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Arthur Rusch
Chair
South Dakota Senate Judiciary Committee
500 East Capitol Avenue
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Helene Duhamel
Vice Chair
South Dakota Senate Judiciary Committee
500 East Capitol Avenue
Pierre, SD 57501

February 17, 2021

S.B.126, An Act to establish the crime of possession, manufacturing, or distribution of obscene dolls

Dear Senators Rusch and Duhamel,

Prostasia Foundation is a child protection organization that advocates for an evidence-based approach to the prevention of child sexual abuse. We write to express our concern about shortcomings in S.B. 126, which is currently under consideration by the Judiciary Committee. The law is motivated, we hope, by a desire to protect real children from sexual abuse, which as a child protection organization we strongly support. But as an organization that insists the measures we take to protect children should be evidence-based and constitutionally sound, we are concerned that this bill is neither of those things.

Researchers believe these devices may prevent the abuse of real children

We are currently engaged in research with the State University of New York at Oswego to investigate whether victimless sexual outlets such as sex dolls could be used as a tool for the prevention of child sexual abuse, as many experts believe may be the case.¹ According to this hypothesis, for users of such devices who live with an abnormal sexual interest in children, the device could be an essential tool in the

1 They include Dr James Cantor (Director of the Toronto Sexuality Centre), Dr Michael Seto (editor in chief of Sexual Abuse: A Journal of Research and Treatment and author of Pedophilia and Sexual Offending Against Children), Dr Craig Harper (Senior Lecturer at the Department of Psychology, based at Nottingham Trent University), and Dr Richard Siegel (Director of Modern Sex Therapy Institutes). Dr Harper presented with us in November 2019 at the conference of the Association for the Treatment of Sexual Abusers on the topic of "Exploring and Understanding the Experiences of People Who Own Sex Dolls."

management of that condition, preventing them from acting out against a real child.

For this reason alone, S.B. 126 might achieve the opposite impact to what its sponsors intend. We strongly recommend that the bill be put on hold until our research is complete, which will shed light on whether such devices could be tools for prevention, rather than being a gateway to the abuse of real children as the bill assumes.

S.B. 126 would be unconstitutional

Even if S.B. 126 were supported by science, an outright ban on these devices is a plainly unconstitutional way of addressing the problem that they are assumed to present. Alexandra Levy Yelderman, senior staff attorney at the Human Trafficking Legal Center and Adjunct Professor of Law at the Notre Dame, has written a detailed first amendment analysis of the CREEPER Act (a federal bill to ban these devices, similar to S.B. 126), in which she concluded:

The Court's holding in *Ashcroft* that, absent a "direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct" plainly renders the CREEPER Act unconstitutional.²

Aside from its First Amendment problems, the bill would also fail to pass Fourteenth Amendment scrutiny. In *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, the U.S. Federal Circuit court for the 5th circuit affirmed that there is an individual right under the Fourteenth Amendment to engage in private intimate conduct in the home without government intrusion; per *Stanley v Georgia*, 394 U.S. 557 (1969), this also includes the private use of obscene materials. In *Earle*, a Texas law that banned commercial transactions with sex toys was held to infringe this right, despite the government's attempt to justify the ban as being for the protection of minors. The court ruled, "the State's generalized concern for children does not justify such a heavy-handed restriction on the exercise of a constitutionally protected individual right," and concluded, "Whatever one might think or believe about the use of these devices, government interference with their personal and private use violates the Constitution."

S.B. 126 is too broadly drafted

As the South Dakota Association of Criminal Defense Lawyers has also observed, the bill is also drafted in such broad and vague language that it would inevitably impact many innocent parties outside of its intended scope. Such "anatomically-correct" devices are often manufactured in smaller sizes because this makes them lighter and easier to manipulate not because they are intended to resemble children. Yet purchasers of these devices, regardless of size or appearance, have reason to fear that they might be prosecuted simply because the device in question is not tall enough, its eyes are too large, or its breasts too small. Additionally, many individuals have no intent on utilizing the device/s for sexual gratification.

It is beneath the dignity of the South Dakota legislature to consider legislation regulating the intimate dimensions of sex toys. A much better approach is to allow the private sector to self-regulate the sale of smaller-scale devices of this nature, in partnership with child protection experts. As an organization

2 Alex F. Levy, "The 'CREEPER Act' Would Be Yet Another Unconstitutional Law from Congress (Guest Blog Post)," Technology & Marketing Law Blog, June 28, 2018, <https://blog.ericgoldman.org/archives/2018/06/the-creeper-act-would-be-yet-another-unconstitutional-law-from-congress-guest-blog-post.htm>.

advised by such experts, Prostasia Foundation has collaborated with this industry on a set of voluntary guidelines to ensure that they do not sell sex toys that harm children and promote or minimize the gravity of child sexual abuse.

Conclusion

S.B. 126 raises—but does not convincingly answer—a very important question: do these devices lead directly to the harm of real children? We are the only child protection organization that is actively engaged in research to answer this question scientifically so that the next generation of laws dealing with this topic will be better informed. In that respect, S.B. 126 is, at best, premature and may have actively harmful consequences by inhibiting scientific research into the potential benefits of these devices.

We urge you to place a hold on any further consideration of S.B. 126 until hearings on the issue can be held. We offer to testify at any such hearings, and also offer to connect you with other relevant experts and industry stakeholders. If legislation is found to be warranted after hearings have been held, such legislation should be tailored more narrowly than S.B. 126 to avoid its manifest constitutional flaws.

Many thanks in appreciation of your attention to this sensitive and important issue.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jeremy Malcolm', written over a circular scribble.

Jeremy Malcolm
Executive Director, Prostasia Foundation