



Eastern Region Office
PO Box 40008
Philadelphia, PA 19106
215-592-1513 T
215-592-1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
313 Atwood St.
Pittsburgh, PA 15213
412-681-7736 T
412-681-8707 F

MEMORANDUM

TO: House Judiciary Committee
The Honorable Seth M. Grove

FROM: Andy Hoover, Legislative Director

DATE: January 25, 2010

RE: OPPOSITION TO HOUSE BILL 2189

On Tuesday, the House Judiciary Committee is scheduled to consider House Bill 2189. This legislation deals with the issue of young people exploring their sexuality by sending pictures of themselves in various states of undress via cell phones and other electronic technologies. It is popularly known as sexting. While we appreciate the intent of the primary sponsor to ensure that these kids are not charged with felony sex offenses, the legislation is flawed in several ways. The American Civil Liberties Union of Pennsylvania opposes House Bill 2189. On behalf of the approximately 16,000 members of the ACLU of PA, I urge you to vote “no” on HB 2189 and further suggest that the committee spend more time analyzing and refining the legislation.

The ACLU of PA believes that House Bill 2189, as currently written, is facially unconstitutional and would likely be challenged upon enactment. The most serious constitutional flaw is the bill’s overly broad scope, which criminalizes conduct and images that are constitutionally protected. HB 2189 states that a minor 13 years or older can be charged with a second-degree misdemeanor if he or she transmits a photo of him- or herself “in a state of nudity as defined in subsection 5903(e) (relating to obscene and other sexual materials and performances).” 5903(e) states, “‘NUDITY’ means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.”

“[S]imple nudity,” even of a minor, is protected expression under the First Amendment of the United States Constitution. *See Commonwealth v. Davidson*, 938 A.2d 198, 214-15 (Pa. 2007) (citing U.S. Supreme Court decisions). This issue is at the heart of a current ACLU of PA lawsuit, which was filed in March 2009 against the Wyoming County District Attorney’s office. *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009). In this case, the then-district attorney (“DA”) threatened to charge 19 minors, 16 of whom were shown in photos nude, semi-nude or scantily

clad, with felony child-pornography charges unless they agreed to participate in an education program the DA helped design.

Three of the minors (and their parents) sued the DA in federal court, claiming a violation of their First and Fourteenth Amendment rights. The case involved two pictures. In one picture, two of the girls appeared in their underwear. In the second photo, the third girl appeared topless with a towel wrapped around her waist after apparently just exiting the shower. ACLU of PA attorneys convinced a U.S. District Judge in the Middle District of Pennsylvania to issue a preliminary injunction barring the DA from bringing charges against the three girls over the two photos. The DA appealed to the U.S. Court of Appeals for the Third Circuit, where oral argument was held on January 15.¹

A second problem with the legislation is that it applies to what is now being called self-produced child pornography, i.e., minors take racy photos of themselves and then distribute them. Child pornography laws are designed to protect minors against exploitation and abuse. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002); (*Osborne v. Ohio*, 495 U.S. 103 (1990), “anchored its holding in the concern for the participants, those whom it called the ‘victims of child pornography’”). That is also true of Pennsylvania’s law, 18 P.S. § 6312. *See Davidson*, 938 A.2d at 219 (“each image of child pornography victimized each child and subjected the child to ‘precisely the type of harm the statute seeks to prevent’”) (citation omitted). In sexting scenarios, wherein the person transmitting the image is also the person in the photos, the abuse and exploitation is absent, and, thus, the child-pornography standard does not and constitutionally cannot apply. Prosecutions must be limited to those photos that are legally obscene. *See, Free Speech Coalition*, 535 U.S. at 249-51. Since HB 2189 would criminalize much more than just obscene images in self-produced child pornography, the bill is overbroad and, thus, unconstitutional.

Finally, as we understand it, the intent of the General Assembly in introducing HB 2189 is to stop *felony* sex prosecutions of children who engage in sexting, but the bill fails to stop those prosecutions. Current Pennsylvania law allows a person to be charged under both a specific statute and a broader statute. 42 Pa.C.S.A. Section 9303. HB 2189 simply adds a possible new charge without blocking the possibility of felony charges.

¹ Duffy, S.P. (2010) 3rd Circuit panel mulls if teen ‘sexting’ is child pornography. *The Legal Intelligencer*, January 19, 2010. Retrieved on January 22, 2010, from http://www.law.com/jsp/article.jsp?id=1202439023330&rd_Circuit_Panel_Mulls_if_Teen_Sexting_Is_Child_Pornography_.

The ACLU of PA appreciates the attempts to address sexting and to stop felony prosecutions of children engaged in it. HB 2189 needs further revision to bring it into line with the constitution and to ensure that the commonwealth is not slapping criminal records on thousands of children who simply did something foolish, not criminal. When children share pictures of themselves nude using available technology, they present adults with a teachable moment, but not a criminal moment. The people of Pennsylvania would be best served if the House Judiciary Committee held HB 2189 for further discussion and revision. If a vote is held on the bill in its current form, please vote “no.”