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Freedom to Morph? An Analysis of Morphed Imagery, Child Pornography, and the First Amendment

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FREEDOM TO MORPH?: AN ANALYSIS OF MORPHED IMAGERY, CHILD PORNOGRAPHY, AND THE FIRST AMENDMENT.

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Imagine innocently scrolling the internet and coming across a picture that depicts the face of a known child, maybe that of a friend or even one's own child, upon the bodies of persons engaged in sexually explicit activity. Pictures depicting child sexual abuse are damaging to a child's reputation, to their future career, and to their emotional and mental well-being.[1] This problem is far worse today than it has ever been, with estimates of 45 million images and videos of children being reported in a single year.[2] A greater problem with the growth of the internet are "morphed images" – rather than traditional child pornography which depicts the actual, sexual exploitation of a child, morphed images are those images depicting real and recognizable faces of children superimposed onto the bodies of adults engaged in sexually explicit activities.[3]

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1 Congress attempted to change the use of the term "child pornography" to "child sexual abuse material" as this not only more accurately depicts the content of the images, but the term "child sexual abuse material" is more widely used across the world. EARN IT Act, S. 3398, 116th Cong. (2020).

2 Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun with Images of Child Sexual Abuse. What Went Wrong?*, N.Y. TIMES (Sept. 29, 2019), https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html.

3 United States v. Hotaling, 634 F.3d 725, 730 (2d Cir. 2011); Stacy Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY

In 1998, reports of child pornography and sexual abuse imagery were over 3,000.[4] The internet is the "compounding variable" that permits the re-traumatization of children as sexually explicit images are perpetually shared, accessed, and distributed.[5] This material can be found on any online platform and many victims continue to be haunted by these photographs for years, even decades, after their victimization.[6] The National Center for Missing and Exploited Children suggests that because the problem has become so widespread, and law enforcement agencies and technology companies have failed to adequately stop the spread of these images, the only way to slow that growth is to take advantage of the growing use of machine learning.[7] Victims of this abuse suffer psychological and mental trauma as a result of knowing their images are on the internet, and in the traditional sense, many suffer the lasting trauma of sexual abuse that took place in order to create those images.[8] The constant fear of being recognized because of these images is strong even decades after these images have been produced.[9]

Traditional child sexual abuse materials are those images that depict children, who are younger than 18 years old, engaged in sexually explicit activity.[10] At the other end of the spectrum is virtual child pornography, which are wholly computer-generated images and do not involve the physical abuse of a child.[11] Morphed imagery stands at the intersection of these two areas. Morphed imagery includes images of real, innocent, and often recognizable children who have been superimposed onto the images of adults engaged in sexually explicit activity.[12]

This article will begin with a legal analysis of the development of child pornography law as it relates to traditional child pornography, virtual child pornography, and morphed imagery. First, there will be discussion regarding the

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L. J. 909, 911 (2019).

4 Keller, *supra* note 2.

5 CAN. CTR. FOR CHILD PROT., SURVIVOR'S SURVEY EXECUTIVE SUMMARY 28 (2017).

6 *Captured on Film: Survivors of Child Sexual Abuse Material Are Stuck in a Unique Cycle of Trauma*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD, https://www.missingkids.org/content/dam/missingkids/pdfs/Captured%20on%20Film.pdf (last visited Mar. 18, 2022); *Child Sexual Abuse Material*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD, https://www.missingkids.org/theissues/csam (last visited Mar. 18, 2022).

7 Keller, *supra* note 2.

8 *Child Pornography*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-ceos/child-pornography (last visited Dec. 5, 2020); Keller, *supra* note 2.

9 Keller, *supra* note 2.

10 18 U.S.C. § 2256(8) (2018); *see also Child Sexual Abuse Material*, *supra* note 6.

11 Child Pornography Prevention Act of 1996, H.R. 4123, 104th Cong. § 3(8) (1996).

12 United States v. Hotaling, 634 F.3d 725, 729–30 (2d Cir. 2011); Steinberg, *supra* note 3, at 911.

background of the First Amendment, highlighting *Chaplinsky v. New Hampshire*. The analysis focuses on Congress' approach to regulating child pornography and the Supreme Court's attempt to remedy it with the First Amendment and will delve into *Miller v. California* and *New York v. Ferber*, two of the early cases establishing the regulations on child pornography. The article will then chronologically discuss the Child Pornography Prevention Act of 1996, much of which was subsequently rejected by *Ashcroft v. Free Speech Coalition* and the subsequent passage of the PROTECT Act by Congress. There is a discussion of the current circuit split regarding whether morphed imagery falls within protected First Amendment speech. Additionally, the current statutory laws relating to child pornography and morphed imagery's place within those laws will be analyzed. Finally, the discussion will conclude with a legal analysis of the history of child pornography regulation and its emphasis on a child's wellbeing. That section will put particular emphasis on the inability of the Supreme Court to have known the rapid nature of technological growth and their reticence in applying any standards to the issue of morphed imagery, only that these types of images may fall closer to those traditional child pornography images because they include photographs of real children.[13] This section will end with a comparison to another realm of pornography regulation, revenge pornography, which is criminalized in 46 states.[14]

I. HISTORY OF CHILD PORNOGRAPHY LAW

It is necessary at the outset of a discussion of child pornography and the harms caused to children to differentiate child pornography from the traditional understanding of pornography.[15] Every child depicted in child pornography has suffered a crime and is inherently the victim of sexual abuse, meaning "each image graphically memorializes the sexual abuse of that child."[16] The issue of online child pornography is an exceedingly large and growing problem, proving it to be even too large for law enforcement to successfully manage.[17] Child pornography is an increasing issue in society and is exacerbated by the rapidly increasing access to technology.[18] Every year more than 25 million images are reviewed by the National Center for Missing and Exploited Children.[19] Children

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13 Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002).

14 *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INST., https://www.cybercivilrights.org/revenge-porn-laws/ (last visited Mar. 17, 2022).

15 *Child Pornography*, *supra* note 8.

16 *Id.*

17 Keller, *supra* note 2.

18 *Child Pornography and Abuse Statistics*, THORN, https://www.thorn.org/child-pornography-and-abuse-statistics/ (last visited Mar. 25, 2022).

19 *Id.*

of all ages are included in these images.[20] Because these often depict the violent sexual abuse of children, there is a push to change the term "child pornography" to "child sexual abuse material" which would properly describe the types of images that are being distributed.[21] The Department of Justice even indicates the term "[child pornography] fails to describe the true horror that is faced by countless children every year."[22]

The victimization of children does not end when the sexual abuse captured by photograph or video is over, rather, in most cases, child pornography is the permanent record of abuse and cause those who are abused to "suffer a lifetime of re-victimization by knowing the images of their sexual abuse are on the Internet forever."[23] The Canadian Center for Child Protection estimates that over 78% of the child pornography images they assessed depicted children younger than twelve years old and over 60% of those were children under eight.[24] The problem is that there is a great divide among the pictures that are disseminated: some images are of an extremely violent and explicit nature while others may not be.[25] Public ignorance to the magnitude of this issue and the lack of discussion on the topic itself has exacerbated the misunderstanding of just how violent, damaging, and pervasive this problem is in society.

Technology has made this problem increasingly worse, because not only do the images remain online forever, but anyone from anywhere in the world can also view them.[26] The market for child exploitation and child pornography can be traced alongside of the growth and popularization of the internet to the extent that the market for child pornography decreased in the 1990s and boomed again with the advent of the internet.[27] Today, the problem continues to increase.[28] For example, in 2004, the National Center for Missing and Exploited Children reviewed 450,000 child sexual abuse files, and in 2019, that number jumped to 70 million.[29] Moreover, people who create, share, and view this content have an

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20 EARN IT Act, S. 3398 § 6, 116th Cong. (2020); *see also Child Abuse Statistics*, THORN, https://www.thorn.org/child-pornography-and-abuse-statistics/ (last visited Dec. 5, 2020).

21 EARN IT Act, S. 3398 § 6, 116th Cong. (2020); *see also Child Abuse Statistics*, *supra* note 20.

22 *Child Pornography*, *supra* note 8.

23 *See* New York v. Ferber, 458 U.S. 747, 759 (1982); *Child Pornography*, *supra* note 8.

24 *Child Sexual Abuse Images on the Internet*, CAN. CTR FOR CHILD PROT. (Jan. 2016), http://s3.documentcloud.org/documents/2699673/Cybertip-ca-CSAResearchReport-2016-En.pdf.

25 *Child Pornography*, *supra* note 8.

26 *Id.*

27 *Id.*; *Child Sexual Exploitation and Technology*, THORN, https://www.thorn.org/child-sexual-exploitation-and-technology/ (last visited Mar. 25, 2022).

28 *Id.*

29 *Id.*

easier time connecting online and have a wider network to engage with this material.[30] There are many aspects of technology that allow this market to flourish with little to no prosecution; "encryption, key-chain storage . . . peer-to-peer networks," and Internet relay chat rooms are all used by child pornographers and pedophiles to correspond and share their illegal content with stomach-turning efficiency.[31] This allows those interested in these images a safe environment to promote their communication, shielded from public scrutiny, meaning it is "desensitizing those involved to the physical and psychological damages caused to the child victims."[32] If the issues of child pornography are going to be solved, it is necessary for governments and agencies to figure out how to manage online platforms that proliferate these crimes.

II. BACKGROUND OF THE FIRST AMENDMENT

A short analysis of First Amendment jurisprudence related to the issue of pornography is relevant because traditional pornography, i.e., that which depicts adults, is generally protected speech under the First Amendment given that it is not "patently offensive."[33] Child pornography, on the other hand, falls outside of the traditional protections of the First Amendment, as discussed below.[34] Morphed imagery sits between traditional pornography and child pornography – posing a new set of legal issues related to First Amendment regulation.

The First Amendment in pertinent part states "Congress shall make no law . . . abridging the freedom of speech."[35] The drafters of the U.S. Constitution created the Bill of Rights in response to the fear that without it, the government would be able to restrict personal liberties, and because they saw the freedom to speak freely without government regulation as a natural right, they intended the First Amendment to put some types of speech out of the reach of government regulation.[36] The Anti-Federalists, who advocated for limited central government and stronger powers with the state and local governments, championed the Bill of Rights and believed it was necessary to ensure that individual liberties would be protected from governmental intrusion.[37]

Chaplinsky v. New Hampshire held that outside of First Amendment lie

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30 *Child Pornography and Abuse Statistics*, *supra* note 16.

31 John Foley, *Technology and the Fight Against Child Porn*, INFO.WEEK (Feb. 11, 2005), https://www.informationweek.com/technology-and-the-fight-against-child-porn/d/d-id/1030321.

32 *Child Pornography*, *supra* note 8.

33 Miller v. California, 413 U.S. 15, 24 (1973); *see* U.S. CONST. amend. 1.

34 New York v. Ferber, 458 U.S. 747, 764 (1982). *See* text accompanying note 35–51.

35 U.S. CONST. amend. I.

36 *Bill of Rights (1791)*, BILL OF RIGHTS INST., https://billofrightsinstitute.org/primary-sources/bill-of-rights (last visited Mar. 20, 2022).

37 *Id.*

"certain well-defined and narrowly limited classes of speech."[38] This class of speech includes the obscene and lewd speech which, by its nature, plays no role in furthering ideas that have "such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[39] The regulation of child pornography began with the understanding that children are uniquely harmed in both the production of child pornography and also its distribution and therefore lies outside of the traditionally understood boundaries of the First Amendment.[40]

When the government wants to restrict a person's speech based on its content, it must survive a strict scrutiny test.[41] To survive strict scrutiny, the government must prove that a regulation of speech is justified by a compelling state interest and is carried out in the least restrictive means, or in other words, is narrowly tailored to serve the purported government interest.[42] However, despite the strong protections of speech in the First Amendment, the Supreme Court has consistently held some categories of speech that lie outside of these protections and can be regulated by the Government.[43] Furthermore, the intention of the First Amendment was not "to protect every utterance."[44]

Child pornography is one area which comes into conflict with the protections granted by the First Amendment.[45] Throughout the last 100 years, the government has addressed and worked to solve the problems presented by child pornography, however since the 1990s and the advent of technology the issue has become exceedingly complicated.[46] Some even argue the problem of child pornography slowed significantly before the 90s, but subsequently exploded due to the advent of the internet and technology.[47] The scale of the problem can be seen by the exponential growth in the difference between the amount of files reviewed by the National Center for Missing & Exploited Children in 2004—

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38 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

39 *Id.* at 572; *see also* Roth v. United States, 342 U.S. 476, 485 (1957) (holding explicitly that obscenity is outside First Amendment protection).

40 Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. OF SOC. POL'Y & THE L. 1, 3, 10 (2008); *see* U.S. CONST. amend. 1.

41 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

42 *Id.*

43 James Nicholas Kornegay, *Protecting Our Children and the Constitution: An Analysis of the "Virtual" Child Pornography Provisions of the Protect Act of 2003*, 47 WM. & MARY L. REV. 2129, 2133 (2006).

44 Roth v. United States, 354 U.S. 476, 483 (1957).

45 Todd Carville, *The Constitutionality of Criminalizing Virtual Child Pornography*, SYRACUSE L. & TECH. J. 5, 4–5 (2002).

46 *Id.* at 2; Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDIS. L. J. 639, 644 (1999).

47 *Child Sexual Exploitation and Technology*, *supra* note 27.

450,000—compared to the seventy million files reviewed in 2019.[48]

Child pornography is defined as the visual depiction of children engaged in "sexually explicit conduct."[49] Before the advent of technology, there was little to distinguish between the harms of creation versus the harms of dissemination of child pornography because most, if not all, child pornography involved the sexual abuse of children.[50] Because some of the definitions and controlling jurisprudence occurred before the problem of morphed imagery arose, they are sometimes inadequate to properly balance the unique situation morphed images pose in relation to the with the liberties protected by the First Amendment.[51]

The problem of morphed imagery poses a tough legal question because it sits at the intersection of one of the most fundamental liberties cherished by every American, the Freedom of Speech, and the protection of children from sexual exploitation who may not have been physically abused, but who are recognizable in these sometimes violent and gruesome images. Consistently this has translated into the courts needing to find a balance between protecting this fundamental liberty and recognizing the issue of morphed imagery is one that the law absolutely has to address. The following legal background attempts to paint a picture of the difficulty the legislature and courts have had with reconciling these competing interests.

III. LEGAL BACKGROUND

Before the issue of child pornography came to the Supreme Court, the Court first had to deal with the issue of obscenity and whether it qualified as protected speech within the meaning of the First Amendment.[52] One fundamental case related to the Supreme Court's jurisprudence in the context of obscenity is the 1973 case of *Miller v. California.*[53] The issue before the Supreme Court was regarded the scope of the First Amendment prohibition on obscene speech.[54] The factual scenario in this case did not involve the use of children, but rather pornographic materials of adults engaged in sexually explicit activity.[55] The court laid out three factors to consider when determining if a work was obscene and, therefore, without First Amendment protection: (1) the average person "would find that the work taken as a whole appeals to the prurient interest;" (2) the work "depicts or describes, in a patently offensive way, sexual conduct . . .

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48 *Id.*
49 18 U.S.C § 2256(8).
50 Steinberg, *supra* note 3, at 913.
51 *Id.*
52 *See, e.g.*, Miller v. California, 413 U.S. 15, 19–20 (1973).
53 *See generally id.*
54 *Id.* at 19–20.
55 *Id.* at 18.

designed by state . . . law;" and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[56] The Supreme Court stated that the protections of the First Amendment apply to "obscene material" only when the "prurient, patently offensive depiction or description of sexual conduct" has "serious literary, artistic, political, or scientific value to merit First Amendment protection."[57]

The underlying issue with the regulation of child pornography is the middle ground between traditional child pornography, where children are used in the production of the pornography, and virtual pornography which is "created by using adults who look like minors or by using computer imaging."[58] Traditional child pornography is not protected speech under the First Amendment, while virtual child pornography is.[59] In the context of adult material and the First Amendment, it is clear the Supreme Court worked to strike a balance between protecting the freedom of speech with ensuring obscene materials did not become mainstream and pervasive in society.[60] However, this framework fails to adequately regulate materials that portray the sexual abuse of children. Further, this framework fails at remedying the problem when no actual child is physically harmed or abused in the making of certain materials. Historically, the Bill of Rights intended to keep some materials outside of First Amendment protection, including obscene materials, but the Supreme Court often struggled to define what qualified as obscene.[61] The next sections detail the Supreme Court's challenge in striking this balance when it comes to the regulation of child pornography.

A. Relevant Statutory Provisions

Child pornography is defined as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether or not produced by electronic, mechanical, or other means, of sexually explicit conduct."[62] Visual depiction includes "undeveloped film and

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56 *Id.* at 24.

57 *Id.* at 26.

58 Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40 (2002); United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020).

59 *Ashcroft*, 535 U.S. at 256; *Mecham*, 950 F.3d at 260.

60 *Miller*, 413 U.S. at 24.

61 *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding traditional child pornography outside of First Amendment protection regardless of whether it is obscene); *First Amendment*, THE HISTORY CHANNEL, https://www.history.com/topics/united-states-constitution/first-amendment, (Sept. 25, 2019).

62 18 U.S.C. § 2256(8) (defining sexually explicit conduct for the purpose of this section as "(1) graphic sexual intercourse, or (2) bestiality, masturbation, or sadistic or masochistic

video tape, data stored on computer disk or by electronic means which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format."[63] Photographs, videos, digital or computer generated images must be an actual minor, or indistinguishable from an actual minor, who is engaging in sexually explicit conduct.[64] This also includes visual depictions that have "been created, adapted, or modified to appear" to include an indefinable minor.[65] The definition includes those images that may be just of children that are "sufficiently sexually suggestive" even if that child is not engaged in sexual acts.[66] The Federal Government generally has jurisdiction when the internet is involved.[67]

B. *New York v. Ferber*

Before federal law was promulgated on this issue, the Supreme Court in *New York v. Ferber* upheld a New York statute related to the regulation of child pornography.[68] This case involved the owner of a bookstore in Manhattan, New York who was convicted under a New York statute for distributing videos depicting boys under the age of sixteen masturbating.[69] The statute prohibited "persons from knowingly promoting sexual performances by children under 16 by distributing material which depicts such performances."[70]

The Supreme Court held child pornography falls outside of First Amendment protection, regardless of whether it is obscene under the standard set forth in *Miller*.[71] The Supreme Court turned its focus to the production of the materials themselves in addition to the content depicted in the materials.[72] The court analyzed the validity of two New York statutes which made it a crime to

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abuse, or (3) lewd display of genitals.").

63 18 U.S.C. § 2256(5).

64 18 U.S.C. § 2256(8)(B).

65 18 U.S.C. § 2256(8)(C).

66 *Citizen's Guide to U.S. Federal Law on Child Pornography*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography (last updated May 28, 2020).

67 *Id.*

68 New York v. Ferber, 458 U.S. 747, 773–74 (1982).

69 *Id.* at 751–52.

70 *Id.* at 749.

71 *See generally id.* at 764 (holding that when "the balance of competing interests is clearly struck…it is permissible to consider these materials as without the protection of the First Amendment"); Miller v. California, 413 U.S. 15, 24 (1973) (defining the scope of regulation as limited to "works which, taken as a whole, 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").

72 *Ferber*, 458 U.S. at 749.

knowingly authorize a child to participate in sexual acts.[73] The New York appellate court affirmed the trial court's ruling, finding Ferber guilty under section 263.15 of the New York Penal Code, which prohibited "promoting a sexual performance by a child."[74] This law did not require that the material shown to have been created or disseminated by the defendant to be obscene.[75] The single issue before the Supreme Court in this case was "[t]o prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene[.]"[76]

To answer this question, the Supreme Court lays out five reasons in support of placing child pornography in the category of unprotected speech.[77] Ultimately the Court holds states have more flexibility in their regulations of child pornography and such regulations, the Court concludes, do not offend the First Amendment.[78] First, the State has a compelling interest in "safeguarding the physical and psychological well-being of a minor."[79] There are psychological, emotional, and mental health concerns when it comes to the production of child pornography, and because many states have already passed successful legislation protection these aspects of a child's wellbeing the Court believes that this is permissible under the First Amendment.[80] The Court unapologetically states that this interest is paramount to a well-functioning and democratic society and because this law was enacted by the legislature of the state of New York that the court should not engage in second guessing the legislature's determination in protecting and regulating this concern.[81] Protecting the interests of children is one of the strongest interests the government can assert, and it is this concern that ultimately leads to the issue of government regulation. This is because the government may assert the interest in protecting children, but how far that interest extends when technological advances come into play is a question that the court must resolve.

Second, child pornography is "intrinsically related" to the sexual abuse of

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73 *Id.* at 750–51; N.Y. Penal Law §263.05 (McKinney 2001) (noting that the age of the statute has been raised to seventeen).

74 N.Y. Penal Law § 263.15 (McKinney 2001).

75 *Ferber*, 458 U.S. at 751.

76 *Id.* at 753.

77 *Id.* at 756–74.

78 *Id.*

79 *Id.* at 756–57.

80 *Id.* at 757–58.

81 *Id.* at 757–58; *see also* Prince v. Massachusetts, 321 U.S. 158, 168 (1944) ("[A] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.").

minors in two ways.[82] The production is a "permanent record of the child's participation" and distribution itself intensifies the harms to the children as the materials are circulated.[83] Moreover, regulating and effectively extinguishing the distribution of child pornography is required to get at the production of said materials: in other words, to control the supply of the child pornography market it is necessary to control the distribution market at the outset.[84] Again, the Supreme Court emphasizes the legislature's response to a hard-to-control problem and insists that it is not outside of the purview of the legislature to determine that effectively extinguishing the network of child pornography would include pursing those who distribute alongside of those who produce.[85] This is an interesting supply and demand argument from the Court: essentially arguing that to effectively extinguish the supply it is necessary to get at the entire supply chain.[86] Without the distribution channels and those who distribute and sell there would be no market for child pornography and the court emphasizes that this could be the avenue to strangle production.[87]

The Supreme Court reasons "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" and rejects the idea that this type of regulation must stay within the boundaries set by *Miller*, but rather insists in light of how compelling the state's interest is in regulating child pornography that state regulation may go further than the standards set forth by *Miller*.[88]

The standard in *Miller* does not account for the particular sensitives involving child pornography, nor fully encapsulate the state's interest in regulating these materials, which is why the Court extends protections to child pornography even further than the analysis of obscene speech.[89] The first prong of the *Miller* test, whether the work "appeals to the prurient interest," has no connection to the sexual abuse children face in the production of child pornography.[90] The second prong, whether the work is "patently offensive" may include materials even where children are sexually abused in their production.[91] The third prong, relating to the "literary, artistic, political or scientific value," is inconsequential to children who have been sexually abused in the process.[92] In the context of traditional child sexual abuse material, it is logical that *Miller* would not apply

82 *Ferber*, 458 U.S. at 759.
83 *Id.*
84 *Id.*
85 *Id.* at 759–60.
86 *See generally id.*
87 *See generally id.*
88 *Id.* at 760–61.
89 *Id.* at 761.
90 *Id.*
91 *Id.*
92 *Id.*

because this material can never have redeeming qualities if it depicts the actual abuse of a child.

Third, there is an "economic motive" to continue advertising and selling child pornography and therefore fuels its production and subsequent distribution.[93] The First Amendment has never protected speech which is "used as an integral part of conduct in violation of a valid criminal statute."[94]

Fourth, there is likely no important or necessary value added to either scientific or educational work, nor to literary or artistic works by having a child engaged in obscene sexual acts.[95] Any value gained from permitting these types of depictions, the court explains, is likely *de minimus*.[96] There is nothing stopping someone from using a person of age to get across the same artistic point that they would with a person who is underage.[97] The Court is not saying that the depictions are in and of themselves a violation of the First Amendment, but rather the use of children is what is unprotected by the First Amendment.[98] This leaves open other channels for achieving the same end; using persons who appear to be younger would be one such example.

Fifth, "recognizing and classifying child pornography as a category . . . outside the protection of the First Amendment is not incompatible with our earlier decisions."[99] Moreover, the opinion acknowledges that determining whether a type of speech receives First Amendment protection is based on its content.[100] In this case, it is the content that determines to what extent it is obscene and either deserving of First Amendment protection or not.[101] Therefore, it is permissible to regulate child pornography in this way, because it is well settled that some categories are within a certain class of speech that are not protected and may be generalized as such.[102] The Court, it seems, pays its respect to well settled First Amendment jurisprudence and squarely aligns its decision in *Ferber* with the already established categories of speech that fall outside of First Amendment protection. By doing this, the rationales for keeping child pornography as an unprotected class are strengthened through its own reasoning and stare decisis.

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93 *Id.*
94 *Id.* at 761–92 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).
95 *Id.* at 762–63.
96 *Id.* at 762.
97 *Id.* at 763.
98 *See id.*
99 *Id.*
100 *Id.* (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66 (1976)).
101 *Id.* at 763.
102 *Id* at 763–64.

C. Child Pornography Prevention Act of 1996

After *Ferber*, Congress, with the Child Pornography Prevention Act of 1996 (the "CPPA"), expanded the definition of child pornography to include "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 . . . such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct."[103] The purpose of the CPPA was to address the problem of those images which, at the time, were being created by developing computer technology.[104] These newly created virtual images are "virtually indistinguishable" from "unretouched photographic images of actual children engaging in sexually explicit conduct" and therefore the definition needed to expand beyond what it previously encompassed to fit these changing technological capabilities.[105] Part of Congress' concern was the potential for future harm done to children in the circulation of the materials, because these virtual images could be used in the future to solicit real children for the making of child pornography.[106] Congress discussed its fear that sexual predators and those interested in viewing and creating child pornography would use these virtual images to "stimulate and whet their own sexual appetites."[107] The Court decided that, while this statute is objectively working to prevent a serious wrong that is prolific in our society, that this does not excuse the constitutional violation of the overbroad nature of the CPPA, which is addressed by the Supreme Court in *Ashcroft v. Free Speech Coalition*.[108]

While the nature of the CPPA was to address the problem Congress saw with the rise of child pornography and morphed imagery, their reach into the realm of images created without the use of children appears overboard and an unconstitutional violation of free speech.[109] The problem that Congress faces, however, is sometimes these images are indistinguishable from those images that implicate the interests of real children.[110]

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103 18 U.S.C. § 2256(8).

104 S. REP. NO. 104-358, at 7 (1996); *see also* Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2796 (2001).

105 S. REP. NO. 104-358, at 2 (1996); *see also* Sternberg, *supra* note 104, at 2796.

106 Steinberg, *supra* note 3, at 916; Sternberg, *supra* note 104, at 2786 (noting that child predators may use these online images to groom potential victims into believing the types of behavior they are encouraging them to engage in is normal and to allow them to victimize more children).

107 S. REP. NO. 104-358, at 2 (1996)

108 Ashcroft v. Free Speech Coal., 535 U.S. 234, 256, 258 (2002); Kornegay, *supra* note 43, at 2147.

109 Sternberg, *supra* note 104, at 2800.

110 S. REP. NO. 104-358, at 2 (1996); *see also* Sternberg, *supra* note 104, at 2796.

This illustrates the forefront problem with regulating morphed imagery – if Congress and the Courts ultimately decide they need to protect those images that do fall within First Amendment protection, there is likely going to be a class of persons continually affected by morphed imagery because there is no way to distinguish the materials and prohibiting all of them is unconstitutional under current legal frameworks. The moral and legal dilemma then is how far do First Amendment protections go when there are known consequences to upholding those protections, such as the dissemination of materials that include the images of known children engaged in sexually explicit actions. From a moral standpoint, it is obvious that one would desire to regulate every image because the protection of children is of the utmost importance.[111] However, the Supreme Court continually holds that morally abhorrent speech is protected because of the broad application of the First Amendment and that only historically well-established categories of speech will be excluded from protection.[112]

D. *Ashcroft v. Free Speech Coalition*

The constitutionality of the CPPA was challenged in *Ashcroft v. Free Speech Coalition*, and the question presented to the Court was whether it offended the First Amendment's freedom of speech protections to prohibit pornographic images of children that were digitally created in an ever changing technological world.[113] The respondents in *Ashcroft* challenged this type of regulation as overbroad, and the Supreme Court ultimately agreed.[114] The issue is the CPPA prohibits not only child pornography in its original sense, but also prohibits "sexually explicit images that appear to depict minors but were produced without using any real children."[115] The Supreme Court reasons that the types of images that are being regulated by the statute neither get at obscenity under the *Miller* standard nor conform to the definition of child pornography set forth in *Ferber*.[116] This is because, as a general rule, prohibitions are only proper when pornography is obscene, and therefore fall outside of First Amendment protections, or if the works include images of children for all of the reasons set

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111 *See, e.g.*, New York v. Ferber, 458 U.S. 747, 757 (1982).

112 United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 818 (2000) (noting that "moral judgements about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority"); *see also* U.S. CONST. Amend. 1; *See generally* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011) (holding that violent video games were protected by the First Amendment).

113 Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40 (2002).

114 *Id.* at 258.

115 *Id.* at 239.

116 *Id.*

forth in *Ferber*.[117] Before the enactment of the CPPA, there were two ways the government could restrict child pornography: either under the obscenity standard set forth in *Miller* or through *Ferber's* prohibition of child pornography produced through the abuse of children.[118]

Miller requires the Government to prove the work in question "taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value."[119] The CPPA does not require the threshold of what interest the materials appeal to, only that they be depictions of children engaged in sexual acts.[120] Thus, a picture containing depictions of minors engaged in sexually explicit activity, even if it has redeeming qualities or if it only *appears* to be minor engaged in the activity, would be a violation of the CPPA.[121] Moreover, works with only a few instances of what the CPPA determines as outside of protections would as a whole be prohibited, when *Miller* emphasizes taking the work as a whole to determine obscenity.[122]

One of the primary rationales for the blanket prohibition of child pornography in *Ferber* was its intimate relationship to the harms caused to children, both in the depiction of the sexual abuse of children and in the harms cause through repeated distribution.[123] Starting with the proposition that "pornography can be banned only if obscene" *Ferber* laid out the foundation for when child pornography can be banned without it also conforming to *Miller.*[124] The Court made distinctions between virtual pornography and traditional child pornography, the former being what Congress aimed to regulate in the CPPA.[125] Virtual pornography are those original images that are computer, computer generated, or produced by traditional means that portray what looks as if there are minors engaged in sexually explicit conduct.[126] The Court held, despite there being an interest in protecting children from the harm caused by child pornography, that the CPPA went too far in regulating virtual images to prevent

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117 *Id.* (emphasizing that child pornography enjoys no protection under the First Amendment whether it is obscene or not).

118 New York v. Ferber, 458 U.S. 747, 764 (1982); Miller v. California, 413 U.S. 15, 24–25 (1973); Brian G. Slocum, *Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 650 (2004).

119 *Ashcroft*, 535 U.S. at 240; *Miller*, 413 U.S. at 24.

120 *Ashcroft*, 535 U.S. at 240.

121 *Id.* at 241.

122 *Id.* at 246; *Miller*, 413 U.S. at 24–25.

123 *Ashcroft*, 535 U.S. at 240; *Ferber*, 458 U.S. at 759.

124 *Ashcroft*, 535 U.S. at 240; *Miller*, 413 U.S. at 24.

125 *Ashcroft*, 535 U.S. at 241.

126 *Id.*

future harm.[127]

The Supreme Court declined to address the underlying and growing issue: the issue of morphed imagery. However, the Court acknowledges that these types of images may fall closer to the *Ferber* standard because the interests of real children are implicated.[128] Morphed images are created when innocent pictures of real children are altered in such a way that the child appears to be engaged in sexual activity or combined with either a virtual image or an image of an adult who is engaged in sexual activity.[129] Congress was determined after the decision in this case to find a workable solution aimed at curbing the rise of these morphed images, while also maintaining the protections of Free Speech.[130]

E. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003

In response to the decision in *Ashcroft*, Congress again considered the rising issue of virtual child pornography and morphed imagery with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the "PROTECT Act").[131] Congress recognized the *Ferber* decision may not have been able to fully encompass where the technology was headed because the technology to create virtual pornography and morphed images did not exist at the time *Ferber* was decided.[132] Moreover, many believe that *Ashcroft* was incorrectly decided, because the CPPA failed to acknowledge the implications regarding real harm done to real children that were at the forefront of the *Ferber* decision.[133]

At the time of the PROTECT Act, the technology was capable of creating:

> Computer generated depictions of children that are indistinguishable from depictions of real children; use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; disguise pictures of real children being abused by making the image look computer generated.[134]

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127 *Id.* at 245.
128 *Id.* at 242.
129 *Id.; see also* Steinberg, *supra* note 3, at 919.
130 Steinberg, *supra* note 3, at 919.
131 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (2003).
132 *Id.*
133 Kornegay, *supra* note 43, at 2147.
134 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650, 676 (2003).

The technology available at the time of the PROTECT Act allowed creators to manipulate images such that they became unidentifiable as either real children or if they had been created virtually.[135] Congress is clear regarding the *Ashcroft* holding: its backlash is already apparent, and it is creating problems for the prosecution of child pornography.[136] The congressional findings put forth the troubling situation, because the burden of proof is on the government to prove that a real child is harmed in the specific pornography at issue, with the advent of new technology it is harder for the government to prove leading more persons to assert that the images at issue are not of real children.[137]

This Act is known as a gray area in the law of child pornography.[138] Because the court in *Ashcroft* decided not to weigh in on the issue of morphed imagery, Congress had leeway in finding a workaround to the holding of *Ashcroft*.[139] It appears that because the Supreme Court failed to weigh in on the issue, they may have been looking for Congress to readdress their concerns from the PROTECT Act and try to find another remedy to the situation that would not violate the Freedom of Speech. Again, this case further exemplifies the difficulty in finding a balance between protecting a liberty interest and protecting children, where technology makes its nearly impossible to differentiate between the two types of pornography at issue.[140]

F. *United States v. Stevens*

The court in *Ferber* found that child pornography is outside of the First Amendment protection not by engaging in a "balancing of competing interests," but because the production of child pornography necessarily involves child abuse, which is illegal, and is already within a well-established category of speech that historically lies outside of the bubble of First Amendment protection.[141] In *United States v. Stevens*, the Court stated their previous decisions related to child pornography and other First Amendment claims "cannot be taken as establishing a freewheeling authority to declare new

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135 Kornegay, *supra* note 43, at 2148.

136 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650, 677 (2003); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 263 (2002) (O'Connor, J., dissenting) ("Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual-child pornography may evade liability by claiming that these images . . . are in fact computer-generated.").

137 Kornegay, *supra* note 43, at 2148.

138 Steinberg, *supra* note 3, at 918.

139 *Id.* at 919.

140 *See* Kornegay, *supra* note 43, at 2148.

141 United States v. Stevens, 559 U.S. 460, 471 (2010); *see also* New York v. Ferber, 458 U.S. 747, 765 (1982).

categories of speech outside the scope of the First Amendment."[142] Moreover, they urge that the proper inquiry in addressing child pornography is as a category of speech outside of the First Amendment, and not based on a "simple cost benefit analysis."[143]

Because of this, there is no clear way for the courts to address the issue of morphed imagery when it is presented. The Supreme Court has given little guidance when it comes to morphed imagery. Only those images created without any identifiable child and not implicating the interests of a child will be protected by the First Amendment.[144] In other words, virtual pornography is protected. At the other end of the spectrum, those images that obviously involve the abuse of children, as evidenced by the holding in *Ferber*, will not be protected under the First Amendment.[145] The middle ground is when the images implicate the interest of children, but does not involve the abuse of those children.[146] Courts are left to wade through the complicated legal and legislative history. This has resulted in a circuit split. The Second, Fifth, and Sixth Circuits all indicate that this imagery falls outside of First Amendment protection while the Eighth Circuit has held that this falls within the protections of the First Amendment.[147] The foregoing analysis lays the foundation for establishing the current middle ground in the regulation of child pornography.[148] The following analysis presents the circuit split and the analysis each Circuit has taken on this issue.

IV. CIRCUIT SPLIT

A. Second Circuit

The Second Circuit addressed the issue in *United States v. Hotaling* in 2011.[149] The defendant, Hotaling, was charged for having created and in his possession child pornography of six minor females, which he had digitally altered through "morphing."[150] He had imposed the heads of the minor females from nonpornographic pictures onto the bodies of adult women who were engaged in "sexually explicit conduct."[151] Additionally, these images included

142 *Stevens*, 559 U.S. at 472.
143 *Id.* at 471.
144 Steinberg, *supra* note 3, at 911.
145 *Ferber*, 458 U.S. at 764.
146 Steinberg, *supra* note 3, at 911.
147 *See, infra* Section IV.
148 Steinberg, *supra* note 3, at 918.
149 United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011).
150 *Id.* at 727.
151 *Id.*

the actual names of the children whose pictures he used in creating these images.[152] The court focused on whether these types of morphed images implicated the same concerns that the Supreme Court laid out in *Ferber*.[153]

There is a "long recognized" assertion that "the government has a compelling interest in protecting minors from becoming victims of child pornography because of the physiological, reputational and emotional harm that the distribution of such material imposes on them."[154] Hotaling argued that these images were protected under the First Amendment because it was an expression of his "mental fantasies" and no actual children were harmed in the making of the images.[155] Moreover, he argued his pictures were distinguished from earlier cases from other circuits, because his morphed imagery did not include those images of children being abused in their production and is therefore distinguished from an Eight Circuit holding and protected under the First Amendment.[156]

The first issue the court tackled was whether morphed child pornography, which shows the face of a child, but the body of an adult, is protected expressive speech under the First Amendment.[157] The Second Circuit was clear, "the interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts."[158] Hotaling's argument was therefore rejected; it is inconsequential if the explicit images included minors.[159] The Second Circuit distinguishes this case from *Ashcroft* because "the interests of actual minors are implicated"— there were identifiable faces of minors edited in such a way that the identifiable portion of the pictures were of those faces of minors and further the defendant had used the actual names of the girls on many of the images.[160] It seems natural the court would have chosen to align these images with that of *Ferber* considering the gravity of harm done and the recognizable nature of the children involved. However, the court does not give any indication what it might have done if it was not as clear whether these images included the interests of

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152 *Id.*

153 *Id.* at 728–29.

154 *Id.* at 728.

155 *Id.* at 727.

156 *Id.* at 729; *see* United States v. Bach, 400 F.3d 622, 632 (8th Cir. 2005) (holding that the defendant's morphed imagery was outside of the protection of the First Amendment for expressive images because the images used and morphed the faces of minors engaging in explicit sexual conduct, thereby implicating the concerns of the Ferber court that real children were harmed in the production of those images).

157 *Hotaling*, 634 F.3d at 728.

158 *Id.* at 729–30.

159 *Id.* at 730.

160 *Id.* at 729–30.

identifiable children.[161] As far as the Second Circuit is concerned, this appears to be a lingering issue without a remedy.[162]

B. Fifth Circuit

The Fifth Circuit similarly held to keep morphed images depicting identifiable minors outside of the realm of First Amendment protection in *United States v. Mecham*.[163] Here, the court considered to what extent the First Amendment protected images that are between real child pornography and virtual child pornography.[164] In this case, the defendant, Clifford Mecham, had digitally altered images of adults engaged in sexually explicit conduct to include the faces of his minor grandchildren which made them appear to be engaging in the sexual conduct.[165] The court phrases the issue of morphed imagery as "[u]nlike virtual pornography, this "morphed" child pornography uses an image of a real child [and] [l]ike virtual pornography, however, no child actually engaged in sexually explicit conduct."[166] The court in *Mecham* reaffirms that obscenity is outside of First Amendment protection.[167]

However, the court states material including sexual imagery in and of itself does not make it inherently obscene, and therefore outside of First Amendment protection, and goes on to discuss the development of the Supreme Court's approach to child pornography regulation.[168] Moreover, the court emphasizes that in *Ashcroft*, while not addressing the issue of morphed child pornography directly, states that morphed images do "implicate the interest of real children and are in that sense closer to the images in *Ferber*."[169] The challenge for the Fifth Circuit was, since the Supreme Court had not yet weighed in on the issue of morphed imagery, to determine whether the images at issue are "close enough to real child pornography to constitute unprotected speech."[170] The Supreme

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161 *See generally id.*

162 *See generally id.*

163 United States v. Mecham, 950 F.3d 257, 267 (5th Cir. 2020).

164 *Id.* at 260.

165 *Id.*

166 *Id.*

167 *Id.* at 261.

168 *Id.; see also* Roth v. United States, 354 U.S. 476, 487 (1957) (stating that sex and obscenity are not one in the same and is therefore not sufficient in and of itself to be denied Constitutional protection because of obscenity and for sex to be obscene it must be "material which deals with sex in a manner appealing to prurient interest.").

169 *Mecham*, 950 F.3d at 263 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002)).

170 *Id.* (nothing that to determine if images are protected or not within the meaning of the First Amendment jurisprudence it is necessary to determine whether they are more like imagery that involves the direct abuse of children, i.e., traditional child pornography, or

Court has suggested that these types of images do fall close to traditional images of child pornography, which involve the direct abuse of children, rather than wholly virtual child pornography and therefore are unprotected.[171] Thus, the Fifth Circuit's analysis turns on the issue of whether there was an identifiable minor included in the pictures, just as the Second Circuit had done.[172]

Mecham argued that due to the absence of the underlying sexual abuse of children, and the fact that there was no pictured abuse, his images were entitled to protection.[173] This argument relies on *United States v. Stevens*, which held that animal "crush" videos could not be categorically excluded from First Amendment protection because the underlying criminal conduct was absent.[174] This argument was rejected because despite there not being any child abuse portrayed in the morphed images, these images do compromise "the reputational and emotional harm to children that has long been a justification for excluding real child pornography from the First Amendment."[175] The Fifth Circuit goes on to argue that because there is more jurisprudence on the issue of child pornography and the harms done to children in the process that *Stevens* is not persuasive enough to conclude otherwise.[176]

One of the major concerns the Fifth Circuit found was that "limiting the categorical exclusion of child pornography to images depicting criminal abuse of children [would] be . . . significant."[177] The court discussed that this is due to the fact that the definition for child pornography does not solely include sexual abuse of a minor, but also includes those images of a minor that depict "lascivious exhibition of the anus, genitals, or pubic area."[178] The court reasons that taking on this view of child pornography would exclude many prosecutions involving children that do not depict actual abuse and therefore limit even those

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whether they more closely emulate images that are wholly virtual, i.e., images that do not involve the interests of real children).

171 *Id.* at 263 (nothing that to determine if images are protected or not within the meaning of the First Amendment jurisprudence it is necessary to determine whether they are more like imagery that involves the direct abuse of children, i.e., traditional child pornography, or whether they more closely emulate images that are wholly virtual, i.e., images that do not involve the interests of real children).

172 *Id.*; *see generally* United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011).

173 *Mecham*, 950 F.3d at 263.

174 *Id.* at 263–64 (distinguishing the Eighth Circuit case which held that the important factor under *United States v. Stevens* was whether the underlying criminal conduct was present and therefore child pornography must include the actual abuse of a child, whether it is a child whose face is included or not, to be excluded from First Amendment protection).

175 *Id.* at 265; *see also* Doe v. Boland, 698 F.3d 877, 834 (6th Cir. 2021); *Hotaling*, 634 F.3d at 725.

176 *Mecham*, 950 F.3d at 265.

177 *Id.*

178 *Id.* at 266.

prosecutions of traditional child pornography.[179] Therefore, the Fifth Circuit held "because morphed child pornography depicts an identifiable child, it falls outside the First Amendment."[180] Again, the issue falls closer to the standard set forth in *Ferber*, but the Fifth Circuit does not address the concern of technology's ability to make it appear as if the interests of real children are implicated.[181] It appears, however, the Supreme Court is not yet ready to address the circuit split or the issue of whether morphed images are protected speech as this case was denied certiorari on petition to the Supreme Court.[182]

C. Sixth Circuit

The Sixth Circuit in *Doe v. Boland* similarly held morphed imagery as being closer to real child pornography and therefore outside of First Amendment protection.[183] Boland, a lawyer and expert of technology, downloaded stock images of children and morphed their faces onto adult bodies engaged in sexual activity.[184] The court affirmed many of the same principles in *Ferber* when they stated "governments have a compelling interest in protecting children from abuse, the value of using children in pornography is nonexistent, and the market for child pornography is 'intrinsically related' to the underlying abuse."[185]

The Sixth Circuit also paid attention to the Supreme Court's reticence in addressing the issue of morphed images, but took into account its mentioning of the problem with morphed imagery is that it does include real children and therefore may lean more towards real child pornography than wholly virtual child pornography.[186] The court used the argument from *Ashcroft* that the categorical ban on virtual images violated the First Amendment because there was no harm to actual children, but left over the question of morphed imagery implying that this type of imagery leans more towards the traditional definition of child pornography because those images "implicate the interests of real children."[187] The first rejection to the protection under the First Amendment is that there is actual harm done to actual children and the second rejection is the small level of expressive value in morphed imagery.[188]

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179 *Id.* at 266–67.
180 *Id.* at 267.
181 Kornegay, *supra* note 43, at 2148.
182 *Mecham*, 950 F.3d at 266–67, *cert. denied*, 950 F.3d 257 (5th Cir. 2020).
183 Doe v. Boland, 698 F.3d 877, 884 (6th Cir. 2012).
184 *Id.* at 879 (6th Cir. 2012) (setting forth the defendant's purpose was to prove that persons may not always be aware when they are viewing child pornography).
185 *Id.* at 883 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).
186 *Id.*
187 *Id.*
188 *Id.*

In *Boland,* real children are involved in the images and are clearly identifiable.[189] Moreover, the court identifies the second reasoning for refusing to protect these images under the First Amendment is "[t]he relatively weak expressive value of morphed images."[190] The court clearly made their position known: "[t]he 'evil' of child pornography 'so overwhelmingly outweighs the expressive interests, if any, at stake' in this form of communication that lies categorically beyond constitutional protection, meaning that 'no process of case-by-case adjudication is required' to uphold restrictions on it."[191] Because of these arguments, the Sixth Circuit also held that morphed imagery is not protected under the First Amendment.[192] The Sixth Circuit follows the same logical reasoning as the Second and Fifth Circuit—when the interests of an identifiable minor are implicated, the images are clearly unprotected.[193] However, the court left open the issue of when these images clearly are not virtually created, but may not necessarily implicate the interests of real, identifiable children.[194]

D. Eighth Circuit

The Eighth Circuit, on the other hand, has found that morphed images do not fall outside of First Amendment protection.[195] In this case, defendant Anderson sent pictures over Facebook to his minor half-sister that had her face superimposed over the face of an adult women engaged in sexually explicit activity.[196] The court relied on the following two previous cases that addressed the issue of child pornography and First Amendment protection.[197] The first is *United States v. Stevens*, discussed in detail above.[198] The Supreme Court determined that "child pornography was categorically unprotected in *Ferber* because it involved visual depictions that were produced through sexual abuse of one or more children."[199] Furthermore, the court affirmed that First Amendment protection does not depend on a "simple cost-benefit analysis," but is given to every category of speech that was seen to be historically included within the protections of the First Amendment.[200] The Supreme Court relied on

189 *Id.*
190 *Id.*
191 *Id.* (quoting New York v. Ferber, 458 U.S. 747, 762–63 (1982)).
192 *Id.* at 884
193 United States v. Mecham, 950 F.3d 257, 265 (5th Cir. 2020).
194 *Id.*; United States v. Hotaling, 634 F.3d 728 (2d Cir. 2011).
195 United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014).
196 *Id.* at 893.
197 *Id.* at 894.
198 *Id.*
199 United States v. Stevens, 559 U.S. 460, 471 (2010); *Anderson*, 759 F.3d at 894.
200 *Stevens*, 559 U.S. at 471; Anderson, 759 F.3d at 894.

Ferber's holding that child pornography has been historically outside of the protections of the First Amendment and not as a result of a cost-benefit analysis.[201]

The second case relied on by the court, and by the defendant in his argument, was *United States v. Bach*, where the underlying sexually explicit image was that of a minor and therefore "implicated the interests of real child and . . . record[ed] a crime."[202] The court in *Bach* identified that the underlying concerns from *Ferber* were implicated and thus the pictures were unprotected speech.[203] However, the images in *Anderson* were those of an adult woman with the digitally imposed face of a minor, meaning no child was abused in the production of the image.[204] Using *Stevens* as a guide, the Court determined that the evidence was enough to prove that the images produced by *Anderson* were not within the class of speech protected by the First Amendment.[205] Therefore, to determine if these morphed images fall outside of First Amendment protection, they would either need to include the underlying criminal conduct or be within a category historically unprotected by the First Amendment.[206]

The Eighth Circuit takes the approach that Congress was concerned with when enacting the PROTECT Act.[207] Because the Eighth Circuit relies so heavily on the underlying criminal conduct and the historical buckets of protection under the First Amendment, there is a huge class of persons affected by these images that are without legal recourse in the Eighth Circuit.[208] Without this protection, the millions of images not involving the abuse of children but including the interests of an identifiable minor will be protected speech under the First Amendment. The Eighth Circuit gives too much credence to cases, such as *Stevens*, that factually did not involve the interests of children, but were discussing obscenity within the context of materials involving adults.[209]

V. LEGAL ANALYSIS

Child pornography laws attempt to reconcile two extremely compelling but often competing interests: first, the interest of protecting the freedom of speech as guaranteed by the First Amendment and second, the interest in protecting

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201 New York v. Ferber, 458 U.S. 747, 750 (1982); *Anderson*, 759 F.3d at 894.
202 *Anderson*, 759 F.3d at 894; United States v. Bach, 400 F.3d 622, 632 (8th Cir. 2005).
203 *Anderson*, 759 F.3d at 894; *Bach*, 400 F.3d at 632.
204 *Anderson*, 759 F.3d at 895.
205 *Id.* at 893–94.
206 *Id.* at 894.
207 *Id.*
208 Kornegay, *supra* note 43, at 2148.
209 United States v. Stevens, 559 U.S. 460, 471 (2010).

children from sexual exploitation and abuse.[210] The "compelling nature of the government's interest in preventing the sexual exploitation of children" is balanced "against the First Amendment interests implicated in content-based prohibitions of speech."[211] Early Supreme Court decisions could have hardly imagined the technological advances that would make it possible to create the same images without having sexually abused children in the creation of the images. While it is true that children whose faces are used in the production of morphed imagery will not have the ultimate trauma of having survived sexual abuse, they are nonetheless harmed by the photos production as supported by the holdings of the Second, Sixth, and Eighths circuits.[212] One issue associated with child pornography, caused by the rapid growth of technology, is that child pornography has become so pervasive in society that it is "nearly commonplace, and the minors who comprise these images number in the hundreds of thousands."[213] Millions of child pornography images are shared on the internet through social media platforms, totaling over 45 million images reported by major tech companies such as Facebook and WhatsApp.[214]

The Supreme Court should follow Congress and the Second, Sixth and Eighth Circuits and find morphed imagery to fall outside of the protections of the First Amendment—especially when there is an identifiable child used in the picture. Morphed images often involve the use of innocent photographs of children found on the internet, usually shared by their parents and found on social media.[215] More often than not, the children used in the morphed images "were never photographed for pornographic purposes."[216] These children often suffer trauma once the image has been circulated and there is typically no easy way to ensure the image is forever deleted from the internet.[217]

Since *Ferber*, courts have consistently emphasized government's concern with the harm done to children. In *Ferber*, this harm was obvious, as the images implicated the physical and psychological well-being of the children depicted in the images.[218] The circuits that have held morphed imagery as close to traditional child pornography have consistently emphasized this underlying harm to children, regardless of whether or not the child was actually abused in the

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210 Slocum, *supra* note 119, at 639.
211 *Id.*
212 Steinberg, *supra* note 3, at 912.
213 Leary, *supra* note 40, at 9.
214 Katie Benner & Mike Isaac, *Child Welfare Activists Attack Facebook Over Encryption Plans*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com /2020/02/05/technology/facebook-encryption-child-exploitation.html.
215 Steinberg, *supra* note 3, at 919.
216 *Id.*
217 *Id.* at 912.
218 New York v. Ferber, 458 U.S. 747, 756–57 (1982).

making of the images.[219] Since *Stevens*, the Supreme Court has left no doubt that it understands the unique problem child pornography poses today.[220] Further, the Court underscores that the reproduction, distribution, and possession of these images furthers the abuse felt by victims of these images.[221] The demand for child pornography "harms children [because] it drives production."[222] The Supreme Court in 2014 acknowledged the role technology plays in the exacerbation of this problem because of the ease with which images are now traded.[223]

The Supreme Court in *Ashcroft*, despite its rejection of upholding the legislation of child pornography, did not hold that morphed imagery was unprotected speech within the meaning of the First Amendment.[224] Instead, "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*" leaving open the possibility of regulation of these images down the road.[225] The Court underscored the importance of protecting children and the types of harms children face in the creation and distribution of these morphed images.[226]

Since *Ashcroft* was decided in 2002, technology has evolved in ways that the Supreme Court never could have imagined it would in just 20 years. In her dissent in *Ashcroft*, Justice O'Connor proposed that the analysis should turn on whether the image at issue implicated the interest of a person "virtually indistinguishable" from an actual child.[227] She believed that this language and analysis would adequately protect a person's right to the freedom of speech in

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219 *See* United States v. Hotaling, 634 F.3d 729–30 (2d Cir. 2011) (holding that the actual harm to minors was the fact that they were clearly identifiable in the pictures and therefore implicated their interests despite there being no underlying abuse done in the creation of the photographs); *see also* United States v. Mecham, 950 F.3d 257, 261 (5th Cir. 2020) (discussing that harms done to children in the creation and distribution of morphed images undoubtedly implicate the interests of real, identifiable children); *see also* Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012) (noting that the interests of real children are implicated in these images and there is no artistic or literary value in extending First Amendment protections to these images).

220 *See* Paroline v. United States, 572 U.S. 434, 439–40 (2014); *see* United States v. Williams, 553 U.S. 285, 299 (2008) (holding that the solicitation of child pornography or the offers to sell child pornography are categorically excluded form First Amendment protection even if both are for wholly virtual child pornography which is marketed as including real children).

221 *Paroline*, 572 U.S. at 436.

222 *Id.* at 439.

223 *Id.* at 440.

224 Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002).

225 *Id.* at 242.

226 *Id.* 241–42.

227 *Id.* at 265 (O'Connor, J., dissenting).

the realm of wholly virtual child pornography while also adequately protecting the rights of children.[228]

One example that the Supreme Court did not anticipate in its *Ashcroft* holding is the current problem with "deepfakes," which "refer to manipulated videos, or other digital representations produced by sophisticated artificial intelligence, that yield fabricated images and sounds that appear to be real."[229] The problem with this growing technology is that it is now readily available to anyone to create videos of persons that others will believe is real, even though it is not.[230] This technology is rapidly growing and becoming easier to use, and is already being used to create videos of political candidates, celebrities, and others which depict those persons saying things they never in fact said.[231] Furthermore, deep fake technology has already been used in the pornography context.[232] Any person's face, body, or voice can now be used with the help of deepfake technology to create pornographic videos in which (1) an adult never consented or (2) that does not depict the actual sexual abuse of a child.[233] This type of technology poses a problem for the current standing of child pornography regulations. Justice Thomas, in his concurrence in *Ashcroft*, warned precisely of this problem stating, "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."[234]

One parallel area of pornography regulation is "revenge porn"—or "sexually explicit images of a person posted online without a person's consent especially in the form of revenge or harassment."[235] Forty-six U.S. states have passed laws making it a crime to distribute pornographic materials known as "revenge porn."[236] This is clearly harmful to a person's psychological well-being and physical safety.[237] For example, the District of Columbia's regulation of revenge

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228 *Id.* at 264 (O'Connor, J., dissenting).

229 Grace Shao, *What 'Deepfakes' Are and How They May Be Dangerous*, CNBC (Jan. 17, 2020), https://www.cnbc.com/2019/10/14/what-is-deepfake-and-how-it-might-be-dangerous.html.

230 *Id.*

231 Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1756–57 (2019); Shao, *supra* note 230 (noting this technology has already been used to create videos of politicians making inflammatory statements that people then believe are real).

232 Chesney, *supra* note 232, at 1772–73.

233 *See id.*

234 Ashcroft v. Free Speech Coal., 535 U.S. 234, 259 (2002) (Thomas, J., concurring).

235 *Revenge porn*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/revenge%20porn (last visited Apr. 17, 2021).

236 *46 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 14.

237 Taylor Linkous, *It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 14, 14 (2014).

porn defines the harm as "any injury, whether physical or nonphysical, including psychological, financial, or reputational injury."[238] Oftentimes, these images are initially created with consent, but then subsequently shared without consent.[239] The law in this area focuses both on the distribution and the disclosure of these images.[240]

The concerns associated with child pornography are akin to the concerns associated with revenge porn, as the courts and legislature have both focused on the harms done as a result of the images. However, the difference with revenge porn is that the images contain *adults* rather than *children*. Forty-six states have already determined that the nonconsensual sharing of images of adults taken originally with consent is enough for criminal penalties.[241] If the harm done by these "revenge porn" images is enough to prohibit the extension of First Amendment protections, then certainly those morphed images which implicate the physical, emotional, and mental well-being of a child should also be enough for those images to also fall outside of the protections of the First Amendment.

Morphed images sit at a gap in law as it relates to child exploitation, with the conflicting interests of protecting children from their innocent images being used in an explicit way and the constitutional considerations and protections of free speech which the Supreme Court has placed limits in the area of a state's regulation of child pornography.[242] One state, Alaska, may provide a model to other states that are working within the Supreme Court's guidance to prohibit morphed images.[243] Alaska's statute provides that it is a crime to knowingly possess sexually explicit images that are a "depiction of a part of an actual child under 18 years of age who, by manipulation, creation, or modification, appears to be engaged in the conduct."[244] Alaska expanded its definition of child pornography to include those images which "make it appear that the actual child is engaged in sexual conduct."[245] The Alaska Court of Appeals determined that a defendant must only have a "substantial probability" that "the materials [the

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238 Criminalization of Nonconsensual Pornography Act of 2014, D.C. CODE § 22-3051–57 (2014).

239 Katherine Gabriel, *Feminist Revenge: Seeking Justice for Victims of Nonconsensual Pornography Through "Revenge Porn"* Reform, 44 VT. L. REV. 849, 852 (2020).

240 *Id.* at 855.

241 *See generally 46 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 14.

242 Daisy Gray, *Do You Know It When You See It? Using Alaska's Child Pornography Statute as a Nationwide Model for Proscribing Morphed Images*, 38 ALASKA L. REV. 231, 233 (2021).

243 *Id.*

244 ALASKA STAT. § 11.61.127(a) (2021).

245 Gray, *supra* note 243, at 233.

defendant] possessed depicted a minor."[246]

Alaska's approach takes into consideration the need to protect the First Amendment right to freedom of speech, while also accepting that these morphed images "harm children in a manner distinct from virtual child pornography, implicating the perceptible interests of actual minors."[247] Because the Supreme Court has not yet weighed in specifically on the issue of morphed images, it is imperative that states follow in the footsteps of Alaska and criminalize morphed imagery.[248] This approach also satisfies strict scrutiny and the approach set forth in *Ferber*.[249] The state has a compelling interest in "protecting children from the psychological and reputational harms flowing from morphed images" and in the case of the Alaskan statute "[it] is narrowly tailored to address only pornographic images that have the potential harm to real children."[250]

Alaska, likewise, has criminalized the dissemination of revenge porn, leading to the conclusion that from a policy perspective the state believes that the nonconsensual sharing of an image that was taken with consent and the sharing of an image of a child who's identifiable likeness is used, although not necessarily depicting the abuse of that child, but depicting a recognizable child in images of sexually explicit conduct, is worth regulation.[251] Other states should follow in Alaska's footsteps and implement legislation that is narrowly tailored to serve the end of prohibiting morphed imagery that uses identifiable children.[252] This would serve a legitimate public and state interest and at the same time respect the fundamental right set forth in the Constitution protecting the freedom of speech. Furthermore, "because Alaska's statute both functionally prohibits the range of conduct that is capable of harming children while remaining narrowly tailored to that end, other states seeking to update their child pornography statutes should incorporate language from Alaska's."[253]

VI. CONCLUSION

Child pornography, or child sexual abuse material, is harmful. It is harmful to the children involved whether they were physically abused in the creation of the images or innocent images of them were morphed into depictions that made

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246 Ferrick v. State, 217 P.3d 418, 421 (Alaska Ct. App. 2010); Gray, *supra* note 243, at 246.

247 Gray, *supra* note 243, at 256.

248 *See generally id.*

249 *Id.* at 258–60.

250 *Id.* at 259 (discussing that the Alaska statute requires there to be the depiction of an actual minor under the age of eighteen for the image to be illegal under the statute).

251 *Id.* at 257–58.

252 *Id.* at 260–63.

253 *Id.* at 263.

them appear to be engaged in sexually explicit activity.[254] The internet has made this problem exceedingly worse; providing the channels for easy distribution of these images as well as allowing the market for child pornography to flourish.[255] The first step in addressing the issue of child pornography is to acknowledge how pervasive this issue is on internet platforms and figure out how to address these places that allow the proliferation of child sexual abuse imagery.

The natural starting point of child pornography regulation is to discuss the First Amendment protections as they relate to the freedom of speech. The First Amendment requires respect for the freedom of speech, and the government may only regulate speech based on its content when it passes a strict scrutiny test.[256] Traditional child pornography, which involves the creation of images through the, often violent, sexual abuse of minors, falls fully outside of the protections of the First Amendment.[257] Virtual child pornography, on the other hand, describes those images that are made through computer generated images and falls within speech protected by the First Amendment.[258]

The history of the regulation of these types of images has proved to be a battle of tug-of-war between the Supreme Court and the legislature in balancing the protections of the First Amendment right to the freedom of speech against need to ensure that children are adequately protected.[259] This has led to a circuit split that falls short of resolving the problem across the board for child pornography regulation.[260] The Supreme Court should follow Congress and find that morphed imagery falls outside of First Amendment protections. much like the criminalization of revenge porn, morphed child pornography implicates the physical and psychological well-being of children, who are continually harmed with the distribution of these images. [261] Furthermore, the Supreme Court should find that laws prohibiting morphed child imagery, much like those in Alaska, are narrowly tailored and pass strict scrutiny.[262] As the Supreme Court noted in *Ashcroft*, these images uniquely implicate the interests of real children, whose pictures and faces are used to create sexually explicit images.[263] The Supreme Court noted that this makes morphed imagery fall closer to traditional images of

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254 *See generally Child Sexual Abuse Material*, *supra* note 6.
255 *Child Pornography*, *supra* note 8; *Child Sexual Exploitation and Technology*, *supra* note 27.
256 U.S. CONST. amend. I.; Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).
257 New York v. Ferber, 458 U.S. 747, 764 (1982).
258 Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).
259 *See supra* Part III & IV.
260 *See supra* Part IV.
261 Linkous, *supra* note 238, at 11–13; Keller, *supra* note 2.
262 Gray, *supra* note 243, at 263.
263 Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002).

child pornography, meaning that the possibility of regulation is left open.[264] Thus, with support from the Supreme Court and a clear indication from Congress, throughout their legislative history on this issue, that they wish to regulate these types of images, the Supreme Court should follow the Second, Fifth, and Sixth Circuits and hold that morphed child pornography falls outside of First Amendment protections.[265]

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264 *Id.*

265 *See supra* Part III & IV.