

ICAC

- February CyberTips Received: 107
- CyberTips Received thru 3-25-2025: 410
- Overall CyberTips received in 2024: 1557

Total Incident Types (Year to date)

Online Enticement of Children for Sexual Acts	107
Child Pornography (possession, manufacture, and distribution)	288
Misleading words or digital Images on the Internet	3
Unsolicited Obscene Material Sent to a Child	7
Child Pornography (Receipt)	1
Child Sex Trafficking	3
Other Online Crime Against Children	1

Reporting Electronic Service Provider (Year to date)

ESP

Snapchat	122
Instagram, Inc.	38
Facebook	37
TikTok Inc.	32
MediaLab/Kik	25
Google	25
X Corp	21
Discord Inc.	20
Synchronoss Technologies, Inc	16
Reddit, Inc.	12

SENATE JUDICIARY COMMITTEE
MARCH 26, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL

IN SUPPORT OF
ENGROSSED HOUSE BILL NO. 1386

Chairman Larson and members of the Committee:

For the record, my name is Claire Ness. I am the Chief Deputy Attorney General, and I appear on behalf of the Attorney General's Office in support of Engrossed House Bill 1386.

I'd like to take a moment to remember Representative Josh Christy and his sponsorship of this legislation. He reached out to me during the interim to ask how he could help address the growing concerns about computer-generated child pornography, and he let me know about his impressive background in technology and software development. We discussed the current state of the law governing this issue, and he worked with our office to prepare the bill that was introduced in the House. Our office appreciates his support and his efforts on this important topic.

How the Attorney General's Office Actively Combats Child Sexual Abuse Materials

The Attorney General's Office is actively engaged in the fight against child pornography, or child sexual abuse materials (CSAM) as it is more accurately named. The prosecutors in our Criminal Law Division work with State's Attorneys to prosecute individuals for CSAM-related crimes. The Bureau of Criminal Investigations (BCI) - particularly the agents who are members of the Internet Crimes Against Children (ICAC) unit - conducts most investigations in the state involving CSAM and trains law enforcement investigators around the state to do the same. BCI also receives alerts from the National Center for Missing and Exploited Children (NCMEC) when NCMEC identifies known CSAM on an internet address in North Dakota. This triggers an

investigation - by BCI or another law enforcement agency - into the location of that address, the owner and content of the CSAM, and whether there are any known victims. Our office also has employees to assist the victims of CSAM, and we participate on the Human Trafficking Task Force that works with other victim support entities. We also greatly appreciate our law enforcement colleagues around the state who conduct investigations of CSAM.

The Rising Incidence of CSAM in North Dakota

Making, possessing, and trading CSAM is all too common in our state. While NCMEC tips account for only a subset of the actual CSAM investigations conducted by law enforcement, those tips alone are escalating exponentially. For each of the past two years, BCI received well over 1,500 tips from NCMEC. For comparison, in 2019, the number was 379, and in 2020, the number was 585. Now consider that each tip may lead to a device with many images involving multiple victims. And there are many CSAM investigations that develop from information other than NCMEC tips.

Types of Computer-Generated CSAM

Computer generated images and artificial intelligence have opened a new world for the cruel individuals who make, possess, or trade CSAM. These individuals can use computers to generate images or video of children engaged in any sexual conduct they choose, either out of whole cloth (sometimes called virtual CSAM) or by incorporating images of the heads or other body parts of children, such as young relatives or neighbors, into sexual imagery (sometimes called morphed CSAM).

It has been argued by some that the creation of virtual CSAM does not harm children or society. This is incorrect, especially in today's world where virtual CSAM can be indistinguishable from CSAM produced with minors and likely will fall within the legal

definition of obscenity. CSAM - virtual, morphed, or otherwise - creates more child victims. It contributes to the global demand for more CSAM, which is predominantly made by sexually abusing children, and criminals who possess CSAM also are much more likely than not to "touch offend" (sexually abuse) a child.

United States Supreme Court Opinion on Computer-Generated CSAM

In 2002, the U.S. Supreme Court decided that some virtual CSAM had protection under the First Amendment.¹ Virtual CSAM at the time was made using very early forms of computer-generated imagery that did not look like living people, and much less was known about its impact. That is not the case today, and the Court may reach a different result if faced with the same question now. This is an ongoing discussion among prosecutors and policymakers.

Also, in its 2002 decision regarding virtual CSAM, the Court reaffirmed its earlier holding that "obscenity" is not protected by the First Amendment.² So any virtual CSAM that constitutes obscenity is not protected speech, even under the 2002 opinion.

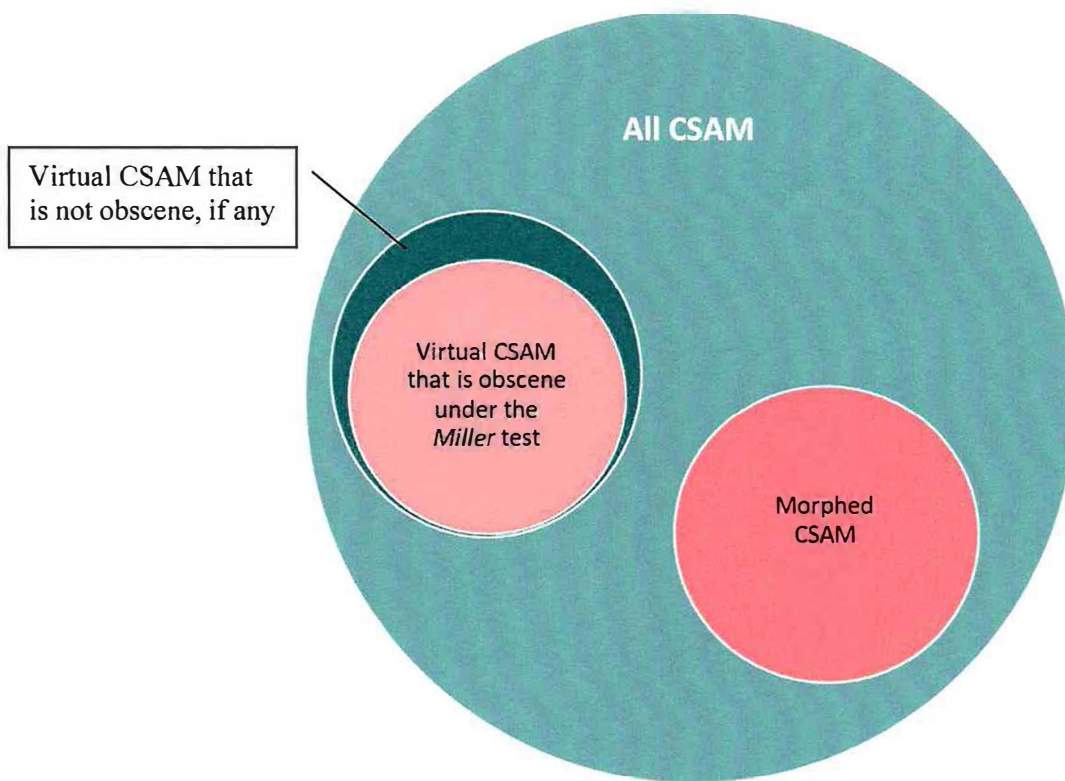
The Court did not rule on the constitutionality of laws prohibiting morphed CSAM. However, the Court's opinion strongly implies that morphed CSAM does not have the same constitutional protections as virtual CSAM. "Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in [another case]. Respondents do not challenge this provision, and we do not consider it."

Under the 2002 Ashcroft v. Free Speech Coalition decision then, CSAM can be divided into different categories with different constitutional protections or lack thereof. CSAM, morphed CSAM, and virtual (or other) CSAM that is obscene are not protected under the First

¹ Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

² Id. (to be obscene, "the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.")(citing Miller v. California, 413 U.S. 15 (1973)).

Amendment. To the extent there is any virtual CSAM that is not obscene, the Supreme Court said in that 2002 case that it would have First Amendment protection. So – if there is any CSAM that fits into the green area in the diagram below – and if the current Supreme Court would come to the same conclusion based on 23 years of technological advances and data – then the sliver of CSAM in that green area would have legal protections under the First Amendment.



How House Bill 1386 Will Address CSAM

House Bill 1386 will (1) ensure prosecutors in North Dakota can charge individuals who make, possess, or trade computer-generated CSAM and (2) enhance penalties for possession of any CSAM involving the most egregious and brutal forms of child abuse, for those possessing significant quantities of CSAM, and for repeat offenders.

Section 1 of the bill adds two definitions to our CSAM definition section to cover computer-generated images of minors, including images of a minor's face or other distinguishing characteristics that have been adapted or modified for use in CSAM.

- First – it defines “computer-generated image” – which is then included in Section 2 of the bill, which prohibits the possession of CSAM.
- Second – it adds a definition of “minor” that includes our current legal definition (an individual under 18 years of age) as well as virtual and morphed images of minors, for purposes of this chapter alone.

Section 2 of the bill adds the defined “computer-generated image” to the list of materials it is unlawful to possess. For example, an image of an actual minor that has been manipulated with a computer to be engaged in a sexually explicit activity with another minor, adult, object, etc. would fall within this definition.

The section of the Century Code amended in Section 2 of the bill already uses the term minor, so it would incorporate the new definition from Section 1 to prohibit virtual and morphed images of minors in CSAM as well.

Section 2 also enhances the penalty for possession of CSAM from a class C felony to a class B felony for possession of particularly heinous forms of CSAM or possession by a registered sex offender. The forms of abuse that trigger this enhanced penalty include sadistic, masochistic, and violent conduct; bestiality; and CSAM involving children under the age of 12. According to the United States Sentencing Commission’s Federal Sentencing of Child Pornography: Non-Production Offenses Report published in June 2021, “over half (52.2%) of the offenders had images or videos of infants or toddlers (22.8% and 29.4%, respectively) and nearly every offender (99.4%) had images or videos depicting victims who were prepubescent or under the age of 13.”

The report also noted that “[t]he enhancements for images depicting sadistic or masochistic conduct or abuse of an infant or toddler (84.0% of cases) ... were also applied in most cases.” Although these are statistics from federal CSAM cases, North Dakota is not immune from these types of crimes.

People sometimes are surprised when members of our office talk about the volume or severity of CSAM in North Dakota. Just as when I testified in the House, I considered bringing a read-out of a video involving CSAM to illustrate for the committee the horrific nature of what happens to these children. I will not read it into the record, but we have one available. The violence the perpetrator displays is unmistakable, and there is no question that it is one of the most inhumane crimes our investigators deal with. I ask this committee not to forget the children who are victims of this crime when you consider this bill and the penalties it will provide.

For these reasons, the Attorney General's Office requests a DO PASS on Engrossed House Bill 1386. Thank you for your time today.