THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON
CHIEF ASST. ATTORNEY GENERAL

TEL: (802) 828-3171

http://www.ago.vermont.gov

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

Date: June 2, 2020

To: Senate Judiciary Committee

From: Attorney General's Office

Re: The constitutionality of "simulated" sexual conduct in the Child Sexual Abuse Materials Statute

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To assist the Committee as it considers H.936, the following is a summary of the Attorney General's Office's position on the proposal to add "simulated" conduct to the definition of sexual conduct.

This is proposed subdivision 13 V.S.A. § 2821(2)(G), which reads: "any simulation of any of the above described conduct." The "above described conduct" referenced in the provision is the statutory definition of "sexual conduct."

It is the Attorney General's Office's position that New York v. Ferber controls this question and shows this provision would be lawful and would not violate the First Amendment. 458 U.S. 747 (1982). In that case the United States Supreme Court upheld a New York law that outlawed the promotion of a sexual performance by a child, including performances that portrayed "simulated" conduct. 458 U.S. 747, 751.

In so doing, the Supreme Court overruled New York's own high court, which had held that the statute was overbroad because it could implicate constitutionally protected materials. 458 U.S. 747, 766. The Supreme Court held that the New York statute described the prohibited depictions with sufficient precision as to avoid constitutional issues. 458 U.S. 747, 765. The Committee should note, however, that the definition of the prohibited depictions in the New York statute is less precise than the definition of sexual conduct in Vermont law. The New York statute describes sexual conduct as, "actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the

genitals." Vermont's current definition, in 13 V.S.A. § 2821(2)—Section 1 of the bill—is more precise, and therefore even less susceptible to challenge.

The Supreme Court emphasized that the New York statute was not sufficiently overbroad to warrant overturning the law, even if the statute could conceivably implicate some material that would be constitutionally protected, such as art or educational materials. 458 U.S. 747, 773. The Court held that the statute was "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." Id. The Court noted that not every statute that could cover some constitutionally protected material must be struck down. Id. Instead, the Court held that, in this case, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." 458 U.S. 747, 773–74.

The same principle—that any overbreadth should be cured by case-specific challenges—applies to this proposal.

The Defender General's Office has argued that cases like Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), United States v. Stevens, 559 U.S. 460 (2010), and Ex parte Lo, 424 S.W.3d 10 (Tex. Crim. App. 2013) should control this case. Each of those cases held that a statute violated the First Amendment by prohibiting too many types of depictions. But each of those statutes was crucially different from the one in question here. Each of those prohibited depictions even when no actual child (or animal, in the case of the Stevens animal cruelty law) was present in the depiction. They outlawed animations and digital simulations. There is no such problem here. Both the New York statute and current Vermont statute are limited to instances where the depiction involves an actual child—not merely an animation or other visual reproduction. As such, the proposed section would be limited to depictions that include an actual child. For this reason, these cases are not analogous.