State of Connecticut

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GENERAL LAW COMMITTEE – FEBRUARY 26, 2025

Raised Committee Bill No. 2
AN ACT CONCERNING ARTIFICIAL INTELLIGENCE

The Office of Chief Public Defender (OCPD) opposes *Section 27 of Committee Bill 2, An Act Concerning Artificial Intelligence,* which expands criminal liability for unlawful dissemination of an intimate "synthetic image" under C.G.S. Section 53a-189c. This office takes no position on the remainder of the bill.

The proposed bill defines "Synthetic Image" to mean "any photograph, film, videotape or other image that (A) is not wholly recorded by a camera, (B) is either partially or wholly generated by a computer system, and (C) depicts, and is virtually indistinguishable from an actual representation of, an identifiable person." The raised bill would make it a felony to send a prohibited synthetic image to more than one person.

If the intent of this raised bill is to criminalize the dissemination of an intimate, "synthetic" computer-generated image that cannot be distinguished from the real thing – in other words, one that can fool people into thinking the image is real when it's not – the raised bill goes far beyond that in problematic ways. The ultimate result of this Section is the potential for criminalizing conduct that is not a crime, as well as creating a variety of First Amendment challenges, vagueness challenges, and uneven application of the law in terms of who gets prosecuted and for what – especially children/juveniles, college students, and young adults.

It is clear that these laws are creating a fundamentally new category of criminal behavior. The real concern here is that our office believes that this legislation will have unintended consequences. Given our current technology used by children/juveniles, high school and college students such as Apple AirDrop, Instagram, and similar technologies and/or apps, which have the ability to transfer an unlimited number of images to an unlimited number of people with the press of a button on your phone, this statute can turn an entire high school into felons within 1 school day. All with a single

image or two as these images are passed around and around - disseminated across the school at the high rate of speed of the Internet. What happens if some of these children decide to show their parents, or even their lawyers, these images on their phone to discuss what is going on? Have the children committed another crime? Have the parents or the lawyer committed a crime simply by viewing the image? We can all agree that finding more ways to put people in prison for speech and expression of ideas is not a good thing. We must seriously question whether the path forward on this issue of "deepfakes" is to use criminal law to remedy this issue.

The U.S. Supreme Court has expressed concern when stating that "a broad censorial power" over lies would cast "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."[1] Of course, a deepfake at its core is a visual lie. The question then is if, as the Supreme Court has held, the First Amendment protects verbal lies, should it also protect visual lies that one finds in deep fakes. There is no question that deepfakes implicate freedom of expression, even though they involve intentionally false statements or false synthetic imagery.

It is well established by our Courts that nudity alone, even when it comes to images of children, is not sufficient to constitute child pornography or to make material obscene.[2] It would follow logically that the dissemination of these images – at least generally – is not only protected under the First Amendment, but also not conduct that can be criminalized. The addition of the dissemination of "synthetic images" section is subject to some serious constitutional questions. Regarding the bill as currently drafted here, this office raises further the following concerns and a few examples of where this raised bill goes further awry:

1. Would this lead to the conviction of a photojournalist who transmits an image of war victims over a computer – with any form of editing? Does the photojournalist have to obtain consent from everyone on the image or images? Or is the language in this statute over-broad, in violation of the First Amendment.

2. Imagine a teen surreptitiously filming a nude minor sunbathing. Our Supreme Court has noted that the surreptitious filming of a nude minor did not, without more, constitute producing child pornography.[3] Would the dissemination of this film (depicting this individual

[1] *United States v. Alvarez,* 567 U.S. 709 at 723 (2012). Individuals are presumptively protected by the First Amendment when they deceive other people by making false statements. The Supreme Court made this clear in the 2012 case of *United States v. Alvarez*. The criminal defendant at the center of the case, Xavier Alvarez, had falsely insisted that he had won a Congressional Medal of Honor for his bravery in battle. In reality, he had never served in the military. He was prosecuted for his false claim under Congress's Stolen Valor Act, which made it a federal crime for a person to "falsely represen[t] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." But the Court found this law unconstitutional. Lies such as that of Xavier Alvarez, are shielded by the First Amendment's free speech protection unless the government can show that that they are not merely false, but also harmful in ways that have traditionally provided the basis for liability.

[2] *See State* v. *Sawyer*, 335 Conn. at 41 n.7 (2020).

[3] *State v. Michael R*., 346 Conn. 432, n. 29 *cert. denied*, 144 S. Ct. 211, 217 L. Ed. 2d 89 (2023) *see also, United States* v. *Steen*, 634 F.3d 822, 824, 827 (5th Cir. 2011) (surreptitiously filming nude minor sunbathing did not, without more, constitute producing child

and/or the creation of someone virtually indistinguishable from this person) over the Internet now turn something legal into new criminal conduct? Would it matter if this was a public beach and it involved an adult woman or man who was nude – is consent implied by virtue of his/her conduct?

3. Imagine the same but instead nude photographs that are not wholly recorded by a camera. Our Supreme Court has noted that photographs were not "child pornography" because they did not show that plaintiffs engaged in sexual activity or in lewd exhibition of genitals.[4] Should dissemination change this into criminal conduct?

4. Imagine finding a synthetic image through social media which frankly isn't difficult in 2025. The language in this statute is vague in regard to situations where a person finds a synthetic image through social media and whether an obligation exists for that person to seek consent before sharing the image.

Our Supreme Court has further noted that it is also apparent that the average person understands the difference between sexually suggestive, posed photographs of nude children and those contained in legitimate educational or artistic materials citing further that no grand jury could conclude that photographs of naked children excerpted from National Geographic magazine, sociology textbook, and naturist catalogue constituted lewd exhibition.[5] Would the dissemination of this material take protected material and turn it into criminal conduct?

This proposal does not address in any meaningful way all legitimate education or artistic materials nor is it consistent with current case law on intimate images. If nudity alone – even when it comes to images of children, is not sufficient to constitute child pornography or to make material obscene and therefore criminal, it should logically follow that the First Amendment offers similar protection to the dissemination of these photos – even if deepfake synthetic images – and should likewise be protected under our First Amendment and not criminalized.

As always, this office is willing and available to discuss this section further and assist with the drafting of any substitute language. But as drafted, this office requests that Section 27 be deleted in its entirety for the reasons put forth in this testimony. Thank you.

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pornography);

[4] *State v. Michael R.*, 346 Conn. at 467 n. 29 citing *Faloona ex rel. Fredrickson* v. *Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1343 n.4 (N.D. Tex. 1985) (nude photographs of plaintiffs were not "child pornography" under *Ferber* because they did not show that plaintiffs engaged in sexual activity or in lewd exhibition of genitals (internal quotation marks omitted)), aff'd, 799 F.2d 1000 (5th Cir. 1986), cert. denied, 479 U.S. 1088, 107 S. Ct. 1295, 94 L. Ed. 2d 151 (1987)

[5] See Id., *see further* e.g., *Commonwealth* v. *Rex*, supra, at 37, 48, 11 N.E.3d 1060 (no grand jury could conclude that photographs of naked children excerpted from National Geographic magazine, sociology textbook, and naturist catalogue constituted lewd exhibition).