SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	AB 1831	**Hearing Date:**	June 18, 2024
Author:	Berman		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Crimes: child pornography***

HISTORY

Source: California District Attorneys Association
Children's Advocacy Institute
Common Sense Media
Screen Actors Guild – American Federation of Television and Radio Artists
Ventura County District Attorney's Office

Prior Legislation: SB 145 (Pavley), Ch. 777, Stats. 2013
SB 203 (Harman), held Assem. Approps., 2010
AB 442 (Parra), held Sen. Public Safety, 2007
AB 235 (Tran), held Sen. Public Safety, 2007
SB 1238 (Battin), held Sen. Public Safety, 2006
SB 588 (Runner), failed Sen. Public Safety, 2005
SB 1499 (Liu) Ch. 751, Stats. 2004
AB 39 (Runner), failed Assem. Public Safety, 2003
AB 1012 (Corbett), Ch. 559, Stats. 2001
SB 927 (Honeycutt), Ch. 55, Stats. 1994
AB 2701 (Costa), Ch. 874, Stats. 1994
AB 2233 (Polanco), Ch. 1180, Stats. 1989

Support: American Association of University Women – California; Brea Police Department; CalChamber; California Association of Highway Patrolmen; California Chamber of Commerce; California Federation of Teachers (CFT) - a Union of Educators & Classified Professionals, Aft, AFL-CIO; California State Sheriffs' Association; City of Downey Police Department; County of Ventura; Crime Victims United; Jewish Family and Children's Services of San Francisco, the Peninsula, Marin and Sonoma; Counties; Los Angeles City Attorney's Office; Microsoft Corporation; Orange County Sheriff's Department; Organization for Social Media Safety; Oxnard Police Department; Chief of Police of The City of San Jose; Peace Officers Research Association of California (PORAC); Sacramento County Sheriff Jim Cooper; San Diego County District Attorney's Office; San Diego Internet Crimes Against Children Task Force; San Jose Police Department; Simi Valley Police Department; SNAP INC.; Technet; The Child Abuse Prevention Council; Ventura County District Attorney's Office

Opposition: ACLU California Action (unless amended)

Assembly Floor Vote: 71 - 0

PURPOSE

The purpose of this bill is to expand existing provisions of law related to child pornography and obscene matter depicting a minor engaged in sexual conduct to include matter that is digitally altered or generated by the use of artificial intelligence (AI).

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including a non-exhaustive list of types of medium, that contains or incorporates in any manner, any film or filmstrip, with the intent to distribute, exhibit or exchange with others any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined. (Pen. Code, § 311.1, subd. (a).)

Existing law prohibits every person who knowingly sends or brings into this state for sale or distribution, or possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter. (Pen. Code, § 311.2, subd. (a).)

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including a non-exhaustive list of types of medium, that contains or incorporates in any manner, any film or filmstrip, with intent to distribute, exhibit or exchange with others for commercial consideration, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct. (Pen. Code, § 311.2, subd. (b).)

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including a non-exhaustive list of types of medium, images that contains or incorporates in any manner, any film or filmstrip, with intent to distribute, exhibit or exchange with a person 18 years of age or older, any matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct. (Pen. Code, § 311.2, subd. (c).)

Existing law prohibits, except as provided, the act of knowingly sending or bringing into this state for sale or distribution, or possessing, preparing, publishing, producing, developing, duplicating, or printing in this state any representation of information, data, or image, including a non-exhaustive list of types of medium, that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or exhibit to, or to exchange with, a person under 18 years of age, any matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct. (Pen. Code, § 311.2, subd. (d).)

Existing law makes a person, except as provided, guilty of sexual exploitation of a child if the person knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including a non-exhaustive list of types of medium, that contains or incorporates

in any manner, any film or filmstrip that depicts a person under the age of 18 years engaged in an act of sexual conduct, as defined. (Pen. Code, § 311.3, subd. (a).)

Existing law defines "sexual conduct" for purposes of sexual exploitation of a child to mean any of the following:

- Sexual intercourse;
- Penetration of the vagina or rectum by any object;
- Masturbation for the purpose of sexual stimulation of the viewer;
- Sadomasochistic abuse for the purpose of sexual stimulation of the viewer;
- Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer; or,
- Defecation or urination for the purpose of sexual stimulation of the viewer. (Pen. Code, § 311.3, subd. (b).)

Existing law prohibits, except as provided, a person who, with knowledge that a person is a minor, or who, while in possession of any facts on the basis of which they should reasonably know that the person is a minor, hires, employs, or uses the minor to participate in the production, distribution or exhibition of child pornography in violation of Penal Code section 311.2. (Pen. Code, § 311.4, subd. (a).)

Existing law prohibits, except as provided, a person who knows that a person is a minor under the age of 18 years, or who should reasonably know that the person is a minor under the age of 18 years, knowingly promoting, employing, using, persuading, inducing, or coercing a minor under the age of 18 years to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including a non-exhaustive list of types of medium that contains or incorporates in any manner, any film, filmstrip, or a live performance involving sexual conduct by a minor for commercial purposes. (Pen. Code, § 311.4, subd. (b).)

Existing law prohibits, except as provided, a person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she they should reasonably know that the person is a minor under the age of 18 years, knowingly promoting, employing, using, persuading, inducing, or coercing a minor under the age of 18 years to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including a non-exhaustive list of types of medium, that contains or incorporates in any manner, any film, filmstrip, or a live performance involving, sexual conduct by a minor under the age of 18 years alone or with other persons or animals. (Pen. Code, § 311.4, subd. (c).)

Existing law defines "sexual conduct" for purposes of Penal Code section 311.4 to mean "any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct." (Pen. Code, § 311.4, subd. (d)(1).)

Existing law prohibits, except as provided, a person from knowingly possessing or controlling any matter, representation of information, data, or image, including a non-exhaustive list of types of medium, that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct. (Pen. Code, § 311.11, subd. (a).)

Existing law states, except as provided, that any city, county, city and county, or state official or agency in possession of matter that depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct is subject to forfeiture. (Pen. Code, § 312.3, subd. (a).)

Existing law defines "matter" to mean "any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines, or materials. "Matter" also means any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated-image that contains or incorporates in any manner any film or filmstrip. (Pen. Code, § 312.3, subd. (h).)

This bill expands the provisions above related to child pornography and obscene matter to include digitally-altered or AI-generated matter, as provided.

This bill defines "AI" to mean "an engineered or machine-based system that varies in its level of autonomy and that can, for explicit or implicit objectives, infer from the input it receives how to generate outputs that can influence physical or virtual environments."

This bill contains Legislative findings and declarations stating that the harms caused by child sexual assault material (CSAM) exist regardless of how CSAM is produced and that the First Amendment does not protect CSAM that incorporates the image of a real child or obscenity even if the obscenity is created entirely by AI.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> AB 1831, the Preventing AI-Enabled Child Exploitation Act, will modernize our laws to ensure AI-generated sexually explicit images of children are illegal to possess, distribute, and create. With the rapid advancement of AI, this technology is being used to create highly realistic images of child sexual abuse, which can be virtually indistinguishable from a real child. The process of creating AI-generated sexually explicit images of minors victimizes thousands of children because an AI program must first learn what these images look like by using existing real images of children. Law enforcement officers in California have already encountered instances of people in possession of AI-generated child sexual abuse material

(CSAM) that could not be prosecuted due to the deficiency in current law. Therefore, it is critical that our laws keep up with evolving AI technology to ensure predators are being prosecuted and children are being protected.

2. Background: Child Pornography

Existing law criminalizes any person who distributes, exhibits, possesses, prepares, publishes, produces, develops, duplicates, or prints any matter that depicts a person under 18 years of age personally engaging in or simulating sexual conduct. (Pen. Code, § 311.11.) Sexual conduct, for these purposes, is defined as "any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct." (Pen. Code, § 311.4, subd. (d)(1).) Penalties for violating existing laws on child pornography range from one-year county jail misdemeanors to state-prison felonies.

Until 1994, child pornography was defined to mean depictions of children under the age of 14 engaged in a sexual conduct. Several other related statutes applied to minors under 17 years of age. In 1994, the child pornography laws were amended to apply to matter depicting any person under the age of 18 years. (AB 927 (Honeycutt), Ch. 55, Stats. 1994.)

However, when the age standard for child pornography was set to include images of any minor, the definition of "sexual conduct" did not change. That definition is broad enough to include not only graphic depictions of sexual intercourse, oral copulation and sodomy, but also what could be characterized sexually oriented posing. Thus, the range of prohibited depictions makes it difficult to assess exactly what a "child pornography" conviction means in any particular instance since child pornography can range from the most graphic depiction of the rape of a prepubescent child possessed by an adult to a nude image of a 17-year old possessed by another minor.

3. History of Relevant Statutes

This bill amends several statutes that are part of a statutory scheme to prohibit child pornography and obscene matter. A description of the history and purpose of those statutes is provided below:

> Principal statutes in this scheme include sections 311.2, 311.3, 311.4 and 311.11, which share a somewhat convoluted and recent history. One of the earliest of these provisions, section 311.4, subdivision (a) (originally § 311.4), was enacted in 1961 and was designed to operate in conjunction with the obscenity statute which was already in existence at the time and which generally banned the sale and distribution of obscene material (§ 311.2, now § 311.2, subd. (a)). As originally enacted, section 311.4 prohibited the use of minors in the sale and distribution of obscene matter. It was not until 1977 or later that the remainder of these provisions came into being. They reflect a recent trend in California, as well as other states, to become increasingly aggressive in the war against child pornography, a subject most experts agree has emerged into "a national problem."

> (DiGennaro, *Child Pornography: Issues of Statutory Vagueness* (1988) 10 Crim. Justice J., p. 197.) These statutes are aimed at extinguishing the market for sexually explicit materials featuring children. Under them, it is no longer only the distribution but the production, reproduction and possession of such material which is proscribed. To be objectionable, the material no longer has to be obscene. To be illegal, the activity no longer has to be for commercial purposes. And violation of these statutes often carries with it the penalty of a prison sentence.
>
> Under the present statutory scheme, sections 311.4 and 311.3 are strictly concerned with visual displays such as might be found in films, photographs, videotapes and live performances. As outlined above, section 311.4 prohibits the employment or use of a minor under the age of 17 in the production of material depicting that minor in "sexual conduct," as defined therein, whether or not it is for commercial purposes (§ 311.4, subds. (b) & (c)). And section 311.3, subdivisions (a) and (b), proscribes the development, duplication, printing, or exchanging of any film, photograph, videotape, negative, or slide depicting a person under the age of 14 years engaged in "sexual conduct" as defined by that statute.
>
> Section 311.2, meanwhile, targets both obscene and nonobscene "matter," which includes books as well as photographs. Said provision makes it a crime to possess, prepare, publish, develop, duplicate or print, with the intent to distribute or exhibit to others, such matter depicting a person under the age of 17 or 18 years engaged in sexual conduct as defined in section 311.4. Finally, section 311.11 (also known as the "Polanco-Ferguson Anti-Child Pornography Act of 1989"), a fairly new statute, is aimed at the mere possession of these kinds of materials. It bans the knowing possession or control of "any matter," the production of which involves the use of a person under the age of 14 engaged in sexual conduct as defined by section 311.4.

(*People v. Cantrell* (1992) 7 Cal.App.4th 523, 540-541.) As discussed in note 3, in 1994 the child pornography statutes were amended to apply to minors under 18, rather than minors under 14 and in some instances under 17. (AB 927 (Honeycutt), Ch. 55, Stats. 1994.)

4. First Amendment Considerations

The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . ." This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." It is a fundamental tenant of First Amendment law that speech cannot be prohibited merely because someone justifiably finds it offensive and objectionable. (See e.g. *Cohen v. California*, (1971) 403 U.S. 15, 22; *Virginia v Black* (2003) 538 U.S. 343, 358.)

Speech can come in all forms of expression, including but not limited to, words both written and spoken, actions, symbols, clothing, art, donations, images, movies, videos, and online posts.

While these guarantees are stated in broad terms, "the right to free speech is not absolute." (*Aguilar v. Avis Rent A Car System, Inc.*, supra, 21 Cal. 4th at p. 134, citing *Near v. Minnesota* (1931) 283 U.S. 697, 708; and *Stromberg v. California* (1931) 283 U.S. 359.) Courts have recognized that there are categories of speech that are not protected under the First Amendment, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422). As discussed further below, obscenity and child pornography have also been held to fall outside the protections of the First Amendment. (*Roth v. United States* (1957) 354 U.S. 476 and *New York v. Ferber* (1982) 458 U.S. 747.)

a. Indecent Materials, Obscenity, and Child Pornography

Indecent speech, which can include pornography and other sexually explicit speech, is not inherently obscene and thus is generally protected speech under the First Amendment. (*Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126.) The U.S. Supreme Court's test to determine whether speech is obscene requires "(a) whether the average person, applying contemporary community standards, not national standards, would find that the work appealed to the prurient interest, (b) whether the work depicted sexual conduct defined by state law, and (c) whether the work lacked serious literary, artistic, or scientific value." (*Miller v. California* (1973) 413 U.S. 15, 24.)

While pornography that is not obscene is protected speech under the First Amendment, child pornography is a different matter. The Supreme Court has recognized that a state may legitimately sanction activities which amount to harmful conduct rather than "pure speech," particularly when the conduct in question involves the use of children to make sexual material. (*Ferber, supra*, 458 U.S. at pp. 770-771.) The "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (*Id*. at p. 757.) The use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 757; *Osborne v. Ohio* (1990) 495 U.S. 103, 109.) Thus, "pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*." (*Free Speech Coalition, supra*, 535 U.S. at p. 240, *citing Ferber, supra*, 458 U.S. at p. 764.)

Due to the differences of how these categories of speech are treated under the First Amendment, obscene speech and child pornography may be banned based on its content, whereas indecent speech cannot be outright banned but may be regulated by the government which has a substantial interest in protecting morals and public order in society. (*Barnes v. Glen Theater, Inc.* (1991) 501 U.S. 560, 569.) Generally, laws that are content neutral face intermediate scrutiny, while laws that are content based are presumptively invalid and face strict scrutiny, a higher standard. (*Turner Broadcasting System v. Federal Communication Commission* (1994) 512 U.S. 622.) A content-based restriction means that the regulation restricts a specific subject matter, in this case sexually explicit speech. Thus, the standard by which the court would allow such a regulation to be upheld is strict scrutiny which requires a showing that the restriction is necessary to serve a compelling state interest. (*Sable Communications of California, supra*, at p. 126.) Thus, regardless of how important the state interest, the regulation of indecent speech must still be precise enough to achieve the purpose the regulation is intended to serve. (*Reno v. ACLU* (1977) 521 U.S. 844, 874.)

b. Relevant Court Cases

This bill adds matter that is digitally altered or generated by the use of AI to the existing statutes that criminalize child pornography and obscene matter. Specifically, these statutes criminalize the possession, distribution, exchange or production of any matter, representation of information, data, or image, including but not limited to a list of medium, such as computer-generated images, that may be used to distribute or exhibit matter that contains or incorporates materials involving the use of a person under the age of 18 years old personally engaging in or simulating sexual conduct.

While AI encompasses a broad range of images which may be real or fabricated, when applied in the context of existing child pornography statutes, the image must be of a real minor in order to pass constitutional scrutiny. In *Free Speech Coalition*, *supra,* the U.S. Supreme Court declared unconstitutional a federal law that defined child pornography to include visual depictions that appear to be of a minor, even if no minor was actually used. (535 U.S. 234.) The government argued that while real children were not harmed in the production of the materials, the materials could still lead to abuse of real children by pedophiles who "whet their own sexual appetites" with such materials. (*Id*. at p. 241.) Additionally, the government argued that as imaging technology improves, it becomes more difficult to prove that a particular picture was produced using actual children. (*Id*. at 242.) The Court found these arguments were insufficient reasons to treat virtual child pornography the same as child pornography made with a real minor. In *Ferber*, *supra*, the Court found that the production and distribution of child pornography are "intrinsically related" to the sexual abuse of the child because the material acts as a permanent record of the child's abuse and the circulation of the material would harm the child's reputation and emotional well-being. (*Id*. at p. 249.) The Court distinguished the harm in virtual child pornography created without using a real minor because it is not a recording of a criminal act nor is there continuing harm on a child victim by the distribution of the materials. (*Id*. at p. 250.)

The *Free Speech Coalition* ruling, albeit in dicta, did comment on the difference between pure virtual images versus morphing images where innocent pictures of real children are altered so that the children appear to be engaged in sexual activity. "Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it." (*Id*. at p. 242.)

In *U.S. v. Hotaling* (2002), 599 F.Supp.2d 306, the Northern District Court of New York, relying on dicta from the *Free Speech Coalition* case, as well as other district court and U.S. appellate court cases, held that criminalizing morphed images of child pornography created without the filming or photography of actual sexual conduct on the part of the identifiable minor does not violate the First Amendment. (*Id*. at p. 321.) "An image of an identifiable, real child involving sadistic conduct -- even if manipulated to portray conduct that was not actually inflicted on that child -- is still harmful, and the amount of emotional harm inflicted will likely correspond to the severity of the conduct depicted." (*Id*. at p. 320, *citing U.S. v. Hoey* (1st Cir. 2007) 508 F.3d 687, 693.) *Hotaling* also cited similar reasoning which was used by another appellate court in holding that an image in which the face of a known child was transposed onto the naked body of an unidentified child in a lascivious pose constituted child pornography outside the scope of the First Amendment protections. (*Id*. at p. 319, *citing U.S. v. Bach* (8th Cir. 2005) 400 F.3d 622.)

In contrast, a California appellate court held that the possession of morphed images, while morally repugnant, does not fall outside the protection of the First Amendment. (*People v. Gerber* (2011) 196 Cal.App.4th 368, 386.) The court looked at Legislative history of previously enacted statutes that contain the same language -- "personally engaging in or personally

simulating sexual conduct" -- and found that it is "clear that the purpose of that legislation was to prevent exploitation of children used to make child pornography." (*Id*. at p. 380, *citing* Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1580 (1977-1978 Reg. Sess.) as amended Aug. 18, 1977, p. 1.) The court also noted that at the time that the Legislature enacted the crime of possession of child pornography, the term "child pornography" had a particular meaning under *Ferber*, *supra*. Specifically, not only must the offender have known that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, production of the matter must have "involve[d] the use of a person under the age of 18 years…" (*Id*. at p. 382, *citing Ferber*, *supra*, 458 U.S. 747, and Cal. Pen. Code, § 311.11.)

Thus, *Gerber* held that "it would appear that a real child must have been used in the production and actually engaged in or simulated the sexual conduct depicted." (*Id*. at p. 382.) The court acknowledged the dicta in *Free Speech Coalition* on morphed images, however, held that such altered materials are closer to virtual child pornography than to real child pornography because the act does not necessarily involve sexual exploitation of an actual child. (*Id*. at p. 386.) Relying on the rationales laid out in both *Ferber*, *supra* and *Free Speech Coalition*, the court emphasized that "*Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated and *Ferber* reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." (*Id*. at p. 385, *citing Free Speech Coalition*, *supra*, 535 U.S. at pp. 250-251.)

The Supreme Court has distinguished between statutes that criminalize possession and distribution of child pornography versus an offer for a transaction to provide or receive child pornography, regardless of whether the child pornography exists or involves a real child or is obscene. (*United States v. Williams* (2008) 553 U.S. 285) In response to the ruling in *Free Speech Coalition*, *supra*, Congress revised the invalidated statute to include among other provisions, making it a crime to provide or request to obtain child pornography rather than targeting the underlying material itself. In *Williams*, *supra*, the U.S. Supreme Court reviewed the revised federal law post-*Free Speech Coalition*, *supra*, which was challenged based on overbreadth and vagueness doctrines. The statute did not require the actual existence of child pornography which would only fall outside First Amendment protections if the matter involves the use of an actual child or if it is obscene. (*Id*. at p. 292.) However, the statute did require that speaker believes or intends the listener to believe that the subject of the proposed transaction depicts real children. (*Id*. at p. 303.) The Court ruled that this prohibition does not violate the First Amendment. The majority opinion reasoned that offers to engage in illegal transactions are categorically excluded from First Amendment protection. (*Id*. at p. 297.) The Court likened the crime to inchoate crimes – acts looking toward the commission of another crime, in this case the delivery of child pornography – and similar to attempt which is an inchoate crime, impossibility of completing the crime is not a defense. (*Id*. at p. 300.) The dissent argued that the new statute impermissibly undermines the Court's prior ruling *Free Speech Coalition*, *supra*, by criminalizing the transaction of constitutionally protected material. (*Id*. at p. 323.)

This bill includes matter that is digitally altered or generated by the use of AI to existing laws on child pornography and obscene matter depicting a minor. In the provisions that apply to obscenity, this bill adds images that contains digitally-altered or AI-generated data depicting what appears to be a person under 18 years of age and removes the term "personally" to indicate that the provision may apply to a virtual person. In provisions that apply to child pornography that is not also obscene, this bill maintains language in existing law that indicates the depicted individual is an actual minor.

As stated above, obscene matter is not protected under the First Amendment, nor is child pornography when made using a real minor. Also discussed above, the U.S. Supreme Court has made a distinction for crimes that punish the offers for child pornography because the crime is not the actual possession or distribution of child pornography, it is the offer to provide or receive child pornography. In that instance, the prohibition was found to be constitutional regardless of whether the matter was obscene or made using a real minor.

This bill does amend statutes that criminalize the offer to distribute child pornography (Pen. Code, § 311.2) however those same statutes also cover a wide range of behavior related to child pornography committed with "intent to distribute" ("knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image . . . . that contains or incorporates in any manner . . . . *with intent to distribute or exhibit to, or to exchange with*, a person 18 years of age or older, or who offers to distribute, distributes, or exhibits to, or exchanges with, a person 18 years of age or older any matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct . . ." [separate subdivision exists that applies to persons under 18 years of age]). This statute is constructed very differently than statute at issue in *Williams, supra*, with a notable difference in the required intent (intent to distribute child pornography versus intent to cause another to believe that the material or purported material contains child pornography.)

This bill adds into Penal Code section 311.2, that the matter contains "a digitally-altered or artificial-intelligence-generated depiction of what appears to be a person under 18 years of age engaging in such conduct, and that lacks serious literary, artistic, political, or scientific value" in an attempt to indicate that when the image is of a virtual person that the image should also be obscene. However, this language does not capture the entire obscenity test from *Miller*, *supra* which requires "(a) whether the average person, applying contemporary community standards, not national standards, would find that the work appealed to the prurient interest, (b) whether the work depicted sexual conduct defined by state law, and (c) whether the work lacked serious literary, artistic, or scientific value." (*Miller, supra,* 413 U.S. at p. 24.) Because this statute is not clearly the same as the statute in Williams, supra and does not codify the entire Miller test on whether content is obscene, it is unclear whether this complies with the First Amendment.

5. Arguments in Support

According to Ventura County District Attorney a co-sponsor of this bill:

> 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. *Aschroft'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].)

6. Arguments in Opposition

According to ACLU California Action:

The U.S. Supreme Court has said that freedom of expression, including freedom of speech, is "the matrix, the indispensable condition of nearly every other form of freedom." *Palko v. State of Connecticut* (1937) 302 U.S. 319, 327. As such, the First Amendment protects nearly all speech, with only a handful of notable exceptions. One of those exceptions is "obscene" works, defined as those works that "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California* (1973) 413 U.S. 15, 24. A second exception is child pornography. *New York v. Ferber* (1982) 458 U.S. 747. Importantly, however, courts have limited the child pornography exception to pornography that depicts real children. *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234. We are concerned that some provisions of AB 1831 fall outside these exceptions. In particular, proposed Penal Code section 311.2 would impermissibly prohibit a person from distributing, intending to distribute, exhibiting, or exchanging:

- Non-obscene material generated by artificial intelligence that neither depicts a real child nor that was generated using images of real children, and
- Non-obscene material that depicts what "appears to be a person under 18 years of age" but is, in fact, a person over the age of 18.

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244. The U.S. Supreme Court has found statutes unconstitutional on their face when they prohibit "a substantial amount of protected expression." *Id*. AB 1831 suffers from such overbreadth: The speech prohibited by AB 1831 includes matter that does not depict real children, as required to fall within the exception to First Amendment protection addressed in *Ashcroft v. Free Speech Coalition*, and that does not "appeal to the prurient interest in sex," or "portray sexual conduct in a patently offensive way," as required to fall within the exception to First Amendment protection addressed by *Miller v. California*.

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