

**PRESENTATION OF ATTORNEY GENERAL OF THE VIRGIN ISLANDS  
ARIEL M. SMITH  
THIRTY-FIFTH LEGISLATURE OF THE VIRGIN ISLANDS  
COMMITTEE ON HOMELAND SECURITY, JUSTICE  
AND PUBLIC SAFETY  
FEBRUARY 13, 2024**

Good morning, Chairman Gittens, members of the Committee on Homeland Security, Justice and Public Safety, legislative staff, and to those of you listening and viewing audience. My name is Timothy Perry, and I am the Chief of the Criminal Division in the St. Thomas, St. John and Water Island District. On behalf of Attorney General Ariel Smith, I am pleased to provide a few remarks regarding proposed Bill No. 35-0182.

Bill No. 35-0182 seeks to amend Title 14 of the Virgin Islands Code, chapter 51, to designate the existing sections as subchapter I and add subchapter II, the Revenge Porn Act. The Department of Justice has done a preliminary review and offers the following comments.

While there is no federal criminal cause of action for the nonconsensual dissemination of private sexual photos, commonly referred to as revenge porn, in 2022, Congress reauthorized the Violence Against Women Act, which included new provisions to address the nonconsensual dissemination of private sexual photos and created a right of action for victims, which permits civil remedies.<sup>1</sup> At the end of

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<sup>1</sup> <https://crsreports.congress.gov/product/pdf/R/R47570/>

2023, 48 states plus the District of Columbia enacted legislation criminalizing the nonconsensual dissemination of private sexual images.<sup>2</sup> Only two states, Massachusetts and South Carolina, do not have laws prohibiting revenge porn.

Because states can enact laws concerning the nonconsensual dissemination of private sexual images, laws – including classification of crimes and penalties – vary widely from state to state. For example, in Alaska, violations are considered second-degree harassment, a class B misdemeanor, punishable by up to 90 days in jail and a fine of up to \$2,000.<sup>3</sup> In Hawaii, a violation of privacy in the first degree, including revenge porn, is a class C felony, punishable by up to five (5) years in prison and a \$10,000 fine.<sup>4</sup> Some jurisdictions, including Connecticut, designate violations as either a misdemeanor or felony based on the number of people to whom the image was disseminated; some, including the District of Columbia, classify offenses as a misdemeanor or felony based on the method of how images were distributed.<sup>5</sup> Others include a felony offense for subsequent violations.

The proposed legislation is very similar to the statutes in Illinois and Oklahoma in both structure and content.<sup>6</sup> However, sec. 1035(a), which discusses punishment for a first offense, is similar to Maryland's statute, while sec. 1035(b),

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<sup>2</sup> [https://ballotpedia.org/Nonconsensual\\_pornography\\_\(revenge\\_porn\)\\_laws\\_in\\_the\\_United\\_States](https://ballotpedia.org/Nonconsensual_pornography_(revenge_porn)_laws_in_the_United_States)

<sup>3</sup> See Alaska Stat. §§ 11.61.120, 12.55.135(b) and 12.55.035

<sup>4</sup> See HRS §§ 711-1110.9, 706-640(c) and 706-660(b)

<sup>5</sup> See Conn. Gen Stat 53a-189c and D.C. Code §§ 22-3052 and 3053

<sup>6</sup> See 720 ILCS 5/11-23.5 and 21 Okl. St. § 1040.13b

which establishes punishment for subsequent violations, is comparable to the penalties in Hawaii.<sup>7</sup> Unlike the statutes in Illinois and Oklahoma, Bill No. 35-0182 includes a provision for civil remedies. It also allows for forfeiture of property, including funds and electronics, acquired or maintained in connection with the nonconsensual dissemination of private sexual images.

As presented in Bill No. 35-0182, to prosecute nonconsensual dissemination of private sexual images, the prosecutor must prove that the accused person:

1. “Purposely, and with the intent to harass” or cause some other harm, distributes a sexual image of an identifiable person, 18 years or older; **after**
2. Obtaining the image knowing it should remain private; **and**
3. There was no consent to distribute.<sup>8</sup>

The Fifth and Fourteenth Amendments to the United States Constitution guarantee due process when someone’s life, liberty or property is at stake. Procedural due process requires the government to follow fair procedures before depriving a person of one of these three rights. One way to do this is by establishing elements of a crime, or a “set of facts that must all be proven to convict a defendant of a crime.”<sup>9</sup> To ensure procedures are fair, each of the elements listed above would

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<sup>7</sup> See Md. Criminal Law Code Ann. § 3-809

<sup>8</sup> Please note that the Virgin Islands Code provides a separate criminal cause of action for distribution or exhibition to a minor under 18 in 14 V.I.C. § 1025.

<sup>9</sup> [https://en.wikipedia.org/wiki/Element\\_\(criminal\\_law\)](https://en.wikipedia.org/wiki/Element_(criminal_law))

have to be proven before a person could be found guilty of the nonconsensual dissemination of private sexual images.

The proposed legislation may be challenged under the First Amendment, which protects freedom of speech, on vagueness grounds.<sup>10</sup> Defendants may argue the statute is overly broad, does not provide notice of the type of conduct or behavior the legislature intended to prohibit or criminalize, or prevents them from engaging in activities protected by the Constitution. While these types of arguments have been made in states that criminalize revenge porn, they have not been successful. At least three state supreme courts and one appellate court have upheld similar laws, finding that the laws were narrowly tailored to meet an important government interest. Further, three of these courts found that speech regarding purely private matters deserves less protection because “it is not at the core of First Amendment protections.”<sup>11</sup>

Requiring prosecutors to prove someone performed an act purposely and with the intent to harass could lead to prosecutorial challenges when coupled with also proving someone should have known a private sexual image was to remain private, as it implies a connection between the “identifiable person” and the “disseminator.” As such, a defendant can assert a valid defense if they can prove they lacked the

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<sup>10</sup> See *People of the V.I. v. Roebuck*, 2021 V.I. Lexis 5 (Super. Ct. Jan. 15, 2021).

<sup>11</sup> <https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/>

intent to harass, or did not know that the image was to remain private or that consent, actual or constructive, from the identifiable person was necessary. These possible defenses will make prosecution of the bill, if passed, in its current form challenging. The exceptions to culpability further diminish the likelihood of a successful prosecution.

The proposed legislation establishes a first-time violation of the statute as a misdemeanor, punishable by up to two years imprisonment and a fine of up to \$5,000. Second and subsequent violations, whether with the same victim or not, would be felonies subject to imprisonment for up to five years and a fine of up to \$10,000. The bill creates two categories of crimes and establishes different levels of punishment based on the number of times a defendant violates the statute.

Under the current established Virgin Islands law, crimes are classified as misdemeanors or felonies. Per 14 V.I.C. § 2, “a felony is a crime or offense which is punishable by imprisonment for more than one year” and “every other crime or offense is a misdemeanor,” unless otherwise designated by the Legislature. Bill No. 35-0182 proposes a higher level of punishment for misdemeanor convictions than the Virgin Islands Code, currently allows.

With that being said, the following things should be considered regarding Bill No. 35-0182:

First, will the elements of the criminal offense, as proposed, effectively deter the behavior the Legislature seeks to criminalize? If so, will requiring a prosecutor to prove a defendant had both the intent and the requisite knowledge to commit the criminal offense achieve the prosecutorial outcomes envisioned?

Second, do the suggested penalties match the undesired behaviors? Does the Legislature intend to apply felony-level punishment to misdemeanor charges? While classifying offenses as misdemeanors or felonies helps connect actions to penalties, does the proposed system ensure punishments are applied fairly?

Third, what are the required resources, including human, financial and technological, needed to investigate and prosecute the new legislation? Creating new laws without implementing a plan of action will not deter the nonconsensual dissemination of private sexual images.

Finally, I would review sections 1034(a)(3) and 1036 for clarity and meaning. I would edit section 1034(a)(3) to “the images involve voluntarily exposure of an identifiable person in public or commercial settings.” I would change section 1036 to read, “A person whose private sexual images have been disseminated in violation of this subchapter may bring a civil action against the person who disseminated the private sexual images...”

With that I want to thank the Committee for the opportunity for the Virgin Islands Department of Justice to testify on Bill No. 35-0182. This concludes our formal remarks.