

No.

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**In The  
Supreme Court of the United States**

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EDDIE SCOTT SEATON  
*Petitioner,*

v.

UNITED STATES OF AMERICA  
*Respondent.*

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On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals  
For The Eighth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Petitioner was convicted 18 U.S.C. § 1466A(a)(1) of a child pornography offense for a hand drawn cartoon image on his computer involving no real or real looking person. This statute prohibits “knowingly ... possess[ing] with intent to distribute, a visual depiction of any kind, including a drawing, [or] cartoon ... that depicts a minor engaging in sexually explicit conduct and is obscene.”

The first question presented is whether § 1466A(a)(1) violates the First Amendment as applied to mere hand drawn pure cartoon images that depicted no real, real looking children, computer generated images, AI, or deepfakes under *Ashcroft v. Free Speech Coalition*, *New York v. Ferber*, nor *Miller v. California*.

2. A forensic search of Petitioner’s computer showed approximately 300 images of child sexual abuse material in the “carved space” of Petitioner’s computer hard drive. The proof showed, however, it could not be accessed by him without a utilities program, which he did not have. There was no proof at trial how it got there, who downloaded it, or whether he even accessed it at all.

The second question presented is whether this is a complete failure of proof by the government making Petitioner’s conviction for possession of child pornography in violation of due process clause of the Fifth Amendment.

## **PARTIES TO THE PROCEEDING**

The only parties to the proceeding are those listed in the caption. This is a criminal prosecution by the United States.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Eddie Scott Seaton respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

### STATEMENT OF RELATED CASES

Under Rule 14.1(b)(iii), the following are directly related proceedings:

- *United States v. Seaton*, 4:20-cr-114-DPM (E.D. Ark.)
- *United States v. Seaton*, No. 24-3157, 2025 WL 2992317, 2025 U.S. App.

LEXIS 27851 (8th Cir. Oct. 24, 2025), rehearing denied Dec. 16, 2025.

### OPINIONS BELOW

The Eighth Circuit's October 24, 2025 opinion is unpublished, and it appears at *United States v. Seaton*, 2025 WL 2992317, 2025 U.S. App. LEXIS 27851 (8th Cir. 2025). (App. 002a-004a)

Rehearing and rehearing en banc were denied. *United States v. Seaton*, 2025 U.S. App. LEXIS 32932 (8th Cir. Dec. 16, 2025). (App. 005a)

The District Court for the Eastern District of Arkansas did not issue a written order denying Petitioner's motion for judgment of acquittal at the close of the government's proof (1) on the basis that 18 U.S.C. § 1466A(a)(1) violated the First Amendment as applied in Petitioner's case, and (2) that the proof did not support knowing possession of child pornography.

### JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit's

opinion issued October 24, 2025. (App. 002a) His petition for rehearing was denied on December 16, 2025. (App. 005a)

Jurisdiction was proper for the district court in the Eastern District of Arkansas under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the U.S. Constitution:

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 Fifth Amendment to the U.S. Constitution:

No person shall ... be deprived of ... liberty ... without due process of law ....

18 U.S.C. § 1466A:

(a) In general. Any person who, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)

(A) depicts a minor engaging in sexually explicit conduct;

and

(B) is obscene; or

(2)

(A) depicts an image that is, or appears to be, of a minor engaging in ... sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

## STATEMENT

This case involves a conviction for possession of (1) hand drawn cartoons depicting a male child having sex with an older woman as an incest fantasy, and (2) child sexual abuse material in the unallocated space on Petitioner's used computer hard drive that he could not even access. No real or real looking child was ever involved. In addition, this is not even seemingly a realistic computer generated image, AI, or deepfake. It is obviously a cartoon. No one could be mistaken that a real person was not involved in making the images.

Petitioner submits, first, that a such a rough cartoon cannot be obscene under the First Amendment because no child was ever involved. The drawing was only from the imagination of the person who drew it. Second, child sexual abuse material found in the "carved space" of his computer was not shown to be ever even be accessible to or by him. That is a failure of proof making his conviction violate the due process clause of the Fifth Amendment.

### **A. Legal Background for Obscenity Cases**

#### **1. *Miller v. California***

In *Miller v. California*, 413 U.S. 15 (1973), the Court finally formulated standards for determining obscenity with its three prong test for the fact-finder to use in identifying obscenity:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

*Id.* at 24. In applying the first two parts of *Miller*, the trier of fact is required to utilize contemporary community standards to determine whether the allegedly pornographic material appeals to the prurient interest and whether it depicts sexual activity in a patently offensive manner. In applying the third part of *Miller* to determine whether the materials possess serious value, however, the trier of fact is not supposed to rely upon contemporary community standards when evaluating value. *Smith v. United States*, 431 U.S. 291, 300–01 (1977).

Yet, courts still struggled with case-by-case determinations of what constitutes obscenity. Sometimes material is not obscene as a matter of law, no matter what the jury said, as in *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974).

## **2. *Ferber* and Child Sexual Abuse Material (CSAM)**

In 1989, the Court carved out a separate category for child pornography<sup>1</sup> involving real children from obscene material in *New York v. Ferber*, 458 U.S. 747 (1982). There, the Court upheld a ban on child pornography that used real children in live performance or photographic or other visual reproduction of live performances without violating the First Amendment. *Id.* at 765. The Court held that the government interest of protecting children from abuse and that child pornography using real children was intrinsically related to the sexual abuse of children. *Id.* at 757–59. The Court found that the standards for obscenity under *Miller* were irrelevant in the unique context of child pornography because the interests in protecting abused children would far outweigh any claim about a work’s social value. *Id.* at 761. Thus,

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<sup>1</sup> Now commonly called CSAM: child sexual abuse material.

child pornography involving real children was its own category, separate and apart from obscene materials. *Id.* at 764–65.

### **3. Comes the Internet and the Child Pornography Prevention Act of 1996 then the PROTECT Act**

The Internet, however, created new challenges for laws attempting to prohibit child pornography. After *Miller* and *Ferber* it seemed unclear whether the government could regulate the production, distribution, or possession of “virtual” child pornography under these cases. (For the last few years, AI completely changed the landscape. More about that later.)

Thus, Congress enacted The Child Pornography Prevention Act of 1996 (CPPA) and expanded the definition of child pornography to include “virtual” child pornography which were artificial images, whether computer generated or hand drawn, that were created without using real children.

Portions of this law were held an unconstitutional restriction of free speech in violation of the First Amendment in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). CPPA not only prohibited images made with actual children, it prohibited “any visual depiction” that “is, or appears to be” of a minor engaging in sexually explicit conduct. *Id.* at 241. Additionally, the law prohibited any “sexually explicit image” that “convey[ed] the impression” that it depicted a minor. *Id.* at 242. Thus, the act banned images that were created without using real children and encompassed constitutionally protected works. *Id.* The Court recognized that “as a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed.” *Id.* at 240. The CPPA was found to be problematic

because it prohibited any visual depiction of minors engaging in sexually explicit conduct without consideration of how the image was produced or the types of works that would fall into the category of “visual depiction.” *Id.* at 241. The Court found that the sections of the law that prohibited images that “appeared to be” minors or images that “conveyed the impression” that a minor was depicted were unconstitutional because they banned a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*. *Id.* at 258. The images in these categories did not involve, let alone harm, any children in the production process and thus the harms inherent in child pornography did not apply. *Id.* at 242. The Court explicitly stated “[v]irtual child pornography is not ‘intrinsically related’ to the sexual abuse of children.” *Id.* at 236, 250.

So, in direct response to *Ashcroft*, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003. The Senate Report, S. Rep. No. 108-2, at 6 (2003), on the PROTECT Act explicitly stated as such:

This bill is a response to the problems faced by prosecutors in the wake of *Free Speech Coalition*; it is not designed to challenge that decision in any way. To the contrary, S. 151 has been carefully written to work within the limitations established by that decision. S. 151 accomplishes this goal by permitting the government to establish its case-in-chief when the children portrayed in sexually explicit depictions *appear virtually indistinguishable from actual minors*. If the government meets this burden, S. 151 nonetheless provides an absolute defense if the defendant can show that the child pornography that forms the basis of his prosecution was not produced using any actual minors. (emphasis added)

The Senate Report claimed that the issue of virtual child pornography had

become a problem in the aftermath of *Ashcroft* and the government's ability to prosecute child pornography cases had been extremely hampered due to defendants claiming any image was only virtual. Thus, the government then had the impossible task of proving that the child depicted in a pornographic image was in fact a real person. *Id.* at 1–3. However, the Report specifically claimed it was trying to address the issues of images depicting real children that had been altered to make the children unidentifiable or appear computer generated. *Id.* at 5. “An ordinary person looking at these pictures would be hard-pressed to distinguish between the real and virtual depictions.” *Id.*

The Senate Report acknowledged that, at the time, technology was cost-prohibitive to produce entirely virtual child pornography, therefore it was assuming the fact that most pornography would still be created using real children:

But the state of the record today indicates that a totally virtual creation would be both time-consuming and, for now, prohibitively costly to produce. Accordingly, it remains true that the overwhelming majority of child pornography depicts actual children. The Committee finds that child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is – and for the foreseeable future will remain – prohibitively expensive. As a result, for the foreseeable future, it will be more cost effective to produce child pornography using real children.

*Id.* at 6.

Now it is not. It is relatively cheap and easily available to almost anyone online. AI is rampant, but that is not this case at all.

#### 4. 18 U.S.C. § 1466A

The workaround to *Ashcroft* was to revive the use of obscenity laws under *Miller*. Thus, 18 U.S.C. § 1466A was created. Obscenity laws did not require a showing of actual harm to minors compared to the *Ferber* line of child pornography cases. Yet, the same goal could be achieved because the vast majority of all child pornography would be found to be obscene by most judges and juries even under the amorphous standard of *Miller*.<sup>2</sup>

By framing the issue in terms of obscenity law, the PROTECT Act permits prosecution without a showing of any real harm to actual minors and attached the same liability as if the individual had possessed actual child pornography. *See, e.g., United States v. Arthur*, 51 F.4th 560, 566–69 (5th Cir. 2022), followed below, *United States v. Seaton*, 2025 WL 2992317, at \*1 n.2 (8th Cir. Oct. 24, 2025) (App. 003a).<sup>3</sup>

### B. Factual Background

#### 1. The Offense

This is a case of having anime cartoon obscene material depicting child sexual abuse brought under 18 U.S.C. § 1466A(a)(1) in one count. They were found on his computer with short stories about them on his desk, too; something written about for years. The other count involves the CSAM images in the “carved space” that Petitioner was never shown to have seen, downloaded, or moved around.

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<sup>2</sup> *See* Letter from Daniel Armagh, Natl. Ctr. For Missing & Exploited Children, to Senator Patrick J. Leahy (Oct. 17, 2002), 149 Cong. Rec. S2582-83 (daily ed. Feb. 24, 2003).

<sup>3</sup> “We reject Seaton’s argument that § 1466A(a)(1) requires that the minor depicted actually exist. § 1466A(c) (‘It is not a required element of any offense under this section that the minor depicted actually exist.’); *see United States v. Arthur*, 51 F.4th 560, 568–69 (5th Cir. 2022).” (App. 003a)

On December 11–12, 2019, the Cyber Crime Unit of the North Dakota Bureau of Investigations was conducting an online investigation into file sharing of suspected child pornography. They connected to an IP address in Central Arkansas and downloaded multiple files that contained child pornography. They contacted the Det. Kalmer of the Little Rock Police Department to refer the case for further investigation. Kalmer worked as a Task Force Officer with the FBI investigating human trafficking and child pornography. The IP address was found to belong to the residence of Eddie Scott Seaton in Cabot, Arkansas. After Det. Kalmer reviewed the files downloaded in North Dakota, a search warrant was obtained for Petitioner's residence. It was also then learned that Petitioner was a patrol officer with the Little Rock Police Department.

The search warrant was executed on December 30, 2019. Petitioner was home at the time; having just dressed in his uniform for work. Another man, his friend Kevin Hicks, was living in his truck in his driveway, with permission. Numerous electronic devices were seized from Hicks' truck, Petitioner's vehicle, and inside the residence. The devices were sent to the FBI for review. Hicks' devices showed he had connected to the Internet via Petitioner's wireless signal, and he was separately charged with his crimes involving the sexual exploitation of children.<sup>4</sup>

In Petitioner's home office, in addition to electronic devices, officers found several handwritten stories and software for creating anime on the desk near the desktop computer. The handwritten stories contained sexual fantasies involving

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<sup>4</sup> He later pled guilty and testified against Petitioner to helping look for CSAM material.

young teenage boys engaging in various sexual conduct with older women. During a cursory search of the desktop computer, officers found an anime image depicting what appeared to them to be cartoon child pornography.

Petitioner was taken to the Arkansas State Police Headquarters in Little Rock to be interviewed by Sgt. Moomey of their Criminal Investigation Division.<sup>5</sup> During the interview, Petitioner stated that he received child pornography unsolicited through email on two occasions about 10 years prior, which he forwarded to the FBI. Petitioner, however, did admit that he searched for all kinds of pornography, but if he came across anything that appeared to be children he would “click out of it.” He denied ever searching for real child pornography.

In response to how real child pornography could have been downloaded using his IP address, Petitioner that he had been allowing his old friend, Kevin Hicks, to stay in the driveway in Hicks’s own truck, Hicks was allowed to use Petitioner’s wireless internet connection. Sgt. Moomey also asked about the handwritten stories found near the computer and admitted to writing the stories many years ago. Petitioner admitted to the officers he liked fantasies involving teenage or younger boys with older women and was interested in anime cartoon pornography. He said he searched for cartoon pornography images on websites 8MUSES and RULE34 that involved juvenile males and older females, as well as a variety of other types of pornography. Petitioner admitted that some cartoon images may be found on his computer, but nothing involving real children.

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<sup>5</sup> Likely because Petitioner was an LRPD officer.

A later forensic review of Petitioner’s desktop computer seized from inside the residence revealed over 61,000 erotic images (age not mentioned) and approximately 300 images of CSAM. The CSAM images, however, were found in the “carved space”<sup>6</sup> of the computer where they were no longer accessible without specific software that was not on his computer or in his house. It could also not be forensically determined when the images in the carved space were created or downloaded and whether Petitioner could have done it.

There were only three images of anime cartoon pornography found in the active space of the computer that had been downloaded on December 18, 2019. The three images contained what appeared to be minor males engaging in sexual conduct with an adult female, as well as containing what appeared to be an alien or “smurf”-like being. Lastly, there were several thousand web searches over several months for the websites 8MUSES and RULE34 on the computer’s web search history in the active space. The desktop user account was associated with Petitioner’s email address and, of course, contained various documents associated with Petitioner’s name. There was nothing found on the desktop computer associated with Kevin Hicks. Finally, the computer was not a “brand name” computer, and it had been built by another person for Petitioner.

## **2. Indictment**

Petitioner was indicted on March 6, 2020 in the Eastern District of Arkansas

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<sup>6</sup> “Carved space” is “the unallocated space within the computer’s hard drive, which contains deleted files that have not been overwritten.” *United States v. Seaton*, 2025 WL 2992317, at \*1 (8th Cir. Oct. 24, 2025) (App. 002a); *United States v. Davis*, 859 F.3d 429, 435 (7th Cir. 2017) (“the existence of the images in the carved space indicates that they were deleted from another location on the hard drive where they were stored at a previous time.”).

charging him with one count of Receipt of Obscene Visual Representation of the Sexual Abuse of Children under 18 U.S.C. § 1466A(a)(1) and one count of Possession of Child Pornography under 18 U.S.C. § 2252(a)(4)(B).

### **3. Trial**

Petitioner’s jury trial lasted four days: May 22–25, 2023. At the close of the government’s case, he moved for a motion for judgment of acquittal on Count 1 on the basis that the three cartoon images were not obscene as a matter of law and 18 U.S.C. § 1466A(a)(1) violated the First Amendment as applied in petitioner’s case.<sup>7</sup> He also moved for a judgment of acquittal on the other child pornography possession count because the proof only showed that the images in the “carved space” on the hard drive were never shown to be accessed or accessible by him, and the government’s witnesses admitted he lacked software to even open them.

The district court took the motion under advisement to further research the issue. Petitioner renewed his motion at the close of the defense case and it was again held under advisement. The jury found him guilty on both counts. Ultimately, the district court never issued a ruling on his motion for judgment of acquittal.

On October 18, 2024 Petitioner was sentenced to a total of 84 months imprisonment and five years supervised release. The judgment of the district court was entered October 24, 2024, and the notice of appeal was filed the same day.

### **4. Appeal**

The court of appeals affirmed Petitioner’s conviction and rejected his

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<sup>7</sup> The obscenity jury instructions are at App. 006a–013a.

constitutional challenge to § 1466A(a)(1) based on the fact that the cartoon anime images did not depict real children. The court reasoned that “the statute proscribes ‘obscene’ images, § 1466A(a)(1)(B), which the First Amendment does not protect regardless of whether the images depict real or fictional children.” (App. 003a–004a) The court further concluded that Petitioner’s reliance on the holding in *Ashcroft* was “misplaced” because “the Supreme Court found that a law proscribing virtual child pornography was unconstitutionally overbroad because it restricted images that were not the product of child abuse and did not require them to be obscene.” (*Id.*) The court of appeals also rejected the sufficiency of evidence argument. (*Id.*)

Petitioner filed a petition for rehearing and rehearing en banc and submitted that anime images with no real or nearly real children cannot be obscene under *Ashcroft* and the First Amendment. The petition was denied. (App. 005a)

## REASONS FOR GRANTING THE WRIT

The court of appeal's decision holding § 1466A(a)(1) constitutional as applied in Petitioner's case is incorrect and conflicts with the basic tenets of this Court's holding in *Ashcroft* and the First Amendment. When there's no real or nearly real image of a child, what's the government's interest?

On the second question, the sufficiency of the evidence and due process question is stark: where is the knowing possession of what was in the completely inaccessible "carved space"? It is an utter failure of proof. Thus, this case thus involves an "important federal question ... that conflicts with relevant decisions of this Court" (Sup. Ct. Rule 10(c)) on sufficiency of the evidence and due process of law.

The court of appeals' reliance on the statute's requirement that the images be "obscene" to find it constitutional undermines this Court's recognition that virtual pornography and actual pornography are not legally identical, with the former being granted protection as a category of speech. The court of appeals also held that the evidence was sufficient to convict despite the fact it was never shown that Petitioner accessed or even could access the material in the "carved space." Petitioner's admission he might have seen it in the past apparently was deemed enough.

**I. The Court of Appeals erred in finding that 18 U.S.C. § 1466A(a)(1) was constitutional under the First Amendment as applied in Petitioner's case.**

**A. 18 U.S.C. § 1466A(a)(1) requires the depiction of a real child.**

18 U.S.C. § 1466A(a) reads as follows:

(a) In general. Any person who, in a circumstance described in

subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)

(A) depicts a minor engaging in sexually explicit conduct;

and

(B) is obscene; or

(2)

(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

Subsection (a)(1) prohibits material depicting “sexually explicit conduct,” which is defined in 18 U.S.C. § 2256. Specifically, the definition of “sexually explicit conduct” repeatedly refers to the existence of a “person” in § 2256(2). “Minor” is defined in both 18 U.S.C. §§ 2232 & 2256 as “any person under the age of eighteen years.”

The textual key is: what is a person?

“Person” is simply defined as “a human being” or a “natural person.” BLACK’S LAW DICTIONARY 1376 (12th ed. 2024). “Natural” meaning “brought about by nature as opposed to artificial means.” *Id.* at 1233. Combining the a straightforward reading of the statute with the stated purpose behind the PROTECT Act, it seems clear that § 1466A(a)(1) should only apply to images depicting real, living, breathing, children. Requiring depictions of real minors would make this section of the statute constitutional on its face under *Ashcroft*, which was the purpose behind the PROTECT Act to

begin with.

However, subsection (c) of the statute specifically states: “It is not a required element of any offense under this section that the minor depicted actually exist.” The intent behind this subsection, however, was only meant to relax the government’s burden of proof for a conviction and to relieve the government of conclusively proving a child’s identity, *i.e.*, their name and date of birth. It was not an endorsement of the criminalization of images depicting obviously fictional cartoon characters with undefinable ages or identities. The court of appeals’ erred in determining that the statute proscribes images that clearly do not depict a real child, thus encompassing numerous materials that were protected under *Ashcroft* and prior cases.

**B. Cartoon images cannot be treated the same as actual pornography or computer generated or AI pornography.**

Under the court of appeals’ reasoning, the “appears to be a minor” language in § 1466A(a)(1) is providing a cartoon depiction of a child with the same legal protections as that of an actual human being, which we submit is overcriminalization under First Amendment jurisprudence.

First, a cartoon “person” is not a human being and it is irrational to attempt to assign a particular “age” to a cartoon. How does one determine the age if the author or illustrator doesn’t provide any context? Or considering cartoon characters are not confined by the biological limitations that living human beings are, can those cartoon characters be adults that look like children or vice versa? If cartoon characters can be part alien or possess super human abilities, why can they not be adult beings that are youthful looking? What if the characters are not actually human at all, but only

look roughly human? Remember that this is a hand drawing, not photorealism. One cannot look at a cartoon image and say it depicts what “appears to be a minor,” because anything is possible in the realm of someone’s imagination. Any attempt to assign a particular age to a cartoon is making an assumption, a subsection one at that, based on what one perceives to be the depiction of a child or minor.

Second, the PROTECT Act anticipated computer or AI or deepfake generated images that could easily pass for the real thing. Congress foresaw computer generated images, and the advent of AI since then, AI images may be entirely indistinguishable from actual child pornography. The government may have an interest in prosecuting AI child pornography as technology progresses because maybe one cannot tell the difference. However, it is unclear what the connection is between the images that the statute specifically lists (*i.e.* cartoons, sculptures, and paintings) and the types of images that would be “virtually indistinguishable” from real children.

But hand drawn images, whether they be excellent or crude should be protected under the First Amendment because there are no children involved. It is clear that fake or cartoon pornography should not be treated as legally identical to actual child pornography under *Ashcroft* and *Ferber*.

**C. Requiring the depicted images to be “obscene” does not make 18 U.S.C. § 1466A(a)(1) constitutional.**

The court of appeals below erred in concluding that the statute was constitutional, and *Ashcroft* was not applicable, because there is a requirement that the depicted images be found to be “obscene.” However, if every image of child pornography, whether hand drawn cartoons or computer generated, can be found to be

obscene then the protections delineated in *Ashcroft* and *Ferber* would be rendered meaningless.

In the context of pornography, obscenity law is, in essence, ambiguous. We all must empathize with Justice Stewart's plaintive: I can't define it but "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 198 (1964) (Stewart, J., concurring). Under *Miller*, it is up to a jury to determine whether an image is "obscene," specifically whether the image "appeals to the prurient interest," is "patently offensive," and has no "social value." *Miller*, 413 U.S. at 24.

Petitioner submits that, even after *Ashcroft* and the PROTECT Act, virtual child pornography cannot be prohibited unless it is deemed obscene; however, the vast majority of jurists will almost certainly find depictions of children engaged in sexually explicit acts, whether actual or virtual, offensive. Subjectivity becomes especially apparent in the context of cartoons or animations that clearly do not depict real children with definable ages. Although juries may objectively agree that a cartoon does not depict a real child, they have found that such cartoons still can qualify as "obscene." See *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v. Handley*, 564 F.Supp.2d 996 (S.D. Iowa 2008).

Thus, the very same virtual pornography that was granted protection in *Ashcroft* may now be prosecuted as obscenity under § 1466A(a)(1) even though the images portray completely imaginary things. Courts still struggle with the definition of obscenity, yet the only constitutional safeguard in § 1466A(a)(1) is a jury's determination of obscenity. But juries can be wrong. See *Jackson v. Virginia*, 443

U.S. 307, 317 (1979), quoted *infra* at p. 20; *Jenkins v. Georgia, supra*.

This, however, stifles expression and leaves artists or retailers unsure of what images will lead to prosecution or not based on the inherent subjectivity of obscenity.<sup>8</sup>

Images that clearly contain no real or nearly real children should not be considered obscene under *Ashcroft* and the First Amendment. This Court should grant review the court of appeals' holding that § 1466A(a)(1) is constitutional as applied to cartoon child pornography depicting entirely fictional children.

It's all imaginary: No children were involved; none were harmed. It should be protected by the First Amendment.

**II. One cannot “possess” child sexual abuse material in the unallocated “carved space” of a hard drive without proof of an ability to see it or recover it, and both were lacking here.**

This case involves the important question of a CSAM conviction without any proof of knowledge or control, which thus violates due process. “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’ *In re Winship*, 397 U.S. 358, 364 (1970), quoted in *Osborne v. Ohio*, 495 U.S. 103, 122 n.17 (1990), a child pornography case.

As to the 300 CSAM images, Petitioner’s conviction involved a complete failure of proof. This was in the “carved space,” unallocated space where deleted files go to

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<sup>8</sup> As stated above, sometimes material is not obscene as a matter of law, no matter what the jury said. *Jenkins v. Georgia*, 418 U.S. at 163–64.

Also compare HBO’s Last Week Tonight’s 2020 episode about the absurd erotic art of anthropomorphic rats that in the 1990’s made a PBS affiliate fear losing its broadcast license just for airing it. [https://en.wikipedia.org/wiki/Stay\\_Up\\_Late](https://en.wikipedia.org/wiki/Stay_Up_Late).

be overwritten as space is needed on the hard drive. *See* n. 6, *supra*. There was no proof presented at trial that Petitioner ever viewed or manipulated these images, that he downloaded them, that he even deleted them putting them in the carved space.

“[I]t a violation of due process to convict and punish a man without evidence of his guilt.” *Thompson v. City of Louisville*, 362 U.S. 199, 206 & n.13 (1960) (collecting cases).

That’s what happened here. The government had no proof of knowledge or of his manipulation of those 300 files. No proof he looked at them and deleted them. No proof that he even tried to look at them. Alos, this was a used hard drive. Who put them there or saw them? The record is silent. The government had nothing.

“Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt ....” *Jackson v. Virginia*, 443 U.S. 307, 317 (1979).

Conviction of possession of files in the “carved space” here violates due process of law because of a complete lack of proof.

## CONCLUSION

The writ of certiorari to the Court of Appeals for the Eighth Circuit should be granted.

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