



**House Judiciary Committee
February 4, 2025**

**House Bill 2183
Testimony of the BIDS Legislative Committee
Presented by Emily Brandt
Opponent**

Chairperson Humphries and Members of the Committee:

We recognize Kansas' strong interest in passing laws that protect children from abuse. However, amending the sexual exploitation of a child statute to criminalize possessing a visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct *regardless of whether an actual child under 18 years of age was involved in the creation of the original image* may run afoul to the First Amendment.¹ So may expanding the definition of "visual depiction" to include "*digital or computer-generated image or picture that has been created, in whole or in part, altered or modified by artificial intelligence or any digital means to appear to depict or purport to depict a child engaging in sexually explicit conduct.*"² For these reasons, the BIDS Legislative Committee respectfully opposes HB 2183.

The question of whether purported child pornography can be criminalized has been the subject of numerous United States Supreme Court cases that are instructive here. First, we know that child pornography depicting actual children is not protected speech under the First Amendment.³ This is so because such laws do not target speech, but rather production. And states have an interest in protecting actual children from abuse.⁴ But laws that purport to criminalize child pornography without regard for whether actual children were used in the production, do target speech.

"Congress shall make no law...abridging the freedom of speech."⁵ A law that imposes criminal penalties on protected speech is the most severe example of speech suppression. In *Ashcroft v. Free Speech Coalition*, the United States Supreme Court held that a federal statute that prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct" was unconstitutional under the First Amendment.⁶ Such a law was different from previous laws that criminalized child pornography created using actual children because, under the statute at issue, possession of images that did not involve, let alone harm, any real children in the production process was criminalized.⁷

¹ HB 2183, p. 1, lines 19–23

² HB 2183, p. 2, lines 41–43; p. 3 lines 1–4; p. 4, lines 19–25; p. 5, lines 17–27.

³ *New York v. Ferber*, 458 U.S. 747 (1982).

⁴ *New York v. Ferber*, 458 U.S. 747, 759–61 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110 (199).

⁵ U.S. Const. Amend. I

⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

⁷ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002).

In *Ashcroft*, the government argued that virtual child pornography created without the use of actual children should be criminalized because it could still “whet the appetites of pedophiles.” But this argument fell short because “the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning speech.”⁸ A government cannot premise legislation on the desirability of controlling a person’s private thoughts. Virtual child pornography created without any real children may offend us on a personal level, but personal sensibilities are not grounds to infringe on people’s constitutional right to speech.

The government also argued that it can be increasingly difficult to tell whether virtual child pornography is created without the use of actual children. But this argument also fell constitutionally short. A government cannot ban protected speech as a means to ban unprotected speech. Any suppression of lawful speech violates the First Amendment.⁹ Particularly when that suppression criminalizes the speech.

Allowing the government to imprison people because it is difficult to decipher whether the production of child pornography harmed actual children or not places an unconstitutional burden on all criminal defendants. It is always the state’s burden to prove, beyond a reasonable doubt, that a crime has occurred.¹⁰ Expanding the sexual exploitation of a child statute, unlawful transmission of a visual depiction of a child statute, and the breach of privacy statute to criminalize virtual child pornography that the state cannot prove harmed actual children not only suppresses speech, it violates a criminal defendant’s right to be presumed innocent. HB 2183 relieves the state of its burden to prove that actual children were harmed.

After *Ashcroft*, the Kansas appellate courts have considered a challenge to the sexual exploitation of a child statute. In *State v. Coburn*, a criminal defendant challenged the sexual exploitation of a child statute as unconstitutional because it criminalized the possession of “simulated nude exhibitions” of a person under the age of 18.¹¹ The Court of Appeals held that simulated or morphed images were not protected speech because they harm real children.¹² The defendant explicitly did not challenge the statute as unconstitutional because it criminalized the possession of child pornography produced without using actual children. HB 2183 does exactly that: it criminalizes the possession of and transmission of child pornography regardless of whether actual children are harmed. This type of criminalization is unconstitutional.

“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”¹³ While AI generated or virtual child pornography that is created without harming actual children may personally offend us, it is still speech. And governments may not criminalize speech. For these reasons, we respectfully ask you to vote no on HB 2183.

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⁸ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

⁹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

¹⁰ U.S. Const. Amends. V, XIV.

¹¹ *State v. Coburn*, 38 Kan. App. 2d 1036, 1062 (2008).

¹² *State v. Coburn*, 38 Kan. App. 2d 1036, 1063–65 (2008).

¹³ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).