

MEMORANDUM

TO: MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES

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SUBJECT: THE TAKE IT DOWN ACT: A CONSTITUTIONAL, TARGETED
APPROACH TO ADDRESSING THE SPREAD OF NONCONSENSUAL
INTIMATE IMAGERY ONLINE

This memorandum examines the “Tools to Address Known Exploitation by Immobilizing Technological Deepfakes On Websites and Networks (TAKE IT DOWN) Act” (H.R. 633, S.146), which addresses the growing spread of nonconsensual intimate imagery (NCII) online. A thorough analysis of the underlying facts and law reveals a dire need for Congress to stop the horrific rise of NCII. Furthermore, the Act’s well-crafted approach to restrict the distribution of NCII and facilitate its timely removal online is narrowly tailored to achieve this compelling interest, fitting squarely within decades of First Amendment jurisprudence.

The memorandum concludes that the TAKE IT DOWN Act is urgently necessary and firmly constitutional—Congress should pass it without delay.

I. BACKGROUND

My name is Slade Bond, and I am the Chair of Public Policy and Legislative Affairs at Cuneo Gilbert & LaDuca, LLP. I previously served at the Department of Justice during the Biden Administration, most recently as the Principal Deputy Assistant Attorney General for Legislative Affairs. Prior to that, I served as the Chief Counsel for the Subcommittee on Antitrust, Commercial, and Administrative Law of the House Committee on the Judiciary.

Over the course of my career, I have been dedicated to ensuring that the internet is open, competitive, and safe. This work includes some of the first bipartisan legislation to protect mobile privacy online, address the dominance of platform gatekeepers, and safeguard the free and diverse press. I also led the House Judiciary Committee’s bipartisan investigation of competition in digital markets, and oversaw the enactment of 19 laws to protect competition; safeguard the rights of survivors of sexual abuse; and uphold the economic security and dignity of consumers, military families, and small businesses.

Throughout this work, I have sought to ensure that these reforms are firmly consistent with our constitutional values, including the American tradition of free speech and viewpoint diversity.

II. SUMMARY OF ARGUMENT

- **The spread of NCII, both real and fake, has risen exponentially, causing widespread harm.** It threatens to metastasize into a much larger problem due to rapid technological advances. In the absence of congressional action it will continue to worsen, harming the emotional, psychological, and financial wellbeing of countless Americans.
- **Congress has a strong constitutional basis to establish well-crafted restrictions on the publication, distribution, and removal of NCII.** The Supreme Court has made clear that the First Amendment does not prevent Congress from regulating certain forms of harmful content, such as child sexual abuse materials, obscenity, or speech that is integral to crime. Legislative efforts to restrict the distribution of NCII fit well within this existing constitutional framework.
- **The “TAKE IT DOWN Act” aligns closely with the First Amendment and America’s tradition of free speech.** It serves a compelling government interest and is narrowly tailored to achieve these goals, closing gaps in state and federal law. The speech regulated by the Act has little, if any, expressive value under the First Amendment.

III. THE PUBLICATION OF NCII—BOTH REAL AND FAKE—HAS GROWN EXPONENTIALLY IN RECENT YEARS

There has been an exponential rise in the distribution of NCII over the past decade.¹ It is a form of sexual abuse that involves sharing sexual images—both real and digitally manipulated—without a person’s consent.² The harms associated with this practice are “serious and often irreversible,” causing significant emotional, psychological, and financial harm.³

More recently, rapid advances in technologies like generative artificial intelligence (AI) have made the production of NCII more realistic while accelerating its distribution. As a coalition of public-interest organizations have noted, a few years ago, malicious actors needed “hundreds of images of a target and high technical knowledge to produce convincing deepfake

¹ Mary Anne Franks & Danielle Citron, *It's Simple: Criminalize Revenge Porn, or Let Men Punish Women They Don't Like*, *The Guardian* (Apr. 17, 2014), <https://perma.cc/SF5E-2FMM>; HOME SECURITY HEROES, 2023 STATE OF DEEPAKES: REALITIES, THREATS, AND IMPACT (2023), <https://www.securityhero.io/state-of-deepfakes/#key-findings>.

² Sometimes referred to as deepfake or revenge pornography, NCII includes both authentic and digitally manipulated forms of sex-based imagery obtained without a person’s consent. Ctr. for Democracy & Tech., Civic Tech Fall Polling 9 (2024), <https://cdt.org/wp-content/uploads/2024/09/2024-09-26-final-Civic-Tech-Fall-Polling-research-1.pdf>.

³ Mary Anne Franks & Danielle Citron, *It's Simple: Criminalize Revenge Porn, or Let Men Punish Women They Don't Like*, *The Guardian* (Apr. 17, 2014), <https://perma.cc/SF5E-2FMM>; HOME SECURITY HEROES, 2023 STATE OF DEEPAKES: REALITIES, THREATS, AND IMPACT (2023), <https://www.securityhero.io/state-of-deepfakes/#key-findings>.

images.”⁴ Today, they can upload a “single clothed image of a victim to freely available websites and generate intimate images in seconds, without the knowledge or consent of the person depicted.”⁵ Sam Gregory, a researcher leading a nonprofit that studies the effects of generative AI and large language models (LLMs), testified last year that these technologies have significantly worsened the problem:

Existing harms are exacerbated by deepfake technologies. Women already face widespread threats from non-consensual sexual images or release of intimate partner images that do not require high-quality or complex production to be harmful. Non-consensual sexual deepfake images and videos are currently used to target private citizens and public figures, particularly women. The scale of this is growing: a recent analysis estimated that even based on public site-sharing of these videos (rather than videos posted on social media, those shared privately, or manipulated photos) by the end of this year, more videos will have been produced in 2023 than the total number of every other year combined.⁶

Adolescents are frequent targets of abuse.⁷ A study by the Center for Democracy & Technology showed that students and educators report “substantial amounts of NCII, both authentic and deepfake, depicting individuals associated with their school being shared in the past school year (2023-2024), with the primary perpetrators and victims being students.”⁸ According to this report, the majority of NCII is shared through social media and online platforms,⁹ and a “sizable percentage” of NCII shared in schools are deepfakes, with students demonstrating “a higher awareness than teachers and parents about NCII of all types.”¹⁰ This study concluded that schools typically are poorly equipped to respond to incidents or provide students and parents with timely information about abuse.¹¹

NCII is also an emerging tool for malicious foreign actors to commit financial crimes to coerce minors. The Federal Bureau of Investigation (FBI) has documented a “horrific increase”

⁴ Letter from Encode et al. to U.S. Rep. Brett Guthrie, Chair, & Frank Pallone, Ranking Member, H. Comm. on Energy & Com. (Mar. 25, 2025), <https://ari.us/wp-content/uploads/2025/03/TAKE-IT-DOWN-Act-Coalition-Letter-03-25-2025.pdf>

⁵ *Id.*

⁶ *Advances in Deepfake Technology, Hearing Before the Subcomm. on Cybersecurity, Info. Tech., & Gov’t Innovation of the H. Comm. on Oversight & Accountability*, 118th Cong. 6 (Nov. 8, 2023) (statement of Sam Gregory), <https://oversight.house.gov/wp-content/uploads/2023/11/Sam-Gregory-House-Oversight-Committee-Advances-in-Deepfake-Technology-November-2023.pdf>.

⁷ What Is Deepfake Porn and Why Is It Thriving in the Age of AI?, Univ. of Pa. Annenberg Sch. for Comm’n (2024), <https://www.asc.upenn.edu/news-events/news/what-deepfake-porn-and-why-it-thriving-age-ai>.

⁸ Ctr. for Democracy & Tech., *Civic Tech Fall Polling* (Sept. 26, 2024), <https://cdt.org/wp-content/uploads/2024/09/2024-09-26-final-Civic-Tech-Fall-Polling-research-1.pdf>.

⁹ *Id.* at 15.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 7.

of extortion of children through the threat of sharing sexually explicit imagery online.¹² These crimes often lead to self-harm and suicide,¹³ and are financially motivated by predators located outside the United States to coerce payments from minors to prevent the release of compromising materials.¹⁴ Between October 2022 and March 2023, the FBI “observed at least a 20% increase in reporting of financially motivated sextortion incidents involving minor victims compared to the same time period the previous year.”¹⁵

The FBI has also reported a sharp rise in AI-enabled sexual abuse. Malicious actors convert photos and videos found online “into sexually-themed images that appear true-to-life in likeness to a victim, then circulate them on social media, public forums, or pornographic websites.”¹⁶ Once created, these images are “sent directly to the victims by malicious actors for sextortion or harassment.”¹⁷ The images are often difficult to remove,¹⁸ and many victims were unaware of the images until brought to their attention by the malicious actor or another person.¹⁹

These trends suggest that foreign malicious actors can soon—if not already—exploit new technologies to scrape real people’s images online without their consent, generate extremely realistic fake nude images, and deploy endless LLM chatbots and other tools to harass and extort victims at a scale that was unimaginable a few years ago.

The consequences of inaction are catastrophic and unthinkable—this must end.

IV. CONGRESS IS ON FIRM CONSTITUTIONAL FOOTING TO BAN THE DISTRIBUTION OF NCII AND STREAMLINE ITS REMOVAL ONLINE

Since its founding, America’s approach to free speech has favored the “discovery of political truth,”²⁰ and disfavored regimes where the government is required to “separate the true

¹² FBI, Sextortion: A Growing Threat Targeting Minors (Jan. 23, 2024), <https://www.fbi.gov/contact-us/field-offices/nashville/news/sextortion-a-growing-threat-targeting-minors>.

¹³ *Id.* (“From October 2021 to March 2023, the FBI and Homeland Security Investigations received over 13,000 reports of online financial sextortion of minors. The sextortion involved at least 12,600 victims—primarily boys—and led to at least 20 suicides.”).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ FBI, Malicious Actors Manipulating Photos and Videos to Create Explicit Content and Sextortion Schemes (June 5, 2023), <https://www.ic3.gov/PSA/2023/PSA230605>.

¹⁷ *Id.*

¹⁸ *The World Wild Web: Examining Harms Online, Hearing Before the H. Comm. on Energy & Com.*, 119th Cong. 13 (Mar. 26, 2025), <https://www.congress.gov/119/meeting/house/118066/witnesses/HHRG-119-IF17-Wstate-HawkinsD-20250326.pdf> (“It is ruinous to victims’ lives, negatively impacting their mental health, causing them to live in extreme fear and shame. Once IBSA is uploaded and circulates worldwide, it exists forever.”).

¹⁹ *Id.*

²⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J, concurring) (“Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery

from the false for us.”²¹ As Justice Robert H. Jackson wrote in 1943, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²²

But the Supreme Court has made it equally clear that the First Amendment does not shield certain forms of harmful content. This includes content that is obscene,²³ child sexual abuse materials (CSAM),²⁴ speech that is integral to crime,²⁵ as well as other forms of speech related to misconduct.²⁶ The Supreme Court observed in 2012 that these constitutional protections “have a historical foundation in the Court’s free speech tradition,” and that the “vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.”²⁷

Congress likewise has significant leeway when crafting laws to protect the safety of minors.²⁸ The Supreme Court has long upheld the constitutionality of “legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”²⁹ Indeed, “Congress may regulate pornography involving all minors” so long as it “has a rational basis to do so.”³⁰ The Court has also recognized the value of not just criminalizing the harmful act of creating abusive images, but also of imposing severe criminal penalties on “persons selling, advertising, or otherwise promoting the product” to address the “economic motive for its production.”³¹

and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”).

²¹ *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“[T]he forefathers did not trust any government to separate the true from the false for us.”).

²² *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²³ *Miller v. California*, 413 U.S. 15, 23 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”).

²⁴ *New York v. Ferber*, 458 U.S. 747, 756 (1982) (“States are entitled to greater leeway in the regulation of pornographic depictions of children.”).

²⁵ *United States v. Stevens*, 559 U.S. 460, 468 (2010) *citing* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

²⁶ *See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (fraud); *Watts v. United States*, 394 U.S. 705 (1969) (true threats); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (grave and imminent danger the government seeks to prevent).

²⁷ *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

²⁸ *United States v. Hotaling*, 634 F.3d 725, 728 (2d Cir. 2011) (“The Supreme Court has long recognized that the government has a compelling interest in protecting minors from becoming victims of child pornography because of the physiological, reputational and emotional harm that distribution of such material imposes on them.”).

²⁹ *New York v. Ferber*, 458 U.S. 747, 757 (1982).

³⁰ *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005) *citing* *United States v. Freeman*, 808 F.2d 1290, 1293 (8th Cir.1987).

³¹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

Lower courts have routinely upheld the constitutionality of restrictions of CSAM when applying the Supreme Court’s longstanding precedents in response to emerging issues. For example, the Eighth Circuit held in 2005 that the First Amendment does not protect a “morphed image” of a child’s likeness onto another nude image.³² The court rejected the notion that the child’s safety was not implicated because the child was not involved in the production of the image, noting that depicting a child “seemingly engaged in sexually explicit activity” causes them to be “victimized every time the picture is displayed.”³³ More recently, in 2011, the Second Circuit reached a similar conclusion, holding that sex-based images using “the faces of actual minors and the bodies of adult females” is not expressive speech for purposes of the First Amendment.³⁴ As the court noted, “the interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts.”³⁵ Even if the bodies in the image did not belong to the children, the court reasoned, “they had been digitally altered such that the only recognizable persons were the minors,” while “the actual names of the minors were added to many of the photographs, making it easier to identify them and bolstering the connection between the actual minor and the sexually explicit conduct.”³⁶

Federal courts have had numerous opportunities to opine on the constitutionality of recently enacted laws regulating nonconsensual sex-based imagery—for both minors and adults—and declined to do so. As part of reauthorizing the Violence Against Women Act in 2022, Congress enacted 15 U.S.C. § 6851, a “federal civil cause of action for individuals whose intimate visual images are disclosed without their consent, allowing a victim to recover damages and legal fees.”³⁷ Since then, there have been scores of cases filed in federal courts across the country—but none of these cases have construed the law as an unconstitutional regulation of speech, in holdings or dicta.³⁸ Instead, courts have recognized that efforts by nearly every state to regulate this activity—including through criminal liability—is a recognition of “the potential for far-reaching and long-lasting effects on victims’ relationships, mental health, employment, and physical and emotional safety, not to mention the effects of shame or humiliation that can be difficult to escape or limit.”³⁹

³² *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005).

³³ *Id.*

³⁴ *United States v. Hotaling*, 634 F.3d 725, 729–30 (2d Cir. 2011).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA), WHITE HOUSE (Mar. 16, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/>.

³⁸ *See, e.g., Doe v. McCoy*, No. 1:23-CV-3169-MLB, 2024 WL 843908, at *1 (N.D. Ga. Feb. 28, 2024) (“This is a ‘revenge porn’ case.”); *Agdal v. X Corp. In Int. to Twitter*, No. 24-MC-80266-JCS, 2025 WL 81594, at *6 (N.D. Cal. Jan. 13, 2025).

³⁹ *K.I. v. Tyagi*, No. CV 1:23-2383-JRR, 2024 WL 4732703, at *4 (D. Md. Nov. 8, 2024) *citing* *United States v. Little*, No. 21-CR-162-JFH, 2022 WL 16714140, at *4 n.5 (N.D. Okla. Nov. 4, 2022) (“This type of behavior, commonly known as ‘revenge porn,’ has been criminalized in at least forty-six (46) states, including Oklahoma.”).

Finally, leading scholars agree that the Supreme Court has left considerable room for carefully tailored prohibitions to address image-based sexual abuse for both adults and minors.⁴⁰ They note that NCII is a form of deceptive speech that, similar to other false information, “undermines, not enhances, the pursuit of truth,”⁴¹ and serves to “undermine free speech itself, at least of its targets.”⁴² The disclosure of NCII also “chills private expression based on the fear that the images would be shared with the public at large,”⁴³ leading to “silencing and self-censorship.”⁴⁴

V. THE “TAKE IT DOWN ACT” CONFORMS WITH DECADES OF FIRST AMENDMENT JURISPRUDENCE

The TAKE IT DOWN Act criminalizes the publication of NCII, including AI-generated NCII, and establishes a process for social media platforms and other sites to remove this content on an expedited basis. It is supported by an ideologically diverse coalition of more than 100 organizations, including public-interest organizations, victim advocacy groups, law enforcement organizations, and businesses.⁴⁵ It achieves a compelling government interest through narrowly tailored requirements that conform to decades of First Amendment jurisprudence.

The TAKE IT DOWN Act is necessary to address a compelling—and devastating—harm.

The Act addresses a “terrifying” crisis that demands a legislative response.⁴⁶ Representative Madeline Dean (D-PA), a cosponsor of the legislation, said that “it is essential that we safeguard survivors of explicit deepfakes and non-consensual intimate imagery (NCII) that often devastate girls and women.”⁴⁷ Representative Maria Elvira Salazar (R-FL) has

⁴⁰ See e.g., Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 894 (2019); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 385 (2014).

⁴¹ Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 894 (2019).

⁴² *Id.* (“Deep-fake manipulation is, at its most fundamental, a form of deliberately deceptive speech. As such, its unchecked proliferation is completely at odds with a society that values the pursuit of truth.”).

⁴³ Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 385 (2014).

⁴⁴ Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 896 (2019).

⁴⁵ Supporting Organizations, The TAKE IT DOWN Act, <https://www.commerce.senate.gov/services/files/D1C333E5-2754-4239-B695-FE087FA9823B> (last visited on Apr. 1, 2025).

⁴⁶ Press Release, Office of Congresswoman Madeleine Dean, Congresswoman Dean Reintroduces the Legislation to Protect Victims of Explicit AI Deepfakes (Jan. 2025), <https://dean.house.gov/2025/1/congresswoman-dean-reintroduces-the-legislation-to-protect-victims-of-explicit-ai-deepfakes>.

⁴⁷ Press Release, Sens. Cruz, Klobuchar, Reps. Salazar, Dean Continue Fight to Pass TAKE IT DOWN Act (Jan. 2025), <https://www.commerce.senate.gov/2025/1/sens-cruz-klobuchar-reps-salazar-dean-continue-fight-to-pass-take-it-down-act>.

likewise added that the “alarming rise of deepfakes is threatening to destroy innocent individuals’ and families’ lives.”⁴⁸

These interests are compelling and have been well-documented by Congress.⁴⁹ Last Congress, the Senate Commerce Committee held a field hearing on June 26, 2024, to gather testimony from victims of sexually exploitative imagery, experts, and advocates for reform.⁵⁰ Over and over, they described a system that is out of control with few guardrails or accountability to prevent the persistent distribution of NCII. One mother, Mrs. Anna McAdams, described how her daughters’ classmate used a product from Google to generate AI-generated nudes of her daughters by just using their photos from social media. According to Mrs. McAdams, it took nearly nine months for Snapchat to remove these images, notwithstanding repeated requests that they do so.⁵¹

Prior to this, the House Committee on Oversight held a hearing about the destructive nature of deepfake technology, including NCII.⁵² Professor Spencer Overton of the George Washington University Law Center testified about how NCII harms women, children, minorities, and vulnerable populations.⁵³ In addition to causing anxiety and depression, Professor Overton noted that victims of NCII engage in self-censorship—they “stop using their phones, social media accounts, and withdraw from digital engagement.”⁵⁴

Most recently, the House Committee on Energy & Commerce held a hearing this Congress on March 26, 2025.⁵⁵ There, several witnesses described concerns for children’s online safety. For example, Dawn Hawkins, a leading expert and advocate against sexual exploitation,

⁴⁸ *Id.*

⁴⁹ See, e.g., *National Security Challenges of Artificial Intelligence, Manipulated Media, and ‘Deepfakes’*, Hearing Before the H. Permanent Select Comm. on Intelligence, 116th Cong. (2019), <https://www.congress.gov/event/116th-congress/house-event/109620> (examining the national security implications of AI-generated manipulated media, including deepfakes); *Addressing Real Harm Done by Deepfakes*, Hearing Before the H. Oversight & Accountability Subcomm. on Cybersecurity, Information Tech., & Gov’t Innovation, 118th Cong. (2024), <https://oversight.house.gov/hearing/addressing-real-harm-done-by-deepfakes> (discussing the harms of deepfakes, including their impact on exploited children and consumer privacy); *Protecting Consumers from AI Deepfakes*, Hearing Before the S. Subcomm. on Consumer Protection, Product Safety, & Data Security, 118th Cong. (2024) (examining the rise of AI-generated deepfakes and potential legislative responses).

⁵⁰ *Take It Down: Ending Big Tech’s Complicity in Revenge Porn*, Field Hearing Before the S. Comm. on Com., Sci. & Transp., 118th Cong. (June 2024), <https://www.commerce.senate.gov/2024/6/field-hearing-take-it-down-ending-big-tech-s-complicity-in-revenge-porn>.

⁵¹ *Id.* (statement of Mrs. Anna McAdams, Mother of Ms. Elliston Berry, Aledo, TX).

⁵² *Advances in Deepfake Technology*, Hearing Before the Subcomm. on Cybersecurity, Info. Tech., & Gov’t Innovation of the H. Comm. on Oversight & Accountability, 118th Cong. (Nov. 8, 2023).

⁵³ *Id.* (statement of Prof. Spencer Overton, George Washington University Law School), <https://oversight.house.gov/wp-content/uploads/2023/11/Overton-Testimony-on-Advances-in-Deepfake-Technology-11-8-23-1.pdf>.

⁵⁴ *Id.* at 4.

⁵⁵ *The World Wild Web: Examining Harms Online*, Hearing Before the H. Comm. on Energy & Com., 119th Cong. 15 (Mar. 26, 2025), <https://www.congress.gov/119/meeting/house/118066/witnesses/HHRG-119-IF17-Wstate-HawkinsD-20250326.pdf>

described the internet as, by design, a “danger zone for kids.”⁵⁶ She explained the immense moral and social costs of allowing these trends to continue:

Every delay has a cost. Every month that passes without change, more children are being groomed, exploited, and lost. Parents are burying children who never should have died. Survivors are reliving trauma every time a platform refuses to remove their abuse and allows it to be reuploaded. And predators are thriving in the absence of regulation.⁵⁷

Ms. Hawkins added that she is “tired of begging companies to care, only to witness tiny, incremental changes while they rake in record profits.”⁵⁸

In the Supreme Court’s line of cases examining the constitutional underpinnings of this issue, *Ferber* and *Ashcroft*, the Court held that the government has a compelling interest for purposes of the First Amendment if it seeks to safeguard the physical and psychological well-being of a minor.⁵⁹ This interest is compelling for two reasons. First, it is necessary to “dry up the market” for these materials through severe penalties applicable to “persons selling, advertising, or otherwise promoting the product.”⁶⁰ Second, it is necessary to protect victims from the repeated psychological, emotional, and financial harm associated with the permanence of sex-based imagery.⁶¹

The Act is narrowly tailored to satisfy these goals.⁶² Its prohibitions are tailored to arrest the distribution of NCII. Its definitions are narrow and draw from current law, such as the Act’s definition of intimate visual depiction,⁶³ and obscene visual representations of children.⁶⁴ The Act’s prohibitions include the publication or threat to publish NCII; distributing nude images of children, and digital forgeries of non-minors that are non-consensual, non-public, not a matter of public concern, and intended to cause harm or causes harm to the victim. It includes several exceptions for legitimate purposes, including for seeking medical help, alerting law enforcement, and protecting national security.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002); *New York v. Ferber*, 458 U.S. 747, 758 (1982).

⁶⁰ *New York v. Ferber*, 458 U.S. 747, 760 (1982) (“Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.”)

⁶¹ *Id.* at 756-57.

⁶² *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (“But to recite the Government’s compelling interests is not to end the matter. The First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest.”).

⁶³ 15 U.S.C. § 6851 (also defining commercial pornography).

⁶⁴ 18 U.S.C. § 1466A.

Importantly, the bill addresses publications that are intended to cause abuse or gratify a person’s sexual desire, as well as those that cause “harm, including psychological, financial, or reputational harm.” This element of the bill is carefully designed to close gaps in many state laws. As legal commentators have noted, NCII is not always intended to “harm or harass,” particularly when it involves victimization by strangers.⁶⁵ This prong is essential to closing a loophole that “normally requires the prosecution to prove that the defendant was aware of the victim’s lack of consent,”⁶⁶ which may not be true in all cases, such as certain forms of sexual extortion by foreign malicious actors.

The Act also requires covered platforms to establish a process for victims to make good-faith requests to remove NCII on an expedited basis. This provision is essential to the goals of the legislation: facilitating the end of NCII distribution *and* ensuring its removal online. As the Supreme Court has recognized, Congress may both criminalize the harmful act of creating these images *and* impose penalties to address the “economic motive for its production.”⁶⁷ While criminalizing the publication of NCII in the first instance is important, Congress is justified in pursuing an additional step to ensure its removal. As courts have recognized for decades, each instance of publication is a new form of abuse to victims of nonconsensual sex-based imagery.⁶⁸ It is not merely the harm associated with generating the imagery in the first instance—it is the fact that it is nearly impossible to remove under current state and federal law. Requiring a removal process for good-faith requests is essential to this compelling interest.

Without this provision, it is difficult to conclude that the Act would fully achieve its critical goals, including protecting victims from repeated abuse. Congress has conducted significant oversight over the many ways that social media platforms and other sites monetize user attention, creating a flywheel of abuse online. As this exhaustive record shows, these firms have turned a blind eye to some of the worst forms of abuse imaginable or been slow to act in response to known problems. Ms. Hawkins spoke persuasively about this problem in her testimony:

For too long, families and advocates have watched in anguish as America’s children are harmed by technologies that the tech companies knew were detrimental to the health and well-being of children. We have worked with these companies, only to see piecemeal steps toward improvement. For too long, we have asked Congress to create the necessary guardrails to hold Big Tech

⁶⁵ Mary Anne Franks, *How to Defeat 'Revenge Porn': First, Recognize It's About Privacy, Not Revenge*, HUFFPOST (June 22, 2015), https://www.huffpost.com/entry/how-to-defeat-revenge-porn_b_7624900 (“To be sure, nonconsensual pornography often plays a role in domestic violence, but making intent to harm or harass an element of the crime does not serve the best interests of domestic violence victims.”).

⁶⁶ Rena Song, *Faking It: A Proposed Solution to Counter Nonconsensual Pornographic Deepfakes*, 31 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 157, 222 (2025) *citing* Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 421 (2013) (“Mental states are inherently difficult to prove, especially since the prosecution can often rely only on circumstantial evidence to support its case.”).

⁶⁷ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

⁶⁸ *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005) *citing* *United States v. Freeman*, 808 F.2d 1290, 1293 (8th Cir.1987).

accountable, while Big Tech grew more powerful, more profitable, and less accountable . . . Our children deserve better.⁶⁹

Finally, the Act is carefully designed to withstand even heightened constitutional scrutiny while the countervailing speech has little expressive value.

In addition to the compelling interest the Act serves, it is the least restrictive means of achieving these goals.⁷⁰ Nearly every state has enacted laws to address the abuse of sex-based imagery. States have also passed legislation to criminalize the intentional publication of NCII. Notwithstanding these important efforts, NCII continues to grow and worsen in the absence of a federal law to address this issue. It would not be enough for Congress to simply codify state law or criminalize the intentional publication and distribution of NCII to address this compelling government interest.

There have been numerous hearings documenting these harms.⁷¹ Congress has received testimony from survivors, advocates, and legal experts in Washington, D.C. and across the country. They have shared stories about abuse, suffering, and death. They would not take these courageous steps if they believed that legislative intervention by Congress was unnecessary to curtail the spread of NCII online.

The Act’s restriction of NCII fits well within the framework for speech that does not enjoy First Amendment protection. In many cases, NCII includes content that is CSAM, which is never protected by the First Amendment.⁷² In other cases, the NCII includes content that is integral to illegal activity under state and federal law, such as the abuse of sex-based imagery,⁷³ which is also unprotected by the First Amendment.⁷⁴ And to the extent that the speech in question does not fit neatly within those two broad categories, NCII is widely viewed as obscenity, which is not shielded by the First Amendment.⁷⁵ 73% of participants in a recent

⁶⁹ *The World Wild Web: Examining Harms Online, Hearing Before the H. Comm. on Energy & Com.*, 119th Cong. 1 (Mar. 26, 2025), <https://www.congress.gov/119/meeting/house/118066/witnesses/HHRG-119-IF17-Wstate-HawkinsD-20250326.pdf>

⁷⁰ *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (“But to recite the Government’s compelling interests is not to end the matter. The First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest.”)

⁷¹ *See supra* note 49.

⁷² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002).

⁷³ Nearly all states have banned “revenge pornography,” and a growing number of states have passed laws to address NCII. As commentators have noted, these laws vary in scope and effectiveness. *See* Rena Song, *Faking It: A Proposed Solution to Counter Nonconsensual Pornographic Deepfakes*, 31 Wash. & Lee J. Civil Rts. & Soc. Just. 157, 195, 199 (2025).

⁷⁴ *United States v. Stevens*, 559 U.S. 460, 468 (2010) *citing* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

⁷⁵ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002) (“Generally, pornography can be banned only if it is obscene under *Miller v. California* . . . but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State’s interest in protecting the children exploited by the production process, *New York v. Ferber*, . . . and in prosecuting those who promote such sexual exploitation.”); *Miller v. California*, 413

survey said they would want to “report to the authorities if someone close to them became a victim of deepfake porn,” while 68% said they “would feel shocked and outraged by . . . the creation of deepfake pornographic content.”⁷⁶ These views are consistent with a survey of adults in another country that found that at least 91.8% of respondents “were concerned that deepfakes could add to online child sexual abuse material, increase distrust in information and manipulate public opinion.”⁷⁷

But to the extent the Act receives heightened scrutiny, the speech it regulates has little, if any, expressive value. The Act does not favor viewpoints, speakers, or message. It poses no threats to the arts, education, or public debate. It does not undermine the “functioning of the marketplace of ideas.”⁷⁸ It does not apply to other forms of false speech that have little social value but may still enjoy some degree of First Amendment protection because it is “inevitable in free debate.”⁷⁹ It does not make sweeping changes to content moderation online, or make other wholesale reforms to the law. And it does not allow a government official to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁸⁰ Instead, the Act simply restricts the distribution of NCII and facilitates its removal. In doing so, it seeks to halt a form of abuse that destroys lives, often leading to suicide and self-harm.⁸¹

Some opponents of the legislation argue that it could have a chilling effect on commercial speech, such as commercial pornography.⁸² In support of this argument, they argue that “intimate visual depiction” is an undefined term for purposes of section 3 of the bill, which establishes a removal process for NCII. Specifically, they argue that the Act:

[C]reates a notice and takedown (NTD) mechanism that would result in the removal of not just nonconsensual intimate imagery but also speech that is neither illegal nor actually NDII [nonconsensual distribution of intimate imagery]. This mechanism is likely unconstitutional and will undoubtedly have a censorious impact on users’ free expression. ***While the criminal provisions of the bill include appropriate exceptions for consensual commercial pornography and matters of public concern, those exceptions are not included in the bill’s takedown system.*** The text, therefore, creates an NTD mechanism for content that

U.S. 15, 23 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”).

⁷⁶ Security Hero, *The State of Deepfakes*, <https://www.securityhero.io/state-of-deepfakes/#deepfake-porn-survey>.

⁷⁷ *The Alan Turing Inst., Behind the Deepfake (July 2024)*, https://www.turing.ac.uk/sites/default/files/2024-07/behind_the_deepfake_full_publication.pdf.

⁷⁸ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

⁷⁹ *Id.* at 52.

⁸⁰ *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁸¹ FBI, *Sextortion: A Growing Threat Targeting Minors*, <https://www.fbi.gov/contact-us/field-offices/nashville/news/sextortion-a-growing-threat-targeting-minors>.

⁸² Ctr. for Democracy & Tech. et al., *Letter to U.S. Senate on Concerns Regarding the TAKE IT DOWN Act* (Feb. 12, 2025), https://cdt.org/wp-content/uploads/2025/02/TAKE-IT-DOWN-Sign-On-Letter_21225.pdf.

is not NDII as defined by the law, and that would result in the takedown of consensual, constitutionally protected speech.⁸³

Without this definition, they argue that section 3 “applies to a much broader category of content—potentially any images involving intimate or sexual content—than the narrower NCII definitions found elsewhere in the bill.”⁸⁴

This criticism is an invalid miscomprehension of the proposed legislation. Section 4 of the TAKE IT DOWN Act establishes definitions for the *entire* Act, including section 3’s removal process. It unambiguously sets forth the definition of “intimate visual depiction” as the same as in section 2 of the bill,⁸⁵ which defines the term by incorporating current law, 15 U.S.C. § 6851, into the Act.⁸⁶ 15 U.S.C. § 6851 is a federal law passed in 2022 that has been construed in dozens of cases by federal courts.⁸⁷ It includes exceptions for “matters of public concern or public interest,” as well as “an intimate image that is “commercial pornographic content, unless that content was produced by force, fraud, misrepresentation, or coercion of the depicted individual.”⁸⁸ Simply put, the criticism of the Act’s constitutionality is based on a fundamental misunderstanding of the legislation and is not supported by its actual text.

Finally, although the technologies associated with NCII may be new, courts have decades of experience separating nonconsensual sex-based images from commercial pornography.⁸⁹ But should there be an actual conflict between these interests, however unlikely, the actual harms caused by the distribution of NCII online—including the compelled speech and censorship of victims of abuse—significantly outweighs the theoretical harms to other forms of commercial speech.

There are certainly times when Congress seeks to regulate content for good reason that may nevertheless fail to satisfy First Amendment scrutiny. This is not one of those.

⁸³ *Id.* (emphasis added).

⁸⁴ Joe Mullin, *The TAKE IT DOWN Act: A Flawed Attempt to Protect Victims That Will Lead to Censorship*, ELEC. FRONTIER FOUND. (Feb. 11, 2025), <https://www.eff.org/deeplinks/2025/02/take-it-down-act-flawed-attempt-protect-victims-will-lead-censorship>.

⁸⁵ The TAKE IT DOWN Act, S.146, 119th Cong. (2025) (as passed by Senate on Feb. 13, 2025), <https://www.congress.gov/119/crec/2025/02/13/171/30/CREC-2025-02-13-pt1-PgS988-3.pdf> (“The terms ‘consent’, ‘digital forgery’, ‘identifiable individual’, ‘intimate visual depiction’, and ‘minor’ have the meaning given such terms in section 223(h) of the Communications Act of 1934 (47 U.S.C. 223), as added by section 2.”).

⁸⁶ *Id.* at sec. 2 (“The term ‘intimate visual depiction’ has the meaning given such term in section 1309 of the Consolidated Appropriations Act, 2022 (15 U.S.C. 6851).”).

⁸⁷ *See, e.g., Doe v. Constant*, No. CV 24-554, 2024 WL 3512136, at *2 (W.D. La. July 23, 2024) (“an ‘intimate visual depiction’ is any photo, video, or other visual image . . . that depicts, in relevant part, (1) the uncovered genitals, pubic area, or post-pubescent female nipple of an identifiable individual; or (2) an identifiable individual engaging in sexually explicit conduct.” 15 U.S.C. § 6851(a). “Sexually explicit conduct” includes a range of sexual activities between individuals, including “graphic sexual intercourse, such as genital-genital, [and] oral-genital,” graphic or simulated lascivious masturbation, or “graphic or simulated lascivious exhibition of the genitals or pubic area of any person.”).

⁸⁸ 15 U.S.C. § 6851(b)(4).

⁸⁹ *Id.*

* * *

The TAKE IT DOWN Act is a targeted solution to address the horrific rise of the distribution of NCII, both real and fake. Congress is on firm constitutional footing to establish protections in this area, while the Act's commonsense prohibitions and removal process fit well within the contours of decades of First Amendment jurisprudence.

To be clear, inaction is action. While Congress may always refine the bill during the legislative process or amend the law as necessary, there is a strong bipartisan consensus that Congress must act now, and any additional delays are unacceptable.