

# DO YOU KNOW IT WHEN YOU SEE IT? USING ALASKA'S CHILD PORNOGRAPHY STATUTE AS A NATIONWIDE MODEL FOR PROSCRIBING MORPHED IMAGES

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## ABSTRACT

*In 1982, the United States Supreme Court addressed the tension between free speech and protecting children by holding child pornography outside the scope of First Amendment protections. Critical to the Court's decision was the fact that child sexual abuse is necessary to produce child pornography. But what if technological advancement removed child abuse from the equation? The recent phenomena of virtual child pornography and morphed images involve the digital alteration of adult pornography to create the appearance of child pornography. The Alaska legislature amended its child pornography statute in response to these developments, proscribing the possession of morphed images. While the federal government has attempted to regulate this digitally altered child pornography, the majority of states aside from Alaska remain silent on the issue.*

*This Note explores the relationship between free speech jurisprudence and the harm that morphed images pose to children, arguing that Alaska's child pornography statute is a promising model for other states to address the threat that digital child pornography poses. However, this Note concludes that pornographic material must be intrinsically related to child abuse to justify its prohibition. Accordingly, this Note argues that while a state statutory ban on materials that rely exclusively on digital doctored is likely*

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*unconstitutional, the Alaska statute prohibiting pornographic images that involve the digital editing of an identifiable child's face onto an adult's body is constitutional. Other states should thus follow Alaska's example and enact a statutory ban on morphed images to ensure efforts to protect children keep pace with technological advancement.*

## I. INTRODUCTION

In December 2016, a federal court sentenced Petersburg resident Marvin Mitchell Jackson to five years in prison for the transportation of child pornography.<sup>1</sup> The sentencing judge highlighted the severity of Jackson's crime, noting the "devastating" impact the images could have on their subjects.<sup>2</sup> When it comes to child pornography, this assertion is relatively non-controversial: courts have long justified prohibitions on its possession because child pornography and child sex abuse are "intrinsically related."<sup>3</sup>

However, Jackson's conduct differs from traditional child pornography in that the materials he possessed did not depict an actual child engaged in sexually explicit conduct.<sup>4</sup> Rather, Jackson used digital editing software to manipulate the innocent images of children—taken from Facebook—to create the appearance of sexually explicit conduct.<sup>5</sup> Under federal law, the possession of these "morphed" images—images where the face of an identifiable child has been digitally inserted onto a sexually explicit image of an adult—is a crime.<sup>6</sup> Alaska similarly proscribes the possession of these images at the state level.<sup>7</sup>

But in the majority of states, Jackson would not have committed a crime.<sup>8</sup> Despite the ease with which a tech-savvy individual can digitally alter material to create the appearance of child pornography, state laws have yet to catch up.<sup>9</sup> This digitally altered child pornography typically falls into two categories: either morphed child pornography, known as morphed images, where an innocent picture of a child's face is digitally

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1. Press Release, U.S. Attorney's Office, District of Alaska, Petersburg Man Sentenced to Federal Prison for Transportation of Child Pornography (Dec. 21, 2016), <https://www.justice.gov/usao-ak/pr/petersburg-man-sentenced-federal-prison-transportation-child-pornography>.

2. *Id.*

3. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

4. *See* Press Release, U.S. Attorney's Office, *supra* note 1.

5. *Id.*

6. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 and 34 U.S.C.).

7. ALASKA STAT. § 11.61.127(a) (2021).

8. *See infra* note 148.

9. *See infra* note 148.

superimposed onto a sexually explicit image of an adult, or virtual child pornography, which refers to entirely computer-generated images intended to depict children engaging in sexually explicit activity.<sup>10</sup>

The technological ability to create realistic-looking morphed and virtual child pornography poses the risk that the ordinary viewer cannot distinguish digitally altered child pornography from that which is real.<sup>11</sup>

The proliferation of morphed and virtual child pornography highlights an important gap in state child exploitation legislation: one which Alaska has remedied. In 2010, the Alaska legislature passed an amendment to the child pornography statute to criminalize the possession of sexually explicit materials that portray either an actual minor or a *depiction* of a part of a minor that has been manipulated to make it *appear* that the minor is engaging in the sexually explicit conduct.<sup>12</sup> Had state police caught wind of Jackson's conduct before the federal officers, the Alaska statutes would empower state prosecutors to criminally charge him for the possession of morphed images. Accordingly, for states seeking to proactively address the possession of morphed images through statute, Alaska provides a promising model.

But there is a constitutional catch. The countervailing state interest in protecting free speech limits the extent to which Alaska and other states can regulate morphed and virtual child pornography.<sup>13</sup> Congressional efforts to proscribe such pornography at the federal level illustrate the thorny constitutional territory that the issue presents. In 1996, Congress passed the Child Pornography Prevention Act (CPPA), which proscribed both morphed images depicting an identifiable child and virtual child pornography.<sup>14</sup> The United States Supreme Court then struck down the virtual child pornography provision of the CPPA on First Amendment grounds in 2002, declining to analyze the constitutional viability of banning morphed images.<sup>15</sup> The following year, Congress passed revised legislation proscribing pornography "indistinguishable" from non-doctored images of child sexual abuse, again extending the reach of its child pornography statute to highly sophisticated virtual child

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10. S. REP. NO. 108-2, at 4-5 (2003); *see* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26-31 (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256) (noting Congress's findings that new technology makes it easier to alter images and makes it difficult to determine if they were made using actual children).

11. S. REP. NO. 108-2, at 5 (2003).

12. ALASKA STAT. § 11.61.127(a) (2021).

13. *See* ALASKA CONST. art. I, § 5 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.").

14. Child Pornography Prevention Act of 1996 § 121 (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256).

15. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234, 242, 258 (2002).

pornography.<sup>16</sup> As of October 2021, the revised virtual child pornography provisions had not been challenged in federal court. While several circuits have weighed in on the morphed images provision, none have struck it down and the Supreme Court has yet to grant certiorari on the issue.<sup>17</sup>

Despite the federal prohibition on morphed and virtual child pornography, both remain legal under the laws of several states.<sup>18</sup> Although states have a compelling interest in protecting children, they must legislate within the bounds of the First Amendment. Because the state interest in protecting children both necessitates and justifies a prohibition on morphed images, such a prohibition is likely within the bounds of the First Amendment. However, given the tenuous constitutional viability of a statute proscribing virtual child pornography, state-level regulation of virtual images is unwise at this juncture.

This Note begins in Part II by detailing the current legal landscape surrounding the regulation of morphed images and virtual child pornography. Because state-level legislation necessarily must comply with the federal constitution, a significant portion of the legal background involves federal law.<sup>19</sup> Part III analyzes the constitutional viability of state legislation proscribing morphed images, arguing that Alaska's statutory prohibition comports with the First Amendment. By explaining the cognizable harms that morphed images pose to children, Part III further advocates for states without an explicit statutory ban on morphed images to adopt legislation analogous to Alaska's. Part IV then explores both whether Alaska should proscribe virtual child pornography from a policy perspective and whether it could do so without encroaching on First Amendment protections. Ultimately, this Note concludes that Alaska's interests in protecting children constitutionally justify the state prohibition on the possession of morphed images. Accordingly, other states should model prohibitions on morphed children pornography after Alaska's statute. Although the relationship between child abuse and purely virtual child pornography is currently too attenuated to justify intruding on speech, this Note does not foreclose the possibility that future research and technological developments might later justify a ban on virtual child pornography that could survive strict scrutiny review.

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16. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, §§ 501-504, 117 Stat. 650, 676-682 (codified as amended at 18 U.S.C. §§ 2252, 2256, 1466).

17. See *infra* Section II.F.1; *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

18. See *infra* Section II.F.2.

19. The standards for evaluating restrictions on speech under the Alaska Constitution are the same as for evaluating restrictions under the federal constitution. See *infra* Part II.A.

## II. THE LIMITS ON REGULATING CHILD PORNOGRAPHY

In 1982, the United States Supreme Court held that child pornography produced using an actual child constituted unprotected speech, explaining that the governmental interest in protecting children from abuse justified excluding child pornography from the First Amendment's ambit.<sup>20</sup> Since then, Congress has passed and amended several statutes criminalizing the possession of child pornography. In 1996, Congress enacted a statute intended to regulate the possession of virtual child pornography.<sup>21</sup> The Supreme Court, however, struck down the statute as unconstitutional on First Amendment grounds, but left open whether different circumstances could ever justify a ban on virtual child pornography.<sup>22</sup>

This Part begins with an overview of First Amendment jurisprudence on child pornography regulations, explaining how the Supreme Court has addressed the tension between the need to protect children and the constitutional free speech prerogative. This Part then discusses the federal regulation landscape of virtual child pornography, focusing on the Supreme Court's reasoning in *Ashcroft v. Free Speech Coalition* that the relationship between virtual child pornography and child abuse is too tenuous to justify curtailing speech.<sup>23</sup> Likewise, this Part examines how the Alaska courts and legislature have regulated child pornography, noting that only morphed images have been criminalized.

Finally, this Part distinguishes morphed images from virtual child pornography from a constitutional perspective, discussing how federal and state courts' analyses of regulations on morphed images suggest that morphed images present a tangible threat to children. Accordingly, while the Supreme Court declined to find that virtual child pornography harms children, lower courts have found that the harms morphed images pose to children can justify their prohibition.

### A. The First Amendment

The First Amendment to the United States Constitution provides,

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20. *New York v. Ferber*, 458 U.S. 747, 748 (1982).

21. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26-31 (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256).

22. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253-54 (2002) ("Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.").

23. *Id.* at 256.

“Congress shall make no law . . . abridging the freedom of speech.”<sup>24</sup> Article I, section 5 of the Alaska Constitution guarantees “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”<sup>25</sup> Both the United States and Alaska Supreme Courts analyze content-based restrictions on speech under strict scrutiny, requiring that the contested rule or regulation be “narrowly tailored to promote a compelling governmental interest” and “the least restrictive means available to vindicate that interest.”<sup>26</sup>

Although content-based restrictions typically trigger strict scrutiny under the First Amendment, the United States Supreme Court has held that certain distinct categories of speech, such as obscenity and child pornography, constitute unprotected speech that the government can permissibly restrict without triggering any First Amendment protections.<sup>27</sup> The Alaska Supreme Court has similarly held obscenity to be outside the scope of protected speech.<sup>28</sup>

## B. Child Pornography Prohibitions in the Twentieth Century

Prior to 2002, the legal doctrine surrounding the prohibition of child pornography was relatively well-settled.<sup>29</sup> Legislators originally relied on the obscenity doctrine—which excluded the category of obscene speech from the scope of the First Amendment—to regulate child pornography.<sup>30</sup> In 1982, the Supreme Court held that child pornography was a distinct category of unprotected speech, allowing states to proscribe its distribution regardless of whether the material is obscene.<sup>31</sup>

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24. U.S. CONST. amend. I.

25. ALASKA CONST. art. I, § 5.

26. *Club SinRock, LLC v. Mun. of Anchorage*, 445 P.3d 1031, 1038 (Alaska 2019) (citing *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 206–07 (Alaska 2007)); see also *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying the same “narrowly drawn” standard to content-based restrictions on speech). Both Alaska and federal law consider restrictions on sexually explicit conduct to be content-based. See *Club SinRock*, 445 P.3d at 1038; *Sable*, 492 U.S. at 126.

27. See *Miller v. California*, 413 U.S. 15, 20 (1973) (holding obscenity is unprotected speech); *New York v. Ferber*, 458 U.S. 747, 748 (1982) (holding child pornography is unprotected speech).

28. *Marks v. City of Anchorage*, 500 P.2d 644, 647 (Alaska 1972).

29. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240, 258 (2002) (striking down virtual child pornography provision of the Child Pornography Prevention Act on First Amendment grounds and explaining that *Miller* and *Ferber* are the applicable standards to analyze regulations on pornography).

30. See *Miller*, 413 U.S. at 21; *Ferber*, 458 U.S. at 753 (“The Court of Appeals proceeded on the assumption that . . . obscenity . . . constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography.”).

31. *Ferber*, 458 U.S. at 764.

### 1. *Obscenity is Unprotected Speech*

The Supreme Court has consistently held that First Amendment protections do not extend to obscene speech,<sup>32</sup> which it defines as “material which deals with sex in a manner appealing to prurient interest.”<sup>33</sup> In *Miller v. California*,<sup>34</sup> the Court attempted to promulgate precise standards for what constituted obscenity, reaffirming its categorical holding in *Roth v. United States*<sup>35</sup> that obscenity is unprotected speech.<sup>36</sup> Acknowledging the need for states to tread carefully when regulating speech, the Court required that for speech to be obscene, the trier of fact must find:

- (a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>37</sup>

Thus, in the wake of *Miller*, the government could only proscribe child pornography if it satisfied the three-pronged *Miller* test.

### 2. *Child Pornography is Unprotected Speech*

The Court declined to apply the *Miller* obscenity standard to a state statute proscribing child pornography in *New York v. Ferber*,<sup>38</sup> choosing instead to fashion a First Amendment carveout to reflect the State’s uniquely compelling interest in protecting children.<sup>39</sup> At issue in *Ferber* was a New York statute that prohibited knowingly “produc[ing], direct[ing] or promot[ing] any performance which includes sexual conduct by a child less than sixteen years of age.”<sup>40</sup>

Upholding the statute against a First Amendment challenge, the Court emphasized that child pornography is “intrinsically related to the

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32. See *Roth v. United States*, 354 U.S. 476, 484–85 (1957) (reasoning that obscenity had no “redeeming social importance” and there was a “universal judgment that obscenity should be restrained”).

33. *Id.* at 487.

34. 413 U.S. 15 (1973).

35. See *Roth*, 354 U.S. at 484–85 (holding “obscenity is not within the area of constitutionally protected speech or press”).

36. *Miller*, 413 U.S. at 23.

37. *Id.* at 24 (internal quotations omitted).

38. 458 U.S. 747, 753 (1982).

39. See *id.* at 755–56 (holding that, like for obscenity statutes, “states are entitled to greater leeway in the regulation of pornographic depictions of children”).

40. *Id.* at 751. The statutory definition of “promote” encompassed distribution. *Id.*

sexual abuse of children.”<sup>41</sup> The Court explained that while the child abuse involved in child pornography occurs at the time of production, the distribution of child pornography furthers this abuse in two ways.<sup>42</sup> First, distribution immortalizes the sexual abuse of the child, perpetuating the consequent harm long after production has occurred.<sup>43</sup> Second, proscribing distribution is necessary to curtail production by “dry[ing] up the market” for such materials.<sup>44</sup>

Although *Ferber* presented the more limited question of whether a state could proscribe the distribution of child pornography, the Court extended its holding to possession in *Osborne v. Ohio*.<sup>45</sup> The Court found that the State’s interest in protecting children justified criminalizing possession in order to dry up the market for child pornography and “stamp out this vice at all levels of the distribution chain.”<sup>46</sup>

### C. The Court Addresses Virtual Child Pornography: *Ashcroft v. Free Speech Coalition*

Despite the categorical exclusion of obscenity and child pornography from First Amendment protection, courts have been reluctant to stretch the boundaries of First Amendment jurisprudence by extending *Ferber* or *Osborne* to scenarios where the match between statutory prohibitions and the state interest asserted is less precise. In the case of virtual child pornography, where no actual child is used to create the material, the line between protecting children and encroaching on free speech begins to blur.

#### 1. Federal Law and the Child Pornography Protection Act of 1996

The 1984 Child Protection Act (CPA) marked the first federal prohibition on the possession of child pornography.<sup>47</sup> Congress had previously passed the Protection of Children Against Sexual Exploitation Act in 1977, which prohibited the distribution of obscene child pornography.<sup>48</sup> However, following the Supreme Court’s holding in

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41. *Id.* at 759.

42. *Id.*

43. *Id.*

44. *Id.* at 759–60.

45. 495 U.S. 103, 110 (1990).

46. Compare *Ferber*, 458 U.S. at 760 (finding that prohibiting distribution of child pornography helped dry up the market for those materials), with *Osborne*, 495 U.S. at 110 (finding that criminalizing possession helped to dry up market).

47. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2254).

48. Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2423, 2251–2253).

*Ferber* that Congress could permissibly regulate private possession of child pornography, the CPA both eliminated the requirement that child pornography be obscene and extended the prohibition on child pornography to its possession.<sup>49</sup>

Responding to concerns that the development of new technology allowed “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,” Congress enacted the Child Pornography Prevention Act (CPPA) in 1996.<sup>50</sup> The statute amended the federal child pornography statute to define child pornography as:

any visual depiction . . . of sexually explicit conduct, where . . . such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct; [or] such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.<sup>51</sup>

The statute defined an “identifiable minor” to include both real minors who were underage at the time the depiction was “created, adapted, or modified,” and those who were “recognizable as an actual person” and had a visual depiction of them as a minor altered to create the visual depiction at issue.<sup>52</sup>

The legislative findings advanced three reasons why virtual child pornography posed distinct harms to children.<sup>53</sup> First, adults may use virtual images to coerce actual children into engaging in sexual conduct with them.<sup>54</sup> Second, because sexual abusers use child pornography to “whet their . . . sexual appetites,” the proliferation of virtual pornographic materials may “inflame[] the desire[] of child molesters, pedophiles, and child pornographers who prey on children,” in turn increasing the demand for child pornography and heightening the risk of sexual abuse.<sup>55</sup> Finally, the existence of child pornography as content, regardless of whether an actual child was used, harms children by

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49. Child Protection Act of 1984 § 4.

50. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26-31 (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256).

51. *Id.* (emphasis added).

52. 18 U.S.C. § 2256(9). The “identifiable minor” provisions of the CPPA and the current statute are identical. *Compare id.*, with Child Pornography Prevention Act § 121.

53. See S. REP. No. 104-358, at 2 (1996).

54. *Id.*

55. *Id.*

characterizing them as sexual objects in the social psyche.<sup>56</sup>

## 2. A Constitutional Challenge

The United States Supreme Court then confronted whether the CPPA's prohibition on virtual child pornography violated the First Amendment in *Ashcroft v. Free Speech Coalition*. The Free Speech Coalition<sup>57</sup> mounted a facial challenge to 18 U.S.C. § 2256(8)(B) and (D), arguing that the statute prohibiting the possession and pandering of virtual child pornography was both vague and overbroad.<sup>58</sup>

The Court held that the purported harm that virtual child pornography posed to children did not justify the CPPA's intrusion on speech.<sup>59</sup> The Court first analyzed the CPPA under *Miller* and *Ferber* to ascertain whether virtual child pornography constituted either obscenity or child pornography, which would render it unprotected speech.<sup>60</sup> Finding that virtual child pornography constituted neither, the Court then evaluated the substantive provisions of the CPPA under strict scrutiny, ultimately concluding that the statute was not narrowly tailored to the government's interest in preventing child sex abuse.<sup>61</sup>

The Court began its analysis by determining whether the CPPA fit under the *Miller* definition of obscenity, noting that the government cannot prohibit speech simply because it "offend[s] our sensibilities."<sup>62</sup> In that vein, the Court determined that the reach of the CPPA expanded beyond the circumscribed categories of *Miller*.<sup>63</sup> Unlike obscene speech, which must appeal to the "prurient interest," materials that the CPPA covers could be benign, such as "a picture in a psychology manual, [or] a movie depicting the horrors of sexual abuse."<sup>64</sup>

Next, differentiating the CPPA from the statute at issue in *Ferber*, the Court reasoned that virtual child pornography is distinct from traditional child pornography.<sup>65</sup> Although the dissemination of traditional child

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56. *Id.*

57. The Free Speech Coalition is a "non-profit trade association for the adult industry." FREE SPEECH COALITION, <https://www.freespeechcoalition.com> (last visited Apr. 23, 2021).

58. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002). The Court noted that the Free Speech Coalition did not raise a challenge to § 2256(8)(C), which covers morphed images, and did not consider its constitutionality. *Id.* at 242.

59. *Id.* at 241–42, 246.

60. *Id.* at 240.

61. *Id.* at 240, 256, 258; *see State v. Zidel*, 940 A.2d 255, 260 (N.H. 2008) (noting that while not explicit, the Court applied strict scrutiny to analyze the CPPA in *Ashcroft*).

62. *Ashcroft*, 535 U.S. at 245–46.

63. *Id.*

64. *Id.* at 246.

65. *Id.* at 250.

pornography is “intrinsically related” to child sex abuse, the relationship between virtual images and sex abuse is more attenuated.<sup>66</sup> Unlike materials that showcase actual children, virtual child pornography, in the Court’s view, victimizes no one.<sup>67</sup> The Court thus rejected the Government’s argument that virtual child pornography increases the likelihood of child sex abuse, emphasizing how the First Amendment counsels against criminalizing speech simply because it “increases the chance an unlawful act will be committed at some indefinite future time.”<sup>68</sup>

While concluding that the Government failed to demonstrate a sufficient link between virtual child pornography and child abuse, the Court did not explicitly close the door on the argument that one could arise.<sup>69</sup> Instead, the Court ended its analysis with a determination that the Government failed to introduce evidence of a “significantly stronger, more direct connection” between the speech and the harm.<sup>70</sup>

The Court’s reasoning in *Ashcroft* carries two key implications for future legislation. First, the decision emphasizes that although virtual child pornography does not constitute a per se exception to the First Amendment, legislation narrowly tailored to preventing child sex abuse may survive a First Amendment challenge.<sup>71</sup>

Second, for legislators to effectively regulate virtual child pornography, they must come to terms with the ultimate policy determination driving the *Ashcroft* decision: the government’s interests in regulating virtual child pornography are inherently distinct from those implicated by real child pornography.<sup>72</sup> The *Ferber* Court premised its determination that child pornography was unprotected speech not on the substantive content of the speech, but rather on how it was produced.<sup>73</sup> No matter how problematic virtual child pornography may be, it does not derive from child sex abuse. Accordingly, trying to fit regulation of virtual child pornography under the *Ferber* umbrella is unlikely to succeed.

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66. *Id.* at 249–50.

67. *Id.* at 250.

68. *Id.* at 253 (internal quotations omitted).

69. *Id.*

70. *Id.*

71. *See id.* at 265 (O’Connor, J., concurring in part and dissenting in part).

72. *Id.* at 250 (“In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.”).

73. *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

#### D. The Uncertain Footing of Virtual Child Pornography in Federal Law

Despite the Court's holding in *Ashcroft*, Congress's 2003 passage of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act ("PROTECT Act") revived the issue of whether virtual child pornography and morphed images ought to be federally banned.<sup>74</sup> This Section dissects the language of the PROTECT Act with a focus on its similarity to the CPPA to outline the current state of federal law on child pornography.

Although *Ashcroft* unambiguously held that certain provisions of the CPPA were unconstitutional restrictions of speech, the Court did not sound the death knell of the regulation of all digitally created child pornography.<sup>75</sup> A year after the Supreme Court handed down the *Ashcroft* decision, Congress passed the PROTECT Act, which parallels the CPPA in several ways. Like the CPPA, the PROTECT Act prohibits receiving, distributing, or possessing child pornography.<sup>76</sup> To define child pornography, the legislation retains two provisions verbatim from the CPPA that the Court did not renounce in *Ashcroft*: the definition of child pornography as depicting an actual child, and the definition of child pornography that encompasses the use of a visual depiction that has been altered to appear as though an identifiable minor is engaging in sexual activity.<sup>77</sup>

However, the PROTECT Act includes one notable change to the language of one of the CPPA's provisions that the Court took issue with. The updated language of 18 U.S.C. § 2256(8)(B) defines child pornography as "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."<sup>78</sup> Rather than requiring the digitally created image be "indistinguishable from" traditional child pornography, the CPPA included any digital image that "appears to be" depicting a minor engaging in explicit conduct.<sup>79</sup>

Although the Supreme Court has upheld the constitutionality of a separate provision of the Act as applied to a *distributor* of virtual child

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74. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 and 34 U.S.C.).

75. See 18 U.S.C. §§ 2252, 2256.

76. *Id.* § 2252A.

77. See *id.* § 2256(8)(B).

78. *Id.* (emphasis added).

79. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26-31 (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256).

pornography,<sup>80</sup> it has yet to hear a First Amendment challenge to the updated statutory language regulating possession. Given the Court's determination in *Ashcroft* that virtual child pornography did not pose a policy problem sufficient to justify curtailing speech, it is unlikely the language of the PROTECT Act cures this overbreadth.<sup>81</sup>

The PROTECT Act and the CPPA represent Congress's efforts to address the fact that technology is at a point where it is virtually impossible to distinguish between images that depict real children and those that are computer renderings.<sup>82</sup> Under the PROTECT Act, what happens to defendants who genuinely do not know what type of child pornography they possess?

In *United States v. X-Citement Video, Inc.*,<sup>83</sup> the Court interpreted the mens rea provision of the PROTECT Act, which imposes a "knowingly" requirement, to apply to whether the images depicted a minor.<sup>84</sup> Although the Court admitted that, under the most natural reading of the statute, the mens rea provision would modify only the immediately preceding verbs, criminal law interpretive principles counseled in favor of "interpreting criminal statutes to include broadly applicable scienter requirements."<sup>85</sup> Although *X-Citement Video* only addressed the portion of the PROTECT Act that covered receipt and distribution, courts have applied its holding to possession as well.<sup>86</sup>

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80. *United States v. Williams*, 553 U.S. 285, 293 (2008). The pandering provision of the PROTECT Act has applicability to virtual child pornography. *Id.* However, this provision only proscribes a narrow class of virtual child pornography: that which is pandered as actual child pornography. *Id.* at 303-04. Because the provision is both limited in scope and applies only to distribution of pornography, not mere possession, *id.* at 293, this Note does not discuss it. There are several pieces of scholarship that discuss the pandering provision at length. See, e.g., Rosalind E. Bell, *Reconciling the PROTECT Act with the First Amendment*, 87 N.Y.U. L. REV. 1879, 1907-08 (2012).

81. See *infra* Section III.B (discussing whether state statutory ban on virtual child pornography could satisfy strict scrutiny).

82. AJ Dellinger, *How to Spot a Photoshopped Picture*, MIC (Aug. 30, 2019), <https://www.mic.com/impact/photoshopped-images-can-be-hard-to-spot-heres-how-to-tell-real-fake-apart-18688498>; see Dan Patterson, *From Deepfake to "Cheap Fake," It's Getting Harder to Tell What's True on Your Favorite Apps and Websites*, CBS NEWS (June 13, 2019, 8:15 PM), <https://www.cbsnews.com/news/what-are-deepfakes-how-to-tell-if-video-is-fake/> ("These days, tech firms, media companies and consumers are all routinely forced to make determinations about whether content is authentic or fake—and it's increasingly hard to tell the difference.").

83. 513 U.S. 64 (1994).

84. *Id.* at 78.

85. *Id.* at 68, 70.

86. See, e.g., *United States v. Davis*, 41 F. App'x 566, 572 (3d Cir. 2002) (requiring knowledge that an image depicts an actual minor to impose liability under § 2252A); *United States v. Payne*, MO-00-CR-107, 2000 WL 33348782, at \*1 (W.D. Tex. Nov. 8, 2000) ("While the statute before the Court is 2252A, not 2252(a),

In contrast, the legislative history behind the PROTECT Act unambiguously indicates Congress's intent to eliminate a mens rea requirement with respect to whether the pornographic images depicted a real minor.<sup>87</sup> The related 2003 Senate Report establishes that the government's burden is only "(1) that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor; and (2) that the image depicts 'sexually explicit conduct' as defined in S 2256(2)(B)."<sup>88</sup> Consequently, the mens rea requirement for the current statute likely does not extend to the objective age of minority.<sup>89</sup> Courts have left open, however, whether knowledge that pornography depicts a real child is a constitutional requirement or an issue of statutory interpretation.<sup>90</sup> This issue will dovetail with the constitutionality of banning virtual child pornography in the first instance.<sup>91</sup> Ultimately, in the wake of *Ashcroft*, several provisions of current federal law remain on unstable footing.

### E. Alaska Law Permits Virtual Child Pornography and Bans Morphed Images

Unlike federal laws, the Alaska statutes do not cover purely virtual child pornography. However, Alaska statutorily prohibits the knowing

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this Court believes that the two statutes are similar enough that the knowledge requirement . . . is equally applicable to 2252A . . .").

87. S. REP. NO. 108-2, at 8 (2003).

88. *Id.*

89. *See X-Citement Video*, 513 U.S. at 75 ("To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved.") (internal quotations omitted).

90. *See, e.g., Commonwealth v. Kennev*, 874 N.E.2d 1089, 1098, 1103 (Mass. 2007) (finding that a mens rea requirement that a possessor of child pornography "knows or reasonably should know [the child] to be under the age of 18" was not constitutionally overbroad); *Ferrick v. State*, 217 P.3d 418, 421 (Alaska Ct. App. 2009) (interpreting Alaska's child pornography statute to require knowledge that the pornography depicted a real child).

91. Due process generally requires that the government affirmatively prove the elements of a crime. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). If a ban on virtual child pornography is unconstitutional, a mens rea requirement as to the age of the subject less than actual knowledge would allow the government to secure a conviction without ever proving that a real child was used. The Alaska Court of Appeals has interpreted its statute to require knowledge of the real nature of the materials, because a government conviction based on an "aware[ness] of a substantial probability" that the materials depicted real children could punish conduct outside the scope of the criminal law. *See Ferrick*, 217 P.3d at 421. Thus, whether the state can punish the awareness of a substantial probability that the materials were real child pornography turns on whether the state can punish possession of virtual child pornography.

possession of child pornography, including morphed images. Section 11.61.127(a) of the Alaska Statutes states:

A person commits the crime of possession of child pornography if the person knowingly possesses or knowingly accesses on a computer with intent to view any material that visually depicts conduct described in AS 11.41.455(a) knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct or a depiction of a part of an actual child under 18 years of age who, by manipulation, creation, or modification, appears to be engaged in the conduct.<sup>92</sup>

The exploitation of a minor statute, section 11.41.455(a) of the Alaska Statutes, states:

A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct listed in (1)-(7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct.<sup>93</sup>

Alaska amended the child pornography statute in 2010 to include the provision proscribing morphed images.<sup>94</sup> As amended, the statutory text expands the definition of child pornography to cover the digital alteration of a non-pornographic image of an actual child to make it appear that the actual child is engaged in sexual conduct.<sup>95</sup> To prosecute an individual for the possession of morphed images, the government is not required to prove the identity of the depicted minor.<sup>96</sup>

Prior to the amendment, the Alaska Court of Appeals interpreted the statute to only apply to materials that depict actual minors.<sup>97</sup> Reading the statute in light of *Ashcroft*, the court determined in *Ferrick v. State* that, to be liable under the statute, the defendant must have possessed “pornographic materials that were produced using real children under

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92. ALASKA STAT. § 11.61.127(a) (2021) (emphasis added).

93. *Id.* § 11.41.455(a) The prohibited conduct referenced in the statute includes sexual penetration, lewd touching, masturbation, bestiality, lewd exhibition, and sexual masochism or sadism. *Id.* § 11.41.455(a)(1)-(7).

94. 2010 Alaska Sess. Laws ch. 18 § 11.61.127.

95. ALASKA STAT. § 11.61.127(a).

96. *Id.* § 11.61.127(e).

97. *Ferrick v. State*, 217 P.3d 418, 420 (Alaska Ct. App. 2009)

the age of 18.”<sup>98</sup> In doing so, the court specifically declined to interpret that statute to include virtual child pornography.<sup>99</sup>

The court of appeals further clarified that while the government must prove a defendant committed the proscribed act to impose liability, it need only show “that the defendant was aware of a ‘substantial probability’” that the materials he possessed depicted a minor.<sup>100</sup>

Specifically, in *Ferrick*, the defendant, Ferrick, challenged his child pornography possession conviction by arguing, inter alia, that section 11.61.127(a) of the Alaska Statutes covered virtual child pornography and was thus invalid under *Ashcroft*.<sup>101</sup> In support of his argument, Ferrick explained that the Alaska Statutes define “knowingly” to include either actual knowledge or an awareness that there is a high likelihood of the prohibited circumstance.<sup>102</sup> Under Ferrick’s reading, the statute would impose criminal liability on a defendant who only possessed virtual child pornography but nevertheless knew that the materials likely depicted minors.<sup>103</sup>

The court of appeals rejected Ferrick’s argument, determining that section 11.41.455(a) only referred to the exploitation of actual children.<sup>104</sup> Accordingly, because 11.61.127(a) prohibits only depictions of conduct proscribed under 11.41.455(a), the actus reus requirement in the latter statute cabins the crime of possession to materials produced using actual children.<sup>105</sup> The court accordingly interpreted 11.61.127(a) to require knowledge as to what renders the conduct criminal: that the materials depicted someone under eighteen years of age.<sup>106</sup>

While the Alaska legislature amended the child pornography statute to include morphed images the year after the court of appeals decided *Ferrick*, the court’s holding that the statute does not proscribe virtual child pornography still stands. First, the court analyzed the statute with respect to *Ashcroft*, which did not address morphed images.<sup>107</sup> Because the

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98. *Id.* at 419.

99. *Id.* (“We further conclude that Alaska’s child pornography statute does not prohibit the possession of ‘virtual’ child pornography, but rather is confined to the possession of pornography that was produced using real children.”).

100. *Id.* at 421.

101. *Id.* at 420.

102. *Id.*; see also ALASKA STAT. § 11.81.900(2) (2021) (defining knowledge as either actual knowledge of a circumstance or an “aware[ness] of a substantial probability of its existence”).

103. *Ferrick*, 217 P.3d at 421.

104. *Id.*

105. *Id.*

106. *Id.*

107. See *id.* at 421–22 (“The statute does not reach [virtual child pornography]—and, therefore, the statute conforms to the United States Supreme Court’s ruling in *Ashcroft v. Free Speech Coalition*.”). When interpreting statutes,

subsequent amendment only expanded the statute to cover images that depict “a part of an *actual* child,” the statute remains consistent with the court’s holding that the statute does not apply to virtual child pornography.<sup>108</sup> Second, the court in *Ferrick* engaged in statutory construction to determine the limited scope of conduct that the child pornography statute covered.<sup>109</sup> Accordingly, the requirement of an “actual child” limits future courts’ ability to extrapolate a ban on virtual child pornography from the statutory text.<sup>110</sup>

Thus, despite the subsequent statutory ban on morphed images, *Ferrick* remains relevant to the discussion of manipulated child pornography in two ways. First, it clarifies that the Alaska courts have not read a ban on virtual child pornography into the state’s child pornography statute.<sup>111</sup> Indeed, in the wake of *Ashcroft*, several other statutes have interpreted child pornography possession statutes similarly.<sup>112</sup> Second, the court’s discussion of the statutory scheme makes clear that the act of possessing actual child pornography is an absolute predicate for liability: an individual who possesses materials which he believes to depict real children but that are fortuitously merely virtual has not committed a crime.<sup>113</sup>

## F. Morphed Images and Real Children

The Alaska statute explicitly proscribes the possession of images

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courts tend to construe a statute “to alter the common law only when that disposition is clear.” ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318 (1st ed. 2012).

108. ALASKA STAT. § 11.61.127(a) (2021) (emphasis added). See SCALIA & GARNER, *supra* note 107 (noting that a statute will be construed to alter the common law only when “that disposition is clear”).

109. See *Ferrick*, 217 P.3d at 421 (explaining that the construction of section 11.61.127(a) as proscribing only conduct involving a real child precluded the defendant’s claims).

110. See ALASKA STAT. § 11.61.127(a) (“A person commits the crime of child pornography if the person knowingly possesses . . . any material that visually depicts conduct described in AS 11.41.455(a) knowing that the production of the material involved . . . a depiction of a part of an actual child under 18 years of age who, by manipulation, creation, or modification, appears to be engaged in the conduct.”).

111. *Ferrick*, 217 P.3d at 421.

112. See, e.g., *People v. Alexander*, 791 N.E.2d 506, 515 (Ill. 2003) (holding unconstitutional the provision of the state statute criminalizing possession of virtual child pornography); *State v. Fingal*, 666 N.W.2d 420, 424 (Minn. Ct. App. 2003) (holding the Minnesota child pornography statute only applies to possession of materials depicting an actual minor).

113. See *Ferrick*, 217 P.3d at 421 (“But AS 11.61.127(a) also requires proof of an actus reus—proof of an underlying act of possession of a certain type of pornographic materials.”).

depicting real minors that have been manipulated to appear as though the minors are engaged in sexually explicit conduct.<sup>114</sup> This prohibition was animated by the need to protect minors against the harm caused by the digital manipulation of their images.<sup>115</sup>

Despite the federal prohibition on morphed images, however, several states have yet to follow in Alaska's footsteps and codify a ban on morphed images.<sup>116</sup> Despite this inaction, the application of First Amendment principles to morphed images indicates that the state interest in protecting children justifies legislative action. This Section explores state statutory law on morphed images and discusses how federal and state courts have addressed the issue on both constitutional and statutory dimensions.

### 1. Federal Courts' First Amendment Flexibility

While the Supreme Court has yet to address directly whether a statutory prohibition on morphed images would survive strict scrutiny, the underlying interest in protecting children provides a compelling reason to intrude on speech.<sup>117</sup>

In dicta, the Court noted in *Ashcroft* that because the likeness of a real child is used in morphed images, these images "implicate the interests of real children and are in that sense closer to the images in *Ferber*."<sup>118</sup> However, the Court did not directly consider the constitutionality of the morphed images provision of the CPPA nor has it considered the analogous provision in the PROTECT Act.<sup>119</sup>

Federal courts have consistently held that prohibitions on morphed images of child pornography do not offend the First Amendment because morphed images pose an independent harm to minors.<sup>120</sup> For example, the Eighth Circuit has held that charging a defendant under 18 U.S.C. § 2256(A)(2) for the knowing receipt of an image that depicted the face of

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114. ALASKA STAT. § 11.61.127(a).

115. *An Act Relating to the Crimes of Harassment, Possession of Child Pornography, and Distribution of Indecent Material to a Minor; Relating to Suspending Imposition of Sentence and Conditions of Probation or Parole for Certain Sex Offenses; Relating to Aggravating Factors in Sentencing; Relating to Registration as a Sex Offender or Child Kidnapper; Amending Rule 16, Alaska Rules of Criminal Procedure; and Providing for an Effective Date*, HOUSE FIN. COMM. MINUTES, 26th Leg., (Apr. 12, 2010) [hereinafter *Finance Committee Minutes*] (statement of Sue MacLean, Director, Criminal Division, Department of Law at 8:23:13 AM)

116. See *infra* Section II.F.2.

117. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002) (declining to analyze whether the ban on morphed images in the CPPA was constitutional).

118. *Id.*

119. *Id.*; 18 U.S.C. § 2256(8)(B).

120. See, e.g., *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005) (holding that a morphed image of a minor's head superimposed onto another's nude body could be prosecuted consistent with the First Amendment); see also *infra* note 127.

an identifiable minor superimposed onto the nude body of another person was not inconsistent with *Ashcroft*.<sup>121</sup> In *United States v. Bach*, the court upheld the constitutionality of the statutory definition as applied to a defendant who edited an identifiable child's face onto an unidentifiable child's body, reasoning that because the image in question created a "lasting record" of the minor seemingly engaged in sexually explicit conduct, every display of the image further victimized the minor.<sup>122</sup> Later, in *United States v. Anderson*,<sup>123</sup> the Eighth Circuit reaffirmed the constitutionality of the statute, this time as applied to an image depicting a child's face edited onto an adult's body.<sup>124</sup> The court distinguished the image from *Bach*, reasoning that because the morphed image involved a minor's face inserted onto the body of an adult, there was no sexual abuse of any minor.<sup>125</sup> While the court declined to categorically exclude morphed images that depict the nude bodies of adults from First Amendment protections because of the lack of underlying crime, it determined that the continued circulation of the image harmed the child subject, satisfying strict scrutiny.<sup>126</sup> The court's reasoning in *Anderson* is important in the context of regulating morphed images because it finds morphed images harmful to children even when the images depict nude adults.<sup>127</sup>

Similarly, the Sixth Circuit has found morphed images beyond the scope of the First Amendment even when the images are not created for purposes of sexual gratification.<sup>128</sup> In *Doe v. Boland*, morphed images were

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121. *Bach*, 400 F.3d at 632. The defendant challenged the definition of child pornography in 2256(8)(C), which covers a "visual depiction that . . . [was] created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," arguing that his conduct did not involve the abuse of a minor. *Id.* at 631.

122. *Id.* at 632. The court also found it important that the nude body in the picture, although of an unidentifiable minor, nevertheless depicted a minor and thus recorded a crime. *Id.*

123. 759 F.3d 891 (8th Cir. 2014).

124. *Id.* at 892-93.

125. *Id.* at 895.

126. *Id.* at 895-96. The Second Circuit has held morphed images categorically beyond the scope of First Amendment protections, reasoning the creation of a "lasting record" constituted abuse to the minor. *United States v. Hotaling*, 634 F.3d 725, 729-30 (2d Cir. 2011). The Ninth Circuit has noted that appellate courts could find morphed images unprotected by analogizing it to child pornography, rather than "carv[ing] out a separate exception." *Shoemaker v. Taylor*, 730 F.3d 778, 787-88 (9th Cir. 2013).

127. See *Anderson*, 759 F.3d at 895 (finding that morphed images create a lasting impression of a minor "seemingly engaged in sexually explicit activity" even when the body depicted is of an adult) (internal quotations omitted).

128. *Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012). Although *Boland* was a civil suit brought by the parents of the minors depicted in the morphed images, the court still engaged in an analysis of the statute to determine whether the

created when an attorney and technology expert digitally altered non-pornographic images of identifiable minors to make the images appear to depict the minors engaging in sexually explicit activity.<sup>129</sup> The defendant created these images for a defense team to use at a federal child pornography trial to demonstrate how easily images can be manipulated and thus inhibit the state's ability to prove a defendant's knowledge that the images depicted an actual minor.<sup>130</sup>

To analyze the defendant's argument that the federal prohibition on morphed images violated the First Amendment, the court echoed *Hoteling* and *Bach* in finding that morphed images implicate the interests of real children.<sup>131</sup> The court specifically focused on the "risk of reputational harm" to find morphed images outside the scope of the First Amendment.<sup>132</sup>

Two aspects of the court's decision are notable. First, the court specifically emphasized the "weak expressive value" of morphed images, noting that although the defendant did not intend to harm children, the images nevertheless had that effect.<sup>133</sup> Second, the court specifically emphasized that the harm to children that morphed images impose is not contingent on the children's knowledge—"even if [the minors] never see the images, the specter of pornographic images will cause them 'continuing harm by haunting [them] in years to come.'"<sup>134</sup>

In 2020, the Fifth Circuit weighed in, finding morphed child pornography to be unprotected speech.<sup>135</sup> Underpinning the court's decision was the determination that First Amendment jurisprudence does not strictly require underlying child abuse to classify material as child pornography.<sup>136</sup> The court explained that the PROTECT Act's definition of "sexually explicit" includes the "lascivious exhibition of the anus, genitals, or pubic area" of a child.<sup>137</sup> Referencing an earlier decision where it declined to read *Ferber* as requiring "the minor [to] affirmatively commit a sexual act or be sexually abused,"<sup>138</sup> the Fifth Circuit found the "reputational and emotional harm" to children as sufficient to exclude

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defendant's conduct was covered by the statute for the purposes of the civil suit. *Id.* at 883.

129. *Id.* at 879.

130. *Id.* at 879–80.

131. *Id.* at 884.

132. *Id.* at 884–85 (internal quotations omitted).

133. *Id.* at 883, 885.

134. *Id.* at 884 (citing *Osborne v. Ohio*, 495 U.S. 103, 111 (1990)).

135. *United States v. Mecham*, 950 F.3d 257, 267 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020).

136. *Id.* at 266.

137. *Id.* (quoting 18 U.S.C. § 2256(2)(A)(v)).

138. *United States v. Traweek*, 707 F. App'x 213, 215 n.2 (5th Cir. 2017).

morphed images from First Amendment protections.<sup>139</sup>

The circuit courts' findings that morphed images present cognizable harms to children legally distinguish morphed images from virtual child pornography.<sup>140</sup> While the circuits are split over whether the correct approach is to classify morphed images as unprotected speech or to apply strict scrutiny review, there is consensus that the compelling state interest in protecting children likely justifies the imposition on speech.

## 2. Divergent State Approaches to Morphed Images

Despite the federal prohibition on morphed images, states remain divided over whether to adopt parallel legislation.<sup>141</sup> For example, Maryland explicitly bans morphed images, prohibiting the possession of visual representations "showing an actual child or a computer-generated image that is indistinguishable from an actual and identifiable child under the age of 16 years" engaged in sexually explicit conduct.<sup>142</sup> New Mexico has a similar provision for obscene materials that "depict[] a prohibited sexual act . . . [if] a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act."<sup>143</sup> Unlike Maryland, the New Mexico statute only criminalizes the production or distribution of this conduct.<sup>144</sup> In contrast, states including Colorado,<sup>145</sup> Kentucky,<sup>146</sup> and California<sup>147</sup> have no such explicit statutory bans.<sup>148</sup> States have cited a variety of rationales for not including a ban on morphed images in their statutes, ranging from concern that the provision would be unconstitutional to a narrow focus on only prohibiting materials that depict underlying sexual abuse.<sup>149</sup> Accordingly, Alaska is

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139. *Mecham*, 950 F.3d at 267.

140. *See, e.g.*, *Shoemaker v. Taylor*, 730 F.3d 778, 786 (9th Cir. 2013) (reasoning that "morphed images are like traditional child pornography in that they are records of the harmful sexual exploitation of children").

141. Fifteen states explicitly include morphed images in their child pornography statutes. *See infra* note 150.

142. MD. CODE ANN. CRIM. LAW § 11-208 (2021). While this statute covers morphed images, it could also be read to cover virtual child pornography. *See infra* note 240.

143. N.M. STAT. ANN. § 30-6A-3(F)-(G) (2021).

144. *Id.*

145. COLO. REV. STAT. § 18-3-405.4 (2021).

146. KY. REV. STAT. ANN. § 531.335 (West 2021).

147. CAL. PENAL CODE § 311.1(a) (West 2021) (prohibiting the possession of sexually explicit material that "depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct").

148. Several other states lack an explicit statutory prohibition on morphed images, including but not limited to Massachusetts, Mississippi, and New York. MASS. GEN. LAWS 272 § 29C (2021); MISS. CODE. ANN § 97-5-33 (2021); N.Y. PENAL LAW § 263.16 (McKinney 2021).

149. *See infra* text accompanying notes 152-160.

amongst the minority of states that statutorily proscribe morphed images.<sup>150</sup>

Moreover, for states with statutes that do not explicitly ban morphed images, there is a lack of consensus over whether reviewing courts will interpret the child pornography statutes to cover such conduct.<sup>151</sup> The general recalcitrance to read in a prohibition on morphed images implies that for a state to implement such a provision, its best course of action is to do so legislatively.

For example, in *People v. Gerber*,<sup>152</sup> a California state court reasoned that the defendant's conduct—using Microsoft Paint to edit a child's head onto an adult's body—was not within the scope of the state child pornography statute.<sup>153</sup> Relying on legislative history indicating the purpose of the child pornography statute was to prevent the exploitation of children, the court held that a real child must have been used to produce the pornographic element of a work to be considered child pornography.<sup>154</sup>

Florida has similarly declined to apply its child pornography statute to a morphed image.<sup>155</sup> The Florida statute states “[i]t is unlawful for any person to knowingly possess . . . a photograph . . . computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.”<sup>156</sup> In *Parker v. State*,<sup>157</sup> the court reasoned that the statute applied only to material that captured sexual conduct by

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150. The states outside of Alaska, Maryland, and New Mexico that ban morphed images are Arkansas, Delaware, Georgia, Hawaii, Illinois, Indiana, Michigan, Minnesota, Missouri, Rhode Island, Virginia, and Wyoming. See ARK. CODE ANN. § 5-27-602 (a)(1) (West 2021); DEL. CODE ANN. tit. 11, § 1111(2) (West 2021); GA. CODE ANN. § 16-12-100.2(b)(3)(A) (West 2021); HAW. REV. STAT. § 707-752(2)(b) (2021); 720 ILL. COMP. STAT. 5/11-20.1(f)(7) (2021); IND. CODE § 35-42-4-4(d) (2021); MICH. COMP. LAWS § 750.145c(b)(i) (2021); MINN. STAT. § 617.246(f)(2)(ii) (2021); MO. REV. STAT. § 573.01(4)(b)(c) (2021); R.I. GEN. LAWS § 11-9-1.3(c)(1)(iii) (2021); VA. CODE ANN. § 18.2-374.1 (2021); WYO. STAT. ANN. § 6-4-303 (West 2021). While Texas' statute does not explicitly ban morphed images, the Court of Criminal Appeals has interpreted it to do so. See *infra* text accompanying note 175.

151. See, e.g., *State v. Zidel*, 940 A.2d 255, 265 (N.H. 2008) (reversing a defendant's conviction for possession of morphed images because state child pornography statute was unconstitutional as applied to defendant's conduct); *Parker v. State*, 81 So. 3d 451, 453 (Fla. Dist. Ct. App. 2011) (finding a Florida child pornography statute did not cover morphed images where a child's head was superimposed on an adult's body); *People v. Gerber*, 126 Cal. Rptr. 3d 688, 701 (Ct. App. 2011) (concluding the same for a California statute).

152. 126 Cal. Rptr. 3d 688 (Ct. App. 2011).

153. *Id.* at 694, 701.

154. *Id.* at 698.

155. See *Parker*, 81 So. 3d at 453.

156. FLA. STAT. § 827.071 (2021)

157. 81 So. 3d 451 (Fla. Dist. Ct. App. 2011).

a child, finding it inapplicable to a morphed image of a child's head on an adult's body.<sup>158</sup>

While the California and Florida courts relied on statutory interpretation to find that the statutes in question did not cover morphed images, a New Hampshire court in *State v. Zidel*<sup>159</sup> held that applying the state child pornography statute to the possession of morphed images would violate the First Amendment.<sup>160</sup> The court distinguished the Eighth Circuit's holding in *Bach*, reasoning that the *dissemination* of morphed images implicated the interests of the real child depicted, but that private possession did not.<sup>161</sup> Criminalizing mere possession of morphed images, where "the children d[id] not know of their existence," did not warrant the imposition of criminal liability.<sup>162</sup> The New Hampshire court thus declined to find that morphed images presented a tangible harm to children.<sup>163</sup>

However, at least three other states have been willing to read in a prohibition on morphed images into their child pornography statutes. In 2002, a Virginia court held that the state child pornography statute at the time both applied to the possession of morphed images and survived strict scrutiny review.<sup>164</sup> The court reasoned that by defining "sexually explicit visual material" as "a digital image or similar visual representation," the statute's plain language encompassed visual representations beyond an unaltered photograph of a child.<sup>165</sup> The court

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158. *Id.* (citing *Stelmack v. State*, 58 So. 3d 874, 877 (Fla. Dist. Ct. App. 2010)). In *Stelmack*, decided a year before *Parker*, the court similarly relied on statutory interpretation to find a morphed image outside the scope of the child pornography statute. *Stelmack*, 58 So. 3d at 876. The court explained that its decision was based on statutory interpretation rather than policy, writing "[w]e do not mean to suggest that the possession of composite images of real children that simulate lewd and lascivious exhibition of children's genitals should not be criminalized." *Id.* at 877.

159. 940 A.2d 255 (N.H. 2008).

160. *Id.* at 263–64.

161. *Id.* at 264–65.

162. *Id.* at 263.

163. *Id.*

164. *Commonwealth v. Simone*, 63 Va. Cir. 216, 245 (Oct. 2003).

165. *Id.* at 242. When the court decided *Simone*, Virginia law banned, inter alia, the possession of pornography materials depicting a person under eighteen years of age. However, the legislature eventually formalized a ban on morphed images in statute. Under Virginia law, "child pornography means sexually explicit visual material which utilizes or has as a subject an identifiable minor." VA. CODE ANN. § 18.2-374.1 (2021) (internal quotations omitted). For the purposes of the statute, "the term sexually explicit visual material means a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present, or similar visual representation." *Id.* (internal quotations omitted).

then held that this construction of the statute would survive strict scrutiny because morphed images are “intrinsically related” to child sex abuse.<sup>166</sup> Not only is the use of the likeness of the child inherently damaging, morphed images create a permanent harmful record of the child.<sup>167</sup>

An Illinois appellate court recently interpreted the statutory phrase “films, videotapes, photographs, or . . . any similar visual medium or reproduction”<sup>168</sup> to cover “cutout pictures of young female children’s faces that had slits cut into the mouths and cutout images of male penises inserted into those slits.”<sup>169</sup> First analyzing whether the defendant’s conviction for possession of child pornography violated the First Amendment, the court determined that because *Ashcroft* did not address morphed images, the court could not conclusively exclude them as child pornography.<sup>170</sup> The court then referenced the federal circuit court decisions on the issue, concluding that morphed images “involve the alteration of ‘innocent pictures of real children so that the children appear to be engaged in sexual activity’” and thus implicate the interests of real children.<sup>171</sup>

After finding a statutory ban on morphed images to comport with First Amendment principles, the court engaged in de novo review to determine whether the state statute covered morphed images.<sup>172</sup> Unlike other state courts, which have been unwilling to stretch the boundaries of the statutory text, the Illinois court noted that, because the cutouts that the defendant possessed “were visible and conveyed a combination of still images taken from magazines,” the images were “akin to photographs and constitute a similar visual medium” as required by the statute.<sup>173</sup> The court thus interpreted the statute to cover the images in question.

Similarly, the Texas Court of Criminal Appeals<sup>174</sup> has held that “child pornography can result from image editing and manipulation.”<sup>175</sup>

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166. *Simone*, 63 Va. Cir. at 242 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002)).

167. *Id.*

168. 720 ILL. COMP. STAT. 5/11-20.1 (2020).

169. *People v. McKown*, No. 4-19-0660, 2021 WL 3721433, at \*4 (Ill. Ct. App. Aug. 23, 2021) (internal quotations omitted). While this was only an appellate-level decision, as of December 2021, McKown had not appealed his conviction. The Illinois Supreme Court has yet to weigh in on how to interpret the child pornography statute with respect to morphed images.

170. *Id.* at \*12.

171. *Id.* at \*13 (quoting *Ashcroft*, 535 U.S. at 242).

172. *Id.* at \*11, \*13.

173. *Id.* at \*13 (internal quotations omitted).

174. In Texas, the Court of Criminal Appeals is the highest authority on issues of criminal law. TEX. CONST. art. V, § 5.

175. *State v. Bolles*, 541 S.W.3d 128, 144 (Tex. Crim. App. 2017).

In *State v. Bolles*, the court considered whether the possession of a cropped image of a child's genitals constituted child pornography under the state statute, which requires the image depict "a child younger than 18 years of age at the time the image of the child was made."<sup>176</sup> The original image depicted a young girl—"of about three years old"—sitting on a bench such that a portion of her genitals was visible.<sup>177</sup> The defendant had used the zoom function on his camera to crop the image to focus only on the genitals.<sup>178</sup> While the subject of the cropped image was clearly underage, the court of appeals found in favor of the defendant, reasoning that because that particular child was over eighteen when he "made" the image by cropping it, the image did not constitute child pornography.<sup>179</sup> The Court of Criminal Appeals rejected this argument on review, reasoning that the image was "made" within the meaning of the statute "on the day the photograph was taken . . . when [the subject] was under the age of 18."<sup>180</sup>

To reach this conclusion, the court engaged in an overview of federal and state court decisions on the issue of morphed images, finding that child pornography "can be created by an individual who manipulates an existing photograph of a minor into a different image even when the original depiction is one of an innocent child acting innocently."<sup>181</sup> While the specific conduct underlying the decision in *Bolles* is not a perfect analogue to morphed child pornography, the court's willingness to account for digital manipulation compounded with its reference to morphed image cases indicates that the Texas child pornography statute likely covers morphed images.<sup>182</sup>

The divergent state court approaches to morphed images indicate that legislative action would be the most effective way to implement a state prohibition on morphed images. While state courts are split on the

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176. *Id.* at 131. The Texas child pornography statute imposes liability on a person who "knowingly or intentionally possesses . . . visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct." TEX. PENAL CODE ANN. § 43.26(a)(1) (West 2021). The statute also imposes a requirement that the depicted conduct be lewd. *Id.* § 43.25(a)(2). After determining whether the image depicted an underage child as a threshold matter, the court then determined that the image satisfied the lewdness requirement. *Bolles*, 541 S.W.3d at 143–44. A Texas appellate court has since interpreted the statute to apply only to material depicting actual children, not purely virtual child pornography. *Ex parte Fusselman*, 621 S.W.3d 112, 122 (Tex. App. 2021).

177. *Bolles*, 541 S.W.3d at 130.

178. *Id.* at 131.

179. *Id.* at 133.

180. *Id.* at 135.

181. *Id.* at 138.

182. *See id.* at 136–37, 144.

issue of whether the harms that morphed images pose justify criminal liability, the Alaska statute provides a promising model for ensuring that the criminal law protects children from the pornographic manipulation of their images.

### III. LOOKING OUTWARD: ALASKA'S STATUTE AS A MODEL FOR OTHER STATES

The federal courts' approaches to regulations on morphed images indicate that Alaska's ban on the possession of morphed images is constitutional. For a regulation on morphed images to fall within the boundaries of the federal and Alaska constitutions, the statute must survive strict scrutiny review. A reviewing court's threshold inquiry is thus whether a ban on morphed images promotes a compelling governmental interest.<sup>183</sup> If so, the court then examines whether the regulation is narrowly tailored to that end.<sup>184</sup> This Part examines the compelling state interest underlying the morphed images statute to argue both that Alaska's statute promotes the protection of children and that other states should adopt an analogous statutory provision.

#### A. Alaska and Other States Have a Compelling Interest in Banning Morphed Images

Morphed images harm children in a manner distinct from virtual child pornography, implicating the perceptible interests of actual minors. Unlike purely virtual child pornography, morphed images depict the likeness of an actual minor, implicating similar interests in protecting children to those raised by actual child pornography. Because the creation of morphed images does not involve child sexual abuse, only *Ferber's* first rationale—that the materials permanently record an actual child in an apparent pornographic manner and “the harm to the child is exacerbated by their circulation”—justifies banning morphed images.<sup>185</sup>

While the Supreme Court has yet to address the constitutionality of banning morphed-image child pornography, some circuit and state courts have asserted a variety of overlapping interests that justify the

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183. See *Club SinRock, LLC v. Mun. of Anchorage*, 445 P.3d 1031, 1037–38 (Alaska 2019) (noting that sexual content merits strong protection under the Alaska Constitution and burdening this speech requires a compelling interest); *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (requiring a compelling governmental interest).

184. *Club SinRock*, 445 P.3d at 1038 (requiring narrow tailoring); *Sable*, 492 U.S. at 126 (same); see *supra* Section II.A.

185. See *New York v. Ferber*, 458 U.S. 747, 759 & n.10 (1982).

criminalization of morphed images.<sup>186</sup> The emergent theme from courts confronting the issue is that, like with real child pornography, “the fear of exposure . . . ha[s] the most profound emotional repercussions.”<sup>187</sup> Research has found “[t]he lack of control over the ongoing sharing of . . . abuse images and the public accessibility of those abuse images can be one of the most difficult aspects of the abuse to overcome. . . . [T]he abuse is ongoing with no definable end.”<sup>188</sup> Unlike purely virtual child pornography, which the Second Circuit found has only speculative harmful effects on children, morphed images depict an identifiable child in a sexual manner.<sup>189</sup> As a result, morphed images cause more direct harm to an actual child.

Litigants challenging statutory prohibitions on morphed images have attempted to distinguish morphed images from traditional child pornography by arguing that the goal of proscribing child pornography is to prevent the underlying sexual abuse.<sup>190</sup> However, the sections of the Alaska code pertaining to digital harassment reflect the legislative judgment that a digital image can be inherently harmful to its subject, even if it does not depict historic sexual abuse.<sup>191</sup>

Specifically, Alaska’s innovative move to criminalize “revenge porn” demonstrates that the dissemination of images not associated with any underlying abuse nevertheless has the capacity to harass the images’ subjects.<sup>192</sup> From a policy perspective, the legislative judgment that individuals have a legally cognizable interest in preventing the dissemination of images that were consensually captured opens the door to the conclusion that children ought not to have their images

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186. See *supra* Section II.F.2.

187. *Ferber*, 458 U.S. at 759 n.10 (quoting Ulrich C. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 292 (1980)).

188. Ateret Gewirtz-Meydan et al., *The Complex Experience of Child Pornography Survivors*, 80 CHILD ABUSE & NEGLECT 238, 239 (2018) (citations omitted).

189. See, e.g., *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011).

190. *United States v. Mecham*, 950 F.3d 257, 263–64, 266 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139 (2020) (declining to limit the definition of child pornography to only those materials depicting the underlying abuse of a minor).

191. See, e.g. ALASKA STAT. § 11.61.120 (2021) (stating that the non-consensual dissemination of a consensually taken image can constitute criminal harassment).

192. *An Act Relating to Harassment*, ALASKA H. JUDICIARY COMM. MINUTES, 24th Leg., (Jan. 18, 2006) [hereinafter *Judiciary Committee Minutes*] (statement of Kevin Meyer, Rep., Alaska State Legislature, at 1:54:27 PM); see ALASKA STAT. § 11.61.120 (2021). Generally speaking, “revenge porn” refers to the non-consensual dissemination of a sexual image that was often – but not always – shared or taken consensually. Jessica M. Goldstein, *‘Revenge Porn’ Was Already Commonplace. The Pandemic Has Made Things Even Worse.*, WASH. POST (Oct. 29, 2020, 8:00 AM), [https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6\\_story.html](https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html).

manipulated into pornography.<sup>193</sup> While there is a manifest difference between “revenge porn” and child pornography, the criminalization of both reflects the idea that a digital image does not need to depict historic sexual abuse to create problems for its subjects.

Indeed, while only someone who “publishes or distributes” such images is liable under the harassment statute, section 11.61.123 of the Alaska Statutes imposes liability on a viewer.<sup>194</sup> Under section 11.61.123, “[a] person commits the crime of indecent viewing . . . of a picture if the person knowingly . . . views, or views a picture of, the private exposure of the genitals, anus, or female breast of another person.”<sup>195</sup> Private exposure occurs when people expose their bodies in such a manner that a reasonable person would not believe would result in the defendant’s viewing.<sup>196</sup> Read together, the revenge porn and private exposure statutes operate to protect an individual from the specific harm that the dissemination and later viewing of the images engenders, rather than the interest associated with the initial capturing of the images.

Given the federal courts’ determination that children have a compelling interest in preventing the manipulation of their images, combined with the Alaska legislative judgment that images can inherently be harmful, Alaska has a compelling state interest in protecting children against morphed images.

### **B. Alaska’s Morphed Images Statute Satisfies *Ferber***

While federal courts have split on whether morphed images categorically constitute unprotected speech,<sup>197</sup> a statutory ban on morphed images likely, at the very least, satisfies strict scrutiny.<sup>198</sup> Under First Amendment jurisprudence, the state’s interest in protecting children from a permanent record of what appears to be them engaging in sexually explicit conduct is likely sufficient to justify the intrusion on speech.<sup>199</sup> While morphed images present less of a risk of psychological harms

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193. *Judiciary Committee Minutes*, *supra* note 192, at 7 (statement of Lesil McGuire, Chair, H. Judiciary Comm. at 2:10:12 PM).

194. ALASKA STAT. § 11.61.123.

195. *Id.* § 11.61.123(a).

196. *Id.* § 11.61.123(e)(2).

197. Compare *United States v. Hotaling*, 634 F.3d 725, 728 (2d Cir. 2011) (finding morphed images categorically unprotected speech), with *United States v. Anderson*, 759 F.3d 891, 895–96 (8th Cir. 2014) (applying strict scrutiny to a prohibition on morphed images). In the wake of the Fifth Circuit’s decision in *United States v. Mechem* that morphed images are unprotected speech, the circuit split is less pronounced. See *supra* note 190.

198. See *infra* note 209 and accompanying text.

199. See *Anderson*, 759 F.3d at 895.

materializing than traditional child pornography,<sup>200</sup> scholars posit that the gravity of harm associated with morphed images may justify the lower probability of harm.<sup>201</sup> Courts have additionally cited reputational harms flowing from morphed images, neither of which rely on the subject's knowledge.<sup>202</sup>

Given Alaska's compelling interest in protecting children from the psychological and reputational harms flowing from morphed images, the statute is narrowly tailored to address only pornographic images that have the potential to harm real children.<sup>203</sup> The language requiring that the material depict an "actual child" cabins the proposed statute's scope to speech that creates a permanent record of a minor's image, aligning the statute with the underlying harm.<sup>204</sup> Likewise, the child pornography statute only applies to material proscribed by the "Unlawful Exploitation of a Minor" statute, limiting impermissible morphed images to only those depicting sexually explicit conduct.<sup>205</sup>

Relatedly, the Alaska ban on morphed images does not stretch beyond analogous statutes that state and federal courts have found to survive strict scrutiny.<sup>206</sup> Like the federal morphed images provision, the Alaska statute specifically requires that the image depict an actual minor who is under the age of eighteen.<sup>207</sup> When the Alaska legislature enacted the statute, it referenced the *Ashcroft* decision, noting that child

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200. The *Ferber* Court found it compelling that "[a] child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." *New York v. Ferber*, 458 U.S. 747, 781 n.10 (1982) (quoting David P. Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)). A victim of a morphed image may never know that the image exists, rendering the psychological harm speculative. *Cf. id.* ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.") (quoting T.C. Donnelly, Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301 (1979)).

201. Suzanne Ost, *Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?*, 30 LEGAL STUD. 230, 241 (2010).

202. See, e.g., *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005) ("The jury could find from looking at the picture that it is an image of an identifiable minor, and that the interests of a real child were implicated by being posed in such a way.").

203. See *supra* Section III.A; *Commonwealth v. Simone*, 63 Va. Cir. 216, 245 (Oct. 2003) (noting the Virginia statute applies only to identifiable minors).

204. ALASKA STAT. § 11.61.127(a) (2021).

205. See *id.* (citing *id.* § 11.41.455).

206. See, e.g., *Simone*, 63 Va. Cir. at 255 (finding that limiting the virtual child statute to identifiable minors comports with *Ferber*); *United States v. Anderson*, 759 F.3d 891 (8th Cir. 2014) (finding that the federal prohibition on morphed images survives strict scrutiny).

207. Compare 18 U.S.C. § 2252A(a)(7), with ALASKA STAT. § 11.61.127(a).

pornography harms the child whose likeness is used.<sup>208</sup>

An Alaska court reviewing the statute could thus echo the Virginia court's determination in *Simone* that morphed images are "intrinsically related" to child sex abuse, ergo justifying regulation.<sup>209</sup> Because of the statutory alignment between the cognizable harms morphed images pose and the punishable conduct, a ban on morphed images would likely survive strict scrutiny review.

### C. Other States Should Explicitly Ban Morphed Images

The state and federal courts' analysis of whether morphed images involve a compelling state interest sufficient to justify the intrusion on speech demonstrates that morphed images implicate the real interests of real children.<sup>210</sup> Not only do these analyses indicate the likely constitutionality of such a prohibition, they also demonstrate how a state ban on morphed images is desirable from a policy perspective. Indeed, federal prosecutors continue to make use of the morphed images provision of the PROTECT Act, demonstrating that the proliferation of morphed images is more than a theoretical possibility.<sup>211</sup> Accordingly, state statutory bans on morphed images will provide state prosecutors with the necessary tools to fight child exploitation crimes.

Given the need to address the possession of morphed images, an explicit statutory ban is necessary for two additional reasons. First, the state courts' divergent approaches to statutory interpretation demonstrates that an explicit statutory prohibition is the best way to

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208. *Finance Committee Minutes, supra* note 115 (statement of Sue MacLean, Director, Criminal Division, Department of Law at 8:23:13 AM).

209. *See Simone*, 63 Va. Cir. at 255 (finding that limiting virtual child pornography statute to identifiable minors comports with *Ferber*).

210. *See supra* Section II.F.

211. *See, e.g.*, Press Release, U.S. Attorney's Office, District of Vermont, Huntington Man Sentenced for Child Pornography Offense (July 12, 2021), <https://www.justice.gov/usao-vt/pr/huntington-man-sentenced-child-pornography-offense> (describing the prosecution of a Vermont man for the creation of a morphed image); Press Release, U.S. Attorney's Office, Middle District of Pennsylvania, McConnellsburg Man Charged with Distribution of Child Pornography (Dec. 15, 2017), <https://www.justice.gov/usao-mdpa/pr/mcconnellsburg-man-charged-distribution-child-pornography> (describing the indictment of a Pennsylvania man for allegedly producing, possessing, and distributing a morphed image); Press Release, U.S. Attorney's Office, Southern District of Texas, Septuagenarian Heads to Prison for Possessing Over 30K Images of "Morphed" Child Pornography (Apr. 8, 2019), <https://www.justice.gov/usao-sdtx/pr/septuagenarian-heads-prison-possessing-over-30k-images-morphed-child-pornography> (describing the conviction of a Texas man for possessing morphed images).

ensure with certainty that the conduct is criminalized.<sup>212</sup> While some state courts have been willing – especially recently – to read a ban on morphed images into child pornography statutes,<sup>213</sup> the unwillingness of other state courts to do the same renders legislative action the clearest path to prohibition.

Second, while a variety of Alaska and other states’ statutes purport to protect individuals from the harms associated with the manipulation of their digital images, other statutes are unable to capture the full breadth of conduct necessary to prohibit morphed images.<sup>214</sup> Alaska’s statutory regime prior to the amendment of the child pornography statutes to cover morphed images acutely demonstrates the need for a distinct prohibition.

For example, while the explicit conclusion that images taken consensually can later be used to harass the images’ subjects motivated the prohibition on “revenge porn,” the statute is underinclusive with respect to morphed images.<sup>215</sup> Specifically, with respect to mens rea, the current harassment statute requires an “intent to harass;”<sup>216</sup> however, it is not just the deliberate use of morphed images to harass that renders them so harmful.<sup>217</sup> Courts have identified the reputational and psychological effects associated with the existence of seemingly pornographic images writ large as a significant cause of harm to children.<sup>218</sup> For a child whose likeness has been edited in a pornographic manner, the intent of the

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212. *See supra* Section II.F.1.

213. *See, e.g.*, *People v. McKown*, No. 4-19-0660, 2021 WL 3721433, at \*13 (Ill. Ct. App. Aug. 23, 2021) (finding Illinois’ child pornography statute applied to morphed images); *State v. Bolles*, 541 S.W.3d 128, 144 (Tex. Crim. App. 2017) (finding Texas’ child pornography state applied to images resulting from “image editing and manipulation”).

214. For example, several states have statutes criminalizing revenge porn, reflecting the interest in preventing the non-consensual dissemination of an image that does not necessarily depict underlying abuse. *See, e.g.*, CAL. PENAL CODE § 647(j)(4)(A) (West 2021) (prohibiting the intentional dissemination of an intimate image of another where the depicted individual expected the image to remain private); COLO. REV. STAT. § 18-7-107(1)(a) (2021) (same); MD. CRIM. LAW CODE ANN. § 3-809 (West 2021) (same).

215. *Judiciary Committee Minutes, supra* note 192, at 7 (statement of Lesil McGuire, Chair, H. Judiciary Comm. at 2:10:12 PM).

216. ALASKA STAT. § 11.61.120.

217. *Gewirtz-Meydan et al., supra* note 188, at 239 (noting victims of child pornography face lasting harms due to “lack of control over the ongoing sharing of their abuse images”).

218. *See, e.g.*, *Commonwealth v. Simone*, 63 Va. Cir. 216, 243 (Oct. 2003) (finding child pornography harmful because of the “permanent record” the materials create); *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011) (“[H]ere we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.”).

possessor is irrelevant.<sup>219</sup> Indeed, a possessor of child pornography is unlikely to be motivated by an intent to harass the child at all. While individuals have complex and varied reasons for viewing child pornography, research suggests that viewers are typically motivated by the desire for sexual gratification rather than an intent to harm children.<sup>220</sup> Moreover, with respect to actus reus, the harassment statute only proscribes the “publi[cation] or distribut[ion]” of harassing images.<sup>221</sup> Because the harms that images pose emanate from the mere possession of the images,<sup>222</sup> the actus reus provision is insufficient to curtail the entire scope of problematic activity. Accordingly, a “revenge porn” statute is insufficient to ban morphed images.

For states lacking a statutory prohibition on morphed images that seek to amend their child pornography statutes to include such a prohibition, Alaska’s statute is a promising model. First, Alaska’s statute crisply and definitively criminalizes the type of conduct capable of harming children.<sup>223</sup> By defining the prohibited material as both that which displays an actual minor or has been modified to do so, the statute leaves little room for courts to quibble over its breadth.<sup>224</sup> Functionally, the application of Alaska’s statute to the possession of morphed images is clear.

Second, as previously explained, Alaska’s statute is narrowly tailored to the cognizable harms that morphed child pornography engenders.<sup>225</sup> For example, unlike the state private exposure statute, which prohibits the viewing of the private exposure of any sort of

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219. This reasoning comports with the judicial recognition in *State v. Parker* that the creation of a permanent record is “one of the most harmful aspects of child pornography.” 147 P.3d 690, 697 (Alaska 2006). Unlike traditional “revenge porn,” which becomes problematic as a function of its use, child pornography—whether morphed or real—depicting an actual child has no socially acceptable use. Thus, it is unnecessary to prohibit only the intentional viewing of child pornography because the child subject of the pornography is harmed regardless of whether the viewer knew the subject’s age.

220. Mary L. Pulido, *Exploring Why Offenders View Internet Child Pornography*, HUFFINGTON POST BLOG (Feb. 29, 2019, 6:06 PM), [https://www.huffpost.com/entry/exploring-why-offenders-v\\_b\\_9330296](https://www.huffpost.com/entry/exploring-why-offenders-v_b_9330296).

221. ALASKA STAT. § 11.61.120. Additionally, a violation of Alaska’s harassment statute is only a class B misdemeanor, whereas violating Alaska’s child pornography statute is a class C felony. Compare *id.*, with *id.* § 11.61.127. If the private possession of child pornography implicates the same derivative harms as possession of a morphed image, the punishments should align.

222. *United States v. Anderson*, 759 F.3d 891, 895–96 (8th Cir. 2014).

223. ALASKA STAT. § 11.61.127.

224. *Cf. People v. McKown*, No. 4-19-0660, 2021 WL 3721433, at \*13 (Ill. Ct. App. Aug. 23, 2021) (finding that the Illinois statute covered morphed images by interpreting a “similar visual medium” to include altered images).

225. See *supra* Section III.B.

nudity,<sup>226</sup> the child pornography statute defines prohibited conduct to cover only depictions of children engaging in sexually explicit activity.<sup>227</sup> Thus, possessing an image that depicts a nude child in a manner deemed not to be “lewd” would be illegal under the private exposure statute, but not the child pornography statute.<sup>228</sup> While it is perhaps unlikely that a hypothetical amendment to the private exposure statute to include morphed images would sweep benign conduct into its ambit, the practical effect of such an amendment would proscribe a broader range of conduct as it relates to morphed images than to real child pornography.<sup>229</sup>

Because the Alaska child pornography statute is intrinsically linked to the requirement that the underlying material depict sexually explicit conduct, it is narrowly tailored to address the harms that morphed images create. Defining prohibited material to only that displaying a child in a sexual manner comports with the harms that courts have associated with morphed images. For example, in *Bach*, the Eighth Circuit emphasized how the “lascivious” nature of the image in question created a harmful permanent record of an identifiable minor.<sup>230</sup> Since the harms associated with morphed images are derivative of the injuries that child pornography inflicts,<sup>231</sup> narrow tailoring of the proposed morphed images statutes requires limiting their reach to that of the general child pornography statute. If a state’s morphed images statute were to criminalize material that would not be illegal under the child pornography statute, courts would be reluctant to find it “narrowly tailored” to protect children.

Because Alaska’s statute both functionally prohibits the range of conduct that is capable of harming children while remaining narrowly tailored to that end, other states seeking to update their child pornography statutes should incorporate language from Alaska’s.

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226. ALASKA STAT. § 11.61.123. This section does not have a morphed images provision. *Id.* “[A] person commits the crime of indecent viewing . . . of a picture if the person knowingly . . . views, or views a picture of, the private exposure of the genitals, anus, or female breast of another person.” *Id.* This statute thus presupposes that the “private exposure” and “genitals, anus, or female breast” components of the statute refer to the same person. *Id.*

227. *Id.* § 11.61.127.

228. Compare *id.* § 11.61.123, with *id.* § 11.61.127.

229. Although the Alaska Supreme Court has not offered a judicial interpretation of the phrase “lewd,” it likely distinguishes sexual conduct from non-sexual conduct. See *Lewd*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/lewd> (last visited Oct. 22, 2021) (defining “lewd” as “sexual in an obvious and rude way”); cf. *State v. Parker*, 147 P.3d 690, 697 (Alaska 2006) (referencing the lewdness requirement in section 11.41.455 of the Alaska Statutes without offering a definition).

230. *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005).

231. See *supra* note 120 and accompanying text.

#### IV. LOOKING INWARD: IS A BAN ON VIRTUAL CHILD PORNOGRAPHY WARRANTED?

Alaska's statutory prohibition on morphed images demonstrates how Alaska legislators have proactively addressed novel threats that technology can pose.<sup>232</sup> When enacting the statutory ban on morphed images, the Alaska legislature contemporaneously considered a ban on virtual child pornography.<sup>233</sup> Proponents of the legislation noted that while Alaska was on the "bleeding edge," it should be on the "cutting edge of laws holding people accountable."<sup>234</sup>

Aaron Sperbeck, a then crime-against-children prosecutor in the Anchorage District Attorney's Office, supported the legislation, emphasizing the purported connection between virtual child pornography and real child abuse.<sup>235</sup> A Detective Sergeant in the Anchorage Police Department noted that the Internet Crimes Against Children Task Force was "uncovering large collections of computer-generated child pornography," indicating the scope of the problem.<sup>236</sup> However, the legislature ultimately declined to enact the provision

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232. This is not the first time Alaska has taken pioneering action to limit the use of technology in sexual harassment and exploitation crimes. *See* *People v. Austin*, 155 N.E.3d 439, 452 (Ill. 2019) (discussing Alaska's "revenge porn" statute). New Jersey was the first state to pass a "revenge porn" statute in 2004; by 2013, only Alaska and Texas had enacted similar statutes. *Id.* By 2017, however, thirty-nine states in total had some sort of "revenge porn" statute on their books. *Id.* In Alaska, concerns about preventing harassment through the use of new technology animated the inclusion of the provision. *Judiciary Committee Minutes, supra* note 192 (statement of Kevin Meyer, Rep., Alaska State Legislature, at 1:54:27 PM).

233. *An Act Relating to the Crimes Of Harassment, Possession of Child Pornography, and Distribution of Indecent Material to a Minor; Relating to Suspending Imposition of Sentence and Conditions of Probation or Parole for Certain Sex Offenses; Relating to Aggravating Factors in Sentencing; Relating to Registration as a Sex Offender or Child Kidnapper; Amending Rule 16, Alaska Rules of Criminal Procedure; and Providing for an Effective Date*, HOUSE FIN. COMM. MINUTES, 26th Leg., (Mar. 19, 2010) (statement of Anne Carpeneti, Assistant Att'y Gen, Criminal Division, Department of Law, at 2:25:10 PM).

234. *Id.* (statement of Anna Fairclough, Rep., Alaska State Legislature, at 2:29:10 PM).

235. Megan Holland, *Legislators Look to Expand Alaska's Child Pornography Law*, ANCHORAGE DAILY NEWS (Sept. 29, 2016), <https://www.adn.com/alaska-news/article/legislators-look-expand-alaskas-child-pornography-law/2009/10/12/>.

236. *An Act Relating to the Crimes of Harassment, Possession of Child Pornography, and Distribution of Indecent Material to a Minor; Relating to Suspending Imposition of Sentence and Conditions of Probation or Parole for Certain Sex Offenses; Relating to Aggravating Factors in Sentencing; Relating to Registration as a Sex Offender or Child Kidnapper; Amending Rule 16, Alaska Rules of Criminal Procedure; and Providing for an Effective Date*, HOUSE. JUD. STANDING COMM., 26th Leg., (Feb. 1, 2010) (statement of Ron Tidler, Detective Sergeant, Anchorage Police Department, at 1:34:09 PM).

criminalizing virtual child pornography, citing both resource constraints<sup>237</sup> and constitutional problems.<sup>238</sup>

The question thus remains whether Alaska should go further to incorporate a ban on virtual child pornography into its statute, or whether morphed images serve as the outer limit of permissible regulation. Answering this question necessarily involves an analysis of the thorny constitutional landscape surrounding virtual child pornography. Because the Supreme Court has held virtual child pornography to be protected speech,<sup>239</sup> any proposed state statute limiting that speech must survive strict scrutiny. Federal courts have yet to see litigation over the “indistinguishable” language in the PROTECT Act, and states with similar statutory language have avoided the constitutional question.<sup>240</sup> Accordingly, the precise contours of Alaska’s legislative authority over virtual child pornography remain in flux.

To ascertain whether a state ban on virtual child pornography exceeds constitutional limits, this Part explores the various interests that could support a virtual child pornography prohibition. Because doctrinal developments and constant technological advancement make the legality of digitally rendered pornography uncertain, the lack of a compelling state interest at this juncture does not foreclose the possibility of future regulation. Accordingly, to ensure the state of the criminal law tracks the development of criminal conduct, legislators ought to be aware of the salient issues that virtual child pornography could implicate. This Part identifies the potential relationship between virtual child pornography

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237. *An Act Relating to the Crimes of Harassment, Possession of Child Pornography, and Distribution of Indecent Material to a Minor; Relating to Suspending Imposition of Sentence and Conditions of Probation or Parole for Certain Sex Offenses; Relating to Aggravating Factors in Sentencing; Relating to Registration as a Sex Offender or Child Kidnapper; Amending Rule 16, Alaska Rules of Criminal Procedure; and Providing for an Effective Date*, SEN. JUD. STANDING COMM., 26th Leg., (Apr. 5, 2010) (statement of Hollis French, Sen., Alaska State Legislature, at 12:04:24 PM).

238. *Id.* (statement of Jerry Luckhaupt, Attorney, Legislative Affairs Agency, at 12:04:24 PM).

239. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

240. *See United States v. Williams*, 553 U.S. 285, 293 (2008) (addressing only the pandering provision of the PROTECT Act). While Wyoming’s child pornography statute proscribes materials “virtually indistinguishable” from real child pornography, Wyoming state courts have avoided the overbreadth question by holding the statute constitutional as applied to possession of real child pornography. *See WYO. STAT. ANN.* § 6-4-303 (West 2021); *Jones v. State*, 173 P.3d 379, 384 (Wyo. 2007). Likewise, Maryland’s child pornography statute includes an “indistinguishable” phrase, but its state courts have yet to analyze its First Amendment viability. *MD. CODE ANN. CRIM. LAW* § 11-208 (2021); *cf. e.g., Payne v. State*, 221 A.3d 997, 1014–15 (Md. Ct. Spec. App. 2019) (discussing the “indistinguishable” language of Maryland statute without reference to constitutionality).

and both child abuse and the effect on prosecutions of actual child pornography. Although there is currently little evidence of a strong relationship to either, this Part suggests how the Alaska legislature could address these issues should they arise.

### A. The Unresolved Connection to Abuse

For courts to find virtual child pornography sufficiently analogous to real child pornography to justify its prohibition, it must be “intrinsically related” to child abuse.<sup>241</sup> *Ferber* focused on how the production of real child pornography involved child abuse.<sup>242</sup> Thus, on its face, virtual child pornography is distinct from actual child pornography because it neither contributes to the market for child abuse nor victimizes an identifiable child.<sup>243</sup>

However, while the Supreme Court in *Ashcroft* found the government’s theory of how virtual child pornography begets child abuse unconvincing, it left open the possibility of whether a more direct link between child pornography and downstream abuse could justify a ban on virtual child pornography.<sup>244</sup>

The theoretical rationale underlying the argument that viewers of child pornography are more likely to sexually abuse children has intuitive appeal. The proliferation of internet communities dedicated to such materials normalizes the “illicit sexual desires” of the viewer; consequently, the argument goes, desensitized viewers may feel more empowered to “break down the natural barriers to contact offenses.”<sup>245</sup>

While there have been numerous empirical studies published following the *Ashcroft* decision that seemingly confirm a relationship between viewing child pornography and sexually abusing children, the empirical evidence may obscure the issue more than clarify it. Among the most cited is the Butner Prison study, conducted in 2009 on male federal prisoners in a voluntary sexual offender treatment program.<sup>246</sup> The

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241. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

242. *See id.* (“[T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”).

243. *Contra id.* at 759 (discussing how ban on actual child pornography “dr[ies] up the market” for material produced by child abuse); *United States v. Bach*, 400 F.3d 622, 632 (explaining that morphed images victimize an identifiable child every time the image is displayed).

244. *Ashcroft*, 535 U.S. at 253–54.

245. *Online Child Pornography: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 109th Cong. 6 (2006) (testimony of Alice S. Fisher, Assistant Att’y Gen., Crim. Div., U.S. Dep’t of Just.).

246. Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report on the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183 (2009).

subjects, all serving sentences for child pornography convictions, were asked to self-report sexual contact with minors.<sup>247</sup> Following the treatment program, eighty-five percent of the study participants self-reported engaging in prior sexual contact with a minor.<sup>248</sup> The study authors interpreted this increase in self-reporting to “indicate that the majority of so-called child pornographers in [the] sample are, in fact, undetected child abusers,” seemingly demonstrating a link between viewing child pornography and sexual contact with a child.<sup>249</sup> While there are limitations to this study, it suggests a correlation between viewing child pornography and sexual contact with minors.

Similarly, the 2005 National Juvenile Online Victimization (J-NOV) study found that, of those arrested for child pornography possession, forty percent had also committed a crime of child sexual abuse.<sup>250</sup> The primary drawback of the study is its failure to provide a causal link that demonstrates how child pornography drives sexual abuse of children.<sup>251</sup> Indeed, a study conducted between 1995 and 2005 examined the relationship between child pornography possession and pedophilia, finding that between two groups of child pornography possessors – those with a history of child sex abuse and those without – both showed equal propensity for pedophilia.<sup>252</sup> These results indicate that a third factor, pedophilic tendencies, is likely driving both child sex abuse *and* child pornography possession, rather than either of the two latter factors influencing each other.

At this juncture, the empirical evidence represents continuing scholarly disagreement on the relationship between child pornography and child sex abuse. At minimum, the current literature likely does not rise to the level of “a significantly stronger, more direct connection” that

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247. *Id.* at 185. Prior to the program, only twenty-six percent of participants reported sexual contact with minors. *Id.*

248. *Id.* at 187.

249. *Id.* at 188. There are, however, several limitations to this study. First, there was no control group; the results were not measured against another group charged with sex offenses. *See id.* at 190. Second, because the program relied on voluntary participation, this group of offenders may not accurately represent child pornography viewers. Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1696–1710 (2012).

250. JANIS WOLAK, DAVID FINKELHOR & KIMBERLY J. MITCHELL, CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 16 (2005).

251. *Id.* at 41 (explaining study methodology as conducting surveys using random sampling).

252. Neil Malamuth & Mark Huppert, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 793 (2007) (citing Michael C. Seto, James M. Cantor & Rav Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 ABNORMAL PSYCHOL. 610 (2006)).

the *Ashcroft* majority posited may justify regulation.<sup>253</sup> Although further technological advancement and empirical research may be more fruitful, the abuse rationale seems insufficient to support a ban on virtual child pornography.<sup>254</sup>

### B. Virtual Pornography, Real Prosecutions

A second policy justification for prohibiting virtual child pornography emanates from the prosecution rationale Justice Thomas found compelling in *Ashcroft*.<sup>255</sup> Ultimately concurring in the majority's judgment, Justice Thomas counseled against closing the door to some form of burden-shifting that would require a defendant to raise his belief that the materials did not depict real children as an affirmative defense.<sup>256</sup> Animating Justice Thomas' concurrence was a concern that technological advancement that renders virtual child pornography indistinguishable from pornography that depicts real children might frustrate efforts to prosecute the latter.<sup>257</sup> Justice Thomas nevertheless qualified his concurrence with the observation that the government failed to demonstrate that this defense had ever been successfully raised.<sup>258</sup>

The Senate Report accompanying the PROTECT Act reflects Congress's fear that virtual child pornography will threaten child pornography prosecutions.<sup>259</sup> Referencing a 2002 photographic array of both virtual and real children that the National Center for Missing and Exploited Children presented, this report concludes that "an ordinary person looking at these pictures would be hard-pressed to distinguish between the real and virtual depictions."<sup>260</sup> According to the report, the increasing proliferation of virtual child pornography threatens

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253. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253–54 (2002).

254. Neil Malamuth and Mark Huppert argue that there is empirical research to suggest child pornography may increase the risk of recidivism among male sex offenders. Malamuth & Huppert, *supra* note 252, at 806. They posit that a narrow statute that proscribes virtual child pornography for convicted sex offenders may survive strict scrutiny. *Id.* at 820. While this is certainly an interesting option and should be considered by legislatures in the future, the study relied on research of pornography's general effect, not just child pornography. *Id.* at 805. Accordingly, this Note does not consider the possibility of proscribing virtual child pornography for convicted sex offenders because, if the results of the study do indeed hold true, the responsive statute should not be limited to virtual child pornography. *See id.*

255. *See Ashcroft*, 535 U.S. at 259 (2002) (Thomas, J., concurring).

256. *Id.*

257. *Id.*

258. *Id.*

259. S. REP. NO. 108-2, at 4–5 (2003).

260. *Id.* at 5.

prosecutions across two dimensions.<sup>261</sup> First, virtual child pornography “arm[s] defendants with a powerful defense,”<sup>262</sup> frustrating guilty pleas even in “clear-cut child porn cases.”<sup>263</sup> Second, the prospect of such a defense has a chilling effect on prosecutors bringing charges for possession of child pornography.<sup>264</sup>

These concerns may have merit. In *United States v. Sims*,<sup>265</sup> a defendant challenged his conviction for possession of child pornography on the basis that, under *Ashcroft*, the government failed to meet its burden of demonstrating the images he possessed depicted real children.<sup>266</sup> The district court granted his motion for acquittal with respect to one of the images, reasoning that the government failed to demonstrate that the image in question “involved the use of actual children engaging in sexually explicit conduct.”<sup>267</sup> Similarly, in *United States v. Reilly*,<sup>268</sup> a district court permitted the defendant to withdraw his earlier guilty plea in the wake of the *Ashcroft* decision, holding that, to support a conviction for child pornography, the defendant must have knowledge as to whether the materials depicted real children.<sup>269</sup>

Conversely, because the issues of whether the images depicted real children and whether the defendant had knowledge as to that circumstance are factual questions left to the jury, the effect that a virtual child pornography defense has on prosecutions may be more minimal than feared.<sup>270</sup> Courts have held that expert testimony is not required to demonstrate that an image depicted a real child, reasoning that a trier of fact is “capable of reviewing the evidence to determine whether the Government met its burden to show that the images depicted real

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261. See *id.* (“Absent legislation, this problem threatens to become entirely unmanageable in the near future.”).

262. *Id.*

263. *Id.* (quoting 148 CONG. REC. S4393 (daily ed. May 15, 2002) (statement of Sen. Leahy)).

264. *Id.*

265. 220 F. Supp. 2d 1222 (D.N.M. 2002).

266. *Id.* at 1224.

267. *Id.* at 1227. It is worth noting that the procedural posture of the defendant’s appeal may have contributed to the outcome in this case. See *id.* Because the *Ashcroft* decision was handed down in the interim between the defendant’s conviction and appeal, the district court ruled that the government’s failure to present evidence that the materials depicted real children at trial was insufficient under *Ashcroft*. *Id.* The court’s finding could thus be interpreted to stand for the proposition that the government must present some sort of evidence at trial, instead of that it will be inherently difficult for the government to secure convictions no matter what. *Id.*

268. No. 01 CR 1114 (RPP), 2002 WL 31307170, at \*1 (S.D.N.Y. Oct. 15, 2002).

269. *Id.* at \*6.

270. See, e.g., *United States v. Farrelly*, 389 F.3d 649, 653–54 (6th Cir. 2004).

children.”<sup>271</sup>

Indeed, juries have been willing to convict for possession of child pornography, even when the virtual nature of the materials is in question. In *United States v. Kimbrough*,<sup>272</sup> the Fifth Circuit upheld a child pornography conviction over the defendant’s argument that the government failed to prove knowledge that the materials presented a real minor.<sup>273</sup> Relevant to the court’s decision was the sufficiency of the jury instructions, reasoning the jury could have acquitted the defendant “had [they] believed [his] defense.”<sup>274</sup>

Similarly, in *United States v. Pabon-Cruz*,<sup>275</sup> a district court reasoned that because knowledge is difficult to prove conclusively, “[p]roof beyond a reasonable doubt may be made out by circumstantial evidence.”<sup>276</sup> There, the court concluded, the fact that investigators found over 500 photographic and 200 video files of child pornography on the defendant’s computer could support an inference that the defendant could not have believed all of the media was virtual.<sup>277</sup>

In Alaska, this type of defense has played out similarly. As the court made clear in *Ferrick*, to secure a conviction for a violation of the child pornography statute, the state must prove that defendants both committed the requisite act and had knowledge as to their conduct.<sup>278</sup> For example, in *Ramos v. State*,<sup>279</sup> a jury convicted Ramos for knowingly possessing child pornography under the Alaska statute despite his argument that he did not know the pornographic images he downloaded depicted minors.<sup>280</sup> Thus, even though Ramos argued he did not have knowledge as to the fact the pornography depicted minors, the jury was willing to find him in violation of the statute. This result, alongside *Kimbrough*, suggests that even when defendants dispute their knowledge as to whether pornography depicts an actual person under the age of eighteen, juries will not necessarily accept this defense on its face. Indeed, because Alaska’s statutory definition of knowledge includes awareness of a substantial probability of the prohibited circumstance, the abstract

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271. *Id.* at 655; *see also, e.g., United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003).

272. 69 F.3d 723 (1995). Notably, this case predates *Ashcroft*, suggesting that defendants attempted to raise creative virtual child pornography defenses even prior to the *Ashcroft* decision.

273. *Id.* at 733.

274. *Id.*

275. 255 F. Supp. 2d 200 (S.D.N.Y. 2003).

276. *Id.* at 206.

277. *Id.*

278. *Ferrick v. State*, 217 P.3d 418, 421 (Alaska Ct. App. 2009).

279. No. A-12373, 2018 WL 3471826 (Alaska Ct. App. July 18, 2018).

280. *Id.* at \*4.

existence of virtual child pornography does not offer an absolute bar to proving that a defendant had the requisite mens rea.<sup>281</sup> Based on *Ferrick* and *Ramos*, the more likely obstacle to prosecution would arise if defendants believed they were viewing pornography that depicted an actual child but were only in possession of virtual child pornography.<sup>282</sup>

Thus, in the wake of *Ashcroft*, it appears that more defendants are raising the issue of virtual images at trial.<sup>283</sup> However, while this might increase prosecutors' burdens to demonstrate the real nature of the materials in their cases-in-chief, there are few cases to suggest that the availability of this defense is anything more than a creative trial strategy.<sup>284</sup> Even in cases where the defendant raised the virtual child pornography issue, juries have nevertheless concluded that the materials depicted real children.<sup>285</sup> The evidence thus far suggests that, both on the federal level and in Alaska, prosecutors are not encountering significant roadblocks to conviction.

### C. Strict Scrutiny Demands More

At this juncture, the connection between virtual child pornography and state interests in protecting prosecutions and preventing abuse is too attenuated to constitute a compelling state interest. However, the current evidentiary treatment of virtual child pornography suggests that trial courts will encounter difficult questions as virtual materials proliferate.

A significant problem with the courts' analytical approach to virtual child pornography—whereby whether an image is virtual or not is a question for the trier of fact—is that it fails to account for technological innovation. In deferring to the jury to determine the nature of an image, courts have reasoned “the images themselves [will] provide[] evidence of the ages of the persons depicted.”<sup>286</sup> But the nature of the problem presupposes otherwise.<sup>287</sup> Under Alaska's current legislative scheme, the jury must believe beyond a reasonable doubt that an image depicts a real child; a digitally altered photo that is indistinguishable from real child

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281. ALASKA STAT. § 11.81.900(2) (2021).

282. See *Ferrick*, 217 P.3d at 421 (holding that proof that the pornographic image depicted an actual minor was necessary to convict under the child pornography statute).

283. See *supra* Section II.B.2.

284. See *supra* Section II.B.2.

285. See *supra* Section II.B.2.

286. *Commonwealth v. Kenney*, 874 N.E.2d 1089, 1103 (Mass. 2007) (quoting *People v. Girard*, 709 N.W.2d 229, 234 (Mich. Ct. App. 2005)).

287. 18 U.S.C. § 2256(11) (“[T]he term ‘indistinguishable’ used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct.”).

pornography cannot support that conclusion.<sup>288</sup> As a practical matter, the increasing sophistication of virtual child pornography requires the prosecutor to either provide an expert witness to testify to the forensics of the image or rely on databases to identify the child depicted.<sup>289</sup>

Perhaps this outcome is desirable. Genuinely benign conduct should not come within the scope of criminal punishment just because it makes the prosecutor's job easier,<sup>290</sup> and there is little evidence to suggest that the virtual child pornography defense has become an abusive trial tactic.<sup>291</sup> However, the combination of placing the burden of proof on the government with the implication that the ordinary person cannot distinguish virtual child pornography from that which is real creates a risk of manipulation, because a defendant can contest his child pornography prosecution without adducing any additional proof.<sup>292</sup>

If virtual child pornography ripens into a tangible hurdle for Alaska prosecutors, the PROTECT Act is a viable model for statutory language to address this problem.<sup>293</sup> By sweeping only virtual child pornography that is "indistinguishable" from that depicting an actual child into its ambit, the PROTECT Act covers only conduct that prevents the ordinary juror from accurately assessing whether the prosecution has proven the factual predicate of the possession crime.<sup>294</sup> Because of the narrowness of the statutory language, the "indistinguishable" definitional provision only excludes possession of an image that the ordinary juror could make a determination on one way or another.

Although "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech," a statute proscribing only materials "indistinguishable" from real child pornography is an adequate mechanism to filter out protected speech.<sup>295</sup> Concurring in part and dissenting in part with the *Ashcroft* judgment, Justice O'Connor posited that changing the language of the child pornography definition from "appears to be" to "virtually indistinguishable from" would provide sufficient narrow tailoring to cure the statute from an overbreadth

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288. See ALASKA STAT. § 11.61.127 (2021); *Ferrick v. State*, 217 P.3d 418, 421 (Alaska Ct. App. 2009) (holding that possession of images depicting a real child is a necessary factual predicate to the offense).

289. S. REP. NO. 108-2, at 4 (2003).

290. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975).

291. See *supra* Section II.B.2.

292. Of course, this argument ignores the reality that juries seem unwilling to buy into the virtual child pornography defense. *United States v. Farrelly*, 389 F.3d 649, 653-54 (6th Cir. 2004).

293. See 18 U.S.C. § 2256.

294. *Id.* § 2256(8)(B).

295. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

challenge.<sup>296</sup>

Specifically, the difference between “appears to be” and “indistinguishable” is nontrivial. As Justice O’Connor noted, material that “appears to be” a child engaging in sexual activity sweeps too broadly; it would cover sexually suggestive “cartoon sketches or statues of children.”<sup>297</sup> Material that is indistinguishable from actual child pornography is more limited. To ensure a defendant cannot fabricate lack of knowledge as a perfunctory defense, a statute that bans only material that appears to the reasonable viewer to be child pornography addresses the core concern that a jury may not believe, beyond a reasonable doubt, that the defendant knew the nature of the materials.

Ultimately, because of the dearth of evidence that the availability of virtual child pornography as a defense has manifestly frustrated child pornography prosecutions, Alaska cannot presently proscribe images that do not depict a real child without contravening First Amendment principles. However, Alaska legislators should maintain awareness of evolving technology and how it affects prosecutorial burdens. If the use of an expert witness to testify to an image’s origins becomes a de facto requirement in criminal prosecutions, an amendment to the state code may be necessary to alleviate the burden on the state criminal division. If virtual child pornography proves to threaten state prosecutions of real child pornography, legislation that parallels the PROTECT Act’s “indistinguishable” language may be viable under strict scrutiny review.

## V. CONCLUSION

States with child pornography statutes that fail to proscribe the possession of morphed images suffer from a fundamental mismatch between the interests that states assert to justify the private possession of child pornography and the scope of the conduct covered. Fortunately, as federal prosecutors capitalize on the morphed images provision of the PROTECT Act and state legislatures adopt parallel statutes, there appears to be movement toward more universal state standards on morphed images. As one of the first states to enact a statutory ban on morphed images, Alaska offers a valuable model for states to base amendment to their child pornography statutes on. Not only is Alaska’s statute broad enough to cover conduct harmful to children, but it is also concurrently narrow enough to comport with the First Amendment.

However, morphed images are likely the outer limit of what Alaska can currently constitutionally proscribe. Given the lack of substantial

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296. *Id.* at 265 (O’Connor, J., concurring in part and dissenting in part).

297. *Id.* at 264.

evidence demonstrating a connection between purely virtual child pornography and tangible harm to children, the First Amendment constrains Alaska's regulatory ability. Nevertheless, the issue is still live: as technology continues to advance, the evidentiary burdens that courts have crafted around virtual child pornography threaten to impede prosecutions for real child pornography. The ability of defendants to raise virtual child pornography as a token defense creates a potential opening for future legislation, and Alaska should not close the door quite yet.