We write briefly in response to Prof. Franks' letter dated July 22, 2018, (which unfortunately we only received indirectly this afternoon):

1 Protected Speech. The introductory sentence has the First Amendment backwards. Speech is presumed protected until the Supreme Court determines that it is not. CRUDIIA is a content-based restriction on speech, The Supreme Court has stated repeatedly that sexually explicit speech that is not obscene as to adults or children, and is not child pornography, is protected speech under the First Amendment even if those images are private, offensive or embarrassing. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); Reno v. ACLU, 521 U.S. 844, 864-68 (1997).

2 Scienter and Motive. CRUDIIA allows the depicted individual to recover substantial damages even though the speaker had no knowledge that disclosure of the image invaded another's privacy, and had no intent to cause any harm. In a wide variety of First Amendment cases, the Supreme Court has held that for speech to be penalized, the speaker must know or intend that her speech cause harm. See e.g. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); *Hess v Indiana*, 414 U.S. 105 (1973).

Reckless disregard does not meet this requirement. In effect, the burden will be on a defendant to prove that plaintiff did consent and did not have a reasonable expectation of privacy, because of the absence of objective "red flags" that would allow a factfinder fairly to conclude that the defendant knows or affirmatively chose not to know that the plaintiff did not consent and had a reasonable expectation of privacy.

Non-obscene private sexual speech has frequently been found to be protected by the First Amendment and subject to strict scrutiny analysis. Sable Communications v. FCC, 492 US 115 (1989); United States v. Playboy Entertainment Group, Inc., 529 U. S. 803 (2000).

The cases cited by the Letter are not applicable to this discussion. They concern areas of law -- defamation, intentional infliction of emotional distress and speech by government

employees -- that the Supreme Court has held are not protected by the First Amendment. In each case, the Court used the public matter distinction to create a safe harbor for protected speech, not to allow otherwise protected speech to be punished. In U.S. v. Stevens, the Supreme Court emphasized that most communication is not about important matters but it is still protected by the First Amendment. "*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. 559 U.S. 460, 478. It cannot be subject to balancing tests weighing "the value of the speech against its societal costs." *Id*., at 472.

In United States v. Osinger, 753 F.3d 939, 948 (9th Cir. 2014) and United States v. Petrovic, 701 F.3d 849, 855-56 (8th Cir. 2012), each court upheld a federal anti-stalking law against a First Amendment challenge because it included a malicious intent element. It was only in dicta that the authors of those opinions addressed the question of whether nude images distributed without consent would be subject to First Amendment protection.

3 Scholarly Consensus. First, we would note that Prof. Franks simply denies the expertise of those who disagree with her. Prof. Levine's academic interests focus on the First Amendment rights of speech and press. Mr. Bamberger is a First Amendment litigator who has been involved in over 100 First Amendment cases and has been honored for his work in the area. The attorneys at the ACLU, EFF and Media Coalition, who submitted separate comments, are also First Amendment experts. As to the First Amendment experts chosen to be consulted by the Committee, I do not believe Dean Chemerinsky has reviewed and commented on the draft, and the Committee was informed last week that Prof. Volokh's view was that, if his suggestions were adopted, it would "enhance the likelihood" of the Act being held constitutional. That is significantly less committal than declaring that the CRUDIIA is "probably constitutional."

We agree with Prof. Volokh that a "suitably clear and narrow statute" could be constitutional. This is not such a statute.

4 Lower Court Decisions. Thirty-six states and the District of Columbia have Revenge Porn laws (Texas and Vermont's laws have been blocked by courts). Twenty-eight of those states have a malicious intent element. One, California, requires that harm be foreseeable and that it occur. Oklahoma and Rhode Island require an illegal intent or foreseeability that the harm would occur. Connecticut, North Dakota, Texas, and Washington have no intent requirement, but require that harm occur. Only Delaware, Idaho, Illinois, Minnesota and Wisconsin require neither an intent to harm nor that harm occur. Of the laws passed after the Arizona case, only Minnesota has lacked all of these elements.

The opinion of the Texas court rested on the lack of an adequate knowledge standard in the law. The decision in the Vermont case held the law unconstitutional in broad terms and did not rest on the lack of or inclusion of any element. Antigone Books, in which Mr. Bamberger was co-counsel, was, in fact, decided on the merits, by a consented-to order of the Court which granted substantial legal fees to plaintiffs as prevailing parties.

Michael A. Bamberger
July 23, 2018 Raleigh Hannah Levine