No. 00-795

IN THE UNITED STATES SUPREME COURT

JOHN D. ASHCROFT, et al.,
Petitioners
v.
THE FREE SPEECH COALITION, et al.,
Respondents

On Writ of Certiorari to the

United States Court of Appeals

For the Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, INSTITUTE FOR THE ADVANCED STUDY OF HUMAN SEXUALITY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, FEMINISTS FOR FREE EXPRESSION, SOCIETY OF PROFESSIONAL JOURNALISTS, AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AS AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICI

Amici are non-profit organizations who fully support efforts by government to prevent sexual abuse or exploitation of children but remain concerned about the rights of publishers, artists, authors, journalists, scholars and citizens to create, distribute, use and possess every kind of expression permitted by the First Amendment. [1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Since its founding in 1920, the ACLU has litigated numerous cases involving issues of freedom of expression and sexually explicit speech including, recently, *Reno v. ACLU*, 521 U.S. 844 (1997) (challenge to Communications Decency Act), and *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 518 U.S. 727 (1996) (challenge to indecency provisions of Cable Television Consumer Protection and Competition Act of 1992). The ACLU of Northern California is a regional affiliate of the national ACLU.

The Institute for the Advanced Study of Human Sexuality is a private graduate school established in 1976 and based in San Francisco, California. The Institute provides a graduate course of study for persons preparing for careers in human sexuality or already working in the field. The Institute maintains archives, resource centers and research facilities dealing with primary sexological and erotological material not available elsewhere.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation founded in 1958 to ensure justice and due process for persons accused of crime, and

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1. Pursuant to Rule 37(3)(a), *amici* have obtained the written consents of the parties, which have been lodged with the Clerk. No party wrote any part of this brief or contributed to its financial support.

to promote the proper and fair administration of criminal justice. It has a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Since 1992 it has worked actively to oppose the misapprehension that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality is inextricably linked with the values enshrined in our Constitution's free speech clause.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information interests of the print and broadcast media since 1970.

The Society of Professional Journalists (SPJ) is a voluntary non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

The Radio-Television News Directors Association is a professional organization comprised of local and network news executives, educators, students and others in the radio, television and cable news business and is devoted to electronic journalism.

All *amici* are concerned about the dangers to free speech and inquiry posed by the Child Pornography Prevention Act of 1996 (CPPA).

STATEMENT OF THE CASE

The Free Speech Coalition and others (respondents) filed this facial challenge to the constitutionality of the CPPA, which amended the federal child pornography law to criminalize not just images of real children engaged in sexual conduct, but any image that "appears to be" or that "conveys the impression" of minors engaged in sexual conduct. 18 U.S.C. §§ 2252, 2256. The district court found, *inter alia*, that the CPPA was content-neutral and was not unconstitutionally vague or overbroad. Pet.App. 50a-65a. The Ninth Circuit Court of Appeals reversed, holding that the CPPA was vague and overbroad in violation of the First Amendment. Pet.App. 1a-43a. After the court below denied a petition for rehearing, this Court granted the government's petition for a writ of certiorari on January 22, 2001.

SUMMARY OF ARGUMENT

The CPPA creates a new category of criminally prohibited speech: nonobscene "child pornography" that neither depicts real children nor uses children in its production. The plain language of the "appears to be" and "conveys the impression" provisions of the CPPA criminalizes a wide variety of images, including those of young-looking adults as well as minors in paintings, drawings and sculpture, and those created and used for serious literary, artistic, political or scientific purposes.

Amici agree with the court below that the "appears to be" and "conveys the impression" provisions are facially unconstitutional and are far too subjective and vague for use in a criminal statute restricting speech. *Amici* confine this brief to three points:

1.

Despite this Court's caution in *New York v. Ferber*, 458 U.S. 747 (1982), child pornography laws have been used to justify suppression and prosecution of legitimate speech and research ranging from parental photographs of nude children in the bathtub to journalistic investigation of the role of law enforcement in online child pornography prosecutions and medical treatment of pedophilia. By cutting off the only avenue of protected speech left open for legitimate speech and research – images that do not involve real children – the CPPA expands the overbreadth of the child pornography prohibition to the point of unconstitutionality.

2.

The government argues in this Court that the CPPA provisions are justified because advances in technology have made it difficult for the government to meet its burden to prove that a defendant possessed or distributed images of actual minors – that is, to prove that the speech is unprotected – before obtaining a conviction. The government argues that the CPPA will make it easier to obtain convictions for child pornography, and that an affirmative defense is available to some defendants who can prove that the images were produced using adults. But the defense is unavailable to a wide range of defendants, including all those charged with possession rather than distribution, creators who use neither real adults nor real children, and distributors who have no way to prove that an adult was used to produce the images. Thus, rather than justifying the law, the reversal of the burden of proof inherent in the CPPA exacerbates its constitutional defects.

3.

The government contends that virtual pornography – images that neither depict real minors nor use real minors in its production – has no First Amendment protection because the images can lead to actual child molestation. Its contention is based on Congressional "findings" that such images may "whet the appetite" of potential molesters and be used to seduce actual

minors. The government submitted no evidence in this case, and the Congressional findings are not based on reliable evidence. In addition, while government may of course proscribe actual child exploitation, the First Amendment does not allow the suppression of speech based on the assumption that it may cause some viewers to engage in illegal acts unless the speech is directed to inciting imminent unlawful action and is likely to produce such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

ARGUMENT

Introduction

In 1984, Congress acted to "expand the child pornography statute to its full constitutional limits." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 74 (1994). In 1996, Congress exceeded those limits. It created an entire new category of criminally prohibited speech: nonobscene "child pornography" that neither depicts real children nor uses children in its production. As the court of appeals observed, "Images that are, or can be, entirely the product of the mind are criminalized." Pet.App. 16a.

The CPPA criminalizes materials that, by definition, may not appeal to the prurient interest, may not be patently offensive and may well have serious literary, artistic, political or scientific value. *Cf. Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity). "Child pornography" has heretofore been confined to materials depicting actual minors performing sexual acts. *See New York v. Ferber*, 458 U.S. 747 (1982).

Prohibitions of both obscenity and child pornography are "unabashedly content-based laws." *See New York v. Ferber*, *supra*, 458 U.S. at 756. They "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Id.* The proper analysis therefore starts with the *presumption* that the CPPA's content-based restrictions

on speech are "beyond the power of the government." *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 115-16 (1991); *see United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1888 (2000), quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"). As will be seen, the government's showing in this case does not overcome that presumption.

I. THE CPPA EXCEEDS THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF REGULATION OF NONOBSCENE SEXUALLY EXPLICIT SPEECH

A. This Court Has Recognized That Even Child Pornography Laws Are Limited by the First Amendment

In *New York v. Ferber*, the Court upheld a state child pornography law that criminalized images of actual minors engaged in sexual conduct that were not obscene. The Court recognized that child pornography laws are nonetheless limited by the First Amendment in two ways. First, the Court noted that applications of child pornography laws to material or research with serious value might violate the First Amendment. 458 U.S. at 773-74. It held that these overbroad applications "should be cured through case-by-case analysis of the fact situations to which [the statute's] sections ... may not be applied." *Id*. at 774. Four concurring justices expanded on the overbreadth issue. Justice O'Connor noted that "clinical pictures of adolescent sexuality" and "pictures of children engaged in rites widely approved by their cultures" might not "trigger the compelling interests identified by the Court." *Id*. at 775. Similarly, Justices Brennan and Marshall opined that the use of materials otherwise within the ambit of the statute may be protected by the First Amendment if they form part of a work having serious literary, artistic, scientific, or medical value. *Id*. at 776-77. Justice Stevens explicitly noted that the First

Amendment would also protect images that fit squarely within the prohibition if used for legitimate purposes:

> A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection.

Id. at 778. Other courts have suggested similar limitations on the reach of child pornography laws.[2/] *See United States v. Lamb*, 945 F.Supp. 441, 449- 50 (N.D.N.Y. 1996) (recognizing need for a "legitimate use" defense for researchers, psychiatrists, etc.); *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001) (same for artists); *U.S. v. Upham*, 168 F.3d 532, 534 (1st Cir.), *cert. denied*, 119 S. Ct. 2353 (1999) (noting submission to jury of whether defendant's purpose in possessing child pornography was to produce a serious literary work). In addition, some state child pornography statutes contain explicit exceptions for work with serious value. *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 106 (1990) (Ohio statute contains exception for material used for "bona

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2. In addition, when amending the federal child pornography law to conform with *Ferber* in 1984, Congress considered whether to include an explicit affirmative defense for "serious literary, artistic, scientific, social or educational value." After considering the following testimony from the Department of Justice that such a defense was unnecessary, Congress did not enact an explicit defense: "Even in the absence of the affirmative defense provided in H.R. 2432, a defendant may take the position that the application of the child pornography statute to his case is unconstitutional and falls within the 'tiny fraction of the materials within the statute's reach' which the Court recognized should receive constitutional protection. 458 U.S. at 772-74. Thus, the affirmative defense provision (which was not in the New York statute approved by *Ferber*) is unnecessary." H.R.Rep. No. 536, 98th Cong., 2d Sess. 13 (1983), reprinted in 1984 U.S.C.C.A.N. 492, at 504 (testimony of Mark M. Richard, Dep. Ass't Atty. Gen.).

fide artistic, medical, scientific, educational ... or other proper purpose"); *Massachusetts v. Oakes*, 491 U.S. 576, 579 (1989) (state statute contains exception for material "produced ... for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library."); Conn. Gen. Stat. §53(a) (2001) (exception to state child pornography statute for images possessed for "bona fide artistic, medical, scientific, educational, religious, governmental or judicial purpose."); Cal. Penal Code §311.2(e) (2001) (same); Ga. Code Ann. §16-12-100(d) (2001) (same); N.Y. Penal Code §235.15(2) (McKinney 2000) (same).

Second, the *Ferber* Court specifically offered constitutionally protected alternatives to the speech prohibited by the statute. For example, the Court suggested the use of young-looking adults or other simulations as a constitutionally protected substitute for the use of actual minors and, in part, justified its own holding by pointing to the availability of such a constitutionally protected alternative. 458 U.S. at 763. The Court thus noted that "a person over the statutory age who perhaps looked younger could be utilized," and that "simulation" could "provide another alternative." 458 U.S. at 763. Rejecting the idea that simulation might be unlawful, the Court held that material that does "not involve *live* performance or photographic or other visual reproduction of *live* performances, retains First Amendment protection." 458 U.S. at 765 (emphasis added); *see also People v. Ferber*, 409 N.Y. Supp. 2d 632, 637 (1978) (noting that state itself had offered these protected alternatives). In *X-Citement Video, supra,* the Court reiterated that nonobscene sexually explicit materials involving adults "are protected by the First Amendment." 513 U.S. at 72.

B. Despite this Court's Caution in *Ferber*, Child Pornography Laws Have Been Applied in an Overbroad Manner That Threatens Legitimate Speech and Research

Before considering the constitutionality of the CPPA's *expansion* of the federal child pornography law, *amici* wish to make the Court aware of the very real impact of child pornography laws on legitimate speech and research even before enactment of the CPPA. The *Ferber* Court's acknowledgement of the constitutional limitations of imposing criminal liability for nonobscene child pornography has not stopped the threat to protected speech. Child pornography has in essence become a strict liability crime for many, including legitimate academics, artists, journalists and sex researchers, who can no longer safely create or possess images even in circumstances that do not implicate the government interests identified in *Ferber*. Prosecutors have unbridled discretion in deciding whom to target. Grandparents and parents have been prosecuted for taking nude photos of their children and grandchildren; some either take years to mount a successful First Amendment defense, or opt to enter pleas to avoid protracted litigation.[3/] Artists, museum directors, advertisers, and mainstream booksellers have had their

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3. *See* Bill Lohmann, "Now, What's Wrong With This Picture?," *The Richmond Times Dispatch*, Apr. 11, 2000 (discussing prosecution of Cynthia Stewart in Oberlin, Ohio, for photographs of her 8-year-old daughter in the bathtub, and stating Ms. Stewart's belief that she did nothing wrong but "agreed to enter a counseling program rather than go to trial [have her child testify in court] and face 16 years in prison if convicted"); Robert L. Smith, "Life Changed in a Day for Mother Accused of Obscenity; Children Remain in Custody," *The Plain Dealer*, Nov. 11, 2000 (discussing frequency of mothers who take pictures of their children being charged with exploiting them, and mentioning Cynthia Stewart case); Andrew Jacobs, "Grandmother, Nude Photos and Charges," *The New York Times*, Feb. 13, 2000 (discussing prosecution of Marian Rubin, a 66-year-old grandmother, social worker and amateur photographer in Montclair, New Jersey, for nude photographs of her granddaughters; also discussing earlier case involving Ejlat Feuer, a photographer who in 1994 faced child pornography charges based on nude photos of his daughter; though the charges were ultimately dropped, Mr. Feuer spent $80,000 to defend himself, and stated, "I don't know if I'll ever reconcile what happened to me and my family."); Debra Galant, "Anger and Pain Over Nude Photos," *The New York Times*, July 30, 2000 (reporting that grandmother Marian Rubin agreed to be placed in a pretrial intervention program without admitting guilt, and noting $25,000 in legal fees for defense); Zimmerman, "Photo Processors Face Developing Dilemma: When to Call the Police," *The Wall Street Journal*, June 1, 2001 (jailing of Marian Rubin).

works seized and been threatened with prosecution.[4] An award-winning journalist has been imprisoned after a court refused to let him present evidence that he was in fact investigating and reporting on the problem of child pornography on the Internet. *U.S. v. Matthews,* 209 F.3d 338 (4th Cir. 2000) (denying journalist's First Amendment defense that illegal images were possessed as part of news investigation), *cert. denied*, 121 S.Ct. 260 (2000).

Sex researchers have had to limit their research of child pornography and even to abandon proven clinical techniques for assessing the treatment of sex offenders.[5] The climate for

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4. *See* Stephen Dubin, *Arresting Images: Impolitic Art and Uncivil Actions* (Routledge, 1992), pp. 170-90 (discussing 1990 prosecution and ultimate acquittal of Cincinnati museum director for child pornography charges based on Robert Mapplethorpe exhibit); James Sterngold, "Censorship in the Age of Anything Goes," *The New York Times*, September 28, 1998 (citing indictments of Barnes & Noble bookstores in Alabama and Tennessee for carrying books alleged to be child pornography, including works by Jock Sturges and David Hamilton); Stephanie Grace, "Nude-Children Photos Too Weak a Case, DA Says," *The Times-Picayune*, Oct. 21, 1997 (discussing ultimate decision of Louisiana District Attorney from Jefferson Parish not to bring criminal charges against Barnes & Noble for selling books by Jock Sturges and Sally Mann); Abigail Foerstner, "The Family of Mann," *Chicago Tribune*, September 19, 1993 (referring to state and federal authorities confiscating photographs and equipment from Jock Sturges though ultimately a grand jury refused to indict him); Pierre Thomas & Paul Farhi, "Calvin Klein Ads Cleared," *The Washington Post*, November 16, 1995 (discussing Justice Department inquiry into whether fashion ads featuring adults in underwear could lead to prosecution as child pornography because the models looked "underage"); "Justice Department Won't Prosecute Klein Over Ads," *The Wall Street Journal*, November 16, 1995 (Justice Department decision not to prosecute Calvin Klein for ads condemned by some as child pornography).

5. *See, e.g.*, W.L. Marshall, *Assessment, Treatment, and Theorizing About Sex Offenders*, 23 Crim. Just. & Behav. 162 (1996) (reviewing research by Marshall and others about child pornography over the past twenty years); Sonnenschein, *Sources of Reaction to "Child Pornography"*, in Elias, et al., *Porn 101*, 527-31 (1999) (describing concerns over use of "The Inevitable Comparison" photographs for scholarly conference). The chilling effect on legitimate research is particularly ironic because Congress itself relied on such research when passing the prior version of the federal law. *See* Sen. Rep. 95-438, 95th Cong. 2d. Sess. at 4 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 42 (citing Robin Lloyd, *For Money or Love: Boy Prostitutes in America*, which documented more than 260 magazines depicting minors engaged in sexually explicit conduct). This Court cited

(continued...)

legitimate research has become so fearful that scholars and researchers did not want their articles cited in this brief for fear of scrutiny, and some professional sex research associations declined to join this amicus brief out of fear that their participation could subject their members to scrutiny and potential criminal liability for their research. Sociology professors have also been threatened with prosecution for studying the role of pornography in modern society. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 759 (2001); Robert O'Harrow, Jr., "Professors Sue Over Va Law Governing Explicit Material On Internet," *The Washington Post* May 9, 1997 (discussing censorship of professor's web site). Even criminal defense attorneys do not have an exception to possess images to assist them in the defense of their client.

On the other side of the coin, certain persons who possess and receive child pornography involving real children appear to enjoy immunity from prosecution. For example, companies that market Internet blocking programs employ hundreds of staff members who download illegal child pornography to add to the programs' lists of sites to block. Jon Bigness, "Sifting Problems of Web Filters," *Chicago Tribune*, February 16, 1998; Jeffrey Savitskie, "In Macomb County: Library to Block Net Porn From Kids," *The Detroit News*, August 13, 1997. In addition, the brief of the National Center for Missing & Exploited Children in this case discusses its possession and review of illegal images. *See* Amicus Curiae Brief of National Center for

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5. (...continued)
similar studies in *New York v. Ferber,* 458 U.S. at 758 n.9 (citing Schoettle, *Treatment of the Child Pornography Patient*, 137 Am J. Psychiatry 1109 (1980); Densen-Gerner, "Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children," reprinted in U.S. Dept. of Health and Human Services, *Sexual Abuse of Children: Selected Readings* 77 (1980); Finch, *Adult Seduction of the Child: Effects on the Child*, Medical Aspects of Human Sexuality 170 (Mar. 1973)). As one district court has recognized, "[i]t is difficult to imagine how a researcher today could catalog so many publications of this sort without running afoul of the child pornography law." *U.S. v. Lamb*, 945 F.Supp. 441, 450 n.4 (N.D.N.Y. 1996).

Missing & Exploited Children, at 8 ("NCMEC analyzes all reported images of child pornography to determine whether a violation of federal child pornography laws may have occurred … "); *id.* at 18 ("Reports of apparent child pornography are forwarded to NCMEC, where trained analysts triage the images and assign a priority value to the report" before sending to law enforcement).

Against this background, Congress opted to *expand* the definition of child pornography in the CPPA well beyond constitutional limits.

C. The CPPA Closes off the Only Avenue Left Open by *Ferber* for Legitimate Creators and Users of Prohibited Material - Material That Does Not Involve Real Children

The only clear safety valve left to creators and users of legitimate speech involving minors and sexual conduct under *Ferber* was sexually explicit material that used fictitious minors. The CPPA's criminal penalties unconstitutionally close that safety valve. Despite the government's attempt to narrow the statute to apply only to computer-generated images that are "virtually indistinguishable" from images of actual minors, the plain language of the statute outlaws sexually explicit depictions of young-looking adults in films, photographs, videos, etc., depictions of children in paintings, drawings, cartoons, video games, anatomically correct dolls, sculpture, etc., [6/] and computer-generated or photo composite images that do not involve real minors. All of these easily fit within the open-ended "visual depiction" provision of § 2256(8). [7/]

6. If an artist created a parody of the famed "Mannequin Pis" statue in Brussels, Belgium (of a cherubic boy urinating into a fountain), perhaps giving the boy an erection, the sculpture (and certainly a "photograph" of it) would fall within the statutory language.

7. The Court will not limit the reach of a statute where its plain language has not been qualified by Congress. *Penn Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Brogan v. United States*, 522 U.S. 398, 408 (1998). As Justice Scalia has put it, "The text is the law, and it is the text that must be observed." Scalia, *A Matter of Interpretation*, 22 (1997).

The CPPA, by redefining certain sexually explicit materials as child pornography, is invalid because it directly proscribes constitutionally protected speech.

Even if case-by-case adjudication of overbroad applications might have protected legitimate speech and research before the CPPA, the CPPA's expansion of liability to nonobscene images of fictitious minors burdens protected speech to the point of facial unconstitutionality. Under *Ferber*, legitimate speakers and researchers could avoid prosecution by creating or using images that did not involve real children. For example, photographers and filmmakers could use young-looking adults. Sex researchers could study and use similar or fictitious images for research and to treat patients. These very alternatives were expressly contemplated by this Court in *Ferber*, in part to limit the impact of the law on legitimate speech and research. Because the CPPA eliminates the ability to create or use even fictitious images of minors engaged in sexual conduct, it is unconstitutional.

As a particularly ironic example of the statute's overbreadth, the CPPA now makes criminal many of the studies that could inform the Court's analysis of whether the government has proven the harm that it alleges. Sex researchers cannot study the impact of virtual child pornography to determine whether it "whets the appetite" of the viewer. They cannot determine whether there is a connection between viewing certain images and committing sex crimes. Journalists cannot analyze whether the market for virtual child pornography is actually increasing on the Internet. The government has now made a category of speech so illegal that society can no longer have informed debates about the premises of that illegality. Scientists studying the harmful effects of illegal drugs are granted licenses that entitle them to possession for research purposes, 21 U.S.C. § 823(f), while scientists wanting to examine the harmful effects from child pornography – though it is speech – face prosecution for possessing contraband.

II. EASING THE GOVERNMENT'S CONSTITUTIONALLY-REQUIRED BURDEN OF PROOF FOR IMPOSING CRIMINAL PENALTIES ON SPEECH IS NOT A COMPELLING INTEREST THAT JUSTIFIES THE CPPA

To justify the CPPA, the government now argues that, absent the "appears to be" provision, it will be unable to meet its burden of proof in child pornography prosecutions. Pet.Br. 23-24, 37. Before the CPPA, child pornography prosecutions required the government to prove that the defendant possessed or distributed images of an actual minor. The requirement was imposed by this Court in *Ferber*, whose rationale for allowing a state to ban nonobscene child pornography is the harm to the minors exploited in the material's production. [8/] Lower courts following *Ferber* have continued to emphasize that the victims of child pornography "are the children who participate in the pornography's production." *United States v. Boos*, 127 F.3d 1207, 1213 (9th Cir. 1997); *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987) (rationale of prohibiting child pornography is to ensure that the child "target" of the "pornographer-photographer" not be "treated as a thing").

The government's new argument is simply an effort to lighten its own burden to prove that speech is unprotected before sending a speaker to jail. It exacerbates the constitutional defects in the statute for several reasons. First, the government has failed to cite a single instance

8. The Court said so no fewer than 15 times: 458 U.S. at 749 ("exploitive use of children in the production of pornography"), 750 ("use of a child in a sexual performance"), 753 ("sexual activity involving children"), 758 ("use of children as subjects"), 758 n.9 ("sexually exploited children"; "molestation by adults is often involved in the production of child sexual performances"); 759 ("permanent record of the children's participation"), 759 n.10 (depiction of child "may haunt him in future years"; "fear of exposure and the tension of keeping the act secret" cause harm), 761 (issue is "whether a child has been physically or psychologically harmed in the production of the work"), 762 ("live performances and photographic reproductions of children engaged in lewd sexual conduct"), 764 ("children engaged in its production"; "sexual conduct by children"), 771 ("employment of children to make sexually explicit materials"), 773 ("employ children to engage in conduct").

of its inability to win a conviction. Despite its experience in hundreds and hundreds of child pornography prosecutions, it has adduced no evidence that it has actually been prevented from proving its case. In fact, at the Senate hearing on the CPPA, the Deputy Assistant Attorney General testified that in a recent year there were "no acquittals" and "1995 saw the highest conviction rate for child pornography cases – 97.6 percent." Child Pornography Prevention Act of 1995: Hearing before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess., 15 (1996)("Senate Hearing"). [9/] Congress did not have "substantial evidence" on which to base its "finding" on the burden of proof point. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997).

Second, the government is essentially arguing that it has a compelling interest in criminalizing protected speech (images of fictitious minors) because it will aid the prosecution of unprotected speech (images of actual minors). Under that rationale any overbroad censorship law could be justified – banning protected speech in order to stamp out illegal speech will always make the government's job easier. That constitutional shortcut is precisely what the overbreadth doctrine is designed to prevent. Under *Ferber*, moreover, use of underage children is a constitutionally essential element of the crime. As a matter of due process, the government must prove all elements of the crime beyond a reasonable doubt. *See, e.g.*, *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

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9. As for the cases cited in the government's brief (Pet.Br. 37 & n.8), they all resulted in convictions and each defendant's argument was unsuccessful. In *United States v. Vig.,* 167 F.3d 444, 450 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999), the court held that the government's burden was not so onerous: the government was not "required to negate what is merely unsupported speculation ... Proof beyond a reasonable doubt does not require the government to produce evidence which rules out every conceivable way the pictures could have been made without using real children."

Third, the government argues that any constitutional problems presented by reversing the burden of proof are cured by the affirmative defense, protecting the defendant if the images were produced using a person who "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 . . . a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252A(c). On its face, this defense applies only to liability for *distribution* (§2252A(1)- (4)), and not for *possession* (§2252(5)), even by legitimate researchers. *See* §2252A(c). Thus, possessors have no defense *even if* they can prove that real adults and not minors were used to produce the images. [10] In addition, mainstream filmmakers who use adult actors to portray teenage sexual conduct – including Nabokov's *Lolita*, Shakespeare's *Romeo and Juliet*, and Alice Walker's *The Color Purple* – have no defense if they distribute or advertise images that "convey the impression" that minors are engaged in sexual conduct. Any portrayal of minors engaged in sexual conduct for any purpose whatsoever is criminal.

In addition, the defense is practically unavailable to all distributors who did not participate in production. It would be difficult if not impossible for each distributor to prove that the persons depicted are adults. Even creators of prohibited images have no defense if they did not use real persons at all, but rather created cartoons, drawings or computer-generated images that appear to be of minors (which could include sex educators who use drawings to demonstrate safer sex practices).

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10. The very existence of the defense makes it clear that the statute in fact covers images of real adults and is not limited to computer-generated images. *See* discussion accompanying n.7, *supra*.

Because the defense is unavailable to most defendants who possess or distribute images that appear to be of minors, it magnifies rather than cures the CPPA's overbreadth. The irony of the limited statutory defense is that it will protect some commercial pornographers (if they can prove adults were used as models), while sending researchers and artists to prison.

III. THE GOVERNMENT CANNOT OUTLAW SPEECH BASED ON THE ASSUMPTION THAT IT MAY CAUSE SOME VIEWERS TO ACT ILLEGALLY

A. The Evidence Does Not Support a Connection Between Virtual Child Pornography and Actual Harm to Minors

The government argues that pictures of what "appear to be" minors must be criminalized because they lead to the commission of illegal sexual acts. It states that virtual child pornography can be "used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites," Pet.Br. 23, and to seduce reluctant minors into sexual activity. As the court below correctly held, this argument fails for two reasons. First, as the court of appeals noted, the government has not proven that there is in fact a causal connection between seeing sexually explicit images of fictitious minors and actual child molestation. Pet.App. 20a. Second, the government may not ban *all* images under the hypothesis that they might cause *some* viewers to engage in illegal acts; speech may not be suppressed unless the government proves that it incites imminent unlawful action and is likely to produce such action. *Brandenburg v. Ohio*, *supra*, 395 U.S. at 447.

The Court cannot simply accept at face value the "findings" recited by Congress as establishing the facts necessary for the government to meet its First Amendment burden. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Sable*

Communications v. FCC, 492 U.S. 115, 129 (1989); *see also United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1886-93 (2000). [11/] Even when the restriction is on "commercial" speech and is not a criminal prohibition, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 188 (1999), quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *accord*, *44 Liquormart v. Rhode Island,* 517 U.S. 484, 505-07 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

The government offered no evidence whatever in this case. It relies solely on the congressional "findings." The findings are not grounded in reliable evidence. Conspicuously lacking is any evidence demonstrating that the use of *computer-generated images that do not involve real minors* is a serious problem and that the statutory prohibition will advance the government's interest in preventing child abuse in a direct and material way. [12/] The "findings" were based on a brief committee hearing on one day. Senate Rep. No. 358, 104th Cong., 2d Sess., 8 (1996) ("Senate Report"). Regarding child abuse involving computer-generated images,

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11. In *Playboy*, the Court invalidated a statute regulating sexually-oriented programming on cable television, a statute designed to protect children from exposure to images of sexual behavior. The Court refused "to give the Government the benefit of the doubt when it attempt[s] to restrict speech" and insisted that "the Government bears the burden of proving the constitutionality of its actions." 120 S.Ct. at 1888. The Court found unpersuasive the "anecdotal evidence" relied upon by the government and pointed out that there was "little hard evidence of how widespread or how serious" the particular problem was. *Id*. at 1889-90.

12. As the court of appeals observed, the Senate in fact recognized that banning "entirely computer-generated images might render the law unconstitutional." Pet.App. 28a, n.11. The Senate Committee was warned by the author of the Attorney General's Commission on Pornography Final Report that this would "highly likely" be unconstitutional. Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess., 43 (1996)("Senate Hearing") (testimony of Prof. Frederick Schauer); *see also* Sen.Rep.No. 358, 104th Cong., 2d Sess., at 36-37 (minority views of Sen. Feingold).

the government's chief legislative witness, Di Gregory, testified that he was "not aware of any of this that we have run across in actual prosecutions, and I don't recall as I sit here whether or not we have come across this in investigations." Senate Hearing at 30. [13/] As the court of appeals observed, there are no factual studies establishing a link between computer-generated child pornography and subsequent sexual abuse of children. Pet.App. 20a, citing Adelman, *The Constitutionality of Congressional Efforts to Ban Computer Generated Child Pornography*, 14 J. Marshall J. Computer & Info L. 483, 490 (1996). There was no evidence before Congress that computer simulations have *ever* been used in child abuse. *Cf. American Amusement Machine Ass'n. v. Kendrick,* 244 F.3d 572, 578-79 (7th Cir. 2001)(studies "do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere"); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (invalidating statute designed to protect minors against violence on television).

Indeed, there was no evidence before Congress that computer-generated images of virtual minors is a widespread or serious problem at all. There was anecdotal evidence at the Senate hearing that pornography might be used to recruit minors for sex, but *adult* sexually oriented materials, "mostly materials not even close to being legally obscene, are even more often used for

13. Senator Grassley immediately requested that Di Gregory submit additional material on this crucial point (*id*. at 30), but the record does not contain any such additional material.

the same purpose." [14/] Even "the underwear pages of mail order catalogues" may be used. Senate Hearing at 45. [15/]

In general, the published social science research concludes that there is no demonstrable causal link between any type of pornography and sexual offenses. *E.g.*, Diamond, *The Effects of Pornography: An International Perspective*, in Elias, et al., *Porn 101*, at 223, 241-42 (1999); *accord*, Tovar, Elias & Chang, *The Effects of Pornography on Sexual Offending*, in *Porn 101*, *supra*, at 261, 272. This is also the finding of the research commissioned by the 1970 Presidential Commission on Obscenity and Pornography:

> In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual

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14. Senate Hearing at 45 (testimony of Prof. Frederick Schauer)(emphasis added). Prof. Schauer was the author of the Report of the Attorney General's Commission on Pornography. *Id*. at 113. The Commission stated that *adult* pornography is used to seduce children. *See Osborne v. Ohio, supra,* 495 U.S. at 143-44 n.18 (Brennan, J., dissenting); Attorney General's Commission on Pornography, *Final Report*, 461, n.74 (1986). The Commission found, however, that such evidence was not sufficient to justify additional restrictions on adult pomography. *Final Report* at 461, n.74. The Commission also did not consider *fictional* depictions to be child pomography at all, even though they might be prosecutable if "obscene." *Final Report* at 405. The Commission explained that child pornography is "not so much a form of pornography as it is a form of exploitation of children. The distinguishing characteristic of child pornography, as generally understood, is that *actual children* are photographed while engaging in some form of sexual activity ... " *Id.; see also id* at 406 ("child pornography includes the sexual abuse of a *real child*")(emphasis added); *id*. at 597; therefore, "child pornography *is* child abuse." *Id*. at 406 (emphasis in original).

15. One court referred to research done by an FBI Special Agent who specializes in child abuse cases, Kenneth V. Lanning. *See United States v. Lamb*, 945 F.Supp. 441, 450 (N.D.N.Y. 1996). The empirical study, based on a sample of 40 child abusers, reviewed their modus operandi and noted that they seduce their victims by a variety of "pressures," including giving "money, gifts and affection." Lanning & Burgess, *Child Pornography and Sex Rings*, 53 FBI Law Enforcement Bulletin 10, 12 (Jan. 1984). The study found that "Pedophiles are skilled at the seduction process. They know how to use bribes, attention, affection, adult authority, and even threats" to get their victims to do their bidding. *Id.* The study made *no mention* of any seduction by the use of any type of pornography.

> materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency.

Report of the U.S. President's Commission on Obscenity and Pornography, 27, 139 (1970). [16/]

Both Diamond and the Tovar authors exhaustively review the research and find, for example, that despite the increased availability of pornography, sex crimes have *decreased*: "there is an *inverse* causal relationship between any increase in pornography and sex crimes." Diamond, in *Porn 101, supra*, at 241 (emphasis in original); *see* Fisher & Barak, *Pornography, Erotica and Behavior*, 19 Int'l J. of Law & Psychiatry 65, 74 (1991); Diamond & Uchiyama, *Pornography, Rape and Sex Crimes in Japan*, 22 Int'l J. of Law & Psychiatry 1, 19 (1999); Diamond, *Porn* 101, *supra*, at 243; 247; Becker and Stein, *Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males*? 19 Int'l J. of Law of Psychiatry 85, 93 (1991).

The government cites some "available secondary literature" as confirming that pedophiles use child pornography to seduce other children into sexual activity, or for their own arousal. Pet.Br. 35, n.6. But nothing in the cited literature even mentions computer-generated images. Moreover, the authors – like the witnesses at the Senate hearing – are by and large not scientific researchers but law enforcement officers or anti-pornography advocates. [17/] And the conclusory

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16. The Attorney General's Commission did find a link (*see* note 14, *supra*), but the "Meese" Commission did not commission any research and this finding has been criticized as largely political. *E.g.*, Diamond, *supra*, at 226.

17. Seth Goldstein, the author of *The Sexual Exploitation of Children* (2d ed. 1999), is a former Berkeley police officer who did no independent research for his law enforcement manual. Shirley O'Brien's 1983 book long predates the technology at issue here. Tim Tate, *Child Pornography: An Investigation* (1990), written by a reporter, is out of print. Campagna and Poffenberger, who were at least academics (Castleton State College and West Virginia Northern Community College), limited their discussion of child

(continued...)

quotations excerpted in the government's citations do not cite any research or study on which they could be validly based. Indeed, there was no valid evidence before Congress on which to predicate the "virtually indistinguishable" conclusion enacted as the "finding" on which all of the government's arguments depend.

B. The CPPA Violates this Court's Well-Established Limits for Punishing Speech on the Theory That it May Encourage Others to Engage in Unlawful Behavior

In the absence of any proof of actual harm, the crux of the government's argument is that it can ban nonobscene images of fictitious minors because they *might* encourage some viewers to engage in unlawful behavior by "whet[ting]" the appetite of potential pedophiles. But that argument is constitutionally indistinguishable from the proposition that hate speech can be banned because it may lead to hate crime. The Court soundly rejected that proposition in *Brandenburg v. Ohio*, 395 U.S. 447 (1969), when it ruled that an audience's possible violent reaction can be imputed to a speaker only if the speaker's words were directed to "inciting or producing imminent lawless action and . . . [were] likely to make or produce such action." *Compare R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), *with Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

The government acknowledges the *Brandenburg* rule (Pet. Br. 31), but argues for an exception that would be a gaping hole in First Amendment protection, swallowing many forms of expression. The government's assertion is that powerful and evocative speech may lead an

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17. (...continued)
pornography – so as to avoid "highly subjective" and "complex" definitional issues – to photographs that "show minors engaged in sexual activities with adults, other children and animals," *The Sexual Trafficking in Children* 117 (1988), the kind of material addressed by *New York v. Ferber*, 458 U.S. 747 (1982). The "independent investigator" quoted by the government on pedophiles using pornography for arousal (Pet.Br. 39) is in fact an FBI agent. *See United States v. Lamb, supra*, 945 F.Supp. at 450.

impressionable listener to engage in illegal or self-destructive behavior. The *Brandenburg* rule, however, does not rest on the "naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (Hustler magazine article on "auto-erotic asphyxiation" that led teenage boy to hang himself while masturbating protected by First Amendment). Even the explicit advocacy of future illegal action does not warrant suppression by the government. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Pictures of juvenile or child sexuality that do not involve real minors cannot be deemed "advocacy" of illegal conduct, much less "incitement." To make the point obvious, images prohibited by the CPPA could not rationally be considered "incitement" if they were presented at a scholarly conference or couched with warnings. Yet the government argues that such images can be criminalized regardless of whether they are possessed by a scientist, journalist, or sex educator, because of the supposed connection between viewing them and the seduction of children. But there is no basis for presuming that sexual images will necessarily or even in many cases "incite" either reluctant minors or potential molesters to engage in illicit sexual acts. The "incitement" cases demand much more convincing evidence than the government has presented here. *See Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (advertising of contraceptives does not illegally "incite" sexual acts); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959) (film did not "incite" adultery);[18/] *American Amusement Machine*

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18. In *Kingsley*, the Court invalidated a state law that banned any "immoral" film, defined as a film that portrayed "acts of sexual immorality" as "desirable, acceptable, or proper." New York had denied a license to the film of "Lady Chatterley's Lover" because it portrayed adultery as "right and desirable." The Court reasoned that the state banned the (continued...)

Ass'n. v. Kendrick, supra, 244 F.3d at 575 (violent video games not shown to "incite" juvenile violence). [19]

Judge Easterbrook's opinion in *American Booksellers Ass'n. v Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*., 475 U.S. 1001 (1986), is a sound guide to the proper analysis for the instant case. Indianapolis sought to justify its ordinance on the ground that "pornography affects thoughts." 771 F.2d at 328. Judge Easterbrook acknowledged that "people often act in accordance with the images and patterns they find around them." *Id*. at 328- 29. The court therefore accepted for purposes of argument the "premises" of the ordinance – that depictions of the subordination of women in fact "tend to perpetuate subordination," including the "bigotry and contempt it produces, with the acts of aggression it fosters..." *Id*. at 329. The court reasoned, however, that this "simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation." *Id*. In this sense, pornography is no different from "racial bigotry, anti-Semitism, violence on television," expressions of disrespect

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18. (...continued)
film because it "advocates an idea – that adultery under certain circumstances may be proper behavior. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty." 360 U.S. at 688. *See also, Butler v. Michigan*, 352 U.S. 380, 381 (1957) (reversing conviction under statute that banned a book "tending to the corruption of the morals of youth.").

19. *Accord, Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997) (trading cards depicting heinous crimes not harmful to minors, rejecting contention that minors "imitate" such crimes); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (invalidating statute designed to protect minors against violence on television); *Waller v. Osbourne*, 763 F.Supp. 1144, 1150-51 (M.D. Ga. 1992) (lyrics suggesting that young listeners commit suicide protected by First Amendment); *Watters v. TSR, Inc.*, 715 F.Supp. 819 (W.D. Ky. 1989) ("Dungeons and Dragons" game not legally responsible for causing suicide; protected by First Amendment); *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979) (broadcasters of television violence may not be held liable for causing imitative criminal act); *Olivia N. v. NBC*, 126 Cal.App.3d 488 (1981), *cert. denied*, 458 U.S. 1108 (1982) (same; "copycat" criminal act following television program).

for government and so on, since people who are exposed to the speech may act on it, with undesirable social consequences. *Id*. at 330. "Much speech is dangerous" (*id*. at 333), but this does not mean that government can outlaw it. Thus, for example, the ugly racist ideas of the Ku Klux Klan may be communicated, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Communists who wish to overturn our government may speak freely, *DeJonge v. Oregon*, 299 U.S. 353 (1937); Nazis may march through a largely Jewish community, *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); and pornography that "subordinates" women cannot be made subject even to civil sanctions. *American Booksellers Ass'n. v. Hudnut, supra.*

The government cites only one decision of this Court to support its argument that the CPPA is justified by the need to stop pedophiles, and it stands for precisely the opposite conclusion for which the government cites it. In *Osborne v. Ohio*, the Court expressly rejected the argument that the private possession of even obscene material may be punished on the ground that it "would poison the minds of its viewers." 495 U.S. at 109; *see Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The fact that such material "might lead to deviant sexual behavior" is not sufficient to criminalize its possession. *Osborne*, 495 U.S. at 109 n.4; *Stanley*, 394 U.S. at 566-67. *Osborne* upheld a state statute criminalizing possession of actual child pornography, but reversed the conviction on due process grounds. In dictum cited by the government, the Court noted that encouraging destruction of child pornography is desirable "because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." 495 U.S. at 111. The Court certainly did not hold, or even imply, however, that this "suggestion" was sufficient in and of itself to uphold the constitutionality of the challenged statute. Rather, it was the state's interest in eliminating the market for *real* child pornography and thereby protecting the children who were abused in its production that justified the departure from the rule in *Stanley v.*

Georgia. Thus, in distinguishing the Ohio statute from the one struck down in *Stanley*, the Court stated: "In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned the obscenity would poison the minds of its viewers. . . . The difference here is obvious: [T]he State does not rely on a paternalistic interest in regulating Osborne's mind. Rather Ohio has enacted [a statute] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." 495 U.S. at 109. Further, the state statute in *Osborne* contained specific exceptions for nude pictures of children for "artistic," "educational," "research" or other valid purposes. 495 U.S. at 106.

The government may of course directly prohibit enticing children into sexual acts, regardless of the enticements used – candy, ice cream, money or erotic pictures. Indeed, sexual acts and attempted acts with minors already are crimes in a variety of contexts. *E.g.*, 18 U.S.C. § 2422(b) (enticing minor to engage in sexual activity); 18 U.S.C. § 2423 (travel with intent to engage in sexual act with juvenile); Cal. Penal Code § 288; *see also* § 311.4(c) (inducing minor to engage in sexual act to make pornography). The government can and should engage in vigorous enforcement of these laws. But in enacting the CPPA, it ignored a practical and less restrictive alternative to the ban of protected speech. Congress rejected the Department of Justice recommendation that instead of criminalizing nonobscene sexual images that do not use actual children, it increase the penalties for *obscene* images of children, whether real or virtual. Senate Hearing at 32 (testimony of Deputy Assistant Attorney General Di Gregory). In contrast to the CPPA, this solution would ensure protection for legitimate speech and research with serious literary, artistic, scientific, or medical value. Instead, Congress chose to enact a statute that violates the First Amendment.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision of the court of appeals invalidating the provisions of the CPPA at issue in this case because they violate the First Amendment.

Respectfully submitted,

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