




To: Uniform Law Commissioners, 2018 ULC Annual Meeting

From: American Civil Liberties Union, Electronic Frontier Foundation, and Media Coalition

Dated: July 20, 2018

Re: Consideration for adoption of the Civil Remedies for Unauthorized Disclosure of Intimate Images Act (the "CRUDIIA")

The undersigned organizations are dedicated to protecting the exercise of free speech rights guaranteed by the United States Constitution. The ACLU works to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States; the Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world; and Media Coalition Inc. protects the First Amendment right to produce and distribute books, magazines, recordings, home video and video games. All groups are committed to defending Americans' First Amendment right to access and engage in the broadest possible range of speech.

We write to urge the ULC to reject the Final Draft of CRUDIIA (the "Draft")[1] because we believe that it violates the First Amendment and will have a chilling effect on protected speech. The Draft creates a broad cause of action against anyone who discloses an image containing nudity or sexual activity without the affirmative consent of the depicted person. We appreciate the drafting Committee's desire to prevent the non-consensual distribution of an individual's nude images, but any legislation that punishes speech must comply with the First Amendment. In particular, because the Draft would impose a content-based restriction on protected speech, it must satisfy strict judicial scrutiny. Unfortunately, the Draft in its current form would not survive such scrutiny. It fails both because it does not require that the defendant act with malicious intent or even knowledge of potential privacy infringements, and because it does not require the plaintiff to demonstrate actual harm. Similar laws have failed to withstand legal challenges because they also omitted these requirements.[2] We offer our analysis below. We also agree with Professor Raleigh Levine's letter to the ULC on the Draft's unconstitutionality.

## I. The Draft Would Be Subject to Strict Scrutiny Because It Imposes a Content-Based Restriction on Protected Speech.

[1] We refer to the June 14, 2018, draft for approval posted on the ULC website. We are aware that the drafting committee has had subsequent discussions about changes to the draft.

[2] *See Ex parte Jones*, No. 12-17-00346-CR (Tex. Ct. App. May 16, 2018); *Antigone Books LLC v. Brnovich*, 2:14-cv-02100 (D. Ariz.) (Final Decree dated July 10, 2015).

If enacted into law, the Draft would be subject to strict judicial scrutiny because it imposes a content-based restriction on protected speech. First, the Draft restricts protected speech. It applies to intimate photographic images that depict an identifiable person naked or engaged in sexual conduct.[3] Such images do not fall into any of the recognized exceptions to First Amendment protection.[4] A small subset of nude images may fit into the historic exceptions for obscene material as defined in *Miller v.* California, 413 U.S. 15 (1973), or child pornography as defined in *New York v. Ferber*, 458 U.S. 747 (1982). But such images are already illegal under federal and state criminal laws that carry severe penalties. By contrast, there is no historic exception to the First Amendment for truthful speech made without the consent of the person depicted, discussed, or described, even if the speech is an image that is private, offensive, or humiliating. It is exceedingly unlikely that the Supreme Court will recognize a new exception to the First Amendment for private images distributed without the subject's consent.[5] Legislatures cannot create new categories of unprotected speech by weighing the value of the speech against the harm of its publication.[6]

Second, the Draft imposes a content-based regulation of speech because it punishes only images that depict nudity or sexual activity.[7] Content-based restrictions on speech are presumptively invalid, and the government bears the burden of demonstrating that the restriction satisfies strict scrutiny.[8] This is the most exacting standard of judicial review, and many laws have failed to survive it.[9] To satisfy 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 law in question is the least restrictive means to achieve that interest.[10]

## II. The Draft Is Unlikely to Satisfy Strict Scrutiny.

It is highly unlikely that the Draft would survive judicial review. As an initial matter, it is important to note that the compelling state interest standard is a demanding one.[11] Protecting individual privacy is an important interest. But the Supreme Court has repeatedly struck down

---

[3] Draft § 2(7).
[4] *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing the recognized exceptions to the First Amendment).
[5] *Id.* at 469
[6] *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 791 (2011) ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.").
[7] *Stevens*, 559 U.S. at 468(statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based).
[8] *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).
[9] *See, e.g.*, *Brown*, 564 U.S. at 799.
[10] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813.
[11] *See, e.g., New York v. Ferber*, 458 U.S. 747, 757 (1982) (describing a compelling state interest as "a government objective of surpassing importance").

civil and criminal penalties on speech about personal and sensitive information when First Amendment rights were at stake. In *Time, Inc. v. Hill*, the Supreme Court threw out an award for civil damages under New York's invasion of privacy law.[12] In *Florida Star v. BJF*, the Court threw out a civil damages award against the Florida Star for publishing the name of a rape victim.[13] In *Smith v. Daily Mail Publishing Co.*, the Supreme Court emphasized that these decisions regarding the balance of free speech and privacy concerns were not limited exclusively to information obtained from the government.[14]

Speech also remains protected even when it may "stir people to action," "move them to tears," or "inflict great pain."[15] On this point, the Supreme Court's decision in *Simon & Schuster v. Members of New York State Crime Victims Board* is instructive.[16] There, the Court considered whether New York's "Son of Sam" law was constitutional. The law effectively prohibited people who committed crimes from publishing accounts of the criminal activity for profit, instead requiring any such profits to be diverted to compensation for the victims and their families.[17] The Court held that the government could not claim "any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers," or "any interest in limiting whatever anguish [the speaker's] victims may suffer from reliving their victimization."[18] The Court thus held that the government's desire to prevent crime victims from enduring emotional pain related to the publication of stories about their trauma—stories the victims frequently considered both private and painful—was not itself sufficient to justify a financial penalty on protected expression.

Even if legislation is found to address a compelling state interest, it must still be narrowly drawn to meet that interest.[19] The Draft fails narrow tailoring because it does not require that the distributor act with malicious intent or actual knowledge that they are invading the depicted person's privacy, and because it would allow the depicted person to recover statutory damages without demonstrating actual harm. It would impose liability, including statutory damages, even if the distributor is unaware that the depicted person would object to the distribution. Section 3(b) of the Act would allow a depicted individual to recover against anyone who discloses an intimate image of the depicted individual, if the discloser knew or acted with reckless disregard for whether: (1) the individual did not consent to the disclosure; (2) the individual had a reasonable expectation of privacy in the image or the image "was made accessible through theft,

---

[12] 385 U.S. 374 (1967).
[13] 491 U.S. 524 (1989); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).
[14] 443 U.S. 97 (1979).
[15] *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011).
[16] 502 U.S. 105 (1991).
[17] *Id.* at 108–09.
[18] *Id.* at 118.
[19] *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.").

bribery, extortion, fraud, false pretenses, voyeurism, or exceeding authorized access to property or to an account, message, file, device, or resource"; and (3) the depicted individual was identifiable. The Comment to Section 3 states that a person acts recklessly if they know "of the risk of harm created by the conduct or knows facts that make the risk obvious," and "the precaution that would eliminate or reduce the risk involves burdens" that are slight relative to the magnitude of the risk. For many intimate images, such as any nude photo that appears to be "amateur," there will often be an apparent risk that the depicted person intended the photo to remain private.

The Draft emphasizes that anyone who does not obtain clear, unambiguous, and voluntary consent for *each* disclosure of a possibly private intimate image is at risk for liability. Section 2(1) of the Draft defines "consent" as "affirmative, conscious, and voluntary authorization by an individual with legal capacity to give authorization." The Comment to Section 2 states: "The definition of consent as 'affirmative, conscious, and voluntary authorization' is intended to make clear that consent in this context cannot be tacit or coerced. While consent need not be in writing, it cannot be inferred solely from silence or lack of protest, nor can it be obtained through coercion. Consent is also disclosure-specific. In plain English, someone who discloses an intimate image subject to the Draft must obtain the depicted individual's affirmative consent *for each specific disclosure*. The Comment further states that "[w]hen the nature or scope of consent is ambiguous, it is the responsibility of the would-be discloser to obtain clarification before disclosing." So, the would-be discloser must not only obtain the depicted individual's consent to each specific disclosure; they must also bear the burden of any ambiguities regarding the nature or scope of that consent.

The Draft would therefore impose liability whenever a person discloses a potentially private image of another individual without first obtaining the depicted individual's affirmative consent. In other words, people who wish to share nude pictures that *might* have been taken under circumstances in which the depicted individual had a reasonable expectation of privacy *must* obtain affirmative consent from the depicted individual to avoid liability.[20] In most cases, it will be impossible or impractical for re-publishers to obtain affirmative consent or otherwise investigate the circumstances behind a picture (including whether consent has already been granted) prior to each specific publication. A subsequent publisher often does not know the circumstances surrounding the creation of an image or its initial distribution. They often do not and cannot know the stories behind many of the images they publish: whether the images were taken with consent, originally shared with consent, or subsequently published with consent. Online users, in particular, often have little or no information about the origin stories of the

[20] The Comment to Section 3 of the Draft acknowledges this reality. It states: "The basic elements of this cause of action are 1) intentional disclosure or threat to disclose 2) an intimate image 3) of an identifiable individual 4) without the consent of the depicted individual. Additionally, the Act limits liability to those who 5) know or show reckless disregard for whether the depicted individual had a reasonable expectation of privacy or know or show reckless disregard for whether the intimate image was made accessible through unlawful means such as theft, bribery, or similarly unlawful means."

photos they see and share online, and often have no means of identifying or contacting the subjects of the photos in question. Under such circumstances, the safest course is silence, even if the depicted person might not have objected to the distribution of a given image. The Draft would therefore chill a substantial amount of protected speech that does not implicate the government's interest in protecting individual privacy.

A court is also likely to conclude that the Draft is not sufficiently tailored to the government's interest in protecting privacy because it does not include a requirement that the plaintiff demonstrate actual harm to impose liability. The Supreme Court has repeatedly held that protected speech cannot be civilly or criminally penalized absent proof that the speech results in actual harm.[21] The Draft, on the other hand, allows the plaintiff to prevail if they suffer any emotional injury. This term is not otherwise defined, so it could be satisfied by the most modest demonstration of embarrassment. Further, the Draft provides statutory damages, so the plaintiff has no burden to demonstrate harms beyond the low initial threshold. By contrast, to prevail on a tort claim for intentional infliction of emotional distress, the plaintiff must generally show that the defendant engaged in "extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress."

As a result of these defects, the Draft is unlikely to survive judicial review. Strikingly similar laws have been successfully challenged in Texas and Arizona.[22] Like the Texas and Arizona laws, the Draft implicates not just malicious violations of privacy by those with actual knowledge of the potential harms, but also countless Internet users who repost online images without knowledge of the circumstances surrounding their creation. The Draft would also inflict practical harm on numerous other First Amendment activities. A journalist who photographs an unclothed person in a war or conflict zone cannot possibly be expected to obtain the person's consent. Subjects of Edward Weston's photographs, some of whom passed away long ago, are not available to consent to new publications. In most if not all instances, it is impossible for booksellers to ascertain whether persons depicted in books have consented to the capture or the publication of potentially private or intimate images. And if "the disclosure" means what it implies—e.g., the specific offer of a book at a particular bookstore or library—then the Draft's reach is even more alarming, meaning that affirmative consent is not only required to publish an image in a new book, but also to distribute that book (and thus particular copies of that image) in specific ways.

---

[21] *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 719 (2012); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) ("[T]he award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons." (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)). Notably, *Dun & Bradstreet* and *Gertz* involved defamation, which is not protected by the First Amendment.

[22] *Ex Parte Jones*, 2018 WL 2228888, at *6–*7; *Antigone Books LLC v. Brnovich*, 2:14-cv-02100 (D. Ariz.) (Final Decree dated July 10, 2015).

It is therefore likely that any state law modeled after the Draft will be held unconstitutional, a result that vitiates the purposes of a Uniform Act. Constitutional considerations aside, we urge the Commission to seriously consider the public policy it wishes to effectuate—and ensure that the language of the Draft is consistent with those wishes. Is the Commission seeking to punish every teenager who has ever shared an image of nudity without permission online? Such a law would be impractical, damaging, and extremely broad in scope. But the current Draft—which does not even require that the offender know that they are invading another person's privacy, let alone that they have any intent to cause harm—permits just such a result.

When the purpose of legislation is to create liability for the publication of images, the greatest care is required to avoid infringement on First Amendment rights and causing a chilling effect on protected speech. Again, we urge the ULC to reject the Draft and/or amend it so it only targets intentional, knowing, and malicious invaders of privacy.

Dated: July 20, 2018

Contacts:
Brian Hauss, ACLU (bhauss@aclu.org; 212-549-2604)

Sophia Cope, EFF (sophia@eff.org; 415-436-9333 ext. 155)

David Horowitz, Media Coalition (horowitz@mediacoalition.org; 212-587-4025)