No.

In the Supreme Court of the United States

CHRISTOPHER ALLEN,
PETITIONER,
v.
COMMONWEALTH OF VIRGINIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Virginia prosecuted Mr. Allen for electronically pasting the faces of minors onto sexually explicit pictures of adults. In *Ashcroft v. Free Speech* Coalition, 535 U.S. 234, 242 (2002), this Court explicitly reserved the issue of First Amendment protections for such images.

Is Virginia Code § 18.2-374.1 (2003), prohibiting the production of "sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age," overbroad on its face because it reaches a substantial amount of protected speech?

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The unpublished decision of the Court of Appeals of Virginia is reprinted at Pet. App. 11a. Its order denying rehearing is reprinted at Pet. App 15a. The order from the Supreme Court of Virginia denying the appeal is reprinted at Pet. 17a. Its order denying rehearing is reprinted at Pet. 18a.

JURISDICTION

The Supreme Court of Virginia entered judgment on April 28, 2009. A timely petition for rehearing was denied on June 12, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 2003 version of Virginia Code § 18.2-374.1 provides in relevant part:

A. For the purposes of this article and Article 4

> (§ 18.2-362 et seq.) of this chapter, the term "sexually explicit visual material" means a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.
>
> B. A person shall be guilty of a Class 5 felony who. . . 2. Produces or makes or attempts or prepares to produce or make sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age . . . .

The full text of Va. Code § 18.2-374.1 (2003) is set forth at Pet. App. 19a.

STATEMENT OF THE CASE

At trial, Virginia's evidence showed that Christopher Allen used a computer to match photographs of the heads of minor girls with photographs of the bodies of adults engaging in sexual activity, sometimes called "morphing" or "compositing." In the trial court, and on appeal, Mr. Allen consistently argued that the First Amendment does not permit a criminal conviction for the creation of sexually explicit material that does not involve sexual activity by a child in its creation, at least without a finding of obscenity. The Virginia courts rejected Mr. Allen's First Amendment claim, and he is currently serving a sentence of seventeen years for five counts of producing child pornography in violation of the version of Virginia Code § 18.2-374.1 in effect at the time of his alleged offense.

On May 22, 2006, a Fairfax County, Virginia grand jury indicted Mr. Allen on five counts of violating Va. Code § 18.2-374.1, which made it unlawful to produce "sexually explicit visual material which utilizes or has a subject a person less than eighteen years of age."

Mr. Allen timely moved the trial court to dismiss the indictment on the grounds that Va. Code § 18.2-374.1 was unconstitutionally overbroad under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and this Court's other cases. Pet. App. 1a-7a. After hearing both parties at a pretrial hearing, the

trial court denied the motion. Pet. App. 9a. The trial court "conclude[d] that the prosecution in this case involves real children who are being harmed by the use of their images in this way. And I further conclude that the statute under which Mr. Allen is being prosecuted in this case is neither over-broad or vague. So the motion is denied." Pet. App. 9a. The trial court entered an order to that effect, although the court mistakenly referenced an opinion letter it had written on an unrelated claim Mr. Allen had advanced. Pet. App. 10a.

A jury trial commenced on May 7, 2007. As predicted in the pre-trial hearing, the prosecution case consisted of evidence that Mr. Allen, a graphic designer, used a computer program to "paste" the faces of girls onto the bodies of adult women engaged in sexual activity. Mr. Allen did not distribute the photographs; a postal inspector found them on the computer in Mr. Allen's home.

The jury convicted Mr. Allen of all five counts of producing child pornography. Following a sentencing hearing, the trial court sentenced Mr. Allen to seventeen years incarceration, followed by post-release supervision and registration as a sex offender.

Mr. Allen appealed his conviction to the Court of Appeals of Virginia, presenting the question of the overbreadth of the statute. On May 7, 2008, the Court of Appeals of Virginia denied the appeal. The Court of Appeals of Virginia concluded that the statute was not overbroad because the Virginia

statute does not contain a provision that prohibits images that merely "appear to depict" children. Pet. App. 11a. The Court of Appeals of Virginia cited this Court's reservation of the morphed images issue in *Ashcroft*: "Although in *Ashcroft*, the Court did not address morphed images, the Court explicitly stated that the morphed images 'implicate the interest or real children and are in that sense closer to the images in *Ferber*.'" Pet. App. 13a.

The Court of Appeals of Virginia reasoned,

> The plain language of Virginia's child pornography statute limits its application to images that depict actual, real children. Appellant superimposed the pictures of those children – including some of his own children and some of the children he coached – onto pictures of adults engaging in sexual activity. As such, the images that appellant created in this case are indeed closer to the works discussed in *Ferber* – images that depict sexual conduct by children – and are, therefore, quite different from the virtual images at issue in *Ashcroft*. Because appellant created pornographic images using pictures of real children, the images created by appellant do not fall within the purview of the *Ashcroft* holding (i.e., the unconstitutional portions of the CPPA.) Accordingly, appellant's reliance upon *Ashcroft* in an attempt to render Code sec. 18.2-374.1 unconstitutional is misplaced, as the Virginia child pornography statute contemplates only the images of actual

children.

Pet. App. 14a.

Mr. Allen timely requested, but was denied, reconsideration by the Court of Appeals of Virginia. Pet. App. 15a. On October 29, 2008, Mr. Allen timely filed a Petition for Appeal before the Supreme Court of Virginia, raising the overbreadth issue in that Court. The Supreme Court of Virginia refused the petition on April 28, 2009, Pet. App. 17a, and denied a Petition for Rehearing on June 12, 2009. Pet. App. 18a.

REASONS FOR GRANTING THE WRIT

This case starkly presents the question left unanswered in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002): whether the First Amendment protects images of sexual activity that depict minors, but do not involve any actual sexual activity by minors in the production process. Virginia attempted to criminalize such images by prohibiting drawings, sculptures, and other visual representations which "ha[ve] as a subject a person less than eighteen years of age." This statutory language, subsequently repealed, criminalizes an enormous amount of protected speech, and is clearly overbroad on its face.

A. This Court has not yet addressed the important question, unanswered in *Free Speech Coalition*, of whether the First Amendment protects images of sexual activity that depict minors, but do not involve sexual activity by minors in their production.

In *Free Speech Coalition*, this Court addressed the constitutionality of 18 U.S.C. § 2256(8)(B) & (D), and found that those subsections prohibited a substantial amount of protected speech. This Court explicitly noted,

> Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so

> that the children appear to be engaged in sexual activity. 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*. Respondents do not challenge this provision, and we do not consider it.

Free Speech Coalition, 535 U.S. at 242.

Many lower courts have noted this gap in the law. *See, e.g.*, *United States v. Sims*, 428 F.3d 945, 956 n.4 (10th Cir. 2005); *United States v. Bach*, 400 F.3d 622, 631-32 (8th Cir. 2005); *United States v. Ellyson*, 326 F.3d 522, 529 n.2 (4th Cir. 2003); *State v. Coburn*, 176 P.3d 203, 222 (Ct. App. Kan. 2008); *State v. Tooley*, 872 N.E.2d 894, 903 (Ohio 2007). Indeed, the Court of Appeals of Virginia noted this Court's comments on § 2256(8)(C) in its opinion below, and relied on its *dicta* that morphed images "implicate the interests of real children and are in that sense closer to the images in *Ferber*." Pet. App. 13a.

Although relatively few courts have addressed the issues presented by morphing, those few have divided. Some, like the Court of Appeals of Virginia below, have taken this Court's reference to *Ferber* to mean that the child protection rationale in *Ferber* controls the inquiry. *See, e.g.*, *Coburn*, 176 P.3d at 222-23; *Tooley*, 872 N.E.2d at 903.

The Supreme Court of New Hampshire has

taken the opposite approach, focusing on this Court's explanation that "'*Ferber*'s judgment about child pornography was based on how it was made, not on what it communicated.'" *State v. Zidel*, 940 A.2d 255, 263 (N.H. 2008) (quoting *Free Speech Coalition*, 535 U.S. at 250-51). The New Hampshire court concluded that possession of morphed sexual images depicting children is protected speech, at least until the images are distributed. *Id.* at 263-64.

In *United States v. Bach*, 400 F.3d at 629-32, the Eighth Circuit directly addressed the constitutionality of § 2256(8)(C). The case did not present "the typical morphing case in which an innocent picture of a child has been altered to appear that the child is engaging in sexually explicit conduct, for the lasciviously posed body is that of a child." 400 F.3d at 632. Because both the face and body shown in the picture belonged to minors, that court concluded, "Although there may well be instances in which the application of § 2256(8)(C) violates the First Amendment, this is not such a case." *Id.*

This Court should grant the writ to fill the gap in the law left by *Free Speech Coalition*, and resolve the confusion of the lower courts with respect to morphed images of sexual activity.

B. **Morphed images of sexual activity that depict minors, but do not involve sexual activity by minors in their production, do not fall within *Ferber*'s categorical exclusion from First Amendment protection.**

This Court's cases excluding child pornography from First Amendment protection focus on the sexual abuse of the child in the production process. In what the Eighth Circuit has called "the typical morphing case," *Bach*, 400 F.3d at 632, no child has been sexually abused in the production of the images. These images "do not involve live performance or photographic or other visual reproduction of live performances," and accordingly "retain[] First Amendment protection." *New York v. Ferber*, 458 U.S. 747, 765 (1982).

The principles of the First Amendment prohibit the government from controlling what "we can see, read, speak or hear." *Free Speech Coalition,* 435 U.S. at 245-46. However, these freedoms are not limitless. Content neutral restrictions on time, place and manner are permitted. See *Perry Ed. Assn. v. Perry Local Educator's Assn.* 460 U.S. 37, 45 (1983). Similarly, content-based restrictions are legitimate if they are narrowly tailored to serve a compelling state interest. *See, e.g.*, *Cornelius v. NAACP LDEF,* 473 U.S. 788, 800 (1985).

Concurrently, certain types of speech do not retain any form of constitutional protection. These include defamation, *Dun v. Bradstreet, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), incitement to imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), obscenity, *Miller v. California*, 413 U.S. 15 (1973), and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

This Court held in *New York v. Ferber*, 458 U.S. 747, 764-66 (1982), that distribution of child pornography is one of the forms of speech categorically excluded from the First Amendment. This Court identified two major rationales for this categorical exclusion: (1) child pornography creates a permanent record of child sexual abuse; and (2) the distribution of child pornography in the marketplace provides an economic motive for additional child sexual abuse to produce more material. *Id.* at 759-63. "Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came." *Free Speech Coalition*, 535 U.S. at 250.

In *Osbourne v. Ohio*, 495 U.S. 103, 111 (1990), this Court extended the categorical ban on child pornography to mere possession. This Court stressed the harm to the child from a permanent record of his or her abuse, as well as the economic motive for production. *Id.* at 109-11.

Osbourne also noted the secondary impact of the ban on pedophiles who might use child pornography to seduce additional victims. *Id.* at 111. "The Court, however, anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography.' It did not suggest that, absent this concern, other governmental interests would suffice." *Free Speech Coalition*, 535 U.S. at 250 (quoting *Osbourne*, 495 U.S. at 110).

Under *Ferber* and *Osbourne*, all depictions of sexual activity involving children are not excluded

from First Amendment protection. The Court in *Ferber* explained that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Ferber*, 458 U.S. at 765. Even without considering the reasoning in *Free Speech Coalition*, morphed images depicting sexual activity by children which do not involve sexual activity by children in their production do not implicate the core concerns of *Ferber* and *Osbourne*.

In addressing the § 2256(8)(B) ban on wholly virtual pornography, *Free Speech Coalition* held that the alleged secondary effects of explicit material depicting children are not sufficient to exclude speech from First Amendment protection absent the sexual abuse of children. This Court rejected the rationale that such images encourage pedophiles. 535 U.S. at 253. And it explained that the interest in deterring the production of child pornography could not justify a ban on wholly virtual sexual images of children because "there is no underlying crime" in its production. *Id.* at 254.

The remaining rationale for placing morphed images depicting sexual activity by children that do not involve child sexual abuse in their production beyond First Amendment protection is that "they implicate the interests of real children." *Id.* at 242; *see also, e.g.*, *Coburn*, 176 P.3d at 222-23 ("The images, even if altered to simulate sexually explicit conduct, implicate the interests of children and could

harm their physiological, emotional, and mental health.")

While many states prohibit only the employment of children in sexually explicit material, Virginia and ten other states follow the federal example of prohibiting morphed images of minors depicting sexually explicit material, regardless of whether sexual activity by minors was involved in the production.[1]

Only this Court can determine whether the interest in protecting people from having their images used for private sexual ends is sufficiently compelling to justify banning an entire class of speech. Even if this interest is compelling, however, Virginia's statute sweeps so broadly that it does not serve this end.

C. The Virginia statute under which Mr. Allen was convicted is facially overbroad because it prohibits a substantial amount of protected speech.

At the time of Mr. Allen's acts, Va. Code §

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[1] *See* Hawaii Code 707-750(2)(b); Illinois Code 720 ICLS 5/11-20.1(f)(7); Michigan Code 145c(1)(a)(i), (1)(m), (2); Minn. Stat. 617.246(1)(f)(2)(ii); Missouri Code 573.023(2)(b)(c); New Hampshire Code 649-A:2(IV)(c) & 649-A:3-b; New Jersey Code 2C:24-4(4); New Mexico Code 30-6A-3(E); Rhode Island Code 11-9-1.3(a), (c)(1)(iii); Utah Code 76-5A-2(1), 76-5a-3(1)(a).

18.2-374.1 prohibited the production of drawing, sculpture, digital image, or other visual representation depicting nudity or sexual activity or excitement that "has as a subject a person less than eighteen years of age." Because the statute defines its prohibition by the image's subject rather than the presence of an identifiable minor, the statute prohibits all of the literature this Court identified in *Free Speech Coalition* and more.

The First Amendment "needs breathing space," and for that reason statutes attempting to restrict or burden its exercise must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A law imposing criminal penalties is, of course, a form of speech suppression, *Wooley v. Maynard*, 430 U.S. 705, 710-12 (1977), and a defendant can attack an overly broad statute even though the conduct of the person making the attack is "clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber*, 458 U.S. at 769. To be unconstitutional, the overbreadth of a statute must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

At the time of the events leading to Mr. Allen's conviction, Va. Code § 18.2-374.1(B)(2) prohibited the production of "sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age." Virginia Code §

18.2-374.1(A), in turn, defined "sexually explicit visual material" as "a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation" which depicts specified sexual conduct.

The statute prohibits all sexually explicit drawings, sculptures, pictures, films, and digital images that have a person under eighteen "as a subject." What this Court said of § 2256(8)(B) is even more true of § 18.2-374.1(B)(2): "This statute proscribes the visual depiction of an idea – that of teenagers engaging in sexual activity – that is a fact of modern society and has been a theme in art and literature throughout the ages." *Free Speech Coalition*, 535 U.S. at 246. This Court noted that there are hundreds of films "that explore those *subjects*," and deplored the possibility that one which included a graphic scene would be punished without inquiry into its redeeming value. *Id.* at 248 (emphasis added).

Virginia's statute is worse than § 2256(8)(B). Under Virginia's scheme, the subject of under-18 sexuality is not an incidental casualty of the ban on speech, but rather it is the subject of a minor engaged in sexual activity itself that constitutes the crime. Because it regulates the subject of the work rather than the age of the actors, Virginia's reaches even the young-looking actors which *Ferber* identified as an alternative and permissible means of expression. *See Free Speech Coalition*, 535 U.S. at 251; *Ferber*, 458 U.S. at 763.

Consider Vladimir Nabokov's 1955 novel *Lolita*, fourth on the Modern Library's list of the 100 Best Novels of the Twentieth Century. *Lolita* has been filmed twice, in 1962 by Stanley Kubrick and again in 1997 by Adrian Lyne. In *Lolita*, twelve-year-old Dolores Haze is seduced by a neurotic European improbably named Humbert Humbert, then leaves Humbert for playwright and pedophile Clare Quilty. *Lolita* "has as a subject a person less than eighteen years of age," regardless of the age of the actress playing Dolores. As a matter of fact, both actresses playing Dolores (Sue Lyon and Dominique Swain) were under eighteen at the time their respective versions of *Lolita* were filmed. If such a film showed, even for an instant, "the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple" or "covered . . . male genitals in a discernibly turgid state," Va. Code § 18.2-390, the cast and crew would have produced child pornography under Virginia's statute.

Even if the psychological harm to a child from their depiction in sexually explicit material justifies exclusion of morphed images from First Amendment protection, Virginia's statute is not tailored to serve that end. Title 18 U.S.C. § 2256(8)(C), like some state statutes, prohibits modifying an image "to appear that an identifiable minor is engaging in sexually explicit conduct." *See Bach*, 400 F.3d at 631 (discussing "identifiable minor" requirement). The version of § 18.2-374.1 under which Mr. Allen was

convicted has no such requirement;[2] the statute permits conviction whether or not a minor could identify him- or herself in a visual depiction.

Furthermore, the facts of this case demonstrate the tenuous link between the statute and the psychological harm some courts have suggested. At trial, the prosecution demonstrated that Mr. Allen had morphed images of sexual activity on his computer, but introduced no evidence that he ever distributed the images or showed them to any other person. In fact, the detective who investigated the case found no evidence that the images were distributed, printed, or emailed.

Like the indirect harms suggested by the government in *Free Speech Coalition*, 535 U.S. at 250, the psychological harm from a person viewing him- or herself in a morphed image is contingent on another act: distribution. *See Zidel*, 940 A.2d at 263. The images on Mr. Allen's computer could not harm the minors portrayed because neither the minors nor the general public ever saw them. Even if, therefore, this Court considers the interest in prevent psychological harm through exposure to morphed images to be weighty, this case demonstrates that the purported interest is not necessarily furthered by Virginia's statute.

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[2] Virginia's current version of Code § 18.2-374.1 does contain an "identifiable minor" requirement. *See* Va. Code § 18.2-374.1 (2009).

For these reasons, Mr. Allen respectfully requests that this Court grant his Petition for Writ of Certiorari to address this important question, left unaddressed in *Free Speech Coalition*.

Respectfully submitted,

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