, in a forensic interview, the child told the interviewer that Bradshaw "put his penis in her mouth." *See Bradshaw*, 675 S.W.3d at 81. *Bradshaw* affirmed the trial court's ruling that the interviewer was the outcry witness and could testify about the child's statement during the interview, because

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[3] Green's reference to *Clark v. State*, 558 S.W.2d 887, 888–89 (Tex. Ct. Crim. App. 1977) is inapposite because *Clark* does not involve a challenge to admission of evidence under this statute. *See* Def's Br. at 33. Of course, if a child said that a person touched her "front butt," and a listener understood what that meant, that would count as an outcry/disclosure because it would describe the sexual abuse in a discernible manner and reveal it to a listener. The child's age and development are irrelevant in that analysis.

it was the first "discernible description of a sexual offense that had occurred." *See id.*

There are three important things to note about *Bradshaw*. First, the court seemed to assume that the child's gesture was a non-verbal assertion and *could* have qualified as an outcry, if it had described the sexual offense (and that pantomiming sexual abuse would count as an outcry). Its holding treated the gesture as a statement and analyzed it accordingly.

Second, the child's mother understood the gesture to mean something, and she "called the police because she believed that the child victim pointing to her mouth described oral sex between Bradshaw and the child victim." *See id.* But that still did not mean the child's mother was the proper outcry witness. Why not? Because the mother's intuition did not change the fact that the gesture had not "provided anything beyond a general insinuation that a sexual offense ha[d] occurred." *See id.* (citing *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Ct. Crim. App. 2011)). So even when a listener can fill in the gaps, the focus is still on the contents of the statement itself and whether it truly describes a discernible act of abuse and *reveals* it. An insinuation is not enough, even if it piques an astute listener's suspicion.

Third, although the child "was five years old at the time," neither that fact nor any fact about the child's development or maturity was relevant in

analyzing whether her gesture qualified as an outcry/disclosure. *See id.* Neither Green nor the State can find *any* Texas case that relies on a child's young age or apparent level of development to treat a statement that fails that discernible-description test (or the related how-when-where test) as an outcry/disclosure and to preclude admission of a later statement that actually *does* provide a discernible description of sexual abuse. *See* Def's Br. at 32–36. So Texas authority weighs heavily against Green's position.

The only other source of persuasive authority is Michigan, which authorizes admission of a statement that corroborates a child victim's testimony. However, "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible." *See* Mich. R. Evid. 803A(b). The term "corroborative statement" seems to set a much lower bar. But even so, Michigan courts will affirm rulings that admit "the first corroborative statements describing the sexual abuse"—and not earlier vague statements. *See People v. Thatcher*, No. 238361, 2003 WL 22092582, at *1 (Mich. Ct. App. Sept. 9, 2003) (per curiam); *People v. Bartlett*, No. 352470, 2021 WL 5408525, at *6–7 (Mich. Ct. App. Nov. 18, 2021) ("While IJ had made earlier vague corroborative statements about being touched, the statements made to Wright were the first statements that actually corroborated IJ's trial testimony about forced fellatio and that

defendant had rubbed his penis on her vagina."); *cf. People v. Ferree*, No. 342246, 2019 WL 2145968, at *2 (Mich. Ct. App. May 16, 2019) (rejecting challenge that testimony about other conversations was testimony about a corroborative statement, because it did not "contain a description of [an] incident of sexual abuse"). And no Michigan court has superimposed any age/development analysis. Green's new gloss enjoys no support there, either.

c. When applied in conjunction with *Sievers*, Green's approach puts trial courts in an impossible position: they must guess which statement is the initial disclosure, and they must guess how to "take into account the speaker's age and development" in making that determination.

A discernable-description definition of "disclosure" is concrete. It is not perfect, but it places the goalposts: trial courts should try to identify the earliest statement that reveals that an act of abuse occurred and gives some discernible description of that abuse. *See Garcia*, 792 S.W.2d at 91. Green wants those goalposts to move up and down the field, to "take into account the child's age and development," and he wants this Court to do the same when it reviews rulings that sort through a series of statements to identify the initial disclosure. *See* Def's Br. at 36–40. This puts trial courts in an impossible position—a high-stakes guessing game with only one correct answer, and no real way to identify it before they rule.

Green correctly notes that Texas appellate courts review rulings that admit statements under their outcry-witness statute for abuse of discretion. *See* Def's Br. at 33 n.1; *Bradshaw*, 675 S.W.3d at 80 (quoting *Garcia*, 792 S.W.3d at 92).[4] But in Iowa, admissibility of hearsay evidence are reviewed under "a correction-of-errors-at-law standard." *See Sievers*, 20 N.W.3d at 208 (citing *State v. Skahill*, 966 N.W.2d 1, 8 (Iowa 2021)). So Iowa courts do not benefit from "the broad discretion" that helps Texas courts deal with "the difficulty that can arise in identifying the proper outcry witness." *See Foreman v. State*, 995 S.W.2d 854, 858–59 (Tex. Ct. App. 1999). In Iowa, there is only one correct way to rule; a ruling that a particular statement is the initial disclosure of abuse is either correct or incorrect, as a matter of law.

If courts applying *Sievers* can rely on a discernible-description test, then the goalposts do not move, and courts can rely on opinions that identify (or rule out) statements as disclosures of abuse and compare those to statements at issue in any given case. But Green's gloss makes that impossible. There is no way to predict how a reviewing court will "take into account the child's age and development"—especially when the challenge on

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[4] Michigan courts say that they review rulings that admit statements under Rule 803A for abuse of discretion—but also that they review *de novo* rulings on whether certain evidence is "inadmissible as a matter of law." *See People v. Gursky*, 786 N.W.2d 579, 606 (Mich. 2010) (quotation omitted).

appeal urges the reviewing court to consider factors not urged below, in light of "studies that appear for the first time in an appellate brief without having first been presented to or considered by the district court." *See State v. Schadl*, No. 25–0575, 2026 WL 1837441, at *4 (Iowa June 26, 2026); *cf.* Def's Br. at 36–38. Green's arguments from Danica Haas's testimony present a similar problem: none of those concepts were urged or mentioned as part of Green's objection to Stephanie's testimony about Herschel's disclosure, and Haas's testimony was not offered until *after* the trial court overruled the objection and after Stephanie had already testified about the substance of that initial disclosure. *See* Def's Br. at 39–40, 43; D0255, Trial Tr. vol. 2, 148:2–153:16; *cf. State v. Canady*, 4 N.W.3d 661, 669 (Iowa 2024) (noting that a fact that "wasn't brought to the [trial] court's attention when it ruled on the objection" cannot support a claim of error in an evidentiary ruling).

Even if it had been urged/supported below, Green's gloss has no internal logic—so no district court would ever be able to understand how it should apply, in any given case. Green's major premise is that some children "disclose in 'breadcrumbs'" and some children struggle to disclose due to "limited linguistic abilities." *See* Def's Br. at 43 (citing D0254, Trial Tr. vol. 3, 180:20–181:7). His minor premise: Herschel's prior statements stopped short of describing abuse in some discernible way, seemingly due

to his limited vocabulary and knowledge (befitting a toddler). *See* Def's Br. at 42–47. Therefore, Green argues, Herschel was one of those children who could not disclose abuse, so his prior statements *were* disclosures of abuse. Logically, that does not prove the statements were disclosures. It uses the fact that his statements did not disclose abuse as an inductive premise from Herschel's development. Green's gloss lacks any standard for determining what kind of statement a young child *does* make count as a disclosure of abuse, considering a child's age and development. In place of that, Green wants courts to treat the fact that a child's statement disclosed no abuse as inductive proof that the same statement *was* a disclosure. No trial court will be able to follow that logic—because there is none.

Zooming out, a definition of "disclosure" that requires trial courts to "take into account the child's age and development" would be subjective and variable—even under the best of circumstances. Under *Sievers*, that puts trial courts in an impossible position: only one of the child's statements can be the initial disclosure of abuse; one answer is correct and all others are incorrect, as a matter of law; and there is no way to know *how* or *when* those considerations turn a non-disclosure into a disclosure of abuse. "No rule of law should work as a trap" for the district court. *See State v. Hellstern*, 856 N.W.2d 355, 365 (Iowa 2014) (Cady, C.J., concurring specially). But Green's

new gloss on section 622.31B would set such a trap and force trial courts to make guesses where it lies. This Court should reject that approach.

d. Green's gloss works against the statute's purpose by requiring courts to only consider less reliable non-disclosures, in place of more reliable statements that actually disclose abuse.

Section 622.31B makes a child's disclosure of abuse admissible over a hearsay objection, if there are also "sufficient safeguards of reliability." *See* Iowa Code § 622.31B(2)–(3). The *only* kind of statement that may come in is "an initial disclosure of [an] offense" that meets that reliability threshold. The sole purpose of section 622.31B is to make such disclosures admissible.

Green argues that "young children, ages 2-3, might not have the linguistic skills or capabilities to disclose their abuse." Def's Br. at 37–39. Yes, exactly. Young children often struggle to make statements that reveal abuse to adults. *See, e.g.*, D0189, Court Ex. 33, 8:16–9:5 (Stephanie: "[W]hen people are little, you just don't always know what they're saying, even though they are talking"). When a young child tries to say something about abuse but can't get their point across, that child was unable to *disclose* their abuse. The statement revealed nothing and made nothing known—so, not a disclosure. That statement doesn't fall within the class of statements that the legislature sought to authorize (and require) trial courts to admit. And if a non-disclosure steals the "initial" designation and blocks admission of an *actual* disclosure

(made after the child finally develops the ability to disclose the abuse), that undercuts the objective of section 622.31B both coming and going.

In section 622.31B, "the legislature was obviously striking a balance between the general prohibition against hearsay and the … societal desire to curb the sexual abuse of children" by making initial disclosures of abuse admissible as evidence (but only in particular situations and only when they clear a reliability threshold). *See Garcia*, 792 S.W.2d at 91. "But the societal interest in curbing child abuse would hardly be served" if the evidence of an actual disclosure—a discernible description of an act of abuse—was displaced by a statement that *didn't* disclose abuse and meant nothing to anybody. *Id.*

Section 622.31B also directs trial courts to consider "the content of the statement" in assessing its reliability and admissibility. *See* Iowa Code § 622.31B(3)(b). The fact that a disclosure describes sexual abuse "beyond the realm of [the child's] experience" is generally an indicator of reliability. *See State v. Rojas*, 524 N.W.2d 659, 664 (Iowa 1994) (quoting *State v. Sorenson*, 421 N.W.2d 77, 86 (Wis. 1988)). In contrast, a statement that is seemingly nonsense and describes nothing discernible is less reliable—nobody can say for certain what it means, or that it means anything at all. Section 622.31B is uninterested in authorizing/requiring the admission of those statements as evidence—the "object sought to be attained" is the

admission of reliable statements that disclose abuse. *See* Iowa Code § 4.6(1). But Green's gloss on the statute (under *Sievers*) would require trial courts to *only* consider those less reliable statements that shed very little light on whether abuse occurred, in place of an actual disclosure of abuse that bears the "safeguards of reliability" that support its admission. *Id.*, § 622.31B(3)(b).

Green's gloss would pay a perverse dividend to offenders who "take carnal knowledge of an infant too young to [speak] clearly as to … details of such shocking activity." *See State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970). Under his approach, statements that otherwise would not qualify as disclosures—because they disclosed nothing—would usurp the "initial" tag and bar admission of an *actual* disclosure (made later on), if made while the child was still too young to be able to give a description of what happened that would reveal the abuse. This Court should reject that approach, in favor of one that enables section 622.31B to fulfill its purpose: it should hold that a statement is only a disclosure of abuse under section 622.31B (and *Sievers*) if it describes a discernible act of abuse in a way that reveals abuse to a listener.

* * *

For all of those reasons, the district court did not err in ruling that Herschel's prior statements that *did not* reveal abuse were not "disclosure[s]

of an offense," and it did not err in ruling that his subsequent statement that described/revealed to Stephanie that Green performed oral sex on him was the initial disclosure and was admissible under *Sievers*.

B. Even if those prior statements count as disclosures, the trial court was correct to admit the first statement that described acts of oral sex as the initial disclosure of *that* sexual abuse.

Texas courts hold that "[i]f the child victim first described one type of abuse to one outcry witness, and first described a different type of abuse to a second outcry witness, the second witness could testify about the different instance of abuse." *See Tear*, 74 S.W.3d at 559; *accord Turner v. State*, 924 S.W.2d 180, 183 (Tex. Ct. App. 1996) (officer was proper outcry witness for allegation of sexual intercourse, when victim's prior statement to counselor only described digital penetration and didn't mention/describe intercourse). Michigan courts have a similar rule. *See People v. Massengill*, No. 351349, 2021 WL 1590015, at *3 (Mich. Ct. App. Apr. 22, 2021) (rejecting claim that admission of six corroborative statements had violated Michigan Rule 803A because "the prohibition against more than one corroborative statement relates to a singular 'incident,'" and the six corroborative statements that were admitted "did not all pertain to the same incident"). Here, even if Green is right that one or both prior statements were disclosures, the

admitted statement was still the very first disclosure of a particular sex act—specifically, contact between Herschel's mouth and Green's penis.

Section 622.31B(2)(a) addresses testimony by the victim concerning their own out-of-court statement, which is limited to "an initial disclosure of the offense." Subsection (b) addresses testimony from another person about the victim's out-of-court statement, and it differs slightly: it allows testimony on a statement "that is an initial disclosure of an offense charged for physical abuse *or* a sexual offense against the victim." *See* Iowa Code § 622.31B(2)(a)–(b). So Stephanie could testify regarding any statement from Herschel that was the initial disclosure of "a sexual offense against [him]."

If Herschel's statement that his teacher "pooped in [his] mouth" was a disclosure of a sexual offense at all, it would be some kind of coprophagia or perhaps contact between Herschel's mouth and the teacher's anus—which is still distinct from a sex act by "[c]ontact between the mouth and genitalia." *See id.,* § 702.17(2). Likewise, even if Herschel's statement that his teacher "peed [his] pants" was a disclosure of a sexual offense, it would be closest to "[e]jaculation onto the person of another." *See id.*, § 702.17(4). Still, neither of those statements (even construed that generously) described or disclosed the sexual offense that Herschel revealed in his actual disclosure: that Green's

penis "got big," then he "put it in [Herschel's] mouth a bunch of times, and then icky green stuff came out of it." *See* D0255, Trial Tr. vol. 2, 148:2–149:24. So that statement would still be the "initial disclosure" of "a sexual offense" not previously disclosed, and it would still be admissible under *Sievers*.

Green argues that the "pooping" statement was also a disclosure about oral sex because later (in the month following his actual disclosure), Herschel made other statements "referring to Benny [Green] as pooping in his mouth out of his weiner, and icky green stuff came out." *See* Def's Br. at 43; D0189, Court Ex. 33, 15:1–16:16. But the earlier statement didn't contain any of the additional clues that revealed or described an act of oral sex—no reference to anyone's penis, nor anything that could plausibly be ejaculate. Without those, most parents (or jurors) would hear the statement as a silly toddler joke. *See, e.g.*, Jenny Marder, *Why Are Kids So Obsessed with Poop Jokes?*, N.Y. TIMES (Apr. 15, 2020), https://www.nytimes.com/2020/04/15/parenting/kids-potty-humor.html. The statement did not describe or reveal sexual abuse—only *subsequent* statements gave it that meaning. It was not a disclosure.

On the statement where Herschel said his teacher "peed [his] pants," Green argues that "[e]ven if it is unclear if [Herschel] was being ejaculated on, [he] told his mother he saw his teacher's genitalia," so this "would indicate the child was the victim of indecent exposure, a sexual abuse crime." *See* Def's Br.

at 45–47. But Herschel did not mention seeing any genitalia in that statement. *See* D0189, Court Ex. 33, 7:16–8:7. And even if he had—indecent exposure is a *different* offense. The later statement that described an act of oral sex would still be the initial disclosure of sexual abuse by mouth-to-genital contact. *See* Iowa Code § 709.9 (indecent exposure); *cf. Tear*, 74 S.W.3d at 559; *Turner*, 924 S.W.2d at 183. So even then, the trial court would have been correct to admit Stephanie's testimony about Herschel's actual disclosure as evidence of the initial disclosure of an offense—a distinct offense—under *Sievers*.

C. Alternatively, Herschel's disclosure was admissible under Rule 5.807. The State gave notice; the statement was reliable/trustworthy; and it was necessary as the only evidence of the sex act that it described in detail.

When Michigan courts determine that a statement was improperly admitted under Michigan Rule 803A, they assess its admissibility under the residual hearsay exception. *See, e.g.*, *People v. Katt*, 662 N.W.2d 12, 25–26 (Mich. 2003); *People v. Douglas*, 852 N.W.2d 587, 597–99 (Mich. 2014); *People v. Bowman*, No. 270342, 2008 WL 241113, at *5 (Mich. Ct. App. Jan. 29, 2008). This Court, too, will affirm on appeal notwithstanding a finding that the trial court erred in admitting hearsay, if the same evidence would have been admissible under a different exception to the hearsay rule (even one not argued below). *See, e.g.*, *State v. Dessinger*, 958 N.W.2d 590, 599

(Iowa 2021). Here, this Court should affirm because Stephanie's testimony about Herschel's disclosure was alternatively admissible under Rule 5.807.

Notice: The State gave "notice of the intent to offer the statement—including its substance and the declarant's name." *See* Iowa R. Evid. 5.807(b). It would not matter that the notice was given under section 622.31B—it was still notice of intent to offer the statement, and it included everything that Rule 5.807(b) requires. *See* D0105, Notice; D0108, Amended Notice. And the State also gave a separate notice under Rule 5.807, as well. *See* D0109, Notice, at 2 (explaining that notice "extends to the mother of John Doe who is expected to testify to statements [under] Section 622.31B").

Trustworthiness: It is unclear difference separates "sufficient circumstantial guarantees of trustworthiness" under Rule 5.807 from "sufficient safeguards of reliability" under section 622.31B. *See Rojas*, 524 N.W.2d at 663; Iowa Code § 622.31B(3)(b). The trial court found that Herschel's disclosure cleared the reliability threshold: it found no coaching, no indication of motive to fabricate, and "some real specific statements" on "oral sex" that were "very detailed." *See* D0254, Trial Tr. vol. 2, 22:9–23:17 & 25:12–26:1. Green attacks the disclosure's reliability, but his attacks neither engage with nor undercut the trial court's findings. *See* Def's Br. at 48–51. Those findings established sufficient reliability—and trustworthiness, too.

Green argues that the disclosure identified "Prince Wednesday" as the person who put their penis in Herschel's mouth, but did not name Green (a later identification was suggestive). *See* Def's Br. at 50–51. But the identification was separate—and not hearsay. *See* Iowa R. Evid. 5.801(d)(1)(C). Problems with that identification (if any) cannot affect the reliability of the disclosure, hours earlier. In any event, Green was the only male teacher at HCCD while Herschel was there. *See* D0253, Trial Tr. vol. 4, 88:14–89:12. Herschel testified that Prince Wednesday was his nickname for Green (like how Green called him "Prince H----"). *See* D0254, Trial Tr. vol. 3, 19:7–21:14; D0255, Trial Tr. vol. 2, 142:15–144:4.

Green argues Herschel had three CPC interviews, which can "create errors in children's reporting." *See* Def's Br. at 49–50. No need to engage with that, because it cannot undercut the trustworthiness of the disclosure that *preceded* any CPC interview (unrepeated in testimony given after CPC interviews). At best, it would mean this disclosure was *more* reliable than anything Herschel could say at trial. And it reinforces the court's finding that the disclosure being spontaneous (and not coached) helped establish its reliability. *See* D0254, Trial Tr. vol. 2, 22:9–23:17. So too, trustworthiness.

Finally, Green argues that Herschel's disclosure "indicated the sexual contact happened that day," but security camera footage showed that Green

and Herschel had no contact that day (so "officers presumed [Herschel] was referencing an incident from 2018"). *See* Def's Br. at 48–49. The fact that Herschel disclosed events that must have happened earlier in response to the question "how was your day" is peculiar, but not fatal—especially given that delayed disclosure is common among very young children. *See* D0254, Trial Tr. vol. 3, 170:14–172:14 & 181:22–182:22.

Green's attacks cannot overcome the fact that this toddler described details of a sexual act "beyond the realm of [the child's] experience." *See Rojas*, 524 N.W.2d at 664 (quoting *Sorenson*, 421 N.W.2d at 86). Herschel described "petting" an adult's penis, and then "it got big." *See* D0255, Trial Tr. vol. 2, 148:2–149:24. He described repeated oral penetration, and then ejaculation. *See id.* Those details of sexual anatomy, behavior, and function are beyond the experience of most three-year-olds. Herschel's account had "a ring of veracity" because the alternative was that he had somehow guessed everything about fellatio—from pre-act preparation to post-act cleanup. *See Rojas*, 524 N.W.2d at 664 (citing *United States v. Grooms*, 978 F.2d 425, 427 (8th Cir. 1992)); *cf.* D0255, Trial Tr. vol. 2, 165:6–20 (Stephanie stating that Herschel had surely seen his father naked, but had never walked in on any intimate acts in the marital bedroom). His statement was also corroborated by his apparent discomfort around Green. *See id.* at 142:15–144:4; *State v.*

Hildreth, 582 N.W.2d 167, 170 (Iowa 1998) (observing that child's testimony on sexual abuse was "corroborated by the evidence of the child's aversion to returning to the Hildreth home and her contemporaneous emotional upset"). And his description of how Green brushed his teeth with a toothbrush and returned that toothbrush to his pocket was also corroborating—since Green did keep his own toothbrush at HCCD. *See* D0249, Trial Tr. vol. 5, 60:21–63:3 (admitting to keeping his own toothbrush at HCCD, and admitting Herschel would not have occasion to learn that fact by brushing with him). The ruling that found "sufficient safeguards of reliability" was correct, and this Court should find "sufficient guarantees of trustworthiness" for the same reasons.

Necessity: Iowa courts typically find the necessity requirement is met when "the most probative evidence, the victim's account of the alleged sexual abuse, would not have been presented to the jury simply by having the victim testify"—in other words, when the statement includes a description of an act of sexual abuse that can't be presented through live testimony from the victim at trial. *See Skahill*, 966 N.W.2d at 12 (citing *Rojas*, 524 N.W.2d at 662–63; *State v. Neitzel*, 801 N.W.2d 612, 623 (Iowa Ct. App. 2011)). At trial, Herschel testified that he could not remember whether Green had ever put anything in his mouth. *See* D0254, Trial Tr. vol. 3, 23:9–14; *contra* Def's Br. at 48 (incorrectly stating that Herschel testified that it did not happen).

Nobody disputed that Herschel could no longer remember the sex act that he described in that disclosure. *See id.* at 22:9–22; D0255, Trial Tr. vol. 2, 11:16–12:2. Green is right that the disclosure's content "was not cumulative" with any other evidence—it was "[t]he only instance" of evidence about this particular sex act. *See* Def's Br. at 51–52. So the necessity prong is met. *See Rojas*, 524 N.W.2d at 662–63; *Neitzel*, 801 N.W.2d at 623.

Necessity would be established even if Green were correct that Herschel's statement that "[his] teacher pooped in [his] mouth" was the initial disclosure under *Sievers*. Green argues that statement was eventually understood as describing the same act of oral sex. Even if true, that cannot refute a showing of necessity, for two reasons.

First, that earlier statement would likely fail the reliability/trustworthiness requirement for admission. Where the actual disclosure reflected a familiarity with details of a sex act that toddlers would not ordinarily have, guess, or fabricate; the "pooping" statement evinces a *lack* of knowledge about adult intimacy. On its face, it's pure potty humor of the sort that kids often come up with, without basis in fact. No court could admit it as sufficiently reliable. So even if it was the initial disclosure, there would still be no admissible evidence of any act of oral sex, unless and until the court admitted the contents of Herschel's *actual* disclosure. *Cf. State v.*

Maldonado, 993 N.W.2d 379, 387–89 (Iowa Ct. App. 2023) (distinguishing *Skahill* and affirming ruling that admitted CPC interview for statements that provided "significantly more detail and context" than victim's trial testimony).

Second, one cannot understand the "pooping" statement as describing sexual abuse without reference to Herschel's later statements. *See* Def's Br. at 43 (citing D0189, Court Ex. 33, 15:1–16:10). So there would still be a need for Stephanie's testimony about those other statements, to explain how/why "pooping" could be understood as a reference to ejaculation. *Id.* at 44 (arguing section 622.31B may only authorize admission of a disclosure that names a body part in toddler's terms—like "XXX touched my cookie"—in which case, "additional testimony would be needed" to prove what the disclosure meant, including "the nickname for the specific body part"). So Herschel's statements that *described* the act of oral sex would still meet the necessity requirement.

Interest of justice: Admission furthered the interest of justice since "appropriate showing[s] of reliability and necessity were made, and admitting the evidence advance[d] the goal of truth-seeking expressed in [Rule] 5.102." *See Neitzel*, 801 N.W.2d at 623 (quoting *Rojas*, 524 N.W.2d at 663); *accord State v. Krick*, 643 A.3d 331, 343 (Del. Super. Ct. 1993) ("The child's hearsay statement in a sexual abuse case is often the only proof of the crime."). Also,

that requirement (along with materiality) was deleted from Rule 5.807 before this trial, so it is inapplicable. *See* Iowa R. Evid. 5.807 (eff. Jan. 1, 2023).

* * *

If Green is correct that the disclosure that Stephanie testified about was not the initial disclosure under *Sievers*, this Court should still affirm because evidence of that statement was admissible under Rule 5.807. The State gave notice of its intent to admit it. The statement was trustworthy, for the same reasons that the trial court found it was reliable. And it was the only available evidence of the sex act which it described (in probative detail). So there is no reversible error. *See Dessinger*, 958 N.W.2d at 599–603.

D. As a last resort, this Court should overrule *Sievers*.

Throughout this brief, the State has argued that Herschel's statement was "the initial disclosure" of an offense, under *Sievers*—because of how *Sievers* construed section 622.31B(2). But the law says "*an* initial disclosure of [an] offense." This case illustrates why *Sievers* was wrongly decided. The *Sievers* dissent is correct; the State urges this Court to adopt it, for the reasons it outlines. *See Sievers*, 20 N.W.3d at 213–18 (Waterman, J., dissenting). Additionally, in brief:

1. *Sievers*'s concerns about "constitutional due process and confrontation rights" were misplaced.

Sievers held that the idea that section 622.31B prefers "more hearsay" was "dubious," because "admission of hearsay can jeopardize a defendant's constitutional due process and confrontation rights." *Id.* at 210–11 (majority). But that premise about constitutional rights is flawed, without support for the constitutional-avoidance implication that *Sievers* drew from it.

Start with constitutional due process. Admitting a child's disclosure as proof of the matter asserted does not jeopardize the fairness of the trial—especially not when a court must first determine that the statement clears a threshold of reliability. *See Thomson v. Trombley*, No. 06–12619, 2008 WL 4427790, at *23 (E.D. Mich. Sept. 30, 2008) (collecting cases where "courts that have considered the issue have uniformly found that admission of child hearsay statements under the tender years exception does not deprive a defendant of a fair trial"). The notice requirement, similarly, ensures that a defendant is not ambushed without opportunity to prepare. There isn't any colorable argument that admitting evidence of multiple initial disclosures under section 622.31B would violate due process; the concern is illusory.

The only citation *Sievers* offers is to *Crawford*—a case about the Confrontation Clause. It is inapposite. Section 622.31B cannot admit a statement unless the declarant "testifies at the trial." *See* Iowa Code

§ 622.31B(3)(c); *Veverka*, 938 N.W.2d at 201–02 (holding trial court erred because its analysis under Rule 5.807 "was infected with extraneous considerations relating to our confrontation clause jurisprudence," which "was not relevant" as child "was available and subject to cross-examination"). Confrontation rights are irrelevant to any analysis of section 622.31B.

Numerous states have statutes and rules that authorize admission of *any* such disclosure of abuse that meets a reliability threshold. *See Sievers*, 20 N.W.3d 208–09 & n.1. The State's research found *none* of those have been held unconstitutional in any application to evidence of statements by any child who also testifies at the trial and is subject to cross-examination.

For good measure, *Sievers* also erred in declaring that "a defendant's constitutional right to a fair trial … is why the burden falls on the State to prove that a hearsay exception applies in the first place." *See id.* at 211. That burden falls on the *proponent* of any hearsay evidence—no matter who it is. *Compare id.* (citing *State v. Jackson*, 4 N.W.3d 298, 306 (Iowa 2024)), *with Jackson*, 4 N.W.3d at 306. The Iowa rules of evidence apply even-handedly to all parties—including parties who do not have a Sixth Amendment right to a fair trial. And the universal right to due process is vindicated by "following evidentiary rules that are designed to assure both fairness and reliability" in the trial process. *See State v. Countryman*, 573 N.W.2d 265,

266 (Iowa 1998) (quoting *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984)).

Of course, statutes should be construed to avoid unconstitutionality. Admitting multiple initial disclosures would be constitutional. So *Sievers* was incorrect to suggest that its reading of section 622.31B might be required or preferable as a matter of constitutional avoidance.

2. This case illustrates how *Sievers* turns section 622.31B against its legislative purpose.

Before 2022, Herschel's statements would have been inadmissible (unless Rule 5.807 applied). Section 622.31B was enacted to change that. The statute prefers more (reliable) hearsay than the status quo that existed before its enactment. But *Sievers* interprets it to prefer the status quo ante whenever there's uncertainty as to which disclosure happened first, or if a unreliable proto-disclosure that initiates nothing happens to precede a reliable disclosure that *does* initiate action. *Sievers* posited that another construction "essentially erases" the word "initial" from the statute. *See* 20 N.W.3d at 208. But *Sievers* construed "initial" in a way that erased everything else. It eliminated everything from "an" and "a" to identify the statements/disclosures that qualify under subsection (2) to its stated intent to apply to statements from victims with "a deficiency in [their] short-term or long-term memory" who—like many children—are susceptible to

confusion and imperfect recall about who they told, what they said, and when they said it. *See* Iowa Code § 622.31B(1)(b). The statute's reliability requirement reflects legislative intent. The definite-proof-of-first-in-time requirement that *Sievers* injected does not.

Interestingly, Green concedes that any *other* statements that Herschel thought he made—which Stephanie did not remember—do not count as "the initial disclosure" or displace statements that she *did* remember. *See* Def's Br. at 35–36 (discussing *Dority v. State*, 631 S.W.3d 779, 791 (Tex. Ct. App. 2021)); *id.* at 41 n.2 (explaining decision to decline to argue statements with "no description" were disclosures). It's a good strategic decision. The alternative interpretation is indefensible. It runs counter to the obvious legislative purpose to make at least one reliable disclosure admissible (and it's not preserved). But *Sievers* does not disclaim that challenge. Far from it. *Sievers* suggests any ambiguity whether an actual disclosure was the child's *very first* attempt to talk about abuse will always preclude admission. *Sievers* prohibits admission of testimony on a reliable disclosure that initiated an investigation when the evidence is in equipoise as to whether the child/victim ever confided in anyone else, at any point before that disclosure. A dogged examination will almost always extract an "I don't know" or "I'm not sure" from a pre-teen (or a person with a cognitive impairment), either

on chronology or on the exact contents of their statements to others, over the years. And if that is all it takes to render section 622.31B inapplicable, then what is left?

While *Sievers* stands, prosecutors and courts will not offer or admit any disclosure if there was any vague statement. Prosecutors in similar situations are being advised to fold, rather than risk reversal on ambiguity over which statement counts as *the* initial disclosure. The contents of any disclosure that arguably spans multiple statements—as many do—cannot and will not be admitted to corroborate the victim's testimony. *Sievers* restores that status quo ante; it is as if section 622.31B never existed. This cannot be what the legislature intended—but *Sievers* compels this result. As such, *Sievers* was wrongly decided and should be overruled.

* * *

Years from now, the opinion in this case will be cited alongside *Sievers*, in rulings involving section 622.31B. This case offers a chance to correct the error in *Sievers*. The Court should take it.

E. Any error would be harmless as to Green's convictions for sex acts with Chaya and Mayim.

Green's sex acts with Chaya and Mayim were both proven by other strong evidence, unconnected to the evidence involving Herschel. Both girls exhibited sexually precocious behavior that corroborated their testimony.

D0255, Trial Tr. vol. 2, 185:2–19; D0254, Trial Tr. vol. 3, 46:14–48:4. And each girl testified that Green had touched *both*—they corroborated each other on that critical point. *See* D0255, Trial Tr. vol. 2, 202:23–208:16; D0254, Trial Tr. vol. 3, 64:16–70:4. And jurors were instructed to determine Green's guilt "separately on each count." *See* D0211, Jury Instr. 12. So even if this Court orders retrial on Count I, it should find the error harmless as to Counts II and III and affirm those convictions. *See State v. Howard*, 825 N.W.2d 32, 43 (Iowa 2012) ("We consider whether the court's admission of [inadmissible evidence] was harmless for each count separately."); *Jackson*, 4 N.W.3d at 312–13 (finding error in admitting hearsay was not harmless as to a conviction where that evidence was relevant, but also finding that it *was* harmless error as to another conviction because the improper hearsay "had no bearing on" the elements of that offense or the facts used to prove them).

CONCLUSION

The State respectfully requests this Court reject Green's challenge and affirm his convictions.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. If argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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