

May 31, 2018

The Hon. Gina Raimondo
Governor
State House
Providence, RI 02903

Re: Legal Memo in Support of Request for veto of 18-H 7452 and 18-S 2581

We respectfully ask you to veto House Bill 7452 and Senate Bill 2581 because we believe they violate First Amendment protections for free speech and will have a chilling effect on the media and other speakers. We appreciate your concern about the non-consensual distribution of certain images, but we caution that, to avoid infringing on constitutionally protected speech, any legislation must be carefully drawn to focus on those who knowingly and intentionally commit a malicious invasion of privacy. Unfortunately, this legislation does not meet that test.

H.B. 7452 and S.B. 2581 would make it a crime to distribute a nude image of an identifiable person if the publisher created or obtained the image under circumstances in which a reasonable person would know or understand that the image was to remain private; the image was distributed without the consent of the person in the image; and the publisher did so with knowledge or reckless disregard that the person in the image would suffer “harm.” “Harm” is defined to include emotional distress, financial loss or reputational injury. There is an exception for an image that “constitutes a matter of public concern, such as a newsworthy event or related to a public figure.” A violation would be subject to up to one year in prison, a fine of \$1,000, or both.

This legislation may be well intentioned but it will inevitably have a substantial chilling effect on the news media. They risk a one-year prison sentence if a jury does not agree with their editorial judgments about what is newsworthy. The media often publish newsworthy images that are likely to cause emotional distress or reputational harm. The impact of the image is often what makes it newsworthy. It is also why a reasonable person would know that the image was intended to be kept private. The photos Anthony Weiner sent of himself to women he met online are an example of images that would be subject to prosecution under this legislation. Weiner did not consent to the publication of the images and a publisher should know that he created or shared them with an expectation or understanding that they would remain private to prevent reputational harm or emotional distress. While there is a “public concern” exception, it must be weighed against the risk of a prison sentence. The risk is exacerbated by the language in the bill that refers to an image that “constitutes” a matter of public concern. If the scandal is that Weiner is talking to women online, the picture itself may not constitute a matter of public concern. Rather, a jury might deem it to be merely to be evidence of his infidelity or unnecessary to report the story.

H.B. 7452 and S.B. 2851 are also unconstitutional because they are content-based bans on speech that do not fit into a historic exception to the First Amendment and are not narrowly tailored to satisfy strict scrutiny analysis. The bills also lack the requisite knowledge standard as to consent to publish the image or whether the image was to remain private. Mere expectation of

privacy and the foreseeability of reputational harm from truthful speech is not sufficient to overcome the First Amendment in a generally applied criminal law.

Recently, courts struck down two similar non-consensual disclosure laws on these grounds. On April 18, 2018, a Texas appellate court unanimously held that the state's law "is an invalid content-based restriction and overbroad in the sense that it violates rights of too many third parties by restricting more speech than the Constitution permits." *Ex Parte Jones Case* (May 16, 2018) (The court did not need to get to the question of whether a malicious intent prong was necessary but did suggest that such an element might have acted to limit the scope of the law sufficiently that it was not unconstitutionally overbroad).

In 2015, a group of booksellers, librarians and publishers successfully brought the first facial challenge to a law that barred dissemination of such images without consent that did not include a malicious intent element. The state of Arizona agreed to a permanent bar on enforcing the law: *Antigone Books v. Brnovich*, 2:14cv2100 (D. Ariz. July 10, 2015). (<http://mediacoalition.org/antigone-books-v-brnovich/>). The court did not issue an opinion because the state decided not to contest the challenge. Instead, Arizona agreed to a final order issued by the judge finding "that entry of this Final Decree will further the objectives of judicial economy, fiscal responsibility, and the U.S. Constitution." The court also ruled that the plaintiffs were the prevailing party and entitled to legal fees.

The clear trend since the original Arizona law was blocked is to have a malicious intent element. Nine states have passed a law barring the non-consensual distribution of certain images, and eight of them have an intent element, including Arizona (Missouri is very close to doing so as well). In addition, this spring Idaho and Maryland amended their existing laws to add a malicious intent element. Overall, 37 states have laws barring distribution of nude images without consent, and 26 of them have a malicious intent element. Of the eleven that do not, five of them require that serious harm result from the publication of the image. Only six do not require either of these elements and all but one of these is an older law.

Below, we offer a more detailed explanation of why we believe this legislation likely unconstitutional.

I. Content-based Regulation of Speech

H.B. 7452 and S.B. 2581 are a content-based regulation of speech because they only criminalize images with nudity. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). The Court went even further in *Reed v. Town of Gilbert, Arizona*, holding that even a law that may not be content based on its face is treated as such if it "cannot be justified without reference to the content" or was enacted "because of disagreement with the message [the speech] conveys[.]", 135 S. Ct. 2218, 2237 (2015). Consent to publish is not relevant to this determination.

Content-based Regulation is Presumed Unconstitutional If Not a Historic Exception

A content-based restriction on speech is presumed to be unconstitutional unless it fits in one of the few historic exceptions to the First Amendment. “[T]he Constitution demands that content-

based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *Playboy*, 529 U.S. at 817 (2000).” *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). This is a very high bar to overcome, and it is very uncommon that any content-based restriction on speech survives this legal framework. As the Court said, ‘It is rare that a regulation restricting speech because of its content will ever be permissible.’” *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011) (internal citations omitted).

Since this legislation is a content-based restriction on speech, the next step of the analysis is to determine whether it falls into a historic exception to the First Amendment. As the Court recently explained:

“From 1791 to the present,” however, the First Amendment has “permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” These “historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”

U.S. v. Stevens, 559 U.S. 460, 467 (internal citations omitted). *See also*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

This legislation does not fall into an existing exception to the First Amendment. There is no historic exception to the First Amendment for private speech. In *Connick v. Myers*, the Supreme Court held: “We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.” 461 U.S. 138, 147 (1983). Nor is there a historic exception to the First Amendment for nude images or sexual content that are not obscene under the *Miller v. California* standard. *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Playboy*, 529 U.S. 803, 814 (2000); *Ashcroft v. ACLU*, 542 U.S. at 670 (2004). Nor can the government create a new category of unprotected speech by weighing the value of the speech against the harm of its publication. In *Brown*, the Court said, “new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.” 564 U.S. at 791. The Court specifically rejected the government’s argument that it “[c]ould create new categories of unprotected speech by applying a ‘simple balancing test’ that weighs the value of a particular

category of speech against its social costs and then punishes that category of speech if it fails the test. We emphatically rejected that ‘startling and dangerous’ proposition.” *Id.*, at 792.

II. Strict Scrutiny Analysis

If a content-based law does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 813. To meet the test for strict

scrutiny, the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is the least restrictive means to achieve that interest. *See id.*; *R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118.

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as “a government objective of surpassing importance.” 458 U.S. 747, 757 (1982). Protecting individuals from criminal behavior such as being harassed, threatened or intimidated meets this high threshold. However, the Court has not found that shielding the privacy of the subject of speech or protecting them from emotional pain is sufficient to overcome the First Amendment protection for a generally applied criminal law that limits speech based on its content.

In addition to not finding privacy to be a historic exception to the First Amendment, the Supreme Court has repeatedly struck down laws intended to protect important privacy interests even when the harm to the subject of the speech is foreseeable. The Court has overturned laws and vacated court orders that barred speech about criminal proceedings intended to protect a defendant’s privacy. This included laws that barred publication of very sensitive information likely to cause emotional or reputational harm such as the names of rape victims and the identity of juvenile offenders. *See, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). In *Smith v. Daily Mail Publ’g Co.*, the Supreme Court emphasized that this line of cases was not limited to information obtained from the government, but applied to information gathered from “routine newspaper reporting techniques.” 443 U.S. 97, 103 (1979).

In *Simon & Schuster*, the Supreme Court considered whether New York’s “Son of Sam” law was constitutional. Justice O’Connor dismissed the suggestion that there was a compelling interest in barring speech to avoid the mental suffering inflicted on crime victims and their families by a memoir of a member of organized crime retelling stories of their victimization. In her majority opinion, she wrote, “The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers.... The Board thus does not assert any interest in limiting whatever anguish Henry Hill’s victims may suffer from reliving their victimization.” 502 at 118.

Even if the legislation is found to address a compelling state interest, it must still be narrowly drawn to meet that interest. *See, Sable Communications of Cal., Inc. v. FCC*, 492 US 115, 126 (1989) (“It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.”). H.B. 7452 and S.B. 2581 are not narrowly drawn to address malicious acts as it would criminalize the distribution of images without any harmful intent or a showing of serious injury. Limiting the legislation to distribution with an intent to harass, stalk, threaten or cause similar substantial harm would target malicious acts without burdening protected speech.

III. Inadequate Knowledge Standard:

Any law that infringes on speech must have an adequate knowledge standard. Like the Texas law struck down in *Ex Parte Jones*, H.B. 7452 and S.B. 2581 lack a sufficient standard as to consent and expectation of privacy. There is no knowledge standard in the bills as to whether a person has consent to publish an image. In *Smith v. California*, the Supreme Court ruled that laws restricting access to speech must include a scienter requirement. A bookseller could not be prosecuted if he or she had no knowledge of the contents of a book or magazine. 361 U.S. 147 (1959). Under this legislation, a bookseller could be prosecuted for selling a book with a nude image even if they believe they are doing so with the consent of the person in the image.

The scienter requirement as to whether the image should remain private is a reasonable person standard. This is a negligence standard, which the First Amendment prohibits in criminal laws regulating speech. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it...”); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (“[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.”).

IV. Exception for “Public Concern” Does Not Cure First Amendment Deficiency

The exception from liability for dissemination of images that “constitute a matter of public concern” (whatever this vague terms mean) cannot cure an otherwise unconstitutional law; rather it makes it more likely H.B. 7452 and S.B. 2581 are unconstitutional. As noted above, this legislation is a content-based restriction on speech so an exception for a matter of “public concern” is creating a content-based exception to a content-based law. Thus, it compounds the constitutional flaw of the ban on certain images rather than curing it.

In *Regan v. Time, Inc.*, the Supreme Court struck down a federal law banning the printing of images of currency that had an exception for publication “for philatelic, numismatic, educational, historical, or newsworthy purposes.” 468 US 641, 644 (1984). The Court ruled that the law is an unconstitutional content-based restriction on speech because “one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not.” *Id.*, 648 (internal citations omitted).

More broadly, the Supreme Court has rejected the premise of a public interest exception, that speech with greater value gets greater First Amendment protection. In *U.S. v. Stevens*, the law

criminalized certain images of animal cruelty but there was an exception for images with “serious value,” based on the safe harbor in the obscenity test. The government argued that the exception saved the statute because it could subject the speech to a test balancing “the value of the speech against its societal costs.” In his majority opinion, Chief Justice Roberts wrote, “As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.” 559 U.S. at 478. The Court added that: “*Most* of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from government regulation.” *Id.*, at 478 (internal citations omitted)(emphasis in the original).

Nor can this statute be saved by the promise by legislators or prosecutors that the statute will only be used only for the most egregious violations. Again, in *Stevens* the Court said, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *Id.*, at 480.

Finally, enactment of these bills could prove costly. If a court declares them unconstitutional in a facial challenge, there is a very good possibility that the state will be ordered to pay the plaintiffs’ attorney’s fees. In the challenge to the Arizona law, the state agreed to pay the plaintiffs \$200,000 in legal fees, even though the case never proceeded past a very initial phase.

Again, we respectfully ask you to protect the First Amendment rights of the people of Rhode Island and veto this legislation.

**The Media Coalition
New England First Amendment Coalition
Rhode Island Press Association
American Civil Liberties Union of Rhode Island**