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April 30, 2014

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 43, "Criminal Law – Harassment – Revenge Porn"

Dear Governor O'Malley:

We have reviewed House Bill 43, "Criminal Law – Harassment – Revenge Porn" for constitutionality and legal sufficiency. While this bill presents novel constitutional issues, it is our view that it can most likely be successfully defended against constitutional challenge, at least as applied to photographs, film, videotapes, recordings, and other forms of actual image reproduction. We are less confident that the law would be upheld as applied to other forms of virtual image reproduction such as drawings or animation, which are, in any event, unlikely to be the types of conduct that would be prosecuted under this statute.

House Bill 43 would prohibit a person from intentionally causing serious emotional distress to another by intentionally placing on the internet, an image of the other person that reveals the identity of the person with his or her intimate body parts exposed or while engaged in sexual contact, with knowledge that the other person did not consent to the placement of the image on the internet and under circumstances in which the other person had a reasonable expectation of privacy that the image would be kept private. The prohibition would not apply to lawful and common practices of law enforcement, the reporting of unlawful conduct, legal proceedings, or situations involving voluntary exposure in public or commercial settings. A violation would be a misdemeanor subject to imprisonment not exceeding two years or a fine not exceeding \$5,000, or both.

Legislative enactments against so-called “revenge porn” have been a fairly recent development in some states. Similar bills were enacted in New Jersey in 2004, and California in 2013. There is no federal law addressing revenge porn. Although there does not yet appear to be any published court opinions that address First Amendment challenges to these revenge porn statutes, federal courts that have examined an analogous statute (18 U.S.C. § 2261A, which prohibits interstate stalking and harassing conduct) have suggested that the statute does not punish speech, but rather the conduct involved in the act of posting or sending information. *See e.g. United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (violation of 18 U.S.C. § 2261A was not protected speech); *see also United States v. Sayer*, 2012 U.S. Dist. LEXIS 67684 (D. Me. 2012). Because the federal stalking statute, like House Bill 43, requires malicious intent by the defendant and substantial harm to the victim, the statute was held not to be impermissibly overbroad. *Petrovic*, 701 F.3d at 856. Similar analysis could be used to defend the prohibition in House Bill 43, that the intentional use of the materials in question for the purpose of causing serious emotional distress, is not protected speech.

In a forthcoming law review article, two law professors suggest that revenge porn legislation may be drafted in such a way that would be likely to survive First Amendment challenges. *See Citron and Franks, Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. (forthcoming 2014).¹ For example, the authors suggest that legislation should make clear that the person distributing the images must be shown to have knowledge that “the subject of those images did not consent to the disclosure of the images and that the subject had a reasonable expectation that they would be kept confidential or private.” *Id.* at *23. They also suggest that a statute require the state to prove that the victim suffered emotional harm, and that the images “do not concern matters of public importance.”² *Id.* at *24. *See also United States v. Shrader*, 675 F.3d 300, 311-12 (4th Cir. 2012) (recognizing that an intent to cause serious emotional distress may mitigate vagueness and may provide adequate notice of proscribed action). The authors rely on court decisions addressing First Amendment challenges to civil tort actions that suggest that disclosure of matters of purely private matters are deserving of less First Amendment protection than matters of public concern, and that the images at issue constitute the former. *Id.* at *28 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (dicta explaining that protected disclosure of phone conversation between union officials that constituted a

¹ Downloaded at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368946 (last visited April 23, 2014).

² An exception to the prohibited act for “images concerning matters of public importance” had been amended onto the bill, but ultimately was stricken before the bill’s passage.

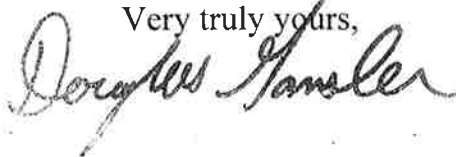
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matter of public concern did not involve “domestic gossip or other information of purely private concern”); *Michael v. Internet Entertainment Group, Inc.* 5 F.Supp.2d 823 (C.D. Cal. 1998) (upholding privacy tort claim for publishing celebrity sex tape, explaining that public has no legitimate interest in graphic depictions of intimate aspects of celebrity couple’s relationship)).

House Bill 43 contains many of the suggestions offered in the law review article. As the prohibited act in the bill is limited to non-consensual distributions of matters in which the victim had a reasonable expectation of privacy and that requires the State to prove that the actor intentionally cause serious emotional distress by placing the image on the internet, such limitations may help preserve its constitutionality.

While we believe that the prohibited act in House Bill 43 would likely survive a facial challenge to its constitutionality, there is a risk that as applied to virtual representations such as drawings or animation, a court could find the prohibition to be an impermissible restraint on speech. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (federal prohibitions against use of virtual images of child pornography found to be overbroad and unconstitutional); *but see United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008) (federal statute prohibiting trafficking in obscene material upheld as applied to receipt of obscene anime images). Nevertheless, it is our view that House Bill 43 is legally sufficient and constitutional.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/JMM/kk

cc: The Honorable Luiz R.S. Simmons
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro