

**No. 00-795**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 2001

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JOHN D. ASHCROFT, ET AL.,  
*Petitioner*

v.

FREE SPEECH COALITION, ET AL.,  
*Respondent.*

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**On Petition for Writ of Certiorari  
From the Ninth Circuit Court of Appeals**

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**BRIEF OF THE NATIONAL CENTER FOR MISSING  
& EXPLOITED CHILDREN AS AMICUS CURIAE IN  
SUPPORT OF PETITIONER**

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--	---

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Annual Report of Investigations of the United States Postal Inspection Service (2000) . . . . .	22
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Federal Bureau of Investigation, Innocent Images National Initiative Report, February 5, 2001 . . . . .	22
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Internet Crimes Against Children Task Force Report, Office of Juvenile Justice and Delinquency Prevention (OJJDP), January 2001 . . . . .	20



Internet Crimes Against Children Task Force, Report to the National Center for Missing and Exploited Children, March 2000. ....	21
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