Free Speech Coalition v. Reno: Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?

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> "The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children."[1]

CHILD PORNOGRAPHY IS a growing national problem. In 1995 federal investigators filed more child pornography cases than in any previous year.[2] The annual increase in cases was higher than in any year since 1986.[3] Advances in computer and computer imaging technology have only exacerbated the problem. With these technological advances, child pornographers can now create child pornography without using "real" children.[4] The computer-generated images pornographers can create are virtually indistinguishable from child pornography using real children. In addition to revolutionizing the production of child pornography, technological changes facilitated its

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1. New York v. Ferber, 458 U.S. 747, 757 (1982) (quoting 1977 N.Y. Laws, ch. 910, § 1).

2. *See Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 16 (1996) [hereinafter *Senate Hearing*] (statement of Kevin DiGregory, Deputy Assistant Attorney General, Department of Justice).

3. *See id.* at 17.

4. The Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251–2260 (1994 & Supp. IV 1998), which is examined extensively in this Note, does not explicitly use the term "real" children. However, the Ninth Circuit did in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), stating: "Throughout the legislative history, Congress has defined the problem of child pornography in terms of real children." *Id.* at 1089. In this Note, the term "real" children means those children who are actually involved in the production of child pornography.

distribution. As of December 1995, nearly one million sexually explicit pictures of children were on the Internet at any given time.[5] Of these pictures, over eight hundred were graphic depictions of "adults or teenagers engaged in sexual activity with children between eight and ten years of age."[6] In 1996, to combat these new problems with child pornography, Congress enacted the Child Pornography Prevention Act[7] ("CPPA").

In late 1999, the Ninth Circuit, in *Free Speech Coalition v. Reno*,[8] struck down provisions of the CPPA.[9] Based on its interpretation of prior case law, the court reasoned that Congress may criminalize child pornography where actual children are used to produce the pornographic materials,[10] but Congress may not constitutionally proscribe virtual child pornography.[11] The Ninth Circuit's *Free Speech* decision created a split in authority with the First and Eleventh Circuits.[12]

This Note focuses on the Ninth Circuit's holding in *Free Speech* and criticizes the court's opinion as being contrary to prior case law and detailed congressional findings. Part I discusses the problems created by recent technological advances, which prompted Congress to enact the CPPA. This section also reviews important Supreme Court cases establishing the constitutional framework for analyzing child pornography, and recent cases upholding the constitutionality of the CPPA. Part II focuses on the case itself, discussing both the majority and dissenting opinions. Part III criticizes the majority opinion, relying on congressional findings, prior case law, and the dissenting opinion. Finally, this Note concludes that, contrary to the view taken by the Ninth Circuit in *Free Speech*, Congress possesses the constitutional authority to proscribe virtual child pornography.

5. *See* Jennifer Stewart, Comment, *If This Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INT'L L. 205, 207 (1997) (citing John Henley, *The Observer Campaign to Clean Up the Internet: Hackers Called in as Cybercops to Drive Out Porn*, OBSERVER, Sept. 1, 1996, *available in* 1996 WL 12065705).

6. *Id.*

7. 18 U.S.C. §§ 2251–2260 (1994 & Supp. IV 1998).

8. 198 F.3d 1083 (9th Cir. 1999).

9. *See id.* at 1097.

10. *See id.* at 1092.

11. *See id.* at 1086.

12. *See* discussion *infra* Part I.B.2.

I. Background

A. Advances in Technology and the Enactment of the CPPA

Congress's attempts to destroy the evils of child pornography began with the enactment of the Protection of Children Against Sexual Exploitation Act of 1977.[13] Since then, Congress has made several revisions to the original legislation.[14] However, with each revision child pornographers found ways to circumvent the law's prohibitions.[15] This cycle recently repeated itself and caused Congress to enact the CPPA.

With advances in computer and computer imaging technology, child pornographers can now create computer-generated child pornography—i.e., pornographic materials that depict children engaging in sexually explicit activity without using real children to create the materials.[16] For purposes of this Note, computer-generated child pornography is divided into two categories—virtual and computer-altered child pornography. Virtual child pornography does not depict a real or identifiable child.[17] Through a technique called "morphing,"[18] the image of a *Playboy Bunny* or *Penthouse Pet* can be scanned into a com-

13. 18 U.S.C. §§ 2251–2253 (1994 & Supp. IV 1998). This original law prohibited using a minor to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce." *Id.* § 2251(a).

14. *See, e.g.*, Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2253 (1994 & Supp. IV 1998)) (eliminating the requirement that child pornography be considered obscene under *Miller v. California*, 413 U.S. 15 (1973), in order to be criminal); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended at 18 U.S.C. § 2251 (1994 & Supp. IV 1998)) (banning child pornography advertisements); Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (codified as amended at 18 U.S.C. § 2255 (1994)) (subjecting violators of child pornography laws to liability for personal injuries to children who were used in production of child pornography); Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 18 U.S.C. §§ 2251A–2252 (1994 & Supp. IV 1998)) (prohibiting use of computers to transport, distribute, or receive child pornography); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4816 (codified as amended at 18 U.S.C. § 2252(a)(4) (1994 & Supp. IV 1998)) (banning possession of three or more pieces of child pornography); and a 1994 amendment, Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (codified as amended at 18 U.S.C. § 2260 (Supp. IV 1998)) (criminalizing importation of child pornography).

15. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1087–89 (9th Cir. 1999).

16. *See* S. REP. No. 104-358, at 15 (1996). According to computer graphics specialists, all that is required to create these pornographic materials is "an IBM-compatible personal computer with Windows 3.1 or Windows 95, or an Apple MacIntosh computer" and "off-the-shelf imaging-editing and 'morphing' computer software costing as little as $50." *Id.* at 15–16. For a definition of "morphing," see *infra* note 18.

17. *See Free Speech*, 198 F.3d at 1097–98 n.1 (Ferguson, J., dissenting).

puter and transformed through animation techniques into a sexually explicit image of a child.[19] Although the morphed image is "virtual," it is practically indistinguishable from an "unretouched" photographic image of a real child in a sexually explicit pose.[20] By contrast, computer-altered child pornography depicts the image of a real or identifiable child.[21] A photograph of an innocent child can be scanned into the computer, and with the "cut and paste" feature, the child's head can be superimposed onto the body of someone who is engaged in sexually explicit activity.[22] Furthermore, with image-altering software and computer hardware, that same photograph of the innocent child can be altered in such a manner as to remove the child's clothing and to arrange the child into "sexual positions involving children, adults and even animals."[23]

Recent advances in computer imaging technology have rendered pre-CPPA federal law ineffective in two ways. First, because real children are no longer needed to produce child pornography, these computer-generated pornographic materials are placed outside the reach of pre-CPPA federal law.[24] Second, even where real children are used, image-altering software can transform sexually explicit material in such a way that it is impossible for prosecutors to identify the persons in the material or to prove that real children were used in producing the material.[25] To close these loopholes, Congress enacted the CPPA, amending the definition of child pornography.[26] The CPPA defines child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

18. "'Morphing' is short for 'metamorphosing,' a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image." Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440 n.5 (1997). For a demonstration of morphing, see Stephen Lines, *Semi-Automatic Morph Between Two Supermodels* (visited Aug. 26, 2000) <http://www.ai.mit.edu/people/spraxlo/R/superModels.html>.

19. *See* Burke, *supra* note 18, at 440–41.

20. S. REP. No. 104-358, at 15–16 (1996).

21. *See Free Speech*, 198 F.3d at 1097–98 n.1 (Ferguson, J., dissenting).

22. *See id.* (Ferguson, J., dissenting).

23. S. REP. No. 104-358, at 15.

24. Before the passage of the CPPA, federal law criminalized the production, distribution, and possession of visual depictions of real children engaging in sexually explicit conduct. *See* 18 U.S.C. § 2252 (1994 & Supp. IV 1998).

25. *See* S. REP. No. 104-358, at 16.

26. *See* 18 U.S.C. § 2256(8) (Supp. IV 1998).

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
(B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct;
(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.[27]

Accompanying the CPPA were thirteen detailed congressional findings that justify proscribing virtual child pornography.[28] The CPPA also created an affirmative defense for pornographers who use youthful-looking adults to produce pornographic materials and do not market such materials as child pornography.[29]

B. Prior Case Law

1. Constitutional Framework

a. *New York v. Ferber*

The first judicial decision upholding a state's attempt to eliminate the scourge of child pornography was the landmark case of *New York v. Ferber*.[30] Ferber, the owner of an adult bookstore, was convicted under a New York child pornography statute for selling two films that contained images of young boys masturbating.[31] The New York Court of Appeals overturned his conviction, holding that the statute violated

27. *Id.* (emphasis added).

28. *See* 18 U.S.C. § 2251 (Supp. IV 1998). In general, Congress found that children who were used in the production of pornographic images could sustain physical and psychological harm; that pedophiles and child sexual abusers use child pornography "to stimulate and whet their own sexual appetites"; that technological advances in computer and computer imaging render it difficult to distinguish pictures of real children engaging in sexually explicit activity from visual depictions of "virtual" children—i.e., computer-generated images of children—involved in such activity; and that protecting children from "sexual exploitation provide[s] a compelling governmental interest" in proscribing both real and virtual child pornography. *Id.*

29. *See id.* § 2252A(c). The affirmative defense could be raised to show that:
(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
(2) each such person was an adult at the time the material was produced; and
(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id.

30. 458 U.S. 747 (1982).

31. *See id.* at 752.

the First Amendment.[32] In reversing the high court of New York, the United States Supreme Court unanimously held that "states are entitled to greater leeway in the regulation of pornographic depictions of children"[33] and that the New York statute was not unconstitutionally overbroad.[34]

The Court advanced five reasons for giving New York greater leeway to proscribe child pornography:[35] (1) the state has a compelling interest in protecting the physical and psychological well-being of children;[36] (2) the distribution of pornographic material depicting children in sexual activity is "intrinsically related to the sexual abuse of children";[37] (3) "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of [its] production";[38] (4) child pornography has little or no social value;[39]

32. *See* People v. Ferber, 52 N.E.2d 523, 526 (N.Y. 1981).

33. *Ferber*, 458 U.S. at 756. The *Ferber* Court declined to apply the obscenity standard enunciated in *Miller v. California*, 413 U.S. 15 (1973). *Miller* defined obscenity as:

> (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.

413 U.S. at 24. The Supreme Court in *Ferber* was "persuaded that the [state legislature is] entitled to greater leeway in the regulation of pornographic depictions of children." 458 U.S. at 756. According to the *Ferber* Court, the *Miller* standard:

> does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.

Id. at 761.

34. *See id.* at 766, 773. Under the overbreadth doctrine:

> Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.
>
> . . . In such cases it has been the judgment of [the Supreme] Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). However, a statute will be invalidated as overbroad only if the overbreadth is "substantial[,] judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. For a discussion of the substantial overbreadth doctrine, see discussion *infra* Part III.B.1.

35. *See Ferber*, 458 U.S. at 756–64.

36. *See id.* at 756–57.

37. *Id.* at 759.

38. *Id.* at 761.

and (5) the acknowledgement and classification of child pornography as a category of material outside the protection of the First Amendment is compatible with Supreme Court precedent.[40]

The Supreme Court rejected Ferber's claim that the New York child pornography statute was overbroad, stating that the overbreadth doctrine is "strong medicine" and should be applied "only as a last resort."[41] The Court found that the New York statute's "legitimate reach dwarfs its arguably impermissible applications."[42] While some protected speech ranging from medical textbooks to pictorials in the National Geographic might be subject to the law, these "arguably impermissible applications of the statute amount to [no] more than a tiny fraction of the materials within the statute's reach."[43] The Court held any overbreadth that may exist should be cured on a case-by-case basis.[44]

b. *Osborne v. Ohio*

In a significant subsequent decision, the Supreme Court upheld an Ohio child pornography statute proscribing the possession and viewing of pornographic materials in *Osborne v. Ohio*.[45] The *Osborne* Court accepted Ohio's three justifications for criminalizing the possession of child pornography: (1) decreasing the production and supply of child pornography would in turn decrease the demand;[46] (2) encouraging possessors of child pornography to destroy the material, which is a permanent record of a child's abuse;[47] and (3) destroying this material that "evidence suggests pedophiles use to seduce other children into sexual activity."[48] By accepting this third rationale, the Supreme Court signaled a willingness to go further than *Ferber*, sug-

39. *See id.* at 762.
40. *See id.* at 763.
41. *Id.* at 769 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).
42. *Id.* at 773.
43. *Id.*
44. *See id.* at 773–74.
45. 495 U.S. 103, 111 (1990).
46. *See id.* at 109–10. Given the importance of Ohio's "interest in protecting the victims of child pornography," the Court felt it could not "fault Ohio for attempting to stamp out this vice at all levels in the distribution chain." *Id.* at 110.
47. *See id.* at 111. The Court explained that "the pornography's continued existence causes the child victims continuing harm by haunting the children in years to come." *Id.*
48. *Id.* at 111 n.7. "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." *Id.* (footnotes omitted) (quoting 1 Attorney General's Commission on Pornography, Final Report 649 (1986) [hereinafter Final Report]).

gesting that the harm caused to children generally, not just those victimized in the production of child pornography, qualifies as an important government justification[49] for proscribing child pornography.

2. Recent Cases Upholding the Constitutionality of the CPPA

a. *United States v. Hilton*

The first case to consider the constitutionality of the CPPA was *United States v. Hilton*.[50] Hilton was indicted for criminal possession of computer disks that contained three or more visual depictions of child pornography in violation of the CPPA.[51] The district court overturned Hilton's indictment, agreeing with his argument that the CPPA was unconstitutionally vague and overbroad, and thus unenforceable.[52] On appeal, the First Circuit reversed and unanimously held that "the law, properly construed, survived Hilton's constitutional challenge."[53]

While acknowledging that the CPPA implicated the First Amendment, the First Circuit held that Congress could constitutionally expand the definition of child pornography to include virtual child pornography.[54] The *Hilton* court based its holding on the child pornography jurisprudence established by the Supreme Court in *Ferber* and *Osborne*.[55] The appellate court found that where child pornography is concerned, considerations beyond the prevention of direct harm to real children can be important government interests.[56]

The *Hilton* court then proceeded to consider whether the CPPA was so overbroad as to capture constitutionally protected speech. In ruling against Hilton's overbreadth challenge, the court reasoned that Congress intended the "appears to be" language of the CPPA[57] to target only those visual depictions that are "'virtually indistinguishable to unsuspecting viewers from unretouched photographs'" of real chil-

49. The phrase "important government justification," as used in this Note, denotes the ordinary meaning of these words as used in everyday parlance. The phrase is not meant to connote a term of art used in constitutional jurisprudence.

50. 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

51. *See id.* at 67.

52. *See id.*

53. *Id.* at 65.

54. *See id.* at 76.

55. *See id.* at 73.

56. *See id.* at 70.

57. 18 U.S.C. § 2256(8)(B) (Supp. IV 1998). *See supra* text accompanying note 27.

dren engaging in sexually explicit activity.[58] In addition, since child pornographers cater to pedophiles, who by definition have a preference for pre-pubertal children, the CPPA would only cover those images of pre-pubescent children "who otherwise clearly appear to be under the age of 18."[59] Therefore, the *Hilton* court concluded that the CPPA was not unconstitutionally overbroad.[60]

Finally, on the issue of vagueness,[61] the First Circuit concluded that the CPPA provides ordinary people with "sufficient definiteness" as to what conduct is prohibited and does not "encourage arbitrary or discriminatory enforcement."[62] The court stated that the standard for evaluating key language of the CPPA is "an objective one."[63] "A jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity."[64] Moreover, the First Circuit found that, under the statute,[65] a prosecutor must prove the element of scienter[66] to obtain a valid conviction under the CPPA.[67] In addition, the First Circuit found that the CPPA offers an additional safeguard by creating an affirmative defense[68] to a charge under the CPPA if the person depicted in the sexually explicit material actually was an adult at the time the image was produced.[69] Taken together, these elements of the CPPA led the court to rule against the defendant on his vagueness challenge.[70]

58. *Hilton*, 167 F.3d at 72 (quoting S. REP. NO. 104-358, at 7 (1996)).

59. *Id.* at 73.

60. *See id.* at 74.

61. The vagueness doctrine is "[t]he doctrine—based on the Due Process Clause—requiring that a criminal statute state explicitly and definitely what acts are prohibited, so as to provide fair warning and preclude arbitrary enforcement." BLACK'S LAW DICTIONARY 1548 (7th ed. 1999). "A statute will not be held void for vagueness unless it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.'" *Hilton*, 167 F.3d at 75 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). For a discussion of the void of vagueness doctrine, see *infra* Part III.B.2.

62. *Hilton*, 167 F.3d at 75 (quoting *Kolender*, 461 U.S. at 357).

63. *Id.*

64. *Id.*

65. *See* 18 U.S.C. § 2252A(a)(5)(B) (Supp. IV 1998).

66. Scienter is "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission." BLACK'S LAW DICTIONARY 1347 (7th ed. 1999).

67. *See Hilton*, 167 F.3d at 75.

68. *See* 18 U.S.C. § 2252A(c) (Supp. IV 1998); *see also supra* note 29.

69. *See Hilton*, 167 F.3d at 75.

70. *See id.* at 76.

b. *United States v. Acheson*

Eleven months after the First Circuit rendered its decision in *Hilton*, and just one month before the Ninth Circuit decided *Free Speech*, the Eleventh Circuit, in *United States v. Acheson*,[71] unanimously ruled that the CPPA does not run afoul of the First Amendment and is neither unconstitutionally vague nor substantially overbroad.[72] The *Acheson* court's analysis was similar to that of the *Hilton* court. Quoting *Hilton*, the court in *Acheson* concluded that since "'it is well-settled that child pornography, an unprotected category of expression identified by its content, may be freely regulated,'" the defendant's argument that the CPPA is unconstitutional failed.[73] Like the *Hilton* court, the *Acheson* court found that the CPPA is not substantially overbroad because its application is limited to visual depictions of "'pre-pubescent children or persons who otherwise clearly appear to be under the age of 18.'"[74] Finally, as in *Hilton*, the *Acheson* court held that the CPPA is not unconstitutionally vague because in addition to imposing on the government the burden of proving the element of scienter, the CPPA offers an affirmative defense.[75]

II. The Case: *Free Speech Coalition v. Reno*

A. The Facts

Plaintiff-appellant, the Free Speech Coalition ("Coalition"), is a trade association of businesses involved in the production and dissemination of adult material.[76] The Coalition raised a facial claim,[77] seeking declaratory and injunctive relief by a pre-enforcement challenge to the "appears to be"[78] and "conveys the impression"[79] language of the CPPA.[80] The Coalition also challenged the constitutionality of the

71. 195 F.3d 645 (11th Cir. 1999).

72. *See id.* at 648.

73. *Id.* at 650 (quoting *Hilton*, 167 F.3d at 69).

74. *Id.* at 651–52 (quoting *Hilton*, 167 F.3d at 73).

75. *See id.* at 653.

76. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).

77. A facial challenge is "[a] claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally." BLACK'S LAW DICTIONARY 223 (7th ed. 1999). By contrast, an as-applied challenge is "[a] lawsuit claiming that a law or governmental policy, though constitutional on its face, is . . . unconstitutional on the facts of a particular case or to a particular party." *Id.*

78. 18 U.S.C. § 2256(8)(B) (Supp. IV 1998). *See supra* text accompanying note 27.

79. 18 U.S.C. § 2256(8)(D). *See supra* text accompanying note 27.

80. *See Free Speech*, 198 F.3d at 1086.

CPPA's affirmative defense.[81] The district court held that the CPPA was constitutional and granted the government's motion for summary judgment,[82] denying the Coalition's cross motion for summary judgment.[83] The Coalition appealed.[84]

B. The Decision

1. The Majority Opinion

On appeal, the Ninth Circuit, in a 2-1 decision,[85] overturned the district court's decision and held that Congress cannot constitutionally proscribe virtual child pornography.[86] The court found the CPPA unconstitutional on three grounds: (1) lack of compelling government interests; (2) vagueness; and (3) substantial overbreadth.[87]

First, the majority concluded that the government had not provided any compelling interest for banning virtual child pornography.[88] The court interpreted *Ferber* to hold that only preventing direct harm to real children used to produce child pornography can be a compelling interest.[89] The court rejected the government's argument that pedophiles use child pornography to "whet[ ]" their own appetite and to sexually abuse children.[90] The majority reasoned that to accept the government's position would be to criminalize the "foul figments of creative technology that do not involve any human victim in their creation or in their presentation."[91] In addition, even though conceding that images of children engaging in sexually explicit activity are morally repugnant, the court found that no factual studies currently

81. *See Free Speech*, 198 F.3d at 1087. The affirmative defense the Coalition challenged can be found at 18 U.S.C. § 2252A(c) (Supp. IV 1998). *See supra* note 29.

82. *See Free Speech*, 198 F.3d at 1087.

83. *See id.*

84. *See id.* at 1086–87.

85. The opinion was authored by the Honorable Donald W. Molloy, a district court judge, sitting by designation, and was joined by the Honorable Sidney R. Thomas of the Ninth Circuit. *See id.* at 1086 n.1.

86. *See id.* at 1086. The majority left unresolved the constitutionality of the CPPA's affirmative defense. *See id.*

87. *See id.* at 1095, 1097.

88. *See id.* at 1095. The *Free Speech* court applied strict scrutiny because it determined that the CPPA is a content-based regulation. *See id.* at 1091. The court cited *Crawford v. Lungren*, 96 F.3d 380, 385–86 (9th Cir. 1996), for the proposition that if a statute is content-based, "the government must establish a compelling interest that is served by the statute, and it must show that the [statute] is narrowly tailored to fulfill that interest." *Free Speech*, 198 F.3d at 1091.

89. *See Free Speech*, 198 F.3d at 1092.

90. *Id.* at 1091–92.

91. *Id.* at 1093.

link virtual child pornography to the subsequent sexual abuse of children.[92] The court stated: "Absent this nexus, the law does not withstand constitutional scrutiny."[93] Since the court did not find any compelling government interest, it did not reach the narrowly-tailored prong of the strict scrutiny test.[94]

Second, the majority concluded that the "appears to be"[95] and "conveys the impression"[96] language of the CPPA are unconstitutionally vague because both phrases are "highly subjective."[97] A person of ordinary intelligence, the court found, would not have a "reasonable opportunity to know what is prohibited."[98] At the same time, the court concluded, the language allows law enforcement officials to apply the CPPA in an "arbitrary and discriminatory fashion."[99]

Finally, the court ruled in favor of the Coalition on its overbreadth challenge.[100] The majority held that the CPPA is substantially overbroad since it captures material that has been accorded First Amendment protection.[101] "That is, non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment."[102]

2. The Dissenting Opinion

Judge Ferguson, in his dissent, concluded that Congress could constitutionally proscribe virtual child pornography.[103] Judge Ferguson began by articulating five justifications for the prohibitions found in the challenged portions of the CPPA. First, relying on *Ferber* and *Osborne*, he found that preventing harm to real children depicted in sexually explicit images is not the only legitimate reason for banning child pornography.[104] "[P]rotecting children who are not actually pic-

92. *See id.*

93. *Id.* at 1094.

94. *See id.* at 1095. For a description of the strict scrutiny standard of judicial review, see *supra* note 88.

95. 18 U.S.C. § 2256(8)(B) (Supp. IV 1998). *See supra* text accompanying note 27.

96. 18 U.S.C. § 2256(8)(D). *See supra* text accompanying note 27.

97. *Free Speech*, 198 F.3d at 1095.

98. *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

99. *Free Speech*, 198 F.3d at 1095–96.

100. *See id.* at 1096.

101. *See id.* at 1095.

102. *Id.* (citing New York v. Ferber, 458 U.S. 747, 764–65 (1982)).

103. *See id.* at 1097–98 (Ferguson, J., dissenting).

104. *See id.* at 1098 (Ferguson, J., dissenting).

tured in the pornographic image is a legitimate and compelling state interest" for such a ban.[105]

Second, the dissent concluded that the Supreme Court already endorsed the government's interest in criminalizing child pornography for seduction purposes.[106] As Judge Ferguson noted, the Court in *Osborne* "recognized that states have a legitimate interest in preventing pedophiles from 'us[ing] child pornography to seduce other children into sexual activity.'"[107] Judge Ferguson also found that *Osborne* endorsed a state's "legitimate interest in destroying the child pornography market."[108]

Third, the dissent argued that "[t]he lesson from *Ferber* and *Osborne* is that legislators should be given 'greater leeway' when acting to protect the well-being of children."[109] He reasoned that since technological advances make it increasingly difficult to prosecute child pornography cases, Congress has an important justification to close this loophole in existing law—the "built-in reasonable doubt argument"[110] that defendants use as a legal defense.[111]

Fourth, Judge Ferguson concluded that, like real child pornography, virtual child pornography has little or no social value.[112] He reasoned that "[t]he only difference [between real child pornography and virtual child pornography] is that [the former] uses actual children in its production, whereas [the latter] does not."[113] He argued that this distinction, although noteworthy, "does not somehow transform virtual child pornography into meaningful speech."[114]

Fifth, the dissent argued that the majority should not have applied the strict scrutiny standard of review.[115] Rather, Judge Ferguson advocated a balancing approach, as indicated by prior Supreme Court

105. *Id.* at 1099 (Ferguson, J., dissenting). Although Judge Ferguson used the term "compelling interest," he did not argue for strict scrutiny review of the CPPA. *See id.* at 1101 (Ferguson, J., dissenting).

106. *See id.* at 1099 (Ferguson, J., dissenting) (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990)).

107. *Id.* (Ferguson, J., dissenting) (quoting *Osborne*, 495 U.S. at 111).

108. *Id.* (Ferguson, J., dissenting).

109. *Id.* at 1100 (Ferguson, J., dissenting) (citing New York v. Ferber, 458 U.S. 747, 756 (1982)).

110. *See* discussion *infra* Part III.A.1.c.

111. *Free Speech*, 198 F.3d at 1100 (Ferguson, J., dissenting) (citing S. REP. NO. 104-358, at 16–17 (1996)).

112. *See id.* (Ferguson, J., dissenting) (citing *Ferber*, 458 U.S. at 762).

113. *Id.* (Ferguson, J., dissenting).

114. *Id.* at 1100–01 (Ferguson, J., dissenting).

115. *See* discussion *infra* Part III.A.2.

decisions.[116] In particular, the dissent noted that, on the issue of categorizing child pornography, the *Ferber* Court held that "'the balance of competing interests [was] clearly struck and that it [was] permissible to consider these materials as without the protection of the First Amendment.'"[117] Judge Ferguson also relied on the *Osborne* Court's finding that the "'gravity of the State's interests' outweighed [an individual's] limited First Amendment right to possess child pornography."[118]

Judge Ferguson also concluded that, because the CPPA merely targets "a narrow class of computer-generated pictures easily mistaken for real photographs of real children," it is not substantially overbroad.[119] Moreover, Judge Ferguson stated that the CPPA offers an added protection, in that an affirmative defense[120] exists for persons—like members of the Coalition in this case—who produce and disseminate pornographic materials, so long as those materials use youthful-looking adults at the time of production and are not "pandered as child pornography."[121]

Finally, the dissent, agreeing with *Hilton*'s void for vagueness analysis,[122] determined that the "appears to be" and "conveys the impression" language of the CPPA is not highly subjective.[123] The dissent noted that there is an additional safeguard against arbitrary prosecutions, in that the government must prove the element of scienter in order to obtain a valid conviction under the CPPA.[124]

III. Analysis

The Ninth Circuit's holding in *Free Speech* that Congress cannot constitutionally proscribe virtual child pornography appears to ignore detailed congressional findings, prior Supreme Court decisions, and recent case law. These authorities all support the position that Con-

116. *See Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting).

117. *Id.* (Ferguson, J., dissenting) (quoting *Ferber*, 458 U.S. at 764).

118. *Id.* (Ferguson, J., dissenting) (quoting Osborne v. Ohio, 495 U.S. 103, 111 (1990)).

119. *Id.* at 1102 (Ferguson, J., dissenting) (citing Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to -27 (1996) (codified as amended at 18 U.S.C. § 2256 (Supp. IV 1998)) [hereinafter Omnibus Act]).

120. *See* 18 U.S.C. § 2252A(c) (Supp. IV 1998).

121. *Free Speech*, 198 F.3d at 1102 (Ferguson, J., dissenting) (quoting S. REP. NO. 104-358, at 10 (1996)).

122. *See* United States v. Hilton, 167 F.3d 61, 74–76 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

123. *See Free Speech*, 198 F.3d at 1103 (Ferguson, J., dissenting).

124. *See id.* (Ferguson, J., dissenting).

gress *can* constitutionally prohibit and criminalize virtual child pornography.

A. Virtual Child Pornography Is Outside of the Scope of First Amendment Protection

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."[125] But this freedom is not absolute.[126] Certain types of expression are outside the protection of the First Amendment.[127] Child pornography is one such type of unprotected speech.[128] "It is evident beyond the need for elaboration" that states have a compelling interest in "safeguarding the physical and psychological well-being of a minor."[129] The *Ferber* Court recognized that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[130] To that end, the Supreme Court has sustained statutes aimed at protecting the physical and psychological well-being of children[131] "even when the laws have operated in the sensitive area of constitutionally protected rights."[132] Moreover, the Supreme Court has recognized that states are "entitled to greater leeway in the regulation of pornographic depictions of children."[133]

The *Free Speech* court erred in two ways by holding that Congress may not constitutionally prohibit the production or dissemination of virtual child pornography. First, contrary to the court's conclusion, Congress had five important justifications for enacting the CPPA. Second, the Ninth Circuit should have evaluated the CPPA under the balancing approach suggested by the Supreme Court in *Ferber* and *Os-*

125. U.S. CONST. amend. I.

126. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (citing Cantwell v. Connecticut, 310 U.S. 296 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931); Schenck v. United States, 249 U.S. 47 (1919); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

127. *See, e.g.*, Roth v. United States, 354 U.S. 476, 486 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250, 252 (1952) (libelous speech); *Chaplinsky*, 315 U.S. at 571 (fighting words).

128. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) ("There are . . . limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment.").

129. *Id.* at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

130. *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

131. *See* discussion *supra* Part I.B.1.

132. *Ferber*, 458 U.S. at 757.

133. *Id.* at 736.

borne, rather than applying the strict scrutiny standard of review. As suggested by the dissent in *Free Speech*, in upholding child pornography statutes, *Ferber* and *Osborne* balanced the government's interest in criminalizing child pornography against the limited social value of such material. The *Free Speech* majority should have followed this approach, under which the CPPA is constitutional.

1. Five Important Justifications

In its findings which accompanied the CPPA, Congress articulated five important justifications[134] for proscribing virtual child pornography: (a) to prevent pedophiles from using virtual child pornography to seduce other children into sexual activity[135] and thus to protect children who are not actually depicted in the pornographic image;[136] (b) to eliminate virtual child pornography as an incitement for pedophiles to abuse children;[137] (c) to prevent pedophiles from exploiting virtual child pornography's "built-in reasonable doubt argument" to escape prosecution;[138] (d) to destroy the child pornography market;[139] and (e) to protect only speech that is of redeeming social value.[140]

a. Preventing Pedophiles from Using Virtual Child Pornography to Seduce Children and Protecting Children Who Are Not Depicted in Pornographic Material

Pedophiles often use child pornography to seduce children into sexual activity.[141] Based on this determination, the Supreme Court in *Ferber* stated that pornographic material "depicting sexual activity by

134. The author of this Note refers to these considerations as "important justifications" in order to avoid confusion between terms of art used for judicial review under the "balancing approach" and those used for the strict scrutiny standard of review. *See supra* note 88. Were a court, such as the Ninth Circuit in *Free Speech*, to use a strict scrutiny approach, the author believes these factors would be deemed "compelling government interests" which would justify upholding the statute.

135. *See* Omnibus Act, *supra* note 119, § 121(1)(3).

136. *See* United States v. Hilton, 167 F.3d 61, 70 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

137. *See* Omnibus Act, *supra* note 119, § 121(1)(4).

138. *Senate Hearing*, *supra* note 2, at 71 (testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

139. *See* Omnibus Act, *supra* note 119, § 121(1)(12).

140. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1100 (9th Cir. 1999) (Ferguson, J., dissenting) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

141. *See* Final Report, *supra* note 48, at 649; *see also Senate Hearing*, *supra* note 2, at 35 (statement of Dr. Victor Cline, a clinical psychologist and psychotherapist who worked with victims of sexual abuse and assault).

juveniles is intrinsically related to the sexual abuse of children."[142] In her book, *Child Pornography*,[143] Dr. Shirley O'Brien described this vicious cycle of the sexual victimization of children:[144]

> (1) pornography is shown to the child for "sex education"; (2) attempt to convince child explicit sex is acceptable, even desirable; (3) child porn is used to convince child that other children are sexually active—it's ok; (4) child pornography desensitizes—lowers child's inhibitions; (5) some of these sessions progress to sexual activity; (6) photographs or movies are taken of the sexual activity.[145]

Moreover, the Supreme Court in *Osborne* recognized a state's interest in preventing pedophiles from "us[ing] child pornography to seduce other children into sexual activity."[146] Yet, the majority in *Free Speech* argued that no factual studies currently exist linking virtual child pornography with subsequent sexual abuse of children.[147] This argument is misplaced. Technological advances in computer imaging render it possible to produce virtual child pornography that is practically indistinguishable from real child pornography.[148] An unsuspecting viewer (for example, a child, judge, police, prosecutor, or juror) would not be able to tell whether the pornographic material was produced using real children.[149] Because of a child's inability to make this distinction, virtual child pornography has the "same seductive effect" on a child as real child pornography.[150] Therefore, Congress has an important justification for preventing pedophiles from using virtual child pornography to seduce children into sexual activity.

The majority in *Free Speech* mistakenly suggested that protecting those children used in producing child pornography is the only legitimate justification for prohibiting it.[151] Although the *Ferber* Court focused on such protection, the Supreme Court in *Osborne* was willing to consider additional factors.[152] In upholding Ohio's ban on the possession of child pornography, the *Osborne* Court relied on evidence suggesting that "pedophiles use child pornography to seduce other

142. New York v. Ferber, 458 U.S. 747, 759 (1982).
143. SHIRLEY O'BRIEN, CHILD PORNOGRAPHY (2d ed. 1992).
144. *See id.* at 89.
145. *Id.*
146. Osborne v. Ohio, 495 U.S. 103, 111 (1990).
147. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1093 (9th Cir. 1999).
148. *See* S. REP. NO. 104-358, at 15 (1996).
149. *See Senate Hearing, supra* note 2, at 70.
150. *Id.*
151. *See Free Speech*, 198 F.3d at 1092.
152. *See* Osborne v. Ohio, 495 U.S. 103, 110–11 (1990).

children into sexual activity."[153] The First Circuit in *Hilton* properly observed that the *Osborne* Court intimated a "subtle, yet crucial, extension of [Congress's] legitimate interest to the protection of children not actually depicted in prohibited images."[154] Therefore, the Supreme Court has suggested that protecting children who are not depicted in pornographic materials is an important justification because child pornography laws are meant to protect *all* children.

b. Eliminating Pornographic Materials That Inflame Pedophiles to Sexually Abuse Children

In passing the CPPA, Congress found that pedophiles and child abusers often use child pornography "to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children."[155] Congress also concluded that child pornography "inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials."[156]

In his study, Dr. William Marshall found that 67% of child molesters and 83% of rapists admitted to using hardcore sexual materials, and that 53% of all child molesters said they deliberately view the materials in preparation for molestation.[157] Dee Jensen, the president of Enough Is Enough!, testified before the Senate Judiciary Committee that "child pornography is actually 'hard copy' . . . visualizations of the pedophile's dangerous mental fantasies of having sex with children."[158] Child pornography is "an addiction that escalates, requiring more graphic or violent material for arousal."[159] This addiction leads pedophiles and child sexual abusers to view children in the pornographic material as objects, having no "personality, rights, dignity, or feelings."[160] "The final stage is 'acting out,' doing what has been

153. *Id.* at 111. *See also* discussion *supra* note 48 and accompanying text.

154. United States v. Hilton, 167 F.3d 61, 70 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

155. Omnibus Act, *supra* note 119, § 121(1)(4).

156. *Id.* § 121(1)(10)(B).

157. *See Senate Hearing*, *supra* note 2, at 92 (testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

158. *Id.* at 38 (testimony of Dee Jensen, President of Enough Is Enough!—a non-profit, non-partisan women's organization opposing child pornography and illegal obscenity).

159. *Id.* at 39.

160. *Id.*

viewed in the pornography. This leads to crimes of sexual exploitation and violence."[161]

Dr. Victor Cline's testimony before the Senate Judiciary Committee supports the view that virtual child pornography inflames pedophiles and child sexual abusers to abuse children just as much as real child pornography does.[162] To such sexual predators, the slight difference, if any, between real and virtual pornographic images involving children are "irrelevant because [the virtual children] are perceived as minors to [the predator's] psyche."[163] The stimulating effects are the same. Thus, because of child pornography's vicious cycle,[164] virtual child pornography, just like pornography using real children, is a cause of sexual abuse of children. The courts should recognize this as an important justification that does not offend the First Amendment.

c. Closing the Loophole in Existing Law That Pedophiles Exploit to Escape Prosecution

Under pre-CPPA child pornography laws, the government in a child pornography prosecution must meet "its burden of proving [beyond a reasonable doubt] that a pornographic image is of a real child."[165] However, with the advent of virtual child pornography, these pre-CPPA laws can easily be avoided. In enacting the CPPA, Congress recognized that the advances in computer imaging technology are making it virtually impossible to distinguish virtual child pornography from photographic depictions of real children in sexually explicit activity.[166] Consequently, absent the CPPA, the government, in a child pornography case, would have the almost impossible task of meeting its burden of proving a real child was used. This is because the accused can simply assert a "built-in reasonable doubt argument."[167] That is, it will always be arguable that the child is not real but virtual, and thus the defendant can establish a reasonable doubt that a real child was not used in the pornography. The government's inability to meet its burden of proof has the "effect of *increasing* the

161. *Id.*

162. *See id.* at 36.

163. *Id.* at 35–36 (testimony of Dr. Victor Cline, a clinical psychologist and psychotherapist).

164. *See* O'BRIEN, *supra* note 143, at 89.

165. S. REP. No. 104-358, at 20 (1996).

166. *See id.*

167. *Senate Hearing, supra* note 2, at 71 (testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

sexually abusive and exploitative use of children to produce child pornography" because the risk of punishment for such conduct is reduced.[168]

In *United States v. Kimbrough*,[169] this loophole in child pornography laws was raised as a legal defense.[170] There, the defendant argued that the government must prove that each item of alleged child pornography did, in fact, depict an actual minor.[171] The prosecution prevailed only because of its "carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned."[172] The *Kimbrough* case was tried in 1993, when computer imaging technology was in its infancy, and thus the defense was not as potent as it could be in the near future as technology rapidly progresses.[173] Moreover, because virtual child pornography can be produced without scanning a child pornography magazine into the computer, prosecutors can no longer introduce the original magazine to the jury for comparison to the alleged pornographic material.[174] *Kimbrough* is just one example of the potential ineffectiveness of pre-CPPA child pornography laws in light of the advent of virtual child pornography. This "virtual child" loophole could be exploited to allow sexual predators to escape criminal liability. Congress was justified in enacting the CPPA to close this loophole in existing law to protect children from molestation and sexual abuse.

d. Destroying the Child Pornography Market

The Supreme Court has recognized that states have an important justification for destroying the child pornography market.[175] Congress found that proscribing the possession of child pornography will encourage people to destroy such material, "thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children."[176] Since pedophiles trade and sell virtual child pornographic materials for those that are of real children

168. S. REP. No. 104-358, at 20.
169. 69 F.3d 723 (5th Cir. 1995).
170. *See id.* at 732–33.
171. *See id.*
172. S. REP. No. 104-358, at 17.
173. *See id.*; *Kimbrough*, 69 F.3d at 732.
174. *See* S. REP. No. 104-358, at 17.
175. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990).
176. Omnibus Act, *supra* note 119, § 121(1)(12).

engaging in sexually explicit activities, virtual child pornography helps "keep the market for child pornography thriving."[177]

Furthermore, if virtual child pornography is not criminalized, pedophiles who receive any child pornography would most likely keep it, rationalizing that it might be virtual, since virtual and real child pornography are practically indistinguishable. Because under pre-CPPA law the government must prove that the pornographic material involved real children in its production, these pedophiles would feel even more secure in keeping the material, in that they could simply assert the "built-in reasonable doubt argument."[178]

The CPPA eliminates this legal defense and rationalization for possessing child pornography. In addition, by prohibiting the production and distribution of virtual child pornography, the CPPA also decreases the supply of and demand for all child pornography.

e. Virtual Child Pornography Has Little or No Social Value

The *Free Speech* court did not consider the fact that real and virtual child pornography have little or no social value. It is well accepted that the First Amendment "was fashioned to assure unfettered interchange of ideas for bringing about the political and social changes desired by people."[179] In *Ferber*, the Supreme Court, in holding that child pornography is outside the protection of the First Amendment, found that the value of child pornography "is exceedingly modest, if not *de minimis*."[180]

In terms of its social value, virtual child pornography should be treated the same as real child pornography. First, in both forms children are depicted engaging in sexually explicit activity. Second, to the unsuspecting viewer (a child or an adult), virtual child pornography is practically indistinguishable from real child pornography.

Importantly, *Free Speech* appears to have erred in finding that virtual child pornography does not involve the use of real children.[181] The truth is to the contrary. A pedophile could use virtual child pornography to seduce an innocent child into performing sexually explicit acts. After he photographs the acts, the pedophile could scan

177. S. REP. NO. 104-358, at 91 (testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

178. *See* discussion *supra* Part III.A.1.c.

179. Free Speech Coalition v. Reno, 198 F.3d 1083, 1100 (9th Cir. 1999) (Ferguson, J., dissenting) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

180. New York v. Ferber, 458 U.S. 747, 762 (1982).

181. *See Free Speech*, 198 F.3d at 1092.

them into a computer and alter the child's characteristics to appear virtual—i.e., unidentifiable as to the "real" child used to produce the pornographic images. If virtual child pornography were legal, the child would have been sexually exploited, abused, and victimized, while the pedophile potentially escapes criminal liability. Because advances in computer imaging technology are rendering it practically impossible to distinguish virtual from real child pornography, this scenario is not at all far-fetched. In fact, because of these technological advances, the pedophile will use virtual child pornography as a new tool to sexually exploit, abuse, and victimize children. Therefore, virtual child pornography, like its twin, real child pornography, should be placed outside of First Amendment protection because it has slight, if any, social value and constitutes "no essential part of the exposition of ideas."[182]

2. The Balancing Approach

The *Free Speech* court appears to have misread the Supreme Court's prior child pornography decisions in *Ferber* and *Osborne*. In neither of these cases did the Supreme Court apply strict scrutiny to the child pornography statutes at issue.[183] Rather, the Court used a balancing approach—weighing the government's justifications for proscribing child pornography against the limited social value of such pornographic materials.[184]

On the issue of categorizing child pornography, the *Ferber* Court held that "the balance of competing interests [was] clearly struck and that it [was] permissible to consider these materials as without the protection of the First Amendment."[185] As noted by the dissent in *Free Speech*, in upholding Ohio's child pornography statute, the *Osborne* Court found that the "'gravity of the State's interests' outweighed [the defendant's] limited First Amendment right to possess child pornography."[186] These cases suggest that a balancing approach is the proper standard of judicial review for laws prohibiting child pornography.

Following *Ferber* and *Osborne*, *Free Speech* should have analyzed the CPPA under a balancing approach. Had the court in *Free Speech* ap-

182. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that "fighting words" are outside of First Amendment protection).

183. *See Ferber*, 458 U.S. at 764; Osborne v. Ohio, 495 U.S. 103, 111 (1990).

184. *See Ferber*, 458 U.S. at 764; *Osborne*, 495 U.S. at 111.

185. *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting *Ferber*, 458 U.S. at 764).

186. *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting *Osborne*, 495 U.S. at 111).

plied such an approach, it would have found that Congress's five important justifications for proscribing virtual child pornography discussed above clearly outweigh the *de minimis* value of such pornographic material.[187]

B. The CPPA Does Not Violate Due Process

A finding that the CPPA is constitutional under the First Amendment does not end the analysis. The CPPA must also pass constitutional muster under due process of law claims—that is, the twin challenges of substantial overbreadth and void for vagueness. Contrary to the conclusion of the majority in *Free Speech*, the CPPA is neither substantially overbroad nor unconstitutionally vague.

1. The CPPA Is Not Substantially Overbroad

In *Free Speech*, the constitutional challenges focused on the CPPA's new definition of child pornography. Child pornography, as defined in the CPPA, is any visual depiction that "appears to be" or is promoted or distributed to "convey[ ] the impression that the material is . . . of a minor engaging in sexually explicit conduct."[188] The majority improperly found this language overbroad.

As the Supreme Court admonished, the overbreadth doctrine is "strong medicine" that must be employed "sparingly and only as a last resort."[189] Accordingly, when a federal statute is challenged as overbroad, a federal court "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."[190] Generally, for a statute to be invalidated as overbroad, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[191]

First, the Coalition argued that the "appears to be" language of the CPPA[192] is so broad that it criminalizes speech that has been accorded First Amendment protection.[193] However, the legislative history refutes this assertion. The purpose of the CPPA is to address computer-generated child pornography.[194] Congress intended the new language to target the narrow class of visual depictions that are

187. *See Ferber*, 458 U.S. at 762.
188. 18 U.S.C. § 2256(8)(B), (D) (Supp. IV 1998).
189. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).
190. *Ferber*, 458 U.S. at 769 n.24 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).
191. *Broadrick*, 413 U.S. at 615.
192. 18 U.S.C. § 2256(8)(D) (Supp. IV 1998).
193. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999).
194. *See* S. REP. No. 104-358, at 7 (1996).

"virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct."[195] The "appears to be" language "applies to the same type of photographic images *already* prohibited, but . . . does not require the use of an actual minor in its production."[196] In upholding the CPPA against an overbreadth challenge, the First Circuit in *Hilton* concluded that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the reach of the Act."[197] The reason is that "[b]y definition, they would not be 'virtually indistinguishable' from an image of an actual minor."[198] The CPPA's sweep is no broader than prior constitutional child pornography laws.

Second, concerns that the CPPA proscribes pornographic materials that contain youthful-looking adults engaging in sexually explicit conduct are also unwarranted. Most of the prosecutions "under the 'appears to be a minor' provision" would involve sexually explicit images of "pre-pubescent children or persons who otherwise clearly appear to be under the age of 18."[199] The reason is that "purveyors of child pornography usually cater to pedophiles, who by definition have a predilection for pre-pubertal children."[200] Moreover, the CPPA provides an affirmative defense to a charge of distributing, reproducing, or selling child pornography.[201] Therefore, members of the Coalition are shielded from prosecution so long as the pornographic material they produce and distribute uses adults, and the members do not "intentionally pander the material as being child pornography."[202]

While the CPPA might prohibit a tiny fraction of constitutionally protected material (for example, "where youthful adults pose as children for sexually provocative images with redeeming social value"), this "does not render the statute as a whole substantially overbroad," in light of the CPPA's legitimate sweep.[203] Instead, whatever potential overbreadth may exist "should be cured through case-by-case analysis

195. *Id.*

196. *Id.* at 21.

197. United States v. Hilton, 167 F.3d 61, 72 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

198. *Id.*

199. *Id.* at 73.

200. *Id.*

201. *See* 18 U.S.C. § 2252A(c) (Supp. IV 1998).

202. S. REP. No. 104-358, at 21 (1996).

203. *Hilton*, 167 F.3d at 74.

of the fact situations to which its sanctions, assertedly, may not be applied."[204]

2. The CPPA Is Not Void for Vagueness

The *Free Speech* court found that the CPPA's phrases "appears to be"[205] and "conveys the impression"[206] are void for vagueness because they are "highly subjective" and could be enforced "in an arbitrary and discriminatory fashion."[207] This finding is unjustified.

Holding the same language was not unconstitutionally vague, the First Circuit in *Hilton* stated that the standard for invalidating a statute "on vagueness grounds is a stringent one."[208] For the CPPA to be void for vagueness, it must fail to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement."[209]

First, the terms "appears to be" and "conveys the impression" are not highly subjective.[210] "A jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the [pornographic material] to be of an actual individual under the age of 18 engaged in sexual activity."[211] Although hardly exhaustive, the following evidence could be presented to the jury to allow an objective determination of whether the defendant is guilty:

> [T]he physical characteristics of the person; expert testimony as to the physical development of the depicted person; how the disk, file, or video was labeled or marked by the creator or the distributor of the image, or the defendant himself[;] . . . and the manner in which the image was described, displayed, or advertised.[212]

Where the case involves pre-pubescent children, the jury will consider the sexually explicit material and determine whether the virtual depiction "appears to be" a minor.[213] On the other hand, where the case involves post-pubescent children, expert witnesses will testify as to the physical development of the person in the material and the man-

204. Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973).
205. 18 U.S.C. § 2256(8)(B) (Supp. IV 1998).
206. *Id.* § 2256(8)(D).
207. Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999).
208. *Hilton*, 167 F.3d at 75.
209. *Id.* (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).
210. *See id.*
211. *Id.*
212. *Id.*
213. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1103 (9th Cir. 1999) (Ferguson, J., dissenting).

ner in which the "creator, distributor, or possessor labeled the disks, files, or videos."[214]

Second, the challenged language does not allow arbitrary and discriminatory enforcement because the government must prove the element of scienter to obtain a valid conviction.[215] Not only must the government show "beyond a reasonable doubt that the individual 'knowingly' produced, distributed, or possessed" pornographic material, but also that "the material depicts a person who appeared to [the defendant] to be under the age of eighteen."[216] Thus, a defendant must be acquitted if he honestly believes that the depicted person appears to be at least eighteen years old (and the jury believes him), or if he can show that he knew youthful-looking adults were used to produce the sexually explicit visual depictions, and the visual depictions were not presented or marketed as containing real minors.[217] Since the terms "appears to be" and "conveys the impression" provide an ordinarily intelligent person with sufficient knowledge of what conduct is prohibited and do not encourage arbitrary and discriminatory enforcement, the CPPA is not void for vagueness.

Conclusion

The Ninth Circuit's holding in *Free Speech* that Congress cannot constitutionally proscribe virtual child pornography departed dramatically from the principles established by the Supreme Court in *Ferber* and *Osborne*. The holding also directly conflicts with the well-reasoned decisions of the First and Eleventh Circuits finding the CPPA constitutional. Contrary to the finding in *Free Speech*, pedophiles, child molesters, and child pornographers use real and virtual child pornography to victimize, abuse, and exploit the most vulnerable members of our society—children. The judiciary should support the legislative effort to eliminate the scourge of all child pornography by upholding the constitutionality of the CPPA. Failure to do so is not only contrary to prior constitutional doctrine, but also jeopardizes our democratic society, for its continuance rests "upon the healthy, well-rounded growth of young people into full maturity as citizens."[218]

214. *Id.* (Ferguson, J., dissenting).

215. *See* 18 U.S.C. § 2252A (1994 & Supp. IV 1998).

216. *Free Speech*, 198 F.3d at 1103 (Ferguson, J., dissenting) (quoting 18 U.S.C. § 2252A(a) (1994)).

217. *See* United States v. Hilton, 167 F.3d 61, 75–76 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

218. New York v. Ferber, 458 U.S. 747, 757 (1982) (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).