No. 09-306

DEC 4 - 2009

In The
Supreme Court of the United States

CHRISTOPHER H. ALLEN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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December 4, 2009

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QUESTIONS PRESENTED

The Petitioner, Christopher H. Allen, created sexually explicit images by morphing the heads and faces of actual, identifiable children with images of adult bodies engaged in sexual activity. Allen claims the First Amendment protects the resulting images. The questions presented are:

1. Does the First Amendment protect sexually explicit images created by morphing the heads and faces of actual, identifiable children with images of adult bodies?

2. When the state courts have construed a state statute as applying only to child pornography that depicts actual children, is that statute substantially overbroad and, thus, facially unconstitutional?

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Virginia Attorney General William C. Mims, on behalf of the Commonwealth of Virginia, and pursuant to this Court's Order of October 5, 2009, submits this Response to the Petition for Certiorari.[1]

INTRODUCTION

The First Amendment does not protect *actual* child pornography, *New York v. Ferber,* 458 U.S. 747, 756-58 (1982), but it does protect *virtual* child pornography. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-51 (2002). However, the line between virtual and real child pornography blurs when pornographers morph the images of real children with the images of real adults or computer generated images. *Id.* at 242. "Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber.*" *Id.*

The Petition asks this Court to decide the constitutionality of possessing sexually explicit morphed images involving actual, identifiable children. The Petitioner, Christopher H. Allen, altered "innocent pictures of real children so that the children appear to be engaged in sexual activity." *Id.* Specifically, he "superimposed the pictures of those children—including some of his own children and

[1] On October 13, 2009, this Court extended the time for filing a response to December 4, 2009.

some of the children that he coached—onto pictures of adults engaged in sexual activity." *Pet. App.* 14a. Allen was convicted of producing, but not distributing, child pornography in violation of *Virginia Code* § 18.2-374.1(B)(2) ("Virginia Act").[2] He now claims that his production of these sexually explicit morphed images is constitutionally protected and the Virginia Act is substantially overbroad and, thus, facially unconstitutional.

This Court should deny review. With one exception, every appellate court to address the possession of sexually explicit morphed images involving actual, identifiable children concluded that the images are constitutionally unprotected. While there is a conflict among the lower appellate courts, this Court should not grant review simply because of one outlier decision.

Moreover, as construed by the Virginia courts, the Virginia Act is limited in "its application to images that depict actual, real, children." *Pet. App.* 14a. The Constitution does not protect such images, *Ferber*, 458 U.S. at 756-58, and, even if there are unconstitutional applications, the statute is not substantially overbroad. Thus, this Court should deny review of the overbreadth issue.

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[2] The statute was substantially rewritten in 2007 and those changes went into effect after Allen was convicted. 2007 Va. Acts chs. 759, 823.

STATEMENT OF THE CASE

1. In many respects, Allen was the typical suburbanite. He operated a computer based graphic design business out of his home, cared for his niece on nights when his sister-in-law worked the night shift, and coached his stepdaughter's soccer team in a league for girls under ten years of age. Yet, there was a darker side to Allen. Using computer technology, he took the faces of his stepdaughter, his niece, and several girls on the soccer team from innocent photographs and combined or "morphed" them with pictures of adults engaged in sexually explicit acts.[3] The photographs are extremely graphic. For example, using a photograph depicting a girl with her mouth open, eating a slice of watermelon, Allen digitally removed the watermelon slice and replaced it with an erect penis. The girls depicted in the resulting morphed photographs were around seven-years-old at the time these photographs were created.[4] The children are readily identifiable in the images. *See* Trial Transcript of May 7, 2007 at 187 (soccer player), 194-95 (soccer player), 199-200 (soccer player), 205 (niece), 206 (stepdaughter), *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

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[3] Allen also morphed images of the head and face of his sister-in-law onto the bodies of adults engaged in sexual acts. *See* Trial Transcript of May 7, 2007 at 206, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

[4] *See* Trial Transcript of May 7, 2007 at 90, 186, 193-94, 199, 204, 213, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

Acting on a tip from Allen's wife, federal postal inspectors and the local police executed a search warrant and seized computers containing the morphed images. Allen was indicted by a federal grand jury for two counts of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). He ultimately pled guilty to one count and received a sentence of forty-one months in federal prison.

2. While Allen was in federal custody, a state grand jury indicted him for five counts of producing child pornography in violation of the Virginia Act.

Allen moved to dismiss the state indictment on First Amendment grounds. Although Allen framed his request exclusively in overbreadth terms, a careful examination of his argument reveals that he was making *both* an as-applied challenge and a facial challenge alleging overbreadth. *Pet. App.* 2a-7a. *See also* Petition for Appeal at 13-17, *Allen v. Virginia*, No. 2045-7-04 (Va. Ct. App. 2008). The as-applied challenge emphasized that Allen never distributed the sexually explicit morphed images. *Pet. App.* 5a-7a. *See also* Petition for Appeal at 15-17, *Allen v. Virginia*, No. 2045-7-04 (Va. Ct. App. 2008). The facial challenge alleging overbreadth argued that the Virginia Act "could be read to apply to virtual child pornography just as readily as to morphed child pornography." *Pet. App.* 3a. *See also* Petition for Appeal at 14-15, *Allen v. Virginia*, No. 2045-7-04 (Va. Ct. App. 2008).

In denying the motion, *Pet. App.* 10a, the trial court concluded, "the prosecution in this case involves real children who are being harmed by the use of their images in this way" and "the statute under which Mr. Allen is being prosecuted is neither over-broad or vague." *Pet. App.* 9a. Thus, the Virginia Act is constitutional as applied to Allen and is not substantially overbroad.

Following a two-day trial, a jury convicted Allen on all five counts. The trial court sentenced him to twenty-four years in prison, seven of which is suspended, and required Allen to register as a sex offender following his release.

3. Virginia's intermediate appellate court refused Allen's appeal. *Pet. App.* 11a-14a. In rejecting the appeal, the court distinguished the images produced by Allen from the images at issue in *Ashcroft*. As the court explained:

> While *Ashcroft* dealt with pornographic images created without involvement of real children, the images at issue in this case were produced using photographs of real children. The photographs, which depicted the heads and faces of real children, were layered by appellant or "morphed," on top of images of adults engaged in sexual activity. The resulting images, therefore, showed a child's head superimposed on an adult engaged in sexual acts. Stated another way, morphed images, such as the images appellant produced, result from instances

> where "pornographers [] alter innocent pictures of real children so the children appear to be engaged in sexual activity." Although morphed images were not at issue in *Ashcroft*, the Court explicitly stated that morphed images "implicate the interests of real children and are in that sense closer to the images in *Ferber*."

Pet. App. 13a (citations omitted, bracket original). Since Allen "created pornographic images using pictures of real children, the images created by [Allen] do not fall within the purview of the *Ashcroft* holding." *Pet. App.* 14a. Thus, the Virginia Act is constitutional as applied to Allen and it is not substantially overbroad.

Allen sought rehearing of the denial of his appeal and the Court of Appeals of Virginia declined the request. *Pet. App.* 15a.

4. The Supreme Court of Virginia refused Allen's appeal on April 28, 2009. *Pet. App.* 17a. The court denied Allen's request for rehearing on June 12, 2009. *Pet. App.* 18a. Under Virginia law, such a denial by the Supreme Court of Virginia is a decision on the merits. *See Sheets v. Castle,* 559 S.E.2d 616, 619 (Va. 2002).

The Petition for Certiorari followed.

REASONS FOR DENYING THE PETITION

First, this Court should not decide the constitutionality of possessing sexually explicit morphed images of actual, identifiable children. The few courts that have addressed this issue are largely in agreement, with only one outlier court disagreeing with the Virginia courts. Moreover, there is no constitutional right to possess sexually explicit morphed images of actual, identifiable children.

Second, this Court should deny review of the overbreadth challenge to the Virginia Act. As construed by the Virginia courts, the Virginia Act is limited to child pornography involving actual children. Because there is no constitutional right to possess child pornography involving actual children, the Virginia Act has no unconstitutional applications. However, even if there are unconstitutional applications, the Virginia Act is not substantially overbroad.

I. THIS COURT SHOULD NOT DECIDE THE CONSTITUTIONALITY OF POSSESSING SEXUALLY EXPLICIT MORPHED IMAGES OF ACTUAL, IDENTIFIABLE CHILDREN.

A. The Conflict Among The Lower Courts Is Shallow.

Few courts have addressed the constitutionality of possessing sexually explicit morphed images of actual, identifiable children. Other than the lower court, only four appellate courts have addressed it.

Like the Virginia appellate courts, Ohio's highest court and Kansas' intermediate appellate court hold that the Constitution does not protect sexually explicit morphed images involving actual children. *See Ohio v. Tooley*, 872 N.E.2d 894, 903 (Ohio 2007), *cert. denied,* 552 U.S. 1115 (2008); *Kansas v. Coburn*, 176 P.3d 203, 222-23 (Kan. Ct. App. 2008). The Eighth Circuit, while acknowledging that the Constitution might protect *some* morphed images, held that the First Amendment does not protect the morphed image when the child is identifiable.[5] *United States v. Bach,* 400 F.3d 622, 632 (8th Cir. 2005). Conversely, the Supreme Court of New Hampshire held that government could not criminalize the mere *possession* of morphed images "where the naked bodies do not depict body parts of actual children engaging in sexual activity." *New Hampshire v. Zidel*, 940 A.2d 255, 263 (N.H. 2008). However, the New Hampshire court suggested that the *distribution* of such morphed images "may be harmful to the depicted child." *Id.*

Aside from the outlier *Zidel* decision, there is substantial agreement among the lower courts with respect to the lack of First Amendment protection of a right to possess sexually explicit morphed images

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[5] If the question of the child being identifiable is constitutionally significant, it is not at issue in this case. All of Allen's victims are identifiable in the morphed images. *See* Trial Transcript of May 7, 2007 at 187, 194-95, 199-200, 205, 206, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

involving actual, identifiable children. Quite simply, "the holding of *Zidel* is at odds with every other federal and state court which has confronted, even indirectly, the constitutional question raised by the dicta in *Ashcroft* concerning statutes which impose criminal penalties for possession of morphed images of child pornography." *United States v. Hotaling,* 599 F. Supp. 2d 306, 319 (N.D. N.Y. 2008).[6] This Court need not grant review simply because of one outlier decision, which reviewed a statute with narrow purpose. Rather, this Court should grant review only if other courts follow *Zidel.*

Moreover, the specific purpose of the New Hampshire statute at issue in *Zidel* was to stop the "use [of children] *as subjects* in sexual performances." 940 A.2d at 262 (emphasis added). The court observed that this interest was not served when the photographs did not depict children involved in sexual activity. *Id.* at 263. This narrow purpose helps to explain the ruling of the New Hampshire court. In contrast, although the Virginia Act does not contain an express declaration of purpose, "[t]he legislative enactment of the possession statute clearly reflects the decision of the General Assembly to protect Virginia 'children from treatment it

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[6] Other courts have rejected the argument that the First Amendment protects possession of morphed images of actual children engaged in sexual activity. *Cobb v. Coplan,* 2003 WL 22888857, at *7-8 (D. N.H. 2003) (federal habeas review); *Maine v. Monahan,* 2003 WL 1666665, at *1-2 (Me. Super. Ct. 2003).

determines is physically or psychologically injurious to youth.'" *Virginia v. Simone*, 63 Va. Cir. 216, 239 (Va. Portsmouth Cir. Ct. 2003), *rev'd on other grounds* at *Simone v. Commonwealth*, No. 0551-04-1, 2005 WL 588257 (Va. Ct. App. March 15, 2005) (quoting *Freeman v. Virginia*, 288 S.E.2d 461, 465 (Va. 1982)). Unquestionably, a child whose image is used in sexually explicit images can be psychologically scarred from such images, and the best way to prevent the images from being disseminated is to prohibit the creation of such images.

B. There Is No Right To Possess Sexually Explicit Morphed Images Involving Actual, Identifiable Children.

This Court's review is unwarranted because the Virginia courts faithfully and correctly applied this Court's First Amendment jurisprudence. The Virginia Act is constitutional as applied to Allen. There is no constitutional right to possess morphed images involving actual, identifiable children. Therefore, the prosecution of Allen for producing, but not distributing, such images is constitutional.

First, "the creation and possession of pornographic images of living, breathing and identifiable children via computer morphing is not 'protected expressive activity' under the Constitution." *Hotaling*, 599 F. Supp. 2d at 321. While such images might not meet the traditional definition of "obscene" articulated in *Miller v. California,* 413 U.S. 15, 24 (1973), "the

States are entitled to greater leeway in the regulation of pornographic depictions of children." *Ferber*, 458 U.S. at 756. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607 (1982)). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Thus, the States may constitutionally proscribe not only actual child pornography, *Ferber*, 458 U.S. at 756-58, but "any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008).

Second, there is no constitutional right to possess sexually explicit morphed images involving actual, identifiable children. The government may criminalize the distribution of obscene materials, *see Miller*, 413 U.S. at 24, but may not criminalize the mere possession of obscene materials. *See Stanley v. Georgia,* 394 U.S. 557, 567 (1969). However, the rule is different for actual child pornography. There is no constitutional right to distribute, *Ferber*, 458 U.S. at 756-58, or to possess actual child pornography. *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990).

Contrary to Allen's suggestions, *Pet.* 11-13, the *Osborne* rationale is equally applicable to sexually explicit morphed images involving actual, identifiable children. Like actual child pornography, the

constitutional value of a sexually explicit morphed image is "exceedingly modest, if not *de minimis.*" *Ferber,* 458 U.S. at 762. By prohibiting the possession of such images, Virginia seeks "to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." *Osborne*, 495 U.S. at 109. It is "surely reasonable for the State to conclude that it will decrease the *production* of child pornography if it penalizes those who [merely] *possess* and view the product, thereby decreasing demand." *Id.* at 109-10 (emphasis added). Similarly, it is logical for Virginia to conclude that it will decrease the production of sexually explicit morphed images involving actual, identifiable children if it criminalizes the possession of such images.

To be sure, the harm to children from the production of sexually explicit morphed images is less than the harm to children in the production of actual child pornography. Yet, that lesser degree harm to the child does not alter the constitutional analysis.[7] When sexually explicit morphed images involve actual, identifiable children, "a lasting record has been created of . . . an identifiable minor child, seemingly engaged in sexually explicit activity. [The child] is thus victimized every time the picture is displayed." *Bach*, 400 F.3d at 632. Furthermore, storing the images creates a likelihood that the images will

[7] Moreover, the fact that the victims may be unaware that they are victims is irrelevant. The crime is producing the image, not communicating the image.

be discovered and shared with others, thereby traumatizing the identifiable children depicted in the images.

Indeed, that is exactly what happened here. The parents of one of the girls depicted in the morphed images felt compelled to tell their daughter about it, although without showing her the actual photograph. Upon learning of what happened, their young daughter "was very disturbed by it and she sobbed uncontrollably." *See* Trial Transcript of May 8, 2007 at 154, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007). Another parent described her teenage daughter as "very angry" and "very disturbed" upon learning about the photo and testified that "this deeply affected her and it has affected our entire family." *See* Trial Transcript of May 8, 2007 at 157, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007). The mother of another girl related that her daughter had to go through counseling, does not trust men at all, and even tried to take her own life. She testified that the incident "forever changed the makeup of our family, not just my children and myself, but all of our family." *See* Trial Transcript of May 8, 2007 at 160, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

The presence of an identifiable victim distinguishes the sexually explicit morphed images from virtual child pornography and actual adult pornography using actors who appear to be children. *Bach*, 400 F.3d at 632. Such morphed "images 'implicate the interests of real children' and are

'closer' to the types of images placed outside the protection of the First Amendment in *Ferber*." *Hotaling*, 599 F. Supp. 2d at 321 (quoting *Ashcroft*, 535 U.S. at 242, 254).

II. THIS COURT SHOULD DENY REVIEW OF THE OVERBREADTH CHALLENGE TO THE VIRGINIA ACT.

Although the Virginia Act is constitutional as applied to Allen, he may still pursue a facial challenge alleging overbreadth.[8] *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (facial challenges alleging overbreadth available in some limited contexts). In a facial challenge alleging overbreadth, the law is invalidated in *all* applications "because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party,* 128 S. Ct. 1184, 1190 n.6 (2008) (citation omitted). In arguing overbreadth, Allen is not raising his own claims, but the constitutional claims of *others* not before this Court.

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[8] There is no reason for this Court to consider the facial challenge alleging overbreadth. "It is neither [the courts'] obligation nor within [their] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 128 S. Ct. at 1838. Because the Virginia Act is a state statute, this Court defers to the Virginia court's construction of the statute.[9] *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). As the Virginia Court of Appeals noted, "[t]he plain language of Virginia's child pornography statute limits its application to images that depict actual, real children." *Pet. App.* 14a. Unlike the federal provisions invalidated in *Ashcroft*, the Virginia Act does not apply to virtual child pornography. Rather, "the Virginia child pornography statute contemplates only the images of actual children." *Pet. App.* 14a. *See also Simone*, 63 Va. Cir. at 237 ("The plain language of the Virginia child pornography statute confines its application to images utilizing actual children."). Because the Virginia Act is limited to actual child pornography and because there is no constitutional right to possess actual child pornography, *Osborne*, 495 U.S. at 109-10, there are no unconstitutional applications of the Virginia Act.[10]

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[9] If the state courts have not construed the statute, the proper course is for the federal courts to certify questions to the State's highest court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77-80 (1997).

[10] The petitioner incorrectly states that the Virginia statute criminalizes the depiction of mere nudity of an underage child. *Pet.* 14. That is incorrect. *Virginia Code* § 18.2-374.1(A) prohibits "*a lewd* exhibition of nudity." (emphasis added). Lewd is a

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The second step of the overbreadth analysis is to determine whether the statute "criminalizes a substantial amount of protected expressive activity." *Williams*, 128 S. Ct. at 1841. Allen has the "heavy burden," *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 207 (2003), "of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists," *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (brackets original, citation omitted). There must be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801 (1984). Even assuming a statute has unconstitutional applications, "that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *McConnell,* 540 U.S. at 207 (internal quotation marks and citation omitted). "This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of

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synonym of "lascivious," meaning "a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite." *Pedersen v. City of Richmond*, 254 S.E.2d 95, 98 (Va. 1979).

situations to which it might be validly applied." *Parker v. Levy,* 417 U.S. 733, 760 (1974).

Allen does not—and cannot—identify a single instance where the Virginia Act, as construed by the Virginia courts, is unconstitutional.[11] While he implicitly suggests that a sexually explicit scene involving a child actor is constitutionally protected, *Pet.* 16, *Ferber* forecloses such an argument. *Ferber,* 458 U.S. at 756-65. Moreover, assuming that *Ferber* is limited and the Constitution does protect some sexually explicit scenes involving actual children, "the vast majority of its applications" raise "no constitutional problems whatever" and the statute is not substantially overbroad. *Williams,* 128 S. Ct. at 1844. Therefore, his overbreadth argument fails.

Finally, to the extent one could conceive of some realistic circumstances where the Virginia Act is unconstitutional, any such application may be avoided through case-by-case litigation. *Hicks*, 539 U.S. at 124. "As-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168. Because the statute is constitutional as applied to Allen, there is no need to consider the draconian remedy of declaring the Virginia Act invalid in all applications. When confronted with a statute that is unconstitutional in

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[11] Contrary to Allen's assertions, *Pet.* 15, the Virginia Act does not reach adult actors who appear to be children. *See Pet. App.* 14a (Virginia Act limited to depictions of actual children).

some applications, courts should "try not to nullify more of a legislature's work than is necessary, [because] '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006).

CONCLUSION

For the reasons stated above, this Court should **DENY** the Petition for Certiorari.

Respectfully submitted,

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