

Written Testimony About HB 382
Submitted to the Idaho House Judiciary and Rules Committee on
January 23, 2024 on behalf of the
American Civil Liberties Union of Idaho

Respected Chairman Skaug and Members of the House Judiciary & Rules Committee:

This written testimony is submitted to the committee on behalf of the ACLU of Idaho about House Bill 382. The ACLU of Idaho does **not oppose House Bill 382**, though we do think its First Amendment protections could be improved with amendment.

(1) HB 382 Mirrors Existing Federal Statute, the PROTECT Act, 18 USC § 2256.

The type of imagery where a real child's identifiable features are super imposed into sexually explicit conduct is referred to by some courts as "morphed" Child Sexual Abuse Material (CSAM). Federal bills have wrestled with how to address both CSAM and morphed CSAM under the First Amendment. Congress passed the PROTECT Act, 18 USC § 2256, upon which HB 382 is modeled, which also prohibits distribution or possession of "morphed" CSAM. Courts have upheld § 2256. In *Ferber v. New York*, the Supreme Court upheld a state statute that prohibited distribution of "material depicting children engaged in sexual conduct." The Supreme Court concluded that speech was outside the protections of the First Amendment, particularly relying on the state interest in "safeguarding the physical and psychological well-being of a minor." Three courts of appeals found that that morphed CSAM is unprotected; one found that its regulation passes strict scrutiny. For example, the Fifth Circuit reasoned that morphed CSAM is unprotected because *Ferber v. New York* did not rest on just the physical abuse of children, but "reputational and emotional harm to children" as well. *United States v. Mecham*, 950 F.3d 257, 265 (5th Cir. 2020) (discussing the other three cases).

(2) Amendments That Would Improve First Amendment Impacts of HB 382:

- (a) Narrow the bill's definition of "sexually exploitative material" to match the federal definition of "child pornography" by limiting its reach to minors "engaging in" sexually explicit conduct and striking other verbiage ("participating in, observing, or being used for explicit sexual conduct").

- (b) Narrow the bill's definition of "sexually exploitative material" by requiring each alternative definition to require that the child be "identifiable."
- (c) Strike or amend the clause stating the bill "shall not be construed to require proof of the actual identity of the identifiable minor." This creates the risk of confusion that an "identifiable" minor need not be a real person; at minimum, language should be added specifying that "identifiable minor" must be an "actual person."
- (d) Maintain the *mens rea* of knowing and willful to avoid imposing liability on distributors of speech. Lower mental states such as recklessness may impose liability on distributors like internet service providers, cloud storage providers, and social media platforms for content of which they are not actually aware. This incentivizes platforms to increase monitoring and surveillance of users and consequently raises additional constitutional questions.

The ACLU of Idaho is committed to defending every person's freedom of speech. We will carefully evaluate any bill that regulates the freedom of speech. We think HB 382 is largely unobjectionable. However, we hope you might consider the modifications above which would more narrowly tailor HB 382's regulation of speech to achieve the outcome of protecting actual, identifiable, children.

Thank you for your time today and for the opportunity to testify.

Sincerely,

Julianne Donnelly Tzul
Advocacy Director
ACLU of Idaho