

November 7, 2019

The Honorable Jerrold Nadler
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Doug Collins
Ranking Member
House Judiciary Committee
2142 Rayburn House Office Building
Washington, D.C. 20515



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Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

RE: Oppose the SHIELD Act (H.R. 2896)

Dear Chairman Nadler and Ranking Member Collins,

On behalf of the American Civil Liberties Union (ACLU), we strongly urge you to oppose H.R. 2896, the Stopping Harmful Image Exploitation and Limiting Distribution Act of 2019 (SHIELD Act),¹ which would create federal criminal penalties of up to five years in prison for sharing intimate photos without the consent of the person depicted. We are aware that a number of Members of Congress are asking the Committee to hold a hearing on the SHIELD Act.² Although we believe the government has an important role to play in addressing this issue, the SHIELD Act does not take the right approach to addressing this issue. Its broad sweep is not properly tailored to withstand constitutional challenge. We write to urge the House Judiciary Committee not to take up the SHIELD Act.

We recognize that the Act is addressed to a serious public issue — the grave harms associated with nonconsensual disclosure of intimate images. People, disproportionately women and LGBTQ people, have been socially ostracized, lost jobs, and suffered stalking and harassment as a result of intimate photos being disclosed without their consent. And, fundamentally, the nonconsensual distribution of a person's intimate image without their consent deprives them of the right to determine who is permitted to view their bodies, a significant privacy interest.

The Act, however, is not the right vehicle to address these harms. As written, it is unconstitutional under the First

Amendment. It also threatens to create new federal crimes without adequate safeguards to prevent overcriminalization, thereby potentially turning tens of thousands of Americans into unwitting felons.

Congress should always exercise an abundance of caution when creating new federal felony crimes, especially those aimed at speech. The SHIELD Act threatens to impose significant criminal penalties – up to five years in prison for a single distribution of a single image. This Committee knows all too well the dangers associated with conferring sweeping new prosecutorial powers on law enforcement officials, which is why the ACLU has often opposed the creation of new federal crimes without adequate safeguards.³ The concern of overcriminalization is heightened when the SHIELD Act is considered against the backdrop of state laws already prohibiting these disclosures, often through criminal law.⁴

Unfortunately, the SHIELD Act does not include sufficient safeguards to ensure that felony prosecution will be limited to those who knowingly violate the privacy rights of others, an essential element for passing constitutional muster.⁵ The SHIELD Act adopts a recklessness standard. Under this standard, a person could be convicted of a felony under the bill even if they do not actually know that they are violating someone else's privacy. Criminal laws, especially those aimed at speech or association, routinely require the government to prove knowledge with

¹ Stopping Harmful Image Exploitation and Limiting Distribution Act (SHIELD Act), H.R. 2896, 116th Cong. (2019). Images covered by the bill would include those of any person who is 18 or older engaged in “sexually explicit conduct” as defined by federal law and those of any person, regardless of age, in which “the naked genitals, anus, pubic area or post-pubescent female nipple of the individual are visible”. *Id.* To be covered, the person depicted would also have to be identifiable from the image or from text accompanying in the image. *Id.*

² Letter from Representative Tom Malinowski et al. to Representatives Jerrold Nadler and Karen Bass (Nov. 1, 2019) <https://malinowski.house.gov/sites/malinowski.house.gov/files/Revenge%20Porn%20Letter%20to%20Nadler%20and%20Bass%2011.11.19.pdf>.

³ ACLU Letter Opposing S.1334/H.R. 2253, The Back the Blue Act of 2017, <https://www.aclu.org/letter/aclu-opposes-back-blue-act>; ACLU Letter Opposing H.R. 4192, Confronting the Threat of Domestic Terrorism Act, <https://www.aclu.org/letter/aclu-statement-opposing-hr-4192-confronting-threat-domestic-terrorism-act>

⁴ Pam Greenberg, *Fighting Revenge Porn and 'Sextortion'*, Nat'l Conf. of State Legislatures (Aug. 2019), http://www.ncsl.org/Portals/1/Documents/legisbriefs/2019/AugustLBS/Revenge-Porn-and-Sextortion_29.pdf.

⁵ Criminal laws prohibiting the unauthorized disclosure of intimate images are much more likely to survive judicial review under the First Amendment if they include such a knowledge requirement. See *Antigone Books LLC v. Brnovich*, 2:14-cv-02100 (D. Ariz.) (Final Decree dated July 10, 2015); *State v. VanBuren*, 214 A. 3d 791 (S. Ct. Vt. 2019) (upholding a statute criminalizing the distribution of naked images with actual knowledge of a depicted person's reasonable expectation of privacy and lack of consent); *State v. Culver*, 918 N.W. 2d 103, 109 (Wis. App. 2018) (upholding a Wisconsin statute restricting the distribution of naked images when the distributor knew the depicted person had not consented and reasonably expected privacy); *Ex Parte Jones*, 2018 WL 2228888 (TX App. 2018) (holding unconstitutional a statute that prohibited distribution of naked images without consent in circumstances where the defendant had no knowledge of lacking the depicted person's consent), appeal pending. But see *State v. Austin*, 2019 IL 123910 (2019) (upholding a criminal prohibition on the distribution of naked images where the distributor knew or had reason to know that the depicted person had a reasonable expectation of privacy and had not consented to the distribution).

respect to all essential elements of the offense.⁶ And the ACLU has opposed criminal laws targeting speech that fail to require the prosecution prove knowledge regarding the essential elements of the offense.⁷ The higher standard serves to limit prosecutorial discretion, a critical factor here where the law's constitutionality and the freedom of speech are implicated.

Absent a higher standard, under the bill, a teenager might be prosecuted under the Act for posting an intimate image they find on social media or receive from a friend, even if the teenager did not actually know that the image was not posted with the consent of the depicted person. Because the Act allows for charge stacking, if the teenager had 50 followers on the social media site where they posted the image, they could quickly find themselves facing a 250-year prison sentence for a single click of a mouse or tap on a cell phone screen. To take another example: Suppose a man and woman go on a date one evening. The next day, the man sends the woman an unsolicited and unwelcome intimate image. The woman forwards the image to her sister, writing "Can you believe this?" The sister forwards the image to a friend, commenting on what happens in the dating world. Under the SHIELD Act, both the woman and her sister have arguably committed felony crimes. The Constitution does not sustain such prosecutions.⁸

The SHIELD Act also threatens to chill speech on matters of public concern. Although the Act includes an exception for people who share intimate images based on the "objectively reasonable" belief that the image touches on a matter of public concern, it is not clear how far this protection extends. For example, is it "objectively reasonable" to conclude that an intimate image of the President engaged in a sexual relationship outside of marriage touches on a matter of public concern? If not, is it a felony under the Act to share any articles or blog posts containing the image on social media? Even in circumstances where a defendant would likely be acquitted, the risk of prosecution itself is a powerful deterrent. A better approach for any

⁶ See, e.g., *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

⁷ See, e.g., ACLU, *What's Wrong with Fetal Rights*, <https://www.aclu.org/other/whats-wrong-fetal-rights> ("The legislation must contain a requirement of knowledge or intent to commit the crime in order to comply with the due process guarantee of the Constitution."); ACLU Letter Opposing H.R. 258, The Stolen Valor Act of 2013, <https://www.aclu.org/other/aclu-opposes-stolen-valor-act-2013>. See also Brief for American Civil Liberties Union as Amicus Curiae at 18, *U.S. v. Evelyn Sineneng-Smith*, 2013 WL 6776188 (N.D. Cal. 2013) (criminalizing actions that encourage or induce an undocumented person to enter or remain in the United States), currently before U.S. Supreme Court; Plaintiff's Motion for Preliminary Injunction and Memorandum of Law at 23-24, *Kenny, v. Wilson*, 2016 WL 8793468 (D. S.C.) (Aug. 16, 2016) (challenging criminal disorderly conduct in schools statute); Plaintiff's Memorandum in Support of their Motion for a Preliminary Injunction at 29, *Dakota Rural Action v. Noem*, No. 19-5026 (D. S.D. filed April 9, 2019) (challenging South Dakota's "riot boosting" law, which prohibits advising, encouraging, soliciting etc. participation in a riot (targeted at pipeline protests)).

⁸ See *Ex Parte Jones*, 2018 WL 2228888, at *5-8 (TX App. 2018) (noting the constitutional problems of imposing criminal liability on a person who shares an image they have a constitutional right to share without actual knowledge of lacking consent).

criminal law would be to exempt images shared based on a good faith belief that the images touched on matters of public concern.

For these reasons, at a minimum, any federal criminal restriction on the nonconsensual disclosure of intimate images – particularly one classified as a felony – must require the government to establish that the defendant *knowingly* violated the depicted person's reasonable expectation of privacy by sharing an image without consent to be constitutional. A meaningful exception for matters of public concern and interest must also be included to avoid chilling speech related to matters of public concern.

In conclusion, although we agree that the government has an important role to play in preventing the nonconsensual distribution of intimate images, the SHIELD Act's unconstitutionally broad sweep confers too much discretion on law enforcement officials and threatens to chill expression on matters of public concern. We therefore ask the House Judiciary Committee to refrain from taking any action that would enshrine this bill in federal law. If you have any questions, please feel free to contact Kate Ruane, kruane@aclu.org or (202) 675-2336.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Newman".

Ronald Newman
National Political Director

A handwritten signature in black ink, appearing to read "Kate Ruane".

Kate Ruane
Senior Legislative Counsel