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No Child Was Harmed in the Making of This Video: Morphed Child Pornography and the First Amendment

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NO CHILD WAS HARMED IN THE MAKING OF THIS VIDEO: MORPHED CHILD PORNOGRAPHY AND THE FIRST AMENDMENT

Abstract: On February 13, 2020, the Fifth Circuit Court of Appeals held, in *United States v. Mecham*, that the First Amendment does not protect morphed child pornography as a form of speech. The Fifth Circuit found that "morphed child pornography" is like "real child pornography" because the content harms the emotional health and reputation of a child. Thus, the Fifth Circuit held that the First Amendment excludes both forms of child pornography from protection. The Sixth and Second Circuits follow this rule, emphasizing that the government has a strong imperative to intervene in situations that harm children. In contrast, the Eighth Circuit has held that, under the Supreme Court's recent opinion in *United States v. Stevens*, the First Amendment protects morphed child pornography unless it depicts an underlying crime. Therefore, in the Eighth Circuit, the First Amendment protects morphed child pornography that does not capture the real sexual abuse of a child. The Supreme Court denied *Mecham* certiorari, and the Court has not addressed the treatment of morphed child pornography under the First Amendment substantively. This Comment argues that the Fifth Circuit correctly decided *Mecham* by holding that the First Amendment does not protect morphed child pornography. It also argues that the Eighth Circuit minority holding is erroneous because it fails to show judicial restraint and disregards policy.

INTRODUCTION

When the United States codified its first laws against child pornography in the 1970s, child pornography could only feature real sexual abuse against children.[1] As the demand for photo and video altering technology has explod-

[1] *See* 18 U.S.C. § 2251 (criminalizing child pornography); Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 915 (2019) (noting that child pornography laws in the early 1990s did not account for the advancements in technology that led to the rise of digitally created child pornography). Congress codified the first child pornography statute in 1977. *See* 18 U.S.C. § 2251 (criminalizing real child pornography, which does not involve the use of modern digital editing technology). Nearly twenty years later, Adobe began selling Photoshop, the photo and video editing software through which many individuals create morphed pornographic images, on a mass scale. *See Adobe Photoshop*, BRITANNICA (Dec. 11, 2008), https://www.britannica.com/technology/Adobe-Photoshop [https://perma.cc/UNW6-AKT9] (describing the history and production of the Adobe Photoshop technology). *See generally* Brian Yamada, *Pornoshopped: Why California Should Adopt the Federal Standard for Child Pornography*, 32 LOY. L.A. ENT. L. REV. 229 (2012) (examining the influence of new technology on child pornography).

ed, so have its uses in both the legal and illicit pornography industries.[2] Society now faces an unanticipated phenomenon—a genre of child pornography that does not feature the sexual abuse of children.[3]

Perhaps the most contentious development in child pornography is morphed child pornography, in which the faces of real children are superimposed upon adult actors engaged in sex acts.[4] Initially state and federal legislators took a strong stance by categorically banning all pornography featuring the likeness of real children.[5] In response, the Eighth Circuit ruled that laws banning morphed child pornography may violate the First Amendment right to free speech.[6] The Eighth Circuit emphasizes that if there is no underlying crime, namely the sexual abuse of a child, the pornography is protected speech

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[2] *See* Yamada, *supra* note 1, at 229–30 (describing the rapidly growing use of Photoshop to produce child pornography); *see also* Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 653 (2003) (calling pornography the most popular, and potentially the earliest, use of the internet, followed by the trading of pirated content). The use of Photoshop and artificial intelligence (AI) in photo and video editing is rampant in both legal and unlawful pornography. Megan Farokhmanesh, *Is It Legal to Swap Someone's Face into Porn Without Consent?*, THE VERGE (Jan. 30, 2018), https://www.theverge.com/2018/1/30/16945494/deepfakes-porn-face-swap-legal [https://perma.cc/2XZA-WWJE] (describing the rise of AI's role in the creation of hyper-realistic pornography videos superimposed with the faces of celebrities and other real people). AI describes when a robot or computer has the capacity to complete tasks like a sentient human being. B.J. Copeland, *Artificial Intelligence*, BRITANNICA (Aug. 11, 2020), https://www.britannica.com/technology/artificial-intelligence [https://perma.cc/N97N-NLKQ].

[3] *See* Yamada, *supra* note 1, at 229–30 (clarifying that technological advances allow child pornographers to create content in ways that traditional legislation does not address). Another form of technology that is revolutionizing pornography is deepfake technology. Matt Burgess, *Deepfake Porn Is Now Mainstream. And Major Sites Are Cashing In*, WIRED (Aug. 27, 2020), https://www.wired.co.uk/article/deepfake-porn-websites-videos-law [https://perma.cc/G2GR-RNVU]. Deepfakes use artificial intelligence to create hyper-realistic videos in which the editor superimposes the face of an individual over the body of another person. *See* Farokhmanesh, *supra* note 2 (explaining the rise of deepfake technology in pornography). The subjects of these videos are usually celebrities. *See* Burgess, *supra* (noting prominent deepfakes, such as actress Emma Watson and singer Billie Eilish). Child pornographers also use deepfake technology to create realistic morphed and virtual child pornography. Jacob Young, *Deep Fakes, FaceApp and Child Pornography*, MEDIUM (Oct. 9, 2019), https://medium.com/@jacobyoung84/deep-fakes-faceapp-and-child-pornography-63ee23e56f30 [https://perma.cc/96TZ-W3SF].

[4] *See* United States v. Mecham, 950 F.3d 257, 260 (5th Cir.), *cert. denied*, 141 S. Ct. 139 (2020) (noting that there are well reasoned justifications both for and against First Amendment protection of morphed child pornography). *See generally* Richard Bernstein, *Must the Children Be Sacrificed?: The Tension Between Emerging Imaging Technology, Free Speech, and Protecting Children*, 31 RUTGERS COMPUT. & TECH. L.J. 406 (2005) (noting the convergence of the First Amendment with new-age technology and the law surrounding child pornography).

[5] *See* 18 U.S.C. § 2256 (criminalizing real and morphed child pornography), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); *Mecham*, 950 F.3d at 262 (noting that Congress expanded the definition of child pornography following the widespread use of the internet and computers).

[6] *See* United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014) (holding that the First Amendment protects morphed child pornography unless the content depicts an underlying crime). *See generally* U.S. CONST. amend. I (prohibiting laws that limit free speech).

under the First Amendment.[7] Other courts have upheld laws prohibiting morphed child pornography because the children featured face trauma and reputational harm like in real child pornography.[8]

On February 13, 2020, the Fifth Circuit, in *United States v. Mecham*, joined the majority and held that the First Amendment categorically excludes morphed child pornography from its protection.[9] Because the Supreme Court denied certiorari in March of 2020, the constitutionality of laws banning morphed child pornography remains an open question.[10]

In light of the current uncertainty, this Comment argues that the First Amendment should not protect morphed child pornography because the harm inflicted on the featured children is significant enough to justify government intervention.[11] Part I of this Comment provides an overview of obscenity and child pornography legislation, including technological advances in pornography, and introduces the *Mecham* case.[12] Part II outlines the Supreme Court's past decisions regarding several forms of child pornography and various circuit courts' treatment of morphed child pornography in relation to the First Amendment.[13] Finally, Part III argues that the majority holding of the Fifth

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[7] *See Anderson*, 759 F.3d at 895 (citing United States v. Bach, 400 F.3d 622, 632 (8th Cir. 2005)) (noting that the Eighth Circuit's 2005 holding in *United States v. Bach* that the defendant could be charged with possession of child pornography under the First Amendment was still good law because the underlying video featured the sexual abuse of a child).

[8] *See Mecham*, 950 F.3d at 267 (holding that morphed child pornography is like real pornography because both harm real children); Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012) (holding that the First Amendment does not protect morphed child pornography because it injures the interests of real children and has de minimis artistic value); United States v. Hotaling, 634 F.3d 725, 730 (2d Cir. 2011) (holding that the federal and state governments may criminalize morphed child pornography because it causes emotional and reputational harm to child victims). Morphed child pornography harms the reputations of child subjects if someone recognizes the child and believes they engaged in the sex acts featured. *See Mecham*, 950 F.3d at 267 (explaining how morphed child pornography causes children reputational harm). Such pornography also causes emotional harm if the child knows that a sexualized image with their likeness exists and that adults who sexually abuse children may view and distribute the images. *See id.* (noting that morphed child pornography causes psychological trauma to children).

[9] *See* 950 F.3d at 267 (joining the Sixth and Second Circuits in finding that the First Amendment does not apply to morphed child pornography); *Boland*, 698 F.3d at 883 (holding that victims of morphed child pornography may recover damages under the tortious cause of action in a child pornography statute); *Hotaling*, 634 F.3d at 730 (holding that the First Amendment excludes morphed child pornography using the face of a real minor from protection).

[10] Mecham v. United States, 141 S. Ct. 139 (2020), *denying cert. to* 950 F.3d 257 (5th Cir. 2020). The Supreme Court exercises the discretion to grant review of a case in which a party petitions for the writ of certiorari. *See* 13A ELIZABETH M. BOSEK, ET AL., CYCLOPEDIA OF FEDERAL PROCEDURE. § 60:143 (3d ed. 2020) (discussing the meaning behind the denial of certiorari). When the Court denies certiorari, it does not address the merits or affirm the lower court ruling. *Id.* It simply means an insufficient number of justices elected to review the case; it is a matter of choice without legally significant meaning. *Id.*

[11] *See infra* notes 101–109 and accompanying text.

[12] *See infra* notes 15–58 and accompanying text.

[13] *See infra* notes 59–78 and accompanying text.

Circuit in *Mecham* is correct, both in its interpretation of the Supreme Court's holding in 2010 in *United States v. Stevens* and its consideration of core policy concerns behind child pornography bans.[14]

I. The History of Child Pornography Legislation, Technological Evolution of Pornography, and the First Amendment

Modern child pornography generally takes one of three forms—real, virtual, or morphed.[15] Real child pornography features the sexual acts of real children.[16] Virtual pornography features adult actors, but the adult actors either intend to resemble children or an editor digitally alters their features to make them appear child-like.[17] Morphed child pornography also usually features adult actors, but it superimposes the faces of real children upon the adult actors to make it appear as though the children are engaging in sexually explicit acts.[18]

Historically, persons challenging statutes that criminalize pornography do so under the First Amendment's free speech clause.[19] State and federal statutes

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[14] *See infra* notes 79–109 and accompanying text.

[15] *See Mecham*, 950 F.3d at 260 (noting that under federal and most state laws "child pornography" includes real and morphed child pornography and originally also included virtual child pornography); *see also* 18 U.S.C. § 2256(8) (defining child pornography as including real, virtual, and morphed child pornography), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).

[16] *See Mecham*, 950 F.3d at 260 (defining real child pornography as pornography featuring the sexual depiction of real children, often through sexual violence); *see also* Steinberg, *supra* note 1, at 909 (same).

[17] *See Mecham*, 950 F.3d at 260 (defining virtual child pornography as pornography featuring adults intended to look like children or adolescents, but not featuring the likeness of real children); *see also* Steinberg, *supra* note 1, at 916 (same).

[18] *See Mecham*, 950 F.3d at 260 (defining morphed child pornography as digitally altered adult pornography using the likenesses of real children); *see also* Steinberg, *supra* note 1, at 909 (same). Child pornographers superimpose morphed photos and videos with the face of a real child, such that the pornography bears the child's likeness. *See* Steinberg, *supra* note 1, at 916 (describing the process by which child pornographers create morphed pornography).

[19] *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that the First Amendment does not protect child pornography); Miller v. California, 413 U.S. 15, 23 (1973) (holding that the First Amendment generally protects adult pornography). The Court views pornography as speech because the First Amendment applies to ideas transmitted through photos, videos, and books. *See* Roth v. United States, 354 U.S. 476, 487 (1957) (noting that sexual depictions are not innately obscene and the First Amendment cannot blanketly bar them). *But see generally* Andrew Koppelman, *Is Pornography "Speech"?*, 14 Legal Theory 71 (2008) (presenting an argument against treating pornography as speech by noting that free speech principles apply to the imparting of ideas). Although the First Amendment only explicitly governs federal action, the Supreme Court has held under the incorporation doctrine that the First Amendment also applies to states through the due process clause of Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the Fourteenth Amendment's due process clause protects First Amendment freedom of speech and press at the state level). The First Amendment also contains clauses protecting the exercise of religion, freedom of the press, the right to assembly, the right to petition, and freedom from the establishment of a federal religion. U.S. Const. amend. I.

cannot regulate protected speech without satisfying strict scrutiny review.[20] If the First Amendment excludes a form of speech from protection, however, legislatures typically may assign criminal or civil penalties to persons engaging in that type of speech.[21]

Courts agree that the First Amendment protects virtual child pornography but does not protect real child pornography.[22] There is disagreement surrounding whether the First Amendment protects morphed child pornography, the middle ground, from criminalization.[23] Section A of this Part describes the rise of child pornography laws following the fall of obscenity legislation.[24] Section B provides an overview of the circuit split regarding the First Amendment protection of morphed child pornography.[25] Finally, Section C outlines *United States v. Mecham*, the most recent circuit case on the issue.[26]

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[20] *See* Charles W. Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 429 (2014) (noting the general presumption that speakers enjoy First Amendment protection, and that the government cannot criminalize their expression). At the most basic level, state and federal legislatures cannot criminalize or further limit the exercise of free speech. *See id.* (explaining how the First Amendment protects speech in practice).

[21] *See id.* at 413 (describing the concept of categorical exclusion from the First Amendment). Categorical exclusion is a free speech doctrine under which a court characterizes speech into categories which are either protected or excluded from the scope of the First Amendment. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 917 (2009). For example, the Constitution categorically excludes libel from protection, and thus, governments may impose civil or criminal liability to individuals that engage in libelous statements. *See id.* (observing that the First Amendment categorically excludes libel as category of speech from protection).

[22] *See* U.S. CONST. amend. I (barring state and federal governments from enacting statutes that limit free speech); Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (holding that the First Amendment protects virtual child pornography); *Ferber*, 458 U.S. at 747 (holding that the possession of real child pornography is not protected speech under the First Amendment). Courts hold that real child pornography intrinsically violates children and thus the First Amendment does not protect it. *See Ferber*, 458 U.S. at 758 (asserting that the government has a legitimate interest in criminalizing child pornography because it causes physical, psychological and emotional trauma). Virtual pornography does not involve the abuse or the likeness of a real child and does not harm real children, so it does have First Amendment protection. *See Ashcroft*, 535 U.S. at 256 (distinguishing real and virtual child pornography).

[23] *See Mecham*, 950 F.3d at 260 (holding that the First Amendment does not protect morphed child pornography). *But see* United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014) (holding that the First Amendment protects morphed child pornography as a form of speech).

[24] *See infra* notes 27–40 and accompanying text.

[25] *See infra* notes 41–50 and accompanying text.

[26] *See infra* notes 51–58 and accompanying text.

A. The History of Obscenity Prosecution and the Advent of Child Pornography Law

From the earliest history of the United States to the mid-nineteenth century, prolific obscenity laws negated the need for child pornography legislation.[27] Up until the 1950s a swath of state and federal obscenity laws criminalized lewd material, including adult and child pornography.[28]

In 1957, in *Miller v. California*, however, the Supreme Court held that depictions of sex were not inherently obscene and governments could not blanketly prosecute them under the First Amendment.[29] Subsequent case law required the state to prove that a work (1) appealed to a "prurient interest," (2) was offensive to community norms, and (3) lacked value to the sciences, writing, politics, or the arts to show it was obscene.[30] *Miller* made prosecutions under obscenity laws incredibly difficult, leading federal and state governments to draft the first American child pornography laws.[31] Such laws crimi-

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[27] *See Mecham*, 950 F.3d at 261 (illustrating that child pornography laws developed later in American legal history due to the breadth of obscenity laws). Obscenity laws criminalized behaviors that society considered morally reprehensible, usually relating to sex and the excretion of bodily fluids. *Obscenity*, BLACK'S LAW DICTIONARY (11th ed. 2019). Obscenity laws arose in the United States in the colonial era, and early legislatures established them in criminal codes even before the founding. *See Mecham*, 950 F.3d at 261 (noting that the history of obscenity legislation led to the ultimate rise of child pornography laws). Because obscenity laws were incredibly broad, states and the federal government used obscenity laws to effectively prosecute child pornography crimes. *See id.* (explaining that before the fall of obscenity laws, child pornography laws were unnecessary to prosecute that behavior).

[28] *See Mecham*, 950 F.3d at 261 (describing the history of obscenity legislation). By 1956, twenty federal obscenity laws existed, including the Tariff Act of 1842, which prevented merchants from importing obscene material, and the Comstock Act of 1873, which added criminal penalties for mailing obscene material. *Id.*

[29] *See* U.S. CONST. amend. I (prohibiting the federal government from creating laws that limit free speech); 413 U.S. 15, 23–24 (1973) (holding that the First Amendment does not protect obscene material but that pornography is not always obscene). Once the Supreme Court narrowed the scope of obscenity laws, legislatures across the country enacted specific child pornography laws to ensure that governments could prosecute such crimes properly under the Constitution. *See Mecham*, 950 F.3d at 261 (describing how child pornography laws filled the void where obscenity laws once existed).

[30] *Miller*, 413 U.S. at 24; *see* Carmen M. Cusack, *Busting Patriarchal Booby Traps: Why Feminists Fear Minor Distinctions in Child Porn Cases: An Analysis of Social Deviance in Gender, Family, or the Home (Etudes 4)*, 39 S.U. L. REV. 43, 45 (2011) (outlining how modern courts still rely on the *Miller* factors in analyzing the legitimacy of obscenity prosecution). Prurient refers to having an inappropriate, often excessive, interest in sex. *Prurient*, BLACK'S LAW DICTIONARY, *supra* note 27. The *Miller* test does not exclusively target sexual depictions, nor does it render all sexually graphic material obscene under this standard. *See* E.H. Scholper, Annotation, *The Modern Concept of Obscenity*, 5 A.L.R. 1158 § 4.5 (1996) (explaining the broad reach of the Miller test beyond pornography and sexual depictions).

[31] *See Mecham*, 950 F.3d at 261 (citing *Miller*, 413 U.S. at 48) (describing *Miller* as giving the states a tool to differentiate between sexual content, which the First Amendment protects, and obscene content, which legislatures may permissibly criminalize). Child pornography emerged from a new need to criminalize materials that depicted the sexual abuse of children due to the new restraints on

nalized the distribution, and later the possession, of materials depicting children sexually but did not require that the materials be obscene.[32]

In 1982, in *New York v. Ferber*, the Supreme Court affirmed that the First Amendment categorically excludes the distribution of child pornography from its protection.[33] The Court used four rationales to explain this decision: (1) the state has a strong interest in protecting minors; (2) distribution of this material permanently memorializes the abuse; (3) there is little to no value in child pornography; and (4) there is a historical understanding that the First Amendment does not protect some types of speech because the inherent harm of the speech overwhelmingly outweighs any expressive value.[34] In 1990, in *Osborne v. Ohio*, the Supreme Court used the same four tenets to hold that the First Amendment does not protect the possession of child pornography as well.[35]

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obscenity laws. *See id.* at 261–62 (noting that child pornography laws emerged directly following *Miller*, as states could no longer criminalize pornography generally through obscenity laws).

[32] *See id.* at 262 (citing New York v. Ferber, 458 U.S. 747, 756–64 (1982)) (specifying that New York's original child pornography law prohibited the distribution of child pornography); *see also* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (explaining that Ohio's child pornography laws target the possession of child pornography).

[33] *See* 458 U.S. at 756–64 (holding that the First Amendment does not protect the distribution of real child pornography as speech). The state of New York had convicted a pornographic bookstore owner for selling two videos of young boys masturbating. *Id.* at 751–52. The state initially charged the owner under both child pornography and state obscenity laws, but the court acquitted him of the obscenity charges. *Id.* at 752. The Supreme Court solely considered the validity of the New York child pornography law under the First Amendment. *Id.* at 753.

[34] *See id.* at 751–52 (explaining the analysis of the Supreme Court through the use of a four-factor test reflecting history and public policy). This Comment refers to the fourth factor of the *Ferber* test as "value-harm balancing." *See id.* (noting the four factors of the *Ferber* test to analyze child pornography under the First Amendment). The earliest legal systems of the states criminalized certain types of speech, resulting in their exclusion from First Amendment protection. *Id.* at 754. For example, libel and fighting words are types of speech where any potential value of the material is greatly outweighed by its harm. *See id.* at 751–52 (detailing that libel, fighting words, and child pornography are classic examples of speech that the First Amendment categorically excludes from its protection). The Supreme Court has clarified that this method of analysis is not dispositive in the analysis of alternative forms of child pornography. *See* United States v. Stevens, 559 U.S. 460, 472 (2010) (illustrating that value-harm balancing is not the only factor courts should consider); *Mecham*, 950 F.3d at 265 (explaining that value-harm balancing may no longer have significant weight in the analysis of child pornography). The jurisprudence is unclear regarding how much weight value-harm balancing should have on the analysis of whether the First Amendment protects a particular form of child pornography. *See Stevens*, 559 U.S. at 471 (emphasizing that the value-harm balancing of a form of child pornography is but one step in a First Amendment analysis); *Mecham*, 950 F.3d at 265 (explaining the uncertainty in the Federal Courts of Appeals surrounding what weight courts should assign to the value-harm balancing of a form of speech).

[35] *See* 495 U.S. at 103–04 (holding that the First Amendment protects neither distribution nor possession of child pornography). As opposed to *Ferber*, the defendant in *Osborne* was only in possession of pornographic images of children and did not sell nor intend to sell the images. *Compare Osborne*, 495 U.S. at 103 (applying the *Ferber* test to a conviction for possession of child pornography), *with Ferber*, 458 U.S. at 752 (noting the defendant was charged with the distribution of child pornography).

The 1996 Child Pornography Prevention Act (CPPA) added morphed and virtual child pornography to the list of prohibited pornography depictions to account for the advent of photo and video manipulation technology.[36] In 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down the CPPA, holding that it was too broad and it criminalized behaviors that the First Amendment protects.[37] The Court held, therefore, that virtual child pornography is protected speech, noting that virtual pornography has value to the arts or literature.[38] Further, the Court emphasized that virtual pornography is not intrinsically linked to sexual abuse, as there is no child involved or harmed in the creation of such pornography.[39] Notably, the Court acknowledged that morphed child

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[36] *See* 18 U.S.C. § 2256(8)(B)–(C) (defining morphed and virtual pornography as child pornography), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); *Mecham*, 950 F.3d at 262 (discussing the codification of the Child Pornography Protection Act (CPPA)). The innovations of virtual and morphed child pornography were products of the mid-1990s, before which child pornography was only produced through the abuse of a real child. *See* Steinberg, *supra* note 1, at 913 (describing the rise of morphed child pornography in relation to technological advancements).

[37] *See* 18 U.S.C. § 2256 (criminalizing real, morphed, and virtual child pornography); 535 U.S. 234, 246–47 (2002) (detailing that the CPPA criminalizes thoughts rather than wrongdoing). The overbreadth doctrine, under which the Supreme Court struck down the CPPA, cautions legislatures from writing overly comprehensive statutes that criminalize some behaviors that the Constitution protects. *See The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844 (1970) (describing the historical conception of the overbreadth doctrine). Thus, courts strike down statutes that intend to permissibly regulate certain acts because their breadth unintentionally covers protected acts. *See id.* at 845 (explaining how courts use the overbreadth doctrine in practice). The CPPA criminalized a large amount of speech, including packaging that suggested that the film's contents were illegal when the film did not actually contain youthful actors. *See* 18 U.S.C. § 2256 (criminalizing a broad range of behaviors surrounding child pornography); *Ashcroft*, 535 U.S. at 238 (holding that the CPPA is unconstitutionally over-broad because it criminalizes virtual pornography, which governments cannot criminalize under the First Amendment). The legal community generally views overbreadth in statutes as impermissible because the government can use such statutes to infringe upon constitutional rights. *See The First Amendment Overbreadth Doctrine*, *supra*, at 844 (explaining the policy behind the overbreadth doctrine as protecting individuals' rights).

[38] *See Ashcroft*, 535 U.S. at 247 (holding that virtual child pornography is protected speech because it features neither the real sexual abuse nor the likeness of real children). In 2003, Congress repealed the CPPA and replaced it with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act). Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended at 18 U.S.C. § 2256); *see also* Yamada, *supra* note 1, at 233 (noting that the broadness of the CPPA could have criminalized popular books and movies). Justice Kennedy noted that under the CPPA, both the play *Romeo and Juliet* and the Academy Award-winning movie *American Beauty*, which each featured child sex acts through adult actors, met the definition of child pornography. *See Ashcroft*, 535 U.S. at 247–48 (communicating the value of virtual child pornography to literature and the arts). The Justice opined that American culture and art have a tradition of exploration in teenage or youth relationships. *See id.* (emphasizing that some virtual child pornography intrinsically has artistic value because individuals use it to portray child sexuality in books, movies, and plays without abusing or implicating the likeness of real children).

[39] *Ashcroft*, 535 U.S. at 256 (differentiating virtual child pornography from real child pornography to hold that the First Amendment protects the former). Real child pornography features the actual, physical sexual abuse of children, whereas virtual child pornography creates the appearance of children engaged in sex acts by using adult actors and, sometimes, computer editing. *See supra* notes 16–

pornography fell closer to real child pornography because it harms the interests of a real child, but it did not rule on its relation to the First Amendment.[40]

B. Stevens *and the Circuit Split*

In 2010, in *United States v. Stevens*, the Supreme Court reversed a conviction for a defendant who created an "animal crush" video, holding that such laws violated the First Amendment's protection of speech.[41] The Supreme Court opinion distinguished depictions of animal cruelty from child pornography.[42] The Court noted that real child pornography is distinct from animal cruelty videos, as the market for such pornography is tied to the abuse of children.[43] Further, the *Stevens* Court explained that the value-harm balancing of child pornography in *Ferber* was not deeply important to the holding that child pornography is not protected speech.[44]

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17 and accompanying text (defining real and virtual child pornography). Thus, virtual child pornography does not inflict the same harms to children as does real child pornography, and the First Amendment protects virtual child pornography as speech. *See Ashcroft*, 535 U.S. at 249 (relying on harm to children as persuasive analysis behind the criminalization of real child pornography that does not apply to morphed child pornography).

[40] *See Ashcroft*, 535 U.S. at 242 (explaining the similarities between real and morphed pornography but ignoring the ultimate question of whether the First Amendment protects morphed pornography). Morphed child pornography occupies a middle space, in which it takes on many of the harmful characteristics of real child pornography but does not depict actual abuse. *See Mecham*, 950 F.3d at 264–65 (explaining the disagreement over whether the First Amendment protects morphed child pornography as speech). The conflicting characteristics make morphed child pornography particularly difficult for courts to classify in relation to the First Amendment. *See id.* (describing the circuit split as originating partially from the fact that morphed child pornography bares similarity to both real and virtual pornography); *see also Ashcroft*, 535 U.S. at 256 (holding that the First Amendment protects virtual child pornography); *Osborne*, 495 U.S. at 111 (holding that the First Amendment does not protect the possession of real child pornography); *Ferber*, 458 U.S. at 764 (holding that the First Amendment does not protect the distribution of real child pornography).

[41] 559 U.S. 460, 481–82 (2010). Animal crush videos usually depict women crushing small animals using high heels. *See id.* at 465–66 (explaining what animal crush videos typically entail). Individuals that find the videos sexually gratifying share the videos with each other, much like the distribution of child pornography among pedophiles. *See id.* at 466 (citing 18 U.S.C. § 48) (explaining that the animal cruelty law under which the state charged the defendant targeted the interstate market for "crush" videos).

[42] *See id.* at 471 (noting that real child pornography is an exceptional category of speech, as its creation and distribution creates demand for child pornographers and child sexual abusers to harm children). Although the First Amendment has historically excluded some categories of speech that the Supreme Court has not noted in past decisions, animal cruelty is not clearly one of them. *See id.* at 472 (emphasizing that the Court cannot simply create new categories of protected speech at whim).

[43] *See id.* at 471 (citing *Ferber*, 458 U.S. 761–62) (distinguishing child pornography from videos of animal cruelty by noting that child pornography creates an economic incentive to abuse children). As demand for child pornography increases, it causes the creators of the real pornography to abuse children to produce more content. *See id.* (describing that the Court considered the unique relationship of child pornography to the demand for child abuse).

[44] *See id.* (clarifying that the *Ferber* Court did not base its opinion entirely on a weighing of the pornography's harm against its value).

Courts are split as to whether *Stevens* is relevant to the First Amendment analysis of morphed child pornography.[45] Only the Eighth Circuit has held that, under *Stevens*, the First Amendment protects morphed child pornography.[46] In 2014, in *United States v. Anderson*, the Eighth Circuit held that, under *Stevens*, morphed child pornography that does not depict an underlying crime, namely sexual abuse, is protected speech.[47] Contrarily, the Second and Sixth Circuits hold that the First Amendment excludes morphed child pornography, like real child pornography, from protection.[48] They emphasize that morphed child pornography harms the real children whose faces are superimposed.[49] Neither court referenced the *Stevens* analysis which the Eighth Circuit applied in *Anderson*.[50]

C. United States v. Mecham*: The Fifth Circuit Joins the Majority*

In February of 2020, in *United States v. Mecham*, the Fifth Circuit joined the majority of circuits in holding that the First Amendment categorically excludes morphed child pornography from its protection.[51] The defendant, Clifford Mecham, created over 30,000 files of morphed child pornography in

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[45] *See id.* at 471–72 (holding that the First Amendment protects animal crush videos as speech). *Compare Mecham*, 950 F.3d at 267 (holding that, despite *Stevens*, the First Amendment does not protect morphed child pornography because real children are harmed in both morphed child pornography and real child pornography), *with* United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014) (holding that, in light of *Stevens*, the First Amendment protects morphed child pornography where the underlying photo or video does not feature a criminal act).

[46] *See Anderson*, 759 F.3d at 895 (holding that the First Amendment does not categorically exclude morphed child pornography from its protection).

[47] *See id.* at 894–95 (citing *Stevens*, 559 U.S. at 460). *Stevens* noted that child pornography uniquely incentivizes criminal abuse, which the *Anderson* court interpreted to require that an underlying criminal act be present in child pornography for it to be constitutionally criminalized. *See id.* at 895 (holding that the First Amendment protects morphed child pornography because morphed child pornography does not feature the underlying criminal abuse of children, despite featuring the likeness of real children).

[48] *See* Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012) (holding that laws criminalizing morphed child pornography are constitutional because the pornography threatens the interests of specific children and there is *de minimis* value to the content); United States v. Hotaling, 634 F.3d 725, 729–30 (2d Cir. 2011) (holding that the First Amendment does not apply to morphed child pornography because the pornography necessarily harms the reputation and wellbeing of a child); *see also* U.S. CONST. amend. I (prohibiting the federal government from infringing on freedom of speech).

[49] *See Boland*, 698 F.3d at 884 (holding that the First Amendment does not protect morphed child pornography); *Hotaling*, 634 F.3d at 729–30 (same).

[50] *See Mecham*, 950 F.3d at 265 (first citing *Boland*, 698 F.3d at 883–84; then citing *Hotaling*, 634 F.3d at 725) (expressing that *Boland* and *Hotaling* were issued after *Stevens* but that neither addressed the *Stevens* holding); *Anderson*, 759 F.3d at 895 (holding that the First Amendment protects morphed child pornography because the maker did not actually sexually abuse a child to produce the pornography); *see also Stevens*, 559 U.S. at 471–72 (noting in dicta that the value-harm balancing of real child pornography is not dispositive of whether the First Amendment categorically excludes it from protection).

[51] *See* 950 F.3d at 267 (holding that laws criminalizing morphed child pornography do not violate the First Amendment because morphed child pornography is not protected speech).

which he placed the faces of his four granddaughters over adult female actresses engaged in pornographic sex.[52] The defendant superimposed his own face over the male actors in several videos and emailed them to his granddaughter.[53]

The state prosecuted Mecham in the U.S. District Court for the Southern District of Texas for possession of child pornography.[54] He filed a motion to dismiss the charges, arguing that the First Amendment protects morphed child pornography, but the court denied the motion and later convicted Mecham.[55] Mecham appealed his conviction to the Fifth Circuit.[56] The court granted the appeal to consider whether First Amendment protection applied to morphed child pornography.[57] The Fifth Circuit affirmed the sentence, primarily emphasizing that morphed child pornography was analogous to real pornography as the creation of the pornography harms a real child.[58]

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[52] *Id.* at 260. Mecham's granddaughters were all minors, ages four, five, ten, and sixteen years old in the photos he used. *Id.*

[53] *Id.* The video he emailed to the sixteen-year-old granddaughter included several clips in which Mecham superimposed her face onto a female participant and his own face onto a male participant. *Id.* A police intervention began when Mecham sent his laptop for repair and the technician discovered thousands of similar files. *Id.* The repairman alerted the local police department. *Id.* The court in *Mecham* noted that the videos made it appear that the two were engaged in sex acts, and that Mecham ejaculated into the child's mouth. *See id.* (discussing the particularly egregious nature of the morphed images).

[54] *Id.* at 261. The state chose only to pursue a possession charge against Mecham, although there was evidence that he distributed the morphed child pornography at least to the eldest granddaughter. *Id.* The prosecution charged Mecham with possessing a video of nearly nine minutes that superimposed the face of Mecham's five-year-old granddaughter onto a slideshow of pornographic photos of women engaged in various forms of sexual activity. *Id.* In several of the images, Mecham had superimposed his face on the men in the depictions. *Id.*

[55] *Id.* The court awarded a 97-month sentence using the federal enhancement for a child pornography offense that depicts sadistic, masochistic, or otherwise violent conduct. *See Mecham*, 950 F.3d at 267 (noting that Mecham also disputed his sentence); U.S. SENT'G GUIDELINES MANUAL § 2G2.2(b)(4)(A) (U.S. SENT'G COMM'N 2018) (enhancing sentences for child pornography featuring extreme violence). A sadistic image is one that portrays conduct that an observer would believe was causing the victim in the depiction emotional or physical pain. *Mecham*, 950 F.3d at 267 (citing United States v. Nesmith, 866 F.3d 677, 681 (5th Cir. 2017)). The definition of "sadistic image" limits the application of the enhancement to morphed child pornography charges, as in most cases the victim will experience the pain after learning the pornography exists, rather than in the moment that the pornography is made. *Id.* (citing *Nesmith*, 866 F.3d at 681). The district court applied a level-four enhancement, increasing Mecham's sentencing range from 63 to 78 months to 97 to 121 months. *Id.* Mecham's original sentence of ninety-seven months was the lowest sentence the court could have assigned to him within the sentencing range. *Id.*

[56] *Mecham*, 950 F.3d at 267.

[57] *Id.* at 263. *Mecham* also appealed the sentence enhancement, asserting that the court did not make a finding of sadism necessary to support the enhanced sentence. *See Mecham*, 950 F.3d at 267 (explaining the calculation of Mecham's sentence); U.S. SENT'G GUIDELINES MANUAL § 2G2.2(b)(4)(A) (providing the enhancement used in Mecham's case).

[58] *See Mecham*, 950 F.3d at 267 (holding that the First Amendment does not protect morphed child pornography). *Mecham* relied in part on the logic of the Second and Sixth Circuits: that the harm that morphed child pornography causes to real children justifies government intervention under the

II. Navigating the Frontier of the First Amendment in the Context of Child Pornography

In March of 2020, Mecham sought certiorari, but the Supreme Court declined to hear the case, leaving open the question of whether the First Amendment protects morphed child pornography.[59] Section A of this Part describes the minority approach's reasoning for holding that morphed child pornography is protected speech.[60] Section B describes the majority approach's opposing reasoning.[61] Section C describes how the Fifth Circuit in 2020, in *United States v. Mecham*, expanded the analysis of the majority and the court's direct criticism of the Eighth Circuit's holding.[62]

A. The Minority Reasoning for Protecting Morphed Child Pornography Under the First Amendment

In 2014, in *United States v. Anderson*, the Eighth Circuit held that morphed child pornography that did not depict the underlying abuse of children was protected speech.[63] The court differentiated this holding from a past case

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First Amendment. *See id.* at 265 (first citing Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012); then citing United States v. Hotaling, 634 F.3d 725, 729–30 (2d Cir. 2011)) (noting that both *Boland* and *Hotaling* analogize real child pornography to morphed child pornography).

[59] *See* Mecham v. United States, 141 S. Ct. 139 (2020), *denying cert. to* 950 F.3d 257 (5th Cir. 2020). By denying certiorari, the Supreme Court has declined to rule on the matter and has not passed judgment against or in favor of the Fifth Circuit's holding. *See* Bosek, *supra* note 10, § 60:143 (explaining that a denial of certiorari does not signify the Supreme Court's affirmation of the lower court's ruling).

[60] *See infra* notes 63–66 and accompanying text.

[61] *See infra* notes 67–74 and accompanying text.

[62] *See infra* notes 75–78 and accompanying text.

[63] 759 F.3d 891, 894–95 (8th Cir. 2014) (holding that the First Amendment generally protects morphed child pornography). The defendant in *Anderson* was convicted of possession of morphed child pornography for superimposing the photo of a female minor's face over the face of an adult pornography actress engaged in sex acts. *Id.* at 893. The court initially held that the First Amendment does not categorically exclude morphed child pornography from its protection as long as that pornography does not show the underlying abuse of a child. *Anderson*, 759 F.3d at 895 (holding that where morphed child pornography does not contain an underlying crime, the First Amendment protects it as speech). The court further noted that the defendant possessed pornography in which the underlying content featured adults, not children. *See id.* (stressing that the defendant's morphed pornography did not feature child abuse). The Eighth Circuit distinguished these facts from those of its 2005 case *United States v. Bach*, in which the child pornography featured an image morphed on to real child pornography and, thus, could constitutionally be criminalized. *See id.* at 894 (citing United States v. Bach, 400 F.3d 622, 632 (8th Cir. 2005)) (emphasizing that because the underlying pornography in *Bach* featured a posed minor, the morphed child pornography captured criminal child abuse). Although the pornography possessed by the defendant in *Anderson* was protected speech, the court upheld the federal child pornography statute and the defendant's conviction under it because the statute satisfied strict scrutiny. *See id.* at 895–96 (holding that the government satisfied its burden under strict scrutiny that the statute fostered a "compelling interest" and was narrowly tailored to meet that interest); *see also* 18 U.S.C. § 2256 (criminalizing morphed child pornography under federal law), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

affirming a conviction for morphed child pornography where the defendant superimposed the face of a child celebrity over a photo of another minor engaged in sexual activity.[64] This other type of morphed child pornography could still be prosecuted under the standard in *Anderson* because the underlying video still depicted a sex crime.[65] Thus, the court held that, under *Stevens*, the First Amendment protects pornography unless it depicts an underlying crime, namely the sexual abuse of a minor.[66]

B. The Majority Reasoning for Categorically Excluding Morphed Child Pornography from First Amendment Protection

In direct contrast with the Eighth Circuit, the Second, Sixth, and now Fifth Circuits have held that morphed child pornography is not protected speech.[67] In 2011, in *United States v. Hotaling*, the Second Circuit noted that

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[64] *See Anderson*, 759 F.3d at 894–95 (citing *Bach*, 400 F.3d at 632) (describing a past ruling that seemingly held the criminalization of morphed child pornography proper under the First Amendment); *Bach*, 400 F.3d at 624 (affirming the criminal sentence of a defendant for possession of morphed child pornography). The ruling in the Eighth Circuit's 2005 case, *United States v. Bach*, reflects a similar analysis to *Mecham*, as well as the Sixth Circuit in 2012, in *Doe v. Boland*, and the Second Circuit in 2011, in *United States v. Hotaling*, as it emphasized the harm to the child celebrity each time the photo was shared. *See* Doe v. Boland, 698 F.3d 877, 884 (6th Cir. 2012) (emphasizing the harm to children in morphed child pornography if another person recognized their photos or if the child knew of the use of their image); United States v. Hotaling, 634 F.3d 725, 729–30 (2d Cir. 2011) (noting reputational and psychological harm to child victims from morphed child pornography); *Bach*, 400 F.3d at 632 (identifying the harm to the child victim from distribution of the pornography). As possession of sexualized, nude photos of minors is a crime, and the underlying photo in *Bach* was of a naked minor, the pornography was criminal—not because the child pornographer superimposed the child's face, but because the underlying image was criminal. *See Bach*, 400 F.3d at 632 (affirming the sentence of a defendant for possession of morphed child pornography).

[65] *See Anderson*, F.3d at 894 (citing *Bach*, 400 F.3d at 632) (affirming a prior child pornography conviction involving a morphed image because the underlying image featured a nude photo of a child); *see also Bach*, 400 F.3d at 632 (explaining that the morphed child pornography featured an underlying photo of real child pornography).

[66] *See* F.3d at 894 (citing *Bach*, 400 F.3d at 622) (justifying the prior holding in *Bach* under its new interpretation of *Stevens* by distinguishing morphed pornography featuring an underlying image or video of child sexual abuse from that featuring an underlying image or video of adults); *see also* United States v. Stevens, 559 U.S. 460, 471 (2010) (noting that certain types of speech are categorically outside of the protection of the First Amendment, such as child pornography). As the ruling in *Bach* dealt with an underlying nude photo of a child, the material still contained real child pornography and the First Amendment did not protect it. *See Anderson*, 759 F.3d at 894 (citing *Bach*, 400 F.3d 622) (justifying its ruling in *Bach*, in which a child pornographer was convicted for morphing the face of a child onto an existing image of real child pornography).

[67] *See* United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020) (holding that it is constitutional to criminalize the superimposing of a five-year-old's face onto adult pornography); *Boland*, 698 F.3d at 883 (holding that it is constitutional to award damages to the families of children whom the defendant superimposed onto adult pornography for the purposes of trial testimony); *Hotaling*, 634 F.3d at 730 (holding that the First Amendment excludes the morphing of the photographic images of minors onto the bodies of adults in sadomasochistic pornography). In 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court noted that morphed child pornography

morphed child pornography was not just a "record of the defendant's fantasies" because the pornography's depictions harm the emotional and reputational well-being of a real child just like in real child pornography.[68] In 2012, in *Doe v. Boland*, the Sixth Circuit echoed the logic in *Hotaling* by holding that the First Amendment permits the criminalization of morphed child pornography.[69] The *Boland* court added that morphed pornographic depictions have no value and that banning them does not threaten artistic expression.[70]

In *Mecham*, the Fifth Circuit revisited the logic of the majority of circuits under *Stevens*, holding consistently that the First Amendment does not protect morphed child pornography.[71] The circuit court acknowledged that *Stevens* may limit the relevance of the value-harm balancing rationale in determining if the First Amendment categorically excludes morphed child pornography.[72]

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causes harm to the reputation and psychological well-being of children, making it similar to real child pornography. *See* 535 U.S. 234, 242–45 (2002) (noting that, despite the First Amendment protection of virtual pornography, morphed child pornography is more similar to real child pornography, in that it is a danger to real children).

[68] *See* 634 F.3d at 730 (noting that the harm that morphed child pornography does to children is sufficient to justify exclusion from First Amendment protection). In *Hotaling*, the court described the harm from the morphed child pornography as stemming from the fact that a person could identify the children depicted in the photos. *See id.* (explaining that if someone recognized the children in the morphed child pornography, they may face reputational harm).

[69] *See id.* (holding that morphed child pornography endangers the wellbeing and reputation of children in the same way as real child pornography); *Boland*, 698 F.3d at 883–84 (analyzing both morphed child pornography's harm to children and its lack of cultural value). The child would experience reputational harm if another person recognized the child's likeness in the morphed photos and emotional harm if the child knew these images existed and could potentially threaten their safety. *See Boland*, 698 F.3d at 884 (explaining the potential for harm to children from morphed child pornography).

[70] *Boland*, 698 F.3d at 884 (emphasizing that banning morphed child pornography does not inhibit creativity, as virtual pornography is a legal and non-harmful alternative).

[71] *See Mecham*, 950 F.3d at 267 (holding that the dicta in *Stevens* does not change the analysis of morphed child pornography under the First Amendment, and that the First Amendment categorically excludes morphed child pornography from its protection because it features real children).

[72] *See id.* at 264–65 (citing United States v. Stevens, 559 U.S. 460, 471 (2010)) (emphasizing that even the most reaching interpretation of *Stevens* limits the applicability of value-harm balancing to new forms of child pornography in First Amendment analysis); *see also Stevens*, 559 U.S. at 471 (holding that the weighing of value and harm in *Ferber* was not the only reason for the Court's ruling). *Stevens* noted that real child pornography is an incredibly specific case because its creation requires the abuse of children, and, thus, the demand for real child pornography incentivizes people to abuse children to make it. *See* 559 U.S. at 471 (distinguishing child pornography from videos of animal abuse because the Court believed animal abuse videos did not have the same impact on the market for animal abuse). *Stevens* also emphasized that *Ferber* required the analysis of other factors outside of a value-harm balancing of the pornography. *See id.* (noting that although animal crush videos cause greater societal harm than value, this element of analysis is not dispositive of the treatment of such videos under the First Amendment); New York v. Ferber, 458 U.S. 747, 756 (1982) (analyzing four factors, including the memorialization of abuse and lack of societal value of child pornography, in holding that the First Amendment does not protect real child pornography). *But see Mecham*, 950 F.3d at 266–67 (criticizing the minority approach as inappropriately interpreting dicta in *Stevens* to

Even if *Stevens* rejected value-harm balancing, the holdings of the Second and Sixth Circuits still stood because they relied most significantly on the trauma inflicted on the children depicted in morphed child pornography.[73] *Mecham* ruled that because the Supreme Court recognized the harm to children in *Ferber* and *Ashcroft*, such harm alone is sufficient to deny First Amendment protection to morphed child pornography.[74]

C. Mecham*'s Commentary on the Alleged Jurisprudential Errors of the Eighth Circuit*

Mecham condemned the Eighth Circuit for essentially inventing the underlying crime requirement which has the potential to overturn the longstanding criminalization of real child pornography.[75] The Fifth Circuit, in *Mecham*, emphasized that *Stevens* merely addressed child pornography in a single paragraph of a lengthy opinion about an entirely distinct type of speech—depictions of animal abuse.[76] Further, the paragraph served to distinguish child pornography from animal abuse depictions, not to liken the legal treatment of the two.[77] As

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undermine longstanding Supreme Court precedent, which allows for the criminalization of lewd photos of naked children who are not sexually abused in the photo or video).

[73] *Mecham*, 950 F.3d at 265 (first citing *Boland*, 698 F.3d at 883–84; then citing *Hotaling*, 634 F.3d at 725) (holding that, even if the weighing of value and harm was no longer influential in the analysis, *Hotaling* and *Boland* focused on the harm to children and were accordingly still good law).

[74] *See Ashcroft*, 535 U.S. at 242 (emphasizing that morphed child pornography harms the real children that it features like the victims of real pornography); *Ferber*, 458 U.S. at 758 (holding that bans on real child pornography are constitutional because it harms children); *Mecham*, 950 F.3d at 266–67 (asserting that interpreting *Stevens* as requiring child pornography to show an actual crime before it could be banned would constrain the laws surrounding both real and morphed child pornography).

[75] *See* 950 F.3d at 266–67 (suggesting that *Anderson's* holding implicitly overrules the direct holding of *Ferber*, the seminal case for the treatment of child pornography under the First Amendment). *But see* United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014) (holding that the First Amendment generally protects morphed child pornography).

[76] *See Mecham*, 950 F.3d at 265–66 (citing United States v. Price, 775 F.3d 828, 838 (7th Cir. 2014)) (stating that, where it is unclear if or how Supreme Court precedent is changing, lower courts must show judicial deference). *Stevens* merely notes in dicta that the value-harm balancing of a form of child pornography is not dispositive of its treatment under the First Amendment. *See* 559 U.S. at 471 (explaining tangentially that the government's argument under the value-harm balancing prong is irrelevant because animal abuse videos are entirely dissimilar to child pornography).

[77] *See Mecham*, 950 F.3d at 266 (holding that the analysis of child pornography in *Stevens* is too brief and unrelated to overrule nearly half a century of case law). In *Stevens*, the state argued that videos of animal abuse were analogous to child pornography because the value of both forms of content is de minimis, but the harm they cause is great. *See* 559 U.S. at 471 (rejecting the state's argument because animal abuse videos do not have the same impact on the market for abuse as real child pornography). In *Stevens*, the Supreme Court only referenced child pornography to directly address and explain the error in the state's assertion. *See id.* (distinguishing child pornography from videos of animal abuse). The Court did so by emphasizing that the link between child pornography and the sexual abuse of children influenced the *Ferber* Court more greatly than value-harm balancing. *See id.* (lessening the emphasis on the value-harm balancing test).

such, *Mecham* criticized the Eighth Circuit's interpretation of *Stevens* for lacking judicial restraint where Supreme Court jurisprudence is arguably evolving.[78]

III. WHY THE FIRST AMENDMENT SHOULD NOT APPLY TO MORPHED CHILD PORNOGRAPHY

In 2020, in *United States v. Mecham*, the Fifth Circuit correctly ruled with the majority, showing judicial restraint as a lower court and awareness of the clear policy implications of its holding.[79] Section A of this Part describes the jurisprudential wisdom of the Fifth Circuit's deference, rather than making a controversial ruling ahead of, and in conflict with, Supreme Court case law.[80] Section B outlines how the circuits in the majority are protecting against the dangerous sentiment that an adult's sexualization of a minor is not criminal or detrimental unless physical sexual abuse has occurred.[81]

A. Breaking Ranks: Early Overruling and Contradiction of Clear Precedent

The norms of judicial deference should caution circuit courts from making bold moves against established Supreme Court doctrine.[82] As *Mecham* not-

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[78] *See Mecham*, 950 F.3d at 266 (emphasizing that *Anderson* diverged significantly from established doctrine based on limited authority from dicta); *Anderson*, 759 F.3d at 894–95 (holding the First Amendment generally protects morphed child pornography); *cf. Stevens*, 559 U.S. at 471 (holding that animal crush videos are unlike child pornography and, thus, the First Amendment protects the former). Judicial restraint is a substantive policy that cautions judges to use deference to higher courts and the legislature in making rulings of law. *See* Kermit Roosevelt, *Judicial Restraint*, BRITANNICA (Apr. 30, 2010), https://www.britannica.com/topic/judicial-restraint [https://perma.cc/67NB-ZYJ5] (defining judicial restraint). *Mecham* characterized the Supreme Court doctrine surrounding child pornography and free speech as contentiously evolving because it is unclear if the Supreme Court intended *Stevens* to overrule past precedent that guided the analysis of forms of child pornography. *See Mecham*, 950 F.3d at 266 (criticizing the minority approach for overstating the position of the Supreme Court). *Mecham* argues that unless the Supreme Court has explicitly overruled itself, lower courts cannot act against established Supreme Court doctrine. *See id.* at 265 (emphasizing the need for deference where the Supreme Court has not clearly changed established precedence).

[79] *See* 950 F.3d 257, 267 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020) (holding that morphed child pornography is not protected speech, because it harms children identifiable in the pornography).

[80] *See infra* notes 82–98 and accompanying text.

[81] *See infra* notes 99–109 and accompanying text.

[82] *See* Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 74–75 (1982) (proposing that when lower courts overrule Supreme Court doctrine anticipatorily, it is often construed as appropriating the power of the Supreme Court). The legal community is critical when a lower court overrules Supreme Court precedent based on the lower court's perception that the Supreme Court is moving in that direction. *See id.* at 55 (explaining the jurisprudential theory that lower courts should not overrule Supreme Court precedent unless the Supreme Court has explicitly overruled itself first). One criticism is that the lower court's act appropriates the duties of the higher Court. *See id.* at 74–75 (explaining arguments against overruling the Supreme Court without the Court acting first). Further, such actions create uncertainty

ed, the legal analysis of child pornography and the First Amendment has remained constant for nearly forty years.[83] The Supreme Court has recognized repeatedly that the harm perpetrated against the children featured in real and morphed child pornography is analogous, and both harms are genuine governmental concerns.[84]

Mecham correctly stressed that *Stevens* does not provide the authority for the Eighth Circuit to rule anticipatorily.[85] The opinion is not written about child pornography but, rather, videos depicting animal abuse.[86] The Court references child pornography only to dispel the comparison between it and the "crush" videos that *Stevens* was addressing.[87] The Supreme Court explained that the sexual abuse inherent to child pornography makes it a unique case, but it did not assert that latent criminal acts are necessary to criminalize a form of

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for a large number of cases, especially at the circuit level. *See id.* at 77–78 (emphasizing that uncertainty is a prominent concern against overruling the Court). Perhaps most alarming is the potential that the Supreme Court will not address an erroneous overruling for a prolonged period of time. *See id.* at 78 (noting that procedural difficulty often leaves bad precedent from the circuit courts in place). The Supreme Court may not grant certiorari for a variety of reasons, and until another case or controversy of the same character is brought before it, the incorrect ruling will stand. *See id.* (recognizing that often the Supreme Court is unable to address bad precedent for years).

[83] *See* U.S. CONST. amend. I (proscribing the government from creating laws that impinge on free speech); *Mecham*, 950 F.3d at 266–67 (stating that the foundation of child pornography legislation has remained uncontradicted since *Ferber*); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002) (noting that morphed child pornography is like real child pornography because the pornography harms recognizable children in its creation); New York v. Ferber, 458 U.S. 747, 758 (1982) (recognizing the harm to children in its First Amendment analysis of a child pornography statute).

[84] *See Ashcroft*, 535 U.S. at 242 (noting that unlike virtual pornography, both morphed and real pornography cause harm to identifiable children); *Ferber*, 458 U.S. at 758 (holding that harm to reputation and wellbeing necessitates constitutional government intervention in the distribution of child pornography); *Mecham*, 950 F.3d at 265 (holding that real and morphed child pornography create analogous harms).

[85] *See Mecham*, 950 F.3d at 265 (citing United States v. Stevens, 559 U.S. 460, 471 (2010)) (asserting that the divergent subject matter of *Stevens* and its minor consideration of child pornography makes the holding largely inapplicable to child pornography); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (asserting that federal courts of appeals should refrain from overruling Supreme Court decisions). An error occurs in the circuits when a federal appeals court strays from the Supreme Court's precedent without the Supreme Court renouncing that legal rule first. *See* Kniffin, *supra* note 82, at 74–75 (explaining that rash actions of circuit courts cause harm). The Supreme Court has explicitly held that, where its precedent seems to rest on analysis rejected in other opinions but the precedent directly applies to a case before a court of appeals, the court should follow the precedent. *See Rodriguez de Quijas*, 490 U.S. at 484 (holding that circuit courts may not overrule Supreme Court decisions unless the Court has first overruled its own precedent).

[86] *See Mecham*, 950 F.3d at 265–66 (citing United States v. Price, 775 F.3d 828, 838 (7th Cir. 2014)) (noting that the purpose of *Stevens* is to address an animal abuse statute and the opinion only briefly discusses child pornography in a paragraph of its analysis).

[87] *See id.* at 266 (asserting that it is unlikely that the Supreme Court intended its ruling in *Stevens* to have an impact on the body of case law surrounding child pornography and the First Amendment).

child pornography.[88] At most, *Stevens* clarified that courts should not base their analysis of a particular form of child pornography solely on the fact that its harm outweighs its value.[89]

Mecham persuasively articulated that, even if the prior jurisprudence surrounding child pornography was in question, circuit courts should not "read tea leaves" to divine where the Supreme Court may rule.[90] Where a circuit court perceives a future transition in the legal standard, they should wait for the Supreme Court to codify that transition into law.[91] *Mecham* rightfully rejected the minority approach in *Anderson* as it not only rules too hastily, but it actively contradicts the holding of *Ferber*, the seminal case discussing child pornography under the First Amendment.[92] The Eighth Circuit held that the First Amendment protects child pornography if the content does not capture an underlying criminal act.[93] Lascivious photographs of nude children do not capture a crime, as it is not illegal for children to be naked.[94] Yet, common sense and the explicit ruling in *Ferber* make it clear that the acts of taking, possessing, or distributing these pho-

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[88] *See id.* (citing *Stevens*, 559 U.S. at 471) (contending that *Anderson* not only warps the ruling in *Stevens*, but it also does so in a way that conflicts with the precedential framework surrounding all child pornography cases).

[89] *See id.* at 265 (citing *Stevens*, 559 U.S. at 471) (explaining that, because *Stevens* makes the point that the value-harm balancing of child pornography was not the only justification behind *Ferber*, the balancing may no longer be a substantive source of analysis in child pornography cases).

[90] *See id.* (explaining that circuit courts cannot try to predict the future decisions of the Supreme Court to justify rulings that do not accord with precedent); *see also Rodriguez de Quijas*, 490 U.S. at 484 (condemning the Fifth Circuit for overruling otherwise undisturbed Supreme Court doctrine); Big Time Vapes, Inc. v. Food & Drug Admin., 963 F.3d 436, 447 (5th Cir. 2020) (citing *Mecham*, 950 F.3d at 265) (emphasizing that circuit courts cannot overrule existing doctrine because of what they believe the Supreme Court will rule in the future).

[91] *See Rodriguez de Quijas*, 490 U.S. at 484 (stating that the Supreme Court alone has the power to challenge and overrule Supreme Court precedent).

[92] *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that a criminal statute prohibiting the distribution of photos of children's genitals does not violate the First Amendment); *Mecham*, 950 F.3d at 265 (asserting that the ruling in *Anderson* undermined the criminalization of pornographic pictures of children's genitals which *Ferber* explicitly affirmed); United States v. Anderson, 759 F.3d 891, 894 (8th Cir. 2014) (holding that the First Amendment protects morphed child pornography that does not also feature an underlying crime).

[93] *See Anderson*, 759 F.3d 894–95 (holding that under *Stevens*, morphed child pornography must feature a crime in its underlying content for the First Amendment to exclude it).

[94] *See Mecham*, 950 F.3d at 266 (noting that *Ferber* dealt with and affirmed a statute that criminalized sexually charged photos of naked children). The PROTECT Act is the most current federal statute criminalizing child pornography. *See* 18 U.S.C. § 2256 (criminalizing real and morphed child pornography), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). The PROTECT Act criminalizes depictions of the "sexually explicit conduct" of children, which includes the lewd showing of a person's genitals or pelvis. *See id.* (not limiting the scope of child pornography only to depictions of criminal abuse). Thus, the minority approach challenges the most important federal criminal law against child pornography. *See id.* (criminalizing child pornography, including lewd photos of children, at the federal level); *Anderson*, 759 F.3d at 894–95 (holding that the First Amendment protects morphed child pornography where there is not an underlying crime, as in lewd photos of naked children).

tos are criminal.[95] If the minority holding in *Anderson* is correct, the opinion destabilizes the foundation for the criminalization of child pornography, as it calls into question *Ferber* and all its progeny.[96] The minority approach effects extreme, sweeping change that only the Supreme Court can initiate.[97] *Mecham* was wise to reject this usurpation of Supreme Court power.[98]

B. Breaking Trust: Antithetical Policy Outcomes Under the Minority Ruling

The Fifth Circuit acknowledged the objective truth that the criminalization of any form of child pornography rests firmly on the protectionist desire to prevent harm to minors.[99] The Eighth Circuit stated that the majority misplaced its concern for minors in relation to photos and videos that do not capture the act of a crime.[100] The ruling rests upon the idea that the fundamental harm of child pornography is the underlying abuse.[101] This necessarily implies

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[95] *See Mecham*, 950 F.3d at 266 (citing *Ferber*, 458 U.S. at 765) (noting that the New York child pornography statute that the Supreme Court affirmed in *Ferber* banned sexual photos of a minor's genitalia).

[96] *See id.* at 265–66 (citing United States v. Price, 775 F.3d 828, 838 (7th Cir. 2014)) (emphasizing that such a drastic change in law is not consistent with such a minor and passing reference in an unrelated case); *Anderson*, 759 F.3d 891 at 894–95 (holding that the First Amendment generally protects morphed child pornography that does not feature criminal sexual abuse); *see also Ferber*, 458 U.S. at 762 (holding that criminalizing lewd photographs of minors is constitutional under the First Amendment). If morphed child pornography that does not feature an underlying crime is protected speech, the government must meet the considerable burden of strict scrutiny to criminalize and prosecute child pornographers who take, possess, or distribute sexual photos of nude children that do not picture sexual abuse. *See Anderson*, 759 F.3d at 895–96 (upholding the conviction of a defendant for possession of morphed pornography not featuring underlying child sexual abuse, because the government justified its intervention under strict scrutiny). *But see Mecham*, 950 F.3d at 266 (criticizing the holding in *Anderson* as contravening jurisprudential principles and basic logic).

[97] *See Mecham*, 950 F.3d 266 (noting that federal courts of appeal cannot overrule Supreme Court opinions); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (chastising the Fifth Circuit for overruling an undisturbed Supreme Court opinion based on the Fifth Circuit's inclination that the Court would eventually rule in this manner).

[98] *See* 950 F.3d 266 (emphasizing that it is not in the purview of federal courts of appeal to overrule the Supreme Court); *see also Rodriguez de Quijas*, 490 U.S. at 484 (stating that only the Supreme Court can overrule its own decisions).

[99] *See Mecham*, 950 F.3d at 262 (citing *Ferber*, 458 U.S. 756) (noting that *Ferber* rejected a freedom of speech defense in a child pornography conviction based on the justified interest of the government to intervene where it harms minors). In real child pornography, the child subjects face physical, emotional, and reputational harm. *See supra* note 15 and accompanying text (describing real child pornography).

[100] *See Anderson*, 759 F.3d 891 at 894–95 (holding that, under the First Amendment, the government may only criminalize morphed child pornography that does not feature an underlying criminal act if it satisfies the strict scrutiny standard).

[101] *See id.* at 894 (holding that the First Amendment protects morphed child pornography that does not feature a criminal act).

that the trauma from pornography's circulation is secondary and minimal.[102] Yet the Supreme Court and many circuit courts have recognized that the distribution of child pornography is one of the most harmful criminal acts associated with it and thus held that the First Amendment does not bar criminal distribution laws.[103] The policy implications of the minority's ruling are therefore divorced from the statutory framework and case law of child pornography.[104]

Further, pornographic images frequently circulate globally, revictimizing the child subject every time an image is shared.[105] For example, in 2014, in *Paroline v. United States*, the Supreme Court heard a case from a survivor whose abuser created at least 35,000 unique files of child pornography.[106] More disturbingly, at the time of her case, the National Center for Missing and Endangered Children alone had processed 70,000 files of her abuse from all over the world.[107] Although survivors of morphed child pornography do not

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[102] *See* Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1453–54 (2014) (asserting that it is common sense that distribution is a lesser evil than creation because all people would choose to be the victim of morphed pornography over being the victim of actual sexual abuse).

[103] *See* Osborne v. Ohio, 495 U.S. 103, 108–10 (1990) (citing Stanley v. Georgia, 394 U.S. 557, 567–68 (1969)) (noting that the Court has historically acknowledged that criminalizing personal possession has less justification in the First Amendment than distribution); *Ferber*, 458 U.S. at 761–62 (asserting that the distribution of child pornography creates an economic incentive to create these materials); *Stanley*, 394 U.S. at 567 (holding that states may not criminalize the personal consumption of obscene material but may criminalize its distribution); United States v. Hotaling, 634 F.3d 725, 730 (2d Cir. 2011) (noting that morphed child pornography was more than an individual's fantasy in part because people made it to distribute it).

[104] *Compare Anderson*, 759 F.3d 894 (holding that the First Amendment protects morphed child pornography where there is no underlying criminal harm in its creation), *with Hotaling*, 634 F.3d at 730 (explaining that because morphed child pornography harms children, there is sufficient justification for exclusion from First Amendment protection). *See generally Osborne*, 495 U.S. 103 (holding that the criminalization of the possession of child pornography is less firmly footed in the First Amendment then the criminalization of the distribution of child pornography).

[105] *See* Warren Binford et al., *Beyond* Paroline*: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, 35 CHILD.'S LEGAL RTS. J. 117, 123 (2015) (noting that the web presence of a file of child pornography is radically greater now that pedophiles distribute child pornography internationally).

[106] *Id.* at 121 (noting that the particular victim's images are some of the most prolifically distributed images online). The survivor, known under the pseudonym Amy, described in her victim statement that the fear, humiliation, and trauma from the prolific distribution of the images of her abuse magnified the harm from her abuse exponentially. *See id.* (excerpting Amy's victim statement). Like Amy, survivors of morphed child pornography face the knowledge that strangers will perpetually have access to their images to use for sexual gratification. *See id.* (noting Amy's struggle with revictimization from the scope of the distribution of the videos of her abuse). That fear is not minimal and necessitates government intervention. *See id.* (noting the magnitude of trauma Amy experienced merely from the distribution of her abuse).

[107] *See id.* at 117 (describing the scope of international distribution of child pornography featuring Amy). The National Center for Missing and Abused Children calculated the 70,000 figure only from images processed between 2002 and 2014, with files located in Scandinavia, New Zealand, Europe, and Australia. *See id.* (explaining the high prevalence of the files of Amy's abuse in a short period of time). Although the figure includes repeated files, internet distribution allowed the presence of these files to at least double. *See id.* (noting that although there were only 35,000 unique files of her abuse,

share her experience of repeated sexual assault, the likelihood that their images will circulate on a large scale is not insignificant.[108] *Mecham* empowers government actors to intervene in this profound form of victimization, further exhibiting the relative strength of the majority approach.[109]

CONCLUSION

Considering the various jurisprudential and policy arguments at play in the case law of both the Supreme Court and the circuit courts, the Fifth Circuit correctly held in *United States v. Mecham*, in 2020, that the First Amendment should not protect morphed child pornography. Although the Supreme Court's 2010 opinion in *United States v. Stevens* may call the value-harm balancing of the 1982 Supreme Court opinion *United States v. Ferber* into question, *Stevens* is also brief, topically unrelated, and vague. In *United States v. Anderson*, in 2014, the Eighth Circuit undermined the history of child pornography case law by interpreting *Stevens* as holding that the First Amendment protects child pornography that does not depict an underlying crime. Such a radical step usurps the power of the Supreme Court and disregards some of the most important policy behind banning child pornography. Thus, the Fifth Circuit acted rationally in *Mecham* by averring the majority opinion that the First Amendment does not protect morphed child pornography.

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the National Center for Missing and Abused Children found that the files were shared at least 70,000 times).

[108] *See id.* (noting that the global accessibility of the internet made the world-wide circulation of child pornography the norm, rather than the exception).

[109] *See* United States v. Mecham, 950 F.3d 257, 267 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020) (noting that every circuit court to address morphed child pornography has acknowledged that such content deeply and profoundly harms children).