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To: The Joint Legislative Committee on Justice Oversight

From: The Attorney General's Office, Prepared by David Scherr, Assistant Attorney General and Co-Director of the Attorney General's Office Community Justice Division

Re: Proposal pursuant to Act 132, Section 2: Prohibiting the depiction of simulated sexual conduct in child sexual abuse materials.

Pursuant to Section 2 of Act 132, the Attorney General's Office (AGO) submits the following proposal to prohibit simulated sexual conduct in child sexual abuse materials (formerly referred to as child pornography) where the simulation involves an actual child.

This proposal is necessary to protect children from sexual abuse and deter their forced participation in the production of child sexual abuse materials. The proposal is narrowly tailored to ensure it does not unlawfully impinge upon constitutionally protected speech.

In accordance with Act 132, the AGO consulted with the Department of State's Attorneys and Sheriffs and the Defender General's Office. The Department of State's Attorneys and Sheriffs has no objection to the proposal. The Defender General's Office believes the proposal is unconstitutional under First Amendment law.

It is the opinion of the AGO that the proposal below is well within the bounds of the Constitution and the First Amendment. If the proposal is passed, Vermont would join 44 states, Washington D.C., and the federal government in prohibiting simulated sexual conduct when the simulation involves an actual child. None of

these laws have been found unconstitutional. To the contrary, the United States Supreme Court has held that simulated sexual conduct, where the simulated act involves an actual child, is not constitutionally protected speech and may be criminalized.

This memo will first present the AGO proposal, followed by a legal memorandum explaining the relevant First Amendment law.

I. Proposal of the Attorney General's Office:

a. Proposed Text:

Section 13 V.S.A. § 2821(2) provides a definition of "sexual conduct" in the context of child sexual abuse materials. Although the definition describes a number of qualifying acts, it fails to include simulations of those sexual acts. Without addressing this shortcoming, some images that depict highly sexualized conduct with actual children are not prosecutable in Vermont.

For example, there could be a visual depiction of a clothed child whose mouth is very close to an adult's penis but the camera angle does not allow the viewer to confirm that there is contact. Currently, that image is not prosecutable in Vermont because there would be no confirmed contact between the child's mouth and the adult's penis.

To solve this problem, the AGO proposes the addition of what would be subsection (G) to 13 V.S.A. § 2821(2):

> (G) Any simulation of the above conduct. For the purposes of this chapter, "simulated" means the explicit depiction of any of the conduct set forth in this subsection which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.

b. Additional Context:

This proposal is closely modeled after New York State law. N.Y. Penal Law §263.00(3) and (6), § 263.15 . New York's prohibition on simulated sexual conduct that involves a child has been held constitutional by the United States Supreme Court. Ferber v. NY, 458 U.S. 747, 765 (1983) (holding that New York's prohibition on promoting a sexual performance by a child, a performance that by definition could include simulated sexual conduct, is constitutional) ("We hold that [N.Y. Penal Law] § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection.").[1] Under this

[1] Under the New York statutes held constitutional by the United States Supreme Court in Ferber v. New York, 458 U.S. 747, 765 (1983), child pornography is defined as "any performance or

proposal and existing Vermont law only those depictions of simulated sexual conduct that involve an actual child will be liable for criminal charges. As explained further below, this limitation is necessary to preserve the proposal's constitutionality. The definition of sexual conduct found in section 2821 applies to several crimes, including Use of a Child in a Sexual Performance (13 V.S.A. § 2822), Consenting to a Sexual Performance (§ 2823), Promoting a Recording of Sexual Conduct (§ 2824), and Possession of Child Sexual Abuse Materials (§ 2827). As is currently provided in these statutes, each of these crimes may only be charged if an actual child is involved.

This proposal is more narrowly tailored than the one the AGO presented earlier this year because it includes a limitation requiring the image to include nudity, just as New York law does. The prior proposal included no such limitation. With this clause, a depiction cannot be subject to criminal liability unless there is nudity present in the image (defined as "any uncovered portion of the breasts, genitals or buttocks"). This will serve to protect works of legitimate artistic value—for example, movies that explore themes of teenage sexuality—from unwarranted prosecution.

II. Legal Memorandum

The First Amendment to the United States Constitution allows Vermont to criminalize imagery that depicts simulated sexual conduct by a child where there is an actual child involved in the simulation.

This is a mainstream position in First Amendment law. At least 44 states, the District of Columbia, and the federal government prohibit images of simulated sexual conduct where an actual child is involved.[2] No Supreme Court case has

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part thereof which includes *sexual conduct* by a child less than sixteen years of age." N.Y. Penal Law § 263.00(1). " 'Sexual conduct' means actual or *simulated* sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." N.Y. Penal Law § 263.00(3). " 'Simulated' means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks." N.Y. Penal Law § 263.00(6).

[2] 18 U.S.C.A. § 2256(2)(A); N.H. Rev. Stat. Ann. § 649-A:2; Mass. Gen. Laws Ann. ch. 272, §§ 29C and 31; Me. Rev. Stat. tit. 17-A, § 281(4); N.J. Stat. Ann. § 2C:24-4(b)(1); Conn. Gen. Stat. Ann. § 53a-193(14); Cal. Penal Code § 311.4(d); Ala. Code § 13A-12-190(7); Alaska Stat. Ann. § 11.41.455(a); Ariz. Rev. Stat. Ann. § 13-3551(10) and (11); Ark. Code Ann. §§ 5-27-302(4) and 5-27-601(15); Colo. Rev. Stat. Ann. § 18-6-403; Del. Code Ann. tit. 11, §§ 1100(7)(i) and 1111(1); D.C. Code Ann. § 22-3101(5)(A); Fla. Stat. Ann. § 827.071(1)(j); Ga. Code Ann. § 16-12-100(a)(4); Haw. Rev. Stat. Ann. § 707-750; Idaho Code Ann. § 18-1507(f), (g), (h), and (i); 720 Ill. Comp. Stat. Ann. 5/11-20.1(a)(1); Iowa Code Ann. § 728.12; Kan. Stat. Ann. § 21-5510(d)(1); Ky. Rev. Stat. Ann. § 531.300(4)(a); La. Stat. Ann. § 14:81.1(B)(10); Mich. Comp. Laws Ann. § 750.145c(q), (r) [aspects of MI statutory scheme likely unconstitutional under Ashcroft v. Free Speech Coal, 535 U.S. 234 (2002).]; Minn. Stat. Ann. § 617.246; Miss. Code. Ann. §§ 97-5-31(b), (f) and 97-5-33; MO ST 573.010(20), (21); Mont. Code Ann. § 45-5-625(5)(b) and (c); Neb. Rev. Stat. Ann. § 28-1463.02(5); Nev. Rev. Stat. Ann. §§ 200.730, 200.710, 200.720; N.M. Stat. Ann. § 30-6A-3; N.Y. Penal Law § 263.00(3), (6); N.D. Cent. Code Ann. §

rendered these laws unconstitutional. The Court has held that images of simulated sexual conduct that involve actual children may be prohibited.

a. The Legal Rule Summarized

The U.S. Supreme Court, in a series of cases, has developed the following rule: a depiction of sexual conduct that was produced using an actual child involved in the conduct, whether the conduct was simulated or actual, is not protected speech and may be criminalized. Depictions of child sexual abuse that were not produced using an actual child—virtual depictions—are protected speech under the First Amendment.

The Court has explained that protecting children from the grave harm caused by the production of child sexual abuse materials is the reason why these materials get minimal First Amendment protection and can be criminalized. But where no child is part of their production that policy concern is absent, and the Court has held that a higher level of First Amendment protection applies.

b. The Legal Rule Explained

The AGO proposal hews closely to New York law in part because the U.S. Supreme Court directly addressed the relevant New York statutes, including the question of material showing simulated sexual conduct, and held them to be constitutional in the seminal case addressing child sexual abuse materials. Ferber v. New York, 458 U.S. 747 (1983).

Subsequent Supreme Court cases refined and clarified the Ferber standard, as explained further below.

i. Ferber Deemed Child Sexual Abuse Materials Unprotected by the First Amendment

In Ferber, the Supreme Court ruled that child sexual abuse materials have minimal First Amendment protection. In so deciding, the Court upheld New York's prohibition on promoting a sexual performance by a child, which included, by definition, a prohibition on depictions of simulated sexual conduct that involved a child. N.Y. Penal Law §§ 263.15, 263.00(3), (6).

12.1-27.2-01(4); Okla. Stat. Ann. tit. 21, § 1024.1(3); Or. Rev. Stat. Ann. § 163.665(3); 18 Pa. Stat. and Cons. Stat. Ann. § 6312; S.C. Code Ann. § 16-15-375(5); S.D. Codified Laws § 22-24A-3; Tenn. Code Ann. § 39-17-1003(a)(2); Tex. Penal Code Ann. § 43.25(a)(2); Utah Code Ann. § 76-5b-103(10); Va. Code Ann. §§ 18.2-374.1(A) and 18.2-390(3); Wash. Rev. Code Ann. § 9.68A.011(4); W. Va. Code Ann. § 61-8C-1(c); Wis. Stat. Ann. § 948.01(7); Wyo. Stat. Ann. § 6-4-303(a)(iii) [aspects of WY statutory scheme likely unconstitutional under Ashcroft, 535 U.S. 234 (2002).].

An earlier Supreme Court case had defined a set of standards that expressive material had to meet before it would be considered "obscene," and therefore not protected by the First Amendment. Miller v. California, 413 U.S. 15 (1973). Ferber held that child pornography[3] was not protected by the First Amendment even if it did not meet the standard for obscenity defined in Miller. *E.g.*, Ferber, 458 U.S. at 764. The primary reason for this holding was a state's compelling interest in "safeguarding the physical and psychological well-being of a minor." Ferber, 458 U.S. at 756–57 (citations and quotations omitted).

The Court held that New York's prohibition on child pornography did not violate the First Amendment by being overbroad—in other words, the law did not also prohibit a substantial amount of speech that is protected by the First Amendment. Ferber, 458 U.S. at 773. The Court also found that the law prohibited the constitutionally unprotected speech (child pornography) with sufficient precision to pass First Amendment muster. Ferber, 458 U.S. at 765.

ii. Ferber Permitted Simulated Sexual Conduct to be Prohibited Where It Involved an Actual Child

The statute at issue in Ferber, outlawing the promotion of a sexual performance by a child, included by definition a prohibition on promoting both simulated and non-simulated sexual conduct where an actual child was involved. N.Y. Penal Law §§ 263.15, 263.00(3), (6). The Court considered this aspect of the definition and held that it was constitutionally permissible.[4]

In deciding the law was valid, the Court repeatedly noted that a prohibition on simulated sexual conduct was a part of the law it was considering. Ferber, 458 U.S. at 751, 763, 765. The Court explicitly held that prohibition to be constitutionally valid, writing:

> Section 263.15's prohibition incorporates a definition of sexual conduct that comports with the above-stated [First Amendment] principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: "*actual or simulated sexual intercourse*,

[3] Although the preferred terminology is now "child sexual abuse materials," which Vermont law recognized in Act 132, for clarity and readability this memo will sometimes use the older term "child pornography" when discussing court cases and statutes that use that older term.

[4] The Court in Ferber decided the constitutionality of the New York statute in terms of a facial challenge to the law, not an as-applied challenge. *E.g.*, Ferber, 458 U.S. at 767-68. This meant it did not limit its decision to the facts of the case; instead it considered the broad universe of possible applications of the law (Id.) and held that this broad universe of applications was generally constitutionally acceptable. Ferber, 458 U.S. at 765, 773. So even though the materials that the defendant Ferber was accused of distributing did not include simulated sexual conduct, the Court's decision was not limited to those facts.

> deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." § 263.00(3).

Ferber, 458 U.S. at 765 (emphasis added).

Moreover, the Court in Ferber explicitly considered the ways in which simulations involving people who are not children could be legally permissible--and by doing so acknowledged that the statute outlawed simulations involving real children. Ferber, 458 U.S. at 763 ("As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative.").

iii. Ashcroft v. Free Speech Coalition Held that Materials Produced Without a Child Involved Enjoy Greater First Amendment Protection

Ashcroft v. Free Speech Coalition held that a federal law violated the First Amendment when it prohibited depictions of child sexual abuse that were not produced using an actual child. These would include "virtual" depictions such as computer-generated images. 535 U.S. 234 (2002). The Court explained that, "[b]y prohibiting child pornography that does not depict an actual child, the statute goes beyond New York v. Ferber . . . , which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process." Ferber, 535 U.S. at 240.

The Court drew a distinction between portrayals of sexual conduct that involve actual children and portrayals that do not. According to the Court, when no child is involved in producing the material the state's compelling need to protect children is no longer relevant, the Ferber standard no longer applies, and the depiction enjoys a higher level of First Amendment protection. *See* Ashcroft, 535 U.S. at 250 ("In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the [statute in question] prohibits speech that records no crime and creates no victims by its production.").

When this issue was discussed before the Senate Judiciary Committee earlier this year, the Defender General's Office argued that Ashcroft held unconstitutional attempts to outlaw *any* simulated child sexual abuse materials, even when an actual child was used in the simulation.

That is not the law. To the contrary, at the time that Ashcroft was decided—and to this day—federal law outlawed simulations of sexual activity that involve actual children. 18 U.S.C.A. § 2256(2). Ashcroft did not find that provision of federal law unconstitutional and no other Supreme Court case has.

Ashcroft never overruled Ferber's decision that simulated activity involving actual children was not protected by the First Amendment. Moreover, the Court in Ashcroft recognized the distinction Ferber had made between simulations that do not involve actual children and those that do—and Ashcroft maintained the protection Ferber had granted for those that do not. Ashcroft, 535 U.S. at 236; *see* Ferber, 458 U.S. at 763 (quoted in Section II(b) above).

For these reasons, Ashcroft is irrelevant to the proposed law. Vermont law does not allow for any charge to be brought unless an actual child is involved in the making of the child sexual abuse materials.

iv. U.S. v. Williams Confirms that Simulated Conduct Involving Actual Children May Be Criminalized

In U.S. v. Williams, a case upholding the constitutionality of a federal law making it unlawful to "pander" (say that you are making available) child sexual abuse materials, the Court confirmed its prior holdings in Ferber and Ashcroft regarding simulations of sexual conduct involving children. 553 U.S. 285, 297 (2008).

The Williams Court held constitutional one of the law's key definitions that prohibited depictions of explicit sexual conduct involving actual children—even when that conduct was only simulated. The prohibition passed constitutional muster precisely because, "[c]ritically, unlike in [Ashcroft], [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children. . . ." Williams, 553 U.S. at 297.

Williams noted that the "constitutionally approved" statute at issue in Ferber had included a definition that prohibited simulated sexual activity. The Court further stated that the federal law criminalizing depictions of sexual conduct involving actual children, whether the conduct is simulated or not (18 U.S.C.A. § 2256(2)), was a near copy of Ferber's "constitutionally approved" definition. Williams, 553 U.S. at 296.

III. Conclusion

For the reasons stated above, the statute proposed by the AGO abides by First Amendment limits on government prohibitions, as set forth by the U.S. Supreme Court.