

Written Testimony About HB 391
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:

The ACLU of Idaho submits this written testimony to the committee to **oppose House Bill 391**, because it is not narrowly crafted to protect First Amendment freedoms in furtherance of its objective, and because other existing statute might be more narrowly adapted to accomplish the objective of HB 391.

(1) HB 391 Lacks An Affirmative Defense of Consent.

18-6606(a) requires a person to have disclosed explicit synthetic media. 18-6606(b) requires a person to have threatened to disclose the same content with the intent to obtain money or consideration (page 1, lines 12 – 19). However, neither intent clause provides an affirmative defense should the identifiable individual adult whose likeness is incorporated in the synthetic media consent to either possession or distribution.

(2) HB 391's Broad Intent Clause Implicates a Wide Array of Speech.

The bill's broad "intent" prong reaches an overly broad array of speech. While 18-6606(4)(e) requires that an "ordinary person viewing the synthetic media could conclude that it is an actual image" (page 2, lines 7-8), much of the standard relies upon context which can vary widely. An example of currently permissible speech that would be implicated by HB 391 is a parody of a public figure in a television program, where a host delivers a speech that is unrelated to arousing a prurient interest in the audience, and highlights a point with an explicit synthetic image of the public figure. A watcher seeing a complete segment would know that an image was both fictional and part of a larger message, which could range from a policy critique to derision to humor, or any or all of the above. But the image outside of the context of the speech surrounding it could easily be mistaken for an actual image, distributed for the purpose of obtaining money or other valuable consideration, such as a large enough viewership to support advertising revenue, in violation of 18-6606(4)(e).

(3) HB 391 Fails to Protect Against Distribution of Non-Consensual, Non-Synthetic Imagery.

By focusing on "explicit synthetic content" rather than consent, HB 391 risks triggering strict scrutiny. HB 391 leaves other harms such as non-consensual sexual imagery ("revenge porn") unaddressed. HB 391 sweeps in content discrimination that is likely could not survive judicial review in its goal of protecting privacy. A better approach to protecting privacy may be to focus on non-consensual sexual imagery generally.

(4) The Purpose of HB 391 Could be Better Achieved By Amending Existing Idaho Statute: 18-6605 or 18-7902.

There are two existing statutes that could be modified to achieve the same objective as HB 391, with less infringement on the freedom of speech. Existing Idaho code **18-6605**, Video Voyeurism, includes important language limiting the intent associated with guilt to either "lascivious entertainment" or "prurient interest" (18-6605(2)) or to "annoy, terrify, threaten, intimidate, harass, offend, humiliate or degrade." (18-6605(3)(a)). 18-6605 provides a defense of consent to the offense of distribution, in 18-6605(3)(c), and requires that person "knew or reasonably should have known that the person depicted in the image did not consent to the dissemination, publication or sale of the image." (18-6605(3)(b)).

Alternately, Idaho code **18-7902**, which bars Malicious Harassment for race, color, religion, ancestry or national origin, could be amended to add sexual harassment, including sexual harassment via the means of explicit real or synthetic images of an identifiable adult.

In either pathway of amending existing statute to produce a more narrowly tailored protection of individuals' privacy, important elements to include would be to add a defense of consent, and to more precisely limit the intent required to prove guilt.

The ACLU of Idaho is committed to defending every Idahoan's freedom of speech. We will carefully evaluate any bill that regulates the freedom of speech. We think HB 391 regulates too much potential speech. Lawmakers should achieve the intended aim with a more narrowly crafted bill, based either on 18-6605 or 18-7902.

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

Sincerely,

Julianne Donnelly Tzul

Advocacy Director
ACLU of Idaho