No. 00-795

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

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

BRIEF FOR THE PETITIONERS

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

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

QUESTION PRESENTED

The Child Pornography Prevention Act of 1996 (CPPA), prohibits, *inter alia*, the shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999). It also contains a similar prohibition concerning any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(D) (Supp. V 1999). The question presented is whether those prohibitions violate the First Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 198 F.3d 1083. The opinion of the district court (Pet. App. 50a-65a) is unreported. The order denying rehearing (Pet. App. 44a-49a) is reported at 220 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1999. A petition for rehearing was denied on July 19, 2000 (Pet. App. 44a-45a). On October 10, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 16, 2000. The petition was filed on that date and was granted on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Child Pornography Prevention Act of 1996 are reproduced in an appendix to the petition for a writ of certiorari. See Pet. App. 67a-76a.

STATEMENT

1. a. For almost a quarter of a century, Congress has sought to combat the harm to children caused by the production and distribution of child pornography. Congress first addressed the subject of child pornography in the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7. That Act made it a crime for any person to induce a child under 16 years of age to engage in "sexually explicit conduct" in order to produce a visual depiction of such conduct. § 2(a), 92 Stat. 8. The 1977 Act also made it a crime for any person to distribute for commercial gain any obscene depiction of a minor engaged in sexually explicit conduct. *Ibid.*

In response to this Court's decision in *New York* v. *Ferber*, 458 U.S. 747 (1982), which sustained the constitutionality of a state statute that prohibited the dissemination of child pornography that did not satisfy the standards for obscenity under *Miller* v. *California*, 413 U.S. 15 (1973), Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, §§ 4(3), 5(a)(1) and (5), 98 Stat. 204-205. In that Act, Congress eliminated the requirement that the depictions must be obscene, removed the requirement that the depictions be distributed for a commercial purpose, and raised the age of minority from 16 to 18.

In 1986, the Attorney General's Commission on Pornography issued a report on child pornography and made

recommendations for improving federal law enforcement efforts. Attorney General's Commission on Pornography, *Final Report* 405-418, 595-735 (July 1986). That same year, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs reported on its investigation into the activities of child pornographers and pedophiles. See *Child Pornography and Pedophilia*, S. Rep. No. 537, 99th Cong., 2d Sess. (1986).

Drawing upon the information and recommendations contained in those reports, Congress enacted the Child Protection and Obscenity Enforcement Act of 1988. That law adopted the Pornography Commission's recommendation that producers of sexually explicit visual depictions be required to create and maintain records of the identities and ages of their performers. Pub. L. No. 100-690, § 7513, 102 Stat. 4487 (adding 18 U.S.C. 2257). See Attorney General's Commission on Pornography, *Final Report* at 618-623. In 1990, following the decision in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), which upheld a state prohibition against possession of child pornography, Congress amended federal law to prohibit the possession of visual depictions of children engaged in sexually explicit conduct. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323(a)(2), 104 Stat. 4818.

b. The prohibitions discussed above apply only to visual depictions of actual children engaged in sexually explicit conduct. See 18 U.S.C. 2251, 2252 (1994 & Supp. V 1999). With advances in computer technology, Congress became concerned that persons could create visual depictions of children engaged in sexual activity that might not involve the participation of any actual child, but that would nonetheless pose serious dangers for children. After holding hearings on that subject, see *Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996) (*Senate Hearing*), Congress

enacted the Child Pornography Prevention Act of 1996 (CPPA). Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26 to 3009-31. As part of that Act, Congress enacted 13 findings that explain why it enacted the CPPA. The Senate Report accompanying the CPPA elaborates on those findings. S. Rep. No. 358, 104th Cong., 2d Sess. (1996).

Congress found that "new photographic and computer [imaging] technologies make it possible to produce * * * visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). Congress also found that, even when actual children are used, computers can "alter sexually explicit [depictions] in such a way as to make it virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 6(A)). The Senate Report describes one way that computer images of child pornography are created: innocent pictures of children are taken from books, magazines, catalogs, or videos; the images are then loaded onto a computer; and the original pictures are then transformed through a process known as "morphing" into pictures depicting children engaged in sexually explicit conduct. S. Rep. No. 358, *supra*, at 15-16.

Congress considered the development of computer-generated child pornography extraordinarily troubling for several reasons. First, Congress determined that "child pornography is often used as part of a method of seducing other children into sexual activity." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3). In particular, "a child who is reluctant to engage in sexual activity with an adult * * * can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." 18

U.S.C. 2251 note (Supp. V 1999) (Finding 3). Congress found that computer-generated images of children engaged in sexually explicit conduct can be just as effective in seducing children into sexual activity as photographic images of real children. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8).

Second, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites" and that "such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 4). Congress found that child pornography can have that effect, regardless of whether the pornography takes the form of computer-generated images or photographs of real children. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8).

Third, because computers can alter sexually explicit depictions so as to make it "virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children," 18 U.S.C. 2251 note (Supp. V 1999) (Finding 6(A)), Congress was concerned that the prohibitions against the distribution and possession of child pornography involving real children could become unenforceable. As explained in the Senate Report:

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

> pornographic depictions of actual children will go free from punishment.

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

Fourth, Congress heard evidence that computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct. *Senate Hearing* 20, 23, 30, 35, 90. Congress learned that, because of that phenomenon, the production and distribution of computer-generated child pornography helps to sustain the market for the production of visual depictions that involve real children. *Id.* at 91.

Congress concluded that the government has a "compelling" interest in "the elimination of child pornography and the protection of children from sexual exploitation." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 13). That interest, Congress further concluded, extends not only to depictions of actual children engaged in sexually explicit conduct, but also to depictions that "are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 13).

c. The CPPA imposes criminal penalties on the knowing shipment, receipt, distribution, reproduction, sale, or possession of "child pornography." 18 U.S.C. 2252A(a) (Supp. V 1999). In provisions that are not at issue here, the CPPA defines "child pornography" as "any visual depiction * * * of sexually explicit conduct," where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999), or "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999). In the provisions at issue here, the CPPA also defines child pornography as any visual depiction of sexually explicit conduct that "is,

or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(B) (Supp. V 1999) (emphasis added), or "is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D) (Supp. V 1999) (emphasis added). The "appears to be" and the "conveys the impression" provisions respond to Congress's findings concerning the dangers to children posed by computer-generated images of children engaged in sexually explicit conduct.

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

The CPPA contains affirmative defenses that limit its reach. The Act provides that it shall be an affirmative defense to a charge of unlawful shipment, receipt, distribution, reproduction, or sale of child pornography that "the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct, * * * each such person was an adult at the time the material was produced; and * * * the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c) (Supp. V 1999). A separate subsection, added in 1998, provides that it shall be an affirmative defense to a charge of unlawful possession of child pornography that the defendant possessed "less than three matters containing visual depiction proscribed by that paragraph," and "promptly and in good faith * * * took

reasonable steps to destroy each such visual depiction," or "reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction." Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 203(a)(2), 112 Stat. 2978 (codified at 18 U.S.C. 2252A(d) (Supp. V 1999)).

A conviction on a charge relating to the shipment, receipt, distribution, reproduction, or sale of child pornography carries a maximum penalty of 15 years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than five years' and no more than 30 years' imprisonment. 18 U.S.C. 2252A(b)(1) (Supp. V 1999). A conviction on a charge of possession of child pornography carries a maximum penalty of five years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than two years' and no more than 10 years' imprisonment. 18 U.S.C. 2252A(b)(2) (Supp. V 1999).[1]

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[1] Several States have enacted statutes criminalizing depictions that appear to be of children engaged in sexual activity. See, *e.g.*, Minn. Stat. Ann. § 617.246(f)(2)(iii) (West 2001) (defining pornographic work to mean any visual depiction that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct"); Mo. Ann. Stat. § 573.035 (West 2001) (prohibiting the promotion of child pornography that "portrays what appears to be a minor as a participant or observer of sexual conduct"); Del. Code Ann. tit. 11 § 1103(e) (Supp. 2000) (defining child to mean "any individual who is intended by the defendant to appear to be 14 years of age or less"); Ariz. Rev. Stat. Ann. § 13-3555 (West 2000) (forbidding persons depicted as a participant in sexual conduct "to masquerade as a minor," or to produce or distribute visual depictions "whose text, title or visual representation depicts a participant in any exploitive exhibition or sexual conduct as a minor even though any such participant is an adult"). In addition, England and Canada have amended their child pornography laws to reach depictions that appear to be of children. See Protection of Children Act, 1978, § 7(8),

2. After the CPPA was signed into law, the Free Speech Coalition and others (respondents) filed suit in the Northern District of California against the Attorney General of the United States and the United States Department of Justice. Pet. App. 3a. The Free Speech Coalition is "a trade association of businesses involved in the production and distribution of 'adult-oriented materials;'" the other respondents are a publisher of a book on nudism, an artist who paints nudes, and a photographer who specializes in erotic photography. *Ibid.* Respondents alleged that the "appears to be" and the "conveys the impression" provisions of the CPPA are vague and overbroad in violation of the First Amendment. *Id.* at 50a, 54a.[2]

On cross-motions for summary judgment, the district court first determined that respondents have standing to raise their claims. Pet. App. 54a-56a. The court noted that, because respondents allege that they use only adults in their works and that they do not market their works as child pornography, their works fall within the Act's affirmative defense in Section 2252A(c). *Id.* at 54a. The court nonetheless ruled that respondents have standing based on their allegations that the challenged prohibitions have caused them to refrain from distributing certain works. *Id.* at 55a-56a.

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amended by Criminal Justice and Public Order Act, 1994, § 84(3)(c)(8) (Eng.) (reaching "pseudo-photograph" created by computer "[i]f the impression conveyed by a pseudo-photograph is that the person shown is a child"); Criminal Code, R.S.C., ch. C-46, § 163.1(1)(a)(i)(1998) (Can.) (banning visual representations that show a person "who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity").

[2] Respondents also alleged that the CPPA constitutes a prior restraint on speech. Pet. App. 50a. The district court rejected that claim, *id.* at 65a, the court of appeals affirmed that ruling, *id.* at 27a, and that claim is not at issue here.

On the merits, the court concluded that the CPPA is "content-neutral," because it is designed to counteract the effect that child pornography has on innocent children and not to regulate ideas. Pet. App. 57a-58a. The court therefore reviewed the prohibitions at issue under the standard applicable to content-neutral regulations that incidentally burden speech. The court held that the prohibitions satisfy that standard. The court concluded that the challenged provisions "clearly advance[] important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created." *Id.* at 58a. The court further concluded that the prohibitions "burden[] no more speech than necessary in order to protect children from the harms of child pornography." *Id.* at 59a.

The district court also held that the "appears to be" and the "convey[s] the impression" prohibitions are not unconstitutionally overbroad. Pet. App. 63a-64a. The court concluded that, under a fair reading of the Act and its affirmative defenses, it is "highly unlikely" that the Act would prevent the production of "valuable works." *Id.* at 62a-63a. The court also held that the CPPA is not unconstitutionally vague. *Id.* at 63a-64a.

3. The court of appeals reversed. Pet. App. 1a-43a. The court agreed with the district court that respondents have standing based on respondents' allegations that they ceased distributing certain material because they feared prosecution. *Id.* at 12a. On the merits, the court of appeals held that the "appears to be" and "convey[s] the impression" prohibitions "do not meet the requirements of the First Amendment." *Id.* at 2a.

a. The court of appeals first held that the CPPA restricts speech based on its content, Pet. App. 13a, and that the government was therefore required to show that the "appears to be" and "convey[s] the impression" provisions are

narrowly tailored to further a compelling interest. *Id.* at 15a. Finding that those provisions are not supported by a compelling interest, the court ruled that the government failed to sustain that burden. *Id.* at 15a-23a.

The court of appeals read *New York* v. *Ferber*, 458 U.S. 747 (1982), to hold that "Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children." Pet. App. 17a. The court also drew from *Ferber* the principle that government may not regulate child pornography based on the effect such images have on those who view them. *Id.* at 16a-17a. Applying that understanding of *Ferber*, the court ruled that "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions." *Id.* at 19a. The court also concluded that there is not a "demonstrated basis to link computer-generated images with harm to real children." *Id.* at 20a. Absent such a link, the court reasoned, "the law does not withstand constitutional scrutiny." *Ibid.*

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

The court also held that the CPPA is unconstitutionally overbroad. Pet. App. 25a-27a. The court reiterated its earlier conclusion that Congress may only regulate depictions of child pornography that involve real children, and then concluded that "the CPPA is insufficiently related" to that interest "to justify its infringement of protected speech." *Ibid.*

b. Judge Ferguson dissented. Pet. App. 29a-43a. Judge Ferguson first faulted the majority for failing to recognize the government's legitimate interests in prohibiting the dissemination of images that can be used to seduce children into sexual activity, destroying the child pornography market, and ensuring that the prohibitions against the use of real children in sexually explicit depictions are not effectively undermined. *Id.* at 32a-35a. Judge Ferguson also criticized the majority for "ignor[ing] the fact that child pornography, real or virtual, has little or no social value." *Id.* at 35a. Because "Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value," *id.* at 37a-38a, Judge Ferguson concluded, "virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment." *Id.* at 38a.

Judge Ferguson also disagreed with the majority's holding that the CPPA is unconstitutionally overbroad. Pet. App. 38a-41a. In his view, because the Act targets only those images that are "indistinguishable" from unretouched photographic images of actual children, it does not reach "everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner." *Id.* at 39a. Judge Ferguson also noted that one of the Act's affirmative defenses, in Section 2252A(c), would shield photographic images of youthful-looking adults in sexual poses, so long as they are not marketed as child pornography. *Id.* at 40a. Any possible impermissible applications of the CPPA, Judge Ferguson explained, should be resolved on a case-by-case basis. *Id.* at 40a-41a.

Finally, Judge Ferguson concluded that the CPPA is not unconstitutionally vague. Pet. App. 41a-43a. As he read the Act, the inquiry into whether an image appears to be a minor is an objective one: The question is "whether an unsus-

pecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.* at 42a (citation omitted). Judge Ferguson noted that the CPPA's scienter requirement provides an additional safeguard against arbitrary enforcement. *Id.* at 42a-43a.

c. The government's petitions for rehearing and rehearing en banc were denied. Pet. App. 44a-45a. Judge Ferguson would have granted rehearing and recommended granting the suggestion for rehearing en banc. *Id.* at 44a. Judge Wardlaw (joined by Judges O'Scannlain and T.G. Nelson) dissented from the denial of rehearing en banc. *Id.* at 45a-49a. Agreeing with the points made in Judge Ferguson's dissent, Judge Wardlaw concluded that the panel majority had impermissibly "elevate[d] the free speech rights of pedophiles over the compelling governmental interest in protecting our children." *Id.* at 49a.

SUMMARY OF ARGUMENT

The Child Pornography Prevention Act of 1996 (CPPA) is the product of Congress's determination that advances in computer technology make possible the creation of images that are virtually indistinguishable from depictions of real children engaged in sexually explicit conduct. The statute embodies Congress's judgment, based on abundant evidence, that such depictions are intrinsically related to the sexual abuse of real children. Under the analysis applied in *New York* v. *Ferber*, 458 U.S. 747 (1982), that form of child pornography, like child pornography involving real children, is unprotected by the First Amendment. The court of appeals therefore erred in facially invalidating the prohibitions against the dissemination and possession of such depictions. Indeed, four courts of appeals have rejected First Amendment challenges to those prohibitions.

A. In *Ferber*, the Court held that visual depictions of actual children engaged in sexual activity constitute a distinct category of speech that is unprotected by the First Amendment. Three principal considerations led the Court to reach that conclusion: The government's interest in protecting children from sexual abuse is "compelling." 458 U.S. at 756-757. The distribution of depictions of children engaged in sexually explicit conduct is "intrinsically related" to the sexual abuse of children. *Id.* at 759. And the value of such depictions is "exceedingly modest, if not *de minimis*." *Id.* at 762.

Those same considerations lead to the conclusion that the material covered by the CPPA is also unprotected. First, the governmental interest at stake is the "compelling" one of protecting children from sexual exploitation. Second, the depictions at issue are "intrinsically related" to the sexual abuse of children: Pedophiles use such depictions to seduce other children into sexual activity and to whet their appetites for sexual abuse; the existence of such material makes it far more difficult to establish that a pornographic image is of a real child, endangering the government's ability to enforce existing child pornography laws; and such material is exchanged for pictures of real children engaged in sexually explicit conduct, and adds fuel to the underground market for child pornography. Finally, the value of depictions of children engaged in sexually explicit conduct is exceedingly modest, if not *de minimis*. Thus, like depictions of real children engaged in sexually explicit conduct, depictions that are virtually indistinguishable from such depictions are categorically unprotected by the First Amendment.

For essentially the same reasons, even if the provisions at issue triggered strict scrutiny, they would still be constitutional. The CPPA covers an exceedingly narrow range of depictions of children engaging in sexually explicit conduct. The CPPA substantially furthers in a number of respects the

government's compelling interest in preventing the sexual exploitation of children. And there are no less restrictive means of advancing the government's compelling interest in protecting children from sexual abuse. The CPPA therefore survives strict First Amendment scrutiny as well.

B. The court of appeals' reasons for concluding that the prohibitions at issue are not supported by a compelling interest are unpersuasive. Contrary to the court of appeals' understanding, *Ferber* did not hold that the government's sole compelling interest is in regulating depictions involving real children. The state statute at issue in *Ferber* applied only to depictions of sexual conduct by actual children, and at the time of the decision in that case, the technology for producing computer-generated images that are virtually indistinguishable from photographs of real children had not yet developed. The Court therefore had no occasion to decide whether the dangers to children associated with new computer technology justify prohibitions like those enacted in the CPPA. Under the legal analysis the Court applied in deciding that child pornography involving real children is not protected by the First Amendment, however, the child pornography at issue here is also unprotected by the First Amendment.

The court of appeals also concluded that the First Amendment precludes the government from relying on interests that depend on the effect of the material on the audience. But the government's interest in ensuring that the prohibitions against child pornography depicting real children are not rendered unenforceable does not depend on the effect of the material on the audience. The same is true of the government's interest in preventing virtual child pornography from fueling the market for child pornography involving real children. The court of appeals simply ignored those vital interests.

Moreover, Congress's interest in preventing pedophiles from using child pornography to seduce children into performing sexual acts legitimately rests on Congress's judgment that child pornography is a common tool of crime. It is true that the success of child pornography as a tool of crime depends on its effect on the children who view it. But there is no First Amendment right to distribute such material to children or, more generally, to use speech to facilitate a crime.

Congress also legitimately considered the fact that pedophiles use child pornography to whet their own appetites for sexual abuse. Regulating speech based on its potential to incite unlawful conduct ordinarily raises First Amendment concerns. But in this case, the unusual vulnerability of children, the secretive nature of child abuse, and the *de minimis* value of the speech, overcome such concerns. In any event, the three other independent justifications for the prohibitions at issue are more than sufficient to sustain their constitutionality.

The court of appeals also concluded that Congress had failed to establish a sufficient factual link between child pornography and sexual abuse. The court, however, failed to accord the deference to Congress's findings required by this Court's decisions. Moreover, the court ignored abundant evidence that supports Congress's findings.

C. The CPPA is not unconstitutionally vague. Persons of ordinary intelligence can discern whether a depiction is virtually indistinguishable from a photograph of a real child engaged in sexually explicit conduct. Contrary to the court of appeals' view, that statutory standard is objective rather than subjective. The question is whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity. That question can be readily answered in the vast majority of cases based on the physical characteristics of the

persons depicted and the way in which the material is promoted. The Act's requirement that any violation must be knowing further diminishes any vagueness concern.

D. Finally, the CPPA is not unconstitutionally overbroad. The statute's "legitimate reach" plainly "dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. The statute is aimed at hard core child pornography and does not apply to innocuous images of naked children. Nor does it reach drawings, cartoons, sculptures, or paintings depicting youthful persons in sexually explicit poses. There may be a limited class of cases in which it might be necessary to use material covered by the CPPA in order to produce educational, medical, or artistic works. But there is no reason to think that the "arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. In these circumstances, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 773-774 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973)).

ARGUMENT

THE "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" PROVISIONS OF THE CHILD PORNOGRAPHY PREVENTION ACT ARE CONSISTENT WITH THE FIRST AMENDMENT

Two central provisions of the CPPA are at issue here. The first prohibits the dissemination and possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999). The other prohibits the dissemination and possession of any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a

visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(D) (Supp. V 1999). The court of appeals in this case invalidated both prohibitions on First Amendment grounds. That ruling conflicts with the decisions of four other circuits. See *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999); *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States* v. *Mento*, 231 F.3d 912 (4th Cir. 2000), petition for cert. pending, No. 00-8114; *United States* v. *Fox*, No. 00-40034, 2001 WL 370045 (5th Cir. Apr. 13, 2001).

The court of appeals erred in invalidating the "appears to be" and "conveys the impression" prohibitions. Congress intended for both prohibitions to reach a narrow category of material—depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5); see also 18 U.S.C. 2251 note (Supp. V 1999) (Findings 8, 13).[3] As we now demonstrate, that limited category of material is not protected by the First Amendment; the challenged prohibitions are constitutional even if they trigger strict scrutiny; and the prohibitions are neither unconstitutionally vague nor substantially overbroad.

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[3] The principal difference between the two provisions is that the "conveys the impression" provision requires the jury to assess the material at issue in light of the manner in which it is promoted. Thus, under the "conveys the impression" provision, in close cases, a jury may find that the material at issue is child pornography based on the way it is promoted, even if the material might not constitute child pornography if promoted in a different manner. Cf. *Ginzburg* v. *United States*, 383 U.S. 463, 474-476 (1966).

A. Depictions That Are Virtually Indistinguishable From Depictions Of Real Children Engaged In Sexually Explicit Conduct Are Unprotected By The First Amendment

1. Legislation that restricts speech based on its content is ordinarily subject to strict scrutiny and may be upheld only if it is narrowly tailored to further a compelling interest. *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 813 (2000). There are, however, "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," and "[t]hese include the lewd and obscene." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942) (footnote omitted). "[S]uch 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 that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

In *Roth* v. *United States*, 354 U.S. 476, 485 (1957), the Court expressly held that "obscenity is not within the area of constitutionally protected speech or press." In *Miller* v. *California*, 413 U.S. 15 (1973), the Court reaffirmed that holding. *Id.* at 23-24. *Miller* also defined the category of expression that is unprotected as works which, taken as a whole, appeal to the prurient interest, portray sexual conduct in a patently offensive way, and do not have any serious literary, artistic, political, or scientific value. *Id.* at 24.

In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Court held that visual representations of sexual performances by children under 16 years of age, see N.Y. Penal Law § 263.15 (McKinney 1980), are also "without the protection of the First Amendment." 458 U.S. at 764. The Court concluded that such child pornography lacks First Amendment protection whether or not it is obscene under *Miller*. *Id.* at 761, 764-765. Three principal considerations led the Court to hold

that child pornography constitutes a distinct category of unprotected speech.

First, the government's "interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*,'" 458 U.S. at 756-757 (citation omitted) (emphasis added). Indeed, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. Second, the "distribution of photographs and films depicting sexual activity by juveniles is *intrinsically related* to the sexual abuse of children." *Id.* at 759 (emphasis added). "[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Ibid.* Moreover, "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 controlled." *Ibid.* Third, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is *exceedingly modest, if not de minimis*." *Id.* at 762 (emphasis added). It would be "unlikely," the Court observed, "that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-763.

Based principally on those three considerations, the Court concluded that live performances or photographic reproductions of children engaged in sexually explicit conduct are unprotected by the First Amendment. 458 U.S. at 764. The Court explained that, because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, * * * it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 763-764.

2. The prohibitions at issue here restrict a category of child pornography that was not at issue in *Ferber*—depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). The three considerations that led the Court to hold that child pornography involving real children is unprotected, however, lead to the same conclusion here. Prohibiting the distribution of material that is virtually indistinguishable from photographs of actual children engaging in sexually explicit conduct is supported by a "compelling interest" in preventing the sexual abuse of children, 458 U.S. at 756; the dissemination of such material is "intrinsically related" to the sexual abuse of children, *id.* at 759; and the value of such material is "exceedingly modest, if not *de minimis*," *id.* at 762. Thus, as Judge Ferguson stated in his dissenting opinion below, such "child pornography should join the ranks of * * * child pornography [involving real children] as a class of speech outside the protection of the First Amendment." Pet. App. 38a.

a. Congress identified the interest underlying the prohibitions at issue here as "the protection of children from sexual exploitation." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 13). That is the same interest that supported the prohibition at issue in *Ferber*. As explained in *Ferber*, that interest is one of "surpassing importance." 458 U.S. at 757.

b. The distribution and possession of material that is virtually indistinguishable from photographs of real children engaged in sexually explicit conduct is also "intrinsically related to the sexual abuse of children." *Ferber*, 458 U.S. at 759. There are at least four ways in which the existence of such material fosters the sexual abuse of children.

First, as Congress found, "child pornography is often used as part of a method of seducing other children into sexual

activity." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3). "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3).

The Senate Report elaborated on that concern:

> Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers. Peer pressure can have a tremendous effect on children, helping to persuade a child that participating [in] sexual activity such as that depicted in the material is "all right."

S. Rep. No. 358, *supra*, at 13-14. Pedophiles and child molesters thus use child pornography "to break down the resistance and inhibitions of their victims or targets of molestation." *Id.* at 13.

As Congress found, the government's interest in preventing the seduction of children through the use of child pornography is not limited to images of actual children engaged in sexual activity. Rather, "the effect of visual depictions of child sexual activity * * * on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, * * * which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8); accord *Fox*, 2001 WL 370045, at *4; *Mento*, 231 F.3d at 920; *Acheson*, 195 F.3d at 649; *Hilton*, 167 F.3d at 69.

Second, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 4). "[S]uch use of child pornography," Congress determined, "can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 4). Child pornography thus "encourages the activities of child molesters and pedophiles." S. Rep. No. 358, *supra*, at 12. Again, Congress found that "the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, * * * is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means" that are "virtually indistinguishable" from images of actual children. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8); accord *Mento*, 231 F.3d at 920; *Acheson*, 195 F.3d at 649; *Hilton*, 167 F.3d at 69.

Third, because computers can alter sexually explicit depictions so as to make it "virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children," 18 U.S.C. 2251 note (Supp. V 1999), Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child. S. Rep. No. 358, *supra*, at 20. In particular, because computers can produce images that are virtually indistinguishable from images of real children, a defendant charged with distributing or possessing images of real children could almost always argue that the government failed to prove beyond a reasonable doubt that the images were of real children. *Id.* at 16. That "built-in reasonable doubt argument," *ibid.*, could eventually "render[] unen-

forceable" the prohibitions against the distribution or possession of child pornography produced using actual children. *Id.* at 20. See also *Mento*, 231 F.3d at 920. Thus, as the Fifth Circuit recently explained in upholding the constitutionality of Section 2252A, "Congress has advanced a powerful new rationale for the necessity of the 'appears to be' language in § 2252A: the need to address the law enforcement problem created by tremendous advances in computer technology since *Ferber* and *Osborne* were decided, advances that have greatly exacerbated the already difficult prosecutorial burden of proving that an image is of a real child." *Fox*, 2001 WL 370045, at *5 (footnote omitted); cf. *Ferber*, 458 U.S. at 765-766 & n.19 (holding that a State may prohibit the distribution of child pornography produced outside the State in part because "[i]t is often impossible to determine where such material is produced").

Fourth, computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct, and they add fuel to the underground market in child pornography. *Senate Hearing* 91 (testimony of Bruce A. Taylor). By prohibiting dissemination and possession of computer-generated images, the CPPA helps to stamp out the market for child pornography involving real children. *Hilton*, 167 F.3d at 73; see also *Fox*, 2001 WL 370045, at *4, *5; cf. *Osborne*, 495 U.S. at 110-111.

c. While the harm caused by the material at issue here is great, its value "is exceedingly modest, if not *de minimis*." *Ferber*, 458 U.S. at 762. It is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-763.

To the extent that it might be necessary for literary, scientific, or educational purposes to depict children engag-

ing in such conduct, the depictions can be created in a manner that is consistent with the CPPA. Because the Act applies only to depictions that are virtually indistinguishable from photographs of real children, it does not apply to drawings, cartoons, sculptures, or paintings that depict youthful-looking persons in sexual poses. *Hilton*, 167 F.3d at 72; *Mento*, 231 F.3d at 922. The Act also affords an affirmative defense to persons who disseminate visual depictions involving adults who may appear to be children, provided that such distributers do not "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c)(3) (Supp. V 1999).

In addition, the Act does not apply to visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted. Cf. *Jenkins* v. *Georgia*, 418 U.S. 153, 161 (1974). Significantly, moreover, like the state statute at issue in *Ferber*, the CPPA does not ban the dissemination of any particular message concerning the sexuality of children; it simply bans the use of child pornography in connection with that or any other message. *Ferber*, 458 U.S. at 763; cf. *Erie* v. *Pap's A.M.*, 529 U.S. 277, 293 (2000) (plurality opinion) (ban on public nudity has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at nude dancing establishments). The First Amendment interest in disseminating material that is covered by the CPPA is therefore marginal at best. See *id.* at 294 (noting that "few of us would march our sons and daughters off to war to preserve the citizen's right to see specified anatomical areas exhibited at establishments like Kandyland") (internal quotation marks omitted).

d. In sum, the harms caused by depictions that are virtually indistinguishable from photographs of actual

children involved in sexually explicit conduct "overwhelmingly outweigh[] the expressive interests, if any." *Ferber*, 458 U.S. at 763-764. Thus, under the analysis set forth in *Ferber*, such child pornography is "without the protection of the First Amendment." *Id.* at 764; see also *Fox* 2001 WL 370045, at * 6 (because depictions that appear to be of actual children engaged in sexual conduct are properly considered child pornography, "they are outside the protection of the First Amendment and may be freely regulated even to the extent of an outright ban"); *Acheson*, 195 F.3d at 650 (quoting *Hilton*, 167 F.3d at 69) ("As 'it is well-settled that child pornography, an unprotected category of expression identified by its content, may be freely regulated,' * * * Appellant's facial challenge fails.").

3. Because the category of speech regulated by the prohibitions challenged by respondents is unprotected by the First Amendment, those prohibitions do not trigger strict scrutiny. The same considerations that demonstrate that the speech at issue here is unprotected, however, also show that the prohibitions are narrowly tailored to further a compelling interest. Thus, even if those prohibitions triggered strict scrutiny, they would still be constitutional.

The CPPA covers an exceedingly narrow range of depictions of children engaging in sexually explicit conduct, see 18 U.S.C. 2256(2). It substantially furthers in a number of respects the government's compelling interest in preventing the sexual exploitation and abuse of children. In addition, the statute provides for an affirmative defense that shields distributors of such images from criminal liability if the depictions they distribute are made using adult performers and the distributor does not advertise, market, or otherwise hold out the depiction to be of children. 18 U.S.C. 2252A(c) (Supp. V 1999). And there are no less restrictive means of advancing the government's compelling interest in protecting children from the harmful uses of the depictions covered

by the statute. Relying on these same basic considerations, the Fourth and Fifth Circuits have held that the CPPA satisfies strict scrutiny. *Mento*, 231 F.3d at 918-921; *Fox*, 2001 WL 370045, at *3-*6.

B. The Court Of Appeals' Reasons For Concluding That The Government Does Not Have Authority To Regulate The Depictions At Issue Are Unpersuasive

The court of appeals did not question our submission that the visual depictions at stake in this case have little, if any, value. It held, however, that the government's interests are not sufficiently compelling to justify restrictions on those depictions. See Pet. App. 15a-23a. That holding rests on three fundamental legal errors.

1. First, the court of appeals read *Ferber* to hold that Congress "has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children." Pet. App. 17a. Nothing in *Ferber*, however, prevents Congress from addressing the serious dangers to children posed by child pornography that is virtually indistinguishable from child pornography involving real children. The statute before the Court in *Ferber* applied only to depictions of sexual performances by actual children. See N.Y. Penal Law § 263.15 (McKinney 1980). Moreover, at the time of *Ferber*, the technology for producing computer-generated images that are virtually indistinguishable from photographs of real children had not yet developed. The Court in *Ferber* therefore had no occasion to decide whether the new dangers to children associated with computer technology could justify prohibitions like those at issue here. As the Fourth Circuit has explained, "*Ferber* necessarily dealt only with depictions of actual children, long before virtual pornography became an issue." *Mento*, 231 F.3d at 919.

The specific statements from *Ferber* cited by the court of appeals are not to the contrary. The court of appeals relied

on the statement in *Ferber* that the government's interest is "limited to works that *visually* depict explicit sexual conduct by children below a specified age." Pet. App. 15a-16a (quoting *Ferber*, 458 U.S. at 764 (emphasis in *Ferber*)). That sentence, however, does not draw a distinction between pictures of real children and pictures of persons who appear to be children, for both sorts of pictures "visually depict" sexual conduct by children. Indeed, in a footnote to the very statement cited by the court of appeals, the Court in *Ferber* specifically noted, without any suggestion that such laws are invalid, that two States had defined a child as "a person under age 16 or who appears as a prepubescent," and one State had defined a child as "one who is or appears to be under 16." *Ferber*, 458 U.S. at 764 n.17.

The court of appeals also relied on a statement in *Ferber* that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." Pet. App. 16a (quoting *Ferber*, 458 U.S. at 763). But that statement merely described one option available under the New York law before the Court; it was not a holding that the First Amendment protects the dissemination of images that are virtually indistinguishable from photographs of real children engaged in sexually explicit conduct. That question was not involved in the case. Moreover, as already discussed (see p. 25, *supra*), the CPPA permits persons to distribute works that use adults who appear younger as long as the depictions are not advertised, promoted, presented, described, or distributed as visual depictions of a minor engaged in sexually explicit conduct. 18 U.S.C. 2252A(c) (Supp. V 1999).

Finally, the court of appeals relied on the Court's statement in *Ferber* that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First

Amendment protection." *Ferber*, 458 U.S. at 764-765 (quoted in part at Pet. App. 17a). In context, that statement is best understood as referring to the First Amendment's protection for nonobscene written works, and perhaps nonobscene artistic drawings, paintings, cartoons, or sculptures that are created without live models—none of which are covered by the CPPA. See *Mento*, 231 F.3d at 919 n.8. Because *Ferber* presented no question concerning computer-generated or other depictions that are virtually indistinguishable from those of actual children engaged in sexual conduct, there is no reason to believe that the quoted statement was directed to such material. To the contrary, as we have pointed out above (see p. 28, *supra*), the Court elsewhere specifically noted, without any expression of disapproval, that the child pornography laws of several States applied to depictions of a person who "appears to be" a child under 16 or a prepubescent child. See 458 U.S. at 764 n.17.

More fundamentally, it would be a mistake to attempt to resolve the question presented here by parsing isolated sentences in an opinion that was addressed to the resolution of a different question. See *Texas* v. *Cobb*, No. 99-1702 (Apr. 2, 2001), slip op. 6 ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."). The crucial part of the Court's decision in *Ferber* is the *legal analysis* the Court applied in deciding that child pornography involving real children is not protected by the First Amendment. As we have shown, under that legal analysis, the form of child pornography at issue here is likewise unprotected by the First Amendment.

2. a. The court of appeals also concluded that the First Amendment does not permit the regulation of visual depictions of child pornography based on a "consideration of the effects such images have on others, even if those effects exist." Pet. App. 16a. The provisions at issue here, however, have two independently sufficient justifications that are not

based on a consideration of the effects of the images on those who view them. Neither the interest in ensuring that the prohibitions against possession of child pornography depicting real children are not rendered unenforceable, nor the interest in preventing virtual child pornography from fueling the market for child pornography involving real children, depends on a consideration of such effects. Both interests are compelling and outweigh any marginal First Amendment interest that may be at stake in this case. In dismissing the interests supporting the CPPA as impermissibly resting on the effects that child pornography has on pedophiles who view it, the court of appeals simply ignored those distinct and vital governmental interests.

b. Congress also legitimately relied on its interest in preventing pedophiles from using child pornography to seduce children into performing sexual acts. That interest rests on Congress's judgment that child pornography is a common tool of crime. Just as States may enact bans on tools that are often used in the crime of burglary, see *People* v. *Chastain*, 733 P.2d 1206, 1208-1211 (Colo. 1987) (en banc), Congress may enact a ban on the sale of material that is often used in the crime of sexual abuse of children. It is true that the success of child pornography as a tool of crime depends on its effect on the children who view it. But that does not alter the constitutional analysis. An adult has no First Amendment right to display such material to children in the first place. In addition, the First Amendment has never been understood to "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Ferber*, 458 U.S. at 762 (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Thus, the protection of the First Amendment does not extend to visual depictions of child pornography that are commonly used as an integral part of the crime of sexual abuse of children. Children do not have the maturity in

judgment to evaluate the material that is presented to them by pedophiles, and pedophiles exploit that vulnerability to commit their crimes.

This Court's decision in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), fully supports the conclusion that the government may prohibit the possession of child pornography in order to prevent pedophiles from using it to seduce children into sexual activity. In that case, the Court upheld Ohio's ban on the possession of child pornography, relying in part on the State's interest in preventing pedophiles from using child pornography "to seduce other children into sexual activity." 495 U.S. at 111. As the First Circuit explained in *Hilton*, 167 F.3d at 70, *Osborne* "marks a subtle, yet crucial, extension of a state's legitimate interest to the protection of children not actually depicted in prohibited images."

c. Congress also legitimately considered the fact that pedophiles use child pornography to whet their appetites for sexual abuse. The government's interest in preventing pedophiles from using child pornography to stimulate their appetites for sexual abuse does depend on the effects such images have on pedophiles, and the regulation of speech because of its potential to incite unlawful conduct ordinarily does raise serious First Amendment concerns. See *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). In the circumstances presented here, however, the First Amendment does not preclude Congress from taking account of the effects that child pornography has on pedophiles, along with the other considerations discussed above, in responding to the compelling interest in protecting children against sexual abuse.

First, children are especially vulnerable victims who are unlikely to be able to resist abuse or to have the maturity of judgment to seek assistance in avoiding their abusers. Second, the crime of sexual abuse is secretive in nature and is unlikely to be observed by those who could protect

children targeted by pedophiles. Third, it would not be practical for Congress to rely exclusively on counter-speech to address that problem. See *Kansas* v. *Hendricks*, 521 U.S. 346, 360 (1997). Fourth, the government has "greater leeway" to regulate pornographic depictions of children than it has to regulate other kinds of materials. *Ferber*, 458 U.S. at 756. And fifth, in contrast to the core First Amendment interest in political speech at issue in *Brandenburg*, the First Amendment interest in disseminating child pornography is modest, if not *de minimis*. *Ferber*, 458 U.S. at 762-763. Those factors combine to justify as both legitimate and compelling the government's interest in preventing pedophiles from using child pornography to whet their appetites for sexual abuse. In any event, the constitutionality of the "appears to be" and "conveys the impression" prohibitions does not ultimately depend on the acceptance of the "whetting the appetite" rationale. As we have discussed, there are three other independent justifications for the prohibitions, and those justifications taken together are more than sufficient to sustain their constitutionality.

3. Finally, the court of appeals rejected Congress's findings that the dissemination of child pornography fosters the sexual abuse of children, concluding that there is not a demonstrated link between child pornography and the "subsequent sexual abuse of children." Pet. App. 20a. The court apparently based that conclusion on a single student law review note. *Ibid.* (citing Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996)). The court erred in casting aside Congress's considered judgment in that fashion.

In reviewing the validity of a federal statute under the First Amendment, "courts must accord substantial defer-

ence to the predictive judgments of Congress." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997). The courts' "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence,'" and "substantiality" is measured "by a standard more deferential" than that accorded "to judgments of an administrative agency." *Id.* at 195. Such deference is warranted both because Congress is "far better equipped than the judiciary" to gather and evaluate evidence bearing upon legislative questions, *ibid.*, and out of "respect for [Congress's] authority to exercise the legislative power," *id.* at 196. Moreover, in reviewing Congress's actions, a court may not insist that Congress make its determinations on the basis of particular forms of evidence. In addition to relying on the testimony of experts and others with relevant experience, Congress may also rely on the judgments of other public bodies that have investigated the problem, *Pap's*, 529 U.S. at 297; *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986), judicial opinions, *Pap's*, 529 U.S. at 297, and "common sense," *Burson* v. *Freeman*, 504 U.S. 191, 207, 211 (1992) (plurality opinion). When Congress's findings on the relationship between child pornography and sexual abuse are reviewed with the appropriate degree of deference, they must be credited.

a. A wealth of evidence supports Congress's finding that pedophiles use child pornography to seduce children into sexual activity. Researchers and prosecutors who testified at the Senate Hearing informed Congress unequivocally that pedophiles use child pornography as a method of seduction.[4]

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[4] *Senate Hearing* 35 (statement of professor of psychology Dr. Victor Cline) (Child pornography is used "to seduce children into engaging in sexual acts" with adults.); *id.* at 96-97 (testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families) ("Actual or simulated child pornography is shown to convince the child that other children regularly participate in sexual activities with

Earlier federal investigations arrived at the same conclusion. In 1986, the Attorney General's Commission on Pornography found "substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children." *Final Report*, *supra*, at 411.[5] In

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adults or peers. * * * Continued exposure to the pornography lowers the inhibitions of the child to a point where he allows the molester to kiss and touch him sexually. Eventually, if successful, the seduction process progresses to more explicit activity between the child victim and adult or other children, using the pornography as instructional tools.") (footnote omitted); *id.* at 20 (statement of Deputy Chief Postal Inspector Jeffrey J. Dupilka) ("Child molesters use kiddie porn to seduce children into participating in sexual activity with them."); *id.* at 18 (statement of Deputy Assistant Attorney General Kevin U. DiGregory) ("Entirely artificial images * * * can be used by pedophiles to seduce children"); *id.* at 37 (testimony of Dee Jepsen, President of Enough is Enough) ("Therapists who treat sexually addicted persons declare, and studies confirm, that pornography, often child pornography, does play a major role in the molestation process with children.").

[5] See *Final Report*, *supra*, at 411 ("Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it."); *id.* at 649 ("Child pornography is often used as part of a method of seducing child victims."); *ibid.* ("A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity."); *ibid.* ("From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography."); *id.* at 649-650 ("Child pornography is * * * used to illustrate the activities in which the pedophile wishes a child to engage. In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.") (footnote omitted); *id.* at 649 ("A pedophile offender will use child pornography in which the children appear to be having a good time. The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.").

that same year, the Senate Permanent Subcommittee on Investigations also concluded that pedophiles use child pornography to "lower a child's inhibitions," and to "assist them in seducing their victims." S. Rep. No. 537, 99th Cong., 2d Sess. 10, 44 (1986). This Court specifically noted in *Osborne* that "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity," 495 U.S. at 111, and the available secondary literature confirms that conclusion.[6] The reported cases also provide vivid examples of pedophiles using images of child pornography in the course of exploiting children sexually.[7]

Child pornography is not the only means by which pedophiles seduce children into sexual activity. The evidence before Congress, however, shows that it plays a significant role. One witness informed Congress that approximately one-third of the molesters in his practice had used child pornography as a seduction tool. *Senate Hearing* 116 (testimony of Dr. Cline). Another witness testified that a study of 1,400 sexual exploitation cases in Louisville, Kentucky

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[6] Tim Tate, *Child Pornography: An Investigation* 118 (1990) (a pedophile's collection of child pornography is "a vital tool in the future seduction of new victims"); Daniel Campagna & Donald Poffenberger, *The Sexual Trafficking in Children: An Investigation of the Child Sex Trade* 118 (1988) (child pornography is used "to lower a minor's inhibitions and resistance to sex," and "as an instructional aid to indoctrinate victims into various sexual practices"); Shirley O'Brien, *Child Pornography* 89 (1983) (child pornography is "used to convince [the] child that other children are sexually active," and as a tool to "lower[] [the] child's inhibitions" against sexual activity with adults); Seth Goldstein, *The Sexual Exploitation of Children: A Practical Guide To Assessment, Investigation, and Intervention* 149 (2d ed. 1999) (child pornography "is often used by the child molester to seduce the child").

[7] See, *e.g.*., *United States* v. *Snyder*, 189 F.3d 640, 643 (7th Cir. 1999), cert. denied, 527 U.S. 1097 (2000); *Burke* v. *State*, 27 S.W.3d 651, 655 (Tex. Ct. App. 2000), petition for discretionary review refused, Nos. 00-1869 & 00-1870 (Tex. Crim. App. Dec. 6, 2000).

"revealed that a significant number of molestation cases involve child pornography." *Id.* at 92. The testimony that Congress heard is consistent with evidence from other sources. The Senate Permanent Subcommittee on Investigations reported that most of the child molesters that it interviewed "said they had used [such] material to lower the inhibitions of children or to coach them into posing for photographs." S. Rep. No. 537, *supra*, at 9. And a study conducted by the Los Angeles Police Department's Sexually Exploited Child Unit revealed that more than 20% of the 320 cases investigated by that unit during a ten-year period involved the use of child pornography. *The Sexual Exploitation of Children*, *supra*, at 149.

The evidence before Congress also established that computer-generated pictures of child pornography can be used to seduce children just as effectively as pictures of real children. One witness explained that there is "no difference" between computer-generated pornography and pictures of actual children in terms of their effectiveness as a tool of seduction of minors. *Senate Hearing* 116 (testimony of Dr. Victor Cline). Another witness similarly testified that "[t]he real and the apparent * * * are equally dangerous because both have * * * the same seductive effect on a child victim." *Id.* at 70 (testimony of Bruce A. Taylor). Since computer technology can be used to produce visual depictions that are virtually indistinguishable from unretouched photos of actual children engaged in sexually explicit conduct, it would be difficult to reach any other conclusion.

Indeed, even the student note relied upon by the court of appeals found it "relatively easy to infer from proof that children are swayed by images of actual children the conclusion that they will also be swayed by lifelike computer-generated images." Adelman, *supra*, 14 J. Marshall J. Computer & Info. L. at 490. The note further stated that "computer-generated images may be even more dangerous

than photographic ones," since "[i]t will soon be possible to create realistic sexually explicit images of a child's friends or siblings in an effort to convince that child that engaging in sexual acts is acceptable." *Id.* at 490-491.

b. In addition, Congress had a substantial basis for concluding that a prohibition against images that appear to be of children engaged in sexual activity is necessary in order to make sure that those who distribute and possess images depicting real children engaged in sexual activity do not escape prosecution and conviction. Congress was informed that in one major federal child pornography prosecution—*United States* v. *Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996)—the defendant had relied on the existence of "currently available computer programs" to argue "that the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one, and that the defendant should be acquitted if the government did not meet that burden." S. Rep. No. 358, *supra*, at 17 (quoting *Senate Hearing* 18 (statement of Deputy Assistant Attorney General DiGregory)).

The government overcame the defense in the *Kimbrough* case "through a carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned." *Senate Hearing* 18. When *Kimbrough* was tried, however, the relevant technology was "at an early stage of development." *Ibid.* Congress also learned that, as time passes, "magazine archives will be of less value to prosecutors since child pornography produced today will no longer predate the availability of graphic imaging software." *Ibid.*[8]

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[8] Since the enactment of the CPPA, defendants have continued to argue that the pictures they are accused of possessing are not of real children. See, *e.g.*, *Fox*, 2001 WL 370045, at *5 ("During the trial in the

c. There was also substantial testimony presented to Congress that pedophiles exchange pictures of children engaged in sexual activities. *Senate Hearing* 35 (testimony of Dr. Cline); *id.* at 30 (testimony of Deputy Chief Postal Inspector Dupilka); *id.* at 90 (testimony of Bruce Taylor). Evidence from other sources confirms that child pornography is a form of currency that can be used to obtain additional child pornography. See Kenneth Lanning, *Collectors, in Child Pornography and Sex Rings* 83, 86-87 (Ann Burgess et al. eds. 1984) ("child pornography and erotica" is used "as a medium of exchange," with pedophiles "exchang[ing] photographs of children for access to or phone numbers of other children"). Accord S. Rep. No. 537, *supra*, at 11; see also *Final Report*, *supra*, at 650 ("Child pornography is also seen as a valuable commodity among pedophiles," and "[v]isual depictions may be traded or sold between collectors."). Indeed, in 1984, Congress deleted the commercial purpose requirement from the federal child pornography laws precisely because "[m]any of the individuals who distribute" child pornography "do so by gift or exchange without any commercial motive." H.R. Rep. No. 536, 98th Cong., 1st Sess. 2 (1983). Substantial evidence therefore supports Congress's judgment that prohibiting the

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instant case, for example, Special Agent Barkhausen, the government's computer expert, was forced to concede under cross-examination that 'there's no way of actually knowing that the individual depicted [in the images] . . . even exists[.]'"); *United States* v. *Coleman*, No. ARMY 9801240, 2001 WL 55523, at *3 (Army Ct. Crim. App. Jan. 24, 2001) (upholding guilty plea despite defendant's contention that "he failed to explicitly admit that the children in the images were 'real,' as opposed to computer-generated, images"); *United States* v. *Vig*, 167 F.3d 443, 450 (8th Cir.) (rejecting defendant's argument that images might not be of real children as "unsupported speculation"), cert. denied, 528 U.S. 859 (1999). See also Br. for Appellant at 34-35 in *United States* v. *Marvin Hersh*, No. 00-14592-CC (11th Cir. Feb. 27, 2001).

dissemination and possession of images that appear to be of children engaged in sexual activity will help to stamp out the market for child pornography involving real children.

d. Finally, the evidence before Congress established that "[c]hild pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles." S. Rep. No. 358, *supra*, at 12. One psychiatrist informed Congress that "the overwhelming majority" of pedophiles in his clinical experience "use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to, then later use as a model for their own sexual acting-out with children." *Senate Hearing* 35 (testimony of Dr. Cline). Congress also learned that in "many cases coming to the attention of law enforcement the arousal and fantasy fueled by child pornography is only a prelude to actual sexual activity with children." S. Rep. No. 358, *supra*, at 13.

Independent investigators have come to the same conclusion. For example, one commentator has explained:

> Child pornography and child erotica is used for the sexual arousal and gratification of pedophiles. They use child pornography the same way other people use adult pornography—to feed sexual fantasies. Some pedophiles only collect and fantasize about the material without enacting these fantasies. In most cases coming to the attention of law enforcement, however, the arousal and fantasy fueled by the pornography is only a prelude to actual sexual activity with children.

Lanning, *supra*, 86; accord S. Rep. No. 537, *supra*, at 10. Once again, Congress was informed that even if "no underage children were used in producing this pornographic material, to the viewer this is irrelevant because they are perceived as minors to the psyche." *Senate Hearing* 35-36 (testimony of Victor Cline).

4. In sum, the court of appeals erred as a matter of law in concluding that the interests supporting the provisions at issue are not compelling. Because those interests clearly outweigh whatever minimal First Amendment interest may be at stake in disseminating depictions that are virtually indistinguishable from photographs of real children engaged in sexually explicit conduct, the provisions at issue here do not violate the First Amendment.

C. The Provisions At Issue Are Not Unconstitutionally Vague

The CPPA's "appears to be" and "conveys the impression" provisions are also not unconstitutionally vague. Pet. App. 24a. The Constitution does not impose "'impossible standards' of clarity." *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). Nor does it require "mathematical certainty" from statutory language. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The First Amendment and the Due Process Clause require only that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108.

The CPPA's "appears to be" and "conveys the impression" provisions satisfy that standard. As we have explained, both provisions apply only to material that is "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." See, *e.g.*, 18 U.S.C. 2251 note (Supp. V 1999) (Findings 5, 8, 13). Persons of ordinary intelligence can discern whether material falls within that standard.

The court of appeals concluded that the statutory standard is "highly subjective" and therefore impermissibly vague. Pet. App. 24a. The standard imposed by the CPPA, however, is an "objective" standard, not a subjective one. As the First Circuit explained in *Hilton*, "[a] jury must decide, based on the totality of the circumstances, whether a reason-

able unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." 167 F.3d at 75; accord *Mento*, 231 F.3d at 922.

As the First Circuit further explained, "any number of objective signs" can "warn an ordinary viewer of sexually explicit material of the apparent age of the person depicted." *Hilton*, 167 F.3d at 76. The physical characteristics of the person depicted will provide adequate warning in a great range of cases, including those in which an apparent prepubescent child is depicted. *Id.* at 73-74; accord *Fox*, 2001 WL 370045, at *8. When the physical characteristics of the person depicted leave room for doubt, fair warning can be obtained from "the manner in which the image was described, displayed, or advertised." *Hilton*, 167 F.3d at 75; accord *Acheson*, 195 F.3d at 652-653. Moreover, "those involved in the production of lawful sexually explicit material can easily protect themselves by verifying the ages of the models they employ or by taking steps to visually demonstrate that a computer-generated image is meant to portray an adult." *Hilton*, 167 F.3d at 76. See 18 U.S.C. 2257 (requiring producers of sexually explicit visual depictions to create and maintain records of the names and ages of their performers).

The Act's scienter requirement—that any violation must be "knowing[]"—further diminishes any vagueness concerns. See 18 U.S.C. 2252A(a)(1)-(5) (Supp. V 1999). A person who honestly believes that a reasonable unsuspecting viewer would not consider the depiction to be of a minor must be acquitted. See *Hilton*, 167 F.3d at 75-76; *Fox*, 2001 WL 370045, at *8; see also *United States* v. *X-Citement Video*, 513 U.S. 64 (1994).

This Court's decision in *Ferber* confirms that use of the terms "appears to be" and "conveys the impression" do not render the CPPA unconstitutionally vague. In that case, the Court held that New York's child pornography law defined

the forbidden acts of sexually conduct "with sufficient precision." 458 U.S. at 765. That law included as one forbidden act "simulated sexual intercourse," *ibid.*, and the meaning of "simulate" is "to give the appearance" of, *Webster's Third New International Dictionary* 2122 (1976). See also *Miller*, 413 U.S. at 24, 27 (holding that inquiries into whether material "appeal[s] to the prurient interest" of the "average person, applying contemporary community standards," and depicts in a "patently offensive" way sexual conduct defined by state law, are not unconstitutionally vague); 18 U.S.C. 1028(a)(6) (1994 & Supp. V 1999) (making it unlawful to "knowingly possess[] an identification document that is or appears to be an identification document of the United States which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority"). The court of appeals therefore erred in holding that the provisions at issue are unconstitutionally vague.

D. The Provisions At Issue Are Not Substantially Overbroad

The court of appeals held that the provisions at issue are substantially overbroad. It based that holding, however, entirely on its earlier conclusion that a compelling interest in regulating child pornography is implicated only when the material at issue depicts real children. Pet. App. 25a-27a. As we have explained, that part of the court's analysis is simply incorrect. The compelling interest in protecting children from sexual abuse is also fully implicated when the material is virtually indistinguishable from depictions of real children engaged in sexually explicit conduct, and that interest clearly outweighs the First Amendment interest, if any, in disseminating and possessing such material.

Moreover, applying ordinary overbreadth standards, the CPPA is not unconstitutionally overbroad. This Court has

held that the overbreadth doctrine is "strong medicine" and, that in order for the doctrine to be applied, the overbreadth involved "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613, 615 (1973). Judged by that standard, the provisions at issue are not unconstitutionally overbroad.

In *Ferber*, the Court rejected an overbreadth challenge to New York's prohibition against the distribution of depictions of real children involved in sexually explicit conduct. 458 U.S. at 773-774. The Court "consider[ed] this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Id.* at 773. The Court emphasized that the statute was aimed "at the hard core of child pornography," and it did not view the possibility that some protected expression might be covered by the statute as sufficient to require facial invalidation. *Ibid.* The Court explained that "[h]ow often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ibid.* In those circumstances, the Court concluded, "§ 263.15 is 'not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" *Id.* at 773-774 (quoting *Broadrick*, 413 U.S. at 615-616).

The reasoning applied in *Ferber* is equally applicable here. Like the statute at issue in *Ferber*, the CPPA is aimed at "hard core" child pornography—depictions that involve "sexual intercourse," or "lascivious exhibition of the genitals or pubic area." 18 U.S.C. 2256(2)(A) and (E). The CPPA

does not apply to an "innocuous depiction of a minor * * * however that depiction is produced." S. Rep. No. 358, *supra*, at 20. For example, the "Coppertone suntan lotion advertisements featuring a young girl in a bathing suit are not now, and will not become under [the statute], child pornography." *Ibid.* Nor is the statute implicated by a "parental picture of a child in the bathtub or lying on a bearskin rug." *Id.* at 21.

As in *Ferber*, it is difficult to know precisely how often it might be necessary to use depictions that are covered by the CPPA in order to produce educational, medical, or artistic works. But here, as in *Ferber*, there has been no suggestion that materials of that kind would amount to more than a tiny fraction of the materials within the statute's reach. As we have discussed, there are several ways to disseminate educational, medical, or artistic works concerning a child's sexuality without violating the CPPA: The Act does not cover drawings, cartoons, sculptures, and paintings that depict youthful-looking persons in sexual poses; it supplies an affirmative defense to persons who disseminate visual depictions involving adults who may appear to be children, provided that the depictions are not promoted or presented as child pornography, 18 U.S.C. 2252A(c) (Supp. V 1999); and the Act does not apply to visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted. Thus, here, as in *Ferber*, the provisions at issue are "not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Ferber*, 458 U.S. at 773-774 (quoting *Broadrick*, 413 U.S. at 615-616); see *Fox*, 2001 WL

370045, at *7; *Acheson*, 195 F.3d at 652; *Hilton*, 167 F.3d at 74.[9]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

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[9] We do not suggest that the Act has any invalid application or that the First Amendment requires some type of serious value defense. Regardless of its value, material that is covered by the CPPA can still be used to seduce children into sexual activity; it can still be used by pedophiles to stimulate their appetites for sexual abuse; it can still frustrate prosecutions involving depictions of real children who cannot be identified as such; and it can still be exchanged for other pictures of child pornography. Cf. *Ferber*, 458 U.S. at 774-775 (O'Connor, J., concurring). Those considerations are paramount, and they categorically outweigh the First Amendment interests at stake in disseminating child pornography. As the Court did in *Ferber*, however, we recognize that the Act raises more serious questions as applied to the limited number of cases, if any, in which depictions of child pornography are necessary "in order to produce educational, medical, or artistic works." *Ferber*, 458 U.S. at 773.