No. 00-795

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Child Pornography Prevention Act of 1996, prohibits, *inter alia*, the shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. IV 1998). It also contains a similar prohibition concerning any visual depiction that 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." 18 U.S.C. 2252A, 2256(8)(D) (Supp. IV 1998). The question presented is whether those prohibitions violate the First Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners are Janet Reno, Attorney General of the United States, and the United States Department of Justice. Respondents are The Free Speech Coalition, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli.

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The Solicitor General, on behalf of the Attorney General of the United States and the United States Department of Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-43a) is reported at 198 F.3d 1083. The opinion of the district court (App., *infra*, 50a-66a) is unreported. The order denying rehearing (App., *infra*, 44a-49a) is reported at 220 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1999. A petition for rehearing was denied on July 19, 2000. App., *infra*, 44a. On October 10, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Child Pornography Prevention Act are reprinted in an appendix to this petition. App., *infra*, 67a-76a.

STATEMENT

For almost two decades, federal law has prohibited the production and distribution of child pornography. Before the enactment of the Child Pornography Prevention Act of 1996 (CPPA), the prohibitions applied only to visual depictions of real children engaged in sexually explicit conduct. See, *e.g.*, 18 U.S.C. 2252(a)(1)(A) and (4)(B)(i). Responding to concerns raised by advances in computer technology, the CPPA extends the prohibitions relating to child pornography to visual depictions of children engaged in sexually explicit conduct, regardless of whether real children are involved in the production of those images. The provisions of the CPPA that effect that extension are at issue here.

1. a. The CPPA prohibits the knowing shipment, receipt, distribution, reproduction, sale, or possession of

child pornography. 18 U.S.C. 2252A(a) (Supp. IV 1998). In provisions that are not at issue here, the CPPA defines child pornography to include any visual depiction that involves the use of a minor engaging in sexually explicit conduct, or that has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[1] 18 U.S.C. 2256(8)(A) and (C) (Supp. IV 1998). In the provisions at issue here, the CPPA further defines child pornography to include: (1) any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(B) (Supp. IV 1998); and (2) any visual depiction that "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," 18 U.S.C. 2256(8)(D) (Supp. IV 1998).

b. Congress enacted into law in the CPPA 13 legislative findings that explain the reasons that Congress broadened the prohibitions relating to child pornography. 18 U.S.C. 2251 note (Supp. IV 1998) (Congressional Findings). Those findings are drawn from information presented in congressional hearings on the subject of child pornography. *Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 35 (1996) (*Senate Hearing*). The Senate Report accom-

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[1] The CPPA defines "sexually explicit conduct" as "actual or simulated - (A) sexual intercourse * * * ; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2). "Minor" is defined as "any person under the age of eighteen years." 18 U.S.C. 2256(1).

panying the CPPA also illuminates the basis for the CPPA. S. Rep. No. 358, 104th Cong., 2d Sess. (1996).

In its statutory findings, Congress determined that "new photographic and computer imagin[g] technologies make it possible to produce * * * visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 5). Congress also found that, even when actual children are used, computers can "alter sexually explicit [depictions] in such a way as to make it virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 6(A)). Congress found those technological developments extraordinarily troubling for several reasons.

First, Congress determined that "child pornography is often used as part of a method of seducing other children into sexual activity." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 3). In particular, "a child who is reluctant to engage in sexual activity with an adult * * * can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 3). Congress determined that computer-generated images of children engaged in sexually explicit conduct can be just as effective in seducing children into sexual activity as photographic images of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8).

Second, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites" and that "such use of child pornography can desensitize the

viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 4). Congress found that child pornography can have those pernicious effects, regardless of whether the pornography takes the form of computer-generated images or photographs of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8).

Third, Congress was concerned that advancing technology could render unenforceable the prohibitions against the distribution and possession of child pornography involving real children. As explained in the Senate Report:

> As the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible, to distinguish computer-generated from photographic depictions of child sexual activity. It will therefore become almost impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children will go free from punishment.

S. Rep. No. 358, *supra*, at 20.

Fourth, Congress heard evidence that computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct. *Senate Hearing* 20, 23, 30, 35, 90. Congress learned that, because of that phenomenon, the production and distribution of computer-generated child pornography helps to sustain

the market for the production of visual depictions that involve real children. *Id.* at 91.

Based on those considerations, Congress concluded that there are "compelling" governmental interests in eliminating child pornography that takes the form of computer-generated images of children engaged in sexual activity. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 13). Those compelling interests are implicated, Congress concluded, when the computer-generated images of children engaged in sexual activity "are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 13).

c. The CPPA establishes affirmative defenses that limit the reach of the Act. The CPPA provides an affirmative defense to a charge of unlawful shipment, receipt, distribution, reproduction, or sale of child pornography if the defendant can 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." 18 U.S.C. 2252A(c) (Supp. IV 1998). In addition, as amended in 1998, the CPPA provides an affirmative defense to a charge of possession of child pornography if the defendant can show that he "(1) possessed less than three images of child pornography; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—(A) took reasonable steps

to destroy each such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such image." 18 U.S.C. 2252A(d) (Supp. IV 1998).

A conviction on a charge relating to the shipment, receipt, distribution, reproduction, or sale of child pornography carries a maximum penalty of 15 years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than five years' imprisonment and no more than 30 years' imprisonment. 18 U.S.C. 2252A(b)(1) (Supp. IV 1998). A conviction on a charge of possession of child pornography carries a maximum penalty of five years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than two years' imprisonment and no more than ten years' imprisonment. 18 U.S.C. 2252A(b)(2) (Supp. IV 1998).

2. After the CPPA was signed into law, the Free Speech Coalition and others (respondents) filed suit in the Northern District of California against the Attorney General and the Department of Justice seeking to invalidate certain provisions of the CPPA. App., *infra*, 3a. The Free Speech Coalition is a trade association of businesses involved in the production and distribution of "adult-oriented materials"; the other respondents are a publisher of a book on nudism, an artist who paints nudes, and a photographer who specializes in erotic photography. *Ibid.* Respondents alleged that the CPPA is vague, overbroad, and an impermissible prior restraint on their speech to the extent that it applies to visual depictions that do not involve actual children. *Id.* at 50a, 54a.

On cross-motions for summary judgment, the district court upheld the constitutionality of the Act. App., *infra*, 50a-66a. The court held that the Act should be evaluated under intermediate First Amendment scrutiny, because it is designed to counteract the effect that child pornography has on innocent children and is not intended to outlaw the ideas themselves. *Id.* at 58a. The court concluded that the Act readily satisfies intermediate scrutiny. *Id.* at 59a-62a. The court determined that the CPPA "clearly advances important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created." *Id.* at 58a. The court also determined that "the CPPA burdens no more speech than necessary in order to protect children from the harms of child pornography. *Id.* at 59a.

The district court also held that the Act is not overbroad. App., *infra*, 63a. The court found that, under a fair reading of the CPPA's prohibitions and its affirmative defenses, it is "highly unlikely" that the Act would prevent the production of "valuable works." *Id.* at 62a-63a.

The court also held that the CPPA is not unconstitutionally vague. App., *infra*, 63a-64a. The court explained that the Act "clearly and specifically defines the prohibited conduct as the depiction of children—engaged in sexually explicit conduct." *Id.* at 63a. Finally, the court concluded that, because the CPPA does not require advance approval for production or distribution of sexually explicit materials, it does not constitute an improper prior restraint on speech. *Id.* at 65a.

3. The court of appeals reversed. App., *infra*, 1a-43a. The court held that "the phrases 'appears to be' a

minor, and 'convey[s] the impression' that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment." *Id.* at 2a.

a. Finding that the CPPA restricts speech based on its content, the court of appeals held that the CPPA can survive First Amendment scrutiny only if the government can show that it is narrowly tailored to further a compelling interest. App., *infra*, 14a-15a. Relying on *New York* v. *Ferber*, 458 U.S. 747 (1982), the court further held that government has a compelling interest in regulating child pornography only when its goal is "the protection of the actual children used in the production of child pornography." App., *infra*, 17a. Applying that understanding of *Ferber*, the court held that the government's interests in preventing pedophiles from using child pornography to seduce children into sexual activity and to stimulate their sexual appetites are not compelling. In particular, the court stated that "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions." *Id.* at 19a. The court also concluded that there is not a demonstrated link between computer-generated child pornography and the subsequent sexual abuse of children. *Id.* at 20a.

The court of appeals next held that the CPPA is unconstitutionally vague. App., *infra*, 23a-24a. It concluded that the phrases "appears to be" and "convey[s] the impression" are "highly subjective" and that a person of ordinary intelligence "could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution." *Id.* at

24a. The court declined to follow the First Circuit's holding in *United States* v. *Hilton*, 167 F.3d 61, cert. denied, 120 S. Ct. 115 (1999), that the CPPA is not unconstitutionally vague. App., *infra*, 23a.

Again disagreeing with the First Circuit's decision in *Hilton*, the court also held that the CPPA is unconstitutionally overbroad. App., *infra*, 25a-27a. The court reiterated its earlier conclusion that Congress may regulate child pornography only in order to prevent the harm caused to children involved in its production. *Id.* at 26a. And the court concluded that "the CPPA is insufficiently related" to that interest "to justify its infringement of protected speech." *Ibid.*

b. Judge Ferguson dissented. App., *infra*, 29a-43a. Judge Ferguson disagreed with the majority's holding "that preventing harm to depicted children is the only legitimate justification for banning child pornography." *Id.* at 32a. He concluded that, under *Osborne* v. *Ohio*, 495 U.S. 103 (1990), Congress has a legitimate interest in prohibiting the dissemination of images that can be used to seduce children into sexual activity, and in destroying the child pornography market. App., *infra*, 32a-33a. Judge Ferguson also criticized the majority for failing to recognize that advances in computer-imaging technology are threatening to undermine the government's ability to enforce existing child pornography prohibitions. *Id.* at 34a-35a. Judge Ferguson concluded that "Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value." *Id.* at 37a-38a.

Judge Ferguson also concluded that the CPPA is not overbroad. App., *infra*, 38a-41a. Because the Act targets only those images that are "indistinguishable"

from photographic images of actual children, the Act does not, in his view, reach "everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner." *Id.* at 39a. Judge Ferguson also noted that an affirmative defense shields photographic images of youthful-looking adults in sexual poses, so long as they are not marketed as child pornography. *Id.* at 40a. Any possible impermissible applications of the CPPA, Judge Ferguson explained, should be resolved on a case-by-case basis. *Id.* at 40a-41a.

Finally, Judge Ferguson concluded that the CPPA is not unconstitutionally vague. App., *infra*, 41a-43a. As he read the Act, the inquiry into whether an image appears to be a minor is an objective one: The question is "whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.* at 42a (quoting *Hilton*, 167 F.3d at 75). Judge Ferguson also pointed out that the CPPA's scienter requirement provides an additional safeguard against arbitrary enforcement. *Id.* at 42a-43a.

c. The government's petitions for rehearing and rehearing en banc were denied. App., *infra*, 44a-45a. Judge Ferguson would have granted rehearing and recommended granting the suggestion for rehearing en banc. *Id.* at 44a.

Judge Wardlaw (joined by Judges O'Scannlain and T.G. Nelson) dissented from the denial of rehearing en banc, App., *infra*, 45a-49a, observing that the panel decision "creates a conflict with our sister circuits on an issue of exceptional importance," *id.* at 45a. Judge Wardlaw faulted the panel majority for failing to recognize that the CPPA is supported by at least two compelling interests: the interest in preventing ped-

philes from using child pornography to seduce children into sexual activity, and the interest in effectively enforcing the prohibitions against the production of visual depictions involving real children. *Id.* at 46a-47a. Finally, Judge Wardlaw faulted the majority for dismissing congressional findings concerning the danger to real children from rapidly advancing computer technology. *Id.* at 48a-49a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case invalidated as unconstitutional two critical provisions of the Child Pornography Prevention Act. That constitutional ruling squarely conflicts with decisions of the First, Eleventh, and Fourth Circuits. It is also incorrect. The provisions of the CPPA invalidated by the court of appeals constitutionally advance the government's compelling interest in the "prevention of sexual exploitation and abuse of children." *New York* v. *Ferber*, 458 U.S. 747, 757 (1982). Review by this Court is clearly warranted.

A. The court of appeals in this case invalidated two key provisions of the CPPA. The first prohibits the dissemination and possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. IV 1998). The second prohibits the dissemination and possession of any visual depiction that 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." 18 U.S.C. 2252A, 2256(8)(D) (Supp. IV 1998). Those two provisions are designed to address the serious dangers to children posed by computer-generated child pornography.

The court of appeals definitively held those two provisions unconstitutional. It expressly concluded that "the phrases 'appears to be' a minor, and 'convey[s] the impression' that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment." App., *infra*, 2a. The court of appeals' invalidation of two critical provisions of a recent Act of Congress clearly warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

B. Review is also warranted because the court of appeals' constitutional ruling conflicts with decisions of the First, Eleventh, and Fourth Circuits. *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 120 S. Ct. 115 (1999); *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States* v. *Mento*, No. 99-4813, 2000 WL 1648878 (4th Cir. Nov. 3, 2000). All three circuits have upheld the constitutionality of the CPPA, rejecting identical First Amendment challenges.

In *Hilton*, a defendant charged with unlawful possession of computer disks containing child pornography challenged the constitutionality of the CPPA on its face. The First Circuit rejected that facial challenge, ruling that the Act "neither impinges substantially on protected expression nor is so vague as to offend due process." 167 F.3d at 65. It held that the Act's coverage of material that appears to be of a minor engaged in sexually explicit conduct is supported by the government's compelling interest in "safeguarding the welfare of children," *id.* at 73, and that "[w]hatever overbreadth may exist at the edges [is] more appropriately cured through a more precise case-by-case evaluation of the facts in a given case." *Id.* at 74.

The First Circuit also refused "to strike down the CPPA as unconstitutionally vague," finding that "[t]he language of the statute affords an ordinary consumer of sexually explicit material adequate notice of the kinds of images to avoid." *Id.* at 76-77.

In *Acheson*, a defendant charged with receipt and possession of more than 500 computer images of child pornography challenged the facial validity of the CPPA. Like the First Circuit, the Eleventh Circuit rejected overbreadth and vagueness challenges to the statute, concluding that "the legitimate scope of the statute dwarfs the risk of impermissible applications," 195 F.3d at 652, and that the "statute puts a reasonable person on notice as to what conduct is prohibited and provides adequate protection against arbitrary enforcement," *id.* at 653.

Most recently, in *Mento*, the Fourth Circuit likewise rejected a facial challenge to the CPPA. It ruled that the "appears to be" and "conveys the impression" provisions are supported by the government's "compelling" interest in protecting "all children from sexual exploitation resulting from child pornography." 2000 WL 1648878, at *4. The Fourth Circuit held that the CPPA "does not burden substantially more material than necessary to further" that interest. *Id.* at *7. And it concluded that "the CPPA provides clear and adequate notice of the activity it regulates, such that ordinary citizens and those charged with enforcing the law may readily understand what is prohibited." *Ibid.*

The Ninth Circuit's decision in this case is irreconcilable with the First Circuit's decision in *Hilton*, the Eleventh Circuit's decision in *Acheson*, and the Fourth Circuit's decision in *Mento*. That conflict among the courts of appeals on the constitutionality of an Act of Congress warrants resolution by this Court.

C. Finally, review is warranted because the court of appeals erred in holding that the provisions at issue here are unconstitutional. Those provisions constitutionally advance the government's compelling interest in the "prevention of sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757. The court of appeals' compelling interest, vagueness, and overbreadth rulings are all deeply flawed.

1. a. The court of appeals read this Court's decision in *Ferber* to hold that the government has a compelling interest in regulating child pornography only when its goal is "the protection of the actual children used in the production of child pornography." App., *infra*, 17a. Based on that understanding of *Ferber*, the court of appeals held that the government's interests in preventing pedophiles from using child pornography to seduce children into sexual activity and to stimulate their own sexual appetites are not compelling. *Id.* at 19a. The court of appeals' understanding of *Ferber* is simply incorrect.

The prohibition against the dissemination of child pornography at issue in *Ferber* was designed to prevent the harm to children who become involved in the production of child pornography. In sustaining the validity of that prohibition against a First Amendment challenge, however, the Court did not purport to restrict the government to pursuing that interest alone. The Court instead identified the relevant compelling interest supporting the suppression of child pornography as the "prevention of sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757. That more general interest extends to all children who may be abused as a result of the dissemination of visual depictions of child pornography, not just children who are actually involved in the production of such material.

Osborne v. *Ohio*, 495 U.S. 103 (1990), further demonstrates that the government is not limited to protecting children involved in pornographic depictions. In that case, the Court sustained the constitutionality of a prohibition against the possession and viewing of child pornography. The Court expressly held that one state interest supporting that prohibition was preventing pedophiles from using pictures of child pornography to seduce other children into sexual activity. *Id.* at 111.

Under *Ferber* and *Osborne*, the government's interests in preventing pedophiles from using child pornography to seduce children into sexual activity and to stimulate their sexual appetites are compelling and fully justify the provisions at issue here. That is particularly true in light of Congress's specific finding that computer-generated images of child pornography can be used for those purposes just as effectively as pictures of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8).[2]

b. Even if we assume, *arguendo*, that protecting children who participate in the production of child pornography is the only interest that may be considered in the First Amendment analysis, that interest is directly implicated here. Congress found that advancing technology makes it increasingly difficult, if not impossible, to distinguish computer-generated from

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[2] The court of appeals determined that there is not a demonstrated link between computer-generated child pornography and the subsequent sexual abuse of children. App., *infra*, 20a. Following hearings on the subject, however, Congress expressly determined that such a link exists. 18 U.S.C. 2251 note (Supp. IV 1998) (Findings 3, 4, 8, 9, and 10). The court of appeals had no basis for disregarding that congressional judgment. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

photographic depictions of children engaged in sexual activity. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 6(A)); S. Rep. No. 358, *supra*, at 20. As a consequence, the government may find it impossible in many cases to prove that a pornographic image is of a real child. *Ibid.* The prohibitions at issue here ensure that people who disseminate or possess pornographic depictions of actual children will not escape punishment in those circumstances.

In addition, computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct, adding fuel to the underground child pornography industry. *Hilton*, 167 F.3d at 73. By prohibiting dissemination and possession of computer-generated images, the CPPA helps to stamp out the market for child pornography involving real children. See *Osborne*, 495 U.S. at 110; *Ferber*, 458 U.S. at 759-760.

c. In sum, the provisions at issue here, like the provisions upheld in *Ferber* and *Osborne*, advance the government's compelling interest in the "prevention of sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757. The court of appeals erred in concluding otherwise.[3]

2. The court of appeals' vagueness ruling is equally flawed. The court concluded that the phrases "appears

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[3] The prohibition against the promotion of visual depictions so as to convey the impression that the material is child pornography, 18 U.S.C. 2256(8)(D) (Supp. IV 1998), is independently justified under *Ginzburg* v. *United States*, 383 U.S. 463 (1966). There, the Court held that the First Amendment does not protect commercial entities that engage in "the sordid business of pandering" by "deliberately emphasiz[ing] the sexually provocative aspects of [their products] in order to catch the salaciously disposed." *Id.* at 472.

to be" and "convey[s] the impression" are "highly subjective" and that a person of ordinary intelligence "could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution." App., *infra*, 24a. Those criticisms are seriously misguided.

As the First Circuit held in *Hilton*, the statutory standard is an "objective one." 167 F.3d at 75. The relevant inquiry is whether "a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." *Ibid.* That standard can readily be administered, particularly as applied to images of participants who possess the physical characteristics of prepubescent children. The Act's scienter requirement—that any violation must be "knowing"—further diminishes any vagueness concerns. See 18 U.S.C. 2252A(a)(1)-(5) (Supp. IV 1998). A person who honestly believes that a reasonable unsuspecting viewer would not consider the depiction to be of a minor must be acquitted. See *Hilton*, 167 F.3d at 75-76.

There may still be cases at the margin in which there is some uncertainty concerning whether the statutory standard has been satisfied. But that is not at all unusual in a statute that seeks to combat the dissemination of unlawful pornography, and it does not render the statute unconstitutional. See *Ferber*, 458 U.S. at 751 (approving definition of child pornography that includes "simulated" conduct); *Miller* v. *California*, 413 U.S. 15, 24 (1973) (approving definition of obscenity that depends on whether material "appeals to the prurient interest" of the "average person" and is "patently offensive").

3. The court of appeals also fundamentally erred in holding that the CPPA is unconstitutionally overbroad. That holding rests entirely on the court's earlier conclusions that the government's sole compelling interest is in preventing harm to children involved in the production of child pornography, and that the provisions at issue here do not advance that interest. App., *infra*, 25a-27a. As we have explained, however, that part of the court's analysis is simply incorrect. The government's compelling interest extends to all children who may become the victims of abuse. And even if the government could only seek to prevent harm to children involved in the production of child pornography, the provisions at issue here directly advance that interest.

Nor is there any other basis for a finding that the CPPA is unconstitutionally overbroad. As the First Circuit has explained, because the Act targets only those images that are "indistinguishable" from photographic images of actual children, the Act does not reach "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses." *Hilton*, 167 F.3d at 72. The Act also shields through an affirmative defense the dissemination of photographic images of youthful-looking adults in sexual poses, so long as they are not marketed as child pornography. 18 U.S.C. 2252A(c) (Supp. IV 1998). And, finally, there is no occasion in this case to consider whether the CPPA raises First Amendment concerns as applied to a narrow subset of materials that have serious literary, artistic, political, or scientific value and that are marketed as such. *Hilton*, 167 F.3d at 74. Any such First Amendment concerns would not justify facial invalidation of the CPPA. "Whatever overbreadth may exist at the edges" can be "cured through a more

precise case-by-case evaluation of the facts in a given case." *Ibid.*; see *Ferber*, 458 U.S. at 774; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16536

THE FREE SPEECH COALITION, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS; BOLD TYPE, INC.; JIM GINGERICH; RON RAFFAELLI, PLAINTIFFS-APPELLANTS

v.

JANET RENO, ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANTS-APPELLEES

Appeal from the United States
District Court for the
Northern District of California

Filed: Dec. 17, 1999

Before: Warren J. Ferguson and Sidney R. Thomas, Circuit Judges, and Donald W. Molloy,[4] District Judge.

Opinion by Judge MOLLOY; Dissent by Judge FERGUSON.

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[4] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

MOLLOY, District Judge:

I.

The question presented in this case is whether Congress may constitutionally proscribe as child pornography computer images that do not involve the use of real children in their production or dissemination. We hold that the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct.

II.

In this case, the district court found that the Child Pornography Prevention Act of 1996 ("CPPA" or the "Act") was content-neutral, was not unconstitutionally vague or overbroad, and did not constitute an improper prior restraint of speech. The district court also found that the Child Pornography Prevention Act's affirmative defense did not impermissibly shift the burden of proof to a defendant by virtue of an unconstitutional presumption.

While we agree that the plaintiffs have standing to bring this case and that the Act is not an improper prior restraint of speech, the balance of the district court's analysis does not comport with what we believe is required by the Constitution. We find that the phrases "appears to be" a minor, and "convey[s] the impression" that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment. Consequently we hold that while these two provisions of the Act do not pass constitutional muster, the balance of the Child Pornography

Prevention Act is constitutional when the two phrases are stricken. Whether the statutory affirmative defense is constitutional is a question that we leave for resolution in a different case.

A.

The appellants consist of a group that refers to itself as "The Free Speech Coalition." The Free Speech Coalition is a trade association of businesses involved in the production and distribution of "adult-oriented materials." Bold Type, Inc. is a publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism;" Jim Gingerich is a New York artist whose paintings include large-scale nudes; and Ron Raffaelli is a professional photographer whose works include nude and erotic photographs.

The Free Speech Coalition sought declaratory and injunctive relief by a pre-enforcement challenge to certain provisions of the Child Pornography Prevention Act of 1996. The complaint was filed in the Northern District of California. Both parties moved for summary judgment. The district court determined the CPPA was constitutional and granted the government's motion for summary judgment. *See The Free Speech Coalition v. Reno*, No. C 97-0281 VSC, 1997 WL 487758, at *7 (N.D. Cal. Aug. 12, 1997).[5] At the same time it denied Free Speech's cross motion for summary judgment. *See id.* After the district court's adverse ruling, Free Speech appealed.

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[5] The Opinion of the district court is not published in the Federal Supplement.

In this appeal, Free Speech argues the district court was mistaken in its determination that the legislation is content neutral. They also argue that the district court was wrong to hold that the Act is not unconstitutionally vague. The argument is that where the statute fails to define "appears to be" and "conveys the impression," it is so vague a person of ordinary intelligence cannot understand what is prohibited. Free Speech also questions the district court's holding that the affirmative defense provided in the Act is constitutional. Finally, Free Speech appeals the lower court's determination that the Act does not impose a prior restraint on protected speech and that it does not create a permanent chill on protected expression.

B.

Child pornography is a social concern that has evaded repeated attempts to stamp it out. State legislatures and Congress have vigorously tried to investigate and enact laws to provide a basis to prosecute those persons involved in the creation, distribution, and possession of sexually explicit materials made by or through the exploitation of children. Our concern is with the most recent federal law enacted as part of the effort to rid society of the exploitation of children for sexual gratification, the Child Pornography Prevention Act of 1996.

1.

The original federal legislation specifically prohibiting the sexual exploitation of children has been amended several times since it was enacted as the Protection of Children Against Sexual Exploitation Act of 1977. *See* Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253). The

conduct prohibited by this law criminalized using a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct with the knowledge that it was or would be transported in interstate or foreign commerce. *See id.* Visual depiction was defined as including undeveloped film. *See United States v. Smith*, 795 F.2d 841, 846-47 (9th Cir. 1986). The term also included reproductions of photographs or pictures. *See United States v. Porter*, 709 F. Supp. 770, 774 (E.D. Mich. 1989), *aff'd*, 895 F.2d 1415 (6th Cir. 1990) (unpublished mem.). The language of 18 U.S.C. §§ 2251 and 2252 has survived overbreadth and vagueness challenges. *See, e.g., United States v. Reedy*, 845 F.2d 239, 241 (10th Cir. 1988).

The Protection of Children Against Sexual Exploitation Act was enacted based upon congressional findings that child pornography and prostitution were highly organized, highly profitable, and exploited countless numbers of real children in its production. *See New York v. Ferber*, 458 U.S. 747, 749 n. 1, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982) (citing S. Rep. No. 95-438, at 5 (1977)). While the Act criminalized the commercial production and distribution of visual depictions of real children under the age of sixteen engaging in sexually explicit conduct, it also extended the prohibitions of the Mann Act, 18 U.S.C. §§ 2421-2424, so as to criminalize the interstate transportation of children or juveniles for the purpose of prostitution. *See* Pub. L. No. 95- 225, § 3, 92 Stat. 7 (1977). The Act criminalized a broad range of sexual acts.

2.

The Protection of Children Against Sexual Exploitation Act had its problems. According to the Final

Report of the Attorney General's Commission on Pornography, only one person was convicted under the Act's production prohibition. *See* Attorney General's Comm'n On Pornography, *Final Report* 604 (1986) (hereinafter "AG Report"). As a consequence of the law's deficiencies and the Supreme Court's ruling in *Ferber*, Congress enacted the Child Protection Act of 1984. *See* Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2253). The Child Protection Act did away with the earlier requirement that the prohibited material be considered obscene under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973), before its production, dissemination, or receipt was criminal. *See id.* § 4. The Child Protection Act also raised the age limit for protecting children involved in the production of sexually explicit material from sixteen years to eighteen years. *See id.* § 5.

When the Child Protection Act of 1984 was enacted Congress recognized that a great deal of pornographic trafficking involving children was not for profit. Thus, the 1984 law also did away with the requirement that the production or distribution of the material be for the purpose of sale. *See id.* §§ 4, 5. The 1984 law also picked up on a key phrase from *Ferber*, where the Supreme Court discussed limits on the classification of child pornography, stating that the "nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct. . . ." *Ferber*, 458 U.S. at 764, 102 S. Ct. 3348. Congress changed the phrase "visual or print medium" in the former law to the phrase "visual depiction." *See* Pub. L. No. 98-292, §§ 3, 4, 98 Stat. 204 (1984). Finally, Congress substituted the word "lascivious" for the word

"lewd" in the definition of "sexual conduct" to make it clear that the depiction of children engaged in sexual activity was unlawful even if it did not meet the adult obscenity standard. *See id.* § 5.

3.

In 1986, Congress amended the law once again. The Child Sexual Abuse and Pornography Act of 1986, Public Law No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251), banned the production and use of advertisements for child pornography. Another statutory change made wrongdoers subject to liability for personal injuries to children resulting from the production of child pornography. *See* Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (1986) (codified as amended at 18 U.S.C. § 2255). By passing these Acts, Congress continued its quest to end "kiddie porn."

4.

The continuing effort to marshal a means of stopping child pornography resulted in the passage of the Child Protection and Obscenity Enforcement Act of 1988. *See* Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252). This law made it unlawful to use a computer to transport, distribute, or receive child pornography. *See id.* § 7511. It also added a new section to the criminal law that prohibited the buying, selling, or otherwise obtaining of temporary custody or control of children for the purpose of producing child pornography. *See id.* § 7512. The new law required record keeping and imposed disclosure requirements on the producers of certain sexually explicit matter. *See id.* § 7513.

5.

In 1990 the Supreme Court decided *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). *Osborne* upheld an Ohio law that prohibited possessing and viewing child pornography. *See* 495 U.S. at 111, 110 S. Ct. 1691. Soon thereafter, the Child Protection Restoration and Penalties Enhancement Act of 1990 was passed. *See* Pub. L. No. 101-647, § 301, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4)). This law criminalized the possession of three or more pieces of child pornography. *See id.* § 323. Again in 1994, the federal law concerning child pornography was amended to punish the production or importation of sexually explicit depictions of a minor. *See* Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259). But, as with all the predecessor protective laws, this statute protected real children from exploitation. *See id.* The law also mandated restitution for victims of child pornography. *See id.* § 40113.

Throughout the legislative history, Congress has defined the problem of child pornography in terms of real children. Up until 1996 the actual participation and abuse of children in the production or dissemination or pornography involving minors was the *sine qua non* of the regulating scheme. The legislation tracked the decisions of the Supreme Court as well as the swift development of technology and its nearly infinite possibilities. The statutory odyssey was from adult pornography secured or not by the First Amendment, to child pornography permitted or not, to pseudo child pornography protected or not, until in 1996 the law was amended to prohibit virtual child pornography. The

1996 law, the law at issue here, changed course. The regulation direction shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself, whether it involved real children or not. This shift forms the basis of the constitutional challenge Free Speech makes here.

6.

The Child Pornography Prevention Act of 1996 expanded the law to combat the use of computer technology to produce pornography containing images that look like children. The new law sought to stifle the use of technology for evil purposes. This of course was a marked change in the criminal regulatory scheme. Congress had always acted to prevent harm to real children. In the new law, Congress shifted the paradigm from the illegality of child pornography that involved the use of real children in its creation to forbid a "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct." *See* 18 U.S.C.A. § 2256(8)(B) (West Supp. 1999).

The premise behind the Child Pornography Prevention Act is the asserted impact of such images on the children who may view them. The law is also based on the notion that child pornography, real as well as virtual, increases the activities of child molesters and pedophiles.

7.

18 U.S.C. § 2256(8)[6] defines child pornography as "any 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[.]"[7] At issue in this appeal are the definitions

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[6] 18 U.S.C. § 2256(8) 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-
>
> (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. . . .

[7] "Sexually explicit conduct" means:

> actual or simulated-
>
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or

contained in subsections (B) and (D) of § 2256(8). Section 2256(8)(B) bans sexually explicit depictions that appear to be minors. Section 2256(8)(D) bans visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression" that they contain sexually explicit depictions of minors.

Because we hold the language at issue is unconstitutional, we do not consider the challenge to the affirmative defense in 18 U.S.C. § 2252A(c).[8]

III.

Standing is a question of law reviewed de novo. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997). A party has standing to bring a claim before a court if the party has suffered "'actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *See The Free Speech Coalition*, 1997 WL 487758, at *2 (citing *Valley Forge Christian College v.*

(E) lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C.A. § 2256(2) (West Supp. 1999).

[8] The CPPA, 18 U.S.C. § 2252A(c), provides an affirmative defense for violations of the Act if:

(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.

Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982)).

The record shows the individuals and businesses within The Free Speech Coalition withheld or stopped distributing products out of fear that they would be prosecuted for such behavior. The district court was correct in finding the facts presented here are sufficient to confer standing. The government does not question the district court's standing decision.

IV.

A.

A challenge to the constitutionality of a federal statute is reviewed de novo. *See Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996). A district court's decision to grant summary judgment is reviewed de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). When the district court upholds a restriction on speech, we conduct an independent de novo examination of the facts. *See Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1209 n. 2 (9th Cir. 1996).

1.

The district court held that the contested provisions of the Child Pornography Prevention Act are content-neutral regulations. *See The Free Speech Coalition*, 1997 WL 487758, at *7. The district judge reasoned that the law was passed to prevent the secondary effects of the child pornography industry, specifically the exploitation and degradation of children. *See id.* The court also found that the Act addressed the need to

control child pornography because virtual pornography led to the encouragement of pedophilia and the molestation of children. *See id.* This reasoning was based on a finding that the CPPA is intended "to counteract the effect that [real or virtual child pornography] has on its viewers, on children, and to society as a whole." *Id.* The lower court expressly found the legislation was not intended to regulate or outlaw the ideas themselves. *See id.*

We do not agree. In *United States v. Hilton*, 167 F.3d 61, 68-69 (1st Cir. 1999), *pet. for cert., filed*, No. 98-9647 (U.S. 1999), the First Circuit found that the Act at issue was content-based because it expressly aims to curb a particular category of expression, child pornography, by singling out the type of expression based on its content and then banning it. The *Hilton* court's determination that blanket suppression of an entire type of speech is a content-discriminating act is a legal conclusion with which we agree. The child pornography law is at its essence founded upon content-based classification of speech.

The CPPA prohibits any sexually explicit depiction that "appears to be" of a minor or that is distributed or advertised in such a manner as to "convey the impression" that the depiction portrays a minor. Thus, the CPPA distinguishes favored from disfavored speech on the basis of the content of that speech. *See Crawford*, 96 F.3d at 384.

Part of the rationale for the Act is the congressional determination that "a major part of the threat to children posed by child pornography is its effects on the viewers of such material[.]" S. Rep. No. 104-358, at 17 (1996). The Congress surmised that "the effect is the

same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer." *Id.* One Senator referred to the notion that "[c]omputer imaging technology has given child pornographers a new way to create 'synthetic' child pornography which is virtually indistinguishable from 'traditional' child pornography." *Id.* at 26. This belief was then carried to its logical content-based conclusion that "'synthetic' child pornography which looks real to the naked eye will have the same effect upon viewers as 'traditional' child pornography." *Id.*

The government contends the district court was right in finding that the law is content-neutral. The government argues that because Congress enacted the CPPA to address the secondary effects of speech appearing to depict children's sexual activity, this secondary-effects justification for the CPPA hinges upon the effect of pornography seemingly involving children upon its viewers.

When a statute restricts speech by its content, it is presumptively unconstitutional. *See Crawford*, 96 F.3d at 385. As the First Circuit determined in *Hilton*:

> The CPPA fails both tests for substantive neutrality: it expressly aims to curb a particular category of expression (child pornography) by singling out that type of expression based on its content and banning it. Blanket suppression of an entire type of speech is by its very nature a content-discriminating act. Furthermore, Congress has not kept secret that one of its motivating reasons for enacting the CPPA was to counter the primary effect child pornography has on those who view it.

167 F.3d at 68-69 (footnote omitted). The CPPA is not a time, place, or manner regulation.

2.

Under the circumstances, if the CPPA is to survive the constitutional inquiry the government must establish a compelling interest that is served by the statute, and it must show that the CPPA is narrowly tailored to fulfill that interest. *See Crawford*, 96 F.3d at 385-86.

The district court found that even if no children are involved in the production of such materials the devastating secondary effect that sexually explicit materials involving the images of children have on society, and on the well being of children, merits the regulation of such images. *See The Free Speech Coalition*, 1997 WL 487758, at *4. This legislative finding supported the lower court's finding of a compelling state interest. *See id.* We believe this legal determination is wrong.

There are three compelling interests put forward when instituting efforts to curb child pornography using images of actual children. The first interest is that child pornography requires the participation of actual children in sexually explicit situations to create the images. The second interest stems from the belief that dissemination of such pornographic images may encourage more sexual abuse of children because it whets the appetite of pedophiles. The third interest is that such images are morally and aesthetically repugnant.

The Supreme Court has required state statutes criminalizing child pornography to limit the offense to "works that visually depict explicit sexual conduct by

children below a specified age." *Ferber*, 458 U.S. at 764, 102 S. Ct. 3348. The *Ferber* Court specifically focused on the harm to children. *See* 458 U.S. at 758, 102 S. Ct. 3348. It also found that distribution of pornographic images is "intrinsically related" to the harm suffered by child victims because the images produced are a permanent record of the child's participation, exacerbated by its dissemination. *See id.* at 759, 102 S. Ct. 3348. The Court reasoned that the distribution network for such images needs to be terminated if it is to be effectively controlled. *See id.* The *Ferber* Court acknowledged that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." *Id.* at 763, 102 S. Ct. 3348.

The language of the statute questioned here can criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized. The CPPA's definition of child pornography extends to drawings or images that "appear" to be minors or visual depictions that "convey" the impression that a minor is engaging in sexually explicit conduct, whether an actual minor is involved or not. The constitutionality of this definition is not supported by existing case law.

The rationale articulated in *Ferber* and the constitutional permissibility of regulating the category of child pornography as a separate class is not justified by consideration of the effects such images have on others, even if those effects exist. Instead the focus of analysis is on the harm to the children actually used in the

production of the materials.[9] Nothing in *Ferber* can be said to justify the regulation of such materials other than the protection of the actual children used in the production of child pornography. The language of the statute criminalizes even those materials that do not involve a recognizable minor. This shift is a significant departure from *Ferber*. While the government is given greater leeway in regulating child pornography, materials or depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, retain[s] First Amendment protection." *Ferber*, 458 U.S. at 765, 102 S. Ct. 3348.

Ferber considered the possibility of simulations of sexually explicit acts involving non-recognizable minors and implicitly found them to be constitutionally protected. *See id.* at 763, 102 S. Ct. 3348. The Court also implicitly rejected the regulation of pornography that does not involve minors. *See id.* Thus, the case law demonstrates that Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children. Furthermore, to the extent Congress' justification for the CPPA relies upon such pornography's effect on third parties—children victimized by pedophiles who consume sexually explicit depictions that appear to involve minors—

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[9] The dissent rhetorically asks "Why should virtual child pornography be treated differently than real child pornography?" and then suggests there is no "value" in any pornography involving children, whether it involves real persons or imaginary computer images. This is the critical fault in the secondary effects analysis because it shifts the argument focus from whether the questioned speech or images are constitutionally protected to a focus on how the speech or image affects those who hear it or see it.

the Seventh Circuit has articulated a compelling reason for preventing such third party injury from superseding First Amendment rights.

In *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 334 (7th Cir. 1985), *aff'd*, 475 U.S. 1001, 106 S. Ct. 1172, 89 L.Ed.2d 291 (1986), the Seventh Circuit invalidated a city ordinance prohibiting pornography that portrayed women submissively or in a degrading manner. In *Hudnut*, an argument about the consequences of pornography was put forth to justify the Indianapolis ordinance. *See* 771 F.2d at 328. The defendants maintained that pornography influences attitudes, and that the ordinance was a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. *See id.* at 328-29. It was argued that the ordinance would play an important role "in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it." *Id.* at 325. The Court accepted the premise that "depictions of subordination tend to perpetuate subordination" which in turn leads to "affront and lower pay at work, insult and injury at home, and battery and rape on the streets." *Id.* at 329. Even so, the *Hudnut* court reasoned that pornography's role, if any, in preserving systems of sexual oppression "simply demonstrate[d] the power of pornography as speech. . . . Pornography affects how people see the world, their fellows, and social relations." *Id.*

As the Seventh Circuit noted, however, the unhappy effects of pornography depend on mental intermediation. *See id.* This is particularly so when the images

are not of real human beings, but are representations of a loathsome mind reduced to virtual reality by the technology of graphic computer art. Further,

> Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. . . . If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

Id. at 330.

By the same token, any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions. This is so because to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation. *Cf. Jacobson v. United States*, 503 U.S. 540, 548-49, 112 S. Ct. 1535, 118 L.Ed.2d 174 (1992) (invalidating a federal child pornography conviction and holding that even the compelling interest in protecting children from sexual exploitation does not justify modifications in otherwise applicable rules of criminal procedure); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994) (interpreting 18 U.S.C. § 2252 to require the prosecution to prove the defendant knew the material was produced with the use of a minor, in part because to find otherwise would be constitutionally problematic).

The critical ingredient of our analysis is the relationship between the dissemination of fabricated images of child pornography and additional acts of sexual abuse. Factual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist. *See* Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996). The legislative justification for the proposition was based upon the Final Report of the Attorney General's Commission on Pornography, a report that predates the existing technology. *See id.* at 490. The Final Report emphasized the victimization of real children by adult distribution of the pornographic material. The report shows that the use of sexually explicit photos or films of actual children to lure other children played a small part in the overall problem involving harm to children. *See id.* (citing AG Report at 649-50). Thus, while such images are unquestionably morally repugnant, they do not involve real children nor is there a demonstrated basis to link computer-generated images with harm to real children. Absent this nexus, the law does not withstand constitutional scrutiny.[10]

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[10] The dissent's argument about the secondary effects justification for permitting the statutory regulation here is not sound because it makes too much of dicta set forth in *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). In the first place *Osborne* involved real children. Protecting harm to real children is the point that constitutionally limits the power of Congress to ban some forms of expression.

The premise of the secondary effects argument assumes that children will be enticed by pedophiles to illicit sexual behavior, and consequent injury, if they look at pictures of other kids engaged in sexually explicit conduct. Even if the pictures don't involve real kids, the "realism" of computer images that "appear to be" or "create the impression" of real children can be used by pedophiles to entice a vulnerable child into illegal sexual acts. Thus, according to the dissent, there is a justification to protect kids from the harmful secondary effects of images that don't involve real people. The vulnerability argument makes no constitutional sense in light of *Ferber*'s acknowledgment that adults who look like minors can be used in place of minors in sexually explicit "art" or film depictions. In other words, if the dissent's argument is sound, it would work to bar expression of constitutionally protected speech under *Ferber*. Nothing would keep the determined pedophile from using *Ferber* protected images to entice the vulnerable child into harmful sexual conduct.

A similar fault lies in the dissent's reasoning regarding "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses [that] plainly lie beyond the Act," citing *Hilton*, 167 F.3d at 72. Children are enamored by cartoons and drawings. They are regularly used as a means of teaching and entertaining. Much debate exists about the effects that cartoons and video or computer games have on violent behaviors or other antisocial behaviors involving children. It is unsound to reason that cartoons cannot suggest pornographic behavior or that cartoons could not be used to entice a vulnerable child into illicit sexual behavior. *Cf.* Fritz the Cat (1972) (X-rated cartoon movie, loosely based on Underground Comics' character by Robert Crumb, depicting cat's adventures in group sex, college radicalism, and other hazards of life in the 1960's).

Many innocent things can entice children into immoral or offensive behavior, but that reality does not create a constitutional power in the Congress to regulate otherwise innocent behavior. By the dissent's reasoning a pedophile could use cartoons depicting explicit sexual conduct involving minors to entice a child into engaging in sexually explicit behavior but this would "plainly lie beyond the Act." Cartoons or other images cannot be constitu-

By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

Our determination is not to suggest that anyone condones the implicit or explicit harmful secondary effects of child pornography. Rather it is a determination to measure the statute by First Amendment standards articulated by the Supreme Court. To accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or viewer, would turn First Amendment jurisprudence on its head.

In short, we find the articulated compelling state interest cannot justify the criminal proscription when no actual children are involved in the illicit images

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tionally distinguished from other fictional images based upon the quality of the realism.

The dissent wrongly suggests that our holding accords "virtual child pornography the full protection of the First Amendment." Because the statute is severable, our holding demonstrates that if morphed computer images are of an identifiable child, the statute is enforceable because there is then the potential for harm to a real child.

either by production or depiction. Because we find that Congress has not provided a compelling interest, we do not address the "narrow tailoring" requirement.

3.

The district court found the CPPA is not unconstitutionally vague as it gives sufficient guidance to a person of reasonable intelligence as to what it prohibits. *See The Free Speech Coalition*, 1997 WL 487758, at *6. The *Hilton* court scrutinized the statute with a "skeptical eye" because the new law impinges on freedom of expression. *See* 167 F.3d at 75. In doing so, it concluded, as the district court did here, that the CPPA was not unconstitutionally vague. *See id.* at 76-77. In making its determination the First Circuit applied an objective standard to determine the meaning of the phrase, "appears to be a minor." *See id.* at 75.

A statute is void for vagueness if 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." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983). The requirement involves an understanding by a putative actor about what conduct is prohibited. It is impermissible to define a criminal offense so vaguely that an ordinary person is left guessing about what is prohibited and what is not. Notice that does not provide a meaningful understanding of what conduct is prohibited is vague and unenforceable. Such is the case with the statutory language prohibiting material that "appears to be" or that "conveys the impression."

The CPPA's criminalizing of material that "appears to be a minor" and "convey[s] the impression" that the material is a minor engaged in explicit sexual activity, is void for vagueness. It does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and it fails to provide explicit standards for those who must apply it, "with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972).

The two phrases in question are highly subjective. There is no explicit standard as to what the phrases mean. The phrases provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution.

In the same light, the absence of definitions for these key phrases in the CPPA allows law enforcement officials to exercise their discretion, subjectively, about what "appears to be" or what "conveys the impression" of prohibited material. Thus, the vagueness of the statute's key phrases regarding computer images permits enforcement in an arbitrary and discriminatory fashion. *Cf. City of Chicago v. Morales*, ___ U.S. ___, ___, 119 S. Ct. 1849, 1862, 144 L.Ed.2d 67 (1999) (finding anti-loitering ordinance unconstitutionally vague, in part because "the 'no apparent purpose' standard [used in defining 'loitering'] is inherently subjective" and "depends on whether some purpose is 'apparent' to the officer on the scene.").

4.

The district court held that the CPPA is not overbroad because it prohibits only those works necessary to prevent the secondary pernicious effects of child pornography from reaching minors. *See The Free Speech Coalition*, 1997 WL 487758, at *6. In addition, the First Circuit reasoned that "a few possibly impermissible applications of the Act does not warrant its condemnation[,]" and found that "[w]hatever overbreadth may exist at the edges are more appropriately cured through a more precise case-by-case evaluation of the facts in a given case." *Hilton*, 167 F.3d at 74. We do not agree.

Although overbreadth must "be 'substantial' before the statute involved will be invalidated on its face[,]" *Ferber*, 458 U.S. at 769, 102 S. Ct. 3348, such overbreadth is present here. On its face, the CPPA prohibits material that has been accorded First Amendment protection. That is, non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment. *See id.* at 764-65, 102 S. Ct. 3348. This rule abides even when the subject matter is distasteful.

Congress may serve its legitimate purpose in protecting children from abuse by prohibiting pornography actually involving minors. The Senate considered the constitutional impediment discussed here but disagreed with the assertion that it could not prohibit visual depictions that "appear to be" of minors engaging in sexually explicit conduct when the depictions were produced without using actual children. *See* S. Rep. No. 104-358, at 21 (1996). The Senate reasoned that

advances in technology distinguished the *Ferber* Court's holding because in 1982 when *Ferber* was decided "the technology to produce visual depictions of child sexual activity indistinguishable from unretouched photographs of actual children engaging in 'live performances' did not exist." *Id.*

The danger with this analysis is that it suggests that the more realistic an imaginary creation is, the less protection it is entitled to under the First Amendment. This is not because of any harm caused in its creation, rather it is because of the consequences of its purported reality. Yet, the Supreme Court has restricted the regulation of pornographic material involving minors because of the harm caused by its creation, not necessarily because of the consequences of its creation. The government's interest in prohibiting computer-generated child pornographic depictions is not the same as its interest in prohibiting child pornography produced by using actual children. In the latter instance there may be direct and indirect harm to a child. In the former instance there is no harm, and there can be none, to an actual child, if no real human is used in the production of the images. What is left then is an inconsistent effort to regulate the evil consequences of abusing children to make such images, even though no children are used in its production.

As explained, the CPPA is insufficiently related to the interest in prohibiting pornography actually involving minors to justify its infringement of protected speech. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-39, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980) (village could serve its legitimate interest in preventing fraud by less intrusive measures

than direct prohibition of solicitation; concluding that village ordinance was overbroad, as it had insufficient relationship with protection of public safety or residential privacy to justify interference with protected speech). The CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity makes it overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (describing Supreme Court's findings of overbreadth in cases in which statutes burden protected speech and rights of association).

5.

The district court found that because the CPPA does not require advance approval for production or distribution of adult pornography that does not use minors and does not effect a complete ban on constitutionally protected material, it does not constitute an improper prior restraint on speech. *See The Free Speech Coalition*, 1997 WL 487758, at *7. We agree.

Prior restraint describes "administrative and judicial orders forbidding certain communications" before the communication occurs. *See Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L.Ed.2d 441 (1993). The CPPA only penalizes speech after it occurs. As such it is not a prior restraint of speech. *See id.* at 553-54, 113 S. Ct. 2766. The possibility of self-censorship and the contention that the CPPA has a chilling effect do not amount to a prior restraint. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60, 109 S. Ct. 916, 103 L.Ed.2d 34 (1989).

V.

We hold that the language of "appears to be a minor" set forth in 18 U.S.C. § 2256(8)(B) and the language "convey[s] the impression" set forth in 18 U.S.C. § 2256(8)(D) are unconstitutionally vague and overbroad. The statute is severable. *See* Pub. L. No. 104-208, 110 Stat. 3009, § 101 (1996). The law is enforceable, except for these amendments to 18 U.S.C. § 2256, § 4 of Senate Bill 1237, through the free standing savings provisions of § 9, codified at 18 U.S.C. § 2256(9).[11]

The judgment of the district court is AFFIRMED on the questions of standing and prior restraint. The judgment of the district court is REVERSED on the questions of the constitutionality of the statutory language "appears to be a minor" and "convey[s] the impression."

The pending motion by Stop Prisoner Rape, to file an amicus brief in this case, is denied.

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[11] The Senate specifically dealt with the notion that the inclusion of entirely computer-generated images might render the law unconstitutional. Section 9 of Senate Bill 1237, codified at 18 U.S.C. § 2256(9), was added as a safeguard at the behest of Senator Biden. *See* S. Rep. No. 104-358, at 28 (1996). Section 9 prohibits the use of "identifiable minors in visual depictions of sexually explicit conduct." 18 U.S.C.A. § 2256(9) (West Supp. 1999). Section 9 was added because of the concern that the definition of "child pornography" and its application through § 4 of the Act, the language at issue here, "may be at risk of judicial invalidation insofar as it reaches images that do not depict actual minors." S. Rep. No. 104-358, at 11 (1996).

The case is remanded to the district court with instructions to enter judgment on behalf of the plaintiffs consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

FERGUSON, Circuit Judge, Dissenting:

The majority holds that Congress cannot regulate virtual child pornography[12] because it does not require the use of actual children in its production. Majority Op. at 1095. Without the use of actual children, the majority believes that Congress is simply attempting to

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[12] Computer-generated child pornography comes in many different forms. For purposes of clarity, however, I will divide it into two categories. The first is "virtual" child pornography and the second is "computer-altered" child pornography.

The key to virtual child pornography is that it does not depict an actual or "identifiable minor." Through a technique called "morphing," a picture of a real person is transformed into a picture of a child engaging in sexually explicit activity. *See* S. Rep. No. 104-358, at 15-16. Although the computer-generated image looks real, the children depicted in the image do not actually exist. *See id.* The picture is therefore 100% "virtual."

Computer-altered child pornography, by contrast, contains the image of an actual or "identifiable minor." This type of child pornography can be created by scanning the photo of a child into the computer and then with the aid of the "cut and paste" feature, attaching the child's face onto the body of another person who is engaged in sexually explicit activity. *Id.* Although the image has been altered, the child is still "recognizable" through the child's "face, likeness, or other distinguishing characteristic." 18 U.S.C.A. § 2256(9) (West Supp. 1999). Computer-altered child pornography is banned under 18 U.S.C.A. § 2256(8)(C) (West Supp. 1999). Appellants did not challenge this provision, and therefore, it will not be discussed here.

regulate "evil idea[s]." *Id.* I disagree. Congress has provided compelling evidence that virtual child pornography causes real harm to real children. As a result, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment. In addition, I do not believe that the statutory terms "appears to be" or "conveys the impression" are substantially overbroad or void for vagueness. Accordingly, I would find the Child Pornography Prevention Act of 1996 ("CPPA") constitutional.

I.

For more than two decades, Congress has been trying to eliminate the scourge of child pornography. *See* Majority Op. at 1087-89. Each time Congress passes a law, child pornographers find a way around the law's prohibitions. *See* S. Rep. No. 104-358, at 26 (statement of Sen. Grassley). This cycle recently repeated itself and prompted Congress to enact the CPPA.

Prior to the CPPA, federal law imposed penalties on individuals who produced, distributed, or possessed visual depictions of actual minors engaging in sexually explicit conduct. *See* 18 U.S.C.A. § 2252 (West Supp. 1999). Recent advances in computer-imaging technology, however, have made this law ineffective for two reasons. First, purveyors of child pornography can now produce visual depictions that appear to be actual children engaged in sexual conduct "without using children" at all, "thereby placing such depictions outside the scope of federal law." 141 Cong. Rec. S13542 (daily ed. Sept. 13, 1995) (remarks of Sen. Hatch). Second, even where actual children are used, computers can "alter sexually explicit photographs, films, and videos in

such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using [actual] children." *Id.*

In an effort to close these loopholes, Congress enacted the CPPA which, *inter alia*, bans visual depictions that "appear[ ] to be of a minor engaging in sexually explicit conduct" or that are "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." 18 U.S.C.A. §§ 2256(8)(B), (D) (West Supp. 1999). Along with the CPPA, Congress included thirteen detailed legislative findings that explained why virtual child pornography must be prohibited. *See* 18 U.S.C.A. § 2251 (West Supp.1999), Historical and Statutory Notes, Congressional Findings (hereinafter "*Congressional Findings*").[13]

Despite these detailed legislative findings, the majority rules that Congress failed to articulate a "compelling state interest" to justify criminalizing virtual child pornography. Majority Op. at 1095. The majority argues that Congress cannot constitutionally regulate virtual child pornography because it does not depict "actual children." *Id.* Once "actual children" are eliminated from the equation, the majority believes that Congress is impermissibly trying to regulate "evil idea[s]." *Id.* I disagree for the following reasons.

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[13] The congressional findings were based in large part on testimony presented to the Senate Judiciary Committee. *See Child Pornography Prevention Act of 1995: Hearing before the Senate Judiciary Committee*, 104th Cong., 2d Sess. (1996) (hereinafter "*Senate Hearing*").

First. The majority improperly suggests that preventing harm to depicted children is the only legitimate justification for banning child pornography. Although this was the Supreme Court's focus in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982), the Court has subsequently indicated a willingness to consider additional factors. *See Osborne v. Ohio*, 495 U.S. 103, 110-11, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). In *Osborne*, the Supreme Court addressed the issue of whether Ohio could ban the possession of child pornography. *Id.* at 108, 110 S. Ct. 1691. In finding it could, the Court relied not only on the harm caused to the children who are used in its production (i.e., *Ferber*), but also on the harm that children suffer when child pornography is used to seduce or coerce them into sexual activity. *Id.* at 111, 110 S. Ct. 1691. Thus, in *Osborne*, the Court indicated that protecting children who are not actually pictured in the pornographic image is a legitimate and compelling state interest. *See Id. See also United States v. Hilton*, 167 F.3d 61, 70 (1st Cir.) (recognizing the Supreme Court's "subtle, yet crucial, extension" of valid state interests to include protecting children not actually depicted), *cert. denied* ___ U.S. ___, 120 S. Ct. 115, 145 L.Ed.2d 98 (1999).

Second. The majority ignores the fact that the Supreme Court has already endorsed many of the justifications Congress relied on when it passed the CPPA. As discussed above, 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." *Osborne*, 495 U.S. at 111, 110 S. Ct. 1691. Relying on this justification, Congress enacted the CPPA after finding that "child pornography is often used as part of a method of

seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." *Congressional Findings*, at 3. When child pornography is "used as a means of seducing or breaking down a child's inhibitions," the images are equally as effective regardless of whether they are real photographs or computer-generated pictures that are "virtually indistinguishable." *Congressional Findings*, at 8.[14]

The Supreme Court has also recognized that states have a legitimate interest in destroying the child pornography market. *Osborne*, 495 U.S. at 110. Similarly, in enacting the CPPA, Congress declared that the statute would encourage people to destroy all forms of child pornography, thereby reducing the market for the material. *Congressional Findings* at 12. At the hearing before the Senate Judiciary Committee, witnesses testified that persons who trade and sell images that are indistinguishable from those of actual children engaged in sexual activity "keep the market for child pornography thriving." *Senate Hearing*, at 91 (testimony of Bruce Taylor).[15] This is because pictures that *look* like children engaging in sexual activities can be

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[14] *See also Senate Hearing*, at 70 (statement of Bruce Taylor, Chief Counsel for the National Law Center for Children and Families) (stating that "real and apparent [child pornography] . . . are equally dangerous because both have . . . the same seductive effect on a child victim").

[15] *See also Senate Hearing*, at 35 (testimony of Dr. Victor Cline, Emeritus Professor in Psychology at the University of Utah); *Id.* at 20, 23, 30 (testimony of Jeffrey J. Dupilka, Deputy Chief Postal Inspector for Criminal Investigations).

exchanged for pictures that *are* of actual children engaging in such activities. By limiting the production and distribution of images that appear to be of children having sex, the CPPA helps rid the market of all child pornography.[16]

Third. Even though Congress presented some new justifications that the Supreme Court has not specifically endorsed, the majority still had an obligation to consider them, as long as they advance the general goal of protecting children. In both *Ferber* and *Osborne*, the Court stated that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Osborne*, 495 U.S. at 109, 110 S. Ct. 1691, quoting *Ferber*, 458 U.S. at 756-57, 102 S. Ct. 3348. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, 458 U.S. at 757, 102 S. Ct. 3348. Thus, the Court will generally "sustain[ ] legislation aimed at protecting the physical and emotional well-being of children even when the laws . . . operate[ ] in sensitive areas." *Id.*

The lesson from *Ferber* and *Osborne* is that legislators should be given "greater leeway" when acting to protect the well-being of children. *See Id.* at 756, 102 S. Ct. 3348. The majority, however, ignores this principle and fails to consider any of the new justifications

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[16] *See Senate Hearing*, at 122 (testimony of Professor Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University) (stating that it is "undoubtedly true" that "somewhere in this chain of computer-generated production there are going to be real children . . . involved").

supporting the CPPA. For example, the majority fails to address Congress' concern that computer-imaging technology is making it increasingly difficult in criminal cases for the government "to meet its burden of proving that a pornographic image is of a real child." S. Rep. No. 104-358, at 20. At a hearing before the Senate Judiciary Committee, Deputy Assistant Attorney General Kevin Di Gregory told the committee that in one federal child pornography case, the defendant relied on advances in computer technology to argue that the government had failed to meet its "burden of proving that each item of the alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one." *Id.* at 17, citing *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157, 116 S. Ct. 1547, 134 L.Ed.2d 650 (1996). Although jurors in that case rejected this argument, Congress recognized that as computer imaging software progressed, similar arguments might undermine "the enforcement of existing laws" by raising a "built-in reasonable doubt argument in every child exploitation/pornography prosecution." S. Rep. No. 104-358, at 16-17. Congress believed that the CPPA was necessary to close this loophole, and therefore, the majority should have factored this concern into its evaluation of the case.

Fourth. The majority ignores the fact that child pornography, real or virtual, has little or no social value. *See Ferber*, 458 U.S. at 762, 102 S. Ct. 3348 (stating that the value of child pornography is "exceedingly modest, if not de minimis"). It is well established that "[t]he protection given to speech and press was fashioned to assure unfettered interchange of ideas for bringing about the political and social changes desired by

people." *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957). "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have . . . full protection . . ." *Id.* The First Amendment, however, does not protect certain limited categories of speech that are "utterly without redeeming social importance." *Id. See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992) (stating that "[f]rom 1791 to present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas"). These categories include obscenity, *Roth*, 354 U.S. at 483, 77 S. Ct. 1304, libel, *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S. Ct. 725, 96 L.Ed. 919 (1952), and "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73, 62 S. Ct. 766, 86 L.Ed. 1031 (1942). Child pornography is also one of these categories of speech. *Ferber*, 458 U.S. at 763-64, 102 S. Ct. 3348.

Why should virtual child pornography be treated differently than real child pornography? Is it more valued speech? I do not think so. Both real and virtual child pornography contain visual depictions of children engaging in sexually explicit activity. The only difference is that real child pornography uses actual children in its production, whereas virtual child pornography does not. While this distinction is noteworthy, it does not somehow transform virtual child pornography into meaningful speech. Virtual child pornography, like its counterpart real child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas." *See Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766. Therefore, the majority is wrong to accord

virtual child pornography the full protection of the First Amendment.

Fifth. The majority improperly analyzes the CPPA under a strict scrutiny approach. Majority Op. at 1091. In so doing, the majority misreads the Supreme Court's previous child pornography decisions. These decisions indicate that the proper mode of analysis is to weigh the state's interest in regulating child pornography against the material's limited social value. *See Ferber*, 458 U.S. at 756-64, 102 S. Ct. 3348; *Osborne*, 495 U.S. at 108-111, 110 S. Ct. 1691. The Supreme Court used this test in *Ferber* and found 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." *Id.* at 764, 102 S. Ct. 3348. *See also Osborne*, 495 U.S. at 111, 110 S. Ct. 1691 (finding that the "gravity of the State's interests" outweighed Osborne's limited First Amendment right to possess child pornography).

Virtual child pornography should be evaluated in a similar fashion. The majority should have weighed Congress' reasons for banning virtual child pornography against the limited value of such material.[17] If the majority had, it would have realized that Congress' interests in destroying the child pornography market

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[17] Scholarly writers also support using a balancing test to determine whether virtual child pornography is "outside the protection of the First Amendment." *See e.g.* Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 Harv. J. on Legis. 245, 274-78 (1998).

and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value. Since the balance of competing interests tips in favor of the government, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment.

II.

The analysis does not end with a finding that virtual child pornography is without First Amendment protection. Statutes can be found unconstitutional if they are worded so broadly that they "criminalize an intolerable range of constitutionally protected conduct." *Osborne*, 495 U.S. at 112, 110 S. Ct. 1691. This case focuses on the CPPA's new definition of child pornography which prohibits visual depictions that "appear[ ] to be," or are promoted or distributed "in such a manner that conveys the impression," that they are "of a minor engaging in sexually explicit conduct." 18 U.S.C.A. §§ 2256(8)(B), (D) (West Supp. 1999). The majority holds that this language is overbroad because it bans "material that has been accorded First Amendment protection." Majority Op. at 1095-96. I disagree.

As a general rule, statutes should not be invalidated as overbroad unless the overbreadth is "substantial . . . in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). The Court has cautioned that the overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort." *Id.* at 613, 93 S. Ct. 2908. Accordingly, a statute should not be invalidated as overbroad

"when a limiting construction has been or could be placed on the challenged statute." *Id.*

Appellants suggest that the "appears to be" language is so broad that everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner will be criminalized under the CPPA. However, even a glancing look at the legislative history belies this assertion. Congress enacted the CPPA to address the problem of "computer-generated" child pornography. S. Rep. No. 104-358, at 7. In the findings filed with the CPPA, Congress repeatedly stated that the law is targeted at visual depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." *Congressional Findings*, at 5, 8, 13. The Senate Judiciary Committee explained that the "appears to be" language was necessary to cover the "same type of photographic images *already* prohibited, but which do[ ] not require the use of an actual minor." S. Rep. No. 104-358, at 21 (emphasis in original).

From reading the legislative history, it becomes clear that the CPPA merely extends the existing prohibitions on "real" child pornography to a narrow class of computer-generated pictures easily mistaken for real photographs of real children. *See Congressional Findings*, at 13. Therefore, I agree with the United States Court of Appeals for the First Circuit which found that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the Act." *Hilton*, 167 F.3d at 72. "By definition, they would not be 'virtually indistinguishable' from an image of an actual minor." *Id.* "The CPPA therefore

does not pose a threat to the vast majority of every day artistic expression, even to speech involving sexual themes." *Id.*

There has also been concern that the CPPA prohibits constitutionally protected photographic images of adults in sexually explicit poses. This contention, however, is also without merit. The CPPA explicitly states that "[i]t shall be an affirmative defense" to a charge of distributing, reproducing or selling child pornography that the pornography (1) "was produced using an actual person or persons," (2) each of whom "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 visual depictions of a minor engaging in sexually explicit conduct." 18 U.S.C.A. § 2252A(c) (West Supp. 1999). The CPPA thus shields from prosecution sexually explicit visual depictions so long as they are produced using actual adults and "the material has not been pandered as child pornography." S. Rep. No. 104-358, at 10, 21. Persons—like the appellants in this case—who produce and distribute works depicting the sexual conduct of actual adults, and do not market the depictions as if they contain sexual images of children, are thus explicitly protected from culpability under the CPPA.

While there may be other potentially impermissible applications of the CPPA, I doubt that they would be "substantial . . . in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S. Ct. 2908. Rather than invalidate part of the statute based on possible problems that may never occur, it is best to

deal with those situations on a case-by-cases basis. *See Ferber*, 458 U.S. at 781, 102 S. Ct. 3348 (Stevens, J., concurring) (noting that "[h]ypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors"). Accordingly, I would find that the CPPA is not substantially overbroad. *See Hilton*, 167 F.3d at 71-74 (finding that the CPPA is not unconstitutionally overbroad); *United States v. Acheson*, 195 F.3d 645, 650-52 (11th Cir. 1999) (same).

III.

I also disagree with the majority that the CPPA is unconstitutionally vague. It is well settled that a statute is not void for vagueness unless it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983).

Here, the key phrases of the CPPA are clearly defined. The CPPA applies to visual depictions of a minor engaging in sexually explicit conduct. A minor is defined as "any person under the age of eighteen years." 18 U.S.C.A. § 2256(1) (West Supp. 1999). In addition, "sexually explicit conduct" is defined as actual or simulated "sexual intercourse . . .; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area." 18 U.S.C.A. § 2256(2) (West Supp. 1999). Given the detailed definition of sexually explicit activity, it is unlikely that a person of ordinary intelligence would be unable to determine what activities are prohibited.

The majority nevertheless finds fault with the CPPA because it believes that the terms "appears to be" and

"conveys the impression" are highly subjective and could be enforced "in an arbitrary and discriminatory fashion." Majority Op. at 1095. Once again, I disagree. With regard to the apparent age of the depicted individuals, the government can use the same type of objective evidence that it relied on before the CPPA went into effect. For example, in cases involving prepubescent individuals, the government can show the jury the pictures and the jury can determine for itself whether the virtual image "appears to be" of a minor. *See e.g. United States v. Arvin*, 900 F.2d 1385, 1390 n. 4 (9th Cir. 1990) (citing a jury instruction that requires the members of the jury to decide whether the prepubescent girls are "minors" based upon their own "observation of the pictures"), *cert. denied* 498 U.S. 1024, 111 S. Ct. 672, 112 L.Ed.2d 664 (1991). In cases in which the depicted children have reached puberty, the government can call expert witnesses to testify as to the physical development of the depicted person, and present testimony regarding the way the creator, distributor, or possessor labeled the disks, files, or videos. *See e.g. United States v. Robinson*, 137 F.3d 652, 653 (1st Cir. 1998) (noting that the pornographic photographs listed the ages of boys depicted). Based on these examples, I agree with the First Circuit which found that the standard for evaluating the key provisions of the CPPA "is an objective one." *Hilton*, 167 F.3d at 75. "A jury must decide, based on the totality of the circumstances, whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.*

As an additional safeguard against arbitrary prosecutions, the government must satisfy the element of

scienter before it can obtain a valid conviction under the CPPA. *See* 18 U.S.C.A. § 2252A (West Supp. 1999). In any CPPA prosecution, the government must prove beyond a reasonable doubt that the individual "knowingly" produced, distributed, or possessed sexually explicit material and that the material depicts a person who appeared to the pornographer to be under the age of eighteen. *See Id. See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994) (holding that the scienter requirement "extends to both the sexually explicit nature of the material and to the age of the performers"). "Thus, a defendant who honestly believes that the individual depicted in the image appears to be 18 years old or older (and is believed by a jury), or who can show that he knew the image was created by having a youthful-looking adult pose for it, must be acquitted, so long as the image was not presented or marketed as if it contained a real minor." *Hilton*, 167 F.3d at 75-76. Based on these safeguards, the majority's concerns about arbitrary and discriminatory prosecutions are misplaced. *See Id.* at 74-77 (finding that the CPPA is not unconstitutionally vague); *Acheson*, 195 F.3d at 652-53 (same).

IV.

In sum, the CPPA is not, as the majority claims, an attempt to regulate "evil idea[s]." Instead, the CPPA is an important tool in the fight against child sexual abuse. The CPPA's definition of child pornography provides adequate notice of the type of images that are prohibited and does not substantially encroach on protected expression. Accordingly, I would find the CPPA constitutional.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16536
D.C. No. CV 97-0000281-SC

THE FREE SPEECH COALITION, ET AL.,
PLAINTIFFS-APPELLANTS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
DEFENDANTS-APPELLEES

[Filed: July 19, 2000]

ORDER

Before: FERGUSON and THOMAS, Circuit Judges, and MOLLOY,[18] District Judge.

The panel as constituted above, has voted as follows: Judges Thomas and Molloy voted to deny the petition for rehearing. Judge Thomas voted to reject the suggestion for rehearing en banc and Judge Molloy recommends rejection of the suggestion; Judge Ferguson voted to grant the petition for rehearing and recommended granting the suggestion for rehearing en banc.

[18] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

A judge of the court called for a vote on the suggestion for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

WARDLAW, Circuit Judge, with whom O'SCANNLAIN and T.G. NELSON, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying the petition for rehearing en banc. The divided panel decision warranted this Court's en banc attention because it creates a conflict with our sister circuits on an issue of exceptional importance.

The conflict? The panel majority struck down the provisions of the Child Pornography Prevention Act of 1996 ("CPPA") that criminalize visual depictions that "appear to be" or "convey the impression" of child pornography. *See Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999). It held that these provisions violate the First Amendment because they prohibit visual images of "virtual" child pornography along with "actual" child pornography. It did so in the face of decisions of the First and Eleventh Circuits upholding the same provisions of the CPPA. *See United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999) (rejecting First Amendment challenge to CPPA on grounds of vagueness, overbreadth, and facial invalidity); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999) (same); *see also United States v. Pearl*, 89 F. Supp. 2d 1237 (D. Utah 2000) (holding CPPA survives strict scrutiny review and expressly rejecting the panel's analysis).

The panel majority did not directly flout Supreme Court authority (the Court has yet to address "virtual" as opposed to "actual" child pornographic images). It did, however, disregard the Court's analysis of the compelling governmental interest in "safeguarding the physical and psychological well-being of a minor," which, it reasoned, includes the prevention of sexual exploitation and abuse of children. *New York v. Ferber*, 458 U.S. 747, 756-63 (1982) (holding that "actual" child pornography is a "category of material outside the protection of the First Amendment"). The panel majority narrowed this interest to include only the prevention of harm to real children stemming from their use in the production of pornographic images. At least two more compelling governmental interests are at stake, however, both of which have been identified by Congress as justifications for the regulation at issue.

First, as the Supreme Court has explained, the "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing 1 Attorney General's Comm'n on Pornography, Final Report 649 (1986); D. Campagna & D. Poffenberger, Sexual Trafficking in Children 118 (1988); and S. O'Brien, Child Pornography 89 (1983)). In *Osborne*, the Court reasoned that the "gravity of the State's interests in this context," including the use of child pornography in the seduction of children, justified a ban on possession of child pornography. *Id.* Thus, the harm to "real" children is real, whether or not the pornographic images which look real (or else they would not effectively serve their purpose) are actually computer-generated.

Second, Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, an interest achieved through a ban on visual depictions which "appear[ ] to be . . . of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8):

> As the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible, to distinguish computer-generated from photographic depictions of child sexual activity. It will therefore become almost impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children will go free from punishment.

S. Rep. No. 104-358, pt. IV(B); *see also Hilton*, 167 F.3d at 73 ("As technology improves and access to technology increases, efforts to eradicate the child pornography industry could be effectively frustrated if Congress were prevented from targeting sexually explicit material that 'appears to be' of real children."). Defendants have asserted that reasonable doubt exists where the government fails to prove that the images at issue were of an actual minor rather than of an adult altered to resemble one. *See* S. Rep. No. 104-358, pt. IV(B) (citing as an example *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995)).[1] In an analogous

[1] The government was able to overcome this defense in *Kimbrough* only because it located and produced the original magazine images, which pre-dated the computer technology, from which the

situation, the Supreme Court held that the First Amendment did not bar the State of New York from prohibiting the distribution of pornographic images of children produced outside the state, noting that "[i]t is often impossible to determine where such material is produced." *Ferber*, 458 U.S. at 766 n. 19. Just as the inability to distinguish domestic from foreign materials justifies a ban on both, the impossibility of determining whether an image is "actual" or "virtual" warrants a prohibition of both.

Whether or not an individual judge agrees with the majority decision, our Court should have convened an en banc panel to consider this case because of its exceptional importance. A two-judge majority struck down provisions of a federal statute as unconstitutional when the only other federal courts to rule on the issue have rejected the same constitutional challenges. The panel majority simply dismissed the congressional findings which were based on substantial evidence of the danger to real children of the rapidly advancing computer technology. *See* S. Rep. No. 104-358, pt. IV(B); *see also Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 195 (1997) (requiring courts to "accord substantial deference to the predictive judgments of Congress" in First Amendment cases).

The distinction between "actual" child pornography—unprotected speech—and "virtual" child pornography—speech so highly regarded by the panel majority that it applied the highest level of judicial

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computer-generated images were scanned. *See* S. Rep. No. 104-358, pt. IV(B).

review—should have been more closely scrutinized by our Court. As Judge Ferguson said in dissent:

> Both real and virtual child pornography contain visual depictions of children engaging in sexually explicit activity. The only difference is that real child pornography uses actual children in its production, whereas virtual child pornography does not. While this distinction is noteworthy, it does not somehow transform virtual child pornography into meaningful speech. Virtual child pornography, like its counterpart real child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas."

Free Speech Coalition, 198 F.3d at 1100 (Ferguson, J., dissenting) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

This issue is of immense importance not only because our Court strikes down a congressional enactment, but also because of the ready dissemination of such images via the Internet, and the lack of equally sophisticated tools for preventing their reach to those most vulnerable to their impact. The panel majority elevates the free speech rights of pedophiles over the compelling governmental interest in protecting our children. It does so in the context of technology evolving so quickly that even the applicable legal standards are in flux. There cannot be many other issues that are more "en-banc worthy" than this.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-0281 SC

THE FREE SPEECH COALITION, ET AL., PLAINTIFFS

v.

JANET RENO, ET AL., DEFENDANTS

[Filed: Aug. 12, 1997]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs in this action consist of a trade association that defends First Amendment rights against censorship, the publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism," and individual artists whose works include nude and erotic photographs and paintings. Plaintiffs have filed a pre-enforcement challenge to the constitutionality of certain provisions of the Child Pornography Prevention Act of 1996 ("CPPA"), alleging that they are vague, overbroad, and constitute impermissible content-specific regulations and prior restraints on free speech. Both plaintiffs and defendants have moved for summary judgment.

II. BACKGROUND

Congress has passed several laws[19] in an ongoing attempt to combat child pornography, the market that such pornography has created and maintained, and the harms that such pornography wreaks on children's physical, psychological, emotional, and mental health. S. Rep. No. 104-358, at 8 (1996) ("Sen. Rep."). The most recent of these laws was passed in 1996, and was enacted specifically to combat the use of computer technology to produce pornography that conveys the impression that children were used in the photographs or images. In passing the legislation, Congress recognized that the dangers of child pornography are not limited to its effect on the children actually used in the pornography. Additionally, child pornography "stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies." Sen. Rep. at 12. Child pornography is also used by child molesters and pedophiles "as a device to break down the resistance and inhibitions of their victims or targets of molestation, especially when these are children." *Id.* at 13. "A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity." *Id.*

Congress recognized that computer technology is capable of "alter[ing] perfectly innocent pictures of children . . . to create visual depictions of those children engaging in any imaginable form of sexual

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[19] *See Am. Library Ass'n. v. Barr*, 956 F.2d 1178, 1181-85 (D.C. Cir. 1992) for a discussion of the history of national anti-child pornography legislation.

conduct." *Id.* at 15. These computer-generated pictures are often indistinguishable from photographic images of actual children. "Computer generated images which *appear to* depict minors engaging in sexually explicit conduct are just as dangerous to the well-being of . . . children as material using actual children." *Id.* at 19. Thus, Congress passed the 1996 Act in order to prevent the effects that such computer-generated images might have, even if no children were actually used in the creation of the images.

Specifically, the CPPA defines child pornography as:

> any 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—
>
> (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 such 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. . . .

18 U.S.C. § 2256(8).

The CPPA goes on to define "sexually explicit conduct" as actual or simulated:

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or
>
> (E) lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. § 2256(2).

The CPPA also provides an affirmative defense for violations of the Act if:

> (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.

18 U.S.C. § 2252A(c).

Plaintiffs contend that the CPPA "sweeps within its purview materials that involve no actual children and that traditionally and logically have never been considered to be child pornography." *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 3. They argue that the CPPA, by prohibiting images that appear to be of children, actually criminalizes the production and sale of legitimate works that include images that look like children, but that in reality were made using adults, not children. They allege that the CPPA's "use of overbroad and vague language criminalizes forms of expression in violation of the First and Fifth Amendments." *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 4.

III. LEGAL ANALYSIS

A. Standing

Defendants first argue that plaintiffs do not have standing to bring a claim in this Court, as they have not suffered "actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Defendants contend that plaintiffs' activities fall squarely within the affirmative defense set out in 18 U.S.C. § 2252A(c), as plaintiffs have admitted that their works involve the depiction only of non-minors[20] and that they do not market their works as child pornography.[21]

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[20] *Pls.' Opp. to Defs.' Mot. for Summ. Judg.* at 1.

[21] Defendants also contend that plaintiffs lack standing because, in their complaint, plaintiffs allege that they do not produce the type of "hard-core" sexual images that would be subject to regu-

Plaintiffs counter that they have indeed been injured by the CPPA, as plaintiffs have, in some cases, discontinued the production, distribution, and possession of the certain materials for fear of prosecution under the CPPA. The CPPA, therefore, has had a chilling effect on their speech which is sufficient to constitute standing. *See, e.g., San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) (holding that a chilling effect on speech is a sufficient basis to establish standing in overbreadth facial challenges to government actions involving free speech); *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

Furthermore, plaintiffs contend that they have standing to bring their suit because the affirmative defense set out in 18 U.S.C. § 2252A(c) does not protect consumers and distributors who possess the potentially illegal materials but who are not involved in the production of sexually explicit materials, and who therefore have no way of knowing whether or not the persons depicted are real and are not minors. Plaintiffs have set forth affidavits of businesses and individuals engaged in distributing, selling, or renting sexually explicit materials who have withheld or stopped distributing certain of plaintiffs' products that plaintiffs argue should fit within the statutory defense, out of fear that they will be prosecuted under the CPPA for

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lation by the CPPA. As a result, defendants argue, plaintiffs cannot demonstrate a real and immediate threat of injury and therefore cannot bring this claim. *See Barr*, 956 F.2d at 1187. The Court rejects this argument. The parameters of pornography are difficult to define, and dismissing plaintiffs' claims for lack of standing is not appropriate in this case, given the variety of the plaintiffs' products.

possession of the materials. Plaintiffs are no longer marketing or sending those products to its distributors. *See Virginia v. Am. Booksellers Ass'n., Inc.*, 484 U.S. 383, 393 (1988) (harm resulting from speech regulation may be one of self-censorship).

The Court finds that plaintiffs' allegations are sufficient to establish the requisite standing to bring their claims before the Court.

B. Standard of Review

In evaluating the constitutionality of legislation that infringes free speech under the First Amendment, the Supreme Court has identified the appropriate criteria by which the language of the act and the purposes underlying the passage of the act shall be judged. "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, *reh'g denied*, 492 U.S. 937 (1989) (internal quotations omitted).

In order to determine whether a regulation is content-neutral, "the principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* A "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.; see also City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41, 47-48, *reh'g denied*, 475 U.S. 1132 (1986) (upholding ordinance prohibiting adult motion picture theaters within 1,000 feet of residential zones, churches, parks, or schools on basis that regulation was content-neutral because it was aimed at the secondary effects of such theaters on the surrounding community). If it can be shown that the regulation is justified without reference to the content of the speech, then it is deemed content-neutral. *Renton*, 475 U.S. at 48.

The contested provisions of the CPPA are content-neutral regulations. They have clearly been passed in order to prevent the secondary effects of the child pornography industry, including the exploitation and degradation of children and the encouragement of pedophilia and molestation of children. Furthermore, the Supreme Court has afforded "greater leeway" to regulations of child pornography. *New York v. Ferber*, 458 U.S. 747, 756 (1982). The Supreme Court has "sustained legislation aimed at protecting the physical and well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757. Given the nature of the evils that anti-child pornography laws are intended to prevent, the CPPA can easily be deemed a content-neutral regulation. For even if no children are involved in the production of sexually explicit materials, the devastating secondary effect that such materials have on society and the well-being of children merits the regulation of such images.

Plaintiffs' contention that the CPPA is content-specific is unpersuasive. They claim that the terms of the CPPA clearly target materials that convey certain

ideas to their viewers. The Court finds that the CPPA is designed to counteract the *effect* that such materials has on its viewers, on children, and to society as a whole, and is not intended to regulate or outlaw the ideas themselves. If child pornography is targeted by the regulation, it is due to the effect of the pornography on innocent children, not to the nature of the materials themselves, *especially* if that pornography contains computer-generated images of children. *See, e.g., Am. Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994) (legislation requiring producers of sexually explicit material to document the names and ages of the persons portrayed was content-neutral, as it was intended "not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography"); *Chesapeake B&M, Inc., v. Hartford County*, 58 F.3d 1005, 1010 (4th Cir.), *cert denied*, 116 S. Ct. 567 (1995).

According to the Supreme Court, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting Sys., Inc. v. Fed. Communications Comm'n*, 117 S. Ct. 1174, 1186 (1997).

The CPPA clearly advances important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created. It is beyond debate that the protection of children from sexual exploitation is an important government interest; indeed, the Supreme Court has deemed the

protection of the physical and psychological well-being of minors to be a "compelling" interest. *Ferber*, 458 U.S. at 756-7; *see also* Sen. Rep. at 9 (There is a "compelling governmental interest [in prohibiting] all forms of child pornography.") Furthermore, the CPPA burdens no more speech than necessary in order to protect children from the harms of child pornography. As stated aforesaid, the CPPA specifically defines "sexually explicit conduct" as "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2). It also defines "child pornography" as any visual depiction of sexually explicit conduct where the production involves the actual use of minors engaging in such conduct, the depiction is or appears to be of a minor engaging in such conduct, the depiction has been created, adapted, or modified to appear that a minor is engaging in such conduct, or the depiction is advertised, presented or promoted in such a way as to convey the impression that a minor is engaging in such conduct. 18 U.S.C. § 2256(8). Although there may be a degree of ambiguity in the phrase "appears to be a minor," any ambiguity regarding whether a particular person depicted in a particular work appears to be over the age of eighteen can be resolved by examining whether the work was marketed and advertised as child pornography. Given that the goal of the CPPA is to prevent the digital manipulation of images to create child pornography even when no children were actually used in the production of the material, the CPPA meets that goal by regulating the narrowest range of materials that might fall within the targeted category and including an explicit definition of

the prohibited conduct. Congress certainly intended to exclude from the CPPA's reach materials that do not involve the actual or apparent depiction of children: "[The CPPA] does not, and is not intended to, apply to a depiction produced using *adults* engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor." Sen. Rep. at 21.

The affirmative defense laid out in 18 U.S.C. § 2252A(c) limits even further the scope of the CPPA by removing from the range of criminal behavior the exact type of activity in which plaintiffs claim to engage. Plaintiffs contend that their works do not involve actual children, and that their works are not marketed or advertised as works featuring sexually explicit conduct by children. Their behavior, then, falls squarely within the category specifically set out by Congress as beyond the scope of the CPPA. The Court finds that the incidental harms laid out by the plaintiffs as support for their assertion of standing in this action do not amount to the CPPA's regulating "substantially more speech than necessary to further" the goal of preventing the dangers of child molestation and pedophilia.[22] *See Pls.' Opp. to Defs.' Mot. for Summ. Judg.* at 7-8. Although the effects of a content-neutral speech regulation may be substantial, if they are incidental and largely unavoidable, they will pass constitutional muster. *Am. Library Ass'n. v. Reno*, 33 F.3d at 87-8. Also, "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to

[22] These incidental harms include the depiction of images created within the imagination of the artist. If the images depicted are of children, albeit imaginary ones, and not of actual adults or imaginary people who unequivocally appear to be adults, then the evils associated with child pornography cannot be avoided.

render an antiobscenity law unconstitutional." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60(1989). The contested provisions of the CPPA survive the intermediate scrutiny set forth by the Supreme Court for content-neutral regulations.

The instant case is quite similar to that which the Supreme Court confronted in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Court upheld a New York statute that prohibited persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance. The Court concluded that the statute did not violate the First Amendment. According to the Court, the unprotected nature of the works involved permitted the state to prohibit the particular category of works from distribution, especially given the compelling state interest in protecting children from the harms of child pornography. 458 U.S. at 765.

The final inquiry this Court must make is whether the regulations leave open alternative channels for communication of the information at issue. Defendants contend that "plaintiffs are free to communicate any substantive message they desire, through any medium they desire, as long as they are not depicting actual or computer-generated children engaged in sexually explicit conduct." *Defs.' Mem. in Supp. of Mot. for Summ. Judg.* at 20. The Court finds this argument persuasive. Because plaintiffs allege that their materials are not produced using minor children, and that they do not market their materials so as to suggest that they are child pornography or to exploit the sexual qualities of the work as child pornography, plaintiffs should have no trouble conforming their activities to fit within the

confines of the text of the CPPA or to escape the reach of the law altogether.

C. Overbreadth and Vagueness

Plaintiffs contend that the CPPA is unconstitutionally overbroad and vague. First, regulations that prohibit constitutionally protected speech as well as activity that can legitimately be prohibited are considered to be overbroad. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Plaintiffs base their overbreadth argument on the assertion that the CPPA "impermissibly suppresses material that is protected under the First Amendment" by defining child pornography as including visual depictions of adults that appear to be minors. *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 12. In doing so, plaintiffs argue, the CPPA "bans a wide array of sexually-explicit, non-obscene material that has serious literary, artistic, political, and scientific value." *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 13. Finally, plaintiffs cite the Supreme Court's recent ruling in *Reno v. ACLU* that the governmental interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults." 1997 U.S. LEXIS 4037 at *54 (striking as unconstitutional two provisions of the Communications Decency Act of 1996 that prevent the transmission of "indecent" and "patently offensive" materials over the Internet).

The Court finds that the CPPA is not overbroad. It specifies that only materials that do not use adults and that appear to be child pornography, even if they are digitally produced, are prohibited. By plaintiffs' own admission, plaintiffs' products do not fall into these categories and are also exempt under the CPPA's affirmative defense provisions. It is highly unlikely

that the types of valuable works plaintiffs fear will be outlawed under the CPPA—depictions used by the medical profession to treat adolescent disorders, adaptations of sexual works like "Romeo and Juliet," and artistically-valued drawings and sketches of young adults engaging in passionate behavior—will be treated as "criminal contraband." As long as a work does not depict children, or what appears to be children, engaged in sexually explicit conduct as defined by the statute, and the work is not marketed as child pornography or in such a way that exploits its sexual nature as child pornography, then there is no likelihood that the work will be prohibited by the CPPA. The CPPA is not overbroad because it prohibits only those works necessary to prevent the secondary pernicious effects of child pornography from reaching minors.

Plaintiffs contend that the CPPA is also unconstitutionally vague because it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). However, the CPPA does exactly what the Supreme Court has required of child pornography legislation as set out in *Ferber*: it must (1) adequately define the prohibited conduct; (2) be limited to visual depictions of children below a specific age; and (3) suitably limit and describe the category of forbidden "sexual conduct." 458 U.S. at 764. The CPPA clearly and specifically defines the prohibited conduct as the depiction of children—engaged in sexually explicit conduct. It is limited to visual depictions of minors, but simply redefines the term "depiction" to include images of children that were produced using computers or other artificial means. Finally, it suitably limits and

describes the category of forbidden conduct. As long as the person portrayed in the work is an adult, and the work is not marketed or advertised as child pornography and does not convey the impression that it is child pornography, then the CPPA's affirmative defense applies and removes the work from the scope of its provisions. The Court finds that the CPPA is not unconstitutionally vague, as it gives sufficient guidance to a person of reasonable intelligence as to what it prohibits.[23]

D. Prior Restraint

Plaintiffs contend that the CPPA imposes a prior restraint on speech by enacting a complete ban on material that contains sexually-explicit depictions of adults who appear to be minors and by chilling the expression of "artists, photographers, film makers, publishers, and merchants" by preventing them from disseminating such depictions. Plaintiffs also contend that the CPPA places unbridled discretion in the hands of government officials and deals an unnecessarily severe punishment for an incorrect determination of whether an adult appears to be a minor. The Court agrees with defendants that the CPPA neither completely bans depictions of adults who appear to be minors nor punishes producers or distributors who create works in which adults appear who might be mistaken as minors. Indeed, the affirmative defense laid out in 18 U.S.C. § 2252A(c) clearly permits the use

[23] For examples of other cases that have upheld similarly worded child pornography statutes against vagueness challenges, *see, e.g., U.S. v. Smith*, 795 F.2d 841 (9th Cir. 1986), *cert. denied*, 481 U.S. 1032 (1987); *U.S. v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996).

of adults, even if they look like minors, as long as the works in which they appear are not marketed as child pornography. In addition, "[n]o government official is vested with authority to permit or deny plaintiffs the right to produce these works, and thus the [CPPA] imposes no unconstitutional prior restraint on speech." *Defs.' Opp. to Pls.' Mot. for Summ. Judg.* at 17-18. The CPPA represents no more of a prior restraint on speech than the New York statute at issue in *Ferber*, and the CPPA comes within the rationale of the Supreme Court's holding in that case. Because the CPPA does not require advance approval for production or distribution of adult pornography that does not use minors, and does not effect a complete ban on constitutionally protected material, it does not constitute an improper prior restraint on speech.

IV. CONCLUSION

Therefore, this court finds that the CPPA meets constitutional standards and is therefore constitutional as written. For the foregoing reasons, plaintiffs' motion for summary judgment is hereby DENIED. Defendants' motion for judgment on the pleadings is GRANTED.

IT IS SO ORDERED.

Dated: August 12, 1997.

/s/ SAMUEL CONTI
United States District
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-0281 SC

THE FREE SPEECH COALITION, ET AL., PLAINTIFFS

v.

JANET RENO, ET AL., DEFENDANTS

[Filed: Aug. 12, 1997]

JUDGMENT

In accordance with the Order granting defendants' motion for judgment on the pleadings, it is hereby ordered, adjudged, and decreed that judgment be entered in favor of defendants and against plaintiffs.

IT IS SO ORDERED.

Dated: August 12, 1997.

/s/ SAMUEL CONTI
United States District
Judge

APPENDIX E

1. Section 2251 Note of Title 18 of the United States Code states in pertinent part as follows:

CONGRESSIONAL FINDINGS

Pub. L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121, subsec. 1], Sept. 30, 1996, 110 Stat. 3009-26, provided that: "Congress finds that—

"(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

"(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

"(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity;

"(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse

or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

"(5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

"(6) computers and computer imaging technology can be used to—

"(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

"(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

"(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

"(7) the creation of distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexu-

ally explicit conduct can haunt the minor for years to come;

"(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

"(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

"(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear danger to all children; and

"(B) it 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 exploitatoin of actual children who are victimized as a result of the existence and use of these materials;

"(11)(A) the sexualizatoin and eroticization of minors through any form of child pornographic images has a deleteroius effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitatoin of them; and

"(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of them; and

"(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

"(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct."

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs[1] (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq], chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq], chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraphs[1] (1), (2), (3), or (4) of subsection (a) that—

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[1] So in original. Probably should be "paragraph".

[1] So in original. Probably should be "paragraph".

(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.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

* * * * *

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

* * * * *

(8) "child pornography" means any 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—

(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; and

* * * * *