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MEMORANDUM

TO: House Judiciary Committee

FROM: Andy Hoover, Legislative Director, ACLU of Pennsylvania

DATE: May 2, 2011

RE: OPPOSITION TO HOUSE BILL 815

On Tuesday, the House Judiciary Committee is scheduled to consider House Bill 815. This bill criminalizes so-called sexting, when minors send sexually provocative photos of themselves and others via electronic communications. HB 815 criminalizes children for behavior that, while irresponsible, stems from their biological development. The bill is also written so broadly that it criminalizes activity protected as free expression under the First Amendment. The ACLU of Pennsylvania opposes HB 815, and on behalf of the 17,000 members of the ACLU of Pennsylvania, I urge you to please vote “no” on this bill.

“Sexting” is one word that describes a broad range of activity. It can include photos of partial nudity, nudity, or sexual activity. Sexting occurs between consenting partners and in the form of cyberbullying, when photos are disseminated widely without the consent of the subject of the photos. A 2009 poll conducted by MTV and the Associated Press found that approximately 25 percent of teens have engaged in some form of sexting.

Support for HB 815 is built on the faulty premise that all sexting falls under the state child pornography statute. When the legislature passed the various provisions of the child pornography law, it never envisioned scenarios in which the perpetrator of this form of child abuse would also be the victim of the abuse. And yet by charging a child for the production and distribution of photos of one’s self, that’s exactly what some district attorneys in Pennsylvania are doing, and they are destroying lives in the process. This debate is ongoing only because some DAs are misapplying the law.

HB 815’s definition of “sexually explicit conduct” is overbroad. The definition follows the definition of child pornography in federal law by including “a lewd or lascivious display of the genitals” but then goes further by including displays of the pubic area, breasts, or buttocks. Some forms of sexting, as defined in HB 815, are protected expression under the First Amendment to the U.S. Constitution. If the images involve nudity and are produced and shared with the subject’s consent, it is protected. (See *Commonwealth v. Davidson*, 938 A.2d 198, 214-15, citing U.S. Supreme Court decisions; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002); *Osborne v.*

Ohio, 495 U.S. 103 (1990)) This encompasses the teenage couple scenario in which a couple consensually shares nude and semi-nude photos with each other. HB 815 turns them into criminals. While adults recognize the potential risk of engaging in such behavior, criminalizing it is an overreaction to activity that can be better addressed through education.

Supporters of HB 815 often justify passage of the bill by citing real stories in which one teen harmed and abused another teen through sexting. These examples include a 13-year-old girl in Ohio who committed suicide after a photo of herself that she sent to her boyfriend was given to other kids at her school. Another example occurred in Wisconsin, where a group of boys were deceived into sending nude photos of themselves to another boy, who posed online as a girl and who then blackmailed the boys into having sex with him.

Ironically, this bill would, in fact, criminalize the victims of such abuse and would provide a disincentive for these victims to report the abuse. In April, the Penn State Dickinson School of Law sponsored a panel discussion that featured Rep. Seth Grove, Dauphin County District Attorney Edward Marsico, Riya Shah of the Juvenile Law Center, and myself. At that event, a PSU law professor stated that, if HB 815 were law and his teenage daughter faced such abuse, he would discourage her from reporting the abuse to the authorities because she, too, could be charged. The law should protect victims, not criminalize them.

Parents continue to be challenged by teenage sexual development in new ways, as generations of parents were before them. Sexting is a public health issue that is best addressed through education, not criminalization. HB 815 prohibits expression protected by the First Amendment and damages teens' futures by crippling their opportunities for college admission, job prospects, and military enlistment. In coming to terms with their sexuality, teenagers will make mistakes. The state government has a duty to protect these kids, not over-criminalize them. Please vote "no" on HB 815.