HOUSE JUDICIARY COMMITTEE
JANUARY 20, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1386

Chairman Klemin 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 House Bill 1386 (25.1064.01000).

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 IP address in North Dakota. This triggers an investigation – by BCI or another law enforcement agency – into the location of the IP address, the owner and content of the CSAM, and whether there are any known victims. Our office also has victim-witness advocates to assist the victims of CSAM (and other crimes), and we participate on the Human Trafficking Task Force that works with providers who can help victims of CSAM. We also greatly appreciate all our law enforcement colleagues around the state who conduct investigations of CSAM.

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.

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. Also, criminals who possess CSAM also are much more likely than not to "touch offend" (sexually abuse) a child.

In 2002, the U.S. Supreme Court decided that some virtual CSAM had protection under the First Amendment. That decision was based, in part, on the fact that virtual CSAM at the time was made using very early forms of computer-generated imagery that did not look like living

people. That is not the case today, and the Court may reach a different result if faced with the same question now. Also, in its 2002 decision regarding virtual CSAM, the Court reaffirmed its earlier holding that "obscenity" is not protected by the First Amendment.[1] So any virtual CSAM that constitutes obscenity is not protected speech even under the 2002 opinion.

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.

Section 2 of the bill adds the defined computer-generated images to the list of materials it is unlawful to possess. It also enhances the penalty for possession 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 are identified on page 2 of the bill. Section 2 also enhances the penalty for possession to a class A felony for possession of CSAM involving an infant or toddler.

People sometimes are surprised when members of our office talk about the volume or severity of CSAM in North Dakota. 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 chose not to

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

do so, but I ask this committee not to forget the children when you consider this bill and the penalties it will provide.

Due to the severity of these crimes, the potentially lifelong physical and emotional impacts on the victims, and the short sentences imposed for these crimes under the current statute, the Attorney General's Office supports a DO PASS recommendation on House Bill 1386.

The Attorney General's Office does not take a position on the final provision of the bill on page 3, lines 3-7.