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FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/07
 LAST UPDATED 2/15/07 HB _____

SPONSOR Lopez

SHORT TITLE Study Child Pornography Generated in New Mexico SB SJM 18

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
 Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Senate Joint Memorial 18 requests that the Attorney General convene a task force to study the technological sophistication of virtual or computer-generated pornography in New Mexico, its impacts on New Mexico's children and the extent to which it supports the child pornography market. The task force shall include the attorney general or designee, secretary of public safety or designee, a representative from the administrative office of the district attorneys and any other entities deemed necessary.

The task force's study is to include the following:

1. Pervasiveness and technological sophistication of virtual or morphing technology in child pornography in New Mexico and its effects on the child pornography market;
2. Extent to which morphed images are used by abusers to seduce, molest, entice or lure children;
3. extent of physical, emotional and psychological harm caused to identifiable child victims who are depicted in morphed images; and
4. extent to which abusers of actual children are able to successfully evade prosecution by claiming that there is reasonable doubt as to whether or not the children are able to successfully evade prosecution by claiming that there is reasonable doubt as to whether

or not the children depicted are real or computer-generated.

The task force is to present its finding and recommendations for proposed legislation to an appropriate interim committee no later than November 1, 2007.

FISCAL IMPLICATIONS

As drafted, SJM 18 requires the Attorney General to convene a task force to study the issues in the area of computer generated child pornography, but provides no appropriation for additional staff.

SIGNIFICANT ISSUES

This memorial seeks to study the extent and impact of computer-generated pornography in New Mexico. Because of the risks of using real children in sexually explicit depictions, there is a growing trend to use computer models or to morph children's faces and heads onto sexually explicit images.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court declined to extend *New York v. Ferber*, 458 U.S. 747 (1982), to computer generated or virtual child pornography. *Ferber* held that there was no First Amendment right to possess or generate child pornography and that states could legally pass content-based regulations banning it. *Ferber* depended upon a wealth of empirical evidence as to harm generated by child pornography. In *Free Speech*, the Court found this empirical evidence did not extend to virtual child pornography where no actual children are depicted. However, as to morphing the Court noted in dicta:

“Section 2256(8)(C) [of the federal Child Pornography Prevention Act of 1996] prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children 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 242. See also, *United States v. Sims*, 428 F.3d 945, 956 n.4 (10th Cir. 2005) (noting that *Free Speech* expressly did not decide the constitutionality of morphing).

In his *Free Speech* concurrence, Justice Thomas also noted that the government's most persuasive argument in support of the legislation banning computer generated pornography was that “persons who possess and disseminate pornography images of real children may escape conviction by claiming that the images are computer generated, thereby raising a reasonable doubt as to their guilt.” *Free Speech* at 259 (Thomas, J., concurring). However, Justice Thomas also noted that the government had pointed to no case in which such a defense was successful but noted that “technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children.” *Id.*

In the wake of *Free Speech*, most courts now find that the government must be able to prove that a real child was depicted and therefore harmed. It need not be an identifiable victim, i.e. one that can come to court to testify, but must be a real child that was harmed. See e.g., *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005) (defendant's conviction was upheld where the image shown

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the head of a well known child entertainer morphed upon the photograph of a sexually explicit photograph of a young nude boy – the court found that the image involved a real child who was victimized every time the photograph was displayed).

The only New Mexico appellate case to address child pornography in detail, *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, read an obscenity standard into child pornography in New Mexico, but the issue of computer generated child pornography was not before the Court.

EO/mt