The following is a point-by-point response by the Cyber Civil Rights Initiative (CCRI) to objections raised by the Media Coalition to Minnesota's proposed legislation to safeguard sexual privacy, HF 2741, available here.

For more information about nonconsensual pornography, often referred to as "revenge porn" and the Cyber Civil Rights Initiative's work on supporting victims, educating the public, and working with legislators and the tech industry to protect sexual privacy, please visit www.endrevengeporn.org. For further information specifically about First Amendment questions regarding legislation, please consult CCRI's Guide for Legislators.

MEDIA COALITION, INC.
DEFENDING THE FIRST AMENDMENT SINCE 1973

Memo in Opposition to Minnesota House File 2741 and Senate File 2713

We believe that House File 2741 and Senate File 2713 violate the First Amendment protections for free speech and we respectfully urge the legislature to amend these bills. We appreciate your concern about the distribution of these images, but we caution that any legislation to restrict publication of these images must be carefully drawn to focus on the malicious invasion of privacy without infringing on constitutionally protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including Minnesota: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.F. 2741 and S.F. 2713 bar the dissemination of an image of another person with their "intimate parts" exposed, in whole or in part, or engaged in sexual activity if the publisher knew, or should have known, that the person depicted did not consent and the image was obtained or created under circumstances in which a reasonable person would know or understand that the image was to remain private. "Intimate parts" is defined as the unclothed, partially unclothed or transparently clothed genitals, pubic area or anus, and exposure of any part of the nipple of a female. There is an exception to the legislation for the dissemination of an image if it "relates to a matter of public concern and dissemination serves a lawful purpose." There is a second exception for dissemination for scientific research or educational purposes. A violation is a gross misdemeanor, but the legislation includes numerous aggravating facts that increase the punishment to up to 3 years in prison. In addition to the crime provided in the legislation, it also

creates a private cause of action against a publisher for dissemination of such an image.

Last July, we successfully concluded our challenge to an Arizona law that criminalized the distribution of nude images without the consent of the person so depicted. This was the first facial challenge to such a law.

This statement creates the false impression that the Arizona law was found unconstitutional. There was in fact no ruling on the merits of the law at all.

The state of Arizona agreed to a permanent bar on enforcing the law acknowledging that the law was unconstitutional. *Antigone Books v. Brnovich* (http://mediacoalition.org/antigone-books-v-brnovich/).

This is false. The state of Arizona agreed to not enforce the law, but made no concessions regarding its constitutionality.

Our general counsel was co-counsel in the case, and the plaintiff group consisted of many trade associations that are our members and their constituents. The plaintiffs in the case were four national trade associations representing publishers, news photographers, booksellers and librarians; five Arizona booksellers; and the publisher of a Phoenix newspaper. They challenged the law because it was not limited to the publication of images that were a malicious invasion of privacy. They feared it could be used to prosecute them for selling or loaning a wide range of important newsworthy, historic, artistic, educational and other protected images.

Last week, the Governor of Arizona signed into law H.B. 2001 (http://www.cqstatetrack.com/texis/redir?id=564fcea34&rtype=text&original=y) to replace the law that was enjoined in *Antigone Books*. We believe this law is a model for prohibiting the distribution of images that are a malicious invasion of privacy without violating free speech guarantees. The key elements in the Arizona law are: (1) display or distribution of an image of another person in a state of nudity or engaged in sexual conduct; (2) with knowledge that the person in the image has not consented to the display or distribution; (3) with the intent to harass, coerce, threaten, extort or intimidate the person in the image; (4) the person in the image is recognizable either from the picture itself or information provided by the person who has displayed or distributed it (or a third party but only if acting in concert with the person who initially displayed or distributed it); and, (5) where the person depicted in the image had a reasonable expectation of privacy and an understanding that such image would remain private. These elements are necessary to overcome the strong presumption that any content-based regulation violates the First Amendment.

The only significant differences between Arizona's second bill and Minnesota's is the inclusion of section 3 and requiring a "reasonable expectation of privacy" in addition to "an understanding that such image would remain private." Section 3 is precisely the section that could create First Amendment vulnerability on the ground of viewpoint discrimination and under-inclusiveness, as well as rendering the law incoherent from a policy perspective and duplicative of existing laws against harassment and extortion.

If an "intent to harass" provision were included, this would permit a person to distribute private, sexually explicit material of no public concern unless it could be proven beyond a reasonable doubt that his or her motive was to harass. This would mean it would be legal to distribute such material for *any other motive*, including for profit, entertainment, social validation, or no reason at all.

To be clear, that would mean that revenge porn site operators would be free to destroy the lives, careers, reputations, and personal relationships of thousands of people, mostly women, because they are not motived by a desire to harass but by a desire to make money. That would mean that the people who distributed the private, intimate photos of celebrities such as Jennifer Lawrence would be free to do so with impunity because they were just hoping to provide "entertainment." That would mean that rapists who distribute the recordings they made of their sexual assaults on social media in order to brag about their exploits would be free to continue to do so. The requirement of a "reasonable expectation of privacy" in element 5 would create additional problems for sexual assault victims, as it makes little sense to speak of rape victims as having a "reasonable expectation of privacy" in the recording of their assaults.

The kinds of absurd outcomes are not only troubling from a policy perspective but would also render the law vulnerable to First Amendment attacks on the ground of under-inclusiveness. If the goal of the law is to protect privacy, how can that goal be served by restricting its application to violations motivated by harassment while allowing violations motivated by all other purposes?

Unsurprisingly, the vast majority of criminal legislation regarding other forms of private information does not include arbitrary motive requirements. Both state and federal criminal laws prohibit the unauthorized disclosure of private material such as medical records, financial data, and cell phone usage information. None of these statutes requires that perpetrators act with the intent to harass their victims.

Some believe that there is no "right" to these images or that a publisher must get consent to publish such an image, but the Supreme Court begins with the opposite premise. The Court

presumes that all content-based laws that criminalize speech are unconstitutional unless they fit into a historic exception to the First Amendment or survive strict scrutiny analysis, even if the speech was meant to remain private.

This is false. The Court has stated repeatedly that there are certain "low-value" forms of speech that do not receive the full protection of the First Amendment, and has stated that speech about "purely private" matters falls into this category. In Snyder v Phelps (2011), the Court suggested that a matter is "purely private" if it does not contribute to "the free and robust debate of public issues" or the "meaningful dialogue of ideas." The Court cited, as a specific example of "purely private" matters, a prior case where it found that "videos of an employee engaging in sexually explicit acts" did not address a public concern; the videos "did nothing to inform the public." Snyder v. Phelps, 562 U.S. 443, 452 (2011).

This is a very high bar to overcome, and it is very rare that any content-based restriction on speech survives this legal framework. This may be unsatisfying for those attempting to regulate disfavored speech, but as the Court said, it is a "demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted). Below is the legal analysis triggered by the review of a content-based law.

Content-based Regulation of Speech

Any law that criminalizes speech, including images, based on its content fits this category. It is irrelevant that the images may have been intended to be private or their publication is injurious to the person in the image. *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 Entm't 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 cases cited do not support the claim that the fact that information is private is "irrelevant." Neither of these cases dealt with private information at all.

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[.]" *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2225 (2015).

This is true, and completely at odds with the Media Coalition's recommendation that the statute include an intent to harass provision, which would run the risk of transforming the statute into a

content-based regulation.

Content-based Regulation of Speech is Presumed Unconstitutional

"[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. 803, 817 (2000)." *Ashcroft v. American Civel Liberties Union,* 542 U.S. 656, 660 (2004). This is a bedrock principle of First Amendment doctrine.

Again, the Court does not tend to treat purely private information as receiving full First Amendment protection – it treats it as low-value speech for which strict scrutiny is not required. Moreover, as constitutional scholar Frederick Schauer has noted, there are numerous content-based regulations that the Court has not subjected to strict scrutiny: "no First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices with their competitors, whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival, or whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool. Each of these examples involves some punishment for speech, and each involves liability based both on the content and on the communicative impact of the speech. And yet no First Amendment degree of scrutiny appears. In these and countless other instances, the permissibility of regulation--unlike the control of incitement, libel, and commercial advertising--is not measured against First Amendment-generated standards." Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1770-71 (2004)

As a content-based regulation, the first step of the constitutional 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." *Stevens,* 559 U.S. at 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).

The belief that the protections of the First Amendment apply to all speech with only a few exceptions is a common misunderstanding among those who are not experts in constitutional law. As Prof. Schauer observes, "There are those who appear to believe that the aforementioned exclusions, whether still good law or not, represent the universe of speech lying outside the First Amendment. Yet to take that position is to be afflicted with the common ailment of spending too much time with the casebooks--defining the domain of constitutional permissibility by reference to those matters that have been considered viable enough to be litigated in, and close enough to be seriously addressed by, the courts, especially the Supreme Court. But if we are interested in the speech that the First Amendment does not touch, we need to leave our casebooks and the Supreme Court's docket behind; we must consider not only the speech that the First Amendment noticeably ignores, but also the speech that it ignores more quietly." Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1777-78 (2004).

There is no historic exception for criminalizing speech that is distributed without the consent of the subject of the speech, even if the speech is an image that is private, embarrassing or humiliating.

There are in fact numerous state and federal laws prohibiting the unauthorized distribution of private information – from trade secrets to medical records to drivers' licenses to social security numbers to video rentals - that have never been deemed unconstitutional or even challenged on constitutional grounds. See Daniel Solove, A Brief History of Information Privacy Law, in Proskauer on Privacy Law, PLI (2006).

A small subset of these images may fit into the historic exceptions for obscene material under *Miller v. California*, 413 U.S. 15 (1973) or the exception for child pornography, but they are already illegal under federal laws that carry severe penalties. There are tort remedies that fit within a historic exception and may be available to the victims of a non-consensual disclosure, but we have limited our analysis to criminal restrictions on speech.

This is a curious limitation, as the Supreme Court has never held that there is one First Amendment doctrine for civil law and another for criminal law. It has certainly never held that civil laws categorically create fewer constitutional issues than criminal laws. In New York Times v. Sullivan (1964), the Court stated, "What a State may not constitutionally bring about by means

of a criminal statute is likewise beyond the reach of its civil law of libel." If anything, the Court has pointed in the opposite direction, observing that criminal statutes afford more safeguards to defendants than tort actions, suggesting that criminal regulation of conduct raises fewer First Amendment issues than tort actions. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

Supreme Court Very Reluctant to Find New Exception to First Amendment

It is very unlikely that the Supreme Court will find a new categorical exception to the First Amendment, even for speech that many find offensive or upsetting.

The statute in question is not based on the speech at issue being offensive or upsetting. That, in fact, would be the problem potentially created by including an intent to harass requirement, as the Media Coalition is urging.

In *Free Speech Coalition*, the Court overturned a law that criminalized computer-generated images that appear to be of a minor engaging in sex and images of an adult that appears to be a minor engaging in sexual activity even though the government argued that it was necessary to prevent fueling the market for pornography created using actual minors. 535 U.S. 234 (2002). In *Stevens*, the Court ruled that a law criminalizing depictions of actual animal cruelty is an unconstitutional content- based restriction on speech. 559 U.S. 460. In *Brown*, the Justices found no historic exception to the First Amendment for the sale to minors of video games with violent content that is "patently offensive" and lacks "serious value." 131 S. Ct. 2729 (2011). In *U.S. v. Alvarez*, the Court struck down a law that barred lying about a receiving a medal or commendation for military service. 132 S. Ct. 2537 (2012). *See also Sorrell v. IMS Health, Inc*., 131 S. Ct. 2653 (2011) (sale of pharmaceutical data for commercial purposes); *Citizens United v. FEC*, 558 U.S. 310 (2010) (independent electioneering by corporations and unions); *Reed*, 135 S. Ct. 2218 (2015) (regulation of commercial and non-commercial signs).

Not a single case cited here involves the publication of "purely private facts," which is what this statute addresses and as such, none of them are relevant to the First Amendment analysis of this statute.

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). So, the legislature may have a compelling interest in protecting individuals from being harassed, threatened or intimidated, but these bills do not include any element of intent or require a showing of harm. Even protecting individuals from embarrassment or emotional distress is not sufficient to justify a content-based ban on speech. In *Simon and Schuster*, the Supreme Court considered whether New York's "Son of Sam" law was constitutional. The Court raised the question of whether the mental anguish suffered by the crime victim and his or her family outweighed First Amendment rights of speakers. It quickly dismissed that notion:

"The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers... As we have often had occasion to repeat: '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' [citation omitted] . . . .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.

The reaction of the general audience to the speech is also not enough to overcome the First Amendment. The Court in *Texas v. Johnson* said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989). *See also, R.A.V.*, 505 U.S. 377 (1992) (striking down a statute that limited speech that "arouses anger, alarm or resentment in others"); *Free Speech Coalition*, 535 U.S. at 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it").

Again, this statute does not regulate expression on the basis of offensiveness. It is a regulation of

speech relating to "purely private" matters. The compelling state interest is in protecting privacy, which the Court has repeatedly maintained as vital to the protection of free speech itself. In Bartnicki v. Vopper, the Supreme Court noted that "the fear of public disclosure of private conversations might well have a chilling effect on private speech." Bartnicki v. Vopper, 532 U.S. 514, 533 (2001). In that case, where the Court found that the First Amendment did protect the distribution of an audio recording of a private conversation between two prominent figures in a collective-bargaining negotiation, it emphasized that this was because the conversation dealt with matters of public concern. The Court went out of its way to note that this principle does not justify intrusions into purely private matters. Justice Breyer observed in his concurring opinion that privacy protections help "to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public" Id. at 537.

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 U.S. 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."). Since distribution of an image without consent of the person depicted without any harmful intent or result does not rise to the level of a compelling interest, the legislation must be carefully focused on the malicious invasions of privacy. Narrowing the legislation to distribution with an intent to harass, stalk, threaten or cause similar serious harm would target malicious acts without burdening protected speech.

This "narrowing' would render this law duplicative of existing harassment, stalking, and threat laws, none of which capture the violation of privacy that this statute addresses.

Finally, even if the law is narrowly tailored, it must still be the least restrictive means to accomplish the compelling state interest. In striking down the Communications Decency Act, the Court held a burden on speech is too great, "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). The Court found that user-empowerment tools such as filters were less restrictive than a criminal law. So a court could strike down this kind of legislation if it finds that civil actions or copyright law could effectively bar distribution of non-consensual images with less impact on protected speech.

For the reasons stated above, the statute does not require strict scrutiny, but even if this scrutiny were required, the statute would survive. Nonconsensual pornography has risen in recent years, not declined, despite the existence of civil actions and copyright laws. See attorney Mitchell J. Matorin, *In The Real World, Revenge Porn Is Far Worse Than Making It Illegal*, Talking Points

Memo, Oct. 18, 2013: "In the real world, civil lawsuits are no remedy at all. Attempts to cast this as a copyright issue are absurd--but it's one of the only available legal avenues. It is not a good fit."

Overbreadth and Vagueness

Even if a law satisfies strict scrutiny, it must still be reviewed for overbreadth so it does not sweep in speech that is not the subject of the compelling state interest. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Here the lack of elements that would narrow the scope of the law makes it very likely that it would criminalize images beyond those that justified by the compelling state interest.

Broadrick is a strange case to cite in support of this claim, as the Court ruled that the statute at issue there – one much broader than the statute at issue here – was *not* overly broad. The Court stated that while "laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. … overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601 (1973). The plainly legitimate sweep of this statute is to prohibit the unauthorized distribution of private, sexually explicit photos and videos. The statute only applies to distributors who "know or should know" that the image was created under circumstances intended to remain private and explicitly exempts material that "relates to a matter of public concern and dissemination serves a lawful purpose."

The potential overbreadth of the legislation may be compounded by failing to use a specific knowledge standard in determining if the defendant knew the distribution was without consent and whether the person in the image understood that the picture would remain private. Here a defendant is liable if a reasonable person should have known or understood an element of a law is being satisfied. This is a negligence standard. In *Smith v. California*, the Supreme Court ruled that laws restricting access to speech must include a scienter requirement. 361 U.S. 147 (1959).

A *scienter* requirement means that a law cannot impose strict liability. A negligence standard, however, is not a strict liability standard. In the case cited, the Court did not hold that negligence standards were impermissible: "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for

carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime." 361 U.S. 147, 155-6 (1959).

In a case seeking civil damages for an invasion of privacy, the Court held that the First Amendment requires more than a mere negligence standard. *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....").

While the underlying cause of action in that case was invasion of privacy, the constitutional question involved the mens rea standard appropriate with regard to the truth or falsity of the statements made. Indeed, the Court took care to note that while factual reporting on newsworthy persons and events public interest is protected, this "does not, of course, foreclose an interpretation of the statute to allow damages where "[r]evelations may be *so intimate and so unwarranted* in view of the victim's position as to outrage the community's notions of decency." Time, Inc. v. Hill, 385 U.S. 374, fn 7(1967) (emphasis added).

The last part of the review is to determine if the legislation is sufficiently clear to be understood by the common person. The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'"). Here, the legislation uses terms such as "legitimate purpose," "matter of public concern" and "reasonable expectation of privacy." These terms may have legal meanings in other contexts, but they have none whether speech may be criminalized. They are inherently vague to a publisher, and the lack of definition will inevitably lead to a chilling effect on speech.

This is no more than a bare assertion, rather than demonstration, that these terms are fatally vague. The Supreme Court has held that "there are limitations in the English language with respect to being both specific and manageably brief." CSC v. Letter Carriers, 413 U.S. 548, 578-9 (1973). No statute will "satisfy those intent on finding fault at any cost," but the Constitution

does not require the satisfaction of impossible standards. What is required, rather, is that laws be "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." Id. at 579. The Media Coalition offers no evidence that publishers, who deal regularly with defamation, copyright, and a range of privacy laws - many of which require complex determinations regarding newsworthiness and public concern - will somehow be uniquely and unjustifiably confused or chilled by the prohibition against publishing private, sexually explicit material that is not a matter of public concern without the consent of those depicted.

"Public Concern" Does Not Cure the Bill's Constitutional Deficiencies

The exemption from liability for dissemination of images that "constitute a matter of public concern" (whatever that vague term means) cannot cure a criminal law that violates the First Amendment. This concept is imported from libel law but has no place in the analysis of a content-based regulation.

The concept is by no means limited to libel law. The Court has repeatedly invoked and applied it with regard to privacy law. See Bartnicki v. Vopper (2001): "This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, *i.e.*, communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters. See *Michaels* v. *Internet Entertainment Group, Inc.* (broadcast of videotape recording of sexual relations between famous actress and rock star not a matter of legitimate public concern); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts §117 (stating that there is little expectation of privacy in mundane facts about a person's life, but that "portrayal of . . . intimate private characteristics or conduct" is "quite a different matter"); Warren & Brandeis 214 (recognizing that in certain matters "the community has no legitimate concern"). Cf. *Time, Inc.* v. *Firestone* (1976) (despite interest of public, divorce of wealthy person not a "public controversy"). …("[S]ome intrusions on privacy are more offensive than others"). Bartnicki v. Vopper, 532 U.S. 514, 540 (2001)(internal citations omitted).

In Snyder v Phelps (2011) the Court cited, as a specific example of "purely private" matters, a prior case where it found that "videos of an employee engaging in sexually explicit acts" did not address a public concern; the videos "did nothing to inform the public." Snyder v. Phelps, 562 U.S. 443, 453 (2011).

A publisher's constitutional rights cannot be limited to what a prosecutor, judge or jury may find to be "a matter of public concern." This suggests that some speech is less valuable than others, and thus gets less protection from the First Amendment, but the Supreme Court has dismissed this notion.

This is a non sequitur. Also, the Supreme Court has literally declared that some speech is less valuable than others: '[N]ot all speech is of equal First Amendment importance,' " however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous." Snyder v. Phelps, 562 U.S. 443, 452 (2011)

in the *Stevens* case, the government argued that speech may be subjected to a test balancing "the value of the speech against its societal costs." Chief Justice Roberts dismissed this notion, "[a]s 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. 460, 472.

As constitutional scholar Steven Shiffrin has pointed out, "there was nothing at all startling about the government's call for balancing. In fact, it is startling that the Court claimed to be startled by the argument. The Court had engaged in a balancing of interests many times." Steven H. Shiffrin, The Dark Side of the First Amendment, 61 UCLA L. Rev. 1480, 1489-90 (2014). In any event, carefully crafted, narrow bills such HF 2741 are not based on any "free-floating" balancing of interests. Rather, they are based on settled precedent recognizing that that communications on matters of purely private concern -- such as intimate nude images -- are entitled to a lower level of constitutional protection (Snyder) and that the government may enact privacy protections for such communications without violating the First Amendment (Bartnicki).

The law in *Stevens* included an exception for images that had "serious value," borrowed from the standard for obscenity. The Court specifically rejected the notion that a safe harbor for speech with value could save an unconstitutional law: "[w]e did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place." *Id*., at 477.

Unconstitutional Viewpoint Discrimination

H.F. 2741 and S.F. 2713 are likely also unconstitutional as viewpoint-based discrimination. By including an exception for publication for "legitimate scientific or educational purposes" the state is allowing publication to communicate about the images in the way it deems appropriate while barring publication of such images if it is communicating a disfavored message. Viewpoint

discrimination in regulation of speech is impermissible even when the state has the authority to regulate speech. When regulating categories of speech that the government is allowed to ban, it cannot do so based on the viewpoint espoused by the speaker. In *R.A.V.*, the Court held "[a]s with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. Compare *Frisby* v. *Schultz,* 487 U. S. 474 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), with *Carey* v. *Brown,* 447 U. S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing)." 505 U.S. at 386.

While the exception in question may not be necessary or useful, exceptions to prohibitions on speech do not in themselves render those prohibitions viewpoint discriminatory. What would likely make the statute vulnerable to this attack, as stated above, is the Media Coalition's recommendation that the statute impose an intent to harass requirement.

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We respectfully ask you to protect the First Amendment rights of all the people of Minnesota and amend or defeat H.F. 2741 and S.F. 2713. We would welcome the opportunity to assist in any way during this process. If we can be of assistance, please contact me, at 212- 587-4025 #3 or horowitz@mediacoalition.org.

CCRI also respectfully asks you to "protect the First Amendment rights of all the people of Minnesota," including those of women, who are disproportionately targeted for this devastating form of abuse and whose rights of freedom of expression, as well as their rights to privacy, physical safety, and equality under the law, are gravely undermined by the lack of effective legislation on this issue.
