SHOULD "MORPHED" CHILD PORNOGRAPHY FALL UNDER THE PROTECTION OF THE FIRST AMENDMENT'S FREE SPEECH CLAUSE?

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I. INTRODUCTION

It is well established that the First Amendment's free speech clause does not protect the production or exchange of *real* child pornography—material that exhibits the *real* abuse or sexual conduct of children.[1] However, virtual child pornography, where no real children are required for its production, is still a widely contended topic among courts.[2] Although seemingly simple, this subject walks a fine line between the protection of free speech and the public interest in protecting children from abuse.[3] With the overwhelming advancements in editing and digital technology, there have undoubtedly been new obstacles for lawmakers and prosecutors in terms of creating laws to control this issue.[4] These advancements have made it difficult to distinguish between what images contain real children and what images contain, so called, *fake* children or some other hybrid form.[5]

There are three general categories of virtual child pornography.[6] The first is computer-generated child pornography, which is made without the use of real children or images of real children.[7] Therefore, the children depicted in these sorts of films are completely fictional and fabricated.[8] The second is child pornography that is created with the use of youthful-looking adults who role play as children.[9] Both are considered legal, as the first does not involve the harming or use of real children and the second involves films or images between consenting adults.[10] The focus of this Comment is on the third category—morphed child pornography—a subject that falls in the middle of what is considered real child pornography and completely computer-generated child pornography.[11] Morphing is developed by using actual photos or videos

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1. Shepard Liu, Ashcroft, *Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2007); U.S. CONST. amend. I.

2. Liu, *supra* note 1, at 3; United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

3. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).

4. David L. Hudson Jr., *Virtual Child Pornography*, FREEDOM F. INST., http://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/virtual-child-pornography/ (last updated Sept. 18, 2017).

5. *Id.*

6. Liu, *supra* note 1, at 2.

7. *Id.* at 3.

8. *See id.*

9. *Id.* at 2.

10. Virginia F. Milstead, Note, Ashcroft v. Free Speech Coalition: *How Can Virtual Child Pornography Be Banned Under the First Amendment?*, 31 PEPP. L. REV. 825, 834–35 (2004).

11. Liu, *supra* note 1, at 2; United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

of children, which can then be digitally manipulated to create an entirely different sexualized image.[12] For example, this can be accomplished by superimposing the faces of children onto the bodies of adults engaging in sexual conduct.[13] With these methods, there are many ways that a child predator could use superimpositions to create child porn.[14]

Circuit courts have disagreed on whether morphed child pornography should be categorized as a protected speech, since it seems to be the middle ground between what has historically been unprotected and what is still considered protected under the First Amendment.[15] In February 2020, *United States v. Mecham*[16] brought the issue before the Fifth Circuit.[17] The Fifth Circuit acknowledged the arguments on both sides, but ultimately joined the Second and Sixth Circuits in its decision to exclude morphing from First Amendment protection.[18] More importantly, the court in *Mecham* dissected and rejected the main argument brought forth in the Eighth Circuit, which supports that morphing should be categorized as protected speech.[19] Further, the Supreme Court decided not to review the decision in *United States v. Mecham*.[20] Thus, the Supreme Court has failed to guide courts on how to address this issue uniformly.[21]

This Comment will discuss the legislative history of child pornography, the different cases and arguments surrounding the current circuit split, and the newest case to add an opinion on the issue of morphed child pornography.[22] Ultimately, this Comment will argue that morphed child pornography should not fall within the protections of the First Amendment and that the absence of clear precedent on this issue, along with conflicting arguments across circuits calls for judicial review at the Supreme Court level.[23]

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12. Liu, *supra* note 1, at 3.
13. *Mecham*, 950 F.3d at 260.
14. *See id.*
15. *See id.* at 265.
16. 950 F.3d 257 (5th Cir. 2020).
17. *Id.* at 257.
18. *Id.* at 265.
19. *See id.* at 266–67.
20. 141 S. Ct. 139 (2020) (*cert. denied)* (referring to United States v. Mecham, 950 F.3d 257 (5th Cir. 2020)).
21. *See id.*
22. *See infra* Parts III, IV, V.
23. *See infra* Part VI.

II. THE SOCIETAL IMPACT OF VIRTUAL CHILD PORNOGRAPHY

The sexual abuse and exploitation of children through child pornography has always been a significant national concern.[24] Unfortunately, the internet has created new avenues for child abusers to commit crimes behind the comfort of their screens.[25] According to the United States Sentencing Commission, more than half of all internet child pornography content is of infants and toddlers.[26] Thus, not only does internet child pornography exploit the weakest members of our society, but it also creates a forum in which abuse is permanent and can be further circulated.[27] Children who fall victim to any form of child pornography on the internet experience extreme emotional and psychological harm.[28] Child pornography has shown to be a new form of abuse since child molesters no longer have to physically abuse their victims.[29] Instead, they can easily manipulate child victims into performing acts or posing for a camera, which can later be used for sexual purposes.[30] Victims of this abuse often suffer from anxiety, depression, isolation, and may even develop their own sexual behavioral issues.[31] For obvious reasons, the most negative outcomes appear in individuals who have experienced abuse from a father figure or have experienced abuse for a long duration of time.[32]

Similarly, victims whose images have circulated the web experience deep shame and embarrassment at the thought that someone will recognize them from images of their abuse.[33] As a result, victims of child pornography are forced to relive their abuse over and over again.[34] Clinical psychologists note that many victims struggle to identify a time when their abuse ended and cannot find closure, even as adults.[35]

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24. New York v. Ferber, 458 U.S. 747, 757 (1982).

25. RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY: CAUSES, INVESTIGATIONS, AND PREVENTION 2 (Graeme R. Newman ed., 2012).

26. U.S. SENTENCING COMM'N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY NON-PRODUCTION SENTENCES 4 (2021), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf; Emily Riley, *Internet Blamed for Increase in Child Porn*, CRIME REP. (June 29, 2021), http://thecrimereport.org/2021/06/29/internet-blamed-for-increase-in-child-porn/.

27. Sarah Sternberg, Note, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2785 (2001).

28. *Id.*

29. WORTLEY & SMALLBONE, *supra* note 25, at 75.

30. *Id.*

31. *Id.* at 72.

32. *Id.* at 73.

33. *Id.* at 77.

34. *See* WORTLEY & SMALLBONE, *supra* note 25, at 77.

35. *See id.* at 77.

Aside from the various harms imposed on victims, child pornography acts as a tool for child molesters to seduce children into normalizing sexual activity with adults.[36] Child molesters may use materials to persuade children into participating in creating sexual images which can be utilized to lure more child victims.[37] Child pornography viewers may also find support and encouragement in groups or forums that engage in the same content; forty-three percent of offenders have participated in some sort of an internet child pornography community.[38] The effects that child pornography has on its viewers are equally harmful.[39] When enacting child pornography legislation, Congress acknowledged that pedophiles use this content to self-gratify and stimulate their sexual appetites.[40]

Similarly, almost all pedophiles collect some sort of child pornography in an attempt to fulfill their fantasies or to collect ideas to perpetuate abuse.[41] In 2019, forty-eight percent of child pornography offenders, who were not charged with its production, committed some sort of "aggravating sexual conduct" before, or at the same time, as their offense.[42] These statistics comparatively increased from studies conducted in 2010, showing that there has been a steady incline in abrasive conduct by child pornographic viewers.[43] Experts have described child pornography as an addiction for pedophiles.[44] The addiction eventually intensifies and requires the individual to search for more graphic and explicit content to continue to achieve arousal.[45] Repeated exposure to the same stimuli will eventually require new content for the viewer's stimulation.[46] Thus, the user becomes desensitized to the content, no matter how extreme.[47] Additionally, child pornography viewers often experience a worsening of their personal relationships and problems.[48] One-third of people arrested for child pornography offenses between 2001 and 2006 were actively living with their significant other and experienced such issues.[49]

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36. Sternberg, *supra* note 27, at 2786.
37. *Id.*
38. Riley, *supra* note 26.
39. WORTLEY & SMALLBONE, *supra* note 25, at 82.
40. Sternberg, *supra* note 27, at 2786 (citing S REP. NO. 104-358, at 12 (1996)).
41. *Id.* (citing S REP. NO. 104-358, at 13).
42. U.S. SENTENCING COMM'N, *supra* note 26, at 6; Riley, *supra* note 26.
43. *See* U.S. SENTENCING COMM'N, *supra* note 26, at 6; Riley, *supra* note 26.
44. Sternberg, *supra* note 27, at 2786.
45. *Id.* at 2786–87.
46. WORTLEY & SMALLBONE, *supra* note 25, at 83.
47. Sternberg, *supra* note 27, at 2787.
48. WORTLEY & SMALLBONE, *supra* note 25, at 82.
49. *Id.*

The profitability and demand for different types of child pornography are what drive the market, a market that likely holds billions of dollars.[50] The fact that the distribution of this content is international poses an enormous challenge for its regulation and control.[51] For example, an image can be created in Asia, held in a server in Europe, and be accessed by an offender in North America.[52] Most of the time, child sexual abuse material is being investigated in the present jurisdiction where it is occurring.[53] However, when those materials cross jurisdictional boundaries, it becomes difficult for police departments and investigators to share that information.[54] Additionally, different countries have different laws pertaining to child pornography and its derivatives.[55] For example, Australia and the European Union have already gone as far as to outlaw all virtual child pornography, *even* fully computer-generated material.[56] On the other hand, in the United States, certain types of virtual child pornography are still constitutionally protected.[57] Prices for this content in the industry rarely decrease and because the chances of getting caught are less likely on the internet, child pornographic producers have no interest in stopping.[58]

Computers, cellphones, and other technological advancements have allowed for the expansion of child pornographic material.[59] Morphing software enables individuals to combine real images of children with pornographic images of adults.[60] Thus, the reality is that real children are no longer needed to produce child pornography.[61] In fact, because most child pornography is produced by family members or individuals who are close to the children, many victims would not even be aware that they are being used in pornographic contents.[62] Consequently, when the digital age changes the way child pornography is made, child pornography laws deserve a second look.[63]

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50. Sternberg, *supra* note 27, at 2787.
51. WORTLEY & SMALLBONE, *supra* note 25, at 2.
52. *See id.*
53. *See id.*
54. *See id.*
55. *Id.*
56. WORTLEY & SMALLBONE, *supra* note 25, at 5.
57. Milstead, *supra* note 10, at 834–35.
58. *See* Sternberg, *supra* note 27, at 2787.
59. 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, 641 (2004).
60. Sternberg, *supra* note 27, at 2788.
61. *Id.* at 2788–89.
62. WORTLEY & SMALLBONE, *supra* note 25, at 72, 74.
63. Sternberg, *supra* note 27, at 2789.

III. HISTORY OF REGULATIONS SURROUNDING REAL AND VIRTUAL CHILD PORNOGRAPHY IN THE UNITED STATES

Although the sexual abuse and exploitation of children are as old as humanity itself, internet child pornography is a relatively new phenomenon.[64] The miniature boom of child pornography occurred around the 1960s, as obscenity laws in other countries loosened.[65] For the first time, the United States set forth regulations to outlaw child pornography and to prohibit its importation.[66] By the 1980s, the internet had exponentially increased the amount of child pornography that was being produced and traded.[67] However, virtual child pornography, particularly morphed content, is what has become known as the legal gray area of this topic.[68] The only piece of legislation that sought to regulate virtual child pornography in the United States was introduced in 1996, as the Child Pornography Prevention Act ("CPPA"), which was later overturned in 2002.[69]

A. *The Miller Standard and its Application to Child Pornography*

In 1973, *Miller v. California*[70] created the current standard of review for obscenity.[71] Although not directly relating to restricting child pornography, *Miller* made an important distinction on what type of pornography is considered obscene.[72] Under the *Miller* test, the guidelines to determine whether material is obscene must be:

> (a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken

64. WORTLEY & SMALLBONE, *supra* note 25, at 1.
65. *Id.*
66. *Id.*
67. *Id.* at 2.
68. United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).
69. Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
70. 413 U.S. 15 (1973).
71. *Id.* at 24.
72. *Id.* at 36–37.

> as a whole, lacks serious literary, artistic, political, or scientific value.[73]

Although this test would certainly include some sort of child pornography, by nature it would not include all of them.[74] It would be even less likely that it includes child pornography that falls in the gray area of what is considered real and fake.[75] Because the Court in *Miller* failed to categorize child pornography as inherently obscene, future decisions were bound to be made to specifically attack this issue.[76]

B. New York v. Ferber: *Child Pornography as a Compelling State Interest*

In 1982, *New York v. Ferber*[77] established that child pornography is not protected by the First Amendment's guarantee of free expression.[78] In addition, the Supreme Court clarified that the government has a compelling interest in prosecuting individuals who partake in the creation of child pornography, as the sexual exploitation and abuse of children has always been a national concern.[79] Ultimately, the standards set forth in *Miller* were irrelevant to the issues of child pornography, as *Miller* only established that adult pornography was protected under the First Amendment, so long as the materials were not obscene.[80] Generally, *Miller* defined obscenity as images lacking "serious literary, artistic, political, or scientific value."[81] Ultimately, *Ferber* determined that the *Miller* case could not be used to examine the material of children engaging in sexual conduct and therefore, child pornography did not require proof of obscenity.[82]

In *Ferber*, the defendant sold two sexually explicit films to an undercover police officer.[83] The films depicted young boys engaging in sexual acts.[84] Under New York law, "[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he

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73. *Id.* at 24.
74. *See id.* at 27.
75. *Miller*, 413 U.S. at 27.
76. United States v. Mecham, 950 F.3d 257, 261–62 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020); *see also Miller*, 413 U.S. at 16.
77. 458 U.S. 747 (1982).
78. *See id.* at 764.
79. *See id.* at 760–61.
80. *Id.* at 761; *see Miller*, 413 U.S. at 24.
81. *Miller*, 413 U.S. at 24.
82. *Ferber*, 458 U.S. at 761; *see Miller*, 413 U.S. at 24.
83. *Ferber*, 458 U.S. at 751–52.
84. *Id.* at 752.

produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[85] Therefore, the defendant was convicted at the trial level under the New York statute.[86] However, because the statute did not require the obscenity standard set forth by *Miller*, the defendant claimed the statute was overly broad and appealed his convictions.[87] The Appellate Division of the New York Supreme Court affirmed the trial court's convictions.[88] However, the New York Court of Appeals agreed with the defendant and reversed the convictions on the grounds that the statute violated the First Amendment.[89] The Supreme Court of the United States granted the state's petition for certiorari.[90]

The Supreme Court presented five compelling government interests that justified the ban of non-obscene child pornography.[91] First, the Court emphasized the importance of safeguarding the "physical and psychological well-being" of children.[92] Even when laws have shown the possibility of imposing on some area of constitutionally protected rights, the Court has sustained legislation that has protected youth.[93] Second, child pornographic films and photographs impose direct and continuous harm on the children involved.[94] Digital pornographic materials allow for a permanent record of a child's involvement that negatively impacts the child's life with every circulation.[95] Third, there is an economic motive and a continuous demand for the production of such films.[96] Thus, allowing any remnant of protections for child pornography would essentially be the Court's promotion of illegal activity.[97] In the same manner, the Court suggested that the constitutional freedom of speech and freedom of press does not excuse the use of speech and writing that directly contributes to crime and illegality.[98] Fourth, cases where depictions of children engaging in sexual conduct are used for scientific or educational work are unlikely.[99] Therefore, there is little value in protecting non-obscene child pornography for the purpose of protecting the few and rare

85. *Id.* at 751.
86. *Id.* at 752.
87. *Ferber*, 458 U.S. at 752–53; *see Miller*, 413 U.S. at 24.
88. *Ferber*, 458 U.S. at 752.
89. *See id.*
90. *Id.* at 753.
91. *Id.* at 756–57, 759, 761–63.
92. *Id.* at 756–57.
93. *Ferber*, 458 U.S. at 757.
94. *Id.* at 759.
95. *Id.*
96. *Id.* at 761.
97. *See id.* at 761–62.
98. *Ferber*, 458 U.S. at 761–62.
99. *Id.* at 762–63.

instances where it would be acceptable.[100] Fifth, the negative impact that child pornography has on children is substantial, and therefore outweighs the concerns for First Amendment protection.[101] For these reasons, the Court held that New York's statute was not overbroad.[102] Almost half of all states at the time of *Ferber* were enforcing legislation that directly targeted child pornography without the obscenity standards set forth by *Miller*.[103]

Ultimately, the case seemed to focus on the types of harms that child pornography causes.[104] The physical and psychological harms that are imposed on children who are the subjects of child pornography exemplify a direct injury.[105] This direct harm is also present when these pornographic materials are continuously distributed and that child's trauma is further exasperated.[106] The Court also considers the indirect harms of child pornography.[107] Child abuse is at the core of all child pornography.[108] For example, pedophiles often utilize child pornography to seduce their victims into engaging in sexual activity.[109] The Court in *Ferber* even proposes that the eradication of the child pornography market would likely prevent the infliction of harm on other children.[110] Thus, preventing the direct and indirect harm of children is in the interest of the state.[111]

The Court successfully recognized that child pornography, whether obscene or not, should be prohibited.[112] The consensus was that the First Amendment's protections became of smaller importance when held in comparison to the societal damage that child pornography produces for the Nation.[113] However, the focus of the case was dedicated to real child pornography, that is pornography that captures the actual abuse of a child, whereas the more elusive issue of virtual child pornography was not directly addressed.[114] Instead, the Court suggests that "other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First

100. *Id.* at 762.
101. *See id.* at 764.
102. *Id.* at 774.
103. *Ferber*, 458 U.S. at 749; *see Miller*, 413 U.S. at 24.
104. *See* Liu, *supra* note 1, at 8–9.
105. *Id.*
106. *Id.* at 8.
107. *See id.* at 9.
108. *Id.*
109. *See* Liu, *supra* note 1, at 9.
110. *See id.*
111. Liu, *supra* note 1, at 9.
112. *See* New York v. Ferber, 458 U.S. 747, 756 (1982).
113. *See id.* at 758.
114. *See* Liu, *supra* note 1, at 10.

Amendment protection."[115] This rhetoric creates a loophole in both the way that child pornography can avoid regulation and the way that child pornographic content creators can experiment with images and videos to give the illusion that children are engaging in sexual conduct, when, in fact, there is no live performance taking place.[116] The decision in *Ferber* was expanded in 1990 with *Osborne v. Ohio*,[117] which made it illegal to possess child pornography.[118] Furthermore, the Court in *Osborne* expressly listed the use of child pornography in the seduction process as a valid reason for the state to encourage the destruction of these materials as well as the criminalization of their possession.[119] However, over time, the absence of clear precedent on virtual child pornography brought about the introduction of the CPPA.[120]

C. *Virtual Child Pornography*

1. The CPPA

In 1996, Congress sought to regulate virtual child pornography with the CPPA.[121] The CPPA defined child pornography as:

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is [] [a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that] of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[122]

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115. *Ferber*, 458 U.S. at 765.

116. *See* Liu, *supra* note 1, at 10.

117. 495 U.S. 103 (1990).

118. YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 95 (2008); Osborne, 495 U.S. at 111; *see Ferber*, 458 U.S. at 748.

119. AKDENIZ, *supra* note 118, at 96; Osborne, 495 U.S. at 111.

120. Liu, *supra* note 1, at 10; *see* Child Pornography Prevention Act § 121, 110 Stat. at 3009–27.

121. Liu, *supra* note 1, at 14; *see* Child Pornography Prevention Act § 121, 110 Stat. at 3009–27.

122. Liu, *supra* note 1, at 14*;* Child Pornography Prevention Act § 121, 110 Stat. at 3009–28.

Essentially, the CPPA broadened the scope of the ban set by *Ferber* by covering actual child pornography, as well as all three categories of virtual child pornography.[123] The ultimate goal of the CPPA was to destroy the market for child pornography, protect child victims, and prevent child molesters from feeding into sexual desires that could result in the manifestation of criminal activity.[124] By outlawing computer images that appeared to be real children, the CPPA casted a broad net and in the process was able to rectify the loopholes left by the *Ferber* decision.[125]

2. *Ashcroft v. Free Speech Coalition*

Soon after the introduction of the CPPA, *Ashcroft v. Free Speech Coalition*[126] reversed the Act in 2002.[127] The Supreme Court in *Ashcroft* found that virtual child pornography was not a compelling government interest, and that the CPPA was unconstitutionally overbroad and vague.[128] Ultimately, the Court held that virtual child pornography was protected under the First Amendment.[129] Particularly, *Ashcroft* focused on the unconstitutionality of the Act's language, such as the phrases "appears to be" and "conveys the impression."[130] The concern was that this language would allow the prosecution of individuals who created their materials without the use of real children.[131] Hypothetically, if a producer created a film in which he or she used a youthful-looking adult movie actor to play the role of a child, then that producer could possibly face punishments under the CPPA.[132] Similarly, this language would technically prohibit all virtual child pornography despite its possible literary, artistic, or scientific value.[133] For example, the Court cited Academy Award-winning movies, such as American Beauty, in which there

123. *See* Liu, *supra* note 1, at 14; Child Pornography Prevention Act § 121, 110 Stat. at 3009–28; New York v. Ferber, 458 U.S. 747, 748 (1982).

124. Liu, *supra* note 1, at 15; Child Pornography Prevention Act § 121, 110 Stat. at 3009–27.

125. *See* Liu, *supra* note 1, at 15; Child Pornography Prevention Act § 121, 110 Stat. at 3009–28; *Ferber*, 458 U.S. at 748.

126. 535 U.S. 234 (2002).

127. *But see* Child Pornography Prevention Act, § 121, 110 Stat. at 3009-28; Liu, *supra* note 1, at 32.

128. Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002); Liu, *supra* note 1 at 33; Child Pornography Prevention Act § 121, 110 Stat. at 3009-27.

129. *Free Speech Coal.*, 535 U.S. at 234, 258.

130. *Id.* at 256, 258; Hudson Jr., *supra* note 4.

131. Hudson Jr., *supra* note 4.

132. *Id.*; Child Pornography Prevention Act § 121, 110 Stat. at 3009–26.

133. *Free Speech Coal.*, 535 U.S. at 261, 265.

are portrayals of teenage sexual activity as well as sexual relations between teenagers and adults.[134] Such films would likely fall under some of the Act's prohibited content.[135] In addition, the Court distinguished its decision from that of *Ferber's*, noting that virtual child pornography records no actual crime and therefore creates no victims.[136] The issue of morphing was not fully considered, as the respondents had not challenged that specific provision in the Act.[137] However, the Court's dicta indicated that morphed child pornography still implicated real children and therefore was more aligned with the images presented in *Ferber*.[138] Whether this comparison meant that morphed child pornography was also unprotected by the First Amendment was not made clear.[139] Justice O'Connor concurred in part in regards to the CPPA being unconstitutional when applied to material containing youthful-looking actors.[140] However, she dissented in part, acknowledging that there was a clear concern for the rapidly advancing technological tools being used to create virtual child pornography and that the CPPA's ban on virtual child pornography was not overbroad.[141] Justice Scalia also agreed with O'Connor's opinion that the CPPA's ban on child pornography was not overbroad.[142]

3. The PROTECT Act

The Court's decision in *Ashcroft* was nothing short of controversial.[143] For some, the decision meant that free speech and the First Amendment were being protected to the fullest extent.[144] For others, the Court's decision left questions on the definitive legality of virtual child pornography.[145] In response to the decision in *Ashcroft*, Congress considered a more narrowly tailored approach to the provisions struck down in the CPPA.[146] On April 03, 2003,

134. *Id.* at 248.
135. *Id.* at 247–48.
136. *Id.* at 250; *see* New York v. Ferber, 458 U.S. 747, 748 (1982).
137. *Free Speech Coal.*, 535 U.S. at 242.
138. *Id.* at 242.
139. *See id.*
140. *Id.* at 261 (O'Connor, J., concurring in part and dissenting in part); Child Pornography Prevention Act § 121, 110 Stat. at 3009-28.
141. *Free Speech Coal.*, 535 U.S. at 263–64 (O'Connor, J., concurring in part and dissenting in part); Child Pornography Prevention Act § 121, 110 Stat. at 3009–26.
142. *Free Speech Coal.*, 535 U.S. at 263, 267 (Scalia, J., concurring in part and dissenting in part); Child Pornography Prevention Act § 121, 110 Stat. at 3009–26.
143. Slocum, *supra* note 59, at 654.
144. *Id; Free Speech Coal.*, 535 U.S. at 238.
145. Slocum, *supra* note 59, at 654.
146. *Id.* at 655; *see Free Speech Coal.*, 535 U.S. at 238.

Congress passed an act entitled "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" ("PROTECT Act"), which sought to correct many of the CPPA's provisions.[147] The Act cleared up some of the issues that were determined to be First Amendment violations.[148] In regard to the virtual child pornography provisions of the Act, the PROTECT Act replaced some of the CPPA's unconstitutional language.[149] For example, "appears to be . . . a minor" was replaced with "indistinguishable from that of a[n] [actual] minor."[150] Thus, the PROTECT Act allowed for the prosecution of virtual child pornography that was so realistic that it would be impossible to determine whether the child being used was real or computer-generated.[151]

Similarly, the Act also defined virtual child pornography in a way that does not impose on material which may have artistic or literary value.[152] Although the new definitions and provisions narrowed prior law, the Act also broadened prior affirmative defenses to virtual child pornography.[153] The CPPA granted an affirmative defense for cases that involved youthful-looking actors; however the PROTECT Act grants an affirmative defense for any cases in which there was no actual child used in the production of the material.[154] The Act seemingly portrayed Congress' new goal of prohibiting virtual child pornography only to the extent that it will prevent the production of real child pornography.[155] Congress also asserted that child pornography images that were being trafficked as of 2003 were produced through the actual abuse of children.[156] Some critics of the PROTECT Act's provision on virtual child

147. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, § 1(a), 117 Stat. 650, 650; Slocum, *supra* note 59, at 655.

148. Hudson Jr., *supra* note 4; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. 650.

149. Slocum, *supra* note 59, at 655; Child Pornography Prevention Act, § 121, 110 Stat; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

150. Slocum, *supra* note 59, at 655–56; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, § 502, 117 Stat. at 678.

151. *See* Slocum, *supra* note 59, at 648; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

152. *See* Slocum, *supra* note 59, at 656; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

153. *See* Slocum, *supra* note 59, at 657; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

154. *See* Slocum, *supra* note 59, at 657–58; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

155. *See* Slocum, *supra* note 59, at 658; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

156. *See* Slocum, *supra* note 59, at 658.

pornography believe that Congress is attempting to remedy an issue that does not yet exist.[157] However, Justice O'Connor's dissent in *Ashcroft* notes that the Court's cases "do not require Congress to wait for harm to occur before it can legislate against it."[158]

Although the PROTECT Act is able to prohibit some computer-generated images that are indistinguishable from real children and protect work that is deemed artistically valuable, it still fails to recognize the gray areas of virtual child pornography where the sexual abuse of real children is not needed.[159] Morphed child pornography is a category which usually does not implicate the live abuse of real children, but certainly contributes significant harms to its victims.[160] Additionally, the attainability of editing applications and software has dramatically increased since 2003, to the point where morphed child pornography can likely be created with the use of just a smartphone.[161] Thus, the PROTECT Act neglects to provide a uniform and multifaceted approach to the varying areas of virtual child pornography.[162]

IV. THE CIRCUIT SPLIT ON MORPHED CHILD PORNOGRAPHY

A. *Arguments Against the First Amendment's Protection of Morphed Child Pornography*

The United States Court of Appeals for the Second Circuit established morphed child pornography is not afforded First Amendment protection.[163] The main argument put forth by the Court had to do with the overwhelming emotional and reputational harm that morphed child pornography imposes on victims.[164] Although the United States Court of Appeals for the Sixth Circuit did not answer a First Amendment question, it was still able to establish that

157. *See* Slocum, *supra* note 59, at 665; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

158. Ashcroft v. Free Speech Coal., 535 U.S. 234, 264 (2002) (O'Connor, J., concurring in part and dissenting in part).

159. *See* Slocum, *supra* note 59, at 656–57; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

160. *See* United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

161. *See* Sternberg, *supra* note 27, at 2788.

162. *See* Slocum, *supra* note 59, at 656–57; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 117 Stat. at 650.

163. United States v. Hotaling, 634 F.3d 725, 730 (2d Cir. 2011).

164. *Id.*

morphed child pornography constitutes an immediate injury to those victims involved.[165]

1. The Second Circuit and *Hotaling*

In *United States v. Hotaling*,[166] the defendant admitted to possessing sexually explicit images of six female minors that had been digitally morphed.[167] The heads of the minors had been cropped out of their original photographs and then superimposed on the images of partially nude bodies of adult females engaging in sexual conduct.[168] One of the photographs contained the face of the defendant superimposed on a nude male's body engaging in sexual intercourse with a female bearing the face of one of the child victims.[169] There were also images of the victims faces that were superimposed on bodies that were shackled, leashed, and restrained.[170] Some of the images were taken from pictures of the defendant's daughters with their friends.[171] The pictures were held in digital index folders and were labeled with a pornographic website uniform resource locator ("URL").[172] Additionally, the pictures were titled with the victims' actual names.[173] The defendant asserted that no actual children were ever harmed when he created the images and that no sexual activity took place.[174] He challenged the state statute as being overbroad and vague.[175] Similarly, the defendant claimed the images were a way for him to enjoy his sexual fantasies without hurting anyone and therefore, his actions should be protected under the First Amendment's Free Speech Clause.[176]

The court acknowledged the Supreme Court's ruling in *Ferber*, citing the government's compelling interest in protecting minors from the emotional trauma of child pornography.[177] In the same manner, the court acknowledged dicta brought forth by the Supreme Court in *Ashcroft*, which indicates that morphed images, although technically considered virtual child pornography,

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165. Doe v. Boland (*In re* Boland), 946 F.3d 335, 341–42 (6th Cir. 2020).
166. 634 F.3d 725 (2d Cir. 2011).
167. *Id.* at 727.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Hotaling*, 634 F.3d at 727.
172. *Id.*
173. *Id.*
174. *Id.* at 727, 729.
175. *Id.* at 727.
176. *Hotaling*, 634 F.3d at 727.
177. *Id.* at 728–729; New York v. Ferber, 458 U.S. 747, 748 (1982).

more adequately resembled the images discussed in *Ferber*.[178] In other words, morphed images still include real children and therefore, still pose a threat to the overall emotional and reputational security of children.[179] Ultimately, the court reasoned that the photographs did implicate the recognizable faces of minors and therefore caused great psychological and reputational harm to those victims.[180] Thus, sexually explicit images that bear the faces of identifiable children are not afforded protection under the First Amendment.[181]

2. The Sixth Circuit and *Boland*

In *Doe v. Boland*,[182] the defendant was an attorney and expert witness who was working as a technology expert for individuals that were charged with the possession of child pornography.[183] In an attempt to make the argument that children in pornographic images were indistinguishable from computer-generated children, the defendant took online images of two young girls and morphed them to create images of the two girls engaging in sexual acts. [184] Ultimately, his argument was that if he could easily create these doctored images, then certainly his clients could have downloaded doctored material as well.[185] The defendant presented his images in federal court as an expert witness and was subsequently told by a judge to delete the images.[186] Instead, he kept the images and called federal prosecutors in his hometown to determine if the images were in fact illegal.[187] Ultimately, he was found criminally and civilly liable for the images.[188] The defendant claimed he did not intend to willfully or maliciously injure the minors, but instead he was simply creating images that would be used as exhibits in court.[189]

The court reasoned that there is a substantial certainty of injury when the faces of identifiable minors are used for the purpose of creating morphed child pornography.[190] It was noted that there is a legal presumption of injury

178. *Hotaling*, 634 F.3d at 729; *Ferber*, 458 U.S. at 748; *Free Speech Coal.*, 535 U.S. at 238.
179. *Hotaling*, 634 F.3d at 729–30.
180. *Id.*
181. *Id.* at 730.
182. 946 F.3d 335 (6th Cir. 2020).
183. *Id.* at 337.
184. *Id.*
185. *Id.*
186. *Id.*
187. *In re Boland*, 946 F.3d at 337.
188. *See id.* at 338.
189. *Id.* at 341.
190. *See id.* at 341–42.

when a child's identity is used in morphed pornography.[191] Thus, the injury begins at the moment the images are created.[192] The court drew similarities between morphed child pornography and defamatory statements, stating that both occur when an individual acts with the knowledge that substantial injury or harm is likely to occur.[193] Consequently, the court agreed that the presumption of injury in morphed child pornography was great.[194] It is clear that whatever causes great injury to minors cannot, on its face, be protected under the First Amendment.[195] The court held that the defendant had substantial knowledge that his actions would cause injury and harm to the victims.[196] Therefore, the defendant could not be released from his charge.[197]

B. *Arguments in Support of the First Amendment's Protection of Morphed Child Pornography*

1. The Eighth Circuit and *Anderson*

In *United States v. Anderson*,[198] the defendant sent unsolicited sexually explicit images to his half-sister's eleven-year-old daughter.[199] One of the pictures he had sent depicted an adult male and an adult female engaging in sexual intercourse with the caption: "this is what we will do."[200] The defendant had superimposed his own face onto that of the male's body and the victim's face onto the female's body.[201] Ultimately, he admitted that he created the image and sent it to the victim's Facebook account.[202] The defendant moved to dismiss his charges on the basis that the statute was unconstitutionally overbroad under the First Amendment.[203]

On appeal, the United States Court of Appeals for the Eighth Circuit reasoned that only visual depictions produced through the sexual abuse of a child fell under unprotected speech.[204] Although the court noted the decision

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191. *Id.* at 342.
192. *In re Boland*, 946 F.3d at 342.
193. *Id.* at 338–39.
194. *See id.* at 342.
195. *See id.* at 341–42.
196. *Id.* at 342.
197. *In re Boland*, 946 F.3d at 342.
198. 759 F.3d 891 (8th Cir. 2014).
199. *Id.* at 893.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Anderson*, 759 F.3d at 893.
204. *Id.* at 894.

in *Ferber*, the understanding was that *Ferber* focused on child pornography that was intrinsically related to child abuse and criminal conduct.[205] Furthermore, because no minor was abused in the production of the defendant's content, nor was there historical or Supreme Court case law addressing this issue, the defendant's material fell under protected speech.[206] In order to understand the Eighth Circuit's decision in *Anderson*, it is important to acknowledge the cases that drove the opposing party's arguments and the court's decisional reasoning.[207]

The state argued that *Anderson* was identical to *United States v. Bach.*[208] In *Bach*, the Eighth Circuit heard a case involving a morphed image which superimposed the face of a minor on the body of a minor posing in a sexually explicit manner.[209] Because the underlying image was still the body of a minor, the court reasoned that the material could not be protected by the First Amendment.[210] The underlying image was a record of criminal activity against a child, notwithstanding the face that was superimposed upon it.[211] However, the defense suggested that *Anderson* and *Bach* are completely different.[212] The main difference outlined by the defense was that in *Anderson* the underlying images were of adults engaging in sexual conduct, whereas in *Bach*, the underlying image was of a real child.[213] Thus, no children were attempted to be portrayed in creating the images in *Anderson*.[214] Without the presence of some sort of child abuse in the material, the defense advanced the opinion that the images in *Anderson* are protected by the First Amendment.[215]

The Court in *Anderson* used the Supreme Court's reasoning in *United States v. Stevens*[216] to support its argument that child pornography is only unprotected by the First Amendment when it displays the criminal abuse of children.[217] Additionally, the Court used *Stevens* to explain that the First Amendment's protections do not rely on a balancing test of costs versus benefits.[218] Instead, it reasoned that First Amendment protection depends

205. *Anderson*, 759 F.3d at 894; New York v. Ferber, 458 U.S. 747, 748 (1982).
206. *See Anderson*, 759 F.3d at 894.
207. *See id.*
208. 400 F.3d 622 (8th Cir. 2005); *see Anderson*, 759 F.3d at 894.
209. *Bach*, 400 F.3d at 624, 632.
210. *Id.* at 632.
211. *Bach*, 400 F.3d at 632.
212. *Id.*; *Anderson*, 759 F.3d at 895.
213. *Anderson*, 759 F.3d at 895; *Bach*, 400 F.3d at 632.
214. *Anderson*, 759 F.3d at 895.
215. *Id.* at 894–95.
216. 559 U.S. 460 (2010).
217. *Anderson*, 759 F.3d at 894.
218. *Id*; *Stevens*, 559 U.S. 460 at 464.

primarily on whether the content in question has been historically or traditionally prohibited by the courts.[219] In *Stevens*, the Supreme Court held that animal cruelty content was not automatically excluded from the First Amendment's protection, as there is no evidence of historical prohibitions against the depictions of animal cruelty.[220] Although *Stevens* focused on animal cruelty videos, the Eighth Circuit chose to apply this rhetoric to its morphed child pornography question in *Anderson*.[221] The court held that morphed child pornography should not be excluded from First Amendment protection because it lacks traditional and historical prohibition in the law.[222] Specifically, morphed child pornography does not present the abuse of real children—which has historically been required for First Amendment exemption—therefore, morphed child pornography should fall within the realm of protected speech.[223] The court expressed that morphing attempts to portray a minor, such as the case in *Bach*, and would thus qualify as an exemption from First Amendment protection because it would display the abuse of a child.[224] However, morphing that does not implicate a real minor, such as images of adults engaging in sexual relations with superimposed faces of children, would not qualify as an exception under the reasoning in *Anderson*.[225]

V. THE CASE OF UNITED STATES V. MECHAM

In *United States v. Mecham*, the Fifth Circuit asked whether the First Amendment protects morphed child pornography.[226] The court notes that real child pornography goes unprotected under the First Amendment and that pornography created with youthful-looking adult actors or completely computer-generated children is protected.[227] However, the court acknowledges how morphed child pornography usually falls between these established categories.[228]

In *Mecham*, the defendant took his computer to a repair shop where it was discovered that he had used it to store thousands of images of nude adults

219. *Id.*
220. *Stevens*, 559 U.S. 460 at 481, 482.
221. *Id.*; *Anderson*, 759 F.3d at 894.
222. *Anderson*, 759 F.3d at 894.
223. *See id.*
224. *Id.* at 895; *Bach*, 400 F.3d at 632.
225. *Anderson*, 759 F.3d at 895–96.
226. *See* United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).
227. *Id.*
228. *Id.*

with the faces of children superimposed onto them.[229] After a search of his home, police obtained over 30,000 files of morphed child pornography.[230] All the images found used the faces of the defendant's grandchildren.[231] The defendant admitted that he had superimposed the faces of his four granddaughters onto the bodies of adults engaging in sexual intercourse.[232] The defendant claimed he had created the images and videos in anger after his daughter prohibited him from having any contact with his granddaughters.[233] The victims were of the ages of four, five, ten, and sixteen.[234]

The defendant had managed to email some of these videos to his oldest granddaughter.[235] One of the videos showed the sixteen-year-old victim's face superimposed onto the body of a female engaging in sexual intercourse with a male.[236] The defendant had superimposed his own face onto the body of that male.[237] This video also depicted explicit and disturbing animated scenes of the defendant ejaculating on the victim.[238] Another video contained a photo montage of images of the five-year-old victim's face cropped onto the bodies of females engaging in various sexual acts.[239]

The defendant contended that the charges against him should be dismissed because morphed child pornography is protected under the First Amendment.[240] Furthermore, the defendant argued that he could not be charged because no children were sexually abused in the production of the content.[241]

The court recognized that morphed child pornography is closer in relation to real child pornography, as the face of an identifiable minor is being used to depict sexual content.[242] Additionally, the Fifth Circuit did not neglect to review the arguments on both sides of the circuit split.[243] The court emphasized the importance of the lower court's actions during times when the Supreme Court's caselaw on an issue is not yet solidified.[244] Lower courts

229. *Id.*
230. *Id.*
231. *Mecham*, 950 F.3d at 260.
232. *Id.*
233. *See id.*
234. *Id.*
235. *Id.*
236. *Mecham*, 950 F.3d at 260.
237. *Id.*
238. *Id.*
239. *Id.* at 261.
240. *Id.*
241. *Mecham*, 950 F.3d at 263.
242. *Id.*
243. *Id.* at 265.
244. *Id.*

must not attempt to guess what the Supreme Court might decide, but instead should look to the underlying concerns of the Supreme Court in applicable past decisions.[245]

For example, both *Ferber* and *Ashcroft* focused on reputational and emotional harm to children.[246] The Court wanted to address *Stevens*, as this case supported the Eighth Circuit's decision in *Anderson* and had not been addressed by the Second or Sixth Circuits.[247] *Stevens* put forth the argument that the First Amendment's protections are not decided on a cost-benefit analysis or balancing test.[248] The court in *Mecham* found this statement irrelevant, stating that the Second and Sixth Circuits did not reach their decisions from a simple balancing testing of morphed child pornography, but instead reached their decisions based on their interest in preventing the reputational and emotional harm of children.[249] In the same manner, the court noted that *Stevens* focused on depictions of animal cruelty and only mentioned child pornography in passing.[250] This rhetoric alone cannot override the precedent of the court's concerns regarding child pornography.[251] Additionally, *Stevens* cannot reliably be used as the only justification for First Amendment protection of morphed child pornography, as it makes no mention of the emotional and psychological harm to children that the Supreme Court is trying to prevent.[252] If *Stevens* was attempting to make a significant doctrinal development of child pornography, it would not have been done in a case about animal cruelty videos.[253]

Finally, the court proposed that defining child pornography as only images that exhibit the real criminal abuse of a child would not only limit the prohibition of morphed child pornography, but of real child pornography as well.[254] The definition of real child pornography does not limit itself to pictures and videos depicting real child abuse.[255] On the contrary, real child pornography can be an image of a child in which genitals are exposed or even a cropped image of a child's genitals in which the child's face is not even

245. *Id.*

246. *See Mecham*, 950 F.3d at 265; New York v. Ferber, 458 U.S. 747, 758 (1982); Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002).

247. United States v. Stevens, 559 U.S. 460, 469–71 (2010); *see Mecham*, 950 F.3d at 264–65; *Anderson*, 759 F.3d at 891.

248. *See Mecham*, 950 F.3d at 264–65; *Stevens*, 559 U.S. at 464.

249. *See Mecham*, 950 F.3d at 265.

250. *Id.* at 265–66; *see Stevens*, 559 U.S. at 469, 471.

251. *See Mecham*, 950 F.3d at 265–66.

252. *See id.*; *Stevens*, 559 U.S. at 471.

253. *Mecham*, 950 F.3d at 266; *see Stevens*, 559 U.S. at 465–66, 471.

254. *Mecham*, 950 F.3d at 267.

255. *Id.* at 266.

shown.[256] This broad definition of child pornography has been used for decades to prosecute individuals even when there is no evidence that physical sexual contact occurred.[257] The court did not believe that the decision in *Ferber* was meant to constrict the definition of child pornography to only images which depict abuse, rather, it was only one of the Supreme Court's rationales in reaching its decision.[258] Regarding morphed child pornography, the Fifth Circuit recognized that *Ashcroft* and every other circuit case to address this issue had established that there was indeed a significant threat to the psychological well-being of children affected.[259] Ultimately, the court disagreed with the defendant's claim that morphed child pornography is protected under the First Amendment.[260]

VI. CONCLUSION

The court in *Anderson* mistakenly interpreted the Supreme Court's rhetoric in *Stevens*.[261] *Stevens* differentiated the issue of child pornography from the issue of animal crushing videos, admitting that child pornography is always a *special case* due to its historical establishment as a long standing First Amendment exception.[262] Simply, the Court in *Stevens* was describing its inability to create another First Amendment exception category for animal crush videos, as there would be no historical support for such a ruling.[263] Although the Court in *Stevens* also suggests that there is little need for a cost-benefit analysis in child pornography due to its already established history, it is unlikely that the Court was envisioning the more controversial and gray area category of morphed child pornography.[264] A cost-benefit analysis would likely be essential for such a contested issue.[265] Such an analysis would show that morphed child pornography poses a significant harm to children and provides little to no benefit to society.[266] Under the reasoning in *Mecham*, if

256. *Id.*
257. *Id.*
258. *Id.*; *see* New York v. Ferber, 458 U.S. 747, 750–51, 764 (1982).
259. Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002); *Mecham*, 950 F.3d at 267.
260. *Mecham*, 950 F.3d at 267.
261. United States v. Stevens, 559 U.S. 460, 471 (2010); United States v. Anderson, 759 F.3d 891, 894 (8th Cir. 2014).
262. *Stevens*, 559 U.S. at 471–72.
263. *See id.* at 471.
264. *See id.*
265. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 236, 251–53 (2002).
266. United States v. Mecham, 950 F.3d 257, 263–64 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

a cost-benefit analysis was deemed irrelevant and the concern was solely based on harm to children that was expressed in *Ferber*, morphing would still not fall under protected speech.[267]

Admittedly, child pornography, whether real, virtual or morphed, is a difficult topic to address.[268] In the past, child sexual abuse was often ignored.[269] However, the new digital age has also provided some sort of transparency on the true magnitude of this issue.[270] It is important to acknowledge that child sexual abuse content does not always arise out of situations that were abusive or harmful.[271] The production of sexual images with the use of an identifiable minor constitutes abuse in itself.[272]

Consequently, American jurisprudence has indicated that the government has a compelling interest in safeguarding the overall well-being of our youth.[273] It is established that *real* child pornography causes extreme psychological and reputational harm to its child victims.[274] Virtual child pornography does not always implicate real children getting abused.[275] Thus, it is also established that non-obscene virtual child pornography is protected by the First Amendment.[276]

However, the issue still stands with morphed child pornography.[277] When the identities of real children are implicated in the production of sexually explicit imagery, it would be unreasonable to believe that no harm has occurred.[278] It is essential to acknowledge that child sexual abuse images do not always arise out of situations of abuse themselves.[279] It is quite possible to be a victim of child pornography without ever even knowing it.[280] If we follow the reasoning in *Ferber*, the Court's concern was exclusively on the direct and indirect harm that pornography has on the psychological,

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267. *See id.* at 264–65; New York v. Ferber, 458 U.S. 747, 764 (1982); WORTLEY & SMALLBONE, *supra* note 25, at 123.

268. WORTLEY & SMALLBONE, *supra* note 25, at 9, 123.

269. *See id.* at 123.

270. *See id.* at 72.

271. *See id.*

272. *See Ferber*, 458 U.S. at 759; United States v. Mecham, 950 F.3d 257, 263 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

273. *Mecham*, 950 F.3d at 262.

274. Liu, *supra* note 1, at 8.

275. *Id.* at 3; *see Mecham*, 950 F.3d at 260

276. *See Mecham*, 950 F.3d at 260; Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002).

277. *See Mecham*, 950 F.3d at 260; *Free Speech Coal.*, 535 U.S. at 249.

278. *See* WORTLEY & SMALLBONE, *supra* note 25, at 72.

279. *See id.*

280. *Id.*; *Ferber*, 458 U.S. at 756–57.

reputational, and emotional well-being of child victims.[281] These same harms are present with morphed images as well.[282] The circulation of morphed images is simply another way of disguising exploitation and child abuse.[283] The importance of free speech cannot be used to justify harm and abuse to children.[284] If we are a nation that refuses to protect the sanctity of our youth under the guise of freedom, then we are inherently saying those freedoms are more important than the lives of the people that they were designed to protect.[285] The Supreme Court's guidance to lower courts on how to address this issue uniformly is insufficient and current legislation has failed to cover the plethora of issues that may arise from virtual child pornography.[286] The absence of clear precedent calls for judicial review at the Supreme Court level that aligns with the current majority view of the circuits.[287]

281. *See Ferber*, 458 U.S. at 756–57; *Mecham*, 950 F.3d at 262.
282. *See Free Speech Coal.*, 535 U.S. at 242; *Mecham*, 950 F.3d at 267.
283. *Free Speech Coal.*, 535 U.S. at 242.
284. *See id.* at 251.
285. *See Ferber*, 458 U.S. at 761–62; Slocum, *supra* note 59, at 656–57.
286. *See* Slocum, *supra* note 59, at 685.
287. *See id.* at 663–64, 666.


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