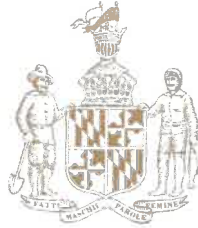


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April 29, 2019

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 1027 and Senate Bill 736, "Criminal Law - Child Pornography"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1027 and Senate Bill 736, both titled "Criminal Law - Child Pornography." We write to discuss constitutional issues raised by the bills and conclude that they are constitutional. We also write to point out the differences in the two cross-filed bills.

Both bills amend the definition of "sexual conduct" found in Criminal Law Article ("CR"), § 11-101(d) to add "lascivious exhibition of the genitals or pubic area of any person." This definition also applies to CR Title 11, Subtitle 2, which includes the provisions relating to child pornography. CR § 11-201(g). Its meaning is essentially the same as the term "lewd exhibition of the genitals," which the Supreme Court found to meet First Amendment standards in *New York v. Ferber*, 458 U.S. 747, 765 (1982). As a result, this portion of the bills is clearly constitutional.

Both bills also amend CR § 11-208 to expand the prohibition on the possession and intentional retention of child pornography to include a "computer-generated image that is indistinguishable from an actual and identifiable child under the age of 16 years." The bills differ, however, in that House Bill 1027 contains a definition of "indistinguishable from an actual child," while Senate Bill 736 defines "indistinguishable from an actual and identifiable child." The definition, with the additional Senate language, is as follows:

(A) (1) IN THIS SECTION, "INDISTINGUISHABLE FROM AN
ACTUAL AND IDENTIFIABLE CHILD" MEANS AN ORDINARY

PERSON WOULD CONCLUDE THAT THE IMAGE IS OF AN ACTUAL AND IDENTIFIABLE MINOR ENGAGED IN SEXUAL CONDUCT.

(2) “INDISTINGUISHABLE FROM AN ACTUAL AND IDENTIFIABLE CHILD” INCLUDES AN ACTUAL MINOR OR A COMPUTER-GENERATED IMAGE THAT HAS BEEN CREATED, ADAPTED, OR MODIFIED TO APPEAR AS AN ACTUAL AND IDENTIFIABLE CHILD.

(3) “INDISTINGUISHABLE FROM AN ACTUAL AND IDENTIFIABLE CHILD” DOES NOT INCLUDE IMAGES OR ITEMS DEPICTING MINORS THAT ARE:

- (I) DRAWINGS;
- (II) CARTOONS;
- (III) SCULPTURES; OR
- (IV) PAINTINGS.

Because the substantive amendment in the bills uses the term “indistinguishable from an actual and identifiable child,” it is our view that if both bills are to be signed, Senate Bill 736, which expressly defines that term, should be signed last.

The definitions in the bills prohibit the possession and intentional retention of child pornography in situations where no child was used in the making of the material in question so long as it appears that an actual and identifiable child is involved in the depicted activity. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court found extension of the federal child pornography act to sexually explicit images that appear to depict minors but were produced without using any real children was invalid. The provisions covered computer-generated images as well as images produced by more traditional means. The Court stated that “the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a ‘picture’ that ‘appears to be, of a minor engaging in sexually explicit conduct,’” as well as “Hollywood movies, filmed without any child actors, if a jury believes an actor ‘appears to be’ a minor engaging in “actual or simulated . . . sexual intercourse,” and further stated that such images “do not involve, let alone harm, any children in the production process.” *Id.* at 241. The Court ultimately relied on this last point to find the challenged statute invalid, saying that “virtual

child pornography is not ‘intrinsically related’ to the sexual abuse of children,” unlike those prohibited by the law upheld in *New York v. Ferber*, 458 U.S. 747, 764 (1982). *Ashcroft*, 535 U.S. at 250.

The *Ashcroft* case was a facial challenge to the Child Pornography Prevention Act (“CPPA”) of 1996, which could be violated with material that had no relation to actual children. In its discussion of the “morphing” provision of that Act, 18 U.S.C. § 2256(8)(C) (2000), however, the Court noted that computer morphing, which it described as the “alter[ation] of innocent pictures of real children so that the children appear to be engaged in sexual activity,” and noted that such material would “implicate the interests of real children and are in a sense closer to the images in *Ferber*.” *Ashcroft*, 535 U.S. at 242. The morphing provision was not challenged in the *Ashcroft* case. After *Ashcroft*, Congress made changes in the law in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT Act”). Under that law, child pornography:

means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256(8). While this law would not appear to allow a prosecution on the basis of completely imaginary children, it does cover some instances where children are depicted as participating in sexual activity, but were actually not involved.

In *United States v. Bach*, 400 F.3d 622, 624 (8th Cir. 2005), the court upheld application of the CPPA to a case where the head of a well-known child entertainer had been skillfully inserted into a photograph of a nude boy. The boy was not identified, and the body shown in the picture did not belong to the child entertainer. The court found that

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prosecution based on this photograph did not violate the First Amendment because “[u]nlike the virtual pornography protected by the Supreme Court in *Free Speech Coalition*, the picture with [the child actor’s] face implicates the interests of a real child and does record a crime.” *Id.* at 632. As a result, the “jury could find from looking at the picture that it is an image of an identifiable minor, and that the interests of a real child were implicated by being posed in such a way.” *Id.*

In *United States v. Anderson*, 758 F.3d 891 (8th Cir. 2014), the court addressed this issue under the PROTECT Act and explained that morphed images “are like traditional child pornography in that they are records of the harmful sexual exploitation of children. The children, who are identifiable in the images, are violated by being falsely portrayed as engaging in sexual activity.” *Id.* at 896. Moreover, “the damage from a morphed image is felt directly by the identifiable minor and “necessarily follow[s] from the speech” itself. *Id.* Thus, the court concluded that “the government thus has a compelling interest in protecting innocent minors from the significant harms associated with morphed images.” *Id.* See also *Shoemaker v. Taylor*, 730 F.3d 778, 786-787 (9th Cir. 2013); *Doe v. Boland*, 698 F.3d 887, 884 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 729-730 (2d Cir. 2011); but see *Zidel v. New Hampshire*, 940 A.2d 255, (N.H. 2008).

While all of these cases involved morphed images rather than fully computer-generated images, it is our view that the same harms are present whenever an actual and identifiable child is depicted in child pornography, and for that reason, it is our view that the provisions of House Bill 1027 and Senate Bill 736 are constitutional.

Sincerely,



Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber