UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF STONE

UNITED STATES of America, Plaintiff,

v.

Joshua JOHNSON, Defendant.

No. ST-21-03

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

R. Baxter, District Judge.

Joshua Johnson was arrested and indicted for the non-consensual disclosure of a private sexual image under the recently enacted federal SHIELD Act (the Stopping Harmful Image Exploitation and Limiting Distribution Act) ("the Act").[1] 18 U.S.C. § 1808. Johnson has moved to dismiss the indictment on the grounds that the statute violates the First Amendment on its face. This Court heard argument on Defendant's motion to dismiss on January 14, 2021. For the reasons stated herein, this Court DENIES Defendant's Motion to Dismiss.

Facts and Background

Joshua Johnson and Isabella Holt, both residents of the state of Stone, dated from December 2017 to September 2020. At the time their relationship ended, Johnson was twenty-eight years old, and Holt was twenty-seven. During their relationship, the two engaged in

[1] The SHIELD Act was created for the purposes of Boston University School of Law's Stone Moot Court competition. In reality, the federal government has not yet enacted a non-consensual dissemination of private sexual images statute, although bills that would create such a federal statute are currently pending before Congress. See e.g., Press Release, Jackie Speier, Congresswoman, House of Representatives, Speier and Katko Amendment to Address Online Exploitation of Private Images Included in Violence Against Women Reauthorization Act (Mar. 21, 2021), https://speier.house.gov/2021/3/speier-and-katko-amendment-to-address-online-exploitation-of-private-images-included-in-violence-against-women-reauthorization-act.

"sexting," taking nude digital photographs on their cell phones and sending them to one another.[2] In an affidavit, Holt attested that the photographs the pair sent to each other were private, meant for the other person's eyes only and that Johnson knew that she wanted to keep the photos private.

Holt broke up with Johnson on September 10, 2020. On September 13, 2020, Holt drove to New Mexico for a three-week long retreat, during which she did not have access to her phone or any Internet-capable devices. On September 14, 2020, upset at the way the relationship ended, Johnson went on a popular social media platform called Tikstagram and posted one of the nude photographs that Holt had sent him during their relationship. The photograph was published to Johnson's feed for all of his Tikstagram followers to see with the caption "not the person U thought she was." Johnson also tagged Holt's profile in the posted picture; once tagged, the nude photograph was linked to Holt's profile so that all of her Tikstagram followers could see them as well. On September 19, 2020, Johnson left on a week-long trip to Colombia. He returned to Stone on September 27, 2020.

Holt turned on her phone as she left her retreat on October 3, 2020 and saw that she had multiple texts from friends alerting her to Johnson's Tikstagram post. She opened the Tikstagram app on her phone, saw the photo, and immediately texted Johnson and asked him to remove it. Johnson replied that he would not. Holt then reported the post to Tikstagram, which took the photograph down within three hours of the report and suspended Johnson's account.

Holt arrived back in Stone late on October 3, 2020. The next morning, she reported Johnson's actions to her local police station, which contacted the local United States Attorney's

[2] All of the nude photographs sent by both Johnson and Holt were taken inside each of their respective homes.

Office. Following a short investigation, on October 5, 2020, Johnson was arrested for the non-consensual disclosure of private sexual images in violation of the SHIELD Act. He was indicted on this charge and was released on bail to await trial.[3]

Discussion

The SHIELD Act (the "Act") was signed into law on August 26, 2020, with an immediate effectiveness date. The Act makes it a crime "to disclose an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part." 18 U.S.C. § 1808 (see Appendix). Criminal liability only attaches to such disclosure if "the person is identifiable," the person who disclosed the images "knows or reasonably should know" that the person depicted did not consent to disclosure, and the "the image was obtained or created under circumstances in which the person who disclosed the image knew or reasonably should have known the person depicted in the image had a reasonable expectation of privacy." § 1808(1)(A)-(C). Johnson concedes that Holt was identifiable and that Holt's "intimate parts," as defined by the Act, were exposed in the image he posted. He contends, however, that even if the Government can prove that the other elements of the Act are satisfied, the Act is unconstitutional under the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Under the First Amendment, "speech" includes other expressive conduct, including videos and photographs and their dissemination. Sorrell v. IMS Health, Inc., 564 U.S. 552, 570 (2011). Certain categories of speech are not protected, however,

[3] The Court is aware that Johnson is now in custody again after being indicted on a separate charge, for the importation of a controlled substance into the United States in violation of 21 U.S.C. § 952. That case is also before this Court.

and the government can prohibit and punish those types of speech without violating the First Amendment. See, e.g., Roth v. California, 354 U.S. 476, 486 (1957).

Thus, when analyzing a challenge to government restrictions on private speech, a court must first determine whether the First Amendment protects the speech in question. City of Houston v. Hill, 482 U.S. 451, 458 (1987). Obscene speech is excluded from First Amendment protection because it is "utterly without redeeming social importance." United States v. Stevens, 559 U.S. 460, 484-85 (2010). Statutes designed to regulate obscene materials must be "carefully limited," however, and their scope "confine[d to the] . . . regulation [of] works which depict or describe sexual conduct." Miller v. California, 413 U.S. 15, 18 n.2 (1973).[4]

Material is obscene if (1) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;" (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law;" and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24 (internal citations and quotations omitted). In non-consensual pornography litigation, such as here, determining whether the obscenity exception applies focuses on the second prong of the Miller test.

In countering Johnson's motion to dismiss, the Government argues that the Act targets images that are patently offensive not only because they depict nudity or sexual conduct, but because they also invade the privacy of the person depicted. See id. at 25; Ginzburg v. United States, 383 U.S. 463, 465-66 (1966) ("[T]he question of obscenity may include consideration of the setting in which the publications were presented."). Johnson contends, however, that although the Act only applies to content that depicts nudity or sexual acts, "nudity alone is not

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[4] Appellee does not contend that any exception other than the obscenity exception applies here.

enough to make material obscene." Jenkins v. Georgia, 418 U.S. 153, 161 (1974). Johnson also asserts that although the Act proscribes obscene speech, the Act also covers content that does not appeal to the prurient interest. See State v. Casillas, 952 N.W.2d 629, 639 (Minn. 2020), petition for cert. filed, No. 20-1635 (U.S. May 24, 2021). This Court agrees with Johnson that the obscenity exception does not apply, especially considering the Supreme Court's "reluctance to expand the category of obscenity to sweep in content not previously included within that category." State v. Van Buren, 214 A.3d 791, 801 (Vt. 2019) (citing Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792-94 (2011)).

Even absent an exception, however, the government may still restrict protected speech, although its efforts to do so are reviewable under either strict or intermediate scrutiny. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). "[I]f a law applies to particular speech because of the topic discussed or the idea or message expressed," it is a content-based regulation, which is "presumptively unconstitutional" and subject to strict scrutiny. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). The Government bears the burden of proving a content-based statute is narrowly tailored to serve compelling state interests. Id. Additionally, the statute must be "the least restrictive means addressing" the government's interest. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 827 (2000). Johnson contends that the SHIELD Act is a content-based statute that cannot survive strict scrutiny.

In contrast, the Government contends that the SHIELD Act is a content-neutral statue because it limits expression without regard to the content of the message that is conveyed. Reed, 576 U.S. at 165. Content-neutral laws are subject to intermediate scrutiny, under which the law must be narrowly tailored to fit a substantial (as opposed to compelling) government interest.

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994).. Johnson concedes that if the Act is a content-neutral law, it passes intermediate scrutiny.

As Congress has recently enacted the SHIELD Act, no federal court has considered a case involving a restriction prohibiting the non-consensual dissemination of privately sent sexual images. However, forty-six states and the District of Columbia have enacted similar "revenge porn" statutes, several of which have faced First Amendment challenges. See, e.g., Cyber Civil Rights Initiative, 46 States + DC + One Territory Now Have Revenge Porn Laws, https://www.cybercivilrights.org/revenge-porn-laws/. The state of Stone has not enacted any similar statute. In the absence of federal case law examining these statutes, the parties and this court must consider relevant state court cases.

In arguing that the Act is a content-based restriction, Johnson contends that the Act does not apply to the disclosure of all images of another person, but only to "a subset of disclosed images," namely those that depict a person's intimate parts or depict sexual acts. Ex parte Jones, No. PD-0552-18, 2021 WL 2126172, at *6 (May 26, 2021 Tex. Crim. App.) (per curiam). Thus, he argues that Act is content-based because it "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." Turner Broad. Sys., 512 U.S. at 643. Next, he argues that the Act cannot survive strict scrutiny because it is not narrowly tailored because it lacks a specific intent requirement and contains relatively few exceptions. Casillas, 952 N.W.2d at 643. Moreover, he argues that the Act does not provide the least restrictive means of regulating the non-consensual dissemination of private sexual images, and he suggests that civil remedies in copyright or privacy law are more appropriate. See Ex parte Jones, 2021 WL 2126172, at *13.

The Government asserts that the Act survives strict scrutiny because it is narrowly tailored; that like other state statutes that have been upheld, the Act contains restrictive definitions of intimate parts and sexual acts that limit the crime of non-consensual dissemination to a confined class of content. See Casillas, 952 N.W.2d at 643. Additionally, although the Act lacks a mens rea requirement, it specifies that the image must have been obtained under circumstances in which a reasonable person would know or understand that it was private, which sufficiently narrows the Act. See Ex parte Jones, 2021 WL 2126172, at *13. Finally, the Government contends that existing remedies are "inadequate" to deter or remedy the non-consensual dissemination of private sexual images. See People v. Austin, 155 N.E.3d 439, 463-64. (Ill. 2019), cert. denied, 141 S. Ct 233 (2020).

This Court need not decide whether the Act survives strict scrutiny, however, because this Court finds that the Act is content-neutral. The Act restricts the non-consensual dissemination of private sexual images to limit harm to victims, not because of the ideas that the images convey. Governmental purpose is the controlling consideration when analyzing a law's content neutrality. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984). Even a statute that restricts some expressive messages and not others is content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive. Hill v. Colorado, 530 U.S. 703, 724 (2000). Here, the Act distinguishes the dissemination of a nude or sexual image not based on the content of the image itself, but whether the disseminator knew or should have known that the person in the image had not consented to the dissemination. See Austin, 155 N.E.3d at 457. Therefore, it is content-neutral and subject only to intermediate scrutiny, which Johnson concedes the Act survives.

Conclusion

For these reasons, Defendant's Motion to Dismiss is DENIED.

SO ORDERED.

Dated: February 10, 2021.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF STONE

UNITED STATES of America, Plaintiff,	)	
v.	)	No. ST-21-03
Joshua JOHNSON, Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

R. Baxter, District Judge.

Joshua Johnson was arrested and indicted for the importation of a controlled substance into the United States in violation of 21 U.S.C. § 952. Johnson has moved to suppress evidence obtained from a search of his iPhone and a subsequent search of his home, which was conducted pursuant to a warrant obtained based on evidence recovered during the search of his iPhone. This Court heard argument on Defendant's motion to suppress on March 4, 2021. For the reasons stated herein, this Court DENIES Defendant's motion to suppress.

Facts and Background

Among other things, Customs and Border Patrol ("CBP") is tasked with preventing the smuggling of illegal drugs into the United States. By May 2020, Customs and Border Patrol infiltrated and began monitoring online discussion in an anonymous chatroom used by those in the international drug smuggling trade to discuss logistics and supply chains. In July 2020, CBP agents had learned of a recently initiated large-scale cocaine importation scheme that involved smuggling cocaine from Colombia into the United States. From a known informant in a rival cartel, CBP learned that the cocaine importation scheme was being run by a mysterious, newly formed drug cartel known only as the Blooths. As their investigation was in its infancy, CBP did

not yet have any circumstantial or concrete evidence as to the identity of any of the members of the Blooth organization.

In late August 2020, however, the agency learned through the chatroom that a man who was a central coordinator in the Blooth cocaine smuggling ring would be arriving from Colombia at Stone International Airport in the state of Stone on September 27, 2020. This man was known to CBP only by the alias "G.O.B." The agency did not have any other identifying information regarding "G.O.B.," such as his height, weight, age, or hair and eye color. The agency spent considerable effort in the weeks leading up to September 27, 2020 attempting to gather more information about "G.O.B.," to no avail. Thus, on September 23, 2020, the CBP officials ordered CBP officers to conduct searches of all incoming male travelers from Colombia into Stone National Airport on September 27, 2020. Officers were instructed to look for "any and all" evidence of involvement in cocaine smuggling.

On September 27, 2020, Joshua Johnson arrived on an international flight at the Stone International Airport from Colombia, where he had been on a week-long hiking trip to explore Ciudad Perdida, an ancient archaeological site older than Machu Picchu. Based solely on the fact that Johnson was a male arriving from Colombia at Stone International Airport on the date in question, CBP targeted Johnson for a search. May Funck, a CBP officer, inspected Johnson's luggage, which contained Johnson's iPhone. A physical pat-down of Johnson and a chemical swab of his outer clothing revealed no evidence of cocaine. Funck nonetheless seized the iPhone over Johnson's strenuous objections of "I need my phone! My entire life is on there!" Funck attempted to unlock the phone, which was secured by a passcode, but was unable to do so, and Johnson refused to unlock it for her. Instead, Funck sent the phone off-site to computer forensic

analysts at the Cyber Crime Center of the Department of Homeland Security ("DHS"). Johnson was permitted to leave the airport and return home.

At the Cyber Crime Center, forensic analysts made copies of Johnson's iPhone solid state drive[5] and performed a forensic evaluation on those copies. After running the forensic software, the analysts found deleted text messages and photographs in the unallocated space[6] on Johnson's iPhone. Those text messages contained instructions from an unknown cell phone number regarding how Johnson was to pick up shipments of cocaine and smuggle them into the United States and to whom the shipments were to be sold once they were inside the United States. The photographs appeared to be of the cocaine shipments; those photographs had been texted to the unknown cell phone number, apparently to confirm Johnson's receipt of the shipments. The forensic search of the iPhone produced no evidence that Johnson was "G.O.B." or that he was in any way associated with the Blooth cartel.

Relying entirely on the evidenced obtained from Johnson's iPhone, DHS obtained a warrant to search Johnson's home for evidence of cocaine smuggling. DHS and Federal Bureau of Investigation ("FBI") agents executed a raid on Johnson's home and arrested Johnson on December 17, 2020. During the search of Johnson's home, DHS and FBI agents found large amounts of cash and a handwritten "cuff sheet" detailing the names of "customers" (smaller-scale drug dealers) who had bought past cocaine shipments from Johnson on credit and how much they owed Johnson. Johnson was then arrested and later indicted for the importation of a

[5] A phone's solid state drive is analogous to the hard drive on a laptop computer.
[6] Unallocated space on a hard drive is space containing deleted data (for example, photographs deleted from a phone's camera roll) which cannot be seen or accessed by a user without the use of forensic software. Essentially, through the forensic search, DHS was able to restore deleted material on Johnson's iPhone.

controlled substance into the United States in violation of 21 U.S.C. § 952. He is presently in custody, awaiting trial.

Discussion

Johnson has moved to suppress all evidence obtained from the search of his iPhone, as well as all evidence obtained from the search of his home. He contends, and the Government concedes, that because the warrant to search Johnson's home was obtained using evidence from Johnson's iPhone, if the iPhone evidence was obtained in violation of the Fourth Amendment, the evidence obtained pursuant to the warrant is fruit of the poisonous tree and must also be suppressed. The Government conducted the challenged search without a warrant, so it bears the burden of proving by a preponderance of the evidence that an exception to the warrant requirement applies. See, e.g., United States v. Davis, 690 F.3d 226, 262 (4th Cir. 2012).

The Fourth Amendment guarantees "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Thus, warrantless searches and seizures "are per se unreasonable," absent probable cause or unless an exception to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357 (1967). One such exception, and the only one at issue here, is the border search exception. See United States v. Ramsey, 431 U.S. 606, 616 (1977).

"[B]order searches constitute a 'historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained.'" United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013) (en banc) (quoting Ramsey, 431 U.S. at 621). Under the border search exception, certain searches and seizures that occur at international borders and their functional equivalent are reasonable without a warrant or probable cause. See Ramsey, 431 U.S. at 616-17; see also United States v. Flores-Montano, 541 U.S. 149, 150 (2004).

In determining whether a given exception to the warrant requirement applies, courts weigh a person's interest in privacy and the nature of the intrusion against the importance of the governmental interests justifying the intrusion. Brigham City v. Stuart, 547 U.S. 398, 398 (2006). The Supreme Court has found that the government's interests at its international border are "at its zenith" because of the substantial government interests in "protecting territorial integrity," national security, and blocking "the entry of unwanted persons and effects" into the country. Flores-Montano, 541 U.S. at 152-53. Thus, the Supreme Court has held that individualized suspicion is not required for "routine" border searches and seizures. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). The Supreme Court has not defined "routine," but has explained that "highly intrusive searches," such as strip searches, body cavity searches, or involuntary x-rays, may qualify as non-routine and thus require some level of individualized suspicion. See Flores-Montano, 541 U.S. at 152 (quoting United States v. Montoya de Hernandez, 437 U.S. 531, 541 n.4 (1985)). In the border search context, courts have also distinguished between manual and forensic searches of digital devices. See, e.g., United States v. Kolsuz, 890 F.3d 133, 137, 148 (4th Cir. 2018) (classifying a search as manual when officers used the iPhone's touch screen to scroll through recent calls and text messages, but as forensic when officers brought a cell phone to a separate Homeland Security Office to search it with a specialized device).

Here, the Government concedes that the search of Johnson's iPhone was a forensic search and that CBP officers lacked any individualized suspicion for conducting the search. Moreover, the Government has not argued that the good faith exception applies; that argument is therefore waived. Thus, the issue before this Court is whether and how the border search exception should

apply to forensic searches of digital devices. This is an issue of first impression in this jurisdiction.

The Supreme Court has not considered whether the forensic search of a digital device qualifies as a routine search, such that the border search exception applies and permits a search absent any suspicion. The Courts of Appeal are split. The Eleventh Circuit has held that forensic searches of digital devices are routine searches and, therefore, no suspicion is required to search a digital device's contents. United States v. Touset, 890 F.3d 1227, 1233-36 (11th Cir. 2018). Several other Courts of Appeal, however, have held that forensic searches of digital devices are non-routine searches such that reasonable suspicion is required to search their contents. See, e.g., Cotterman, 709 F.3d at 962-63; Kolsuz, 890 F.3d at 143-44. Finally, multiple Courts of Appeal have declined to reach the issue. See, e.g., United States v. Molina-Isidoro, 884 F.3d 287, 289, 292 (5th Cir. 2018).[7]

This Court agrees with the Government that a forensic search of a digital device is a routine search—only invasive searches of a person's body are non-routine such that reasonable suspicion is required. See Touset, 890 F.3d at 1234. That does not end the inquiry, however, as Johnson argues that even if a forensic search of a digital device is a routine search, the Government exceeded the scope of the border search exception because it was searching his phone for something other than contraband. He points to the Ninth Circuit, which has held that the border search exception is limited to searches for actual contraband; the exception does not apply to searches for evidence that would aid in prosecuting past and preventing future border-related crimes. Cotterman, 709 F.3d at 957. Moreover, he argues that the border search exception

[7] Many of these cases do not reach the merits of the Fourth Amendment issue because they found the evidence at issue admissible under the good faith exception to the exclusionary rule. Here, the Government has not argued that the good faith exception applies.

is grounded in the government's right to control who and what enters the country and must therefore be limited to searches for contraband. See Ramsey, 431 U.S. at 620. In contrast, the Government points to the Fourth Circuit, which does permit the government to forensically search a digital device for evidence of a border-related crime. Kolsuz, 890 F.3d at 143-44.

Again, this Court agrees with the Government. "[T]he justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally." Id. at 143. Preventing the smuggling of illicit drugs is an important national security interest. Montoya de Hernandez, 473 U.S. at 538 (highlighting the transnational crime rationale underlying the border search exception in finding that the "longstanding concern for the protection of the integrity of the border" is "heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics"). Thus, a search for evidence of contraband or evidence of a border-related crime is well within the scope of the border search exception.

Conclusion

For these reasons, Defendant's Motion to Suppress is DENIED.

SO ORDERED.

Dated: April 8, 2021.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

UNITED STATES of America, Appellee,	)	
v.	)	No. ST-21-03
Joshua JOHNSON, Appellant.	)	

NOTICE OF APPEAL

On April 9, 2021, Appellant Joshua Johnson convicted on one count of violating the SHIELD Act, 18 U.S.C. § 1808. He timely appealed from his conviction, arguing that the United States District Court for the District of Stone improperly denied his Motion to Dismiss the indictment on his § 1808 charge. On September 9, 2021, while his appeal from his SHIELD Act conviction was pending, Appellant Johnson was convicted on one count of importing a controlled substance in violation 21 U.S.C. § 952. He has timely appealed from that conviction, arguing that the United States District Court for the District of Stone improperly denied his Motion to Suppress.

Due to delays caused by the COVID-19 pandemic, this Court will hear Johnson's appeals together. This Court will consider all issues raised in the court below.

J. Taylor, Clerk
September 23, 2021

Appendix

The SHIELD Act (18 U.S.C. § 1808)

(a) Purpose. The non-consensual disclosure of private sexual images without the consent of those depicted is an issue of serious societal concern requiring immediate legislative response. Because of the serious harms associated with the release of such images, especially in the age of the Internet, it is of vital importance to prevent and deter the non-consensual disclosure of private sexual images to avoid these harms to our citizens.

(b) As used in this section:

> (1) "Disclose" includes transfer, publish, distribute, disseminate, exhibit, or reproduce.
> (2) "Disseminate" means distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium.
> (3) "Intimate parts" means the genitals, pubic area, or anus of an individual, or if the individual is female, a partially or fully exposed nipple.
> (4) "Visual image" includes, but is not limited to, a photograph, film, videotape, recording, or any reproduction thereof, whether in a tangible or digital medium.
> (5) "Personal information" includes, but is not limited to,
>
> > (A) a person's first and last name, first initial and last name, first name and last initial, or nickname;
> > (B) a person's home, school, or work address;
> > (C) a person's telephone number, e-mail address, or social media account information; or
> > (D) a person's geolocation data.
>
> (6) "Sexual act" includes but is not limited to masturbation; genital, anal, or oral sex; or sexual penetration with objects.

(c) Any person who--

> (1) discloses or disseminates a visual image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when--
>
> > (A) the person depicted in the visual image is identifiable;
> > (B) the person who disclosed or disseminated the visual image knows or reasonably should know that the person depicted in the image does not consent to the disclosure; and
> > (C) the visual image was obtained or created under circumstances in which the person who disclosed or disseminated the visual image knew or reasonably should have known the person depicted in the visual image had a reasonable expectation of privacy,
>
> (2) shall be punished as provided in subsection (f) of this section.
> (3) Under (c)(1)(A), a person may be identifiable from the visual image itself or personal information offered in connection with the image.

(d) Consent to the recording of the visual image does not, by itself, constitute consent for disclosure of the image. It is not a defense to a prosecution under this section that the person consented to the capture or possession of the image.

(e) The following activities are exempt from the provisions of this Section:

(1) Images involving voluntary exposure in public settings where a person does not have a reasonable expectation of privacy;

(2) Disclosures made to report of unlawful conduct to competent authorities or in the process of the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.

(f) Whoever violates subsection (c) of this section shall be fined under this title and imprisoned not less than 6 months years but not more than 5 years.