AMERICAN CIVIL LIBERTIES UNION
Rhode Island

128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

July 6, 2021

VIA MAIL AND EMAIL

The Hon. Daniel McKee
Governor
82 Smith Street, Room 115
Providence, RI 02903

RE: **Request to Veto H-5614A/S-502A**

Dear Governor McKee:

I am writing to urge you to veto House Bill H-5614A and Senate Bill S-502A. This criminal statute, designed to ban so-called "child erotica," is extraordinarily vague and overbroad and cannot, in our view, 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. This bill's broadened ban on "child erotica," however, would not only carve out a completely new exception to the First Amendment, it would also 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." The key terms "partially clothed" and "sexual gratification or sexual arousal" are left undefined. Further, whether the possession of a picture or video constitutes a criminal offense would depend solely on the purpose for which it is used or viewed, not on how it was created. However, somebody 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 the second one not be considered a criminal at all based solely on the government's determination that one person possessed or 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)

By seeking to regulate how people respond to a lawful image, the bill unconstitutionally subjects people to punishment based on their thought processes, and could lead to the suppression of a wide range of legitimate visual content. For example, fashion magazines with teenage models or entertainment websites posting photos of teenagers in swimsuits face potential criminal liability if those photos are "used" for sexual arousal or if somebody claims that the photos were intended to be sexually provocative. Teenage sex comedies or sexually suggestive films such as *The Blue Lagoon* could be criminalized under this bill.

Indeed, the bill is so broad that an 18-year-old who has been given a "partially clothed" photo of his 17-year-old girlfriend could be guilty of a crime. A person's innocent photos of their young topless nieces playing at the beach could suddenly become criminal if someone else looks at them and sees "erotica." It could directly impact teenagers and young adults who are exploring their sexuality, and could end up being particularly targeted at LGBTQ+ youth. It is for this reason that the bill was opposed in the General Assembly by such local groups as Youth Pride, Inc. and the Center for Sexual Pleasure and Health. The list of ramifications could go on and on.

For all these reasons, the ACLU urges you to veto this legislation, however well-intended it may be.

Sincerely,

Steven Brown
Executive Director

cc: Kim Ahern