POLITICIANS LIVE ON CAMERA: REVENGE PORN, ELECTIONS, AND THE FIRST AMENDMENT

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Since our nation's founding, the private sex lives of politicians have been a consistent topic of public concern. Sex scandals, such as those involving Alexander Hamilton, Bill Clinton, and Donald Trump, have consumed the focus of the public. With the advent of the internet and social media, details of a politician's sex life often come accompanied by photo or video evidence. Outside of the election context, when someone shares an individual's private explicit material without their consent, the leaker has committed the crime of "revenge porn."

Recent high-profile incidents have raised the question of whether the crime of revenge porn can still be prosecuted when the disclosure of private explicit materials involves a political candidate. In the election context, unique First Amendment concerns about chilling political speech result in heightened speech protections. Before prosecuting a case, prosecutors must grapple with the question: Does the First Amendment protect revenge porn when it is used to influence an election? This Essay argues that the special First Amendment concerns about elections are diminished in the revenge porn context: The statutes are already tailored to address those concerns, and the state's independent interest in enforcing revenge porn laws is still compelling. As such, it concludes that the First Amendment should not have extra force in a revenge porn case just because the disclosure occurred in the context of an election.

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INTRODUCTION

Sex scandals are a tradition of American politics. From Alexander Hamilton to Bill Clinton to Donald Trump, U.S. politicians have had their personal sex lives subjected to public scrutiny. With the advent of the internet and social media, the sex scandal has taken on a new dimension. Salacious stories now come with images and videos to back them up, allowing people to publicize sex scandals with ease.

Leaked sex tapes and sexually explicit images can affect election outcomes. Just ask Susanna Gibson. Gibson recently lost her closely contested race for the Virginia House of Delegates[1] after a Republican operative leaked videos of Gibson and her husband having sex for a private charity livestream to *The Washington Post*.[2] The livestream, which was recorded without Gibson's permission, had circulated on the "dark web" prior to the *Post* article and spread further when the Republican Party of Virginia sent mailers to voters that included screenshots from the videos.[3] Gibson narrowly lost the election, despite other Democrats performing better with the same group of voters.[4]

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1 *See 2023 November General and Special Elections*, VA. DEP'T OF ELECTIONS, https://enr.elections.virginia.gov/results/public/Virginia/elections/2023-Nov-Gen [https://perma.cc/SB69-WK96] (last updated Feb. 27, 2024, 3:08 PM).

2 Laura Vozzella, *Va. Dem. House Candidate Performed Sex Online with Husband for Tips*, WASH. POST (Sept. 11, 2023, 6:18 PM), https://www.washingtonpost.com/dc-md-va/2023/09/11/susanna-gibson-sex-website-virginia-candidate [https://perma.cc/TEJ7-ETR7]; Alexander Burns, *Her Online Sex Life Was Exposed. She Lost Her Election. Now She's Speaking Out.*, POLITICO (Dec. 9, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/12/09/susanna-gibson-virginia-digital-privacy-00130883 [https://perma.cc/2SVC-MMG9]. The videos are not automatically saved or recorded. *See Appendix C to the Terms and Conditions of Service: Code of Conduct*, CHATURBATE, https://chaturbate.com/terms/appendix-c [https://perma.cc/XPT6-WVKL] ("You will not record or otherwise capture any of the content shared and/or streamed by any other user of the Platform for any reason."). However, users can archive them to other sites. Vozzella, *supra* ("Chaturbate videos are streamed live on that site and are often archived on other publicly available sites.").

3 *See* Burns, *supra* note 2.

4 In Henrico County, for example, both Gibson and now-State Senator Schuyler VanValkenburg were on the ballot in many overlapping precincts: In that set of precincts, Sen. VanValkenburg received at least 15,714 votes to Gibson's 15,538. *Compare 2023 November General and Special Elections: Henrico County, Member, House of Delegates (57th District)*, VA. DEP'T ELECTIONS, https://enr.elections.virginia.gov/results/public/HENRICOCOUNTY/elections/2023-Nov-Gen/ballot-items/ec550242-03bd-4053-9b3d-4515269a2e40 [https://perma.cc/4623-7GN9] (last updated Feb. 27, 2024, 3:08 PM) (tallying the results for the precincts in Henrico County for Gibson's race), *with 2023 November General and Special Elections: Henrico County, Member, Senate of Virginia (16th District)*, VA. DEP'T ELECTIONS,

If the same videos had been leaked in any other context, we would have a clear term for it: revenge porn. Revenge porn, a type of nonconsensual pornography,[5] involves the leaking of private, consensual sexual material to embarrass or otherwise harm the subjects of the explicit material.[6] Revenge porn presents serious consequences for its victims. It disproportionately affects women and girls as compared to boys and men,[7] and female revenge porn victims frequently endure many of the same negative mental health consequences as rape survivors.[8]

With increasing frequency, revenge porn is moving into the political arena. In 2019, for example, U.S. Representative Katie Hill was forced to resign after a sex scandal that involved her now-ex-husband allegedly leaking her private nude photos.[9] In 2022, U.S. Representative Madison Cawthorn lost his primary after a video of the candidate engaged in lewd, naked behavior with his (male) cousin leaked on Twitter.[10] This is likely to become more prevalent as more millennials and members of Gen Z begin to run for office. Younger generations are more likely to have private, consensual, but explicit photos of themselves saved to devices and shared

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https://enr.elections.virginia.gov/results/public/HENRICOCOUNTY/elections/2023-Nov-Gen/ballot-items/67a173b3-7b1e-4508-a97f-0fde92946e6c [https://perma.cc/JNS9-6UYJ] (last updated Feb. 27, 2024, 3:08 PM) (tallying the results for the precincts in Henrico County for Sen. VanValkenburg's race). Adding the totals in the precincts shared by both districts yields a result of 15,714 votes for Sen. VanValkenburg. However, unlike Gibson's total, that number does not include any provisional ballots, given that they are not allocated by precinct. Sen. VanValkenburg received 547 provisional ballots in Henrico, some number of which were likely in the crossover precincts. Thus, the difference between the two candidates was almost certainly even larger.

5 "Nonconsensual pornography" refers to both the capture of pornography without consent and the dissemination without consent. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

6 *See id.* Although nonconsensual pornography is a broader category than revenge porn, the two are sometimes used "interchangeably." *Id.*

7 Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1919–20 (2019).

8 *See* Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22, 33 (2017) (citing Eva Gilboa-Schechtman & Edna B. Foa, *Patterns of Recovery from Trauma: The Use of Intraindividual Analysis*, 110 J. ABNORMAL PSYCH. 392 (2001); Heather Littleton & Craig E. Henderson, *If She Is Not a Victim, Does That Mean She Was Not Traumatized?*, 15 VIOLENCE AGAINST WOMEN 158 (2009)).

9 Paul LeBlanc, Kyung Lah & Haley Byrd, *Rep. Katie Hill Announces Resignation amid Allegations of Improper Relationships with Staffers*, CNN, https://www.cnn.com/2019/10/27/politics/katie-hill-announces-resignation/index.html [https://perma.cc/6D9D-92A2] (last updated Oct. 28, 2019, 11:19 AM). The leaked photographs only comprised part of the scandal, which involved accusations of sexual impropriety as well. *Id.*

10 Cory Vaillancourt, *Graphic Video Shows Rep. Cawthorn in Compromising Scene*, SMOKY MOUNTAIN NEWS (May 5, 2022), https://smokymountainnews.com/archives/item/33554-graphic-video-appears-to-show-rep-cawthorn [https://perma.cc/J48B-MJCE]; Barbara Sprunt, *Scandal-Plagued Rep. Madison Cawthorn is Ousted in North Carolina Primary*, NPR, https://www.npr.org/2022/05/17/1099502290/north-carolina-11th-congressional-district-results-madison-cawthorn [https://perma.cc/22WV-3Y5N] (last updated May 17, 2022, 11:16 PM).

with others.[11] Political rivals will be tempted to use those materials to embarrass their opponents in the hope of winning elections.

In an interview after losing her election, Gibson indicated that she was attempting to discover the identity of the person who leaked her video in hopes that they would be prosecuted.[12] In most states, the nonconsensual sharing of pornographic material is a crime,[13] and in Virginia, it is a Class 1 misdemeanor.[14] The dissemination of porn is also considered First Amendment "speech."[15] Given that this speech occurred in the context of an election, an area receiving the most exacting First Amendment scrutiny,[16] it seems inevitable that if charges are ever brought, the defendant will argue that the First Amendment protected their conduct.[17] The question for prosecutors, then, is whether the First Amendment means that revenge porn laws cannot be enforced in the election context.

This Essay argues that the First Amendment should have no extra force in a revenge porn case simply because the disclosure occurred in the context of an election. It proceeds in three Parts. First, it outlines the history of revenge porn laws and highlights how courts have generally upheld those laws amid First Amendment challenges. Next, it examines the heightened protection of the First Amendment in the context of elections to show why a First Amendment defense will almost certainly be raised by defendants. Third, it analyzes how those doctrines may come into play in the revenge porn context. It finds that, because they contain exceptions for disclosures made in the public interest, revenge porn statutes are sufficiently tailored to mitigate the concerns that animate applying exacting scrutiny to election speech. Finally, it concludes that juries, not judges, should determine when an election-related disclosure is made in the public interest, and therefore any defense should be evaluated based on the underlying statute and not the First Amendment.

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11 *Cf.* Justin R. Garcia, Amanda N. Gesselman, Shadia A. Siliman, Brea L. Perry, Kathryn Coe & Helen E. Fisher, *Sexting Among Singles in the USA: Prevalence of Sending, Receiving, and Sharing Sexual Messages and Images*, 13 SEXUAL HEALTH at A, D (2016) (finding that younger singles are more likely to send explicit photographs, with each year over the age of twenty-one resulting in "a 6% decrease in likelihood of sending" such images).

12 Burns, *supra* note 2.

13 Leah S. Murphy, *When Free Speech and Privacy Collide: Why Strict Scrutiny Is a Poor Fit for Nonconsensual Pornography Laws*, 42 CARDOZO L. REV. 2577, 2580 & n. 16 (2021).

14 VA. CODE ANN. § 18.2-386.2(A) (West 2019).

15 *See infra* note 27 and accompanying text.

16 *See infra* Part II.

17 This Essay makes no comment on the substance of any such prosecution on the merits or how likely it would be to succeed. Rather, it uses the hypothetical prosecution as a framing device.

I
REVENGE PORN LAWS AND THE FIRST AMENDMENT

Invasions of sexual privacy are not new. However, the internet and social media has brought new means and methods of invading others' privacy.[18] One of the more concerning forms this invasion takes is nonconsensual pornography, which "involves the distribution of sexually graphic images of individuals without their consent."[19] One common form of nonconsensual pornography is revenge porn—often when a jilted ex seeks revenge on their former partner by sharing private explicit photos online.[20] Victims of revenge porn frequently face enormous harm professionally, socially, physically, and mentally because of the violation of their privacy.[21]

Spurred by the work of Professors Mary Anne Franks and Danielle Citron,[22] forty-eight states and the District of Columbia have adopted laws that criminalize nonconsensual pornography.[23] The statutes are not uniform; however, the crime of nonconsensual pornography generally has three elements:

1) the disclosure of private, sexually explicit photos or videos;

2) of an identifiable person; and

3) without the consent of the person depicted.[24]

Some revenge porn laws also include, as an additional fourth element, the intent to "harass[] or intimidate" the person whose materials are disclosed.[25] The criminal statutes also generally contain exceptions for things like material that was "voluntarily exposed in public or commercial setting"

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18 For a thorough treatment of the topic, see generally Citron, *supra* note 7, at 1908–24 (detailing some of the "contemporary sexual-privacy invasions," such as "digital voyeurism," "nonconsensual pornography," and "deep-fake sex videos" that are novel invasions in the internet era).

19 Citron & Franks, *supra* note 5, at 346.

20 *See id.* at 346–47 (noting that nonconsensual pornography includes the distribution of some "images consensually given to an intimate partner who later distributes them without consent, popularly referred to as 'revenge porn'").

21 *See id*. at 350–54 (detailing the "serious consequences" of revenge porn); *see also* Ana Murça, Olga Cunha & Telma Catarina Almeida, *Prevalence and Impact of Revenge Pornography on a Sample of Portuguese Women*, 28 SEXUALITY & CULTURE 96, 109 (2023) (finding that women who are "victims of [revenge porn] tend to have low self-esteem and high feelings of humiliation, depression, and anxiety").

22 *See* Citron & Franks, *supra* note 5; *see also* Murphy, *supra* note 13, at 2579–80 ("[S]cholars Danielle Keats Citron and Mary Anne Franks, together with activist Holly Jacobs, have been at the forefront of publicizing this issue and laying the legal and theoretical framework for the criminalization of nonconsensual pornography.").

23 *See* Murphy, *supra* note 13, at 2580 & n.16 (mentioning that there are "criminal laws now on the books in forty-eight states, D.C., and Guam" prohibiting revenge porn).

24 MARY ANNE FRANKS, DRAFTING AN EFFECTIVE "REVENGE PORN" LAW: A GUIDE FOR LEGISLATORS 7–8, https://cybercivilrights.org/wp-content/uploads/2021/10/Guide-for-Legislators-10.21.pdf [https://perma.cc/MT3N-G3BM] (updated Oct. 2021) (footnotes omitted).

25 *E.g.*, VA. CODE ANN. § 18.2-386.2(A) (West 2019).

or "disclosures made in the public interest."[26]

Just as soon as those laws were adopted, they were challenged under the First Amendment as content-based speech restrictions.[27] In their Article advocating for criminal nonconsensual pornography laws, Professors Citron and Franks foresaw those challenges and argued that "narrowly crafted revenge porn criminal statute[s] that protect[] the privacy of sexually explicit images can be reconciled with the First Amendment."[28] The courts that have taken up the question have largely agreed.

For example, the Vermont Supreme Court upheld Vermont's nonconsensual pornography statute in 2019 after applying strict scrutiny analysis.[29] The court declined to categorize revenge porn "as a new category of speech that falls outside the First Amendment's full protections" and proceeded to analyze whether the statute was "narrowly tailored to serve a compelling [s]tate interest."[30] The court found that the state had a compelling, privacy-based interest in preventing the nonconsensual disclosure of private explicit images—the statute was designed primarily to target private speech, and the harms of revenge porn can be substantial.[31] Further, the court held that the statute was narrowly drafted to serve that purpose given that it: 1) "define[d] nonconsensual pornography narrowly"; 2) imposed a "knowing[]" mens rea requirement on both the disclosure and the lack of consent elements; 3) required that the defendant intended to harm the victim; 4) imposed an objective reasonableness standard for the harm component; and 5) contained several exceptions, including for "[d]isclosures made in the public interest" or on "a matter of public concern."[32]

Using reasoning similar to the Vermont Supreme Court, the Supreme Courts of Minnesota and Indiana likewise upheld their respective nonconsensual pornography laws after applying strict scrutiny.[33] The Supreme Court of Illinois also upheld the equivalent Illinois statute,[34] but the

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26 FRANKS, *supra* note 24, at 9.

27 For example, the Vermont nonconsensual pornography statute was adopted in 2015, and the case which ultimately challenged that law before the Vermont Supreme Court—*State v. VanBuren*—arose later that same year. *See* State v. VanBuren, 214 A.3d 791, 795–96 (Vt. 2019). Pornography is also generally protected speech under the First Amendment, so these statutes were ripe for challenge. *See* Jenkins v. Georgia, 418 U.S. 153, 155 (1974) (holding that the pornographic film "Carnal Knowledge" was not legally obscene and therefore its exhibition was protected by the First Amendment).

28 Citron & Franks, *supra* note 5, at 376.

29 State v. VanBuren, 214 A.3d 791, 813 (Vt. 2019).

30 *Id.* at 807.

31 *Id.* at 808–11 ("By definition, the speech subject to regulation under § 2606 involves the most private of matters, with the least possible relationship to matters of public concern.").

32 *Id.* at 811–13 (quoting VT. STAT. ANN. tit. 13, § 2606 (2015)).

33 State v. Casillas, 952 N.W.2d 629, 644 (Minn. 2020); State v. Katz, 179 N.E.3d 431, 455–56 (Ind. 2022).

34 People v. Austin, 155 N.E.3d 439, 474 (Ill. 2019).

court opted to apply intermediate scrutiny.[35]

Where that leaves us is that revenge porn laws can generally survive even the most exacting scrutiny applied under the First Amendment. All these cases, however, involved private speech. Left open is the question whether the First Amendment analysis would be different if the disclosure happened in the context of an election.

II

THE FIRST AMENDMENT AND ELECTIONS

Elections are special for First Amendment purposes. Political speech, particularly electoral speech, lies at the heart of First Amendment protection.[36] As the Court has stated, the First Amendment's protection of free speech is designed to promote "uninhibited, robust, and wide-open" public "debate on public issues."[37] According to this conception, the Constitution's free speech guarantees are necessary to the success of a democratic form of government[38]—free and open dissemination of speech "is the way in which all relevant information is made available to the sovereign electorate," which they can use to vote on candidates and on policies.[39] As a result, the First Amendment is at its zenith when protecting speech that guarantees access to information necessary for self-government—in other words, political speech.

Because of this democracy-focused conception of the First Amendment, "the constitutional guarantee" of free speech "has its fullest and most urgent application" in political campaigns.[40] Restrictions on campaign speech are routinely struck down under strict scrutiny. The Roberts Court

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35 *Id.* at 466. The Court rested its decision to apply intermediate rather than strict scrutiny in part on the basis that the law "regulate[d] a purely private matter." *Id.* at 456.

36 This Essay does not contend with the argument for "electoral exceptionalism." *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1804–08 (1999). Proponents of electoral exceptionalism believe that, like schools and prisons, elections should be considered a "bounded domain[] of communicative activity" where usual First Amendment standards are modified when applied to electoral speech to promote the democratic principles behind the First Amendment. *See id.*; *see also* Geoffrey R. Stone, *"Electoral Exceptionalism" and the First Amendment: A Road Paved with Good Intentions*, 35 N.Y.U. REV. L. & SOC. CHANGE 665, 666–69 (2011). The idea of electoral exceptionalism has not been embraced judicially and, even if it were, such embrace would not change our conclusion that there is no need for a First Amendment exception to narrowly tailored revenge porn laws. *See* Stone, *supra*, at 676 (noting that one argument for electoral electionalism "has never commanded much support in the judicial understanding of the First Amendment").

37 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

38 James R. Beattie, Jr., *Privacy in the First Amendment: Private Facts and the Zone of Deliberation*, 44 VAND. L. REV. 899, 903 (1991).

39 Frederick Schauer, *Free Speech and the Argument from Democracy*, *in* 25 NOMOS: LIBERAL DEMOCRACY 241, 247 (J. Roland Pennock & John W. Chapman eds., 1983).

40 Buckley v. Valeo, 424 U.S. 1, 15 (1976) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

alone has struck down numerous regulations across the country for impinging on the First Amendment rights of those speaking in an election context: The Court has invalidated a Minnesota ban on political apparel inside a polling place on election day,[41] an Arizona matching funds provision for publicly funded campaigns,[42] and more.[43] This Part explores some of the ways courts have subjected election-related restrictions to heightened scrutiny in the context of campaign finance and public employee speech. This background illustrates why courts may be tempted to subject election-related revenge porn prosecutions to even more First Amendment scrutiny than the cases that involve private speech.

A. Campaign Finance and First Amendment Speech

The Court has expanded its heightened protection to an area once thought to be outside of the First Amendment's purview—campaign finance. For years, campaign finance restrictions, particularly corporate independent expenditures, received no First Amendment scrutiny.[44] Yet, as this Section discusses, in a series of cases beginning with *Buckley v. Valeo* and culminating in the controversial decision of *Citizens United v. FEC*, the Court applied "exacting scrutiny"[45] to campaign finance restrictions, overturning over a hundred years of campaign finance regulation.[46] Recently, the Court has gone so far as to overrule its own precedent to strengthen these First Amendment protections.[47] This evolution illustrates the Court's belief that campaign-related speech is one of the "most fundamental First Amendment activities,"[48] and it demonstrates why courts may be hostile to revenge porn prosecutions that could limit election-related speech.

The Court's first landmark campaign finance case, *Buckley v. Valeo*, strengthened protections for campaign speech. In *Buckley*, the Court upheld the Federal Election Campaign Act's campaign contribution limits and invalidated the Act's independent expenditure limits.[49] Emphasizing the

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41 Minn. Voters All. v. Mansky, 585 U.S. 1, 5, 22–23 (2018).

42 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011).

43 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 365 (2010) (invalidating limitations on independent corporate expenditures in elections on First Amendment grounds).

44 Russ Feingold, *The Money Crisis: How* Citizens United *Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145, 145 (2012) ("For years, our political process was governed by an underlying principle: large organizations, primarily corporations, were not allowed to buy their way into elections. For 100 years, our laws reflected this principle").

45 *Buckley*, 424 U.S. at 44.

46 *Id.* (describing the regulation of corporate election spending starting with the Tillman Act in 1907 to show that *Citizens United* was a watershed decision for campaign finance reform).

47 *See Citizens United*, 558 U.S. at 365 (overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990)).

48 *Buckley*, 424 U.S. at 14.

49 *Id.* at 23, 143.

importance of protecting campaign speech, which the Court deemed one of the "most fundamental First Amendment activities,"[50] the Court distinguished the level of scrutiny for limitations on contributions and limitations on independent expenditures based on their impacts on campaign speech. The Court first held that contribution limitations do not primarily burden freedom of *speech* but rather freedom of *association*.[51] When an individual contributes to a campaign, they are not speaking but giving money to an entity to speak on their behalf. Because contribution limits do not primarily burden speech, the Court applied intermediate scrutiny and upheld the regulations.[52] In contrast, the Court found that the independent expenditure limits "direct[ly] and substantial[ly] restrain[]" speech.[53] Because these regulations directly burden political speech, the Court applied strict scrutiny and invalidated the independent expenditure provisions.[54] The Court made clear that they drew this distinction because "a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . ."[55] It reasoned that citizens must be able to make choices informed by public discussion on campaigns since "the identities of those who are elected will inevitably shape the course that we follow as a nation."[56] Altogether, the Court made clear that regulations which burdened campaigns infringed on the heart of the First Amendment, and therefore would be subject to the highest scrutiny.

The Court's jurisprudence after *Buckley* illustrated this insistence. After *Buckley*, the Court continued to apply strict scrutiny to independent expenditure limits for an expanding list of entities: political action committees (PACs),[57] nonprofits,[58] and not-for-profit corporations.[59] On the reasoning of *Buckley*, the Court invalidated independent expenditure limits for PACs[60] and nonprofits.[61] At first, the Court had held that the restrictions on independent political expenditures for for-profit corporations could survive strict scrutiny.[62] The Court held in *Austin v. Michigan Chamber of Commerce* that corporate political independent expenditures were narrowly

50 *Id.* at 14.
51 *Id.* at 22, 24–25.
52 *Id.* at 25–29.
53 *Id.* at 39.
54 *See id.* at 39, 58–59.
55 *Id.* at 14 (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)).
56 *Id.* at 14–15.
57 *See* FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 496, 500–01 (1985).
58 *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 251–52 (1986).
59 *See* Austin v. Mich. Chamber of Com., 494 U.S. 652, 657 (1990).
60 *See Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 500–01.
61 *See Mass. Citizens for Life*, 479 U.S. at 261–62.
62 *Austin*, 494 U.S. at 656.

tailored to serve a compelling interest: antidistortion.[63] The antidistortion principle seeks to prevent situations in which wealth is amassed with the help of the corporate form and corporations use their resources to promote their political views in a way that most individual citizens cannot.[64] Because of the compelling interest in antidistortion, the Court found that states could regulate corporate independent political expenditures to allow political expenditures to "reflect actual public support for the political ideas."[65]

Yet only twenty years later, the Court rejected antidistortion as a compelling interest in *Citizens United v. FEC*.[66] The decision made clear that in the context of elections, only "a compelling interest" could be used to restrict speech.[67] The *Citizens United* Court applied "strict scrutiny"[68] but rejected all the government's stated interests, including antidistortion.[69] The Court's rejection of each of the proffered interests reflected its view that "political speech [especially campaign speech] must prevail against laws that would suppress it, whether by design or inadvertence."[70] In overturning years of precedent, the Court once again stressed that the election context dictates that the highest level of scrutiny must be applied to regulations of campaign speech. Prosecutors who wish to pursue election-related revenge porn cases will therefore need to have answers for why the prosecution can move forward despite the Court's dictate.

B. Public Employee Speech and Elections

The Court has even applied heightened First Amendment scrutiny to election-related speech in areas where the government has broad freedom to restrict speech. Nowhere is this clearer than in the Court's public employee jurisprudence.

The Court has assumed that the government as an employer has "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large."[71] For example, although the government *cannot* prohibit a private citizen from criticizing a judicial candidate,[72] it *can*

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63 *Id.* at 659–60.

64 *Id.*

65 *Id.* at 660–66.

66 Citizens United v. FEC, 558 U.S. 310, 349 (2010).

67 *Id.* at 340 (citing FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

68 *Id.* (quoting *Wis. Right to Life*, 551 U.S. at 464).

69 *Id.* at 348–49 (listing the three interests advanced by the government: "antidistortion," "anticorruption," and "shareholder-protection"); *id.* at 349 (rejecting the antidistortion interest); *id.* at 360 ("[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption"); *id.* at 362 (refusing to accept the shareholder-protection interest).

70 *Id.* at 340.

71 Waters v. Churchill, 511 U.S. 661, 671 (1994).

72 *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should

fire government employees for complaining about their boss, a judicial candidate.[73] Yet, despite the government's ability to restrict public employee speech, the government has a significantly narrower ability to restrict such speech when it pertains to elections and politics.

To determine whether the government can constitutionally prohibit a public employee's speech, courts first ask whether the employee is acting pursuant to their official duties or if they are speaking "as a citizen on a matter of public concern."[74] If the employee is speaking as a private citizen on a matter of public concern,[75] the court will employ the *Pickering* balancing test and balance the interest of the government in having an efficient workplace with the interests of the employee in speaking on issues of public concern.[76]

The Supreme Court has repeatedly held that public employees have the widest latitude to speak when their speech is "critical to the functioning of the democratic process"[77] and when their speech "inform[s] [citizens] about the instruments of self-governance."[78] When determining if speech "addresses a matter of public concern," courts look to the "content [and]

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be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

73 *See* Lumpkin v. Aransas Cnty., 712 F. App'x 350, 357–60 (5th Cir. 2017) (holding that the Aransas County Attorney's office could constitutionally fire two employees for speaking negatively about their boss, a judicial candidate).

74 Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

75 A public employee is either "speak[ing] as a citizen" or speaking "pursuant to the employee's official duties" depending on the content, context, and form of their speech. *Id.* at 417, 413. Courts make this distinction to determine whether a public employee's speech can be protected by the First Amendment. When a public employee is "speak[ing] as a citizen," their speech can be protected by the First Amendment. *Id.* at 417. In contrast, when an employee is speaking pursuant to their official duties, their speech cannot be protected by the First Amendment. *See* Carter v. Inc. Vill. of Ocean Beach, 693 F. Supp. 2d 203, 210 (E.D.N.Y. 2010), *aff'd*, 415 F. App'x 290 (2d Cir. 2011) (unpublished) (internal citations omitted) ("If a plaintiff was not speaking as a citizen, i.e., if he or she was speaking pursuant to his of [sic] her official duties, then his or her speech was not protected by the First Amendment," no matter if "his or her speech related to a 'matter of public concern.'"). This distinction promotes the balance between "recogniz[ing] that a citizen who works for the government is nonetheless a citizen" with First Amendment rights and allowing "[g]overnment employers, like private employers," to exercise "a significant degree of control over their employees' words and actions." *Garcetti*, 547 U.S. at 419, 418.

76 *Garcetti*, 547 U.S. at 418.

77 Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001).

78 *Id.* (citing Gilbrook v. City of Westminster, 177 F.3d 839, 870 (1999)); *see also, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the '"highest rung of the heirarchy [sic] of First Amendment values,"' and is entitled to special protection.") (citations omitted)); Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) ("Specifically, we have held that the First Amendment's protection against adverse personnel decisions extends only to speech on matters of 'public concern' . . . . [Such speech] lies 'at the heart of the First Amendment's protection.'" (citations omitted)).

form" of a public employee's speech.[79] Courts look first to the content of the speech to see if the employee is speaking on "any matter of political, social, or other concern to the community."[80] Courts begin with this inquiry because it helps determine whether the speech "'enable[s] the members of society' to make informed decisions about the operation of their government."[81] Courts then examine the form and context of the speech to determine the publicness of the speech because "[p]ublic speech is more likely to serve the public values of the First Amendment."[82] When the employee is speaking as a citizen, and the content, context, and form weigh in favor of finding that the speech addresses a matter of public concern, the possibility of a First Amendment claim arises.

It is only then that the Court will apply the balancing test to determine if the government interest in regulating their employee's speech to ensure the "efficient provision of public services"[83] is greater than the employee's interest in speaking. Usually, this *Pickering* balancing test involves jury determinations about the facts, which then influence how the judge balances of the importance of the interests to the parties.[84] In applying the balancing test, the government may have to make a "stronger showing" when the public "employee's speech more substantially involves matters of public concern,"[85] like in the context of campaigns.

Taken together, the public employee speech framework serves to identify and protect speech at the core of the First Amendment while allowing the government to restrict speech on the periphery of the First Amendment. As a result, the possibility of a First Amendment claim often arises in speech related to elections and political figures. Courts have found that the First Amendment threshold is activated when a public employee is campaigning for a political candidate,[86] running for a political office,[87] supporting an elected official's political rival,[88] and even speaking about

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79 *Connick*, 461 U.S. at 147–48.

80 *Id.* at 146.

81 *See, e.g.*, *Weeks*, 246 F.3d at 1234 (9th Cir. 2001) (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)).

82 *Id.* at 1234–35 (citing Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.")).

83 Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

84 *See* Robert Wilson, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the* Pickering *Test*, 18 GEO. MASON C.R.L.J. 389, 391 (2008) (discussing the role of the jury in balancing the interests of the employer with the interest of the public employee).

85 *See, e.g.*, Gonzalez v. Benavides, 774 F.2d 1295, 1302 (5th Cir. 1985).

86 *See, e.g.*, Vojvodich v. Lopez, 48 F.3d 879, 884–85 (5th Cir. 1995).

87 *See, e.g.*, Jordan v. Ector Cnty., 516 F.3d 290, 297 (5th Cir. 2008).

88 *See, e.g.*, Wiggins v. Lowndes Cnty., 363 F.3d 387, 389–90 (5th Cir. 2004) (discussing

elected officials generally.[89] Because of its importance to the First Amendment, the possibility of a First Amendment claim almost always arises when public employee speech involves elections. A similar claim would likely arise in other contexts where a more general government regulation touches on election speech, including in the context of revenge porn.

So, given these robust protections for election-related speech—even in areas once thought to be outside of the First Amendment and areas that receive little First Amendment protection—defendants accused of disseminating revenge porn in elections are almost certain to raise a First Amendment defense to their prosecutions.

III
REVENGE PORN LAWS AND ELECTIONS

How, then, should the courts evaluate a First Amendment defense in a revenge porn case brought against the backdrop of an election? On the one hand, most, if not all, state revenge porn laws are likely narrowly tailored to survive the most exacting form of scrutiny under the First Amendment.[90] On the other hand, Supreme Court precedent suggests that elections are simply treated differently.[91] This Part proposes a solution: The First Amendment should play no additional role in the proceedings. First, it addresses some of the election-related concerns that would tempt courts to apply additional First Amendment scrutiny. It then proceeds to demonstrate how revenge porn laws are adequately drafted to address those concerns, and, given the severe harms associated with revenge porn,[92] how the application of additional First Amendment scrutiny would create more problems than it would solve.

A. Compelling Interests—Chilling Political Speech

There are real and convincing reasons for allowing a First Amendment defense when it comes to election-related revenge porn. Most importantly, courts may be concerned that revenge porn laws could chill the disclosure of material information about political candidates to the public, and as such they may be inclined to apply something stricter than strict scrutiny to prevent the prosecution of election-related revenge porn. An often-cited example of a situation in which we might want extra First Amendment protections for

whether an employee's demotion for supporting an elected official's political rival is protected by the First Amendment).

89 *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 386–87 (1987).

90 *See supra* Part I.

91 *See supra* Part II.

92 *See supra* Introduction.

revenge porn is the "Weiner incident."[93] In May of 2011, the media became obsessed with then-Congressman Anthony Weiner's genitals when a photograph of his crotch, covered only in underwear, appeared on his Twitter account.[94] Weiner claimed his account was hacked and that he had meant to send the photo via private message to a woman who was, notably, not his wife.[95] Two years later, Weiner ran for Mayor of New York, and in the middle of the campaign, a woman named Sydney Leathers—who was also not Weiner's wife—released sexually explicit photos of the candidate he had shared with her.[96] Before this reveal, there were "signs that [] Weiner might be on his way to a political resurrection," including strong polling and fundraising numbers.[97] Instead, Weiner went on to lose the primary by a wide margin, finishing a distant fifth with less than five percent of the total vote.[98]

The Weiner incident illustrates why courts might want to limit the application of revenge porn laws in elections. The leak revealed more than just what Weiner looked like without clothes on: The images revealed facts about the candidate—his extramarital affairs[99]—that were reasonably related to his qualifications to hold elected office. Based on the media attention[100] and Weiner's eventual electoral loss,[101] it is clear that the public was interested in Anthony Weiner's extramarital activities. One rational fear would be that enforcement of revenge porn laws in this context would discourage Leathers and others like her from coming forward with material information about a candidate for public office. Broad revenge porn prosecutions would invoke the risk of "a reaction of self-censorship" and thus potentially pose a "threat to the free and robust debate of public issues"

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93 *See* State v. Katz, 179 N.E.3d 431, 456 n.11 (Ind. 2022) (acknowledging that the Weiner incident is "one persuasive hypothetical situation in which [Indiana's nonconsensual pornography] statute could be applied to political speech").

94 *See* Ashley Parker, *Congressman, Sharp Voice on Twitter, Finds It Can Cut 2 Ways*, N.Y. TIMES (May 30, 2011), https://www.nytimes.com/2011/05/31/nyregion/for-rep-anthony-weiner-twitter-has-double-edge.html [https://perma.cc/H3U2-P5QF].

95 *See id.*; Ashley Parker & Michael Barbaro, *In Reckless Fashion, Rapid Online Pursuits of Political Admirers*, N.Y. TIMES (June 8, 2011), https://www.nytimes.com/2011/06/09/nyregion/weiners-pattern-turning-political-admirers-into-online-pursuits.html [https://perma.cc/YD6W-6RGK].

96 *See* Abraham Josephine Riesman, *The Secret Struggle of the Woman Who Took Down Weiner*, N.Y. MAG.: CUT (May 20, 2016), https://www.thecut.com/2016/05/pain-triumph-weiner-sexter-sydney-leathers.html [https://perma.cc/ZKC3-JH7M].

97 Eli Rosenberg, *Key Moments in the Downfall of Anthony Weiner*, N.Y. TIMES (Oct. 28, 2016), https://www.nytimes.com/2016/10/29/nyregion/key-moments-in-the-downfall-of-anthony-weiner.html [https://perma.cc/WE97-RBRD].

98 *NYC 2013: The Mayoral Primaries: Democrats*, N.Y. TIMES (Sept. 16, 2013), https://www.nytimes.com/projects/elections/2013/nyc-primary/mayor/map.html [https://perma.cc/3RWX-VSLV].

99 Rosenberg, *supra* note 97.

100 *See* Parker, *supra* note 94 (noting coverage of the incident from media sources).

101 *NYC 2013: The Mayoral Primaries: Democrats*, *supra* note 98.

that courts concern themselves with when the state limits speech on matters of public interest.[102]

Yet those fears would be unfounded. As the rest of this Part explores, revenge porn statutes are backed by their own set of compelling interests, and they must already be tailored to address fears of a chilling effect by preventing the prosecution of disclosures made in the public interest. Therefore, there is no need for additional First Amendment scrutiny in this context.

B. Compelling Interests—Protection of Privacy

First Amendment interests are not the only interests at stake in a revenge porn case. To survive strict scrutiny, a law must be backed by a compelling state interest. The courts that have weighed in on the constitutionality of revenge porn laws have noted that the state has a compelling interest in protecting the privacy of its citizens when the speech in question involves inherently private speech.[103] These courts have recognized that harms of revenge porn "can be" quite "severe, including serious psychological, emotional, economic, and physical harm[s]."[104]

A state's interests may be lesser when the laws are applied to political speech.[105] For example, the Supreme Court of Indiana, in upholding Indiana's revenge porn law, noted that the Weiner story identified a "persuasive hypothetical situation" where the statute may be unconstitutional as-applied because it is political speech.[106] The court seemed to acknowledge the possibility that there are circumstances under which the state's compelling interest is not so compelling because the speech is purely private.[107]

Yet, while the state may have a more compelling interest in protecting an individual's privacy when the disclosure is made in a purely private setting, the state's interest in protecting the privacy of public figures is still compelling. Public figures may not enjoy all of the same privacy rights as private individuals, but they do not surrender all privacy rights just by virtue of entering the public realm.[108] A study has shown that victims of revenge

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102 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (Or. 1977)).

103 *See, e.g.*, State v. VanBuren, 214 A.3d 791, 808 (Vt. 2019).

104 *See, e.g.*, State v. Katz, 179 N.E.3d 431, 458 (Ind. 2022) (citing State v. Casillas, 952 N.W.2d 629, 642 (Minn. 2020)).

105 *Id.* at 456 n.11.

106 *Id.*; *see also* Citron & Franks, *supra* note 5, at 382–83 (citing the Weiner images as the kind of disclosure that might fall into a "public interest" exception to revenge porn laws).

107 *See Katz*, 179 N.E.3d at 456.

108 *See* Michaels v. Internet Ent. Grp., 5 F. Supp. 2d 823, 840–41 (C.D. Cal. 1998) (holding that "sex symbol" Pamela Anderson and "rock star" Bret Michaels maintained "privacy interest[s] in

porn often face the same mental health consequences as survivors of sexual assault.[109] The fact that the victim happens to be running for public office does not lessen that harm. Given the severity of the harm, the state maintains its interest in protecting its citizens' privacy rights in this context, even when those citizens are public figures.

Further, in the context of elections, the state might have an additional interest in ensuring that qualified candidates are not discouraged from running for office.[110] As members of the younger generations begin to run for office, that interest may become even more compelling.[111] The state, therefore, still has compelling interests in preventing revenge porn, even when it occurs in the context of an election. The better analytical question is whether the statutes are already tailored to exclude prosecution of cases that would otherwise necessitate First Amendment protection.

C. Narrow Tailoring

If a revenge porn statute is narrowly tailored to survive a facial First Amendment challenge under strict scrutiny,[112] then it is also already tailored to address the First Amendment concerns unique to the election context. Most revenge porn statutes have built-in exceptions for disclosures of already public material or material that has significant public value. For example, a Vermont statute ("Disclosure of sexually explicit images without consent") explicitly does not apply to disclosures of materials "made in the public interest" or "that constitute a matter of public concern."[113] As shown in the public employee cases,[114] election speech likely constitutes a "matter of public concern" that would be covered by the existing exceptions in revenge porn statutes.[115]

Further, nonconsensual pornography is usually a specific intent crime, and in the context of elections, intent may be harder to prove depending on the construction of the statute. Take the Virginia revenge porn statute, which Virginia prosecutors could use in the Susanna Gibson case. The Virginia statute requires that the sender of revenge porn have an "intent to coerce, harass, or intimidate."[116] Proving intent beyond a reasonable doubt is tricky

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the most intimate details of their lives," including their sex lives, despite their "voluntary assumption of fame").

109 *See* Bates, *supra* note 8, at 39.

110 *See, e.g.*, Antonio v. Kirkpatrick, 579 F.2d 1147, 1150 (8th Cir. 1978) ("A State does have a recognized interest in obtaining knowledgeable and qualified candidates for high office").

111 *See supra* note 11 and accompanying text.

112 *See supra* notes 27–35 and accompanying text.

113 VT. STAT. ANN. tit. 13, § 2606 (West 2015).

114 *See supra* Section II.B.

115 *See supra* Section II.B.

116 VA. CODE ANN. § 18.2-386.2 (2019).

when a candidate's pornographic materials are disseminated. Defendants may argue that they are merely sharing relevant information about a candidate for public office. That argument is strongest when the electorate *would* want to know about the leaked material before voting for a candidate, meaning conviction is only possible in a scenario where the public has a minimal or nonexistent interest in learning about the materials.

State courts that have evaluated revenge porn laws under the First Amendment have held that these exceptions and mens rea requirements are crucial to finding narrow tailoring, and therefore the laws would presumably not survive strict scrutiny without them.[117] Consequently, any law that could survive a facial challenge would necessarily include elements that would prevent the prosecution of disclosures made in the public interest. The laws are thus already tailored to meet the election context concern of deterring purely political speech, and no additional First Amendment analysis is required. To hold otherwise would require something stricter than strict scrutiny—a level of perfect tailoring beyond what even the most exacting analysis normally requires. There is nothing about the intersection of elections and revenge porn laws that suggests such an analysis would be necessary.

D. Who Decides?

If these exceptions are doing the same work as additional First Amendment scrutiny, it is reasonable to question what harm would result from allowing judges to just resolve these cases on the merits of a First Amendment defense. The problem is that additional First Amendment scrutiny is likely to lead to an underdeterrence problem. For fear of chilling political speech, judges may be more likely to consider most, if not all, disclosures about a political candidate matters of public importance.[118] However, it is entirely conceivable that there is a category of election-related revenge porn that is not within the public interest, but which the state still has a compelling interest in deterring. Explicit images that do not weigh on a candidate's qualifications for holding office would fall into this category. The videos of Susanna Gibson and her husband, for example, arguably sit in a gray zone of public interest. On the one hand, the videos depict consensual adult behavior and are not evidence of infidelity or other scandal,[119] unlike

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117 *See supra* Part I.

118 *Cf.* 281 Care Comm. v. Arneson, 766 F.3d 774, 791–92 (8th Cir. 2014) (expressing concern over the potential chilling effects of a law that prohibited false political advertisement). The same applies to any specific intent elements of the underlying statute, if they exist. *Cf. id.* at 794 (finding that "[t]he risk of chilling otherwise protected speech is not eliminated or lessened by the mens rea requirement" because the requirement did not "realistically stop the potential for abuse").

119 *See* Vozzella, *supra* note 2.

the Weiner images. On the other hand, the fact that Gibson and her husband performed the acts for others[120] may be a factor that could matter to a voter's evaluation of the candidate. A judge concerned about the First Amendment may simply decide that the mere possibility of such a disclosure serving the public interest would weigh in favor of dismissing any charges brought.

If the question is one of the statute's public interest exceptions and not the First Amendment, the question would be resolved by the jury. And there is good reason to believe that juries are better qualified than judges to determine which disclosures are made in the public interest and which are not. A jury might decide, for example, that a Weiner-style disclosure is in the public interest because it demonstrated the infidelity of a candidate standing for election.[121] A jury may, however, decide that the revelation of the *fact* of the infidelity was in the public interest, but not so for the images themselves.[122] Arguably, a jury is better positioned than a judge to determine what materials matter to voters and therefore which disclosures are in the public interest when it comes to an election. A jury is a better proxy for the public opinion than a judge and therefore likely has a better idea of how much value the public would place on a given disclosure when it comes time to vote. The jury's role here would operate similarly to its role in weighing the parties' interest in *Pickering* balancing, but without any additional analysis required from trial judges.

Unlike *Pickering* balancing, however, the jury would not be part of any First Amendment analysis. Rather, the jury's determinations would be a matter of the statute's public interest exception. If a jury has the opportunity to examine the evidence and determines that the disclosure was not in the public interest, then there is good reason to believe that the disclosure should fall outside the realm of First Amendment protection, as the fear of overdeterring speech that is in the public interest is adequately addressed. Further, with juries the risk of underdeterring disclosures outside the public interest can be minimized, as the jury would not need to be instructed on First Amendment law, and therefore they would not necessarily be animated

120 *See id.*

121 *See* Citron & Franks, *supra* note 5, at 382–84 (noting that there was "public interest . . . in the fact that [Weiner] was having an extramarital, online sexual relationship while running for public office" given that he had previously "promised that he was no longer engaging in these types of extramarital sexual activities").

122 *See id.* (noting that the fact of Weiner's infidelity "could have been easily demonstrated with the numerous text messages exchanged between Weiner and Leathers or with censored versions of the pictures in question" rather than a disclosure of the pictures themselves); *see also* NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 53 (2015) ("[N]aming [a public figure] as an adulterer is one thing; publishing high-resolution video of his sex acts would be another.").

by the same concerns about chilling political speech as judges.[123] Given the extreme harms experienced by victims of revenge porn on the one hand, and the First Amendment concerns inherent in elections on the other, this balance between over- and underdeterrence is preferable to a scheme that places a thumb too far on the scale in either direction.

CONCLUSION

When a citizen decides to run for office, they surrender a certain amount of their privacy. Their financial information, personal lives, family history, health, and yes, even their sex lives are exposed and scrutinized by the public. In a representative democracy, this evaluation of potential representatives is an important element of the democratic process.

Deciding to run for office, however, does not mean the surrender of all of one's privacy expectations. Explicit photographs and videos, when made privately and shared between consenting adults, are some of the most intimate and personal materials imaginable. In private life, when those materials are shared without consent, the harm to the victim can be enormous. Victims suffer immense personal and professional embarrassment,[124] and studies indicate that, among women, the mental health consequences are similar to those faced by survivors of sexual assault.[125] That is why almost every state has made nonconsensual pornography a crime.[126]

The dividing line between material that is relevant to an election and that which is not is difficult to define. Courts, concerned about overdeterrence, may worry about applying revenge porn laws when the disclosure was made to influence an election. They need not. So long as the law is already narrowly tailored to survive a facial First Amendment challenge under strict scrutiny analysis, the underlying statute is likely sufficient to address many of the concerns that animate heightened First

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123 It is possible to instruct juries to consider whether an act is within the public interest without alluding to any First Amendment law. *See, e.g.*, Robinson v. McReynolds, 762 P.2d 1166, 1168 & n.1 (Wash. App., 1988) (detailing the jury instructions for a Washington Consumer Protection Act claim, including "the practice affects the public interest"). Judges could take a similar approach in instructing juries in nonconsensual pornography cases where the defendant raises public interest as an affirmative defense.

124 *See supra* note 21 and accompanying text.

125 *See* Bates, *supra* note 8, at 39 ("The negative mental health consequences of revenge porn for female survivors are similar in nature to the negative mental health outcomes that rape survivors experience. Rape survivors frequently experience PTSD, anxiety, and depression, all of which participants in this study experienced.").

126 *See* Murphy, *supra* note 13, at 2580 n.16 ("[C]riminal laws [are] now on the books in forty-eight states, D.C., and Guam."); Citron & Franks, *supra* note 5, at 386–90 (advising that states adopt revenge porn laws in order to "deter revenge porn and its grave harms" and recommending approaches for doing so).

Amendment scrutiny in the electoral context. Because the risk of underdeterrence in this context is also significant, prosecutions of nonconsensual pornography in elections should proceed on the merits of the individual case and the elements of the crime, including public concern and mens rea requirements, free from the interference of the First Amendment.