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ACLU OF RI POSITION: OPPOSE

TESTIMONY IN OPPOSITION TO 21-H 5614, RELATING TO CRIMINAL OFFENSES - CHILDREN March 3, 2021

The ACLU of Rhode Island opposes H-5614 because we do not believe it can withstand constitutional scrutiny.

Child pornography is a scourge, but Rhode Island currently has strong laws on the books with severe criminal penalties related to this crime. “Child erotica,” however, to the extent that it does not meet the standards for child pornography, simply cannot be prohibited. Such a ban would not only carve out a completely new exception to the First Amendment, it would have the effect of chilling a wide range of protected speech, and subject individuals to criminal penalties for engaging in constitutionally protected conduct.

The bill bars the possession, distribution or display of “any visual portrayals of minors who are partially clothed, where the visual portrayals are used for the specific purpose of sexual gratification or sexual arousal from viewing the visual portrayals.” None of these terms is defined. Further, whether the possession of a picture or photo constitutes a criminal offense would depend solely on the purpose for which it is used or viewed. However, a person who distributes or displays an image simply cannot be held criminally responsible for how the person viewing it reacts. If two people possess the same photo, it is intolerable to think that one person could face prison and another one not be considered a criminal at all based solely on the government’s determination that one person used the photo for “sexual gratification” and the other did not. The effect of this bill is to turn the government into thought police.

As the U.S. Supreme Court noted in striking down a ban on “virtual child pornography”:

The government cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts. First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)

Child pornography has been banned because it has been deemed intrinsically related to the unlawful abuse of children. That is simply not the case with “child erotica.” By seeking to regulate how people respond to a lawful image, the bill unconstitutionally subjects people to punishment based on inappropriate thought processes and could lead to the suppression of a wide range of legitimate visual content. The ACLU urges rejection of this legislation.