

April 1, 2019

Senator Connie M. Leyva
State Capitol, Room 4061
Sacramento, CA 95814
VIA EMAIL [Jessica.Golly@sen.ca.gov] AND U.S. MAIL

Re: Senate Bill 564 (As Amended March 27, 2019) – SUPPORT

Dear Senator Leyva:

I write to you in my capacity as a professor of constitutional law to express my support for your Senate Bill 564, as amended March 27, 2019.

This legislation addresses a problem of major significance to performers whose personas are exploited without their consent in sexually explicit audiovisual works through the use of increasingly sophisticated digital imagery. I have reviewed the latest amended version of this legislation and do not believe it poses any issues of constitutional concern.

While the content regulated by this statute may be “speech” insofar as the First Amendment is concerned, it is a longstanding precept of First Amendment doctrine that “not all speech is of equal First Amendment importance.” *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985). And it is likewise true that “speech on matters of purely private concern is of less First Amendment concern.” *Id.* at 759. The U.S. Supreme Court has correctly recognized that “sexual behavior” is “the most private human conduct.” *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). By regulating the nonconsensual use of an individual’s persona in sexually explicit audiovisual works, Senate Bill 564 does not target any forms of expression that have historically received First Amendment protection.

Indeed, even verbal statements that have been deemed merely “vulgar” and “offensive” have been proscribed where a sufficiently significant countervailing public interest is at stake. *FCC v. Pacifica Found.*, 438 U.S. 726, 747-748 (1978). In the context of this bill, the Legislature can reasonably point to serious reputational and economic harms to the depicted individuals, as well as the lack of social value inherent in false and misleading depictions (which these so-called “deep fakes” admittedly are) as compelling public interests that justify regulation. For that reason, it is not surprising that other states have already begun to enact similar

legislation. For example, Virginia recently passed S. 1736, making it a “Class 1 misdemeanor” in that state to intentionally disseminate digitally created pornographic content similar to the content proscribed by Senate Bill 564. By contrast, Senate Bill 564 creates only a civil remedy and does not seek to impose criminal liability.

In evaluating the constitutionality of Senate Bill 564, different standards apply depending on whether the legislation is content-neutral or content-based. Here, proposed Civil Code Section 1708.86 arguably targets conduct, rather than speech itself, insofar as it prohibits the intentional disclosure of sexually explicit material without the depicted individual’s consent. *Cf. People ex rel. Sorenson v. Randolph*, 99 Cal.App.3d 183, 190 (1979). In that context, regulation is permissible if: (a) it furthers an “important or substantial government interest”; (b) that interest is “unrelated to the suppression of free expression”; and (c) the “incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.*, quoting *United States v. O’Brien*, 391 U.S. 467, 377 (1968). In my opinion, this proposed statute comfortably satisfies that standard.

Moreover, even if SB 564 was deemed a content-based regulation of speech, the legislation is narrowly tailored to a compelling governmental interest and is therefore constitutionally permissible. *Cf. People v. Garelick*, 161 Cal.App.4th 1107, 1124 (2008). The narrow tailoring of this legislation is evidenced by several significant exemptions for content disclosed: (a) in “reporting unlawful activity,” in “legal proceedings,” and in the exercise of “law enforcement duties”; (b) in a matter of “legitimate public concern”; (c) in a work of “political or newsworthy value, or similar work”; and (d) for purposes of “commentary or criticism, or to the extent the disclosure is otherwise protected by the California Constitution or the United States Constitution.” Senate Bill 564, § 1708.86(c)(1)(A)–(D). These exemptions – especially those for works of “political or newsworthy value” – mirror identical limitations in California’s postmortem right of publicity statute that were promulgated at the behest of the motion picture studios and which have never been found inadequate to protect First Amendment rights. *See* Civil Code Section 3344.1(a)(2). To that end, cases interpreting the scope of California’s right of publicity statute ought to be relevant in interpreting similar terms in Senate Bill 564. *See, e.g., Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 400 (2001) (discussing former Civil Code Section 990(n)(2)).

One significant distinction between this legislation and other regulations of speech – in particular, the law of defamation – is that SB 564 does not draw a distinction between public and private figures in the protection it affords. To that end, this proposed measure makes clear that a nonconsensual usage of a depicted individual does not become “newsworthy” merely “because the depicted individual is a public figure.” Senate Bill 564, § 1708.86(c)(2). Absent this limitation, the newsworthiness exception could be interpreted so broadly as to swallow the statute. For instance, in other legislative contexts, concepts like the “public interest” have been given a sweeping definition that might include *any* content pertaining to a public figure. *See, e.g., Nygård, Inc. v. Uusi-Kerttula*, 159 Cal.App.4th 1027, 1042 (2008) (claiming “an issue of public interest” in California’s anti-SLAPP statute is “any issue in which the public is interested”). Because proposed Civil Code Section 1708.86 is intended to prohibit the dissemination of sexually explicit material irrespective of the notoriety of the depicted individual, it is important to clarify that the mere fact that the depiction is of a public figure does not render the content inherently newsworthy.

Finally, the legal and equitable civil remedies allowed by the proposed statute appear appropriate and well-tailored to the regulated conduct. Because of the unique and ubiquitous manner in which digital content is disseminated on the internet, the possibility of injunctive relief is likely to be a necessary remedy to staunch the spread of unlawful content.

I invite you or members of your staff to contact me directly in the event you wish to further discuss my views concerning this important legislation.

Sincerely,


Erwin Chemerinsky