March 26, 2019

Testimony of ACLU of Wisconsin
In Opposition to Assembly Bill 71
Committee on Criminal Justice and Public Safety

Chair Spiros and Members of the Committee:

Thank you for the opportunity to provide testimony on behalf of the American Civil Liberties Union of Wisconsin, a non-partisan, non-profit organization working to protect civil liberties—including the right to free speech. Because AB 71's effort to criminalize possession of representations of minors portrayed in a "sexually suggestive manner" poses serious First Amendment concerns, we respectfully urge the Committee to oppose this bill.

I. AB71 is unnecessary.

This bill is unnecessary because possession and distribution of child pornography is already illegal. Under 948.12, it is illegal for a person to knowingly: (1m) possesses, or accesses in any way with the intent to view any visual representation of a child engaging in sexually explicit conduct. "Sexually explicit conduct" is specifically defined by statute in 948.01 (7).

II. AB71 is vague and may criminalize children who take photos of themselves.

This bill, as drafted, is hopelessly vague. For example, how is an individual supposed to determine, on pain of imprisonment for up to twenty-five years, whether a representation of a child is "sexually suggestive"?

We have seen children in other states prosecuted under the current child pornography definition when minors take pictures of themselves with their cell phones and share them with each other. This bill would compound those problems further by increasing the universe of images people are prohibited from "possessing or accessing," and could affect the lives of countless minors who are unknowingly sending one another images that fall within this overly broad definition. The way in which young people use social media like Facebook, Snapchat, or Instagram make them easy venues to inadvertently snare them in the criminal justice system.

Moreover, how is a publisher to determine whether the image "emits sensuality with sufficient impact to concentrate prurient interest on the child"? This is unclear, though this bill seems to criminalize the distribution of otherwise non-offending "sexually suggestive" content based on the intent or thoughts of the publisher/possessor who "uses" the image, even if the image was created by a photographer without any intent that it be used "to concentrate prurient interest on the child."

Similarly, this bill criminalizes images based solely on the thoughts of the possessor. This is problematic.[1] For example, two people take an identical photograph of high school gymnasts "partially clothed" as permitted during a gymnastics meet. One person is a sports photographer who takes the picture for the purpose of publishing it in a blog about gymnastics that is free to the public. The other person takes the same picture depicting the gymnasts "to concentrate prurient interest on the child." Under the bill, to possess and distribute the first photograph, including to the public, is perfectly legal, but to possess and distribute the second is criminal. The photographs are indistinguishable, so this criminality is based solely on one's supposed and subjective mindset.

III. AB71 criminalizes speech that is not obscene and is therefore protected under the First Amendment.

Child pornography and obscenity are unprotected and rightfully so; however, this bill would criminalize speech that is neither pornographic nor obscene.

Under the so-called *Miller* test developed in the 1973 case *Miller v. California*, three elements must be satisfied for a work to be deemed obscene and therefore unprotected under the First Amendment: (i) the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to prurient interest; (ii) the work must depict or describe, in a patently offensive way, sexual conduct or excretory functions as specifically defined by applicable state law; and (iii) the work, taken as a whole, must lack serious literary, artistic, political, or scientific value.

This bill would, on its face, criminalize publications that do not fit this definition, as it would include publications that (i) are not patently offensive, (ii) do not depict sexual conduct, and (iii) do not lack serious literary, artistic, political, or scientific value. Indeed, there is no First Amendment exception for "sexually suggestive." Would Stanley Kubrick's film adaptation of Lolita be criminally punishable as "sexually suggestive"? Would an episode of Family Guy? Or the 1980 film *The Blue Lagoon* that depicts a 14-year-old Brooke Shields partially naked? It could under this bill's terms.

Given these ambiguities, it would be virtually impossible to draft a bill criminalizing "sexually suggestive content" in a way that was not either vague or in violation of the First Amendment. For these reasons, the ACLU of Wisconsin opposes AB71, and we respectfully urge members of this Committee to oppose this bill.

[1] *See Stanley v. Georgia*, 394 U.S. 557, 566 (1969) ("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."; holding that the State did not have a governmental interest in the mere possession of obscenity in his home because doing so would "attempt to control a person's private thoughts").