No. 12-987

In the Supreme Court of the United States

DEAN BOLAND, PETITIONER

v.

JANE DOE, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 2256(8)(C) of Title 18 defines "child pornography" to include a "visual depiction" that "has been created, adapted, or modified" to make it "appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(C). Section 2255 provides victims of child-pornography offenses with a federal cause of action for damages. 18 U.S.C. 2255. The questions presented are:

1. Whether state law precludes the victims, who are young children, from recovering damages under 18 U.S.C. 2255, based on petitioner's creation of digitally altered images of them engaging in sexually explicit conduct.

2. Whether defining "child pornography" to include "morphed" images of real, identifiable children engaging in sexually explicit conduct violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 698 F.3d 877. A prior opinion of the court of appeals (Pet. App. 34-49) is reported at 630 F.3d 491. The opinion and order of the district court (Pet. App. 16-32) is reported at 825 F. Supp. 2d 905. A prior opinion and order of the district court (Pet. App. 50-66) is unreported but is available at 2009 WL 2901306.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2012. The petition for a writ of certiorari was filed on February 7, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2252A(a)(5)(B) of Title 18 criminalizes the knowing possession of, *inter alia*, any "computer disk

* * * that contains an image of child pornography * * * produced using materials that have been mailed, or shipped or transported in or affecting interstate" commerce. 18 U.S.C. 2252A(a)(5)(B). Section 2256(8)(C) defines "child pornography" to include a "visual depiction" that "has been created, adapted, or modified" to make it "appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(C). Section 2255, in turn, provides a civil remedy to victims of child-pornography offenses. It provides that "[a]ny person who, while a minor, was a victim of [federal child pornography laws] and who suffers personal injury as a result of such violation * * * may sue" and "shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. 2255(a). A successful plaintiff "shall be deemed to have sustained damages of no less than $150,000 in value." *Ibid.*

2. a. Petitioner, a licensed attorney in Ohio, was hired by criminal defendants to serve as an expert witness on digital-imaging technology in child-pornography prosecutions. His "aim was to show that the defendants may not have known they were viewing child pornography." Pet. App. 2. Petitioner downloaded innocent photographs of two young girls from a stock internet photography site. He digitally altered ("morphed") the images to make it appear that the children had been photographed engaging in sexual activity. For example, petitioner took a picture of five-year-old Jane Roe "eating a doughnut" and "replaced the doughnut with a penis." *Id.* at 3. In another image, petitioner "placed six-year-old Jane Doe's face onto the body of a nude woman performing sexual acts with two men." *Ibid.* Petitioner stored those images on his computer, and

later used them in court as exhibits, displaying "before-and-after" versions and "testifying that it would be 'impossible for a person who did not participate in the creation of the image to know [the child is] an actual minor.'" *Ibid.* (citation omitted).

In 2004, petitioner used the morphed images as part of his expert testimony in two Ohio state-court proceedings and in a federal criminal trial in Oklahoma. Pet. App. 3. In the federal proceeding, the government raised the possibility that petitioner's creation and use of the images might violate federal child-pornography laws. The district court directed petitioner to remove the images from his computer's hard drive, but petitioner did not comply with that order. *Id.* at 37; see also *id.* at 43-45. Instead, he later used the same morphed images in two Ohio state-court proceedings. *Id.* at 37.

b. The United States investigated petitioner's activities and, in April 2007, petitioner entered into a pre-trial diversion agreement. Petitioner admitted that he violated 18 U.S.C. 2252A(a)(5)(B) by knowingly possessing child pornography. Pet. App. 3-4. Petitioner also issued an apology in the Cleveland Bar Journal, stating that he "recognize[d] that such images violate federal law" and that it was "wrong" to use "the images of innocent children." *Id.* at 4, 61-62.

3. In September 2007, Jane Doe and Jane Roe, the young children depicted in the sexually explicit digital images petitioner created, and their guardians (collectively, private respondents) filed a civil action under 18 U.S.C. 2255. Pet. App. 4.[1]

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[1] Private respondents also sought damages under 18 U.S.C. 2252A(f)(1) as "person[s] aggrieved" by the specified child-pornography offenses. The district court, however, did not ultimately rely on that statute and it is not at issue here. Pet. App. 10.

a. On cross-motions, the district court granted summary judgment in favor of petitioner. Pet. App. 50-66. With respect to the Oklahoma federal-court proceeding, the district court concluded that it "would not be fair" to impose liability because petitioner was "responding to a federal court directive." *Id.* at 62. As for the state-court proceedings, the district court determined that Ohio's child-pornography statute "confers immunity for bona fide judicial purposes" and that imposing liability on petitioner would raise "[s]erious comity issues." *Id.* at 58, 63. Citing the principle of constitutional avoidance based on Sixth Amendment concerns, the district court declined to "construe the federal statutes imposing civil liability as applying" to an expert witness under such circumstances. *Id.* at 64.

b. Private respondents appealed, and the United States participated in the appeal as amicus curiae at the invitation of the court. The court of appeals reversed and remanded for the district court to consider petitioner's other defenses. Pet. App. 34-49.

The question on appeal was whether the "federal child pornography laws exempt those who violate the law in the course of providing expert testimony," and the court of appeals concluded that federal law contains no such exemption. Pet. App. 39-40. The court noted that other provisions of federal law significantly limit defense counsel's access to child pornography, *id.* at 41 (citing 18 U.S.C. 3509(m)), and that "[i]f Congress did not want defense counsel to view, let alone possess, existing child pornography without governmental oversight, it is hardly surprising that Congress opted not to permit expert witnesses to create and possess *new* child pornography," *ibid.* The court rejected petitioner's reliance on principles of constitutional avoidance be-

cause, among other reasons, the Sixth Amendment does not "allow[] a criminal defendant to defend *one* criminal charge by urging his lawyer or witness to commit *another*." *Id.* at 41-42. As the court explained, petitioner "could have illustrated the difficulty of discerning real from virtual images" in other ways, such as "combining two innocent pictures into another innocent picture" or "morph[ing] an image of an *adult* into that of a minor engaging in sexual activity." *Id.* at 43-44.

The court of appeals also rejected the district court's reliance on Ohio law and on the Oklahoma federal court's supposed directive. The court explained that this is not "a case in which state law authorized [petitioner's] conduct while federal law punished it," because Ohio law did not, in fact, immunize petitioner's conduct. Pet. App. 45. Nor is it a case "of one federal court authorizing him to do something and of another federal court punishing him for it," because the Oklahoma federal court did not, in fact, "authorize[] or require[] the creation or possession of new child pornography." *Id.* at 43-45. The court rejected petitioner's suggestion that "all manner of participants in the criminal justice system will become subject to similar civil actions" for possessing child pornography. *Id.* at 46-47. As the court explained, common-law immunities that ordinarily protect judges, prosecutors and witnesses from civil suits based upon their participation in the judicial process would prevent such actions, but petitioner, who "created and possessed the images prior to testifying in court," had no claim to any such immunity. *Id.* at 48-49.

c. On remand, the parties agreed to brief several issues, including, *inter alia*, (i) "whether the minor [p]laintiffs suffered 'personal injury' under" Section 2255; (ii) "whether the definition of child pornography in

[Section] 2256(8)(c) violates the First Amendment"; and (iii) "whether the application of the federal child pornography statutes to an expert witness in [petitioner's] circumstances violates the Sixth Amendment right to effective counsel." Pet. App. 19. The United States intervened under 28 U.S.C. 2403(a) to defend the constitutionality of the federal child-pornography statutes. Pet. App. 19-20.

The district court answered the first question in the affirmative, explaining that "there is nothing in the statute to suggest that the minors need to know about the images in order to suffer a personal injury." Pet. App. 22. Relying in part on another district court's decision in a declaratory judgment action petitioner had subsequently filed based on the same events, *Boland* v. *Holder*, No. 09-1614, 2010 WL 3860996 (N.D. Ohio Sept. 30, 2010), aff'd, 682 F.3d 531 (6th Cir. 2012), the court rejected petitioner's constitutional defenses. Pet. App. 25-31. The court ultimately granted summary judgment in favor of the private respondents and awarded $150,000 in statutory damages to each minor victim. *Id.* at 32.

d. The court of appeals affirmed. Pet. App. 1-15.

The court of appeals first held that private respondents satisfied all of the requirements for obtaining relief under Section 2255, and rejected petitioner's contention that the minor victims did not suffer any "personal injury" and needed to prove "actual damages." Pet. App. 5-10. The court next held that the damages award in this case did not violate the First Amendment. *Id.* at 10-14. The court explained that child pornography is not a form of protected speech and that "morphed" child pornography is more like conventional child pornography than the sort of "virtual" child pornography at issue in *Ash-*

croft v. *Free Speech Coalition*, 535 U.S. 234 (2002). Pet. App. 11. The court of appeals noted that, in *Free Speech Coalition*, this Court observed that "morphed" images "implicate the interests of real children," *ibid.* (quoting *Free Speech Coal.*, 535 U.S. at 242), and that here "Jane Doe and Jane Roe are real children" whose "likeness[] [is] identifiable in [petitioner's] images" and who suffered "real injuries," *ibid.* The court also noted that the expressive value of such morphed images is "relatively weak," explaining that they "are never necessary to achieve an artistic goal" because "[v]irtual children or actual adults create the same visual effect as a morphed image, yet do no harm to the interests of identifiable minors." *Id.* at 12. The court therefore rejected petitioner's First Amendment challenge to Section 2256(8)(C), agreeing with "[o]ther circuits" that had "reached the same conclusion." *Ibid.*

The court of appeals did not separately address petitioner's Sixth Amendment challenge because he had already "raised the same argument before another panel" in his declaratory judgment action "and lost." Pet. App. 14 (citing *Boland* v. *Holder*, 682 F.3d 531, 536-537 (6th Cir. 2012)).

ARGUMENT

Petitioner seeks this Court's review of two primary issues: (i) whether state law precludes private respondents from recovering damages under 18 U.S.C. 2255, based on petitioner's creation of digitally altered images of young children engaging in sexually explicit conduct; and (ii) whether defining "child pornography" to include "morphed" images of real, identifiable children engaging in sexually explicit conduct violates the First Amend-

ment.[2] The court of appeals correctly resolved both questions. No other court of appeals has considered the relationship between 18 U.S.C. 2255 and state law, and every court of appeals to consider a First Amendment challenge to 18 U.S.C. 2256(8)(C) has rejected it. Further review is not warranted.

1. Petitioner first argues (Pet. 2-4, 8, 10) that state law precludes private respondents from recovering damages under 18 U.S.C. 2255 based on his creation of digitally altered images depicting real and identifiable young children engaging in sexually explicit conduct. Petitioner contends that he created those images solely for the purpose of testifying as an expert witness in state criminal proceedings; that Ohio law immunized his actions; and that Section 2255 does not preempt such state-law immunities. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court, any other court of appeals, or any state court of last resort.

a. The fundamental premise underlying petitioner's preemption argument is flawed in at least two respects. First, petitioner did not create the digitally altered images at issue solely for the purpose of testifying as an expert witness in *state* criminal proceedings. He also created those images for the purpose of a *federal* court proceeding in Oklahoma. Pet. App. 36-37. Petitioner displayed those images in federal court and he retained

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[2] Petitioner also seeks this Court's review of the question whether the minor victims in this case were entitled to statutory damages under 18 U.S.C. 2255. See Pet. i-ii. The United States takes no position on that question here. The government has participated in this litigation to defend the constitutionality of the federal child-pornography statutes and to explain why those statutes are consistent with state law.

them on his computer even after the federal district court ordered them deleted. *Id.* at 37. Because Ohio law certainly did not immunize the creation, display, and possession of child-pornography images for purposes of a *federal* criminal proceeding (in Oklahoma), petitioner's preemption argument would not affect the outcome here.

Second, Ohio law does not, in fact, immunize petitioner's conduct. In the first appeal, the court of appeals explained that Ohio law only "provides immunity from state child pornography statutes if the images are used for 'bona fide judicial purposes.'" Pet. App. 45. As the court noted, petitioner could not demonstrate the "bona fide" need required for that immunity, "given the other means at his disposal to illustrate the difficulty of discerning real from virtual images." *Ibid.* Indeed, in another criminal case in which petitioner was an expert witness, the Ohio Supreme Court rejected the criminal defendant's argument that petitioner needed to "create exhibits for use at trial," *State* v. *Brady*, 894 N.E.2d 671, 677, 679 (Ohio 2008), and that "the absence of an exemption for possessing these kinds of images in the federal child pornography laws precluded him from receiving a fair trial," Pet. App. 45 (citing *Brady*, *supra*). As the Ohio court explained, it is "axiomatic that an expert's conduct must conform to the law." *Brady*, 894 N.E.2d at 679. Accordingly, this is not "a case in which state law authorized [petitioner's] conduct while federal law punished it." Pet. App. 45.

Even if Section 2255 provided a civil remedy for violations of federal law through conduct that state law permits (but does not require), that would not create a conflict, much less render the federal-law prohibition and remedy inapplicable. As the Sixth Circuit explained

in a related case involving petitioner, "[a] difference in the scope of the two bodies of law does not put them into conflict." *Boland* v. *Holder*, 682 F.3d 531, 535 (2012). The federal government, for example, may prohibit and punish the possession of marijuana even if the defendant's state of residence excepts from the state-law criminal prohibition the use of marijuana for medical purposes. See *Gonzales* v. *Raich*, 545 U.S. 1, 29-33 (2005). Similarly, a state immunity from criminal prosecution does not preclude Congress from criminalizing (or, as here, providing a civil remedy) for the same underlying conduct. To be sure, Congress could choose to exempt from civil (or criminal) liability conduct immunized by state law, but it has not done so here. See Pet. App. 40-41. And the mere fact that this case involves expert testimony in criminal proceedings does not change the analysis. Federal law contains no exemption for experts in drug cases to manufacture controlled substances, or for experts in counterfeit cases to print counterfeit money—in state or federal court. See *id.* at 42; *Brady*, 894 N.E.2d at 679. This case is no different.[3]

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[3] Although petitioner pursued a Sixth Amendment claim in the court of appeals, it is not fairly included in the questions presented. See Sup. Ct. R. 14.1(a); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us.") (second and third brackets in original). But for many of the same reasons set forth above, the damages award in this case does not violate a hypothetical future defendant's Sixth Amendment rights—which petitioner, in any event, does not have standing to assert. See Pet. App. 42 ("[N]o constitutional principle * * * allows a criminal defendant to defend *one* criminal charge by urging his lawyer or witness to commit *another*."); *Boland*, 682 F.3d at 536 (concluding that petitioner did not have standing to raise the "Sixth Amendment rights of hypothetical future defendants to have a fair trial").

b. Petitioner does not suggest any conflict among the courts of appeals on this issue and there is none. Instead, he contends (Pet. 2-4, 8) that this Court's review is warranted because the court of appeals' decision conflicts with decisions of state courts. That is incorrect.

As an initial matter, only two of the cited decisions are from a state court of last resort and the other decisions are unpublished. More fundamentally, the state court decisions cited by petitioner involved discovery requests by criminal defense attorneys for copies of the already existing child-pornography images (or computer disks and hard drives containing those images) that gave rise to the criminal prosecution. See, *e.g.*, *State* v. *Boyd*, 158 P.3d 54, 57-58 (Wash. 2007); *State* v. *Second Jud. Dist. Ct.*, 89 P.3d 663, 664 (Nev. 2004); *State* v. *Butler*, No. E2004-3359, 2005 WL 735080, at *9 (Tenn. Crim. App. Mar. 30, 2005); *State* v. *Kandel*, No. A04-266, 2004 WL 1774781, at *1 (Minn. Ct. App. Aug. 10, 2004).[4] None of those decisions suggests, let alone holds, that an expert witness in a criminal case can create new images of child pornography depicting real, identifiable children engaging in sexually explicit conduct—particularly where, as here, the expert could have used other (legal) means to make the same point. See Pet. App. 15, 43 (noting that petitioner could have "illustrated the difficulty of discerning real from virtual images by combining two innocent pictures into another innocent picture" or by using "images of adults or virtual children"). Further review is not warranted.

2. Petitioner also contends (Pet. 17-34) that 18 U.S.C. 2256(8)(C)'s definition of "child pornography" to

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[4] Petitioner cites one additional unpublished decision of what appears to be an Ohio trial court (Pet. 3), but he does not provide any publicly accessible citation to the opinion.

include "morphed" images of real, identifiable children engaging in sexually explicit conduct violates the First Amendment. The court of appeals correctly rejected that argument as well; its decision is consistent with that of every other court of appeals to consider the issue; and this Court recently denied review of a petition for a writ of certiorari raising the same question. See *Hotaling* v. *United States*, 132 S. Ct. 843 (2011). The same result is warranted here.

a. The court of appeals correctly held that the damages award in this case "does not run afoul of the First Amendment." Pet. App. 10. In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Court rejected a First Amendment challenge to a state law that prohibited the production and dissemination of sexually explicit material made using children under the age of 16. *Id.* at 750-752. The Court recognized "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child" and that these harms are "exacerbated by the[] circulation" of the materials, which "are a permanent record of the children's participation." *Id.* at 758-759; see *id.* at 759 n.10. The Court held that, in order "to dry up the market for this material" and thus prevent the attendant harms to children, States were justified in imposing "severe criminal penalties on persons selling, advertising, or otherwise promoting the product," whether or not the materials qualified as obscene. *Id.* at 760.

In *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990), the Court concluded that a similar rationale supports state laws that criminalize the possession of child pornography. The Court reiterated that the "continued existence" of the materials "causes the child victims continuing harm by haunting [them] in years to come" and

concluded that "ban[s] on possession and viewing" child pornography combat such recurring harm by "encourag[ing] the possessors of these materials to destroy them." *Id.* at 111.

In *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), the Court held invalid under the First Amendment a federal statute prohibiting the possession of "virtual child pornography," such as entirely computer-generated images. See *id.* at 241, 258. Because the production of such images does not implicate the interests of actual children, the Court held that the governmental interests that supported the state law at issue in *Ferber* could not justify the federal ban on virtual child pornography. See *id.* at 249-251. In so concluding, the Court carefully distinguished virtual child pornography from material covered by the provision at issue here, 18 U.S.C. 2256(8)(C), which "prohibits a more common and lower tech means of creating virtual images, known as computer morphing." *Free Speech Coal.*, 535 U.S. at 242. Because no party had challenged that provision, the Court did not decide its validity. See *ibid.* The Court observed, however, that because morphed child pornography involves "alter[ing] innocent pictures of real children so that the children appear to be engaged in sexual activity," such images "implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ibid.*

b. The court of appeals correctly applied these principles in rejecting petitioner's First Amendment challenge. As the court explained, "[b]y using identifiable features of children," morphed images "implicate[] the interests of a real child," Pet. App. 12 (quoting *United States* v. *Bach*, 400 F.3d 622, 632 (8th Cir.), cert. denied, 546 U.S. 901 (2005)), and place "'actual minors' 'at risk

of reputational harm,'" *ibid.* (quoting *United States* v. *Hotaling*, 634 F.3d 725, 729-730 (2d Cir.), cert. denied, 132 S. Ct. 843 (2011)). Morphed child pornography inflicts many of the same kinds of emotional, psychological, and reputation harms on children that result from conventional child pornography. As ostensible photographic records of sexual exploitation, moreover, the "continued existence" of such images may "cause[] the child victims continuing harm by haunting the children in years to come." *Osborne*, 495 U.S. at 111; see *Free Speech Coal.*, 535 U.S. at 249 ("Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being.").

That potential for inflicting significant harm on real children distinguishes morphed child pornography from the purely "virtual" child pornography that this Court addressed in *Free Speech Coalition*. The statute at issue in that case prohibited any image that merely "appear[ed]" to involve an underage person engaged in sexually explicit conduct, including wholly "computer-generated images" and images in which youthful-appearing adult actors portrayed minors. See 535 U.S. at 241. No actual children were involved: the statute "prohibit[ed] speech that record[ed] no crime and create[d] no victims by its production." *Id.* at 250. Morphed images, by contrast, do create victims. Section 2256(8)(C) prohibits visual depictions that are "created, adapted, or modified to appear that an *identifiable minor* is engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(C) (emphasis added). An "identifiable minor" is a minor "who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recogniza-

ble feature." 18 U.S.C. 2256(9)(A)(ii). The statute thus prohibits images that appropriate the likenesses of real, identifiable children for the depiction of sexually explicit conduct.

Moreover, as the court of appeals explained, any "expressive value" of such morphed images is "relatively weak" because it is "never necessary to achieve an artistic goal." Pet. App. 12. "Virtual children or actual adults create the same visual effect as a morphed image, yet do no harm to the interests of identifiable minors." *Ibid.* And petitioner "could have shown the difficulty of distinguishing real pornography from virtual images by transforming the face of an adult onto another, or [by] inserting a child's image into an innocent scene." *Id.* at 14-15. Alternatively, "[i]f he felt compelled to make his point with pornography, he could have used images of adults or virtual children." *Id.* at 15. Particularly given the alternative means of expression, petitioner's morphed images are not entitled to First Amendment protection.[5]

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[5] Even if morphed pornographic images were entitled to some First Amendment protection, the federal prohibition is constitutional under the applicable First Amendment standards. Congress enacted the ban on morphed images to prevent severe psychological, emotional, and reputational harm to the actual minors depicted. See S. Rep. No. 358, 104th Cong., 2d Sess. 11, 30-31 (1996). Section 2256(8)(C) is thus supported by a governmental interest that this Court has long accepted as compelling: the "interest in 'safeguarding the physical and psychological well-being of a minor.'" *Ferber*, 458 U.S. at 756-757 (citation omitted); see *id.* at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."); *Osborne*, 495 U.S. at 109. The prohibition is also narrowly drawn to serve that interest because there are no less restrictive alternatives that serve the government's purpose of preventing the victimization of actual minors through

c. Although the issue has not frequently arisen, every court of appeals that has considered the constitutionality of the federal prohibition on morphed child pornography, 18 U.S.C. 2256(8)(C), has held that the statute prohibits images that fall outside the purview of the First Amendment. See *Hotaling*, 634 F.3d at 729 (2d Cir.); *Bach*, 400 F.3d at 632 (8th Cir.).[6] In addition, in a decision addressing a sentencing enhancement for sadistic or masochistic child pornography, the First Circuit agreed in dicta that the First Amendment does not protect morphed images under Section 2256(8)(C). See *United States* v. *Hoey*, 508 F.3d 687, 693 (2007) (expressing agreement with the Eighth Circuit's decision in *Bach*). No court of appeals has accepted the First Amendment theory that petitioner advances.

d. Finally, petitioner relies (Pet. 33-34) on Justice Stevens' concurring opinion in *Ferber* to argue that the First Amendment requires a "courtroom" exception to any child-pornography prohibition. That reliance is misplaced. In *Ferber*, Justice Stevens noted that "the exhibition" of child-pornography "films before a legislative committee studying a proposed amendment to a state law * * * could not, in [his] opinion, be made a crime." 458 U.S. at 778 (Stevens, J., concurring in the judgment). That opinion, of course, was not adopted by the majority. Moreover, petitioner's conduct is not

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morphed child pornography. See *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

[6] Although *Bach* involved the face of a child pasted onto the body of another child (rather than the body of an adult), the Eighth Circuit's conclusion did not turn on that fact. The court instead emphasized that, because the minor's face (and identity) were recognizable, the "image created an identifiable child victim of sexual exploitation" who suffered the type of harm recognized in *Ferber* and reaffirmed in *Free Speech Coalition*. See *Bach*, 400 F.3d at 632.

analogous to the sort of legislative action Justice Stevens envisioned. This case is not about the "exhibition" of existing child-pornography images in a judicial proceeding; it is about the creation (outside a courtroom) of new images of child pornography depicting real, identifiable children engaging in sexually explicit conduct for later "exhibition" inside a courtroom. The concurrence in *Ferber* is thus of no assistance to petitioner here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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