



New England
First Amendment Coalition

June 30, 2017

The Hon. Gina Raimondo
Governor
State House
Providence, RI 02903

RE: 17-S 765 and 17-S 401, THE "REVENGE PORN" BILLS

Dear Governor Raimondo:

Later today, Senate Judiciary Committee is scheduled to vote on a "revenge porn" bill. On the table are a bill proposed by the Attorney General identical to the one you vetoed last year, the constitutional alternative you submitted, or, we understand, a "compromise" bill based on one introduced by Governor Baker in Massachusetts. On behalf of the ACLU of Rhode Island, the Rhode Island Press Association, and the New England First Amendment Coalition, we are writing to urge you to stay the course and call for passage of your legislation. The Massachusetts proposal, we submit, suffers many of the same constitutional infirmities as the Attorney General bill, and will chill free speech and likely result in a court challenge leaving no protection for victims of this conduct.

As you know, one of the key elements of a constitutional bill in this area is a requirement that there be an "intent to harm." The Massachusetts bill does not require such intent, but instead allows an alternative "reckless disregard" standard, while also containing other very problematic language. We have taken the liberty of enclosing an analysis of some of the constitutional problems raised by the Massachusetts bill, and some examples of the impact it would have. We urge you to review it carefully.

Regarding "intent to harm," we believe a few facts can help put our urging adoption of this standard into perspective. Specifically:

* 36 states have passed "revenge porn" laws, and 26 of them have an intent to harm element. As for the others, four have a requirement that harm result, and 1 requires an intent to harm or foreseeability that harm will occur. Only five states have no requirement that the publisher intended to harm or caused harm to the person in the image.

* The lack of a mandatory intent element would also make Rhode Island an outlier in New England. Maine, New Hampshire and Vermont all have "intent to harm" statutes; Massachusetts has no statute at all.

* The clear trend in the states is to include an intent element. Nine states passed laws this past year: AL, AZ, IA, KS, MI, NH, OK, MN and WV. Seven of those states require intent to harm; only two, OK and MN, do not.

Page Two
The Hon. Gina Raimondo
June 30, 2017

* There has thus far been one facial challenge to these laws. In *Antigone Books v. Brnovic*, an Arizona law barring dissemination of images without consent was challenged by a group of Arizona booksellers and associations representing booksellers, publishers and librarians. The Attorney General's office agreed to a permanent ban on enforcement of the law. The court found that barring enforcement "will further the objectives of judicial economy, fiscal responsibility and the U.S. Constitution." When Arizona enacted a new law in response to the court case, an "intent to harm" requirement was added.

It is worth recalling that, in testifying on this issue earlier this year, domestic violence organizations indicated that they had no objections to your legislation.

Our organizations were deeply appreciative of your principled stand last year in vetoing the Attorney General's bill and showing your deep support for the First Amendment. We hope that will continue that, by urging the Senate Judiciary Committee to support your bill and reject any alternative like the Massachusetts model.

Thank you in advance for considering our views.

Sincerely,

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Enclosure

The Problems With Using Massachusetts Language to Amend the “Revenge Porn” Bill.

This memo is from the R.I. Press Association, the New England First Amendment Coalition, the ACLU of Rhode Island and the Media Coalition, all of which supported Governor Raimondo’s veto last year of the Attorney General’s constitutionally problematic “revenge porn” bill. We continue to urge passage of the Governor’s alternative bill this year, S 765.

We understand the Senate Judiciary Committee is considering amendments to S-401/S-765 based on a bill proposed by Massachusetts Governor Baker. While we do not know the full details of the proposed amendments, we believe that Governor Baker’s bill also raises serious First Amendment concerns.

The Massachusetts bill makes it a crime to distribute a nude or sexual image of another person if the person does so with the intent to harm, harass, intimidate, threaten or coerce, or with reckless disregard for the likelihood that the person depicted or the person receiving will suffer harm, and, at the time of the distribution, knew or should have known that the depicted identifiable person did not consent to the distribution. Harm is defined to include suffering substantial emotional distress or financial harm. The harm must be reasonable.

1. Substantial emotional distress cannot justify a restriction on speech.

The intent element includes intent to cause substantial emotional distress. The Supreme Court has struck down attempts to limit speech based on the emotional injury to the audience, even if it a person who is described in the speech. In *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, the Court dismissed the notion that speech could be punished to avoid the mental suffering inflicted on crime victims and their families by a memoir of a member of organized crime retelling stories of their victimization. 502 U.S. 105, 118 (1991).

- Many news stories cause emotional distress or financial harm. Certainly the publication of the Anthony Weiner pictures caused him and his wife emotional distress. Weiner also likely suffered financial harm from their publication.

2. Foreseeability standard is unconstitutional

The publisher can be liable if the harm was foreseeable even if it was not intended or anyone actually suffered harm. As noted above, the First Amendment does not allow the press to be held liable for harm from publishing speech, regardless of whether it is foreseeable.

- It is foreseeable that Anthony Weiner could lose his job if a newspaper published the images he sent of himself to women online. Similarly, it is foreseeable that the prisoners at Abu Ghraib would suffer substantial emotional distress (the pictures were taken to humiliate the prisoners. It is why they were posed nude, often with women).
- No one has to actually suffer harm. It only has to be foreseeable that a reasonable person could suffer harm. By this measure, almost any nude or sexual image would be illegal to publish without affirmative consent since the parent or grandparent of anyone in a nude image could suffer emotional distress.

3. Foreseeability of harm to viewer is also unconstitutional

This problem is compounded because the injury can be foreseeable to the person in the image OR the person who receives the image. This has the same First Amendment problem as above but it's exacerbated because it makes it more likely there is someone who could be reasonably harmed by the publication of the image. It also makes it less likely that the legislation is meant to address a problem that is a compelling state interest.

- Certainly it is foreseeable that Weiner's wife suffering substantial emotional distress even if she might have wanted to know what her husband was up to.
- Similarly, it is foreseeable that the many Arabs or Muslims or victims of torture might suffer emotional from seeing the images from Abu Ghraib.

4. First Amendment bars negligence as knowledge standard

Consent is not actual knowledge but "known or should have known" that the person did not consent. This is a negligence standard. The First Amendment prohibits the use of negligence-based standards in regulating speech. *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...").

- It leaves a publisher guessing what a jury will think is reasonable, which has an inherent chilling effect, especially considering the penalty in the bill.

5. "Public concern" or "lawful purpose" exception does not cure the legislation

The legislation cannot be saved by the exception in S.B. 401/H.B. 5304 for a "matter of public concern" or "serves a lawful purpose." These exceptions create a content-based exception to a content-based law. Thus, it compounds the constitutional flaw of the ban on certain images. This was the basis for the Supreme Court's decision in *Regan v. Time, Inc.*, to strike down a federal law banning the printing of images of currency despite it having an exception for publication "for philatelic, numismatic, educational, historical, or newsworthy purposes." 468 US 641 (1984).

- Again, there is significant chilling effect on speech in forcing a publisher to guess if jury would find that an image is a matter of public concern. Some have argued that the Abu Ghraib pictures or Anthony Weiner pictures are no longer matters of public concern. The image of the napalm girl or images of topless slaves being auctioned off are historic but may not be a matter of public concern. Since a violation of the law is subject to three years in prison, many publishers would not take the risk of distributing them.

For all these reasons, our organizations urge that S-765 be passed, and that efforts to replace its "intent to harm" standard with the Massachusetts bill's language be rejected.