

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 – 1789
www.rutherford.org

June 7, 2016

The Honorable Members of the House of Representatives
Rhode Island General Assembly
82 Smith Street
Providence, RI 02903

Re: “Revenge Porn” Legislation / H 7537¹

Dear Representative:

For more than 34 years, The Rutherford Institute has championed a robust First Amendment,² believing as Justice Louis Brandeis did that “to justify suppression of free speech, there must be reasonable ground (a clear and present danger) to believe that the danger apprehended is imminent, and that the evil to be prevented is a serious one.”

While we commend the Rhode Island General Assembly for recognizing the need to protect individuals against those who would victimize them with “revenge porn,” as well-meaning as the proposed H-7437 legislation may be, it is so vague and overly broad in its efforts to ostensibly criminalize “revenge porn” as to have a chilling effect on protected First Amendment expression.³

It would be in the best interests of the citizens of Rhode Island for the General Assembly to call on constitutional scholars to advise legislators in drafting legislation that both respects the parameters of the First Amendment while also guarding against abusive behavior by those seeking to engage in revenge porn.

¹ “Revenge Porn” Legislation / H 7537,
<http://webserver.rilin.state.ri.us/BillText/BillText16/HouseText16/H7537.pdf>.

² The Rutherford Institute is a non-profit civil liberties organization dedicated to the defense of Americans’ constitutional rights that provides free legal representation to individuals whose civil rights are threatened and/or infringed.

³ Section 2 of H 7537 prohibits the unauthorized dissemination of indecent material procured “with or without that person’s knowledge or consent and under such circumstances in which a reasonable person would know or understand that the image was to remain private[.]”

The Honorable Members of the House of Representatives
Rhode Island General Assembly

If the General Assembly wishes to discourage “revenge porn,” it must do so in a manner that does not run afoul of the Constitution.

Unfortunately, as presently drafted, H-7437—which makes no mention of revenge, harassment or motive and does not require that a photo be proven to cause harm or be intended to cause harm—fails to address the problem of revenge porn in a targeted manner that does not threaten freedom of speech.

1. The proposed legislation is unclear in its scope. This will have a chilling effect on protected expression, particularly as it relates to the right of citizens to hold public officials accountable for their actions, and threatens to suppress the dissemination of many newsworthy and historically significant images.
2. The proposed legislation’s “public concern” exemption is entirely too vague and indefinite to comply with First Amendment principles governing the criminalization of expression. Nowhere in the legislation is the phrase “public concern” defined nor are any criteria for its application discernible in the legislation. As such, the public is left to guess whether images they transmit are lawful and juries instructed to apply the “public concern” exemption might do so based upon their prejudices toward a defendant and not on a principled basis that relates to the political or social value of the defendant’s conduct. The proposed statute makes certain exemptions to the prohibition, specifying dissemination made in the public interest for issues related to reporting unlawful conduct, as well as educational, medical, or scientific activities. Importantly, the proposed statute also contains a vague exemption for “indecent material when the dissemination constitutes *a matter of public concern*.” Vague laws proscribing expressive activity offend the First Amendment because they allow judges and juries to make subjective decisions on what expression is punishable in an arbitrary and discriminatory manner. Vagueness in criminal laws also inhibits speech by forcing citizens to steer wide of what expression is prohibited.⁴
3. The vagueness of the “public concern” exemption endangers the right of citizens to confidently expose misconduct by representatives that might involve the dissemination of explicit material. In light of recent cases where public officials engaged in indecent behavior through electronic devices, we contend that the First Amendment protects a citizen’s right to confront and publicize such behavior through the dissemination of the lawfully and consensually received, explicit material. The vagueness of the “public concern” exemption endangers the right of citizens to confidently expose this kind of conduct by their representatives. It does little to protect the women who exposed former Congressman Anthony Weiner during his sexting scandal, who under this statute would have faced up to five years in prison and up to \$5,000 in fines. To ensure a robust public discourse regarding our elected representatives, the ability to disseminate consensually procured indecent material of public officials must be protected.

⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

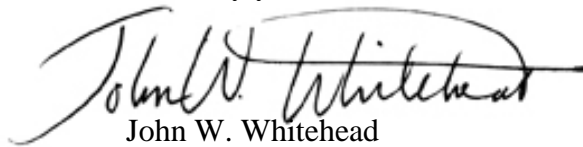
The Honorable Members of the House of Representatives
Rhode Island General Assembly

4. Additionally, the proposed legislation is far too broad and makes criminal the dissemination of images that have political and social importance but do not constitute “revenge porn.” Thus, the legislation covers any image depicting the “intimate areas” of a person, which is defined to include the buttocks or “undergarment clad genitals.” It is not difficult to imagine any number of socially important images, such as the depiction of prisoner mistreatment or victims of conflict, which would be considered a visual image of an intimate area. Despite the need for public awareness of the matter depicted, the proposed “revenge porn” law could criminalize the dissemination of those images and would at the very least chill the dissemination of information about newsworthy matters.

In conclusion, while “revenge porn” is a practice that should be soundly castigated, the Rhode Island General Assembly should tread cautiously in casting its net too wide in pursuit of alleged violators lest lawful speech protected by the First Amendment be criminalized in the process.

We urge the General Assembly to consider the broader effect these laws will have on freedom of speech and reject them as threatening the robust exchange of ideas and information the First Amendment is meant to foster. Any laws addressing this problem must be narrowly targeted so they do not unduly chill speech that is vital to serving the public’s right to know.

Sincerely yours,

A handwritten signature in black ink, reading "John W. Whitehead". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John W. Whitehead
President

The Rutherford Institute