

## PHOTOSHOPPING EVIL: WHY IOWA MUST UPDATE SECTION 728.12 AND EXPRESSLY OUTLAW “MORPHED” CHILD EXPLOITATION

### ABSTRACT

*The U.S. Supreme Court outlawed child pornography nearly 40 years ago. Once a bright line prohibition, the advancement of technology has seen that bright line become rather dim.*

*The Court first addressed this dimming bright line when it was confronted with completely virtual child pornography in Ashcroft v. Free Speech Coalition. Although morally condemning the product of completely virtual child pornography, the Court found the lack of child abuse powerful enough to decide it is protected free speech under the First Amendment. This created a spectrum of sorts, outlawing real child pornography but allowing completely virtual child pornography. Although the decision in Ashcroft helped clarify where completely virtual child pornography fell in regard to the First Amendment, it still left a gray area for child pornography that was not entirely virtual.*

*As computers got easier and easier to use, it led to a rather sinister side effect. Predators that wanted to create child pornography but did not have the computer skills to create it completely virtual, could now “photoshop” the faces of children on to the bodies of adults that were engaged in sexual acts. This “morphed child pornography” landed smack dab in the middle of the Court’s child pornography spectrum, and it has received various treatments in federal courts and state courts alike.*

*The Federal Circuits, along with the state courts who have addressed this issue, are split on whether morphed child pornography receives protections under the First Amendment. The courts that have not found First Amendment protections have cited various dangers to morphed child pornography, including privacy, reputational, and emotional harms. On the other hand, the courts that have found that morphed child pornography is protected by the First Amendment found that the lack of child abuse overwhelms the possible dangers to the children and that it is more similar to the completely virtual child pornography found in Ashcroft.*

*This Note advocates for the position that morphed child pornography should be completely outlawed. We will examine both sides of the circuit and state court split. And although Iowa state courts have not heard a case involving morphed child pornography, we will take a look at the Iowa Child Exploitation Statute, which this Note argues is not broad enough to encompass morphed child pornography. Finally, we will advocate and urge the Iowa legislature to amend Iowa Code section 728.12 to expressly outlaw morphed child pornography, which will protect the children of Iowa and keep them safe from the harms that morphed child pornography poses.*

Content Warning: This Note contains discussion about child exploitation that may be difficult for some readers. Although tough to read (and to write), specific instances of child exploitation are given. The Author feels this is necessary for the reader to fully understand the evils that accompany morphed child pornography.

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#### I. INTRODUCTION

Clifford Mecham took his computer to a technician for routine repairs after experiencing some malfunctions.<sup>1</sup> When the repairman was working on the computer, he noticed some suspicious files that he thought might have contained child pornography, so he notified the authorities.<sup>2</sup> When the police seized the laptop, they did not find actual child pornography, but “morphed” child pornography instead, the product of superimposing a child’s face on to a photo or video of adults engaging in sexual acts.<sup>3</sup> The police confiscated over 30,000 files of morphed child pornography in which Mecham had superimposed the faces of his granddaughters on to the bodies of adults engaged in sexual acts.<sup>4</sup> To make matters worse—if that is even possible—Mecham had also superimposed his face on to the male bodies.<sup>5</sup>

Luckily, the Fifth Circuit realized the dangers morphed child pornography brings despite not depicting actual child abuse and affirmed Mecham’s

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1. United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020).

2. *Id.*

3. *Id.* at 260–61.

4. *Id.* at 260.

5. *Id.*

conviction.<sup>6</sup>

As *United States v. Mechem* illustrates, morphed child pornography is on the rise within the United States and in some cases perfectly legal, despite being repulsive to virtually everyone who is informed that such a thing exists.<sup>7</sup> This rise in popularity has been aided by the fact that it falls within a legal gray area, where it is neither expressly protected nor prohibited.<sup>8</sup> This uncertainty has resulted in a federal circuit court split, as well as many state courts having different viewpoints on the legality of morphed child pornography.<sup>9</sup>

However, when a state legislature enacts a statute broad enough to expressly prohibit morphed child pornography, it will most likely be found valid by the reviewing court.<sup>10</sup> Thus, because Iowa's child exploitation statute is currently not broad enough to prohibit morphed child pornography, it is imperative that the legislature expand the statute to protect the children of Iowa.<sup>11</sup>

## II. JURISPRUDENCE OF CHILD PORNOGRAPHY IN THE UNITED STATES

Despite being outlawed by many individual states, child pornography was not addressed by the U.S. Supreme Court until 1982.<sup>12</sup> In *New York v. Ferber*, the defendant was convicted of violating New York's relatively new child pornography statute for selling sexually graphic videos of underage boys to an undercover cop.<sup>13</sup> The defendant argued the First Amendment's Freedom of Speech Clause protected his right to partake in the production and distribution of child pornography.<sup>14</sup> The Supreme Court held, under strict scrutiny, that child pornography does not receive First Amendment protections.<sup>15</sup> The Court

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6. *Id.* at 267.

7. *Id.* at 264; *see United States v. Anderson*, 759 F.3d 891, 894–95 (8th Cir. 2014) (finding that morphed child pornography can be protected by the First Amendment in certain circumstances).

8. Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 918–20 (2019).

9. Taylor Comerford, *No Child Was Harmed in the Making of This Video: Morphed Child Pornography and the First Amendment*, 62 B.C.L. REV. ELEC. SUPPLEMENT, at II.-323, II.-331–34 (2021); *see Anderson*, 759 F.3d at 895 (ruling in the minority of the split); *see also Mechem*, 950 F.3d 260 (ruling in the majority of the split).

10. *See, e.g., Parker v. State*, 81 So. 3d 451, 457 (Fla. Dist. Ct. App. 2011) (stating that the Florida legislature needs to amend its child pornography statute so the court can properly address the First Amendment question).

11. *See IOWA CODE* § 728.12 (2021).

12. *New York v. Ferber*, 458 U.S. 747, 747 (1982).

13. *Id.* at 751–52.

14. *Id.* at 752.

15. *Id.* at 774.

emphasized the interest that the State of New York had in protecting the health and wellbeing of its children, and that it outweighs the interests of child pornographers.<sup>16</sup>

Having already ruled that producing and distributing child pornography falls outside of First Amendment protections in *Ferber*, the Court then expanded its prohibition in *Osborne v. Ohio*, when it ruled that simple possession of child pornography also falls outside of First Amendment protections and is illegal.<sup>17</sup> In *Osborne*, the defendant was convicted of violating Ohio’s child pornography possession statute when the police discovered four pictures of nude adolescent boys in his home.<sup>18</sup> On appeal, the U.S. Supreme Court reasoned similarly to the Court in *Ferber*, once again basing its decision on the protection of children from the harm of sexual abuse.<sup>19</sup> The Court held that prohibiting the possession of child pornography would cut down on the demand of child pornography, leading to a decrease in the supply (production), and thus ultimately resulting in less children being subject to sexual abuse for the purpose of producing child pornography.<sup>20</sup>

The decision in *Osborne* fell in line with the child pornography prohibition the Court implemented in *Ferber*, in large part because both cases dealt with the same underlying evil of sexualizing children.<sup>21</sup> But what if it were possible for child pornography to exist without the underlying evil of child abuse? With the advancement of technology and computer software, the Court soon had to answer this question, and assess whether this new “virtual child pornography” would be expressly prohibited like real child pornography, or whether it would receive First Amendment protections due to its “virtual” nature.<sup>22</sup>

After establishing the initial bounds with real child pornography and the First Amendment, the Court then had to address virtual pornography, and how it fell within their First Amendment analysis.<sup>23</sup> With the development of technology and computers, those wanting to create child pornography were able to create it virtually, meaning the children seen engaging in sexual acts did not actually exist but were created by computer software.<sup>24</sup>

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16. *Id.* at 756–58.

17. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

18. *Id.* at 107.

19. *Id.* at 111.

20. *Id.*

21. *Id.* at 111 (“In *Ferber*, we affirmed a conviction under a New York statute that made it a crime to promote the ‘lewd exhibition of [a child’s] genitals.’” (citing *Ferber*, 458 U.S. at 751)).

22. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–40 (2002).

23. *See id.* at 245–46 (citations omitted).

24. *Id.* at 239.

Sensing this “loophole” in the child pornography laws, Congress quickly addressed the rise in virtual pornography by passing the Child Pornography Protection Act (CPPA), which expressly prohibited virtual child pornography.<sup>25</sup> The constitutionality of the CPPA was quickly challenged in the courts,<sup>26</sup> and the U.S. Supreme Court, in *Ashcroft v. Free Speech Coalition*, found that completely virtual child pornography is protected under the First Amendment, and thus the provision of the CPPA, which prohibited virtual child pornography, was unconstitutional.<sup>27</sup> The Court reasoned that because no real child is harmed in the making or circulation of virtual child pornography, it is protected by the First Amendment.<sup>28</sup> Even though the Court acknowledged other arguments as to why it should be prohibited, it found that the lack of inherent child abuse and the absence of real-world children tipped the scales in favor of First Amendment protections.<sup>29</sup>

Between *Ferber* and *Ashcroft*, the Court seemed to have come up with a bright line rule regarding child pornography—real child pornography is expressly prohibited and receives no First Amendment protections, while completely virtual child pornography, that contains no identifiable child, is allowed and protected under the First Amendment.<sup>30</sup> However, this bright line rule became increasingly irrelevant with the advent of morphed child pornography, which fell in the middle of *Ferber* and *Ashcroft*.<sup>31</sup>

Morphed child pornography is created when an individual takes a real pornographic photo or video of consenting adults and superimposes the face of real world children onto their bodies using a computer with photo editing software.<sup>32</sup>

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25. Child Pornography Protection Act of 1996 § 121, 18 U.S.C. § 2256(8)

[C]hild pornography’ means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where . . . such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. . . .

26. See *Ashcroft*, 535 U.S. at 239.

27. *Id.* at 258 (holding that the amended CPPA is overbroad and thus unconstitutional).

28. *Id.* at 237 (“[T]here is no underlying crime at all.”).

29. *Id.* at 250 (“While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”).

30. See *id.* at 255; *New York v. Ferber*, 458 U.S. 747, 765 (1982).

31. See *Ashcroft*, 535 U.S. at 242; *Ferber*, 458 U.S. at 747.

32. *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020). One study indicated about half of the images shared on pedophile websites are taken from social media sites. This rate is only expected to rise, as another study found that 98 percent of mothers and 89 percent of fathers upload photos of their child on to Facebook, often times with limited privacy

The result is a work of child pornography that falls in the middle of *Ferber* and *Ashcroft*.<sup>33</sup> Like *Ferber*, there are real world children implicated in its creation and circulation, and like *Ashcroft*, there is no inherent underlying child abuse like in virtual child pornography.<sup>34</sup> Thus, to this day the law is having trouble determining what protections are granted to morphed child pornography, if any.<sup>35</sup> This has resulted in a federal circuit split regarding the protections afforded to morphed child pornography, and whether it is closer to real child pornography or virtual child pornography.<sup>36</sup>

### III. THE CURRENT UNCERTAINTY OF MORPHED CHILD PORNOGRAPHY UNDER THE FIRST AMENDMENT

After the Supreme Court failed to give a bright line ruling on morphed child pornography in *Ashcroft*, Congress responded by enacting the PROTECT Act, which expressly criminalized morphed child pornography.<sup>37</sup> Unsurprisingly, the PROTECT Act was soon challenged in federal courts, and a circuit split resulted which remains to this day, as the Supreme Court has yet to decide on a morphed child pornography case.<sup>38</sup>

The Eighth Circuit concluded that morphed child pornography is not categorically prohibited under the First Amendment.<sup>39</sup> The court in *United States v. Anderson* reasoned that the key in deciding whether morphed child pornography

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measures. Sharon Kirkey, *Do You Know Where Your Child's Image Is? Pedophiles Sharing Photos from Parents' Social Media Accounts*, NAT'L POST (Apr. 18, 2017), <https://nationalpost.com/news/canada/photos-shared-on-pedophile-sites-taken-from-parents-social-media-accounts> [https://perma.cc/B6JD-YG3P] (citing Bahareh Ebadifar Keith & Stacey Steinberg, *Parental Sharing on the Internet: Child Privacy in the Age of Social Media and the Pediatrician's Role*, 171 JAMA PEDIATRICS 413, 413–14 (2017)).

33. See *Ashcroft*, 535 U.S. at 242; *Ferber*, 458 U.S. at 747.

34. See *Mecham*, 950 F.3d at 263.

35. *Id.* at 261–63.

36. *Id.* at 264–65.

37. PROTECT Act § 503, 18 U.S.C. § 2252A

[A]ny person who . . . knowingly . . . advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.

38. See *Mecham*, 950 F.3d at 264–65.

39. See *United States v. Anderson*, 759 F.3d 891, 895–96 (8th Cir. 2014).

falls under First Amendment protections was determining whether there was an underlying crime of sexual abuse against a minor.<sup>40</sup> The court held that if there was no underlying crime of sexual abuse against a minor, morphed child pornography was “protected” under the First Amendment and was still subject to a strict scrutiny analysis under the First Amendment.<sup>41</sup> The Eighth Circuit based their decision on the reasoning laid out by the Supreme Court in *Ashcroft*, and found that when there is no underlying child abuse, the government’s interest in categorically prohibiting morphed child pornography does not outweigh the First Amendment interests of the defendant.<sup>42</sup> Thus, because there is no inherent underlying child abuse involved with the creation of morphed child pornography, the Eighth Circuit decided that it fell closer to *Ashcroft*, and it was afforded First Amendment protections.<sup>43</sup>

The Fifth, Sixth, and Second Circuits reached a different conclusion; however, and held that morphed child pornography falls under the same categorical ban as real child pornography and does not receive First Amendment protections.<sup>44</sup>

As described earlier in the introduction of this Note, the Fifth Circuit held that morphed child pornography does not receive First Amendment protections in *United States v. Mecham*.<sup>45</sup> The court in *Mecham* cited the U.S. Supreme Court’s consistent emphasis in “preventing reputational and emotional harm to children” and held that because morphed child pornography depicts an identifiable child, it does not receive First Amendment protections.<sup>46</sup>

Likewise, the Sixth Circuit prioritized the “reputation and emotional well-being” of children in finding that morphed child pornography is categorically prohibited under the First Amendment in *Doe v. Boland*.<sup>47</sup> Despite not being a criminal case, the court still had to determine whether the defendant’s morphed child pornography was protected under the First Amendment in order to determine

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40. *Id.* at 894–95 (“Whereas the image in *Bach* recorded the sexual abuse of the nude minor who was posed in the original image, Anderson’s morphed image superimposed M.A.’s face onto an image of two adults. No minor was sexually abused in the production of Anderson’s image.” (citing *United States v. Bach*, 400 F.3d 622 (8th Cir.2005))).

41. *See id.* at 895.

42. *Id.* at 894–95.

43. *Id.* at 895.

44. *See United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020); *Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011).

45. *Mecham*, 950 F.3d at 260.

46. *Id.* at 267 (distinguishing *Mecham*’s situations from *United States v. Stevens*, a 2010 U.S. Supreme Court case that held images depicting cruelty to animals are not categorically excluded from First Amendment protections. *United States v. Stevens*, 559 U.S. 460 (2010)).

47. *Boland*, 698 F.3d at 880 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002)).

damages.<sup>48</sup> The court noted the “exceedingly modest, if not *de minimis*” First Amendment value of morphed child pornography and accordingly, found that the societal value is far outweighed by the various harms to the children.<sup>49</sup>

Lastly, the Second Circuit noted the dangers of potential circulation when it held that morphed child pornography does not receive First Amendment protections.<sup>50</sup> In *United States v. Hotaling*, the defendant had “carefully indexed and labeled many of the images with an internet URL and encoded the files in HTML, which is used almost exclusively for publication on the internet.”<sup>51</sup> This led the court to conclude that morphed child pornography “clearly fall[s] within the bounds of the underground, internet arena for child pornography that Congress intended to address” and thus, is not protected expressive speech under the First Amendment.<sup>52</sup>

These circuit courts followed similar paths in determining morphed child pornography falls outside of the First Amendment; reasoning that “By using identifiable images of real children . . . morphed child pornography implicates the reputational and emotional harm to children that has long been a justification for excluding real child pornography from the First Amendment.”<sup>53</sup> These courts noted that the underlying sexual abuse, which occurs to make real child pornography, is not the only harm that affects the child, although it is certainly a large harm.<sup>54</sup> These courts emphasize that there are many reasons why the Supreme Court upheld a ban on real child pornography,<sup>55</sup> and although the biggest reason—underlying child abuse—is absent in morphed child pornography, these circuit courts still found the remaining reasons to be significant enough to find it is not protected by the First Amendment.<sup>56</sup>

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48. *Id.* at 879–80.

49. *Id.* at 883 (quoting *New York v. Ferber*, 458 U.S. 747, 762–63 (1982)) (contemplating whether to afford morphed child pornography First Amendment protections, weighing the value of the speech to the harms the speech brings).

50. *United States v. Hotaling*, 634 F.3d 725, 728 (2d Cir. 2011).

51. *Id.* at 730 (citing *HTML*, MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS (6th ed. 2003) (defining “HTML” as “[t]he language used to specifically encode the content and format of a document and to link documents on the World Wide Web.”)).

52. *Id.* (“[T]he vast majority of child pornography exists on ‘computer hard drives, computer disks, and/or related media’ and is circulated primarily via the internet ‘from trafficker to trafficker.’”). Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §501, 120 Stat. 623, 624 (2006).

53. *United States v. Mechem*, 950 F.3d 257, 265 (5th Cir. 2020).

54. *See Boland*, 698 F.3d at 884; *Hotaling*, 634 F.3d at 728–29; *Mechem*, 950 F.3d at 264.

55. *See Boland*, 698 F.3d at 883; *Hotaling*, 634 F.3d at 728; *Mechem*, 950 F.3d at 260.

56. *See Boland*, 698 F.3d at 885; *Hotaling*, 634 F.3d at 726; *Mechem*, 950 F.3d at 260.



The main difference between the split circuits is whether the presence of underlying child abuse is determinative in deciding whether morphed child pornography receives First Amendment protections.<sup>57</sup> The Eighth Circuit thinks it is determinative while the Second, Fifth, and Sixth do not.<sup>58</sup> This split in ideology is not only seen at the federal level, but at the state level as well, where various states have evaluated whether their respective child pornography statutes address morphed child pornography.<sup>59</sup>

#### IV. MORPHED CHILD PORNOGRAPHY IN STATE COURTS

Just as the federal circuits are split, many states have also come to differing conclusions on how their respective child pornography statutes address morphed child pornography.<sup>60</sup> A Florida state court, in *Parker v. State*, found that morphed child pornography is neither "actual" or "simulated" sexual conduct of a child, and was therefore not prohibited by the state's laws.<sup>61</sup> The defendant, Parker, was a Sunday school teacher who had photographed many of his students in an innocent yearbook-like pose.<sup>62</sup> These innocent looking photos of the students took a dark turn, however, as Parker would remove the students' faces and paste them onto pictures of nude adult women.<sup>63</sup>

In determining whether these morphed pornographic pictures were prohibited, the Florida appellate court applied its relevant child pornography statute, which read: "It is unlawful for any person to knowingly possess . . . a photograph, motion picture, exhibition, show, representation . . . or other presentation which, in whole or in part, he or she knows to include child pornography."<sup>64</sup> When confronted by this morphed child pornography, the Florida Court of Appeals recognized the harm that can be caused by morphed child pornography such as the pasted pictures made by Parker, but they insisted it was up to the legislature to craft a broad enough statute to encompass it.<sup>65</sup> The court in

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57. See *Boland*, 698 F.3d at 883; *Hotaling*, 634 F.3d at 729; *Mecham*, 950 F.3d at 267; *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

58. See *Boland*, 698 F.3d at 883; *Hotaling*, 634 F.3d at 729; *Mecham*, 950 F.3d at 267; *Anderson*, 759 F.3d at 895.

59. Steinberg, *supra* note 8, at 924–28.

60. See *Parker v. State*, 81 So. 3d 451, 460 (Fla. Dist. Ct. App. 2011); *McFadden v. State*, 67 So. 3d 169, 182–83 (Ala. Crim. App. 2010); *People v. Gerber*, 126 Cal. Rptr. 3d 688, 690 (Cal. Ct. App. 2011).

61. See *Parker*, 81 So. 3d at 460.

62. *Id.* at 452.

63. *Id.* Note that these morphed child pornography pictures were made physically and not virtually on the computer.

64. FLA. STAT. ANN. § 827.071(5)(a) (West 2022).

65. *Parker*, 81 So. 3d at 453 ("The legislature's words constrain us.").

*Parker* did not analyze the First Amendment protections potentially afforded to morphed child pornography.<sup>66</sup> However, the language of the court in *Parker v. State* suggests that if the Florida legislature were to enact a statute that expressly prohibits morphed child pornography, the court would find the law valid, meaning morphed child pornography would not receive First Amendment protections.<sup>67</sup>

Likewise, the California state courts have determined their applicable child exploitation statute does not apply to morphed child pornography.<sup>68</sup> In *People v. Gerber*, a father was arrested after he forced his 13 year-old daughter to pose for pictures in her underwear in exchange for cocaine.<sup>69</sup> After he was arrested and charged with violating California’s applicable child pornography statute, the authorities seized two thumb drives which contained pornographic pictures of adult females with his daughter’s face photoshopped in.<sup>70</sup> The defendant told police he had used Microsoft Paint to create pictures of morphed child pornography containing his daughter’s face—and the police found 28 such pictures.<sup>71</sup>

The California appellate court had to examine the relevant child pornography statute, which read “Every person who knowingly possesses or controls any matter, representation of information, data, or image . . . knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct . . . is guilty of a felony.”<sup>72</sup>

Unwilling to judicially expand the child pornography statute, the court found that the word “personally” mandated that the child pornography statute could not apply to morphed child pornography.<sup>73</sup> The court used the common meaning of the word “personally,” as well as the legislative intent to determine that the law only applied to child pornography where the persons who are engaged in the sexual acts are under 18.<sup>74</sup> Thus, because the people depicted engaging in the sexual acts in the defendant’s edited photos were older than 18, he was not found in violation of the child pornography statute.<sup>75</sup>

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66. See *id.* at 457 (“such [First Amendment] analysis is unnecessary for our decision”).

67. See *id.* at 457 (“[I]f our legislature wants to follow Congress’s example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute.”).

68. *People v. Gerber*, 126 Cal. Rptr. 3d 688, 690 (Cal. Ct. App. 2011).

69. *Id.* at 692–93.

70. *Id.* at 693.

71. *Id.* at 694.

72. *Id.* at 694; CAL. PENAL CODE § 311.11(a) (West 2022).

73. *Gerber*, 126 Cal. Rptr. 3d 688, 694–99.

74. *Id.* at 698 (quoting *In re Alva*, 92 P.3d 311, 313 (Cal. 2004)).

75. *Id.* at 701. (“[A] reasonable trier of fact could not find that the images confiscated from

As with the facts in *Parker*, the California case of *Gerber* highlighted the many dangers that are present with morphed child pornography but both courts refused to judicially expand the existing child pornography statute to include it.<sup>76</sup> However, these courts indicated that if their legislatures had drafted broader child pornography statutes, they would have had no issue prohibiting morphed child pornography.<sup>77</sup>

Unlike California and Florida, Alabama state courts have held that morphed child pornography falls under their respective child pornography statute.<sup>78</sup> In *McFadden v. State*, a probation officer was conducting a routine visit with the defendant when he noticed children's underwear stuffed within a cupboard.<sup>79</sup> After receiving permission to search the residence further, he discovered a picture collage which contained a mix of young children and adult genitalia.<sup>80</sup> The defendant was subsequently charged with violating two of Alabama's child pornography statutes,<sup>81</sup> which read:

Any person who knowingly possesses any obscene matter *containing* a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, *genital nudity*, or other sexual conduct shall be guilty of a Class C felony.<sup>82</sup>

And:

Any person who knowingly films, prints, records, photographs or otherwise produces any obscene matter that *contains* a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, *genital nudity*, or other sexual conduct shall be guilty of a Class A felony.<sup>83</sup>

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defendant depicted [the victim] "personally" engaged in or simulating sexual conduct and, consequently, could not find defendant guilty beyond a reasonable doubt of violating section 311.11.").

76. See *Parker v. State*, 81 So. 3d 451 (Fla. Dist. Ct. App. 2011); *Gerber*, 126 Cal. Rptr. 3d at 698–701.

77. See *Parker*, 81 So. 3d at 457; *Gerber*, 126 Cal. Rptr. 3d at 697.

78. *McFadden v. State*, 67 So. 3d 169, 182–83 (Ala. Crim. App. 2010). Concerns regarding morphed child pornography include reputational harm, privacy issues, and support for the child pornography "industry" as a whole. *Id.*

79. *Id.* at 174.

80. *Id.*

81. *Id.* at 175.

82. ALA. CODE § 13A-12-192(b) (2005) (emphasis added).

83. *Id.*

The *McFadden* court recognized that they were bound by the legislature’s words, but nevertheless, held that the harm the legislature sought to keep at bay is basically identical to the harm of morphed child pornography.<sup>84</sup> Thus, the court concluded that the two statutes were drafted broadly enough to address morphed child pornography, and found that it does not receive First Amendment protections.<sup>85</sup> Similar to the Florida court in *Parker* and the California court in *Gerber*, the *McFadden* court found that underlying child abuse was not determinative in deciding whether morphed child pornography should receive free speech protections.<sup>86</sup> However, the Alabama legislature had drafted its child pornography statutes broad enough to allow its application to morphed child pornography, unlike in *Parker* and *Gerber*.<sup>87</sup>

When examining these cases together, it becomes apparent that the only real difference is whether or not the respective state legislatures drafted broad enough child pornography statutes to address morphed child pornography.<sup>88</sup> However, in all three cases, the courts would find valid a statute that expressly prohibits morphed child pornography.<sup>89</sup> Thus, it appears the safest way to ensure that morphed child pornography is prohibited within a state is to have the legislature enact a broad enough statute that expressly prohibits it.<sup>90</sup> That way it is not left up to the courts to judicially expand the statutes, an action which most courts do not support.<sup>91</sup>

#### V. MORPHED CHILD PORNOGRAPHY FALLS OUTSIDE OF IOWA’S CHILD PORNOGRAPHY STATUTE

Iowa’s child exploitation statute reads: “It shall be unlawful to knowingly purchase or possess a visual depiction of a minor engaging in a prohibited sexual

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84. *McFadden*, 67 So. 3d at 179, 184–85 (noting the reputational and emotional harm to children).

85. *Id.* at 184.

86. *See id.*; *Parker v. State*, 81 So. 3d 451, 455–56 (Fla. Dist. Ct. App. 2011); *People v. Gerber*, 126 Cal. Rptr. 3d 688, 690, 699–02 (Cal. Ct. App. 2011) (discussing *New York v. Ferber*, 458 U.S. 747 (1982)).

87. *See McFadden*, 67 So. 3d at 184; *Parker*, 81 So. 3d at 457; *Gerber*, 126 Cal. Rptr. 3d at 696–97.

88. *See McFadden*, 67 So. 3d at 184; *Parker*, 81 So. 3d at 457; *Gerber*, 126 Cal. Rptr. 3d at 696–97.

89. *See McFadden*, 67 So. 3d at 184; *Parker*, 81 So. 3d at 457; *Gerber*, 126 Cal. Rptr. 3d 688 at 701.

90. *See McFadden*, 67 So. 3d at 184; *Parker*, 81 So. 3d at 457; *Gerber*, 126 Cal. Rptr. 3d at 701.

91. *See Parker*, 81 So. 3d at 457; *McFadden*, 67 So. 3d at 184.

act or the simulation of a prohibited sexual act.”<sup>92</sup> At first glance, it may appear that Iowa’s statute encompasses morphed child pornography when it says a “visual depiction” or when it says “a simulation” of a prohibited sex act.<sup>93</sup> But, upon further examination of the legislative intent and the definitions of the component parts, it becomes apparent that morphed child pornography does not fall within the statute.<sup>94</sup>

The first component of Iowa’s child exploitation statute that may appear to encompass morphed child pornography is “visual depiction”.<sup>95</sup> One’s first thought will probably be that morphed child pornography is technically a visual depiction of a minor engaging in a prohibited sexual act.<sup>96</sup> However, one look at the definition section of section 728 reveals that visual depiction is a term to describe the medium on which the substantive material is found, not the substantive material itself.<sup>97</sup> Section 728.1 states: “‘visual depiction’ means but is not limited to any picture, slide, photograph, digital or electronic image, negative image, undeveloped film, motion picture, videotape, digital or electronic recording, live transmission, or other pictorial or three-dimensional representation.”<sup>98</sup>

Thus, it becomes evident that visual depiction is not referring to the substantive material of a minor engaging in a prohibited sexual act, but rather describing the medium on which such prohibited material is stored and distributed.<sup>99</sup>

The second component of the statute which hints at including morphed child pornography is the portion of section 728.12 defining “the simulation of the prohibited sexual act” as illegal.<sup>100</sup> Because simulation is not included in the definition section of section 728, the task to determine whether the term simulation encompasses morphed child pornography is more challenging. An examination of the legislative history of section 728.12 does not reveal any information on the

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92. IOWA CODE § 728.12(3) (2021).

93. *See id.*; *Parker*, 81 So. 3d at 458 (Morris, J., dissenting) (citing FLA. STAT. § 827.071(1)(i) (2022)) (describing how Florida’s child pornography statute defines “simulated” broadly enough that morphed child pornography should qualify as child pornography).

94. *See State v. Robinson*, 618 N.W.2d 306, 315–18 (Iowa 2000).

95. IOWA CODE § 728.12(3) (2021).

96. *See id.*; *see also* *United States v. Hotaling*, 634 F.3d 725, 728 (2d Cir. 2011) (upholding a conviction under the federal child pornography law that utilizes the “visual depiction” language).

97. IOWA CODE § 728.1(11) (2021).

98. *Id.*

99. *See id.*

100. § 728.12(3).

word simulation, thus even further examination is required.<sup>101</sup>

After the legislative intent of section 728.12 is revealed, it becomes apparent that simulation and the entirety of section 728.12 does not include morphed child pornography.<sup>102</sup> In *State v. Robinson*, the Iowa Supreme Court maintained that the legislature regulates child pornography because its “mere creation is harmful to children in that it exploits children in undesirable and perverse ways.”<sup>103</sup> This judicial deciphering of the legislative intent indicates that morphed child pornography would not be included under Iowa’s child pornography statute, as the mere creation of morphed child pornography is not necessarily harmful to children, instead it is the circulation and distribution of morphed child pornography which brings harm to children.<sup>104</sup>

Because this would most likely be an Iowa court’s current understanding of the legislature’s purpose in enacting section 728.12, morphed child pornography would most likely not fall within the statute’s purview.<sup>105</sup> If a case were to make its way to the Iowa Supreme Court, the court would be stuck with the decision of adhering to the legislature’s words in the statute or judicially expanding the statute.<sup>106</sup> Instead, the Iowa legislature can expand the statute by adding a couple sentences and leave no question as to whether morphed child pornography is prohibited within the state of Iowa.<sup>107</sup>

#### VI. WHY THE IOWA LEGISLATURE MUST AMEND SECTION 728.12 TO EXPRESSLY BAN MORPHED CHILD PORNOGRAPHY

The federal circuit courts and various state courts that found morphed child pornography does not receive First Amendment protections have illustrated numerous justifications for their decisions.<sup>108</sup>

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101. A review of legislative materials by the Author found nothing that gives insight into how the Iowa Legislature intended simulation to be interpreted.

102. *State v. Robinson*, 618 N.W.2d 306, 316–17 (Iowa 2000).

103. *Id.* at 316.

104. *See id.*

105. *See id.*; § 728.12(3).

106. *See Parker v. State*, 81 So. 3d 451, 455–57 (Fla. Dist. Ct. App. 2011) (“[The child pornography statute] requires that actual children engage in in sexual conduct.”).

107. *See Robinson*, 618 N.W.2d at 316.

108. *See Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012) (finding that the creation of morphed child pornography harms the child whose image is used); *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011) (stating that because there is in identifiable minor, morphed pornography is not protected by the first amendment); *United States v. Mecham*, 950 F.3d 257, 267 (5th Cir. 2020) (stating the importance of the child’s psychological wellbeing); *McFadden v. State*, 67 So. 3d 169, 183 (Ala. Crim. App. 2010) (finding that displays of nudity collaged

The Fifth Circuit reasoned that images of morphed child pornography harm the psychological well-being of children when the pornography is circulated and is therefore against the interests of real children.<sup>109</sup> It reasoned that psychological harm caused to children by morphed pornography is sufficient to find that it is not protected by the First Amendment, and that the underlying abuse is not needed to find that it is prohibited.<sup>110</sup>

Likewise, the Second Circuit noted that children exploited by morphed child pornography will be subject to reputational harm.<sup>111</sup> The court reasoned that the circulation, distribution, and eventual discovery of morphed child pornography will affect the reputation of the child that was exploited by the image.<sup>112</sup> It argued that being involved in something such as morphed child pornography will stick with a child their entire life and cause harm in perpetuity.<sup>113</sup>

Finally, the Sixth Circuit in *Doe v. Boland* expressed privacy concerns regarding morphed child pornography.<sup>114</sup> The court reasoned that if morphed child pornography were to be allowed, it would inevitably lead to a need for pedophiles to obtain innocent pictures of unsuspecting children, and that in several instances they would be obtained by violating the privacy rights of the child.<sup>115</sup> The Sixth Circuit reasoned that morphed child pornography will require some type of real photo to be used in its creation, and often times this real photo will be of someone whose pictures they do not have legal access to, thus they will invade the privacy of the child to obtain innocent photos to use in the creation of their morphed child pornography.<sup>116</sup>

## VII. RECOMMENDED LEGISLATIVE CHANGE

Now that it has been established that Iowa's child pornography statute does not encompass morphed child pornography, and the harms of morphed child

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with images of minors qualifies as child pornography).

109. *Mecham*, 950 F.3d at 267 (concluding that because morphed child pornography contains an identifiable child, it automatically raises a significant threat to the child's psychological and emotional well-being).

110. *Id.*

111. *Hotaling*, 634 F.3d at 730 (“[H]ere we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.”).

112. *Id.*

113. *See id.* at 730.

114. *Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012) (“In today’s digital world, any image is ‘primed for entry into the distribution chain’ of underground child pornographers.”).

115. *Id.*

116. *See id.* at 883.

pornography have been outlined,<sup>117</sup> the need for legislative change becomes apparent.

Iowa’s child exploitation statute can be altered to encompass morphed child pornography with the addition of a single sentence: “[R]eflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains.”<sup>118</sup> This language is taken from the PROTECT Act, which was a piece of legislation in which the U.S. Congress attempted to ban morphed child pornography.<sup>119</sup>

Incorporating this language into Iowa Code § 728.12, the statute would then read,

It shall be unlawful to knowingly purchase or possess a visual depiction of a minor engaging in a prohibited sexual act or the simulation of a prohibited sexual act, or a visual depiction which *reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains a minor engaging in a prohibited sexual act.*<sup>120</sup>

This modified section of section 728.12 would leave no doubt that morphed child pornography is prohibited within Iowa. This would best reflect Iowa’s values and interests in protecting children and criminalizing behavior which supports the child pornography industry.<sup>121</sup>

#### VIII. CONCLUSION

It is imperative that the Iowa legislature erase all doubt as to whether morphed child pornography is prohibited or not and expand the statute to reflect that. Even though there is no underlying physical child abuse involved with morphed child pornography, there are still many harms that pose a threat to children who are involved when the morphed pornography is circulated.<sup>122</sup> These harms include reputational damage, privacy concerns, and psychological damage.<sup>123</sup> To protect the children of Iowa from these evils, the legislature must

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117. *See supra* Part V.

118. 18 U.S.C. § 2252A (2012).

119. *Id.*; *McFadden v. State*, 67 So. 3d 169, 182 (Ala. Crim. App. 2010).

120. *See* 18 U.S.C. § 2252A (2012).

121. *Miller v. State*, No. 16-0859, 2017 WL 2461535, at \*2 (Iowa Ct. App. June 17, 2017) (“Additionally, our legislature has specifically implemented [statutes] to protect children from being taken advantage of by significantly older abusers, taking into account the difference of age between the parties, as well as the age of the victim.”).

122. *See Doe v. Boland*, 698 F.3d 877, 879 (6th Cir. 2012).

123. *Id.* at 884; *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2011).



alter the child exploitation statute and expressly prohibit morphed child pornography.

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