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PERVERTED OR PROTECTED?: THE BATTLE BETWEEN MORPHED CHILD PORNOGRAPHY AND THE FIRST AMENDMENT

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I. INTRODUCTION

When seventy-two-year-old Clifford Mecham, Jr. hired a technician to repair his Hewlett Packard desktop computer, he had no idea it would lead to his undoing.[1] After the technician found some suspicious items on the computer, he immediately alerted the Corpus Christi Police Department and a lawful search warrant uncovered 31,562 pornographic images and 1,741 pornographic videos that Mecham "had created himself."[2] The files depicted male and female adult film entertainers engaging in sexually explicit acts that Mecham edited to superimpose[3] his own face onto the bodies of the male actors.[4] Horrifically, those were not the only modifications Mecham made; the bodies of the female actors were superimposed with the faces of his granddaughters, aged four, five, ten, and sixteen.[5]

The Supreme Court has designated the act of superimposing children's faces onto videos of adults engaging in sexually explicit acts as "morphed" child pornography.[6] Essentially, morphed child pornography lies at the intersection of "real" child pornography, which the First Amendment does not protect,[7] and "virtual" child

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1. Scott H. Greenfield, *Leaving Dysfunction to Others*, SIMPLE JUST. (Feb. 15, 2020), www.blog.simplejustice.us/2020/02/15/leaving-dysfunction-to-others/ [perma.cc/2FPD-QKJY].

2. *Septuagenarian Heads to Prison for Possessing Over 30K Images of "Morphed" Child Pornography*, U.S. ATTY'S OFF. S. DIST. TEX., (Apr. 8, 2019), www.justice.gov/usao-sdtx/pr/septuagenarian-heads-prison-possessing-over-30k-images-morphed-child-pornography [perma.cc/9EJL-Y2RC].

3. *Superimpose*, DICTIONARY.COM, www.dictionary.reference.com/browse/superimpose [perma.cc/P2WY-VMLL] (last visited Oct. 15, 2021) ("[T]o print (an image) over another image so that both are seen at once.").

4. United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020), cert. denied, 141 S. Ct. 139 (2020).

5. *Id*. at 260.

6. Caleb Beacham, *Metamorphosis: Changing Oklahoma Law to Protect Children from Morphed Child Pornography*, 55 TULSA L. REV. 311, 316, n.47 (2020) (citing Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002); United States v. Hotaling, 634 F.3d 725, 829–30 (2d Cir. 2011); United States v. Bach, 400 F.3d 622, 630 (8th Cir. 2005)). Other labels for morphed child pornography include "rendered" or "spliced" child pornography. Beacham, *supra*, at 316 (citing ALISDAIR A. GILLESPIE, CHILD PORNOGRAPHY: AN INTERNET CRIME 100 (2003)). Others refer to this type of pornography as "pseudo-images." Beacham, *supra*, at 316 (citing SUZANNE OST, CHILD PORNOGRAPHY AND SEXUAL GROOMING: LEGAL AND SOCIETAL RESPONSES 124 (2009)).

7. *Mecham*, 950 F.3d at 263.

pornography, which is protected.[8] Virtual child pornography has been likened to "fictitious child pornography."[9] This is because it is either entirely computer-generated or depicts adults that look like minors.[10] On the other hand, morphed child pornography "is created when an innocent photo of an actual child is edited to make it appear as though the child is engaging in a sexual act."[11] The critical distinction is the "use of an actual child."[12] Thus, unlike virtual pornography, morphed child pornography "uses an image of a real child," but like virtual pornography, "no child actually engaged in sexually explicit conduct" in the making of morphed child pornography.[13] While there are multiple ways morphed child pornography can be created, from using "rudimentary scissors and glue to sophisticated computer editing programs,"[14] strangely, there are not many ways to protect children from being used in it.[15]

On November 28, 2018, Mecham was indicted with one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B),[16] in the U.S. District Court for the Southern District

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8. *Id*. at 260; *see Free Speech Coal.*, 535 U.S. at 239-40 (defining virtual child pornography as sexually explicit images "created by using adults who look like minors or by using computer imaging.").

9. Chelsea McLean, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 224 (2007).

10. Beacham, *supra* note 6, at 316 (citing Gillespie, *supra* note 6, at 100).

11. Beacham, *supra* note 6, at 316 (citing MONIQUE MATTEI FERRARO & EOGHAN CASEY, INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, THE LAW AND FORENSIC SCIENCE 237 (2005)).

12. Beacham, *supra* note 6, at 316.

13. *Mecham*, 950 at 260.

14. Beacham, *supra* note 6, at 316 (citing FERRARO & CASEY, *supra* note 11, at 237).

15. Beacham, *supra* note 6, at 316 (citing FERRARO & CASEY, *supra* note 11, at 237). Images of children can be taken from almost anywhere; there is not much stopping someone from editing photos of real children to make it appear that they are engaged in sexual activity. *Id*. In order to stop child pornography, for example, Maine has implemented classes for parents in sexual assault support centers. *What We Do and Don't Know About Child Pornography – And How to Stop it*, BANGOR DAILY NEWS (Dec. 23, 2015), www.bangordailynews.com/2015/12/23/health/what-we-do-and-dont-know-about-child-pornography-and-how-to-stop-it/ [perma.cc/DX4X-TLZL]. These classes give parents tools to teach their children about sexual safety. *Id*.

16. 18 U.S.C. § 2252A(a)(5)(B) (2018). That statute states that any person who:

> Knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer[.]

of Texas.[17] Mecham soon filed a motion to dismiss the indictment on the grounds that, first, "the images found on his electronic devices [were] not child pornography and therefore protected speech under the First Amendment," and, second, "the images created by photo-shopping a child's head on the body of an adult engaged in a sex act [did] not implicate the compelling interests identified in [Supreme Court precedent], making any definition that reaches such an image unconstitutional as applied."[18] The district court ultimately denied Mecham's motion,[19] and the case proceeded to a stipulated bench trial where Mecham was found guilty.[20] The district court ultimately sentenced him to ninety-seven months' imprisonment,[21] and Mecham timely appealed to the Fifth Circuit.[22] The outcome, however, was anything but certain considering the stark circuit split as to whether the First Amendment protects morphed child pornography.[23]

In examining how this circuit split evolved and why its impact is so critical, this Note proceeds in three parts. Part II details the history of child pornography laws and explores the conflict between the Fifth Circuit's decision in *United States v. Mecham*[24] and the Eighth Circuit's decision in *United States v. Anderson*.[25] Part III breaks down the Fifth and Eighth Circuits' reasonings and uncovers how their respective holdings directly impact child pornography laws. Finally, Part IV scrutinizes the Eighth Circuit's decision and underscores the need to uphold the Fifth Circuit's well-reasoned understanding that morphed child pornography cannot be granted First Amendment protection because "child pornography is a root from which more evils grow."[26]

Id.

17. Indictment at 3, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Nov. 28, 2018).

18. Motion to Dismiss Indictment at 2, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Dec. 21, 2018).

19. Order Denying Motion to Dismiss at 1, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Jan. 4, 2019).

20. Verdict of the Court at 1, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Jan. 7, 2019).

21. Judgment in a Criminal Case at 2, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Apr. 10, 2019).

22. Notice of the Filing of an Appeal, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Apr. 17, 2019).

23. Jacklyn Wille, *'Morphed' Child Pornography Not Protected Speech, 5th Cir. Says*, BLOOMBERG L. (Feb. 13, 2020), www.news.bloomberglaw.com/us-law-week/morphed-child-pornography-not-protected-speech-5th-cir-says/ [perma.cc/32WC-THB2].

24. *Mecham*, 950 F.3d at 257.

25. United States v. Anderson, 759 F.3d 891 (8th Cir. 2014), cert. denied, 135 S. Ct. 2309 (2015).

26. *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 146

II. BACKGROUND

In February 2020, the Fifth Circuit heard Mecham's appeal in *United States v. Mecham*[27] and ultimately joined the Second and Sixth Circuits in holding that "morphed child pornography does not enjoy First Amendment protection."[28] After learning what Mecham had done, this should not be shocking to anyone. What is shocking is that not all jurisdictions agree; the Eighth Circuit has continued to abide by their 2014 decision in *Anderson* that, in order to be categorically excluded from the First Amendment, child pornography needs to depict the underlying crime of child abuse.[29] Although the *Anderson* court found that the government had met its burden under strict scrutiny, the underlying message is certainly cause for concern.[30]

To comprehend the Fifth Circuit's reasoning and its implications, it is imperative to understand, first, the evolution of child pornography laws in the United States, second, Mecham's case and subsequent appeal, and third, the conflict *Anderson* imposes.[31]

A. The Evolution of Child Pornography Laws

Surprisingly, child pornography laws are a fairly modern development,[32] as state prosecutions for the publication of "lewd or obscene" material began to occur in the nineteenth century.[33] In the 1800s, the government enacted two primary obscenity laws, which were the closest thing to regulating child pornography at the time: the Tariff Act barred the importation of obscene material in 1842,[34] and the Comstock Act criminalized mailing obscene material in 1873.[35] These two Acts prompted Congress to enact approximately

(2002) (statement of Hon. Earl Pomeroy, Cong. Rep. from North Dakota) [hereinafter *Stopping Child Pornography*].

27. *Mecham*, 950 F.3d at 260.

28. *Id.*

29. *See Anderson*, 759 F.3d at 895 (holding that, in order to be categorically excluded from the First Amendment, child pornography needs to depict the underlying crime of child abuse).

30. *Id.*

31. *Id.*

32. *Mecham*, 950 F.3d at 261.

33. *Id.*

34. *Id.*

35. *Id.* In 1873, Anthony Comstock persuaded Congress to pass the "Act for the Suppression of Trade in Circulation of, Obscene Literature and Articles of Immoral Use." Gretchen B. Gould, *Obscenity and Pornography: A Historical Look at the American Library Association, the Commission on Obscenity and Pornography, and the Supreme Court* 3 (Dec. 2010) (MA dissertation, University of Northern Iowa). This act is more generally known as the Comstock Act and it regulated the circulation of obscene materials through the mail. *Id.* Comstock

twenty similar laws against obscenity from the mid-1800s to 1956.[36] Because Congress had passed so many obscenity laws during this time, there was not yet an apparent need for regulations specifically targeting sexually obscene material involving children.[37] Of course, exactly what constitutes obscenity is still heavily debated.[38] Until the 1950s, obscene material included short films that showed women in shorter-than-usual skirts,[39] movies that involved actors and actresses kissing one another,[40] and books such as Ulysses,[41] which was banned in 1920 for being "pornographic."[42]

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felt it was his responsibility to improve the morals of other people and bragged that he was personally responsible for destroying "more than fifty tons of indecent books, over 28,000 pounds of book printing plates, around four million obscene pictures, over 16,000 negatives, and driving fifteen people to suicide." *Id*.

36. *Mecham*, 950 F.3d at 261.

37. *Id*.

38. *See, e.g.,* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (stating "I shall not today attempt further to define the kinds of material I understand to be [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.").

39. Olivia B. Waxman, *This Is What Americans Used to Consider Obscene*, TIME (June 21, 2016), www.time.com/4373765/history-obscenity-united-states-films-miller-ulysses-roth/ [perma.cc/5UZ3-N3BF]. In 1894, a twenty-one-second clip shocked viewers because the woman shown in it occasionally tugged at the bottom of her skirt and the crinolines were visible underneath. *Id*. The clip is thought to be one of the first banned. *Id*.

40. *Id*. In a nineteen-second comedy clip, actress May Irwin and actor John Rice nuzzled and kissed. *Id*. The clip was banned because viewers disapproved of the "spectacle of their prolonged pasturing on each other's lips . . ." *Id*. The clip even prompted some viewers to call the police for intervention. *Id*.

41. *Id.* A portion of the book was published in Margaret Anderson's Little Review in 1918. *Id*. Subsequently, the United States Post Office Department seized and burned all copies sent through the mail. *Id*. The book was banned "to protect the delicate sensibilities of female readers." David Bradshaw, *Ulysses and Obscenity*, BRITISH LIBRARY (May 25, 2016), www.bl.uk/20th-century-literature/articles/ulysses-and-obscenity [perma.cc/6C3T-N22Q]. Specifically, three issues were released between July and August of 1920 that involved writings about early sexual experiences and men masturbating to women showing off their legs. *Id*. Ironically, however, it was a female reader that sparked the banning of *Ulysses* in the United States. *Id*. A New York attorney's impressionable young daughter got her hands on a copy and was so shocked that it prompted the attorney to contact the New York District Attorney and the New York Society for the Suppression of Vice. *Id*. In 1920, the New York Society of Suppression of Vice successfully argued that *Ulysses* was obscene. *Id*.

42. United States v. One Book Called 'Ulysses', 5 F. Supp. 182, 183 (S.D.N.Y. 1933). The book "Ulysses" was ultimately found to not be obscene around ten years after it was banned. *Id.* at 185. The court rested its decision on the fact that the book had an impressive reputation in the literary world. *Id*. at 183. However, originally the United States government considered this book to be obscene and copies were seized and burned by the United States Post Office. Gould, *supra* note 35, at 5.

1. Caselaw other than Mecham and Anderson

a. The *Roth* Test

Obscenity laws were first challenged on constitutional grounds in 1957.[43] In *Roth v. United States*, two mail-order businessmen were convicted of mailing obscene materials in violation of 18 U.S.C § 1461.[44] This statute criminalized mailing "obscene, lewd, lascivious, or filthy" material.[45] The Supreme Court applied a test of whether the materials appealed to the prurient interest of the contemporary community standards.[46] Ultimately, Roth's conviction was upheld on the grounds that the First Amendment was not intended to protect every utterance.[47] The Court explained, "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest."[48]

Justice Brennan wrote that obscenity was not within the area of constitutionally protected speech.[49] However, the Court recognized that "sex and obscenity are not synonymous" and that some depictions of sex *are* entitled to First Amendment protection.[50] For example, the portrayal of sex "in art, literature, and scientific works" is protected as free speech because of its decided literary value.[51]

The Court likely thought it settled the matter when concocting the *Roth* test, which asked: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."[52] The Court leaned on its prior definition of prurient interest as "a shameful or morbid interest in nudity, sex, or excretion."[53] In other words, obscenity was gauged by whether the average person thought the material had or encouraged an excessive interest in

43. *Mecham*, 950 F.3d at 261.
44. Roth v. United States, 354 U.S. 476, 480 (1957).
45. *Id*. at 491.
46. *Id*. at 489.
47. *Id*. at 483.
48. *Id*. at 485 (emphasis omitted).
49. *Id.* at 494.
50. *Id*. at 487.
51. *Id*.
52. *Id*. at 489. Prior to this test, another test existed: Whether the "standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." *Id*. at 488-89 (citation omitted). This test was adopted by some American courts, but the Supreme Court rejected it on the grounds that it was too constitutionally restrictive on the freedoms of speech. *Id*. at 489.
53. *Id.* at 487, n. 20 (citations omitted).

sexual matters.[54] In fact, the Court stated that the *Roth* test "provides safeguards adequate to withstand the charge of constitutional infirmity."[55] Essentially, the Court believed the constitutionality of obscenity laws was solved with the inception of the *Roth* test.[56]

b. The Memoirs Test

Unfortunately for the *Roth* test, not all justices agreed, and the *Roth* test took a sharp, drastic turn with the 1966 decision in *Memoirs v. Massachusetts*, again authored by Justice Brennan.[57] There, the Court elaborated upon the *Roth* test, ultimately creating a more stringent threshold.[58] The *Memoirs* test contained three elements that had to be met: (1) "the dominant theme of the material taken as a whole appeals to a prurient interest in sex"; (2) "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters"; and (3) "the material is utterly without redeeming social value."[59] If each element was satisfied, the speech was not entitled to First Amendment protection.[60]

For example, a movie entitled "The Devil in Miss Jones" failed the *Memoirs* test.[61] The film consisted of about fifty-four minutes that almost exclusively depicted sexual conduct.[62] The Court opined that no matter what test was applied, "The Devil in Miss Jones" was obscene.[63]

c. The *Miller* Test

However, this quest to create a satisfactory test by which to measure obscenity was not yet complete. In 1973, Justice Burger opined in *Miller v. California* that the *Memoirs* test was far too

54. *See Prurient*, MERRIAM WEBSTER DICTIONARY (11th ed. 2020) (stating that "prurient" means "marked by, arousing, or appealing to sexual desire.").

55. *Roth*, 354 U.S. at 489.

56. *Id*.

57. Memoirs v. Massachusetts, 383 U.S. 413 (1966). In *Memoirs*, the appellant's book was found to be obscene and not protected by the First Amendment. *Id.* at 420. On appeal, the Supreme Court held that because the book was found to have some literary value, it could not be seen as "utterly" lacking redeeming social value and was therefore protected First Amendment speech. *Id.* at 420.

58. *Id.* at 418.

59. *Id*.

60. *Id*.

61. Commonwealth v. "The Devil in Miss Jones", 3 Va. Cir. 436, 444 (Va. Cir. Ct. 1973). Although this case emerged after the *Miller* test was created, the court noted "[n]o matter which test is applied, this film is obscene." *Id*.

62. *Id*. at 442.

63. *Id*. at 444.

stringent.[64] For years, the *Memoirs* test prompted the Court to be cautious not to strip citizens of their literary, artistic, and scientific creativity.[65] *Miller* criticized *Memoirs* as a standard that was nearly impossible to meet because of the "utterly without redeeming social value" language.[66] The *Miller* Court began to recognize State interests in prohibiting obscene material.[67] So, once again, the Court refigured its threshold.

The *Miller* test required that to be considered obscene, the work as a whole must appeal to the "prurient interest in sex," the sexual conduct must be portrayed in a "patently offensive" way, and the work must "not have serious literary, artistic, political, or scientific value."[68] The work in question needed to have an excessive interest in sexual matters in addition to a lack of literary value, whether it be artistic, political, or scientific. Despite the Court failing to provide clarity as to what these terms meant, out of this uncertain set of standards, child pornography laws were born. Four years after *Miller*, Congress passed the Protection of Children Against Child Exploitation Act in 1977.[69] As the first federal law that focused specifically on child pornography, the main goal of the Act was to prevent children from falling victim to child pornography.[70] At the time of its enactment, only six states had laws explicitly protecting children.[71]

d. The *Ferber* Test

At the time Congress enacted the Protection of Children Against Child Exploitation Act, New York was one of only twenty states that had laws explicitly prohibiting the distribution of child pornography without requiring that the material be legally obscene.[72] In 1977, New York enacted Article 263 of its Penal Code, which criminalized the distribution, but not possession, of child

64. Miller v. California, 413 U.S. 15, 23 (1973). Similar to *Roth*, the defendant in *Miller* mailed pictures of sexually explicit content to individuals who had not requested the material. *Id.* at 16. He was convicted of distributing obscene matter. *Id.* at 16.

65. *Id.* at 24. Examples of nude material that the court found acceptable would be "medical books" for the education of physicians. *Id.* at 26.

66. *Id.* at 22. The *Memoirs* test created a difficulty for prosecutors punishing child pornography. *Id. Memoirs* protected the literary, artistic, and scientific creativity by making it so that state law can only prohibit content if it has no redeeming social value. *Id.*

67. *Id.* at 24.

68. *Id.*

69. Protection of Children Against Child Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978).

70. *Id.*

71. *Mecham*, 950 F.3d at 262.

72. New York v. Ferber, 458 U.S. 747, 749-50 (1982).

pornography.[73] Multiple sections of Article 263 quickly worked their way up to the Supreme Court, and in 1982, the Court upheld the first criminal ban on the distribution of child pornography in *New York v. Ferber*.[74]

In *Ferber*, Paul Ferber, the owner of a bookstore in Manhattan, sold films to an undercover police officer that depicted young boys masturbating.[75] The Court held that child pornography was similar to obscenity and thus not protected by the First Amendment if it involved a visual depiction of sexual conduct by children without "serious literary, artistic, political, or scientific value."[76] Ultimately, *Ferber* granted the States "greater leeway" in the regulation of child pornography by developing a standard by which to judge child pornography.[77] The *Ferber* test was simply an adjustment of *Miller*'s obscenity test,[78] although *Ferber* did not require the trier of fact to find that the material appealed to the prurient interest, nor did the conduct displayed need to be patently offensive.[79]

The Court rationalized its decision with five important reasons. The Court first asserted that the government undoubtedly had an interest[80] in "'safeguarding the physical and psychological well-being of a minor.'"[81] Second, the act of distributing sexually explicit content involving children was intrinsically related to child abuse in two ways: (1) it created a "permanent record" of the child engaging in such explicit conduct, and (2) "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively

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73. *Id.* at 749-50. In *Ferber*, a Manhattan bookstore was convicted of promoting sexual performance when it sold films that showed young boys masturbating, in violation of a statute criminalizing the knowing distribution or promotion of sexual performances by children under the age of 16. *Id.* at 749, 751-52.

74. *Id.* at 774.

75. *Id.* at 751-52.

76. *Id.* at 761. The New York statute was upheld, and the Court stated that the *Miller* test did not prohibit states from "going further" with their laws against child pornography. *Id.*

77. *Id.* at 756.

78. *Id.* at 755.

79. *Id.* at 764.

80. *See* United States v. American Library Association, 539 U.S. 194, 203 (2003) (explaining that content-based restrictions are assessed by the two-part strict scrutiny standard, whereby the government must have a "compelling interest," and its regulation must be "narrowly tailored to further those interests").

81. *Ferber*, 458 U.S. at 756-57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). In other areas of the law, the Court had upheld legislation aimed at protecting youth even if the laws were "sensitive" in the area of constitutionally protected rights. *Ferber*, 458 U.S. at 757. For example, the Court had recently upheld a law "protecting children from exposure to nonobscene literature" in 1968. *Id.* (citing Ginsberg v. State of N.Y., 390 U.S. 629 (1968)).

controlled."[82] Third, advertising and selling child pornography created an economic incentive to produce child pornography, which was an illegal activity across the Nation.[83] Fourth, depictions of children engaging in sexual acts could hardly be said to offer "important and necessary" literary, scientific, or educational value.[84] Finally, the Court found that excluding child pornography from First Amendment protections was not inconsistent with earlier decisions.[85] This analysis in *Ferber* was "grounded . . . in a previously recognized, long-established category of unprotected speech,"[86] that is, "speech integral to criminal conduct, namely the sexual abuse of minors inherent in the production of child pornography."[87]

e. *Osborne v. Ohio*

Working off of a similar rationale in *Ferber*, the Court ruled eight years later in *Osborne v. Ohio* that states were not only authorized to ban the distribution of child pornography but were equally empowered to ban its possession.[88] Clyde Osborne was convicted of violating an Ohio statute when police found four photographs that depicted nude male adolescents posed in sexually explicit ways in his home.[89] Osborne argued that the First Amendment protected the private possession of child pornography.[90] However, the Court rejected this argument and

82. *Ferber*, 458 U.S. at 759. The Court felt that it would be impossible to stop the exploitation of children if those who produced sexually explicit content were the only ones pursued. *Id*. at 759-60.

83. *Id*. at 761. The constitutional freedom for speech rarely has extended its protection to make legal violations of valid criminal statutes. *Id*. at 761-62.

84. *Id*. at 762-63. It is also important to note that the Court was only interested in restricting "real" child pornography. *Id.* at 763. Portrayal of explicit content made to look like children engaging in sexual acts, but actually involving adults, is protected First Amendment speech. *Id*. The Court noted that, if it were absolutely necessary for artistic value to depict children engaged in sexual conduct, it could be done so with of-age individuals acting the part of children. *Id*.

85. *Id*. at 763. For example, libel is not protected by the Constitution. *Id*.

86. United States v. Stevens, 559 U.S. 460, 471 (2010).

87. *Anderson*, 759 F.3d at 894.

88. Osborne v. Ohio, 495 U.S. 103, 111 (1990). Petitioner argued that to narrow the statute to making possession illegal would be unconstitutional. *Id*. at 112-13. The Court disagreed. *Id.* at 113. The statute was not overbroad because the Court construed it to apply only to a depiction of nudity that "constitutes a lewd exhibition or involves graphic focus on the genitals." *Id*. Additionally, because the statute only sought to protect children from child pornography rather than "regulating a person's mind," restriction was permitted. *Id*. at 109.

89. *Id*. at 107.

90. *Id*. Osborne relied on the Court's decision in Stanley v. Georgia, 394 U.S. 557 (1969), which struck down a Georgia law that made the private possession

explained that a State has a great interest in "safeguarding the physical and psychological well-being of a minor."[91] The Court rationalized, much like the third reason explained in *Ferber*, that it was reasonable for a State to impose laws that banned possession of child pornography in order to decrease the production and demand for child pornography.[92]

f. *Ashcroft v. Free Speech Coalition*

As the Internet became more accessible, the need to protect children from child pornography became even greater.[93] Because of this, Congress attempted to broaden federal regulations even further with the Child Pornography Prevention Act of 1996 ("CPPA").[94] The CPPA revised the definition of "visual depiction" to include data stored on computers including virtual[95] and morphed child pornography.[96] But this expansion only lasted until 2002, when it came under fire for violating the First Amendment in *Ashcroft v. Free Speech Coalition*.[97] There, the Supreme Court ruled that certain provisions of the CPPA violated the First Amendment for three reasons, ultimately rendering those provisions unconstitutional.[98] First, unlike "real" child pornography, virtual child pornography was not "intrinsically related to sexual abuse of children."[99] Second, some works in the category of child

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of obscene material illegal. *Osbourne*, 495 U.S. at 108. However, the Court distinguished *Osborne* from *Stanley*; Georgia enacted its law to ban obscenity because "it was concerned that obscenity would poison the minds of its viewers," whereas Ohio enacted its law to protect victims of child pornography, as "it hope[d] to destroy a market for the exploitative use of children." *Id*. at 109.

91. *Id*.

92. *Id*.

93. *Free Speech Coal.*, 535 U.S. at 240.

94. Child Pornography Prevention Act of 1996, 110 Stat. 3009 (1996). Additionally, this Act further restricted individual's ability to possess child pornography. *Id*. It is now a crime to possess any book, magazine, periodical, film, videotape, computer disk, or other material that contains three or more images of child pornography. *Id*.

95. *Free Speech Coal.,* 535 U.S. at 241. A provision of the CPPA prohibited the possession or distribution of child pornography defined as "including any visual depiction that is or appears to be, of a minor engaging in sexually explicit conduct." *Id*.

96. H.R. 4123, *supra* note 94; *see* 18 U.S.C. § 2256 (1996) (amending the definition of child pornography to include the concept of morphed child pornography).

97. *Free Speech Coal.*, 535 U.S. at 240. Multiple plaintiffs alleged that provisions of the CPPA prohibited them from creating content for their adult films in a way that violated the First Amendment. *Id*. at 243.

98. *Id*. at 258. The CPPA extended the prohibition against child pornography to images and videos that appeared to depict minors engaged in sexually explicit conduct, even if they were not produced using real children. *Id*. at 241. In fact, Congress' motive was to ban virtual child pornography. *Id*.

99. *Id*. at 250.

pornography might possibly have significant literary or artistic value.[100] Last, the Court found the argument that virtual child pornography should be banned on the grounds that pedophiles may use it to lure children to be an insufficient justification.[101] The Court pointed to 18 U.S.C. § 2256(8)(C), which prohibits "a more common and lower tech means of creating virtual images known as computer morphing" where "pornographers can alter innocent pictures of real children so that they appear to be engaged in sexual activity."[102] Importantly, the statute underscores how "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children."[103] Ultimately, "the Supreme Court decision in the *Free Speech Coalition* case has made it far more difficult to take action against this evil" that is morphed child pornography.[104]

g. Post-*Free Speech Coalition*

Free Speech Coalition's impact was deafening, and the government's broad ability to prosecute child pornography after its opinion was sharply curtailed.[105] In response, Congress enacted the Prosecutorial Remedies and Other Tools to End Exploitation of Children Today ("PROTECT") Act.[106] The Act signified critical progress in the protection of America's children as it "gave law enforcement authorities valuable new tools to prevent, deter, investigate, prosecute, and punish violent crimes committed against children," while also "strengthening programs, and addressing deficiencies in Federal sentencing policies and practices."[107] The PROTECT Act amended 18 U.S.C. § 2256(8) to read, in pertinent part, as follows: "[S]uch visual depiction is a digital image, computer image, or computer generated image that is, or is indistinguishable from that of a minor engaging in sexually explicit conduct."[108]

Today, under the PROTECT Act, categories of child pornography that are considered free speech include "virtual" child pornography,[109] which is the digital creation of minors engaged in

100. *Id.* at 251.
101. *Id.* 251-52.
102. *Id.* at 242.
103. *Id.*
104. *Stopping Child Pornography*, *supra* note 26.
105. Prosecutorial Remedies Act and Other Tools to End the Exploitation of Children Today ("PROTECT") Act of 2003, 108 Pub. L. No. 21, 117 Stat. 650, 108 Pub L. No. 21, 2003 Enacted S. 151 [hereinafter PROTECT Act].
106. *Id.*
107. *PROTECT Act of 2003*, GOVINFO (Apr. 30, 2019), www.govinfo.gov/features/PROTECT-act [perma.cc/RR6G-53FB].
108. PROTECT Act, *supra* note 105.
109. *Mecham*, 950 F.3d at 260.

sexually explicit conduct, but which, importantly, no real children are involved.[110] Pornography that depicts adults made to look like children engaging in sexually explicit conduct is also considered protected First Amendment speech.[111] With regard to morphed child pornography, a type of pornography that "falls in between those two categories,"[112] the language of the PROTECT Act, concerningly, leaves ample room for interpretation.[113]

h. *United States v. Stevens*

The Court has declined to analyze the characterization of morphed child pornography in the past.[114] In fact, the Court merely furthered confusion on the matter in 2010 in *United States v. Stevens*.[115] This case did not involve child pornography.[116] Rather, respondent Stevens was indicted under 18 U.S.C. § 48, which criminalized the commercial creation, sale, or possession of depictions of animal crush and cruelty videos.[117] Stevens was selling videos of dogfighting and argued that the statute was unconstitutional on First Amendment grounds.[118] On the other hand, the government argued that animal cruelty should be prohibited because of its long history of prohibition in American law.[119]

The Court used *Ferber* as a way to distinguish the prohibition

110. *Free Speech Coal.*, 535 U.S. at 241.

111. *Mecham*, 950 F.3d at 260.

112. *Id.*

113. PROTECT Act, *supra* note 105. 18 U.S.C. § 2256(8)(C) (2010) provides that child pornography includes any "visual depiction [that] has been created, adapted, or *modified to appear* that an identifiable minor is engaged in sexually explicit conduct." *Id.* (emphasis added). "Modified to appear" may suggest morphed child pornography, but arguably does not; in *Free Speech Coalition*, the Supreme Court stated that Section 2256(8)(C) embodied morphed child pornography, but it also stated that morphed child pornography could be categorized as virtual child pornography. *Free Speech Coal.*, 535 U.S. at 242.

114. *Free Speech Coal.*, 535 U.S. at 242. Here, the Supreme Court does briefly mention that morphed child pornography is closer to *Ferber* in the sense that images of real children are involved but made no definitive answer on how to treat morphed child pornography. *Id.*

115. *Stevens*, 559 U.S. 460 (2010).

116. *Id.*at 466.

117. *Id.* at 464-65. 18 U.S.C. § 48 (2010) criminalizes knowingly creating, selling, or possessing depictions of animal cruelty. *Id.* at 464. "The legislative background of [Section] 48 focused primarily on the interstate market for 'crush videos.'" *Id.* at 465 (citations omitted). Generally, "animal crush" videos are videos that depict women "slowly crushing animals to death with their bare feet or while wearing high heeled shoes." *Id.* Sometimes, these videos include women talking to the animals "in a kind of dominatrix patter over the cries of the animals, obviously in great pain." *Id.* at 466.

118. *Id.*

119. *Id.* at 469.

of child pornography and the prohibition of animal cruelty.[120] The Court explained that child pornography was categorically unprotected in *Ferber* because it involved visual depictions that were produced through the actual sexual abuse of children.[121] First Amendment protection did not depend on a simple cost-benefit analysis.[122] Rather, First Amendment protection extended to all speech outside the "historic and traditional categories long familiar to the bar."[123] *Stevens* emphasized that *Ferber* was a special case because it presented a situation where the market for child pornography was so intrinsically related to the underlying abuse that the market was an integral part of the nationally-prohibited production of child pornography.[124] The Court found that *Ferber*'s rationale could not be applied to the facts in *Stevens*.[125] The Court put it bluntly, stating that it could not be "suggested that constitutional freedom [of] speech . . . extends its immunity to speech . . . used as an integral part of conduct in violation of a valid criminal statute."[126]

Until *Mecham* was decided in 2020, only three circuits, the Second, the Sixth, and the Eighth, had ruled on the issue of whether morphed child pornography was protected by the First Amendment.[127]

2. Statutes

Today, child pornography regulations are codified in Title 18, Chapter 110 of the United States Code, under "sexual exploitation and other abuse of children."[128] The overarching goal of Title 18 Chapter 110 is to criminalize the distribution of child pornography.[129]

Specifically, 18 U.S.C. § 2252A provides that "[a]ny person … who knowingly . . . distributes any child pornography using any means . . . including by computer . . . shall be fined under this title and imprisoned not less than [five] years and not more than [twenty] years."[130] Section 2256(8) contains important definitions, outlining that child pornography encompasses: "[A]ny visual

120. *Id*.
121. *Id*. at 471.
122. *Id*. The reason the Court brought *Ferber* and child pornography into this analysis in the first place was because the government was attempting to use *Ferber*-esque rationale. *Id*. at 470-72.
123. *Id*. at 468.
124. *Id*. at 471.
125. *Id*. at 472.
126. *Id*. at 471.
127. Willie, *supra* note 23.
128. 18 U.S.C. §§ 2251–2260A (2021).
129. 18 U.S.C. § 2252 (2021).
130. 18 U.S.C. § 2252A(a)(1)(A)–(b)(1) (2021).

depiction, including any photography, film, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct."[131]

Included in this definition are various subsections detailing scenarios in which child pornography is deemed illegal.[132] For example, Section 2256(8)(A) prohibits "the production of such visual depiction [that] involves the use of a minor engaging in sexually explicit conduct."[133] Moreover, Section 2256(8)(B) prohibits any visual depiction that "is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[134] Importantly, Section 2256(8)(C) prohibits any visual depiction that "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[135]

While the PROTECT Act is a noble start, its efforts have little bearing on the issue as the lineage of caselaw regarding child pornography continues to unfold.

3. Sadism Sentence-Enhancement Caselaw

A four-level sentence enhancement can apply to material that "portrays sadistic or masochistic conduct or other depictions of violence." [136] Sentencing enhancements are:

> policies that mandate that people who are convicted of criminalized behaviors while engaging in generally non-criminalized behaviors . . . or having generally non-criminalized traits . . . receive longer and surer sentences than those who are convicted of the same criminalized behaviors without engaging in these . . . non-criminal behaviors[.][137]

In June 2015, Calvin Nesmith was found to have images that contained child pornography.[138] One particular image showed a sleeping minor female with Nesmith's "erect penis on the minor's lips."[139] Throughout the investigation, the minor was made aware

131. 18 U.S.C. § 2256(8) (2021).
132. *Id.*
133. 18 U.S.C. § 2256(8)(A) (2021).
134. 18 U.S.C. § 2256(8)(B) (2021).
135. 18 U.S.C. § 2256(8)(C) (2021).
136. United States v. Nesmith, 866 F.3d 677, 678 (5th Cir. 2017) (quoting U.S.S.G. § 2G2.1(b)(4)).
137. Traci Schlesinger, *Sentencing Enhancements*, OXFORD BIBLIOGRAPHIES 2 (Feb. 27, 2019), www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0262.xml [perma.cc/A7SV-EM4B].
138. *Nesmith*, 866 F.3d at 678.
139. *Id.*

of the existence of this image.[140] The government moved to apply the four-level sentencing enhancement for sadism.[141] The Fifth Circuit ultimately found that a sadism enhancement was an objective standard.[142] Further, the court held that the sadistic sentence enhancement applied only where emotional or physical pain had been contemporaneous with the creation of the image.[143] Because the child was sleeping and not physically or emotionally harmed at the time the photo was taken, the court declined to add the sentence enhancement.[144]

B. United States v. Mecham

As mentioned in the Introduction, a total of 33,303 media depicting morphed child pornography was seized from five electronic devices owned by Clifford Mecham. [145] These photographs and videos were created by Mecham himself and many of them were morphed using his minor granddaughter's faces.[146]

While Mecham was in custody, he told authorities that he thought the images were "cute."[147] Mecham even went as far as e-mailing some of his creations to his sixteen-year-old granddaughter.[148] One of those videos showed Mecham's face superimposed onto an adult male engaging in oral, vaginal, and anal sex with an adult female who had the superimposed face of his sixteen-year-old granddaughter on the receiving end of the email.[149] Through computer animation, Mecham manipulated the footage "to show the male ejaculating, with the semen shooting to the granddaughter's mouth."[150] Another video, lasting eight minutes and forty-three seconds, added "the face of [his] five-year-old granddaughter to a montage of photos of an adult female engaging in oral, vaginal, and anal sex" with Mecham's face on the adult

140. *Id.*

141. *Id.*

142. *Id.* at 679. The court concluded that the sentencing enhancement should be applied objectively due to the plain language of § 2G2.1(b)(4). *Id.* "[T]he text emphasizes what objectively appears to be happening, not what actually occurred." *Id.* at 680.

143. *Id.* at 681.

144. *Id.* at 681-82. Part of the court's decision rested on policy; without the contemporaneous requirement, the sentence enhancement would apply in every child pornography case regardless of the content because any child who discovers they are the subject of child pornography will feel some level of emotional or psychological pain. *Id.* at 681.

145. *Mecham*, 950 F.3d at 260.

146. *Id.*

147. *Septuagenarian Heads to Prison*, *supra* note 2.

148. *Mecham*, 950 F.3d at 260.

149. *Id.* at 260.

150. *Id.*

male.[151] When law enforcement asked him to explain why he created these images and videos and sent them to his sixteen-year-old granddaughter, Mecham replied that it was his way of "getting back" at his family for preventing him from seeing the children.[152] Allegedly, Mecham had spent many years of his life interacting with his granddaughters only to be suddenly cut off.[153]

1. The District Court

Despite the undisputed fact that Mecham distributed "at least some" of the videos to his granddaughter, a grand jury charged Mecham only with possession of child pornography, not distribution.[154] On January 7, 2019, Mecham proceeded to a stipulated bench trial[155] where the government presented just two exhibits: a stipulation to agreed facts (mainly, that Mecham had created and possessed the images and videos in question) and a disk containing one almost nine-minute video in which "eight different images are being shown at any given time, and every few seconds one of the tiles changes out, and each of the images are all pornographic in nature."[156] The particular video included only one of Mecham's granddaughters, who was five years old at the time the photograph was used.[157]

In finding him guilty, the district court asserted that the video presented by the government met the definition of morphed child pornography under Section 2256(8)(C).[158] It found that, first, Mecham "knowingly possessed an item or items that contain[ed] an image of child pornography," second, "the material was mailed, shipped, and transported in or affecting interstate and foreign commerce," and third, when Mecham possessed the material, he "knew the material contained child pornography."[159] The court

151. *Id.* at 261.

152. *Id.* at 260.

153. *Id.* As explained in Mecham's initial sentencing hearing, one of the incidents that led to his family cutting him off occurred after his daughter grew suspicious that Mecham "might have been grooming one of the daughters." Sentencing Hearing Transcript at 31, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019). After Mecham left his daughter's house one day, she asked Mecham to text him when he arrived home. *Id.* Upon his return home, Mecham allegedly texted his daughter saying, "The pedophile has landed." *Id.* at 32.

154. *Mecham*, 950 F.3d at 261.

155. Pretrial Conference and Stipulated Bench Trial Transcript at 3, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Jan. 7, 2019); *Septuagenarian Heads to Prison*, *supra* note 2.

156. Pretrial Conference and Stipulated Bench Trial Transcript at 6, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Jan. 7, 2019).

157. *Id.* at 11.

158. *Id.* at 15.

159. Verdict of the Court at 1, United States v. Mecham, No. 18 CR 1339

classified the video as "sado-masochistic" and recognized that the "harm to the child is unbelievable, actually, showing her engaged in sexual intercourse with an adult."[160] Because of this, a four-point upward adjustment, pursuant to U.S.S.G. § 2G2.2(b)(4)(A), was applied "for display of masochistic or sadistic conduct."[161]

2. Sentencing

On May 17, 2019, Mecham was sentenced.[162] During the sentencing hearing, defense counsel argued against certain enhancements that the government intended to apply to Mecham.[163]

First, the defense counsel objected to the specific offense characteristic in U.S.S.G. § 2G2.2(b)(2), which provides for a two-point increase "[i]f the material involved a prepubescent minor or a minor who had not attained the age of 12 years."[164] In overruling the objection, the court rejected Mecham's argument that real children were not harmed in the making of his morphed child pornography.[165]

Second, the defense counsel argued against the specific offense characteristic in U.S.S.G. § 2G2.2(b)(4).[166] U.S.S.G. § 2G2.2(b)(4) provides the four-point increase "[i]f the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant toddler."[167] Defense counsel cited *Nesmith*, for the proposition that a contemporaneous injury was necessary to apply the enhancement.[168] The court again overruled the objection.[169]

Ultimately, Mecham's total offense level was thirty, and his criminal history category was 'I,' resulting in a guideline range of ninety-seven months to one hundred and twenty-one months.[170] While the government requested a sentence of ninety-seven months' imprisonment, Mecham asked for a downward departure to forty-

(S.D. Tex. Jan. 7, 2019).

160. Pretrial Conference and Stipulated Bench Trial Transcript at 18, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Jan. 7, 2019).

161. Sentencing Hearing Transcript at 21, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019).

162. *Id.* at 1.

163. *Id.*

164. *Id.* at 6-7; U.S.S.G. § 2G2.2(b)(2).

165. Sentencing Hearing Transcript at 9, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019).

166. *Id.*

167. U.S.S.G. § 2G2.2(b)(4).

168. Sentencing Hearing Transcript at 10, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019).

169. *Id.*

170. *Id.* at 21.

eight months.[171]

Despite his attorney arguing that "there was no actual victim harmed," Mecham was sentenced to ninety-seven months (eight years) in federal prison.[172] The court emphasized the need to protect the community, particularly because Mecham seemed to lack any concept of knowing that what he had done was wrong.[173] The imposed sentence also required that, once released from prison, Mecham would spend the rest of his life on supervised release with specific requirements tailored to restricting his access to children and the internet.[174] The court also noted that "part of the supervised release conditions are going to be no contact with any of these victims, ever."[175] Mecham was also ordered to pay $2,966.78 in restitution to the victims and register as a sex offender.[176]

In attempting to justify his actions, Mecham told the court that he was mad at his family members because they "thought I was a pedophile, which I am not."[177] In his final statement to the court, Mecham stated that he was not aware that what he did was against the law and that his understanding of child pornography "would be using a child to make pornography."[178] To close, the court expressed its concerns about Mecham's supervision lasting the rest of his life

171. *Id.* at 24, 27. Mecham's attorney asked for a decrease in sentencing largely because there was no physical abuse to the victims in the photographs. *Id.* at 36. Harping on this fact, Mecham's counsel stated, "[a]gain, . . . the type of pornographic images that we had here, as opposed to other pornographic images that we usually see or the Court has usually seen where there's actual physical abuse to the victims, but that didn't occur here[.]" *Id.*

172. *Id.* at 6. Defense counsel justified its request of 48 months' imprisonment by citing Mecham's two tours in Vietnam and subsequent struggles with post-traumatic stress disorder. *Id.* at 27.

173. *Septuagenarian Heads to Prison*, *supra* note 2.

174. *Id.*

175. Pretrial Conference and Stipulated Bench Trial Transcript at 19, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Jan. 7, 2019).

176. *Septuagenarian Heads to Prison*, *supra* note 2.

177. Sentencing Hearing Transcript at 32, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019). The court responded, "I wonder what he would call it, making pedophile pictures of his grandchildren having pornographic sex." *Id.* at 32-33. On allocution, he then claimed he made the videos because his family had unfriended and blocked him on Facebook, which he thought was unwarranted considering that he had "spent [ten] or [fifteen] thousand dollars on them just in gifts" over the past ten years. *Id.* at 38. He further claimed that his actions were perpetuated by him thinking it was "cute," but the prosecution detailed the victim impact statements which include Mecham's granddaughters describing how uncomfortable he made them. *Id.*

178. *Id.* at 42. Keep in mind, prior to 2003, Mecham had extremely limited contact with his daughter; Mecham's ex-wife moved back to Germany with his daughter when she was very young. *Id.* at 37. Until 2003, Mecham saw his daughter only two times, once when she was twelve and once when she was thirteen. *Id.* Therefore, Mecham's argument that he produced these videos because his family was cutting him out of their lives, rather than because he has pedophilic tendencies is rather weak.

because he didn't seem to understand the significance of what he had done.[179] Mecham appealed the district court's ruling to the Fifth Circuit and based his argument, in large part, off of *Stevens* – the case that later persuaded the Eighth Circuit to conclude that "morphed child pornography created without any child being abused is protected First Amendment speech."[180]

C. The Conflict of United States v. Anderson

Decided in 2014, *United States v. Anderson* sits in direct opposition to *Mecham*. In *Anderson*, the mother of an eleven-year-old girl, M.A., reported to the Nebraska State Patrol in June 2012 that M.A. had received unsolicited sexually explicit messages and images from a Facebook account under the name of "Bob Shepherd."[181] After assuming control of M.A.'s Facebook account, Nebraska authorities revealed that "Bob Shepherd" was actually the eleven-year-old girl's half-brother, twenty-seven-year-old Jeffrey Anderson.[182] The images that Anderson sent to his half-sister portrayed her own face superimposed over the faces of adult females engaged in sexually explicit conduct.[183]

1. The District Court

On August 22, 2012, Anderson was indicted in the U.S. District Court for the District of Nebraska on four counts stemming from the sexual enticement and abuse of a minor, with Count Three specifically addressing morphed child pornography.[184] He filed a motion to dismiss on the grounds that Count One infringed "upon

179. *Id.* at 43.

180. *Mecham*, 950 F.3d at 264 (citing *Stevens*, 559 U.S. at 464). Similar to the Eighth Circuit's reasoning in *Anderson*, *supra* note 25, Mecham argued that his homemade morphed child pornography was entitled to First Amendment protection because it did not depict the actual sexual abuse of a child, even though faces of real, identifiable children were used. The Fifth Circuit ultimately affirmed Mecham's conviction and remanded for resentencing, as discussed *infra*. *Id.*

181. *Anderson*, 759 F.3d at 893.

182. *Id.*

183. *Id.*

184. Indictment at 1–2, United States v. Anderson, No. 12 CR 3038 (D. Neb. Aug. 22, 2012). Count One alleged a violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256(8)(A). *Id.* at 1. Count Two alleged a violation of 18 U.S.C. §§ 2252A(a)(7) and 2256(8)(A). *Id.* at 1–2. Count Four alleged a violation of 18 U.S.C. § 2422(b). *Id.* at 2. Count Three alleged that "[o]n or about July 5, 2012, in the District of Nebraska, Jeffrey A. Anderson, the defendant herein, did unlawfully and knowingly produce with the intent to distribute and did distribute by any means, including by a computer in interstate commerce, child pornography that is an adapted or modified depiction of an identifiable minor" in violation of 18 U.S.C. §§ 2252A(a)(7) and 2256(8)(A). *Id.*

his right to engage in free speech protected under the United States Constitution."[185] Anderson argued that Section 2256(8)'s definitions were overbroad since "the image in this case – an image of an adult female morphed with M.A.'s head and face engaging in a sexual act – [did] not include an identifiable minor actually engaging in sexually explicit conduct."[186] The Magistrate Judge denied the motion on December 26, 2012 on the grounds that M.A. was an identifiable minor and a real victim with real injuries.[187] Thus, Anderson's alleged conduct was not protected by the First Amendment

Anderson ultimately entered a conditional guilty plea as to Count One, which alleged the distribution of child pornography in violation of 18 U.S.C. §§ 2252(a)(2)(A) and 2256(8).[188] The remaining counts were dismissed.[189]

2. The Appeal

Anderson filed a notice of appeal to the Eighth Circuit challenging both his conviction and sentence.[190] In regard to the morphed child pornography charge, Anderson argued that 18 U.S.C. § 2252(a)(2)(A) and 18 U.S.C. § 2256(8)(C) were unconstitutionally overbroad as applied to him pursuant to the First Amendment.[191] While the government asserted that the morphed image Anderson sent should fall under a category of unprotected speech, the Eighth Circuit found the argument inconsistent with the Supreme Court's recent decision in *Stevens*.[192] The court explained that, in *Stevens*, the Supreme Court "clarified that child pornography was categorically unprotected in *Ferber* because it involved visual depictions that were produced through sexual abuse of one of more children."[193] This meant that "First Amendment protection does not depend on 'a simple cost-benefit analysis,' but rather extends to all speech outside the 'historical and traditional categories long familiar to the bar.'"[194]

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185. Findings, Recommendation and Order at 6, United States v. Anderson, No. 12 CR 3038 (D. Neb. Dec. 26, 2012).

186. *Id.*; Motion to Dismiss, and Request for Evidentiary Hearing and Oral Argument at 1, United States v. Anderson, No. 12 CR 3083 (D. Neb. Nov. 7, 2012).

187. Findings, Recommendation and Order at 1, United States v. Anderson, No. 12 CR 3038 (D. Neb. Dec. 26, 2012).

188. Plea Agreement at 1, United States v. Anderson, No. 12 CR 3083 (D. Neb. Mar. 7, 2013).

189. *Id.*

190. Notice of Appeal at 2, United States v. Anderson, No. 12 CR 3083 (D. Neb. June 14, 2013).

191. *Anderson*, 759 F.3d at 893.

192. *Id.* at 894 (citing *Stevens*, 559 U.S. at 471).

193. *Id.*

194. *Id.* (quoting *Stevens*, 559 U.S. 460 at 471, 468).

The *Anderson* court contrasted the facts at hand with those in a previous Eighth Circuit decision, *United States v. Bach*.[195] In 2005, *Bach* held that the image of a minor's head morphed onto another minor's nude body was the type of harm that could be constitutionally prosecuted under *Ferber*.[196] The difference between the image that Anderson created and the image in *Bach* turned on the fact that Anderson's image morphed a child's face onto an *adult* body, whereas the image in *Bach* morphed a child's face onto *another child's* body.[197] Therefore, the *Anderson* court found that the image in *Bach* recorded actual sexual abuse by showing the body of a child engaging in sexual conduct, consistent with *Stevens*.[198] Conversely, no minor was actually abused in the production of Anderson's images.[199]

The Eighth Circuit, working off of the Supreme Court's reasoning in *Stevens*, emphasized that "unless the Court were to conclude that morphed images like Anderson's come within the category of speech that has been historically unprotected, but not yet specifically identified in case law," the difference between the image in *Bach* and Anderson's image was significant enough to distinguish Anderson's from unprotected speech.[200] Essentially, the issue of whether morphed child pornography is protected speech turns on whether it involves the actual criminal sexual abuse of a minor.[201]

III. ANALYSIS

This section will analyze *Mecham* by, first, taking a closer look at Mecham's arguments on appeal, second, analyzing the Fifth Circuit's holding and reasoning, and, finally, highlighting *Mecham*'s impact on the current legal landscape of morphed child

195. *Id.*; *see Bach*, 400 F.3d at 624 (explaining that Dale Robert Bach was convicted for possessing an image of a young boy who was sitting in a tree displaying his genitals, and that, over the young nude boy's head, Bach had morphed the face of another minor whom he had been communicating with online).

196. *Anderson*, 759 F.3d at 894.

197. *Id*. The *Bach* Court found that the image there implicated the interests of the child whose face superimposed over the naked minor. *Bach*, 400 F.3d at 632. The image had been so skillfully created that it appeared that the child whose face was used was engaging in a lascivious display of his genitals with a knowing grin on his face. *Id*.

198. *Id*. at 895.

199. *Id*.

200. *Id*.

201. *Id*. It is important to note that the Eighth Circuit ultimately did uphold Anderson's conviction. *Id*. The government urged the court that the child pornography statutes as applied to *Anderson* also satisfy strict scrutiny under the First Amendment. *Id*. Under strict scrutiny, the government argued that the statute is justified by a compelling interest and narrowly drawn to serve that interest. *Id*.

pornography.

A. Mecham's Arguments

After Mecham was sentenced to ninety-seven months' imprisonment for one count of possession of child pornography, he appealed his judgment and conviction to the Fifth Circuit.[202] He asserted an as-applied challenge, claiming that 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C) were "unconstitutional as applied to him when no child was sexually abused in the production of the morphed pornographic images he possessed" and that the government "cannot show that restricting his possession of such images is actually necessary to safeguard the physical or psychological well-being of a child."[203] Mecham also claimed that "the district court reversibly erred in applying a four-level 'sadism' enhancement at sentencing, without applying the appropriate legal standard."[204] The ultimate question on appeal was whether the kind of "morphed image[s]" Mecham created "qualify as expressive speech that is protected under the First Amendment."[205] This was a question of first impression in the Fifth Circuit.[206]

First, Mecham argued that his morphed child pornography did not constitute unprotected child pornography under the First Amendment because "no minor was sexually abused in the production of the morphed images, and the images thus were not integral to criminal conduct (namely, the sexual abuse of minors inherent in the production of child pornography)."[207] Mecham relied heavily on *Stevens*'s interpretation of *Ferber*.[208] He argued that *Ferber* was a special case inapplicable to his set of facts because the decision "grounded its analysis in previously recognized, long established category of unprotected speech."[209] According to Mecham, his videos and images were not used as an integral part of conduct in violation of a valid criminal statute.[210] Mecham urged the Fifth Circuit to side with the Eighth Circuit and rule that "where no minor was sexually abused in the production of morphed images, and the images thus were not integral to criminal conduct . . . the images do not fall into the child-pornography category of

202. Notice of Appeal at 1, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. Apr. 10, 2019).

203. Brief for Appellant at ii, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 18.

208. *Id.* at 19.

209. *Id.* (citing *Ferber*, 458 U.S. 756).

210. Brief for Appellant at 20, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019) (citing *Stevens*, 559 U.S. at 471).

unprotected speech."[211] Mecham contended that the Eighth Circuit's approach was best because it took *Stevens* into account.[212] Unlike the Second, Sixth, and Ninth Circuits, the Eighth Circuit analyzed *Stevens* and read it as a warning against using *Ferber* as "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[213]

The government, in turn, urged the Fifth Circuit to "join four of its sister circuits—the First, Second, Sixth, and Ninth Circuits—in rejecting" Mecham's claims that 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C) were unconstitutional.[214] The government argued that Mecham's images used the identifiable faces of his minor grandchildren and formed a permanent record of sexual exploitation.[215] The government contended that the Eighth Circuit's reasoning in *Anderson* was actually flawed because it gave too much weight to *Stevens*.[216] The Supreme Court in *Stevens* was simply using *Ferber* as a way to reject the government's argument that animal cruelty should be unprotected free speech based on a simple balancing test.[217] The government argued that the Supreme Court had consistently recognized that child pornography threatened emotional and reputational harm to children, and thus, 18 U.S.C. § § 2252A(a)(5)(B) and 2256(8)(C) were constitutional as applied to Mecham's facts.[218]

Next, Mecham argued that the four-level "sadism" enhancement was applied in error.[219] Under *Nesmith*, an image is sadistic if it depicts conduct that appears to cause physical or emotional pain simultaneously with the image's creation.[220] Mecham argued that the district court was dismissive of his *Nesmith* argument and that it should have been held that the

211. *Id.* at 22.

212. *Id.* at 23. Basically, Mecham relies extremely heavily on the one paragraph mention of child pornography in *Stevens*. *Id.* Although *Stevens* had nothing to do with child pornography, Mecham organizes his entire brief around the slight mention of child pornography and acts as if the Eighth Circuit's interpretation is undoubtedly the best. *Id*.

213. *Id.* at 23 (citing *Stevens*, 559 U.S. at 472).

214. Brief for Plaintiff-Appellee at 26, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019).

215. *Id.* at 26. Mecham's grandchildren were sexually exploited by a trusted adult and "are now at everlasting risk of psychological, emotional, and reputational harm." *Id*. (citing *Hotaling*, 634 F.3d at 730).

216. Brief for Plaintiff-Appellee, United States v. Mecham, 950 F.3d 257 (2020) (No. 19-40319). The government interpreted the Supreme Court's mention of *Ferber* in *Stevens* as a distinction between animal cruelty as its own unprotected category of speech and child pornography as its own unprotected category of speech. *Id*. at 27.

217. *Id.*

218. *Id.* at 28.

219. Brief for Appellant at 26, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019).

220. *Id.* (citing *Nesmith*, 866 F.3d at 681).

Nesmith standard applied.[221] Because nowhere in the pre-sentencing report PSR asserted that the images Mecham created depicted conduct that could be objectively perceived as causing the children pain contemporaneously with their creation, Mecham argued they met the *Nesmith* standard.[222]

The government argued that sadism is defined as "the infliction of pain upon a love object as a means of obtaining sexual release."[223] Further, the government explains that when pornographic images depict an adult male engaging in sex with a young girl, the conduct is sadistic because it is portrayed as painful or abusive.[224] Although Mecham superimposed his granddaughter's face onto the body of an adult, he selected "youthful, small-breasted women" to make it appear as if the victim actually was his five-year-old granddaughter.[225] According to the government, the guidelines did not require the image to be accurate documentation of real sadism.[226] Therefore, because the image showed intercourse between an adult male and a young girl, an objective observer would perceive conduct that caused pain to the victim in the image contemporaneously with its creation.[227]

B. The Fifth Circuit's Analysis

On February 13, 2020, the Fifth Circuit decided Mecham's appeal.[228] The court noted that "there are reasoned arguments on both sides of the issue," as is typical when a circuit split exists.[229] In emphasizing the importance of showing restraint when Supreme Court caselaw is arguably in flux, the court underscored, "[w]e are not supposed to get ahead of the Supreme Court and read tea leaves

221. Brief for Appellant at 25, United States v. Mecham 950 F.3d 257 (2020) (No. 19-40319). Interestingly, the District Court judge that presided over Mecham's sentencing hearing also presided over *Nesmith*. *Id.* at 26. When Mecham tried to argue *Nesmith*, the judge refused to apply the standard and, rather, tossed the issue to the appellate court. *Id.* "We are going to give [the Fifth Circuit] more cases, then, to look at." *Id*.

222. *Id.* at 28.

223. Brief for Plaintiff-Appellee at 43, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019).

224. *Id.* at 44.

225. *Id.* at 45.

226. *Id.* at 46. Both the First and Second Circuits have upheld the application of sadism enhancements to morphed child pornography. *Id*. (citing *Hotaling*, 634 F.3d at 730-31).

227. Brief for Plaintiff-Appellee, United States v. Mecham 950 F.3d 257 (2020) (No. 19-40319). The government used the *Nesmith* standard to explain that regardless of whether the body of a *child* was used in the images, the body of a young female was used, thus satisfying *Nesmith*. *Id*.

228. *Mecham*, 950 F.3d at 260.

229. *Id*. at 265.

to predict where it might end up."[230] Ultimately, however, the Fifth Circuit sided with the majority view and held that morphed child pornography was not protected speech, and thus, Mecham could not evade punishment.[231] His conviction was upheld but the court remanded the case for resentencing.[232]

In reaching this conclusion, the court explained the need for a balancing test and rejected the *Stevens* rationale, emphasized the detriment of categorical exclusions, and distinguished "real" child pornography from morphed child pornography.[233] Finally, the Fifth Circuit declined to uphold the district court's four-level enhancement for a child pornography offense that involved "material that portrays sadistic or masochistic conduct or other depictions of violence"[234] because the government failed to show that the sentencing enhancement was harmless.[235]

1. Balancing Test vs. Preventing Harm

The Fifth Circuit noted that previous caselaw regarding morphed child pornography warned against "relying solely on a balancing approach when determining if a category of speech is excluded from the First Amendment."[236] Rather, the standard trend was once to balance the literary value of the obscene material with the prurient interest.[237] Now, many courts rely heavily on the established fact that using identifiable images of real children implicates reputational and emotional harm.[238] This has long since been a reason to exclude real child pornography from the First Amendment.[239]

The Second and Sixth Circuits have used concern for emotional and reputational harm to children to show how morphed child pornography raises similar concerns as real child pornography, but declined to address *Stevens* in their decisions.[240]

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230. *Id.*
231. *Id.* at 267.
232. *Id.* at 269.
233. *Id.* at 266.
234. *Id.* at 267.
235. *Id.* at 268.
236. *Id.* at 265 (referencing *Stevens*, 559 U.S. 460 at 471).
237. *Mecham*, 950 F.3d at 265.
238. *Id.* It does seem that, in recent decisions, courts have used the balancing test in addition to the amount of emotional and reputational harm that children will be exposed to if they are involved in morphed child pornography. *Id.*
239. *Id.*
240. *Id. Stevens* was decided by the time the Sixth Circuit addressed the question of whether morphed child pornography was a protected First Amendment speech. *Id.* at 264. Yet, the Sixth Circuit chose not to address it at all. *Id.* at 265. The Second Circuit, likewise, did not address *Stevens*. *Id.* However, when the Second Circuit addressed morphed child pornography and

The Fifth Circuit appeared to question whether the decision in *Stevens* undercut the interest in preventing reputational and emotional harm to children.[241] Ultimately, the Fifth Circuit determined that *Stevens* did not carry enough weight to justify overruling the Supreme Court's longstanding precedent.[242] From *Ferber* through *Free Speech Coalition*, the Supreme Court had placed great importance on the reputational and emotional harm that morphed child pornography causes to the children involved.[243]

By concluding that the brief mention of child pornography in *Stevens* did not carry enough weight to make such a significant departure from the Supreme Court's child pornography decisions,[244] the Fifth Circuit highlighted that the one-paragraph mention of child pornography in *Stevens* was insufficient to overrule the more consistent trend towards an emphasis on emotional and reputational harm that morphed child pornography can cause children.[245] In fact, *Stevens* so briefly mentioned child pornography to the point where other courts have commented on its brevity.[246] Further, the Fifth Circuit was persuaded by the rationale that *Stevens* was used only to reject an analogy between child pornography and depictions of animal cruelty.[247]

The Fifth Circuit relied on the notion that, if precedent of the Court has direct application in a case, but looks like it rests on reasons rejected in some other line of decisions, the Court of Appeals should follow the case that directly controls.[248] This applied specifically here because *Stevens* made no mention of reputational or emotional harm to children.[249] This makes sense because *Stevens* had nothing to do with child pornography;[250] the interest in protecting the emotional and reputational harm that child pornography has on children could not be used to justify banning

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its relationship to the First Amendment, *Stevens* had not been decided yet. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 267.

245. *Id.* at 265.

246. *Id.* (citing United States v. Price, 775 F.3d 828, 838 (7th Cir. 2014)). The Seventh Circuit noted that *Stevens* "had little to say about child pornography at all; the case involved a . . . challenge to a federal statute aimed at curbing the interstate market in 'crush videos.'" *Price*, 775 F.3d 828 at 838. For example, the Seventh Circuit noted that *Stevens* mentioned child pornography "only in passing." *Id.*

247. *Mecham*, 950 F.3d at 266. The Fifth Circuit notes that the Seventh Circuit made a good connection: that child pornography was mentioned in *Stevens* "only in passing" and further, that it was used to reject an analogy between it and depictions of animal cruelty. *Id.*

248. *Id.*

249. *Id.*

250. *Stevens*, 559 U.S. at 466.

videos of animal torture.[251] The Fifth Circuit noted that *Stevens* did not even suggest that a connection to underlying criminal abuse was the only aspect of *Ferber*'s rationale that mattered.[252] On the contrary, *Stevens* actually made clear that the connection to underlying criminal abuse in *Ferber* makes it a special case.[253] To read *Stevens* as a First Amendment defense to all child pornography prosecutions that do not include sexual crimes would limit the reach of not only bans on morphed child pornography, but on real child pornography.[254]

Decisions from *Ferber* through *Free Speech Coalition* have consistently cited the need to protect children from the reputational and emotional harm that could be caused if they were to fall victim to child pornography.[255]

2. Limiting the First Amendment's Categorical Exclusion of Child Pornography to Just Images Depicting Underlying Criminal Abuse of Children Would be Significant and Detrimental

The Fifth Circuit noted that limiting the categorical exclusion of child pornography to only images that depict an underlying criminal act towards a child would be significant.[256] This is because the federal definition of real child pornography does not limit the phrase "sexually explicit" to images depicting sexual abuse of a minor.[257] According to the federal definition, "sexually explicit" includes the "lascivious exhibition of the anus, genitals, or pubic area" of a minor.[258] To prosecute only images that depict sexual abuse of a minor disregards the federal definition of "sexually explicit" and, in fact, completely changes it.[259] This is because the federal definition of "sexually explicit" does not require that an image depict actual abuse of a minor to meet the definition.[260] To change the definition to require that minors are sexually abused in an image or video in order to meet the "sexually explicit" definition

251. *Mecham*, 950 F.3d at 266.

252. *Id.* at 267 (citing *Stevens* 559 U.S. at 471).

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

254. *Id.* Relying heavily on the *Stevens* decision would be detrimental to real child pornography. *Id.* at 266. There would be a strong possibility that it could make prosecutions for real child pornography more difficult if it was found that underlying sexual abuse was an essential element of the prosecution. *Id.*

255. *Id.* It has been the trend that, historically, courts rely heavily on a need to protect children as a way to defeat First Amendment arguments regarding child pornography. *Id.* at 263.

256. *Id.* at 266.

257. *Id.*

258. 18 U.S.C. § 2256(2)(A)(v) (2018).

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

260. 18 U.S.C. § 2256(2)(A)(v) (2018).

would leave a whole slew of content unprotected that should be protected.[261] To change the federal definition to require that sexual abuse be present seems to suggest that nude photographs of children not engaged in sexual conduct, but nevertheless being sexualized, would be acceptable.[262]

However, the Fifth Circuit has used this federal definition of "sexually explicit" to affirm convictions.[263] In *Mecham*, the court referenced a 2017 Fifth Circuit case, *United States v. Traweek*,[264] in order to show that the federal definition of "sexually explicit" is used to prosecute those who distribute or possess child pornography that does not depict criminal sexual abuse of children.[265] In *Traweek*, the Fifth Circuit affirmed a conviction of a father who took images of his nude step-daughters.[266] The images were taken through a hidden camera in the step-daughters' bathroom and showed no sexual or criminal acts.[267] There, Traweek argued that *Ferber* required that the images either depicted sexual abuse or depicted the minor affirmatively committing a sexual act in order to constitute child pornography.[268] The court rejected this argument, finding that the photos did depict "lascivious exhibitions of genitalia," therefore, constituting child pornography.[269] The Fifth Circuit noted that many state and federal courts have upheld prosecutions involving images that zoom in on a minor's genitals, but do not depict sexual abuse.[270] For example, the Fifth Circuit's 2000 decision in *United States v. Lyckman* noted that "child pornography may involve merely pictures of a naked child . . . without physical sexual contact."[271] In fact, *Ferber* actually upheld a New York law that banned "lewd exhibition of genitals" of

261. *Mecham*, 950 F.3d at 267; *see* 18 U.S.C. § 2256(2)(A)(v) (2018) (for example, every photograph or video that includes the "lascivious exhibition of the anus, genitals, or pubic area.").

262. *Mecham*, 950 F.3d at 266.

263. *Id.*

266. United States v. Traweek, 707 F. App'x 213 (5th Cir. 2017).

265. *Mecham*, 950 F.3d at 266. The Fifth Circuit explains their past decisions that use the federal definition of "sexually explicit" as a way to show that that same definition has been used previously to prosecute. *Id.*

266. *Traweek*, 707 F. App'x at 215. Homeland Security Investigations received a tip that Troy Traweek was engaged in explicit email chats with an agent who sent him nude photos of prepubescent females. *Id.* at 213.

267. *Id.* at 215. The photos showed a full-frontal nude image of one minor and the buttocks of the other minor. *Id.* at 213. A search of Traweek's home led to the discovery of hidden cameras as well as other technology used in producing child pornography. *Id.* at 214.

268. *Id.* The Fifth Circuit is using this to show that they have basically already heard a similar argument about what the federal definition of "sexually explicit" is and have rejected that argument. *Mecham*, 950 F.3d at 266.

269. *Id.*

270. *Id.*

271. United States v. Lyckman, 235 F.3d 234, 240 (5th Cir. 2000).

minors.[272]

In sum, the Fifth Circuit has routinely held that child pornography can only be prosecuted if it depicts underlying criminal acts, which is a departure from the statutory language of previous decisions.[273]

3. Depicting Identifiable Children Makes Morphed Child Pornography Closer to "Real" Pornography

The fact that real and identifiable images of minors are being used in morphed child pornography persuaded the Fifth Circuit to hold that it does not deserve First Amendment protection.[274] Using images of identifiable children inevitably leads to emotional harm when the child is made aware that their image is being used in such a vile way.[275] This makes morphed child pornography similar to "real" child pornography in that it still creates substantial harm for the child.[276] Although the children whose faces are used in morphed child pornography are not actually being harmed in the physical sense (as they are in "real" child pornography), they still suffer extreme damage from the aftermath of finding out that their image was used.[277] This can be extremely damaging to the child's psychological well-being and can have permanent effects on countless other areas of their development and livelihoods.[278] For example, one of Mecham's granddaughters explained the fear she

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272. *Mecham*, 950 F.3d at 266 (citing *Ferber*, 458 U.S. at 765). The Fifth Circuit notes that the application of child pornography laws to "lewd or lascivious displays of a child's genitals is not new." Mecham, 950 F.3d at 266. Time and time again, the aspect of the definition of "sexually explicit" has been approved as permissible regulation. *Id.*

273. *Id.* If the Fifth Circuit had decided that the definition of "sexually explicit" was meant to be construed as content that showed underlying sexual abuse, it would be detrimental to previous and future decisions. *Id.* at 266.

274. *Id.* at 265.

275. *Id.* at 266. In Mecham's case, he went out of his way to ensure that his granddaughter received the images he created of her. *Id.* at 260. However, an interesting counterargument lies in cases such as *Nesmith* where the victim only found out about the image taken of her *because* of the investigation. *Nesmith*, 866 F.3d at 678.

276. *Mecham*, 950 F.3d at 266. Obviously, morphed child pornography is dissimilar to real child pornography in that the children whose faces are used in morphed child pornography are not actually experiencing the sexual acts, they are simply made to look like they are adults engaged in sexual acts. *Id.* at 263.

277. *Id.*

278. *Id.* at 267. Would the children be better off having never been exposed to the videos that they are in? *Nesmith* suggests, yes. *Nesmith*, 866 F.3d at 678. There, the child could have lived her entire life not knowing that a pornographic image of her existed; she was only made aware through investigations. *Id.* Once she was made aware, she explained that she felt "humiliated and degraded." *Id.*

felt because of the photos.[279] She had to attend counseling and still struggles with friendships and relationships due to Mecham's actions.[280] The fact that morphed child pornography can be psychologically damning to children is recognized by every circuit when considering the question – even the Eighth Circuit.[281] However, although the Eighth Circuit acknowledged that morphed child pornography was reputationally harmful to children, it was persuaded by the *Stevens* rationale that the images must portray underlying abuse.[282]

4. The Fifth Circuit Declined to Apply the Sentence Enhancement

At his initial sentencing, the district court applied U.S.S.G. § 2G2.2(b)(4)(A) "for display of masochistic or sadistic conduct," which resulted in a four-point enhancement of Mecham's sentence.[283] Section 2G2.2(b)(4) applies "[i]f the offense involved material that portrays sadistic or masochistic conduct or other pictures of violence."[284] This meant that Mecham's advisory guideline range became ninety-seven to one hundred and twenty-one months rather than sixty-three to seventy-eight months.[285] Ultimately, the district court sentenced him to the low end of the range (ninety-seven months), but had the enhancement not been applied, a sentence of

279. Brief for Plaintiff-Appellee at 26, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019). When Mecham posted videos on Facebook, his granddaughter experienced lasting trauma. *Id*.

280. *Id.*

281. *Mecham*, 950 F.3d at 267. In the Eighth Circuit's opinion, it acknowledged that morphed child pornography is definitely damaging to children. *Anderson*, 759 F.3d at 896. However, the fact that there was no underlying abuse persuaded the Eighth Circuit more than the amount of harm that a child might experience. *Id*.

282. *Anderson*, 759 F.3d at 891; *see Mecham*, 950 F.3d at 267 (explaining that the Eighth Circuit was persuaded by the *Stevens* rationale).

283. *Mecham*, 950 F.3d at, 267: Sentencing Hearing Transcript at 21, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019).

284. U.S. Sentencing Guidelines (U.S.S.G.) § 2G2.2(b)(4)(A) (2018). § 2G2.2 of the Guidelines is titled, "Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor." U.S.S.G., GUIDELINES MANUAL 214 (2018). If the defendant is convicted of 18 U.S.C. §§ 1466A(b), 2252(a)(4), 2252A(a)(5), or 2252A(a)(7), their base offense level is 18. U.S. Sentencing Guidelines § 2G2.2(a)(1). Otherwise, the base offense level is 22. *Id.* at § 2G2.2(a)(2). This means that an offender with one or less criminal history point(s) (the lowest criminal history category) has a minimum guideline sentence of 27 to 33 months' imprisonment before departures. U.S.S.G., GUIDELINES MANUAL 407 (2018).

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

ninety-seven months would likely have been an impermissible departure.[286]

The government argued that the Fifth Circuit should uphold Mecham's sentence enhancement because it was harmless as the district court would have applied the same ninety-seven month sentence either way.[287] The Fifth Circuit stated that the district court erred in failing to consider Mecham's argument based on *Nesmith*.[288] In *Nesmith*, the Fifth Circuit undertook an interpretation of U.S.S.G. § 2G2.1(b)(4), which led the court to conclude that "[t]he plain text of [Section] 2G2.1(b)(4) weighs in favor of an objective analysis."[289] The court explained that the inquiry should thus "focus on an objective view of the image – what is portrayed and depicted – rather than the viewpoint of either the defendant or the victim."[290] Ultimately, the Fifth Circuit held that "an image portrays sadistic conduct where it depicts conduct that an objective observer would perceive as causing the victim in the image physical or emotional pain contemporaneously with the image's creation."[291] The *Nesmith* ruling meant that "postcreation emotional harm to Mecham's granddaughters [did] not warrant the [sentence] enhancement" because first, Mecham's images did not portray physical pain, and, second, the government failed to meet its burden.[292]

First, the Fifth Circuit emphasized that Mecham's images did not depict the subjects in pain; the only pain that the images have caused his granddaughters is the post-creation emotional harm.[293] However, an image can still be deemed sadistic if it shows the subjects in physical pain.[294] Considering that morphed child pornography involves the obvious use of an adult body, intercourse alone does not involve the requisite pain.[295] The Fifth Circuit noted

286. *Id.* The District Court's presentence report stated that "numerous morphed images and videos" among the thousands that Mecham had created were qualified for a sentence enhancement. *Id.*

287. *Id.*

288. *Id.*

289. *Nesmith*, 866 F.3d at 679.

290. *Id.* at 679-80. The court noted that the Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits had already agreed that "whether the sadism enhancement applies is an objective inquiry." *Id.* at 680.

291. *Id.* at 681.

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

293. *Id.*

294. *Id.*

295. *Id.* In explaining that, "for morphed pornography involving the obvious use of an adult body, intercourse alone does not involve the requisite pain," the court offered examples of what kinds of morphed child pornography could qualify for the sado-masochistic enhancement, including: when the body image is of a "prepubescent child, just not the one whose face is shown," *Id.* at 268 (citing *Bach*, 400 F.3d at 632); when the body image is showing "conduct that is painful or cruel even for an adult," such as being forcibly restrained, *Mecham*, 950 F.3d at 268 (citing *Hotaling*, 634 F.3d at 731–32); or when the body image

that not all morphed child pornography is disqualified from a sadistic sentence enhancement.[296] However, a pornographic image that is morphed with children's faces over adult bodies engaging in non-painful intercourse is disqualified.[297] Because the district court did not make a finding that Mecham's images showed the adult bodies engaging in painful intercourse, the Fifth Circuit found that it was an error to include the sentence enhancement.[298] The court reasoned that the images Mecham had created showed adult bodies engaging in normal intercourse and found that they were not deserving of a sentence enhancement even though the faces of real children, specifically his granddaughters, were used.[299] It may be a gut reaction to assume that a sentence enhancement should be applied simply because a grandfather could create such sickening content about his granddaughters.[300] However, because the sex between the adults in the images was not in itself painful or violent, the court found that a sentence enhancement was not applicable.[301]

Second, the government was unable to show that the error in applying the four-point enhancement was harmless.[302] To demonstrate that a sentencing error was harmless, the government was required to show that (1) "the district court would have imposed the same sentence had it not made the error," and (2) "it would have done so for the same reasons it gave at the prior sentencing."[303] In *Mecham*, the Fifth Circuit pointed out that the most straightforward way for the government to prove harmlessness would have been if the district court had explicitly stated at sentencing that it would have applied the same ninety-seven-month sentence without enhancement.[304] Here, the district court made no such mention.[305] The Fifth Circuit rejected the government's reliance on the court's consideration of the statutory sentencing considerations in 18 U.S.C. §3553(a).[306] During the district court's sentencing hearing, the government did address 18 U.S.C. §

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reasonably appears to be "of a prepubescent child (even though it is not) for whom the sex act would be painful." *Mecham*, 950 F3d. at 268 (citing *Nesmith*, 866 F.3d at 680).

296. *Id.* at 268.

297. *Id.* at 267.

298. *Id.* at 268.

299. *Id.*

300. *Id.* at 267.

301. *Id.*

302. *Id.*

303. *Id.* at 268 (quoting United States v. Ibarra-Luna, 628 F.3d 712, 714 (5th Cir. 2010)).

304. *Mecham*, 950 F3d. at 268. The government argued that the Fifth Circuit need not even discuss the sentence enhancement at all. *Id.* The government thus contended that, no matter what, the District Court would have given Mecham a ninety-seven-month sentence. *Id.*

305. *Id.*

306. *Id.*

3553(a).[307] However, the district court did not specifically address the government's § 3553(a) reliance.[308] Therefore, the Fifth Circuit held this reliance to be "unexceptional."[309] The Fifth Circuit stated that the court should have considered the sentencing factors when determining the sentence.[310] A court's mere consideration of the Section 3553(a) factors is an even weaker basis for finding harmlessness when the court imposes a sentence at the low end of the guidelines.[311]

C. The Impact of Mecham

The silver lining in Mecham's actions is that, ultimately, the Fifth Circuit's decision will better protect children.[312] The legal effects of the Fifth Circuit's decision regarding the constitutionality of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C) are that more creators of morphed child pornography will be prosecuted.[313] Hopefully, this will disincentivize the creation of morphed child pornography thus saving many children from emotional scarring.[314] On the other hand, the Fifth Circuit's upholding of the *Nesmith* standard could have detrimental effects on the prosecution's ability to enhance sentences for extremely vulgar content simply because the victim was not harmed simultaneously with the creation.[315]

IV. PERSONAL ANALYSIS

The fight to prevent online predators from harming children has been an uphill battle, and the battle is still ongoing.[316] In the age of the Internet, where unlimited information is accessible constantly and in an instant, it is nearly impossible to cover every base. At one time, it would have been hard to imagine that the Internet would evolve in such a way that would allow people to

307. Sentencing Hearing Transcript at 36, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019).

308. *Id.*

309. *Mecham*, 950 F.3d at 268. There was no information that led the Fifth Circuit to believe that the district court would have given Mecham a ninety-seven-month sentence had they actually considered Mecham's arguments regarding the sentence enhancement. *Id.* The easiest way to show that the district court would have applied a ninety-seven-month sentence anyways would be if it explicitly stated that it would have regardless of Mecham's arguments. *Id.* However, the district court did not even consider Mecham's arguments. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 260.

313. *Id.* at 268.

314. *Id.*

315. *Id.*

316. *See supra* Part II.

easily create dangerous content such as morphed child pornography. But, one thing is obvious, morphed child pornography is a real danger that has the ability to devastate real children and their families' lives. Yet, there is a disconnect amongst the circuits regarding the constitutionality of morphed child pornography.[317] As the Internet will likely become an even more powerful tool for creating dangerous content, it is immensely important that circuits become unified in the treatment of dangerous content that we do know exists.

Although freedom of speech is a fair argument and concern, the concern about children's wellbeing should be and has been in the past, much greater.[318] As the Fifth Circuit noted, concern for the emotional and reputational harm to children has long been a valid reason for the categorical exclusion of child pornography.[319] This issue can be tackled in three ways: (1) courts must differentiate morphed and virtual child pornography,[320] (2) Congress should amend the definition of "child pornography" in 18 U.S.C. § 2256 to include specific language regarding morphed child pornography,[321] and (3) the Supreme Court needs to clarify their discussion of *Ferber* in *Stevens* in order to end the prolonged and increasingly dangerous prevalence of morphed child pornography.[322]

A. Distinguishing Morphed and Virtual Child Pornography

In considering the constitutionality of the CPPA in *Free Speech Coalition*, the Supreme Court stated that morphed child pornography *may* fall within the definition of virtual child pornography.[323] Currently, morphed child pornography is (arguably) addressed in Section 2256(8)(C) of 18 U.S.C.[324] The section states as follows:

> (8) "child pornography" means any visual depiction, including any photography, film, video, picture, or computer or computer-generated

317. *See Stevens*, 559 U.S. 460; *Mecham*, 950 F3d. 267.

318. *Id.*

319. *Id.* at 266.

320. *Free Speech Coal.*, 535 U.S. at 240.

321. 18 U.S.C. § 2256(8) (2021). As currently on the books, "child pornography" does not use "morphed child pornography" explicitly. *Id.* Rather, it includes language such as "whether made or produced by electronic, mechanical, or other means." *Id.* This ambiguous language leaves room for interpretation. *Id.*

322. *Stevens*, 559 U.S. at 461. The brief mention of child pornography in this case has spiraled into confusion amongst the circuits as evidenced by the Eighth Circuit being heavily persuaded in their decision by this rationale. *Anderson*, 759 F.3d at 895.

323. *Free Speech Coal.*, 535 U.S. at 242.

324. 18 U.S.C. § 2256(8)(C) (2021).

> image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where …
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[325]

In *Free Speech Coalition*, the Court explained that Section 2256(8)(C) embodies the "more common and lower tech" means of creating virtual images.[326] However, the Court declined to consider the constitutionality of morphed child pornography because only 18 U.S.C. §§ 2256(8)(B) and (D) were challenged under the CPPA.[327] Section 2256(8)(B) prohibited "any visual depiction . . . that is or appears to be, of a minor engaging in sexually explicit conduct."[328] Section 2256(8)(D) banned depictions of sexually explicit acts that are "advertised . . . in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[329]

It is easy to equate morphed child pornography to virtual child pornography; both rely on computer generation to exploit children.[330] However, there is certainly a blurred line between virtual child pornography and morphed child pornography in that neither physically harms real children. Although the Supreme Court chose not to analyze or distinguish morphed child pornography from virtual child pornography, the two are vastly different and must be treated as such. Morphed child pornography and virtual child pornography are different for two main reasons: (1) morphed child pornography uses the images of real identifiable children, thus punishing the creation is punishing more than a mere thought; and (2) The harm to real children greatly outweighs the literary value of morphed child pornography.

1. The Creation of Morphed Child Pornography Goes Beyond Simply Thinking of Acting Illegally

In *Free Speech Coalition*, the government argued that virtual child pornography "whets the appetite" of pedophiles by encouraging them to engage in illegalities.[331] The Supreme Court stressed that just because speech has the tendency to encourage

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325. *Id.*

326. *Free Speech Coal.*, 535 U.S. at 242.

327. *Id.*

328. *Id.*

329. *Id.* Sections 2256(8)(B) and (D) under the CPPA are unconstitutional because the language is too broad. *Id.* at 258. The sections banned sexually explicit content that simply appeared to include a minor, even if it was adults made to look like children. *Id.*

330. *Id.* at 241.

331. *Id.* at 253.

unlawful acts does not mean that the government can prohibit it.[332] The purpose of the First Amendment is to protect people's thoughts, as "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[333]

First Amendment cases typically distinguish words and deeds.[334] Those who create virtual child pornography act only insofar as they create fully computer generated content that depicts children engaging in sexually explicit acts.[335] For this reason, the Court concluded that the provisions in the CPPA that made virtual pornography illegal were unconstitutional.[336] It explained, "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[337]

Morphed child pornography undoubtedly presents more than a "remote connection" between speech that might encourage thoughts and result in child abuse. Because those who create morphed child pornography use real, identifiable children in their content, albeit the images, morphed child pornography goes one step further than virtual child pornography. As evidenced by *Mecham*, morphed child pornography causes harm for the children who are included in the images. Although morphed child pornography does not depict an underlying physical abuse, it does create emotional child abuse. In *Ferber*, the Court concluded that the speech itself was a record of child abuse, and therefore, may be prohibited.[338] Similarly, morphed child pornography itself is a record of emotional abuse significant enough that it warrants prohibition.

2. Is There Literary Value in Virtual or Morphed Child Pornography?

In *Free Speech Coalition*, the government argued that child pornography was without any literary value at all.[339] The Court found that argument unpersuasive, however, on the grounds that there are recognized works of child pornography that might have significant value.[340] *Ferber* explained that virtual child pornography could hold literary value because, under some set of

332. *Id.*; *see Stanley*, 394 U.S. at 566 (asserting that "[t]he government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts").

333. *Free Speech Coal.*, 535 U.S. at 253.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Ferber*, 458 U.S. at 762.

339. *Free Speech Coal.*, 535 U.S. at 250.

340. *Id.* at 251.

facts, its importance could outweigh its harm.[341] When an adult made to look like a child is playing the role of a minor in a TV show, movie, book, or art, there could be literary value in sexual relations, and, of course, no real child is harmed.[342]

The same simply cannot be true for morphed child pornography, as one would be hard-pressed to think of a scenario in which the face of a child superimposed over adult bodies having sex would hold any literary value. Especially because of the risk of harm to the children involved, morphed child pornography will likely never be found to possess any literary value. The importance of the content cannot ever outweigh the harm to a child in morphed child pornography. This is because the child is a *real* human being with thoughts, feelings, and emotions. The "children" in virtual child pornography are either adults made to look like children or entirely animated, thus, harm is not always guaranteed; it is not directed specifically at one real child. Morphed child pornography is dissimilar to virtual pornography in this way.[343] If virtual child pornography is created using animation, there is simply no one that has been harmed because no aspect of the content is "real."[344] Morphed child pornography does have a "real" aspect; the faces of the children being used.[345] Morphed child pornography, unlike virtual child pornography that contains no actual children, "creates . . . victims by its production" and is justifiably prohibited.[346]

Although morphed child pornography is obviously not identical to real child pornography, it should not be equated with virtual child pornography either. Real children are involved. Real harm can be caused. As the Court said in *Free Speech Coalition*, morphed child pornography "implicate[s] the interests of real children and [is] in that sense closer to the images in *Ferber*."[347]

B. MCP Should be Separately Defined in 18 U.S.C. § 2256

Contained within 18 U.S.C. § 2256 are the important definitions for Chapter 110, titled Sexual Exploitation and Other Abuse of Children.[348] Section 2256(8) defines child pornography.[349] Morphed child pornography is included in this definition, but

341. *Ferber*, 458 U.S. at 762.

342. *Id.*

343. *Free Speech Coal.*, 535 U.S. at 242. The Court noted that there are differences between virtual child pornography and morphed child pornography. *Id.*

344. *Id.* at 252.

345. *Mecham*, 950 F.3d at 264.

346. Brief for Plaintiff-Appellee at 26, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019) (citing *Free Speech Coal.*, 535 U.S. at 250.).

347. *Free Speech Coal.*, 535 U.S. at 242.

348. 18 U.S.C. § 2256 (2021).

349. 18 U.S.C. § 2256(8) (2021).

ambiguously.[350] Section 2256(8)(C) prohibits ". . . visual depiction[s] [that have] been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[351] The language of this section should be rewritten to completely outline that content depicting the faces of children superimposed onto the bodies of adults engaging in sexually explicit conduct is prohibited.

Of course, creating a definition of morphed child pornography that passes constitutional muster may prove to be a challenge if it is not worded exactly right. As evidenced in *Free Speech Coalition*, attempts to prohibit virtual child pornography in the past have flopped.[352] The Supreme Court has found the language of the CPPA far too broad and restrictive.[353] In officially defining morphed child pornography, legislators must ensure it is narrower than "created, adapted, or modified."[354]

The Internet is a complex beast, and defining components of it should be no simple task. There needs to be language that specifically defines what morphed child pornography is in order to eliminate ambiguity regarding what conduct is prohibited and what is not. The best way to eliminate ambiguity is to create a separate subsection under Section 2256(8) that explicitly defines morphed child pornography. After all, the technology to create different types of child pornography is only going to increase as the capacity of the Internet does. Accurately defining known Internet dangers would be the easiest way to prepare for those that are yet to come.

C. There Needs to be Clarification Regarding the Supreme Court's Mention of Child Pornography in Stevens

The Supreme Court's mention of child pornography in *Stevens* caused, and still is causing, a significant amount of confusion amongst the circuits. In fact, the Fifth Circuit spent much of its *Mecham* opinion analyzing how *Stevens* has influenced other decisions about morphed child pornography, including the Eighth Circuit.[355] The limited mention of child pornography in *Stevens* states as follows:

> In *Ferber*, for example, we classified child pornography as [a category of speech fully outside the protection of the First Amendment] . . . We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse and was therefore "an integral part of the production of such materials,

350. *Id.*

351. 18 U.S.C. § 2256(8)(C) (2021) (explaining that the language of "created, adapted, or modified" could be much clearer).

352. *Free Speech Coal.*, 535 U.S. at 242.

353. *Id.* at 257.

354. 18 U.S.C. § 2256(8) (2021).

355. *Mecham*, 950 F.3d at 264.

an activity illegal throughout the Nation.[356]

In *Stevens*, the Supreme Court explained that its decision in *Ferber* did not simply rest on a "balance of competing interests" alone.[357] Rather, the decision rested on the fact that child pornography goes hand in hand with underlying abuse.[358] The Eighth Circuit seemingly read this to mean that only content showing underlying abuse will be categorically excluded from the First Amendment, and thus morphed child pornography is protected.[359] Interestingly, the facts presented in *Stevens* had nothing to do with child pornography. As such, *Stevens* cannot continue to hold so much weight.

As the Fifth Circuit pointed out, child pornography was *dicta* in *Stevens* and was used to reject an analogy between it and depictions of animal cruelty.[360] The Eighth Circuit evidently misconstrued one thing about *Stevens*: it failed to mention the importance of protecting children from emotional and reputational harm.[361] For this reason, its application to cases involving child pornography is flawed. Most major cases that analyze child pornography consider reputational and emotional harm suffered by children.[362]

Stevens's suggestion that child pornography must depict an underlying criminal act in order to be excluded from the First Amendment fails to consider harm to children. If this were true, morphed child pornography would be protected by the First Amendment as free speech. The problem with this is that, although morphed child pornography does not inflict physical harm onto children, it does harm them in other ways. And the ways in which morphed child pornography harms children are more tangible than the government's arguments in *Free Speech Coalition*.[363]

D. The Fifth Circuit Erred in Declining to Apply the Four-Point Sadism Sentence Enhancement

The government correctly argued in *Mecham* that the sentence enhancement should apply and that overruling the objection to it

356. *Stevens*, 559 U.S. at 471 (citing *Ferber*, 458 U.S. at 759, 761, 763).

357. *Stevens*, 559 U.S. at 471.

358. *Id*. In *Free Speech Coalition*, the Supreme Court further shed some light on what it meant in *Ferber*. *Free Speech Coal.*, 535 U.S. at 251. *Ferber*'s judgment, explained the Supreme Court, was based upon how child pornography was made, not on what it communicated. *Id.*

359. *Anderson*, 759 F.3d at 894.

360. *Mecham*, 950 F.3d at 266.

361. *Id*.

362. *Ferber*, 458 U.S. at 747; *Free Speech Coal.*, 535 U.S. at 234; *Mecham*, 950 F.3d at 257.

363. *Free Speech Coal.*, 535 U.S. at 242.

was consistent even with *Nesmith*.[364] The video that Mecham created showed his five-year-old granddaughter "being penetrated vaginally, anally, and orally by multiple male adults."[365] Further, Mecham chose, strategically no doubt, to superimpose his granddaughter's face onto a woman's body that looked extremely young.[366] Because of this, an objective viewer would perceive that the victim in the video was in pain.[367] Mecham's efforts to create a morphed pornographic video using a female's body that appeared young were calculated, manipulative, and malicious. It can be seen as an attempt to create content that most closely resembled child pornography and that should not be ignored.

V. CONCLUSION

As the Supreme Court explained in *Free Speech Coalition*, morphed child pornography is a "more common and lower tech means of creating virtual images."[368] But morphed child pornography is not an innocent means of creating child pornography – there is no such thing. Instead, morphed child pornography uses the images of real, identifiable minors and has the ability to create serious reputational and emotional harm.[369] The disconnect between circuits regarding how to treat morphed child pornography is detrimental to the children involved.[370]

To help remedy this problem, three courses of action should be taken. First, morphed child pornography needs to be clearly distinguished from virtual child pornography. Second, 18 U.S.C. § 2256 needs to include explicit language defining morphed child pornography.[371] A separate subsection devoted entirely to morphed child pornography would be beneficial in clearing up the ambiguity.

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364. Brief for Plaintiff-Appellee at 44, United States v. Mecham, No. 19-40319 (5th Cir. July 29, 2019).

365. *Id.* at 45.

366. *Id.*

367. *Id.* at 26.

368. *Free Speech Coal.*, 535 U.S. at 242.

369. *Mecham*, 950 F.3d at 266. During the district court's sentencing hearing, the government explained "[t]he descriptions by the victim, one of his victims . . . talking about her level of discomfort when the defendant was in her home." Sentencing Hearing Transcript at 23, United States v. Mecham, No. 18 CR 1339 (S.D. Tex. May 17, 2019). This delves a little bit into how Mecham's actions impacted his granddaughters. *Id.* Further, Mecham exposed his granddaughter to this content by sending her the videos. *Id*. Clearly, emotional harm must follow from being sent a video of one's own face superimposed over the bodies of adults engaging in sexual relations.

370. *See Anderson*, 759 F.3d 891, 895 (explaining that, unless it can be found that images such as those that Mecham created have been historically unprotected, they are distinguished enough from a morphed image depicting actual sexual abuse to be considered protected free speech.).

371. 18 U.S.C. § 2256(8) (2021).

Finally, the Supreme Court needs to clarify their mention of child pornography in *Stevens*.[372]

Ultimately, "there is no place for child pornography[,] even in our free society,"[373] and this sentiment necessarily must include the epidemic that is morphed child pornography.

372. *Stevens*, 559 U.S. at 471.
373. *Stopping Child Pornography*, *supra* note 26.