

THE PHOTOSHOPPING FELON:
HOW TECHNOLOGICAL ADVANCEMENTS *MORPHED* CHILD
PORNOGRAPHY LAW

Vi Nguyen*

INTRODUCTION

Over the last fifty years, technology has developed expansively, benefitting our daily lives. One benefit is the ability to alter one's physical appearance in electronic media. People can use filters and other photo-editing techniques to transform their physical characteristics.¹ They can give themselves airbrushed-looking skin, alter their weight and height, or tan their skin as if they recently vacationed on a tropical island.² Although most people use these photo editing tactics innocently, there are also uses that are harmful to society. Some people use this new technology to create explicit and disturbing images resembling child pornography.³ As technology advanced, *morphed* child pornography emerged and flooded the Internet. *Morphed* child pornography is created by using an innocent image of a child and combining it with a sexually explicit image of an adult.⁴

The Supreme Court has held that the First Amendment does not protect child pornography.⁵ When the government enacts a statute that prohibits constitutionally protected speech, the Court uses a strict scrutiny test.⁶ This test evaluates whether the government has identified an actual problem and whether the prohibition of the speech is an absolutely necessary solution.⁷ The Court recognized that child por-

* George Mason University Antonin Scalia Law School, J.D. expected, 2022.

¹ See Kerry C. Donovan, *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 581, 588-89 (2012) (explaining the breadth of edits possible with modern technology).

² *Id.*

³ Stacey Steinburg, Comment, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 911 (2019).

⁴ *Id.*

⁵ *New York v. Ferber*, 458 U.S. 747, 774 (1982).

⁶ *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

⁷ *Id.*

nography victims are psychologically haunted by the possibility that their pornographic images continue to circulate.⁸ The government, therefore, has a compelling interest in protecting minors from becoming victims of child pornography—to prevent them from suffering the physiological, reputational, and emotional harm that distribution of such material imposes on them.⁹ The United States courts of appeals disagree about whether *morphed* child pornography is afforded First Amendment protection.¹⁰ In February 2020, the Fifth Circuit joined the Second and Sixth Circuits in holding that the First Amendment does not protect *morphed* child pornography.¹¹ In contrast, the Eighth Circuit has held since 2014 that the First Amendment protects *morphed* child pornography.¹²

First, this Comment will discuss the history of child pornography and the development of *virtual* and *morphed* child pornography. Second, this Comment will discuss the First Amendment and how various courts have applied its constitutional protections to different forms of child pornography. Third, this Comment will examine how circuit courts differ in their application of First Amendment protection in *morphed* child pornography cases. Lastly, this Comment will explain why, if presented with the issue, the Supreme Court should rule alongside the majority of the federal circuit courts of appeals in holding that *morphed* child pornography should not be afforded First Amendment protection.

BACKGROUND

I. THE EVOLUTION OF CHILD PORNOGRAPHY LAW

Over time, the courts have not created a clear definition for child pornography to accommodate society's technological advances.¹³

⁸ See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).

⁹ See *id.* at 249-50.

¹⁰ Jacklyn Wille, '*Morphed*' Child Pornography Not Protected Speech, 5th Cir. Says, BLOOMBERG LAW NEWS (Feb. 13, 2020), <https://news.bloomberglaw.com/us-law-week/morphed-child-pornography-not-protected-speech-5th-cir-says>.

¹¹ See *United States v. Mecham*, 950 F.3d 257, 264-65, 267 (5th Cir. 2020).

¹² See *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

¹³ See Benjamin A. Mains, Note, *Virtual Child Pornography, Pandering, and The First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography*, 37 HASTINGS CONST. L.Q. 809, 810-11, 819-20 (2010).

Originally, the definition was workable because perpetrators made child pornography in the same manner as traditional pornography. As the development of technology altered child pornography-creating processes, Congress responded by passing new legislation that expanded the scope of, and penalties associated with, child pornography.¹⁴ Courts now have more descriptive legislation which can provide guidance to the courts when evaluating and adjudicating cases regarding child pornography in new and undefined forms.¹⁵

Before relatively recent advancements in technology, child pornography was created in a similar fashion to adult pornography.¹⁶ The Supreme Court's definition of child pornography initially encompassed only images that involved physical and sexual abuse of actual minors.¹⁷ Child pornography was defined as "any visual depiction . . . whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where . . . such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct."¹⁸ Under this definition, child pornography required the use of actual minors in the *creation* of the pornographic images and videos.¹⁹ The Court then distinguished *virtual* child pornography from traditional child pornography because it is "not 'intrinsically related' to the sexual abuse of children."²⁰ According to the Court, *virtual* child pornography appears to depict minors but is instead produced using adult images.²¹

Eventually, the category of *morphed* child pornography emerged as technology progressed.²² Under this form of child pornography, perpetrators use minors' actual faces to create images that appear as if the children are performing sexually explicit acts.²³ This method of creation includes using an image of a minor's face and pasting it onto

¹⁴ See Steinburg, *supra* note 3, at 913-16.

¹⁵ *Id.* at 919-20.

¹⁶ *Id.* at 913.

¹⁷ See Mains, *supra* note 13, at 810.

¹⁸ United States v. Hotaling, 634 F.3d 725, 728 (2d Cir. 2011) (citing 18 U.S.C.A. § 2256(8) (2018)).

¹⁹ See Mains, *supra* note 13, at 810.

²⁰ See Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002).

²¹ *Id.* at 234 (explaining that the perpetrators either used adults' images that looked younger or edited the adult images to make them appear younger).

²² See Steinburg, *supra* note 3, at 911.

²³ See Hotaling, 634 F.3d at 729.

an image of an adult's body.²⁴ *Morphed* child pornography differs from *virtual* child pornography because the images used are of actual minors whereas *virtual* child pornography uses images of adults.²⁵

The emergence of this new form of child pornography creates confusion about whether the creators are entitled to any constitutional protections during their prosecution. Historically, the Supreme Court held that the First Amendment does not protect child pornography because children suffer in its creation.²⁶ Federal law currently defines child pornography "as any visual depiction of sexually explicit conduct involving a minor (a person less than 18 years old)."²⁷ Congress enacted the Child Pornography Prevention Act of 1996 (CPPA) to amend the federal criminal code, expanding the scope of penalties.²⁸ The CPPA "extended the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children by prohibiting" possession or distribution of images created by using adults who are made to look like minors or by using computer imaging.²⁹ The Act also coined the term "'*virtual* child pornography,' which include[s] computer-generated images, as well as images produced by more traditional means."³⁰ *Virtual* child pornography prohibited by the CPPA includes "images of youthful looking adults that were posed to look like children and even some cartoon images depicting children engaged in sexual acts."³¹ Constitutional issues arose under this statute because its language did not account for content that did not fit perfectly under traditional or *virtual* child pornography definitions, leaving *morphed* child pornography without a distinct classification.³²

Shortly after the CPPA was enacted, the Free Speech Coalition challenged the CPPA and its constitutionality. In *Ashcroft v. Free Speech Coalition*, an association for the adult-entertainment industry

²⁴ *Id.*

²⁵ *Id.*

²⁶ Carissa B. Hessick, *The Expansion of Child Pornography Law*, 21 NEW CRIM. L. REV. 321, 325 (2018).

²⁷ U.S. Dep't of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>. See also 18 U.S.C. § 2251 (2006).

²⁸ See 18 U.S.C.A. § 2252A(b) (1996).

²⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239-40 (2002).

³⁰ *Id.* at 241.

³¹ See Steinburg, *supra* note 3, at 917.

³² Laura E. Avery, *The Categorical Failure of Child Pornography Law*, 21 WIDENER L. REV. 51, 85 (2015).

was concerned that some of its content might fall within the CPPA's expanded definition of child pornography.³³ The media in question included books advocating for the nudist lifestyle, nude paintings, and erotic photographs.³⁴ The Ninth Circuit held that the CPPA was "substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children."³⁵ It found that the CPPA's definition of obscene materials was inconsistent with the Supreme Court's interpretation in *Miller v. California* and the definition of child pornography in *New York v. Ferber*.³⁶ The Court in *Miller* defined obscene materials as those that "portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."³⁷ The Court in *Ferber* defined child pornography as the knowing use of a child in a sexual performance, including actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.³⁸

The Supreme Court held that materials involving teenagers engaging in sexual activity is not always obscene because it has been a theme in art and literature for centuries.³⁹ To explain its conclusion, the Court used Shakespeare's *Romeo and Juliet* as an example of speech that is prohibited under the CPPA but has high literary value.⁴⁰ Under the CPPA, "[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie."⁴¹ Following this reasoning, the Supreme Court subsequently held that two sections of the CPPA were overbroad and unconstitutional because they proscribed materials involving minors that were neither obscene nor sexually explicit,⁴² which is inconsistent with the holdings in *Miller*⁴³ and *Ferber*.⁴⁴ In *Ashcroft*, the Supreme Court "declined to reach the question whether morphed computer

³³ 535 U.S. at 243.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 251.

³⁷ *Miller v. California*, 413 U.S. 15, 24 (1973).

³⁸ *New York v. Ferber*, 458 U.S. 747, 750-52 (1982).

³⁹ *Ashcroft*, 535 U.S. at 246-47.

⁴⁰ *Id.* at 247.

⁴¹ *Id.* at 257.

⁴² *Id.* at 258.

⁴³ *Id.* at 240.

images—that is, sexually explicit images of children created by ‘alter[ing] innocent pictures of real children so that the children appear to be engaged in sexual activity’—were also entitled to First Amendment protection.”⁴⁵ However, in its discussion of 18 U.S.C. § 2256 and Congress’s definition of child pornography, the Court noted that *morphed* images “implicate the interests of real children and are in that sense closer to the images in *Ferber*.”⁴⁶

After *Ashcroft*, “Congress was apparently concerned that because *Ashcroft* limited the prohibition ‘to material that could be proved to feature actual children,’ many child pornographers would be able to evade conviction.”⁴⁷ Congress then took action and further amended its laws by enacting the PROTECT Act of 2003 to adapt to society’s technological advancements and provide more narrowly tailored language.⁴⁸ This Act extended the definition of child pornography to include *morphed* child pornography and broadened the scope of punishment for these crimes.⁴⁹ The amendment criminalizes:

knowingly produc[ing], distribut[ing], receiv[ing], or possess[ing] with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct; and is obscene; or depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and lacks serious literary, artistic, political, or scientific value.⁵⁰

⁴⁴ *Ferber*, 458 U.S. at 765-66. (in *Miller*, the court focused on whether the images had any literary or artistic value but the court in *Ferber* found that question problematic because it is irrelevant to the effects on the child).

⁴⁵ See Hessick, *supra* note 26, at 326.

⁴⁶ *Id.*

⁴⁷ See Avery, *supra* note 32, at 92.

⁴⁸ See Mains, *supra* note 13, at 830. (the PROTECT Act stands for Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today); see also Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

⁴⁹ Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

⁵⁰ *Id.*

This Act does not criminalize “drawings, cartoons, sculptures, or paintings depicting minors or adults.”⁵¹ Congress hoped to fill the legislative gap between traditional and *morphed* child pornography with this Act.⁵² The PROTECT Act specifically expanded the definition of child pornography to include images of minors even if they are not actually engaged in the sexually explicit acts.⁵³

II. THE FIRST AMENDMENT AND CHILD PORNOGRAPHY

American jurisprudence has produced extensive case law on the constitutionality of child pornography. Certain ground-breaking cases provided the nation with guidelines in classifying different forms of speech and evaluating their constitutionality under the First Amendment.⁵⁴ The nation relies on the freedoms afforded to us under the Constitution but “it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.”⁵⁵ Moreover, the Supreme Court has not held that the First Amendment protects child pornography.⁵⁶

Although the First Amendment affords citizens freedom of speech, there are limitations to different classes of speech.⁵⁷ In *Chaplinsky v. New Hampshire*, the Supreme Court held that “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁵⁸ The Court further defined the classes of speech to:

include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

⁵¹ See Mains, *supra* note 13, at 830.

⁵² See Steinburg, *supra* note 3, at 919-20.

⁵³ *Id.*

⁵⁴ See *Ferber*, 458 U.S. at 750-52; *Miller*, 413 U.S. at 16; *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁵⁵ *Roth*, 354 U.S. at 483.

⁵⁶ See Hessick, *supra* note 26, at 325.

⁵⁷ See *Chaplinsky*, 315 U.S. at 571-72.

⁵⁸ *Id.*

any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁵⁹

This landmark case began the classification of types of materials that should and should not be afforded First Amendment protection. Pornography is widely categorized under obscene materials.⁶⁰

A decade after the *Chaplinsky* decision, the Supreme Court first encountered the issue of whether obscene materials fall under the protections of the First Amendment in another defining case: *Roth v. United States*.⁶¹ In *Roth*, the defendant was charged with violating an obscenity statute for conducting a business where he published and sold books with obscene content.⁶² Although it was the Court's first time being presented with this issue upfront, it found that many of its previous decisions indicated that obscenity is not protected by the freedoms of speech and the press.⁶³ Materials that are without redeeming social importance lack constitutional protections.⁶⁴ The Court clarified that material that contains sex cannot automatically be classified as obscene.⁶⁵ Obscene materials deal "with sex in a manner appealing to prurient interest."⁶⁶ When something is described as prurient, it is "marked by, arousing, or appealing to sexual desire."⁶⁷ However, "[t]he portrayal of sex, e.g., in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."⁶⁸ The test for evaluating potentially obscene materials is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest."⁶⁹ Consequently, the Supreme Court affirmed the lower court's decision holding that the materials the defendant sold were obscene and not protected by the First Amendment because, when looking at the

⁵⁹ *Id.* at 572.

⁶⁰ *Roth*, 354 U.S. at 501-02.

⁶¹ 354 U.S. 476, 483 (1957).

⁶² *See id.* at 480.

⁶³ *Id.* at 481.

⁶⁴ *Id.* at 484.

⁶⁵ *Id.* at 487.

⁶⁶ *Id.*

⁶⁷ *Prurient*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/prurient>.

⁶⁸ *Roth*, 354 U.S. 476, 487 (1957).

⁶⁹ *Id.* at 489.

materials as an average person, the material appealed to prurient interest.⁷⁰

The Supreme Court continued to evaluate First Amendment protections and set out guidelines to categorize allegedly obscene materials. In another landmark case, *Miller v. California*, the Court considered the issue of free speech and the sale of “adult” books.⁷¹ The Court rejected the previous “utterly without redeeming social value test”⁷² and set forth the standards below:

The basic guidelines for the trier of fact must be: (a) whether ‘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 as a whole, lacks serious literary, artistic, political, or scientific value.⁷³

A limit extended to sexual content requires that “[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”⁷⁴ This case set the bar for the future evaluation of obscene materials.

A few years later, the Supreme Court responded to the guidelines set forth in *Miller* and generated a test specifically for child pornography.⁷⁵ In *Ferber*, a statute criminalizing the use of a child in a sexual performance came into question when the defendant sold sexually explicit films to an undercover police officer depicting young boys masturbating.⁷⁶ The statute states that “[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of

⁷⁰ *Id.* at 492.

⁷¹ *Miller*, 413 U.S. at 16.

⁷² *Id.* at 24.

⁷³ *Id.* (internal citations omitted).

⁷⁴ *Id.* at 26.

⁷⁵ *Ferber*, 458 U.S. at 750-52 (citing NY Penal L § 263.11 (2014)).

⁷⁶ *Id.*

age.”⁷⁷ The Court held that child pornography as defined by the New York statute is not protected speech under the First Amendment.⁷⁸

The Court focused on the harms that are caused by the creation and distribution of child pornography.⁷⁹ First, the State has a compelling interest in the protection of children from exploitation through sexual performances.⁸⁰ The children suffer harm to their physiological, emotional, and mental health by their images being used in the creation of the pornographic images—this alone provides a sufficient reason to shield it from First Amendment protection.⁸¹ Second, the distribution of the photographs and films creates a permanent record of the participation, which leads to an exacerbate[ion] of the resulting harm.⁸² Third, “[t]he advertising and selling of child pornography provide an economic motive for, and are thus an integral part of, the production of such materials, an activity illegal throughout the Nation.”⁸³ Fourth, it is unlikely that the visual depictions of children participating in lewd social conduct contain any value.⁸⁴ Fifth, the Court’s earlier decisions are consistent with holding that child pornography is a category of material outside First Amendment protection.⁸⁵

The Court adjusted the *Miller* test by stating “[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not . . . be considered as a whole.”⁸⁶ These adjustments can be compared to the test in *Miller* for clarity when evaluating child pornography cases specifically, instead of obscene materials generally.⁸⁷ The Court noted that “the distribution of descriptions or 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 Amendment protection.”⁸⁸ The Court set the

⁷⁷ *Id.* at 751 (citing NY Penal L § 263.11 (2014)).

⁷⁸ *Id.* at 757-58.

⁷⁹ *Id.* at 757.

⁸⁰ *Id.*

⁸¹ *Ferber*, 458 U.S. at 758.

⁸² *Id.* at 759.

⁸³ *Id.* at 761.

⁸⁴ *Id.* at 762.

⁸⁵ *Id.* at 763.

⁸⁶ *Id.* at 764.

⁸⁷ See *Ferber*, 458 U.S. at 764.

⁸⁸ *Id.* at 764-65.

standard in this landmark case that child pornography is not afforded the First Amendment's protections.⁸⁹

III. DIVISION AMONG THE COURTS REGARDING THE CONSTITUTIONAL PROTECTIONS OF *MORPHED* CHILD PORNOGRAPHY

The constitutionality of *morphed* child pornography has been addressed by four of the United States courts of appeals.⁹⁰ Three of these courts held that the First Amendment did not protect *morphed* child pornography⁹¹ while the lone minority holds that *morphed* child pornography is constitutionally protected if its creation does not involve actual abuse of a child.⁹² The majority of courts reasoned that the government's interest in protecting the children whose images were used in the sexually explicit content heavily outweighs the defendants' claims for free speech under the First Amendment.⁹³ These courts relied on the CPPA and PROTECT Act in holding that *morphed* child pornography falls outside of protected expressive speech.⁹⁴

A. *The Abundant Majority*

Although the circuit courts are currently split on their holdings regarding the First Amendment and its application to *morphed* child pornography, the majority of the courts that have addressed this issue hold that it is not protected.⁹⁵ The Second, Sixth, and Fifth Circuits have all held that *morphed* child pornography is not protected speech under the First Amendment.⁹⁶

⁸⁹ *Id.*

⁹⁰ See *Hotaling*, 634 F.3d at 729; *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012); *Mecham*, 950 F.3d at 262-63; *United States v. Bach*, 400 F.3d 622, 624-26 (8th Cir. 2005); *Anderson*, 759 F.3d at 895.

⁹¹ See *Hotaling*, 634 F.3d at 729; *Boland*, 698 F.3d at 883; *Mecham*, 950 F.3d at 267.

⁹² *Anderson*, 759 F.3d at 895.

⁹³ *Hotaling*, 634 F.3d at 729-30; *Boland*, 698 F.3d at 883; *Mecham*, 950 F.3d at 267.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Jacklyn Wille, 'Morphed' Child Pornography Not Protected Speech, 5th Cir. Says, BLOOMBERG LAW NEWS (Feb. 13, 2020), <https://news.bloomberglaw.com/us-law-week/morphed-child-pornography-not-protected-speech-5th-cir-says>.

The cases detailed below discuss how the impact of harm to the victims prevailed over the defendants' arguments for their right to expressive speech.⁹⁷

The Second Circuit first encountered the issue of *morphed* child pornography in *United States v. Hotaling*.⁹⁸ There, the defendant cut out the heads of six minor females from their "original, non-pornographic photographs and pasted them over the heads of images of nude and partially nude adult females engaged in 'sexually explicit conduct.'"⁹⁹ One of the photos depicted an edited image of the defendant engaged in sexual intercourse with a female body with one of the minor's faces.¹⁰⁰ Another image was edited to portray the head of one of the minor females on another female's body that was "partially nude, handcuffed, shackled, wearing a collar and leash, and tied to a dresser."¹⁰¹ The defendant obtained these images from a computer that he was repairing for one of the victim's family members and from photographs taken by his daughters and their friends.¹⁰²

The Second Circuit affirmed the district court's holding that the First Amendment does not protect *morphed* child pornography where the face of a child is pasted onto the body of an adult in a sexually explicit image.¹⁰³ The court reasoned that the "Supreme Court has long recognized 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 distribution of such material imposes on them."¹⁰⁴ The court found that these children are initially harmed during the creation of the pornographic materials and continue to be harmed for years after its creation.¹⁰⁵

Although the minors were not physically engaging in the sexually explicit acts in the images created by the defendant in *Hotaling*, the interests of actual minors were found to be implicated in these *morphed* images.¹⁰⁶ The Second Circuit compared the images created

⁹⁷ *Hotaling*, 634 F.3d at 727-29; *Boland*, 698 F.3d at 879; *Mecham*, 950 F.3d at 267.

⁹⁸ See 634 F.3d at 727.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 728.

¹⁰⁴ *Hotaling*, 634 F.3d at 728.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 729.

by the defendant to the images at issue in *Ashcroft*.¹⁰⁷ The images in *Hotaling* actually implicated the minors' image and reputation because there were six identifiable minor females that were used, unlike the computer-generated images in *Ashcroft*.¹⁰⁸ The children's names were included on many of the photographs that the defendant created, further adding to the identification of these minors.¹⁰⁹ The Second Circuit emphasized how the specific actions taken by the defendant further imposed reputational and psychological harm on these children, knowing that they were exploited by a trusted family member.¹¹⁰

The reasoning detailed in the Second Circuit's opinion continues to be relevant in present-day society. In the new age, when an individual uploads information onto the Internet, that information is immortalized. Once the content is uploaded, it is impossible to determine which users have viewed or downloaded it.¹¹¹ The media becomes widely disseminated and users' interactions with it can be so extensive that it becomes untraceable.¹¹² The children continue to be haunted over years by the knowledge of the material's continued circulation.¹¹³ The victims of child pornography "often suffer a lifetime of re-victimization by knowing the images of their sexual abuse are on the Internet forever."¹¹⁴ Although the usage of the children's faces may be limited to a few instances, the emotional effects last a lifetime.¹¹⁵

The defendant in *Hotaling* contended that he merely possessed the photographs, but the way he possessed them showed otherwise.¹¹⁶ The defendant had carefully labeled and indexed each image in a manner that is used almost exclusively for Internet publication.¹¹⁷ The Supreme Court finds that the harm inflicted on the minors begins when the images are created.¹¹⁸ The defendant prepared these images

¹⁰⁷ *Id.* at 730.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Hotaling*, 634 F.3d at 730.

¹¹¹ U.S. Dep't of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Hotaling*, 643 F.3d at 730.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103, 110 (1990)).

for publication onto the Internet to enter into the distribution chain, which means the images are uploaded for others to download and continue spreading across the Internet.¹¹⁹ These types of *morphed* images are exactly those which Congress intended to address and criminalize in the PROTECT Act.¹²⁰ For all these reasons, the Second Circuit concluded that images that use the faces of actual minors in a sexually explicit manner are not protected speech under the First Amendment.¹²¹

In *Doe v. Boland*, the Sixth Circuit considered the constitutional protections of *morphed* child pornography when the defendant morphed images of minors engaged in innocent acts into sexually explicit photos.¹²² The defendant downloaded two images of the minors from a stock photography website.¹²³ He morphed one image of a five-year-old child eating a donut by replacing the donut with an image of a penis.¹²⁴ He morphed a second image of a six-year-old girl by pasting her face onto the body of a nude woman performing sexual acts with two men.¹²⁵ The Federal Bureau of Investigation (FBI) became aware of the defendant after he testified in a criminal trial in Oklahoma regarding child pornography, and the agency then searched his home.¹²⁶ There, the FBI seized files which ultimately contained the *morphed* child pornography.¹²⁷ This case arose out a civil lawsuit filed by the parents of the minor victims.¹²⁸ The district court granted summary judgment to the defendant, but the parents appealed.¹²⁹ The case was remanded, and the district court ruled in favor of the parents, awarding them damages.¹³⁰ The defendant's appeal followed, which prompted the Sixth Circuit to determine whether *morphed* child por-

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 698 F.3d at 879.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 880.

¹²⁸ *Boland*, 698 F.3d at 880 (the parents brought the claim under 18 U.S.C. § 2252A(f), which is the federal statute that proscribes civil remedial relief to minor victims in these types of circumstances).

¹²⁹ *Id.*

¹³⁰ *Id.*

nography violates the First Amendment as applied to defendant's conduct.¹³¹

The Sixth Circuit assessed whether the plaintiffs suffered any personal injuries to effectuate the warrant of damages.¹³² The court found that pornography causes children to suffer reputational, emotional, and privacy injuries to their well-being.¹³³ These injuries were compared to the similar injuries of defamation to determine their validity.¹³⁴ The defendant argued that the plaintiffs needed to prove that they were victims and that they suffered a personal injury separately, and that showing only that they were victims does not suffice to prove injury.¹³⁵ The court rejected the defendant's argument because "the statute's separate references to "victim" and "personal injury" show only that minor victims may sue for injuries they incur later in life; the statute does not create one category of victims and another category of people who suffer personal injuries."¹³⁶ The court read the statute to allow minor victims to sue for injuries incurred later in life and that it did not create separate categories for victims and those who suffer personal injuries.¹³⁷ Under this court's interpretation of the statute, a victim can sue the creator of the pornographic material initially and a distributor who sells the material years later.¹³⁸

The plaintiffs became victims and suffered injuries simultaneously when the defendant morphed images of them in innocent poses into sexually explicit images.¹³⁹ The court further determined that the plaintiffs suffered injuries to their reputations because the defendant shared the morphed images with defense counsel and court staff and displayed them in a courtroom.¹⁴⁰ The Sixth Circuit concluded that it was "immaterial that Boland never displayed these images outside of a courtroom and never transmitted them electronically. The creation and initial publication of the images itself harmed Jane Doe and Jane

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 880.

¹³⁴ *Boland*, 698 F.3d at 880-81.

¹³⁵ *Id.* at 881.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Boland*, 698 F.3d at 882.

Roe, and that was enough to remove Boland's actions from the protections of the First Amendment."¹⁴¹

In February 2020, the Fifth Circuit became the third court of appeals to hold that *morphed* child pornography is outside of First Amendment protection.¹⁴² In *United States v. Mecham*, the defendant was convicted of possession of child pornography.¹⁴³ A computer technician found thousands of images of *morphed* child pornography on the defendant's computer after he took it in for repairs.¹⁴⁴ The images showed "nude bodies of adults with faces of children superimposed."¹⁴⁵ The defendant claimed that he made these images by pasting the faces of his granddaughters onto sexually explicit photos and videos of adults, as revenge for his family cutting him off.¹⁴⁶ One of the videos showed an image of an adult female and male having sex with his and his own granddaughter's faces on the bodies.¹⁴⁷ The defendant distributed some of these videos to his granddaughter, but only he was charged with possession.¹⁴⁸ The defendant argued that the First Amendment protects *morphed* child pornography, but the Fifth Circuit disagreed.¹⁴⁹

The Fifth Circuit first discussed how the test in *Miller* was unclear in identifying obscene materials under the Supreme Court's "community standards" test, leaving the prosecution with a difficult time facing constitutional challenges.¹⁵⁰ Next, *Ashcroft's* holding was applied and the Fifth Circuit concluded that "morphed child pornography is 'closer' to real child pornography because the image makes it appear that an 'identifiable minor is engaging in sexually explicit conduct.'"¹⁵¹ The defendant argued that the video he created was entitled to First Amendment protection because his use of a real child's image did not depict actual sexual abuse of the child.¹⁵² The court rejected the defendant's argument that *Ferber* required the minor to affirmatively ---

¹⁴¹ *Id.* at 884.

¹⁴² *Mecham*, 950 F.3d at 261.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 260.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Mecham*, 950 F.3d at 261.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 263 (quoting 18 U.S.C. § 2256(8)(C)).

¹⁵² *Id.*

commit a sexual act or be sexually abused.¹⁵³ The Fifth Circuit acknowledged the current circuit split on this issue and decided to follow the Second and Sixth Circuits' conclusions, relying on the interest in preventing reputational and emotional harm to the children when identifiable images of real children are used.¹⁵⁴ The Sixth Circuit's holding that "*morphed* child pornography has 'relatively weak expressive value'" was referenced in this decision.¹⁵⁵ Upon reliance of the Supreme Court's decisions in *Ferber* and *Ashcroft*, the Fifth Circuit affirmed the district court's decision and held that the First Amendment does not protect *morphed* child pornography because it depicts an identifiable child.¹⁵⁶

B. *The Lone Minority*

The Eighth Circuit is the only court of appeals that currently affords First Amendment Protection to *morphed* child pornography.¹⁵⁷ The first case to come before the court was *United States v. Bach*.¹⁵⁸ In this case, the Eighth Circuit initially held that *morphed* child pornography was protected under the First Amendment when it involves the image of a child's face pasted onto the body of another child.¹⁵⁹ In its later decision, *United States v. Anderson*, the court categorized *morphed* child pornography within protected speech under the First Amendment when it does not involve sexual abuse of an actual minor.¹⁶⁰ This Court's decisions appear to be based on whether the actual use of a minor is involved.¹⁶¹

In *United States v. Bach*, the defendant was convicted of various counts of child pornography after a mother contacted the police about suspicious communication logs found on her family computer.¹⁶² The mother's concern launched a police investigation that revealed the defendant as a registered sex offender, stemming from a conviction

¹⁵³ *Id.* at 266.

¹⁵⁴ *Mecham*, 950 F.3d at 265-67.

¹⁵⁵ *Id.* at 265 (citing *Boland*, 698 F.3d at 883).

¹⁵⁶ *Id.* at 265-67.

¹⁵⁷ *Anderson*, 759 F.3d at 895.

¹⁵⁸ *Bach*, 400 F.3d at 624-26.

¹⁵⁹ *Id.*

¹⁶⁰ 759 F.3d at 895.

¹⁶¹ See *Bach*, 400 F.3d at 624-26. See also *Anderson*, 759 F.3d at 895.

¹⁶² 400 F.3d at 624-26.

involving sex with a fourteen-year-old boy.¹⁶³ After a search of the defendant's home, the police found a photograph where the minor's "head had been skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of [the minor] posing in the tree."¹⁶⁴

The defendant relied on *Ashcroft* when he argued that *morphed* child pornography was protected under the First Amendment because the government did not prove that a real minor was used in the production of the image.¹⁶⁵ The government asserted that the *morphed* images involve real children and produce mental and reputational harm because they contain photos of real children being abused and exploited, as well as the face of an identifiable child.¹⁶⁶ The court in *Bach* held that the image of a minor's head pasted onto another minor's body in a sexually explicit image is without First Amendment protection.¹⁶⁷ This holding was based on the fact that "[t]he interests of real children are implicated in the image received by Bach showing a boy with the identifiable face of [the minor plaintiff] AC in a lascivious pose."¹⁶⁸ The minor in this case was victimized every time the picture was displayed because it created a lasting record of the identifiable minor who was seemingly engaged in a sexually explicit activity.¹⁶⁹

In contrast, the Eighth Circuit later held that *morphed* child pornography is protected under the First Amendment in *Anderson*, a case involving the image of an actual minor's face edited onto the body of an adult.¹⁷⁰ In *Anderson*, the defendant initiated an appeal after he was convicted of distributing of child pornography when a concerned mother contacted the police about sexually explicit messages and images that her minor-aged daughter received on Facebook.¹⁷¹ A police investigation identified the defendant, the minor's adult half-brother, as the sender.¹⁷² One of the images

¹⁶³ *Id.* at 624.

¹⁶⁴ *Id.* at 625.

¹⁶⁵ *Id.* at 629.

¹⁶⁶ *Id.* at 630.

¹⁶⁷ *Id.* at 632.

¹⁶⁸ *Bach*, 400 F.3d at 632 (AC is the minor involved in the creation of the pornographic images).

¹⁶⁹ *Id.*

¹⁷⁰ 759 F.3d at 895.

¹⁷¹ *Id.* at 893.

¹⁷² *Id.*

depicted an adult male and female engaged in sexual intercourse, but the defendant digitally superimposed the minor's face over the face of the female.¹⁷³ The defendant sent this image to the minor with the caption "[t]his is what we will do."¹⁷⁴

The defendant contended that the child pornography statute, in regard to his distribution charge, was overbroad and unconstitutional.¹⁷⁵ The Eighth Circuit applied the strict scrutiny test in upholding the constitutionality of the statute as applied in this case, making it a crime to knowingly distribute child pornography.¹⁷⁶ Under strict scrutiny, "[w]here a statute prohibits constitutionally protected speech based on its content, the government must demonstrate that the prohibition is 'justified by a compelling interest and is narrowly drawn to serve that interest.'"¹⁷⁷ To be narrowly drawn, the law must be actually necessary to achieve its interest.¹⁷⁸ If there is a less restrictive alternative that serves the government's purpose, then this method must be used instead.¹⁷⁹ The defendant argued that the law as applied was not narrowly tailored "because it encompass[ed] an image that clearly depict[ed] adult bodies and because it punish[ed] 'private' distribution of a *morphed* image."¹⁸⁰ After applying the test, the court agreed that the government had a compelling interest in protecting the minors from the harmful effects of these *morphed* images.¹⁸¹ The court concluded that "[t]here was no less restrictive means for the government effectively to protect this child from the exploitation and psychological harm resulting from the distribution of the *morphed* image than to prohibit Anderson from disseminating it."¹⁸² Ultimately, the court determined that the statute met the test of strict scrutiny and that it was not unconstitutional.¹⁸³ The Eighth Circuit then proceeded with the question of whether the defendant was protected by the First Amendment.¹⁸⁴

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 892.

¹⁷⁶ *Anderson*, 759 F. 3d at 893.

¹⁷⁷ *See id.* at 895 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 896.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 895-96.

¹⁸² *Anderson*, 759 F.3d at 896.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Once the court in *Anderson* categorized *morphed* child pornography as constitutionally protected speech, the court further discussed the distribution of the images.¹⁸⁵ The court found that the government has a compelling interest in protecting the child involved from psychological and reputational harm.¹⁸⁶ The focus was on distinguishing actual distribution of the images from the creation of the images alone.¹⁸⁷ As a result, the court held that distribution of *morphed* child pornography is not protected by the First Amendment because distribution of the images creates a lasting record of the child and “the children, who are identifiable in the images, are violated by being falsely portrayed as engaging in sexual activity.”¹⁸⁸ The court thus requires the offender to take the extra step of dissemination to lose First Amendment protection.¹⁸⁹

The Eighth Circuit firmly held that the First Amendment protects the creation of *morphed* child pornography when actual minors are not physically engaged in the sexually explicit acts.¹⁹⁰ The court compared the facts of this case to *United States v. Stevens*, where the Supreme Court “clarified that child pornography was categorically unprotected in *Ferber* because it involved visual depictions that were produced through sexual abuse of one or more children.”¹⁹¹

ANALYSIS

I. HOW THE SUPREME COURT SHOULD APPLY STRICT SCRUTINY TO ISSUES OF CONSTITUTIONAL PROTECTION FOR *MORPHED* CHILD PORNOGRAPHY

When presented with the issue of whether *morphed* child pornography is constitutionally protected, the Supreme Court should apply the strict scrutiny test and hold that the First Amendment does not protect this form of speech. This Analysis will first discuss the strict scrutiny test and how it applies in a case involving *morphed* child por-

¹⁸⁵ *Id.* at 895-96.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 896.

¹⁸⁸ *Anderson*, 759 F.3d at 896 (citing *Shoemaker v. Taylor*, 730 F.3d 778, 786 (9th Cir. 2013)).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 895.

¹⁹¹ *Id.* at 894 (citing *United States v. Stevens*, 559 U.S. 460, 471 (2010)).

nography. Then, this Analysis will explain why the Eight Circuit was incorrect in holding that these protections apply. Finally, the discussion will conclude by explaining why the Supreme Court should follow the majority of the circuit courts in holding that the First Amendment does not protect this form of pornography.

When determining the constitutionality of certain laws, courts sometimes apply the strict scrutiny test, rather than the intermediate scrutiny or rational basis tests.¹⁹² This two-part test requires there to be a compelling governmental interest, and that the law in question must be narrowly tailored to achieve that interest.¹⁹³ To constitute a compelling interest, the government must specifically identify an actual problem that needs to be solved.¹⁹⁴ To determine whether the statute is narrowly tailored to effectuate this interest, the government must show that the “laws [were] written precisely to place as few restrictions as possible on First Amendment liberties.”¹⁹⁵ If there are alternatives that are less restrictive and can still achieve the government’s purpose, then the statute is not narrowly tailored and the legislature must use the other means.¹⁹⁶

Within the issue of *morphed* child pornography, the government has a compelling interest in protecting children from the extensive reputational, emotional, and psychological harms that result from the dissemination of these *morphed* images. Examples of the irreparable psychological harms include “disruptions in sexual development, self-image, and developing trusting relationships with others in the future.”¹⁹⁷ Also, these victims suffer emotional harms including “feelings of helplessness, fear, humiliation, and lack of control given that their images are available for others to view in perpetuity.”¹⁹⁸ Scholars have compared child pornography to other sexual crimes such as

¹⁹² Legal Information Institute, Strict Scrutiny, https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=strict%20scrutiny%20is%20a%20form,the%20constitutionality%20of%20certain%20laws.&text=to%20pass%20strict%20scrutiny%2C%20the,law%20to%20achieve%20that%20interest.

¹⁹³ *Id.*

¹⁹⁴ *Anderson*, 759 F.3d at 895.

¹⁹⁵ Ruth Ann Strickland, *Narrowly Tailored Laws*, The First Amendment Encyclopedia (2009), <https://www.mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws#:~:text=the%20Supreme%20Court%20has%20ruled,possible%20on%20First%20Amendment%20liberties.>

¹⁹⁶ *Id.*

¹⁹⁷ U.S. Dep’t of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>.

¹⁹⁸ *Id.*

revenge porn.¹⁹⁹ These scholars have found that, unlike the victims in revenge porn and other sexual cybercrimes, the victims in child pornography are unable to provide consent for others to take images of them, regardless of whether they are innocent.²⁰⁰ Minors are vulnerable and innocent because of their young age and lack of life experiences. Many of the images used are of minors in innocent poses, not intended for use in an explicit manner.²⁰¹ The government has a compelling interest in protecting these children from these extensive and everlasting harms.

The prohibition of First Amendment protection for the creation and possession of these *morphed* images of children in a sexually explicit manner is narrowly tailored to effectuate these governmental interests. The Department of Justice provides that child pornography is accessible on a multitude of forums, “including social networking websites, file-sharing sites, photo-sharing sites, gaming devices, and even mobile apps.”²⁰² The Internet became a hotspot for child pornography creators because of the “ability to rapidly communicate with large numbers of people and the perception of anonymity in cyberspace.”²⁰³ Once a perpetrator uploads a pornographic image to the Internet, it becomes nearly impossible to wipe from existence.²⁰⁴ Even if it is removed from the website that it was initially uploaded to, that does not account for the individuals who may download it and retain the pornographic images and media on their electronic devices.²⁰⁵ The inability to completely delete the media allows for continued dissemination of the images, which can be used to identify these children, because these users can continue to repost the pornographic media onto other Internet forums.²⁰⁶ The government’s interest in preventing reputational, emotional, and psychological harms stems from the dissemination of the sexually explicit material. These

¹⁹⁹ See Steinburg, *supra* note 3, at 931.

²⁰⁰ *Id.* at 932.

²⁰¹ *Id.* at 918-19.

²⁰² U.S. Dep’t of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>.

²⁰³ Lori J. Parker, Annotation, *Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet*, 7 A.L.R. Fed. 2d 1,1 (2005).

²⁰⁴ U.S. Dep’t of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>.

²⁰⁵ *Hotaling*, 634 F.3d at 730.

²⁰⁶ *Id.*

harms increase over time because the victimized children fear that more people could see the *morphed* images that contain their identifiable faces.

To determine whether the statute is narrowly tailored to effectuate this interest, the government must show that the proscription of these types of pornographic images is the only possible solution.²⁰⁷ The government cannot employ less restrictive means on this form of speech that will prevent children from suffering the harm resulting from the dissemination of these pornographic images. The government can limit these harms by explicitly prohibiting the dissemination of these *morphed* images. Distributors will be less likely to disseminate these images if the First Amendment does not protect them. In the Second, Fifth, and Sixth Circuits where most courts held that the First Amendment did not protect the defendants' creations, law enforcement discovered the defendants before they had published the images onto the Internet.²⁰⁸ Even though the images were not distributed for other eyes to see, that did not prevent the children from being harmed. Once the children were made aware of the creation of these images, the emotional harm began. Thoughts began to intrude upon their minds regarding what would happen if the images were seen by others. Regardless of how widespread the dissemination of these images becomes, the children will still suffer an insurmountable amount of harm. Therefore, a law prohibiting First Amendment protection for *morphed* child pornography is narrowly tailored to achieve the government's compelling interest in preventing harm to the child victims.

II. THE EIGHTH CIRCUIT'S CORRECT ANALYSIS BUT INCORRECT HOLDING

The Eighth Circuit's analyses in *Bach* and *Anderson* would lead a reasonable person to find that *morphed* child pornography should not be protected by the First Amendment. This Section will compare the facts in these two cases and then discuss the application of the strict scrutiny test. Although the Eighth Circuit afforded First Amendment protection to the images created in *Anderson*, the court's opinion pro-

²⁰⁷ See *Anderson*, 759 F.3d at 896.

²⁰⁸ See Jacklyn Wille, '*Morphed*' Child Pornography Not Protected Speech, 5th Cir. Says, Bloomberg Law (2020), <https://news.bloomberglaw.com/us-law-week/morphed-child-pornography-not-protected-speech-5th-cir-says>.

vides reason to reverse its decision.²⁰⁹ In *Bach*, the court previously held *morphed* child pornography as the type of material that should be not protected by the First Amendment when the image encompasses the actual physical and sexual abuse of a child.²¹⁰ The Eighth Circuit applied the strict scrutiny test in *Anderson* and concluded that there is a compelling government interest in protecting these children, and the law prohibiting dissemination is narrowly tailored to effectuate this interest.²¹¹ The Eighth Circuit did not err in its analysis of the law; it erred in its application.

The Eighth Circuit based its holding in *Anderson* on the differences in the facts of the case to the facts in *Bach*.²¹² The court's main reasoning for holding that the images created by *Anderson* were protected by the First Amendment was because a child was not sexually abused during its creation.²¹³ In contrast, the court found that the images in *Bach* did not deserve First Amendment protection because the perpetrator edited the child's face onto a sexually explicit image of another child.²¹⁴ This process required the use of an actual child's image.²¹⁵ What distinguished *Bach* from *Anderson* is the physical and sexual abuse of a child in one of the images used to create the *morphed* child pornography.²¹⁶

The court's *morphed* image analysis in *Anderson* is misplaced. Even if the image's creation did not physically or sexually abuse a child, the child still suffers harm when perpetrators superimpose the child's image onto an adult body.²¹⁷ The *morphed* image creates a lasting record of the child apparently engaged in a sexually explicit act because the child is identifiable by the use of their face. Dissemination of such an image will still cause the child to suffer harm outside of sexual abuse. The Eighth Circuit did not account for the reputational, emotional, and psychological harms that a child will endure as a result. The government's interest in protecting children from victimization accounts for both physical and emotional harm. Regardless of

²⁰⁹ Compare *Anderson*, 759 F.3d at 895 with *Bach*, 400 F.3d at 632.

²¹⁰ *Bach*, 400 F.3d at 632.

²¹¹ *Anderson*, 759 F.3d at 895-96.

²¹² *Id.* at 895.

²¹³ *Id.*

²¹⁴ *Bach*, 400 F.3d at 632.

²¹⁵ *Id.*

²¹⁶ *Anderson*, 759 F.3d at 895.

²¹⁷ U.S. Dep't of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>.

whether the creation of the *morphed* child pornography involved the physical and sexual abuse of a child, the superimposed child will suffer everlasting emotional harm.

The Eighth Circuit applied a strict scrutiny test to evaluate the constitutionality of the statute criminalizing the distribution of *morphed* child pornography in *Anderson*.²¹⁸ The court recognized that the statute was narrowly tailored to effectuate the government's compelling interest.²¹⁹ The court explicitly acknowledged the harms that children can experience from being used in the creation and distribution of these types of images, but the court failed to distinguish how the images in *Anderson* will not lead to those same harms.²²⁰ Although the court's analysis provided reason to proscribe First Amendment protection for *morphed* child pornography, it concluded differently.²²¹ The court was unclear as to why the First Amendment protected *morphed* child pornographic images' *creation*, but not the same images' *distribution*.²²²

The Eighth Circuit erred in establishing a distinguishing factor in *Anderson* for affording constitutional protection to possession of *morphed* child pornography but not dissemination of the same materials. The court acknowledged the same reputational, emotional, and psychological harms that can result from the creation of *morphed* child pornography as stated by the majority of the circuit courts.²²³ The minors whose faces were used in the *morphed* images will suffer the same harms and fears once aware of the creation of the images themselves, regardless of proof of dissemination.²²⁴ The minors live in constant fear and anxiety of the risk that the creator and possessor of the images may disseminate them at any time.²²⁵

²¹⁸ *Anderson*, 759 F.3d at 895-96.

²¹⁹ *Id.* at 896.

²²⁰ *Id.* at 895-96.

²²¹ *Id.* at 895.

²²² *Id.* at 896.

²²³ *Id.* at 895-96.

²²⁴ See *Hotaling*, 634 F.3d at 729-30.

²²⁵ U.S. Dep't of Justice, *Child Pornography* (2020), <https://www.justice.gov/criminal-ceos/child-pornography>.

III. HOW THE SUPREME COURT SHOULD RULE WHEN PRESENTED WITH THE ISSUE OF *MORPHED* CHILD PORNOGRAPHY AND THE FIRST AMENDMENT

The Supreme Court should follow the majority of courts of appeals in holding *morphed* child pornography as outside of the realm of protected speech. The government's interest in protecting children from physical and emotional harm by preventing dissemination at its origin is both narrowly tailored and compelling. By stopping dissemination in its tracks, the government can stop the spread and minimize the harm.

The Supreme Court has not yet considered a *morphed* child pornography case, or whether the First Amendment protects *morphed* child pornography. If the Court considers this question, it should follow the three courts of appeals that already found that the First Amendment does not protect *morphed* child pornography. In lieu of a Supreme Court decision, Congress should enact legislation specifically defining *morphed* child pornography. The legislation should also state that the First Amendment does not protect *morphed* child pornography. This would provide courts of appeals with clarity when the courts encounter child pornography issues. Although the PROTECT Act seems to incorporate *morphed* child pornography, the Eighth Circuit still held that *morphed* child pornography is afforded First Amendment protection when it does not involve the actual physical and sexual abuse of a child.²²⁶

CONCLUSION

If presented with the opportunity, the Supreme Court should follow the Second, Sixth, and Fifth Circuits in holding that the First Amendment does not protect *morphed* child pornography. Historically, the Supreme Court already held that the First Amendment does not protect child pornography.²²⁷ The advancement of technology allows for a new form of child pornography that does not require actual abuse of minors who are physically engaging in sexually explicit acts. Courts should not afford constitutional protection to the development of this form of pornography simply because it did not exist at

²²⁶ *Anderson*, 759 F.3d at 895.

²²⁷ *Ferber*, 458 U.S. at 765.

the time the Constitution was written. Congress has enacted various legislation over the years to account for the evolution of technology and spillover effects of obscene material. The Supreme Court, if presented with the question, should uphold Congress' latest legislation, the PROTECT Act, in response to the expansion of child pornography to include *morphed* images. Children do not need to be physically engaged in the sexually explicit acts to suffer from the lasting physiological, reputational, and emotional harm resulting from the creation and dissemination of *morphed* images.

