

September 29, 2023

The Honorable Chuck Schumer
Senate Majority Leader
U.S. Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Senate Minority Leader
U.S. Senate
Washington, D.C. 20510

Re: SHIELD Act, S. 412

Dear Majority Leader Schumer and Minority Leader McConnell:

The undersigned groups urge you to oppose the Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act of 2023 (S. 412), which would create a new federal crime carrying a one-to-five-year prison sentence for sharing intimate photos of a person without that person’s consent. We recognize that this bill is well intentioned, but we are concerned that it will sweep in and criminalize innocent conduct and worsen the trial penalty that many criminal defendants—including many people who are actually innocent—face in our justice system.

The initial text of the bill would have criminalized using a means of interstate or foreign commerce to distribute an intimate visual depiction of an individual with knowledge of, or reckless disregard for, the lack of the consent of the individual depicted in the distribution.

Revised language eliminates the recklessness standard and subdivides the offense into (1) a misdemeanor, (2) a felony for conduct that intends to abuse, humiliate, harass, or degrade, and (3) separate offenses for conduct relating to depictions of minors. The revised bill also attempts to fix a crucial problem with the SHIELD Act’s initial text by providing that it is not a crime for someone to share an intimate image if they do so “in good faith” to “seek support or help with respect to the receipt of an intimate visual depiction.” We understand this revision is intended to ensure that it is not a crime for someone who is victimized by receiving an *unwanted* sexual image to share it with family or friends in an effort to seek help.

While these revisions are welcome, they fall far short of what is needed. The latest version of the SHIELD Act continues to criminalize innocent conduct and constitutionally protected communication. For example, if a person receives, unsolicited, an intimate image from an acquaintance and in turn forwards the image to a friend or family member—not for the purpose of “seeking support or help”—but instead to express surprise or displeasure, then that person will have committed a crime under the current version of the SHIELD Act. And that should not be. The communication in this example is plainly innocent conduct. Equally plainly, it is protected speech. Yet, under the SHIELD Act, the *victim* of an unsolicited sexual communication could easily find themselves prosecuted.

These examples can be multiplied. Imagine you see (or are sent) an image of a friend's or family member's spouse engaged in sexually explicit extramarital activity, and, in shock, you transmit that image to alert your friend of the infidelity. The SHIELD Act's current text makes that a crime. But, again, it should not be a crime. And, again, it is also protected speech.

Or imagine a high school senior or college freshman who stumbles upon a sexually explicit image that a classmate has chosen to publicly post online, and who then texts their best friend a link to that material. This person, too, has committed a crime under the SHIELD Act's current text. But their conduct is constitutionally protected, and, more fundamentally, it is a deeply human reaction to reach out to close friends when confronted with something shocking or salacious. This, too, should not be criminalized.

Put simply, the SHIELD Act remains dizzyingly overbroad. To the extent this bill intends to criminalize the distribution of "revenge porn" which is intended to and does harm the person depicted, intent to harm should be a statutory requirement. Without that requirement, this bill will sweep in instances like the hypotheticals described above, potentially subjecting fundamentally nonculpable people to harsh criminal penalties and ruinous prosecutions.

This bill falls short even where it tries to safeguard constitutional rights. In an effort to save itself from unconstitutionality, the current version of the SHIELD Act does exempt people from criminal liability when they share an intimate image that "touches upon a matter of public concern." However, this exception is insufficient for several reasons. First, as the examples above reflect, it does not exempt from prosecution a wide range of protected speech that *does not* involve a matter of public concern. Second, there is no commonly accepted definition for what types of images "touch upon matters of public concern." This leaves the term subject to the interpretation of prosecutors and opens the door for different definitions in different cases as well as discretionary and even abusive applications.

The public policy case for federal "revenge porn" legislation is also sorely wanting. Forty-eight states and the District of Columbia already have criminal laws prohibiting the nonconsensual distribution of intimate images.¹ Instituting a new, largely overlapping, federal provision will bring about the threat of duplicative prosecutions, which worsens the trial penalty, and raises policy concerns about overfederalization of the criminal law.

While we appreciate efforts to narrow the bill after serious concerns were expressed by Judiciary Committee members during markup, the revised version still places too much discretion in the hands of law enforcement and prosecutors for fair application, and potentially criminalizes innocent conduct. The bill's goals of protecting privacy could be better advanced by a more narrowly tailored proposal that does not unnecessarily sweep up protected speech on both

¹ National Association of Attorneys General, An Update on the Legal Landscape of Revenge Porn, <https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/>.

public and private matters. We ask you to refrain from moving this bill to the floor. If you have further questions, feel free to contact Nathan Pysno at 202-465-7627 or npysno@nacdl.org.

Sincerely,

National Association of Criminal Defense Lawyers

American Civil Liberties Union

CURE (Citizens United for Rehabilitation of Errants)

Due Process Institute

Federal Public & Community Defenders

The Leadership Conference on Civil and Human Rights