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MEMORANDUM

TO: Pennsylvania House of Representatives

FROM: Andy Hoover, Legislative Director

DATE: May 23, 2010

RE: OPPOSITION TO HOUSE BILL 2189

The House of Representatives may be considering House Bill 2189 sometime this week. This bill creates a new criminal offense for “sexting,” when young people send semi-nude, nude, or sexually provocative photographs of themselves or others via electronic communication. HB 2189 is an overreaction to a problem and is likely unconstitutional. The ACLU of Pennsylvania opposes HB 2189. On behalf of the 18,000 members of the ACLU of PA, I urge you to please vote “no.”

The support for HB 2189 is based on the false premise that all forms of sexting are currently a felony under Pennsylvania law. In reality, a great amount of sexting is protected expression under the First Amendment. Simple nudity, including of a minor, is constitutional (see *Commonwealth v. Davidson*, 938 A.2d 198, 214-15, citing U.S. Supreme Court decisions). Child pornography laws were intended to protect children from abuse. In sexting scenarios in which the creation and distribution of the photos is consensual and the producer of the photos is often also the subject in them, criminal statutes do not apply. (See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002); *Osborne v. Ohio*, 495 U.S. 103 (1990))

Sexting often involves nudity, not sex acts, and involves consenting partners, e.g. a teenage couple. Thus, many forms of sexting are, in fact, protected expression. Nevertheless, HB 2189 criminalizes the very behavior that passes constitutional muster.

If HB 2189 passes the House and eventually becomes law as written, the commonwealth can most certainly expect to face a constitutional challenge, costing the taxpayers of Pennsylvania thousands of dollars in legal fees and maybe millions in damages, if the commonwealth loses that challenge.

The ACLU of Pennsylvania is well-versed on this issue. In 2009, we filed litigation in federal court against the district attorney of Wyoming County. Our clients won that case at the district court level, and recently the Court of Appeals for the Third Circuit ruled in our favor, as well. Last week we announced the filing of new

litigation in Wyoming County. Our client in the new case is suing the local school district, where school officials illegally searched her cell phone, violating her Fourth Amendment right to be free from unreasonable searches and seizures. The illegal search produced photos of our client in various stages of undress and led to punitive consequences both in school and with the county district attorney.

After the Luzerne County juvenile court scandal, it's surprising that any policymaker can support legislation that will actually *expand* the net for charging young people as criminals. As you know, two county judges have been indicted for taking bribes from a private detention facility company in exchange for sending children to the facilities. This criminal activity continued for years because policymakers have accepted an environment in which our children have been over-criminalized.

HB 2189 is a product of that same attitude. This bill criminalizes children for behavior that is certainly irresponsible and that is also borne out of their normative biological development. Teenagers have been exploring their sexuality throughout history. Excessive criminalization of children for their clumsy behavior is dangerous policy, and with surveys showing that 20 percent of teens have engaged in sexting, HB 2189 has the potential to sweep thousands of kids into the juvenile justice system.

The ACLU of Pennsylvania certainly agrees that criminal law should be applied when one person is harassing or abusing another via sexting. (There are existing laws to address this type of behavior.) Consensual sexting that involves photos showing simple nudity, though, is constitutionally protected behavior. Sexting can have long term consequences, and dealing with this problem is best left to parents and educators, not prosecutors. The last thing the children of Pennsylvania need is more contact with the criminal justice system. On behalf of the 18,000 members of the ACLU of Pennsylvania, I urge you to please vote "no" on HB 2189.