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MICAH W. KUBIC, PH.D.
EXECUTIVE DIRECTOR

Judiciary Committee
Kansas House of Representatives
Room 149-S, Kansas State Capitol
300 SW 10th Street
Topeka, KS 66612

RE: HB 2062

Dear Judiciary Committee Members:

The American Civil Liberties Union (ACLU) of Kansas was unable to participate in last week's hearing on HB 2062, a bill relating to blackmail and breach of privacy. The ACLU of Kansas has grave concerns about the bill as drafted.

As a membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas, the ACLU of Kansas is deeply sympathetic with the right of privacy that HB 2062 attempts to protect. However, as drafted, the bill raises serious constitutional issues and may be susceptible to legal challenge.

Our concerns include:

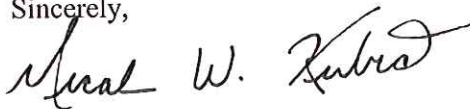
- The bill does not require that the person pictured had an *expectation of privacy*. As it does not require such an expectation of privacy, the bill could criminalize virtually any sharing of nude images. For example, individuals who share, for any reason, nude images that they receive unsolicited from harassing strangers could find their behavior criminalized. Individuals who share professionally produced media content that includes nudity could also find their behavior criminalized. Without an expectation of privacy requirement, the bill will have significant unintended consequences.
- The bill does not include an exception for newsworthy content. Without this exception, the bill would prevent the sharing of images that are directly relevant to both current and historical events but that include nudity. Similar statutes in other states have been challenged in court because they lack these provisions.
- The bill includes no requirement of a relationship between the person pictured and the person sharing the image, nor an actual invasion of privacy. Instead, HB 2062 only requires that the person sharing the image lacks the other's consent. As a result, individuals who lawfully obtain images and then share them, but did not secure the permission of the individual pictured, would be guilty of a felony. If HB 2062 were adopted, every Kansan

who accessed and shared nude images of celebrities that became publicly available during the fall of 2014 would have been guilty of a felony. A better standard would be to require an agreement, or at the very least an “understanding,” that the image will not be shown. Absent such a standard, the bill becomes a formal prepublication permission requirement for all nude images – something that raises grave constitutional questions.

- As drafted, intent alone determines whether an action is criminal under the bill. Where the intent is “to invade privacy,” a crime has been committed. This is overly broad, and could conceivably apply to individuals disseminating professionally produced media content that includes nudity, if there is intent to “invade privacy.” The bill should require a relationship between the parties as well as an agreement or understanding that the image will not be shared.
- The language regarding intent – “to invade privacy” – is not a recognized reason for reducing scrutiny of laws under the First Amendment. That is to say, the intent “to invade privacy” is not recognized as a reason for limiting the rights of individuals to engage in free expression. If the intent of HB 2062 is to prevent individuals from being harassed, threatened, intimidated, or severely emotionally harmed through the sharing of nude images, the bill should state those as reasons. These are more broadly recognized reasons for a reduced level of scrutiny under the First Amendment.
- HB 2062 is effectively a victimless criminal statute. As drafted, a county attorney could bring charges against an individual without any evidence that the person pictured in the offending image ever even knew about its sharing, let alone was victimized by it. In order to withstand scrutiny, the bill should include an actual harm element. That is, the bill should require that there be evidence that actual harm was inflicted upon the individual pictured in the image (whether the harm is financial, severe emotional distress, or something else).
- Existing statutes already address intentional infliction of emotional distress and many forms of invasion of privacy. These are powerful tools that can be, and are already, used to prevent and penalize the behavior that the bill’s sponsors have said it is intended to combat.

For all of these reasons, the ACLU of Kansas believes that HB 2062 raises serious constitutional issues. We urge the Judiciary Committee to reject the bill, or to consider changes that would address some of the most significant questions it raises.

Sincerely,



Micah W. Kubic, Ph.D.
Executive Director