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FOR DISCUSSION ONLY

**CIVIL REMEDIES FOR UNAUTHORIZED
DISCLOSURE OF INTIMATE IMAGES ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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DISCLOSURE OF INTIMATE IMAGES ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 5, 2017

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DISCLOSURE OF INTIMATE IMAGES ACT**

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3 **PREFATORY NOTE**
4

5 [This is a partial draft of the Prefatory Note. The reporter will update commentary as the
6 project proceeds.]

7 The Unauthorized Disclosure of Intimate Images Act addresses a growing form of
8 privacy violation that causes immediate and in many cases irreversible harm. While many states
9 have recently passed criminal legislation addressing the problem, such legislation does not
10 generally compensate victims for the harm they have suffered. What is more, the various state
11 criminal laws offer conflicting and often unjustifiably narrow definitions of the prohibited
12 conduct. This Act provides a clear and comprehensive definition of the abuse that protects the
13 right to intimate privacy while respecting First Amendment freedom of expression.

14 A 2016 survey from the Data & Society Research Institute and the Center for Innovative
15 Public Health found that 4% of U.S. Internet users – 1 in 25 Americans, or roughly 10.4 million
16 Americans – “have been threatened with or experienced the posting of explicit images without
17 their consent.”¹ Intimate images include footage obtained by hidden cameras, consensually
18 exchanged images within a confidential relationship, stolen photos, and recordings of sexual
19 assaults. The motives for unauthorized disclosure are diverse: to prevent domestic violence
20 victims from reporting abuse; to punish former intimate partners for exiting the relationship; to
21 further humiliate or extort sexual assaults victims; or to profit from voyeuristic “entertainment.”
22 The Internet has greatly facilitated the rise of nonconsensual pornography, as dedicated “revenge
23 porn” sites and other forums openly solicit private intimate images and expose them to millions
24 of viewers, while allowing the posters themselves to hide in the shadows. Some victims have
25 seen their private intimate images end up on as many as 11,000 websites, in addition to being
26 widely distributed through social media, blogs, emails, and texts.

27 A single intimate image can quickly dominate the first several pages of search engine
28 results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s
29 family, employers, co-workers, and peers. Victims are often fired from their jobs, expelled from
30 their schools, and forced to move from their homes. They are routinely threatened with sexual
31 assault, stalked, and harassed. Victims often develop post-traumatic stress disorders, depression,
32 anxiety, agoraphobia, and difficulty maintaining intimate relationships. Some victims have
33 committed suicide.

34 The key features of this Act are (1. Prohibiting the disclosure of a photograph or visual
35 recording depicting a person’s intimate image or that person engaged in sexual conduct if the
36
37

¹ Data & Society Research Institute and the Center for Innovative Public Health, *Nonconsensual Image Sharing: One in 25 Americans has been a Victim of ‘Revenge Porn,’* https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf. A 2016 study by the Cyber Civil Rights Initiative (CCRI) found an even higher rate of 12.8% of respondents – roughly 1 in 8 Americans on social media– were the victims of or threatened with the unauthorized disclosure of private photographs and videos. Eaton, A. A., Jacobs, H., & Ruvalcaba, Y. (2017). *2016-2017 Nationwide online study of nonconsensual porn prevalence* [White paper]. Cyber Civil Rights Initiative, Miami, FL.

1 person depicted is identifiable, had an expectation that the image would remain private, and has
2 not consented to disclosure of the image; (2. Prescribing remedies for the depicted person,
3 including actual damages, reasonable attorney’s fees, punitive damages, and disgorgement of
4 profit made by the wrongful act; and (3. Allowing depicted persons to protect their identity in
5 court proceedings.

6
7 The Act exempts disclosures made for lawful and common practices such as law
8 enforcement and medical treatment and notes that the liability of interactive computer service
9 providers for content provided by another party is restricted by federal law.

10
11 The other provisions of the Act define key terms such as “consent,” “disclose,”
12 “identifying characteristics,” “intimate image,” “online identifiers,” as well as addressing
13 severability and the statute of limitations.

14
15 The primary drafting issues revolve around the scope of liability created by the Act. In
16 particular, there are questions about whether the Act should apply only to primarily disclosers or
17 also to secondary disclosers; to only intentional disclosures or also reckless or negligent
18 disclosures; only to disclosers with actual knowledge of either lack of consent to disclosure or of
19 the unlawful means by which the image was made available or also to those who are reckless or
20 negligent with regard to consent or the unlawful means by which the image was made available;
21 what disclosures should be exempt; and the extent to which the Act should apply to interactive
22 computer service providers with regard to content provided by a third party.

23
24 Other issues include whether consent to disclosure can be implied, or whether it must be
25 explicit and affirmative; whether allowing plaintiffs to proceed pseudonymously presents First
26 Amendment, administrative, or other difficulties; whether statutory minimum damages should be
27 included; and how attorney’s fees should be awarded.

28
29 Finally, given that the Act regulates what some consider to be expressive conduct, First
30 Amendment concerns of overbreadth, content-based distinctions, and vagueness must be taken
31 into consideration throughout.

1 **CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE**
2 **OF INTIMATE IMAGES ACT**

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Civil Remedies for
4 Unauthorized Disclosure of Intimate Images Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Consent” means affirmative, conscious, and voluntary authorization.

7 (2) “Disclose” includes transferring, publishing, and distributing.

8 (3) “Identifying characteristics” includes any information that could be used to help
9 identify the depicted individual. The term includes an online identifier.

10 (4) “Intimate image” means a photograph, film, videotape, or other visual recording, that
11 depicts:

12 (A) the uncovered genitals, pubic area, anus, or female post-pubescent nipple of
13 an individual; or

14 (B) an individual engaging in sexual conduct. The term includes masturbation;
15 genital, anal, or oral sex; sexual penetration with objects; and the transfer or transmission of
16 semen on any part of the depicted individual’s body.

17 (5) “Online identifier” means an access name, access code, account name, alias, avatar,
18 credential, gamer tag, display name, handle, login name, member name, online identity,
19 pseudonym, screen name, user account, user identification, username, or other personally
20 identifiable information or signifier that would tie a depicted individual to an electronic service
21 or Internet application, website, or platform account.

22 **SECTION 3. PROTECTION OF PRIVATE VISUAL MATERIAL.**

23 (a) Except as otherwise provided in subsection (b), a person may not:

24 (1) disclose or threaten to disclose an intimate image of an individual without the

1 consent of the individual if the individual can be identified from the intimate image itself or from
2 the image and identifying characteristics displayed in connection with the image; and

3 (A) the person knows or should have known that the depicted individual
4 did not consent to the disclosure; or

5 (B) the person knows or should have known that access to the intimate
6 image was made possible by theft, bribery, extortion, fraud, false pretenses, or exceeding
7 authorized access to property or to an account, message, file, device, or resource.

8 (2) Silence or lack of protest or resistance by itself is not consent.

9 (b) A person disclosing material under subsection (a) is not liable if:

10 (1) the image was created under circumstances in which the depicted individual
11 had no reasonable expectation that the material would remain private; or

12 (2) the disclosure of the image is made:

13 (A) in the public interest; or

14 (B) for the lawful and common practices of:

15 (i) law enforcement;

16 (ii) reporting of criminal activity;

17 (iii) legal proceedings; or

18 (iv) medical treatment.

19 (c) The fact that the depicted individual is a public figure does not, by itself, establish that
20 the disclosure was made in the public interest under subsection (b).

21 **SECTION 4. CIVIL ACTION.**

22 (a) An individual aggrieved by a violation of this [act] may bring an action for relief.

23 (b) In an action brought under this section, a court may award the plaintiff:

1 (1) actual damages [or statutory damages in the amount of \$____, whichever is
2 greater];

3 (2) punitive damages;

4 (3) an amount equal to any profit made from the disclosure of the image by a
5 person who wrongfully disclosed the image;

6 (4) reasonable attorney's fees and costs; and

7 (5) additional relief the court deems necessary and proper, including injunctive
8 relief.

9 (c) This [act] does not affect a right or remedy available under law of this state other than
10 this [act].

11 (d) The plaintiff in a civil action under subsection (a) may proceed using a pseudonym in
12 place of the true name of the plaintiff and may exclude or redact from all pleadings and
13 documents filed in the action other identifying characteristics of the plaintiff. A plaintiff who
14 proceeds using a pseudonym and excluding or redacting identifying characteristics as provided in
15 this section shall file with the court and serve upon the defendant a confidential information form
16 that includes the plaintiff's name and other identifying characteristics excluded or redacted. The
17 court shall seal the plaintiff's name and excluded or redacted characteristics. In so doing, the
18 following rules apply:

19 (1) In cases where the plaintiff is permitted to proceed using a pseudonym, the
20 parties shall use the pseudonym in all pleadings, papers, at any hearings and in open court, and in
21 other statements and documents that are matters of public record.

22 (2) The defendant and the defendant's agent, servant, employee, attorney, and any
23 person in active concert or participation with the defendant, may not publicly reveal the identity

1 of the plaintiff in connection with the action, including to a member of the media.

2 (3) All court decisions, orders, petitions, and other documents, including motions
3 and papers filed by the parties, must be worded so as to protect the name or other identifying
4 characteristics of the plaintiff from public disclosure.

5 (4) The responsibility for excluding or redacting the name or identifying
6 characteristics of a plaintiff from all documents filed with the court is solely with the parties and
7 their attorneys. The court is not required to review pleadings or other papers for compliance with
8 this subsection.

9 (5) The court may enter further orders as necessary to protect the privacy of a
10 plaintiff.

11 **SECTION 5. STATUTE OF LIMITATIONS.** An action under this [act] may be
12 brought not later than four years after the cause of action accrues.

13 **SECTION 6. LIMITATIONS.** This [act] may not be construed to alter or negate any
14 right, obligation, or immunity of an interactive computer service provider under 47 U.S.C. 230.

15 **[SECTION 7. SEVERABILITY.** If any provision of this [act] or its application to any
16 person or circumstance is held invalid, the invalidity does not affect other provisions or
17 applications of this [act] that can be given effect without the invalid provision or application, and
18 to this end the provisions of this [act] are severable.]

19 **SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
20 applying and construing this uniform act, consideration must be given to the need to promote
21 uniformity of the law with respect to its subject matter among states that enact it.

22 **SECTION 9. REPEALS; CONFORMING AMENDMENTS.**

23 (a)

1 (b)

2 (c)