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COMMENTS IN OPPOSITION TO 14-S 2644 – ELECTRONIC IMAGING DEVICES
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The ACLU of Rhode Island recognizes the legitimate and serious privacy issues that are implicated by so-called "revenge porn." We agree that there should be meaningful remedies available for victims of this conduct. The question is whether the adoption of *criminal* penalties – in this instance, up to a three year prison sentence – is the best way to address this issue. For a number of reasons, the ACLU believes that this type of misconduct belongs in the civil, not criminal, courts.

It is important to note at the beginning that while the bill refers to taking pictures of an individual "with or without that other person's knowledge and consent," it is clearly aimed at situations where the image in question was taken with the knowledge and consent of both parties. Any non-consensual photographing is already, quite appropriately, a criminal offense. As a result, the core of this bill means that a person could face a felony criminal record and prison time for disseminating an image that everybody acknowledges was taken knowingly and consensually. The consequences of this are extremely troubling.

As worded, the bill applies to any person who has received the photo in any manner. That means a person could go to prison for three years for disseminating a photo he or she received directly from the alleged victim, for example. But once a person has lawfully obtained a photo, it is quite problematic from a free speech standpoint to criminalize its further dissemination. Limiting the bill's reach to the photographer him or herself is also problematic, for it means he or she could go to jail for disseminating a picture that others are free to share.

The bill also appears to require consent *each time* that a photo that was initially taken consensually gets re-disseminated. In many instances, this will put judges and juries in the position of having to decide – often in the context of an intimate relationship gone sour and months or years after the fact – whether the dissemination of the photo was agreed to by the alleged victim. Mandating perpetual consent any time a photo is further disseminated is a burden the First Amendment should not bear. It creates a presumption that a lawfully taken photograph has been unlawfully disseminated unless the defendant can prove otherwise. In the context of disseminating of images, the presumption should be precisely the opposite: that consent to share has been given absent explicit evidence to the contrary.

Technically, a person who stored on his computer or cellphone the infamous Anthony Weiner photo would be guilty of a felony any time he shared that photo with another person. If the response is that Weiner had no "reasonable expectation of privacy" under the circumstances, that points to a key problem with this legislation. When the photos at issue are by their very nature "private," it is very difficult to parse out when an expectation of privacy is reasonable

once the person has agreed to have the conduct photographed in the first place. When three years in prison hangs in the balance, a person should not have to guess at the answer.

In short, this bill allows a person to go to prison for disseminating a photo – even one that the victim may have disseminated, and without any requirement that the person disseminating the photo intended to cause harm by distributing it, and without any need to prove that any actual harm to the victim resulted from its reissuance.

In an attempt to avoid the many constitutional issues raised by this, the bill states that "constitutionally protected activity" is not covered. But that goes without saying, and does not in any way address the problems associated with making this conduct a crime, or preventing people from being wrongfully charged for this offense.

As we stated at the beginning, we wish to emphasize that, by raising these concerns, we are not suggesting that a person can disseminate intimate photos for malicious reasons with no consequences, but only that the criminal law is not the place for it.

Current state privacy laws and other tort remedies are clearly already available to address this type of conduct. If there is a concern that those laws are not sufficient, we would welcome consideration of a separate tort action to address this problem. However, this misconduct does not belong in our criminal justice system. For these reasons, the ACLU opposes this bill.