



June 3, 2024

Senator Dick Durbin  
711 Hart Senate Office Building  
Washington, DC 20510

Senator Lindsey Graham  
211 Russell Senate Office Building  
Washington, DC 20510

Dear Chair Durbin and Ranking Member Graham:

The nonconsensual production and disclosure of intimate images, including those produced through AI technology, is a profoundly harmful act that is weaponized disproportionately against women and members of the LGBTQ+ community. Distribution of nonconsensual intimate imagery (NCII) can have devastating consequences for victims, including lasting psychological, financial, reputational, and interpersonal consequences.<sup>1</sup> NCII is frequently wielded by perpetrators of domestic violence and others who seek to marginalize and silence its victims.<sup>2</sup> The proliferation of advanced, easy to use AI technology, along with unscrupulous app developers creating and marketing tools designed to produce NCII, has made these images far easier to produce and disseminate. The Center for Democracy & Technology (CDT) is proud to endorse the Disrupt Explicit Forged Images And Non-Consensual Edits, or DEFIANCE, Act, which enhances the existing federal cause of action against creators and distributors of AI-generated NCII.

The DEFIANCE Act carefully balances human rights, free expression, and privacy equities, focusing squarely on the most direct way to address harms perpetrated by AI-generated NCII. The legislation will help victims who are harmed by such digital forgeries to retake control of their agency from perpetrators who may create these images to harass, extort, or otherwise harm them. These harms are addressed head-on by amending the existing VAWA cause of action to more clearly cover intimate visual depictions of identifiable individuals created through the use of software, machine learning, artificial intelligence, or any other computer-generated or technological means. In addition to the existing cause of action against the nonconsensual disclosure of authentic intimate images, the bill empowers victims of digitally forged NCII to bring a federal civil action against any person who knowingly produces or possesses a digital forgery with intent to disclose it, or knowingly discloses or solicits the digital forgery, while

---

<sup>1</sup>See D.K. Citron, *Sexual Privacy*, 128 Yale L.J. 1870 (2018); D.K. Citron & M.A. Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

<sup>2</sup> Citron, *supra* note 1; N. Henry, *Image-Based Sexual Abuse as a Means of Coercive Control: Victim-Survivor Experiences*, 29 *Violence Against Women* 1206 (2023); K.T. Lucas, *Deepfakes and Domestic Violence: Perpetrating Intimate Partner Abuse Using Video Technology*, 17 *Victims & Offenders* 647 (2022); A. Powell, et al. "Image-Based Sexual Abuse" in *Routledge Handbook of Critical Criminology*, at 315 (2018).

knowing or recklessly disregarding that the victim did not consent to its production, disclosure, solicitation, or possession.

The DEFIANCE Act is carefully drafted, focusing squarely on the unique harms posed by AI-generated NCII while minimally impacting valuable expression. While some NCII may be obscene and therefore outside First Amendment protections,<sup>3</sup> much of it is not, thus requiring any content-based restrictions on its creation and distribution to withstand the closest scrutiny a court can apply. Content-based restrictions are generally presumed invalid but may survive judicial review if the law in question is the least restrictive means of advancing a compelling government interest.<sup>4</sup> Provisions of the DEFIANCE Act are likely to be among the “rare case[s]”<sup>5</sup> of content-based restrictions that a court would find constitutional by addressing a uniquely compelling problem with a narrowly-tailored solution.

The dissemination of NCII, including digital forgeries, can cause profound and potentially irreversible harm to its victims. Victims of NCII dissemination may be fearful to leave their homes, face public humiliation, and may experience depression, anxiety, or suicidal ideation.<sup>6</sup> Perpetrators may disseminate NCII for reasons expressly intended to harm victims, including for the purposes of harassment or committing extortion, domestic violence, or other crimes.<sup>7</sup> Taken together, NCII can have a chilling effect on the speech of those depicted, who are disproportionately women, non-binary people, and members of the LGBTQ community,<sup>8</sup> silencing their voices and reducing the prominence of their perspective within the marketplace of ideas. And the advent of easily available AI tools for generating forged NCII has made the problem more ubiquitous.

The DEFIANCE Act also sweeps no more broadly than strictly necessary to achieve the government’s compelling interest in stemming the spread of intimate image abuse. The DEFIANCE Act appropriately attaches an intent requirement to each element relating to NCII digital forgeries, requiring that the defendant knowingly produce, possess, disclose, or solicit the NCII, and that the defendant know of or recklessly disregard the victim’s lack of consent to its production, disclosure, solicitation, or possession.<sup>9</sup> The legislation also includes several limitations that protect free expression, good faith disclosures to assist the victim, and other common sense exclusions that ensure the cause of action does not unduly burden free expression.

---

<sup>3</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>4</sup> *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115 (1989).

<sup>5</sup> *Burson v. Freeman*, 504 U.S. 191 (1992).

<sup>6</sup> See Citron, *supra* note 1; Citron & Franks, *supra* note 1.

<sup>7</sup> See *id.*; Henry, *supra* note 2; Lucas, *supra* note 2; Powell, et al., *supra* note 2.

<sup>8</sup> A.A. Eaton, et al., *The Relationship between Sextortion during COVID-19 and Pre-pandemic Intimate Partner Violence: A Large Study of Victimization among Diverse U.S Men and Women*, 18 *Victims & Offenders* 338 (2023); C.A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 *Feminism & Psychol.* 50 (2018).

<sup>9</sup> See *Counterman v. Colorado*, 600 U.S. 66 (2023) (holding in a true-threats case that the First Amendment requires no more demanding a showing regarding a defendant’s mens rea than recklessness).

The DEFIANCE Act would provide meaningful clarification and enhancements to existing law for those harmed by NCII, however it's created, while including important and necessary protections for free expression. CDT is grateful for your work to help victims of AI-generated NCII and looks forward to the DEFIANCE Act's passage. Please feel free to reach out to Becca Branum ([bbranum@cdt.org](mailto:bbranum@cdt.org)) with any questions.

Sincerely,

Samir Jain  
Vice President of Policy  
Center for Democracy & Technology

Becca Branum  
Deputy Director, Free Expression Project  
Center for Democracy & Technology