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House Judiciary Committee
House Leader Jennifer Williamson, Chair

Re: Testimony in Support of HB 2393 (Civil Action for Revenge Porn)

To the Honorable Chair Williamson and Members of the House Judiciary Committee:

My name is Jacqueline Swanson. I am an attorney licensed to practice in the state of Oregon. I have dedicated my entire career to fighting for the rights of sexual violence survivors; indeed, my work as a sexual assault victim advocate ultimately propelled me to attend law school in order to vindicate the rights of crime victims. Unsurprisingly, then, a large component of my practice at Graves & Swanson, LLC involves representing survivors of sexual and domestic violence in civil litigation, including but not limited to victims of what is commonly known as "revenge porn." I therefore write to you today to urge your support of HB 2393, which (among other things) creates a civil cause of action to allow victims injured by conduct violating ORS 163.472 to seek redress and remedy the harms done to them.

Revenge porn can be generally described as the nonconsensual dissemination of sexually explicit images (photo or video) of another. Oftentimes, the images were originally taken or given consensually between the individuals with the reasonable expectation – express or implied – that the images would remain only between those individuals. In 2015,[1] Oregon joined the vast majority of states by enacting legislation recognizing such conduct as criminal.[2]

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[1] *See* Oregon Senate Bill 188 (2015).

[2] To the best of this author's knowledge, at least forty (40) other jurisdictions (in addition to Oregon) have laws criminalizing conduct constituting revenge porn. *See, e.g.,* Alabama Code § 13A-6-20; Alaska Stat. 11.61.120; Arizona Rev. Stat. Ann. § 13-1425; Arkansas Code Ann. § 5-26-314; California Penal Code § 647(j)(4); Colorado Rev. Stat. § 18-7-107; Connecticut Gen. Stat. § 53a-189c; Delaware Code Ann. tit 11 § 1335; District of Columbia Code § 22-3052; Florida Stat. § 784.049; Georgia Code Ann. § 16-11-90; Hawaii Rev. Stat. § 711-1110.9; Idaho Code § 18-6609; Illinois Comp. Stat. 5/11-23.5; Iowa Code 2017 § 708.7; Kansas Stat. Ann. § 21-6101(a)(8); Kentucky Rev. Stat. § 531.120; Louisiana Stat. Ann. § 14:283.2; Maine Stat. tit 17-A § 511-A; Maryland Code Ann. Crim. Law § 3-809; Michigan Comp. Laws § 750.145; Minnesota Stat. § 617.261; Missouri Rev. Stat. §§ 573.110 & 573.112; Nevada Rev. Stat. § 200.780; New Hampshire Rev. Stat. Ann. § 644:9-a; New Jersey Stat. Ann. § 2C:14-9; New Mexico Stat. Ann. § 30-37A-1; North Carolina Gen. Stat. § 14-190.5A; North Dakota Cent. Code § 12.1-17-07.2; Oklahoma Stat. tit 21 § 1040.13b; Pennsylvania Cons. Stat. tit 18 § 3131; Rhode Island Gen. Laws § 11-64-3; South Dakota Cod. Laws § 22-21-4; Tennessee Pub. Act. Ch. 872; Texas Penal Code Ann. § 21.16; Utah Code Ann. § 76-5b-203; Vermont Stat. Ann. tit 13 § 2606; Virginia Code Ann. § 18.2-386.2; Washington Rev. Code § 9A.86.010; West Virginia Code § 61-8-28a; Wisconsin Stat. § 942.09.

Unlike a number of other states,[3] however, the prior bill did not create a civil cause of action to allow survivors to seek justice on their own terms. The lack of a civil cause of action is problematic because the current parameters of our common law tort claims – such as intentional infliction of emotional distress (IIED) and invasion of privacy – do not adequately meet the needs of victims who have experienced this type of harm.[4] HB 2393 would remedy this, and in so doing, provide a more holistic and restorative approach to ensuring victims have access to legal recourse in the aftermath of this particular type of indignity and harm.

Although I am satisfied with the text of the bill in its current state, I would suggest two possible revisions to strengthen the goal of the bill. First, I would recommend carving out in slightly more detail the discretionary authority of the Court to order both temporary and permanent equitable and/or injunctive relief.[5] Second, I would recommend adding in an additional provision which expressly authorizes victims to file a civil suit under a pseudonym, or ask leave of the court to permit such a

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[3] *See, for example*, California Civil Code § 1708.85; Colorado Rev. Stat. § 18-7-107; Florida Stat. § 784.049(5); Minnesota Stat. § 604.31; North Carolina Gen. Stat. § 14-190.5A(g); Pennsylvania Cons. Stat. tit 42 § 8316.1; Texas Civ. Prac. & Rem. § 98B.002; Vermont Stat. Ann. tit 13 § 2606(e); Washington Rev. Code § 4.24.795.

[4] For instance, to bring a claim for IIED, the plaintiff has the burden of showing, *inter alia*, that the conduct in question "consisted of 'some extraordinary transgression of the bounds of socially tolerable conduct' or the actions must exceed 'any reasonable bounds of social toleration.'" *Patton v. JC. Penney Co.*, 17 301 Or 117,122 (1986) (citing *Hall v. The May Dept. Stores*, 292 Or 131,135,137 (1981)). For conduct to be sufficiently "extreme and outrageous" to support a claim for IIED, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *House v. Hicks*, 218 Or App 348, 358-60 (2008) (quoting Restatement (Second) of 22 Torts, § 46, comment d). While Oregon courts have not set out a specific list of acts that are "extreme and outrageous," they have provided parameters, and the plaintiff's burden in substantiating these parameters is steep and exceptionally more difficult in a society in which "[t]he fight to recognize domestic violence, sexual assault, and sexual harassment as serious issues has been long and difficult, and the tendency to tolerate, trivialize, or dismiss these harms persists." Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345, 347 (2014). For although a court may recognize that the resulting harm from a revenge porn post is great, it may nonetheless decide that the act of posting an explicit photograph itself does not rise to the level of atrocious conduct required to state a claim for IIED, especially when pornographic images and videos are now commonplace on the Internet and in society writ large. In other words, a court (or a jury) could decide that the posting of such an image fails to rise to the level of stating a claim for IIED because "the means of inflicting injury is not an extraordinary transgression of the bounds of socially tolerable behavior." *Hetfeld v. Bostwick*, 136 Or App 305, 309, *rev. den.*, 322 Or 360 (1995). Until and unless society is prepared to recognize that an individual's right of sexual privacy is something that should be protected and the unauthorized disclosure of such information is completely intolerable, a victim's revenge porn suit may be an uphill battle if a victim must rely upon IIED as the theory under which s/he seeks relief.

[5] *See, e.g.* Vermont Stat. Ann. tit 13 § 2606(e)(2) ("In addition to any other relief available at law, the court may order equitable relief, including a temporary restraining order, a preliminary injunction, or a permanent injunction ordering the defendant to cease display or disclosure of the image. The court may grant injunctive relief maintaining the confidentiality of a plaintiff using a pseudonym."); Washington Rev. Code § 4.24.795(2) ("Any person who distributes an intimate image of another person as described in subsection (1) of this section … shall be liable to that other person for actual damages including, but not limited to, pain and suffering, emotional distress, economic damages, and lost earnings, reasonable attorneys' fees, and costs. The court may also, in its discretion, award injunctive relief as it deems necessary.").

filing.[6] I believe such amendments would provide the Court with the authority it needs to effectuate and administer justice in these cases, and also afford victims greater certainty by taking steps to protect their (already-infringed-upon) privacy and restore a sense of their personal autonomy.

With or without the revisions suggested above, I nonetheless wholeheartedly offer my support for this bill, and respectfully implore this Committee to vote yes on HB 2393.

Sincerely,

Jacqueline K. Swanson
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[6] *See, e.g.*, Vermont Stat. Ann. tit 13 § 2606(e)(2) ("The court may grant injunctive relief maintaining the confidentiality of a plaintiff using a pseudonym."); Washington Rev. Code § 4.24.795(6) ("In an action brought under this section, the court shall: (a) Make it known to the plaintiff as early as possible in the proceedings of the action that the plaintiff may use a confidential identity in relation to the action; (b) Allow a plaintiff to use a confidential identity in all petitions, filings, and other documents presented to the court; (c) Use the confidential identity in all of the court's proceedings and records relating to the action, including any appellate proceedings; and (d) Maintain the records relating to the action in a manner that protects the confidentiality of the plaintiff.").