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CHILDREN'S ADVOCACY INSTITUTE



February 26, 2024

The Honorable Marc Berman  
California State Assembly  
State Capitol  
1021 O Street, Suite 8130  
Sacramento, CA 95814

Re: **AB 1831 (Berman) – Preventing AI-Enabled Child Exploitation Act – Support**

Dear Assemblymember Berman:

We are pleased to co-sponsor AB 1831, which extends long standing prohibitions against creation, possession, and distribution of child sexual assault material (CSAM) to artificial intelligence (AI). AB 1831 will help prevent the sexual exploitation of children by ensuring that obscene CSAM created using artificial intelligence is unlawful to produce, to possess, and to distribute to the same extent CSAM is currently illegal under current law. AB 1831 sends a clear message that our society will not tolerate the malicious use of AI to produce harmful sexual content involving minors.

CSAM is a visual depiction of the sexual abuse of children. Its creation, possession, and distribution have long been illegal. Currently, prosecution for possession of CSAM and related crimes requires proof that the material in question depicts a real child. However, advances in AI have made it possible, cheap, and easy to create highly realistic deepfake content, including CSAM. For example, websites available to the general public offer services that modify images of real people, including children, to make them appear nude. Other websites will generate artificial images of children in any position or situation the user demands. The images are often so realistic that the human eye cannot tell they are fake. Under existing law however, these images are not as clearly unlawful as they should be to facilitate prosecution.

There are two kinds of representations of CSAM addressed by AB 1831. The first are AI-generated obscene representations depicting fictitious children in matter that would be illegal under current law if it depicted a real child. Notably, to be “obscene” under AB 1831, the AI-generated representations of fictitious children engaged in sex would have to satisfy the longstanding definition of obscenity already found in Penal Code section 311. This definition requires proof that the matter “taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.” AB 1831 will clarify that there is no legal difference between obscene matter generated by AI and obscene matter generated by a person.

A second type of AI CSAM involves using the face or body of a real child to generate a new AI image. This matter invokes longstanding concerns about child sexual exploitation through the creation, possession, and distribution of images of that exploitation. When CSAM depicts an identifiable child, it has no protection under the law. (*New York v. Ferber* (1982) 458 U.S. 747; *Osborne v. Ohio* (1990) 495 U.S. 103, 110.) Thus, current law already prohibits CSAM when the matter depicts an identifiable child. AB 1831 will clarify that morphed CSAM is unlawful even if created using AI. Moreover, AB 1831 will ensure that the worst of these morphed images are unlawful even if the child cannot be identified.

*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 251–252 is not to the contrary. In that case, the Supreme Court struck down federal law that proscribed possession of non-obscene matter that also did not depict real children regardless of whether that matter had serious literary, artistic, political, or scientific value. *Ashcroft’s* narrow decision left open legal avenues to prosecute obscene images even if no real child was depicted.

AB 1831 is modeled in part after newer federal statutes, such as 18 U.S.C. 2552A and 18 U.S.C. 1466A, both of which have been upheld against First Amendment claims in numerous decisions. (See *United States v. Williams* (2008) 553 U.S. 285, 299 [18 U.S.C. 2552A(a)(3), prohibiting advertising, distributing, etc. of virtual child obscenity satisfied First Amendment test]; *United States v. Arthur* (5th Cir. 2022) 51 F.4th 560, 569, cert. denied (2023) 143 S.Ct. 846 [upholding 18 U.S.C. 1466A(a); obscene image need not depict real minors]; *United States v. Schales* (9th Cir. 2008) 546 F.3d 965, 972 [ban on production, distribution, possession with intent to distribute artificial child obscenity was facially constitutional] *United States v. Dean* (11th Cir. 2011) 635 F.3d 1200, 1208 [18 U.S.C. 1466A(a)(2) is not unconstitutionally overbroad].)

Congress enacted laws to proscribe virtual child obscenity because they recognized that the artificial nature of such images does not render them safe. CSAM has been demonstrated to have unique properties and consequences. Research has shown a correlation between the consumption of CSAM and an increased risk of individuals actually engaging in hands-on sexual offenses against minors. (United States Sentencing Commission Report to Congress: Federal Child

Pornography Offenses (Dec. 2012) Chapter 4 at 77, 94-104, 312.)<sup>1</sup> Viewing and possessing such material can contribute to desensitization or lead to infatuation with a subject, both of which may escalate criminal behavior. (Id., at pp. 97-98, 312.) CSAM can also be used to groom other children into participating in assaultive behavior or as a means of blackmail. (Id., at pp. 77, 102, 312.) CSAM created using artificial intelligence carries these same dangers, perhaps more so because it is easier to generate. Additionally, a recent study revealed that machine-learning models were trained on datasets containing thousands of depictions of known CSAM victims, revictimizing these real children by using their likeness to generate AI CSAM images into perpetuity. (Thiel, D. (2023). Identifying and Eliminating CSAM in Generative ML Training Data and Models. Stanford Internet Observatory.)

The threat posed by AI generated CSAM is real now and emerging quickly as a serious impediment to protecting our children. Law enforcement officers in California have already encountered instances of people in possession of AI-generated CSAM that could not be prosecuted due to the deficiency in current law.

In 2020 investigators in Ventura County investigating the possession and transfer of CSAM amongst three individuals determined that one of the suspects was using his computer to create CSAM images. He confessed to creating and distributing these made-to-order sexually explicit images of children for financial gain. However, despite the obscene nature of the images and the fact that they appeared to depict young children, he could not be prosecuted.

In 2023, a police agency in Los Angeles arrested a subject for possession of CSAM. During an interview with the suspect, he admitted to producing AI CSAM for approximately 2 years on his phone and computer “because you cannot tell someone what you are naturally attracted to since it is a crime.” The suspect enjoyed the idea of flooding “the market” with AI CSAM because “it will visually give you what you want.” The suspect also believed that very soon it would be too difficult to tell the difference between CSAM with real children and AI-generated CSAM.

In December 2023 an AI video was posted on YouTube, likely from a source in Ventura County. The video, which depicts a prepubescent female engaged in sexual intercourse with an adult male, was made publicly available. Because it appears to be artificially generated, police have no means to investigate, much less prosecute or stop the creation or distribution of this and similar videos.

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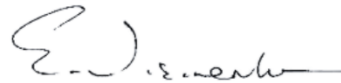
<sup>1</sup> Available at: [2012 Report to the Congress: Federal Child Pornography Offenses | United States Sentencing Commission \(ussc.gov\)](https://www.usssc.gov/2012-report-to-the-congress-federal-child-pornography-offenses) (visited 2/22/24). See also Rivera, A. A. (2019). Child Pornography and Child Sexual Abuse in the 21st Century: A Critical Overview of the Technological Shifts in Distribution, the Academic Literature, and the Current Re-Entry Policies for Convicts of these Crimes (Master’s thesis). Rochester Institute of Technology; Bourke, M. L., & Hernandez, A. E. (2009). Butner Study Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders. *Journal of Family Violence*, 24(3), 183-191.

AB 1831 recognizes that the same longstanding protections afforded to children when it is a human being creating representations of their sexual exploitation should apply with no less force when an AI generates such images at a human being's instruction. No more, but no less. Importantly, AB 1831 addresses these concerns without infringing constitutional protections for free speech. Children are already at risk of exploitation online, and that risk is exacerbated as AI continues to advance. Now is the time for California to take the lead in protecting our children from the sickening and public sexualization of their appearances.

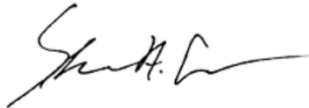
We applaud your commitment to this important issue, and we stand ready to assist.



Kim Stone  
Stone Advocacy, Lobbyist for CDAA



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