No. 06-694

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * 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 illegal child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 444 F.3d 1286. The opinion and order of the district court (App., *infra*, 46a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. A petition for rehearing was denied on July 17, 2006 (App., *infra*, 70a-71a). On October 6, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including Novem-

ber 14, 2006, and on November 6, 2006, he further extended the time to and including December 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech."

2. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law."

3. Section 2252A of Title 18 of the United States Code provides in part:

(a) Any person who—

* * * * *

(3) knowingly—

* * * * *

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in 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; * * *

shall be punished [by fine and imprisonment].

18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004). The entirety of Section 2252A, as well as the congressional findings codified at Pub. L. No. 108-21, § 501, 117 Stat. 676, are set forth in an appendix to the petition. App., *infra*, 72a-83a.

STATEMENT

Following the entry of a guilty plea in the United States District Court for the Southern District of Florida, respondent was convicted of one count of knowingly advertising, promoting, and presenting material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography, in violation of 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004), and one count of possession of computer disks that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2004). He was sentenced to 60 months of imprisonment on each count, to run concurrently, and to two years of supervised release. The court of appeals reversed respondent's conviction on the Section 2252A(a)(3)(B) count, holding that the provision was overbroad and impermissibly vague, and therefore facially unconstitutional. App., *infra*, 1a-45a.

1. a. This case involves 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004), a provision enacted in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act). Section 2252A(a)(3)(B) provides, in pertinent part, that anyone who knowingly "advertises, promotes, presents, distributes, or solicits * * * 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" contains illegal child pornography

(*i.e.*, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct") commits a criminal offense. 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004).

Congress passed Section 2252A(a)(3)(B) in the wake of *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court held unconstitutional two provisions that expanded the definition of illegal child pornography, both of which were enacted in the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 2009-26. One provision, 18 U.S.C. 2256(8)(B) (Supp. IV 2004), defined "child pornography" to include a visual depiction that "is, or appears to be," of a minor engaging in sexually explicit conduct. The second provision, 18 U.S.C. 2256(8)(D), defined "child pornography" to include a visual depiction "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The Court held that those provisions were substantially overbroad in violation of the First Amendment because they "proscribed a significant universe of speech that is neither obscene under *Miller* [v. *California*, 413 U.S. 15 (1973)] nor child pornography under [*New York* v. *Ferber*, 458 U.S. 747 (1982)]." *Free Speech Coalition*, 535 U.S. at 240; see *id.* at 256-258. The Court explained that non-obscene depictions of sexually explicit conduct could be banned consistent with the First Amendment only if they involved real children, because only the need to protect real children from sexual abuse could justify dispensing with the requirement that material be shown

to be obscene before it can be prohibited. 535 U.S. at 250, 256.

With respect to Section 2256(8)(D), the pandering provision, the Court noted that it "punishe[d] even those possessors who took no part in pandering." *Free Speech Coalition*, 535 U.S. at 242-243. Thus, "[m]aterial[] falling within the proscription [was] tainted and unlawful in the hands of all who receive[d] it, though they b[ore] no responsibility for how it was marketed, sold, or described." *Id.* at 258. See *ibid.* (provision not only prohibits pandering but also prohibits "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain").

In response to *Free Speech Coalition*, Congress passed the PROTECT Act, aimed at revising those portions of the CPPA that this Court found unconstitutional to comply with the requirements set forth in the opinion. As particularly relevant here, Congress repealed Section 2256(8)(D), which had defined child pornography to include a visual depiction that had been pandered as such. In its stead, Congress added a new section targeting the act of pandering and solicitation itself. As Congress explained, "[t]he crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent." S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003). Congress further explicated:

> [F]or example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography.

H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61-62 (2003). Congress made clear that "no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent." *Ibid.* That is so because "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." *Id.* at 62.

b. Congress made 15 legislative findings that explain the reasons for the provisions of Section 501 in the PROTECT Act. Pub. L. No. 108-21, 117 Stat. 676.[1] In those statutory findings, Congress emphasized that the government has a "compelling interest" in the continued enforceability and effectiveness of its prohibitions against child pornography, and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676.

Congress found that child pornography "results from the abuse of real children by sex offenders," and that "the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children." § 501(12), 117 Stat. 678. Congress further found "that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated." § 501(5), 117 Stat. 676. In addition, Congress found that there was "no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." § 501(7), 117

[1] The Congressional findings can be located at 18 U.S.C. 2251 (Supp. IV 2004) under the notes section, or in the appendix to the petition (App., *infra*, 72a-76a).

Stat. 677. Congress found, however, that, since this Court's decision in *Free Speech Coalition*, "defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real." § 501(10), 117 Stat. 677.

Congress outlined the difficulties of proof in this area, including that "[c]hild pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker." § 501(8), 117 Stat. 677. Congress further found that the nature of this retransmission can "make it difficult for even an expert conclusively to opine that a particular image depicts a real child." *Ibid.* Congress found that "[t]he number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before." § 501(10), 117 Stat. 677. Congress noted that *Ferber* had driven child pornography from the shelves of adult bookstores, and concluded that Congressional action was necessary in order "to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." § 501(15), 117 Stat. 678.

2. On April 26, 2004, a federal agent logged into an Internet chat room ("per-ten's actions uncensored:1") using a screen name. Based on the title of the chat room and the messages posted in it, the agent recognized it as one dedicated to child pornography. The agent saw a public message from someone with a sexually graphic screen name, which was later traced to respondent. Re-

spondent's public message stated: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent engaged respondent in a private Internet chat, during which they swapped non-pornographic photographs. App., *infra*, 2a (brackets in original); Plea Colloquy Tr. 29-32.

Following the photograph exchange, respondent claimed that he had nude photographs of his four-year-old daughter, stating: "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you??" App., *infra*, 2a (brackets in original). When respondent asked the agent for additional pictures and none was forthcoming, respondent accused the agent of being a cop. The agent answered by accusing respondent of being a cop. After repeating these accusations in the public part of the chat room, respondent posted a message stating: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." The message was immediately followed by a computer hyperlink, which the agent accessed, that contained, among other things, seven images of actual minors, approximately five to 15 years old. The children in the images were nude and were displaying their genitals, engaging in sexually explicit conduct, or both. *Id.* at 2a-3a.[2]

3. After reserving the right to challenge the constitutionality of Section 2252A(a)(3)(B), respondent pleaded guilty, *inter alia*, to violating that provision. App., *infra*, 47a. The district court subsequently denied respondent's motion to dismiss the Section

[2] A subsequent search of respondent's home resulted in the seizure of two computer hard drives that held at least 22 images of actual minors engaged in sexually explicit conduct or lascivious display of genitalia. Most of the images depicted prepubescent children, as well as sado-masochistic conduct or other depictions of pain. App., *infra*, 3a.

2252A(a)(3)(B) count based on the claim that the provision was unconstitutionally overbroad and vague. *Id.* at 46a-69a. In rejecting respondent's overbreadth challenge, the district court concluded that the statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Id.* at 65a. The court noted that the statute "does not criminalize mere possession," but rather prohibits "the pandering in material which is not protected by the First Amendment." *Ibid.* In rejecting respondent's "peripheral 'void for vagueness' challenge," the court concluded it was unnecessary to address the claim, "particularly, where the Court finds that the argument, even if made with more fervor, would not be successful." *Id.* at 48a.

4. The court of appeals reversed in relevant part. App., *infra*, 1a-45a.[3]

a. The court of appeals recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." App., *infra*, 19a. The court further acknowledged that "[t]he materials touted by [respondent] in this case were clearly illegal child pornography." See *id.* at 21a n.54; *id.* at 18a (not-

[3] The court affirmed respondent's concurrent 60-month sentence based on respondent's guilty plea to the other count in the indictment, which charged respondent with possessing computer disks that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (2000 & Supp. IV 2004). App., *infra*, 1a-2a.

ing that "the materials [respondent] possessed were unquestionably depictions of 'real' children"). And the court did not question the "extraordinary importance" of protecting "children against sexual abuse and predatory pedophiles" and the need for "strong federal laws" to address that governmental interest. *Id.* at 6a.

The court noted that Congress "remedie[d] the problem" identified by *Free Speech Coalition* of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." App, *infra*, 16a. Congress accomplished this by moving the pandering provision "from the definitions section to a stand-alone status, and using language that targets only the act of pandering." *Ibid.* The court also noted that Congress "beef[ed] up its findings" on the increased prosecutorial difficulties caused by the "ready availability" of technology that can make pictures of real children unidentifiable or appear to be computer-generated. *Id.* at 17a.

Nevertheless, the court of appeals held that Section 2252A(a)(3)(B) was facially unconstitutional on overbreadth and vagueness grounds. App, *infra*, 37a, 42a, 45a.[4]

b. In addressing respondent's overbreadth challenge, the court noted that Section 2252A(a)(3)(B) would likely pass constitutional muster "[i]f all that the pandering provision stood for was that individuals may not

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[4] The court of appeals also rejected the government's argument that because respondent's written plea agreement referred only to a right to challenge his conviction on overbreadth grounds, the agreement did not preserve a right to challenge the conviction on vagueness grounds. App., *infra*, 37a-38a. The government does not contest in this Court whether respondent preserved a vagueness challenge to Section 2252A(a)(3)(B).

commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." App., *infra*, 21a. This was so, the court concluded, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Ibid.* Because in the court's view, however, Section 2252A(a)(3)(B) is "not limited to commercial exploitation" but encompasses non-commercial speech as well, the court went on to consider whether "the restriction on such non-commercial speech is constitutionally overbroad." *Id.* at 22a.

In so doing, the court reasoned that Section 2252A(a)(3)(B) was "problematic" for three reasons. App., *infra*, 22a. First, because the "pandered child pornography need only be 'purported'" to be covered by the statute, the court was concerned that the statute sweeps in material that either does not in fact exist or that does not satisfy the legal definition of child pornography. *Ibid.* Second, in the court's view, the provision bans protected speech in the form of "the description or advocacy of illegal acts" in circumstances that do not rise to the level of "immediate incitement." *Id.* at 23a & n.58. Third, the court found "particularly objectionable the criminalization of speech that 'reflects the belief' that materials" are illegal child pornography because, in the court's view, the provision punishes "a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious." *Id.* at 23a. As the court understood Section 2252A(a)(3)(B), the intent to traffic in illegal pornography "only applies to one portion of the provision—promoting material in a manner 'that is intended to cause another to believe' it is illicit." *Id.* at 36a.

Accordingly, the court concluded that Section 2252A(a)(3)(B) "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep," and held that it was unconstitutionally overbroad. App., *infra*, 35a-36a.

c. With respect to respondent's vagueness argument, the court was concerned that, because Section 2252A(a)(3)(B) requires neither that the pandered material depict real children nor "that any 'purported' material * * * actually exist," and because the court read the "reflects the belief" portion of the statute as having "no intent requirement," the government could establish a violation of the provision with proof of any communication deemed "reflective of perverse thought." App., *infra*, 40a. The court further concluded that "the determination of what constitutes presentation in a 'manner that is intended to cause another to believe' that material contains illegal child pornography," was even more complex. *Id.* at 39a. In the court's view, the provision would capture an email entitled "Good pics of kids in bed" sent by a grandparent, with innocent pictures attached of grandchildren in pajamas. *Id.* at 40a-41a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision holding Section 2252A(a)(3)(B) unconstitutional is incorrect. The court of appeals not only misconstrued the law's scope, but relied on attenuated hypotheticals to conclude that the statute violated the First Amendment and due process vagueness principles. Properly construed, the statute is neither overbroad nor vague and is totally consistent with the Constitution. Congress targeted a particular form of unprotected speech in Section 2252A(a)(3)(B): speech that proposes to distribute, or solicits the receipt

of, material that is illegal to make or possess. The statute contains both an objective test for identifying when the speech concerns such material and a subjective knowledge requirement on the part of the speaker. Those requirements protect against improper applications of the law and give it the requisite clarity. The court of appeals' misguided invalidation of the law undermines Congress's effort to protect children by eliminating the widespread market in child pornography. Review by this Court is warranted.

A. The Court Of Appeals' Invalidation of An Act of Congress Warrants This Court's Review

Review by this Court is warranted because the court of appeals has invalidated an Act of Congress on its face. App., *infra*, 1a (reversing respondent's conviction "on the grounds of facial unconstitutionality"). Section 2252A(a)(3)(B) reflects Congress's effort to comply with this Court's decision in *Free Speech Coalition* while furthering the government's compelling interest in combating the creation and distribution of child pornography, and in protecting children from sexual abuse. Pub. L. No. 108-21, § 501, 117 Stat. 676. A decision that finds such a prohibition beyond Congress's constitutional reach deserves this Court's attention—particularly because the court of appeals misunderstood the sweep of the law and misapplied this Court's precedents.

As the court of appeals recognized (App., *infra*, 16a-17a), Section 2252A(a)(3)(B) addresses a key concern of this Court with the "pandering" provision invalidated in *Free Speech Coalition*. While that provision defined certain materials as child pornography for all purposes based on the manner in which they were promoted, and then imposed liability on anyone who possessed those

materials even if they were not a party to the pandering, see *Free Speech Coalition*, 535 U.S. at 258, Section 2252A(a)(3)(B) addresses the acts of pandering themselves. As Congress explained, "[t]he crux of what this provision bans is the offer to transact" in clearly proscribable child pornography. S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003); see H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61 (2003). Congress should not be stripped of the power to interdict such offers, and this Court should examine the statute in light of its constitutional precedents before letting such a ruling stand.

B. The Court of Appeals Erred in Striking Down Section 2252A(a)(3)(B) As Unconstitutionally Overbroad and Impermissibly Vague

The court of appeals' decision is incorrect. The court misinterpreted the scope of Section 2252A(a)(3)(B) by reading it more broadly than its language warrants. The court's misapprehension about what the statute prohibits and what it leaves unrestricted infected both its overbreadth and its vagueness analysis. The court of appeals' overbreadth analysis was further undermined by the court's failure, contrary to this Court's decisions, to analyze the ratio between protected applications and unprotected applications, or even to quantify the supposed protected applications. And its vagueness analysis violated the court's duty to give a clarifying construction to an Act of Congress if fairly possible. Properly understood, Section 2252A(a)(3)(B) fits well within constitutional limits.

1. The Court of Appeals Misinterpreted the Scope of Section 2252A(a)(3)(B)

The court of appeals misconstrued the fundamental nature of the prohibition in Section 2252A(a)(3)(B). The

court failed to recognize that the statute reaches only direct efforts to provide or to receive what is, or purports to be, illegal contraband. Section 2252A(a)(3)(B)'s regulation is directly connected to illegal conduct: it proscribes only speech that knowingly "advertises, promotes, presents, distributes, or solicits" material that is (or purports to be) illegal contraband. As Congress explained, it "ban[ned] the offer to transact in unprotected material, coupled with proof of the offender's specific intent." H.R. Conf. Rep. No. 66, *supra*, at 61; S. Rep. No. 2, *supra*, at 12. The court of appeals' concern (App., *infra*, 23a-24a & n.58) that Section 2252A(a)(3)(B) sweeps in abstract advocacy of the type at issue in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), is therefore entirely misplaced.

The court of appeals also erred in interpreting the statute's intent requirement, which has both an objective and subjective component. See, *e.g.*, App., *infra*, 40a (concluding that the "'reflects the belief' portion of the statute has no intent requirement"). To violate the statute, a person must advertise, promote, present, distribute, or solicit material "in a manner" either "that reflects the belief" or "that is intended to cause another to believe" that the material contains illegal child pornography. 18 U.S.C. 2252A(a)(3)(B). The words "in a manner" thus modify both of the prepositional phrases that follow it and provide an objective benchmark: a reasonable person must conclude from the language and context of the communication (its "manner") that the speaker has the "belief" that illegal child pornography is available or desired, or that the communication is "intended to cause another to believe" that the advertised, promoted, or solicited material is illegal child pornography.

Furthermore, the statute has a subjective requirement. By requiring that the statements be made "knowingly," Congress intended the statute to cover only those with the "specific intent" to traffic (or purport to be trafficking) in child pornography. See H.R. Conf. Rep. No. 66, *supra*, at 61-62 ("[T]he government establishes a violation with proof of the communication and requisite specific intent."); S. Rep. No. 2, *supra*, at 12 (noting that the provision requires "proof of the offender's specific intent"). Thus, as the district court recognized (App., *infra*, 65a), to violate this provision, a speaker must have understood that a reasonable person would have interpreted his words, in context, as referring to real child pornography. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

2. Section 2252A(a)(3)(B) Is Not Overbroad

a. Properly construed, Section 2252A(a)(3)(B) proscribes only unprotected speech. As the court of appeals recognized, subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence." App., *infra*, 19a. The provision simply makes it unlawful to offer or to solicit material that is or purports to be such illegal contraband. Nothing in the First Amendment disables Congress from proscribing such speech. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.").

b. Even if Section 2252A(a)(3)(B) reached some protected speech, the statute would not be constitutionally

overbroad. The challenger "bears the burden of demonstrating" a statute's unconstitutional overbreadth. *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003). To meet that burden, it is not enough to show some overbreadth. Rather, "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* v. *Oklahoma*, 413 U.S. 601, 615 (1973). This is so because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law." *Hicks*, 539 U.S. at 119. As this Court has explained, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Ibid.* This Court has thus required that "a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the law's plainly legitimate applications * * * before applying the 'strong medicine' of overbreadth invalidation." *Id.* at 120.

Respondent did not make the requisite showing "'from the text of [the law] and from actual fact,' that substantial overbreadth exists." See *Hicks*, 539 U.S. at 122 (brackets in original) (citing *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 14 (1988)). The court of appeals acknowledged (App., *infra*, 21a-22a) that Section 2252A(a)(3)(B) clearly covers unprotected speech, including all commercial offers or solicitations for illegal child pornography, regardless of whether the offerors actually have any illegal child pornography. The court of appeals identified three reasons that it deemed the statute "problematic" in non-commercial contexts. App., *infra.*, 22a-27a. The court, however,

improperly limited the "commercial context" by excluding situations in which "child pornography is discussed or exchanged." *Id.* at 34a. The court erred in assuming that the purveying or seeking of child pornography for barter or to foster trading relationships is "non-commercial." And the court did not explain why barter should be treated differently for constitutional purposes from sale. The court also included hypotheticals—such as a grandparent forwarding pictures (App., *infra*, 40a-41a)—that are clearly not covered by the statute, properly construed. Even assuming that some non-commercial applications of the statute pose constitutional problems, the court of appeals did not attempt to quantify the extent to which these areas of concern might actually exist or, more importantly, how these areas of potential application of the statute compare with the statute's legitimate sweep.

The court's reliance on a few hypothetical scenarios does not substitute for a proper overbreadth analysis. See *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). It is hard to fathom how the types of isolated scenarios given by the court—persons falsely or mistakenly claiming to possess child pornography, the possession of which is itself a crime—could ever be substantial in comparison with the application of Section 2252A(a)(3)(B) to the type of conduct it was intended to reach: action-oriented speech offering or soliciting fully-proscribable child pornography. Thus, unlike the statutory definitions of child pornography whose implications for mainstream literature and movies depicting teenage sexual activity concerned this Court in

Free Speech Coalition, 535 U.S. at 247-248, 257, Section 2252A(a)(3)(B) could not ensnare promotions of Romeo and Juliet or mainstream movies such as *Traffic* and *American Beauty*. Overbreadth analysis requires "realistic" threats to protected speech, not imagined ones. *Taxpayers for Vincent*, 466 U.S. at 801. It does not hold the enforcement of a law that targets clearly unprotected speech hostage to a few hypothetical scenarios.[5] The court of appeals did not identify realistic threats here, let alone find them substantial compared to the statute's legitimate scope.

To the extent that Section 2252A(a)(3)(B) sweeps within its ambit protected speech, any such application can be avoided through case-by-case adjudication. *Hicks*, 539 U.S. at 124; *New York* v. *Ferber*, 458 U.S. 747, 773-774 (1982). There is no need for the draconian remedy of declaring the statute facially invalid. See *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'") (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) (brackets in original)).

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[5] See, *e.g.*, *Gibson* v. *Mayor & Council of City of Wilmington*, 355 F.3d 215, 227-228 (3d Cir. 2004) (finding the scenarios advanced by the challenger "more than slightly unrealistic" and holding that "the number and weight of permissible applications far outweigh the possible invalid applications, if not in number, then certainly in kind"); *J&B Entm't, Inc.* v. *City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998) (rejecting an overbreadth challenge where the court could "imagine" that the public-nudity ordinance would have banned a nude production of "Hair" or a nude reading by novelist John Grisham, but "these examples, in comparison to its legitimate sweep, are not substantial").

3. Section 2252A(a)(3)(B) Is Not Impermissibly Vague

The court below also erred in concluding that Section 2252A(a)(3)(B) was impermissibly vague. App., *infra*, 37a-42a. To survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (internal quotation marks and citation omitted), nor does it require "mathematical certainty" from statutory language, *Grayned*, 408 U.S. at 110. Instead, a statute is not vague if it is "clear what the [statute] as a whole prohibits." *Ibid.* Moreover, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks and citation omitted). Finally, in the context of a federal statute, federal courts have a duty, if it is fairly possible, to construe the statute to provide clarity and to avoid unconstitutional vagueness. See, *e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 69; *Dennis* v. *United States*, 341 U.S. 494, 501-502 (1951).

The court of appeals' vagueness concerns stemmed from its misunderstanding of the scope of the statute, particularly the statute's intent requirement. See pp. 14-16, *supra*. Properly construed, the statute is not impermissibly vague. Rather, as the district court concluded, Section 2252A(a)(3)(B) "prohibits exactly what it was intended to prohibit, the pandering in material which is not protected by the First Amendment." App.,

infra, 65a. The statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Ibid.* In short, it is not a statute that "simply has *no* core," *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974), but is a statute with a readily understandable and constitutionally unproblematic heartland.

C. The Court Of Appeals' Decision Interferes With A Component Of Congress's Effort To Suppress The Market For Child Pornography

The PROTECT Act revised federal child pornography laws to assure their constitutionality while comprehensively addressing a major social evil. Although the government has used Section 2252A(a)(3)(B) only rarely to date, the provision encompasses culpable conduct that other provisions may not reach. In particular, Congress sought to provide the government with a means to prosecute those who make direct requests to receive, or offers to provide, what purports to be illegal material, regardless of whether the government can prove that such material is in fact real child pornography or that it even exists.

As both the court of appeals (App., *infra*, 17a) and the district court recognized (*id.* at 55a-56a, 67a-68a), in the PROTECT Act Congress made specific legislative findings that addressed concerns of this Court in *Free Speech Coalition*. In those statutory findings, Congress emphasized the harm to real children that flows from the proliferation of the market for child pornography and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market

for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Pub. L. No. 108-21, § 501(3), 117 Stat. 676.; see pp. 6-7, *supra*. In addition, Congress found that, "[i]n the absence of Congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse," as "the mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution." § 501(13), 117 Stat. 678.

Congress gave prosecutors a variety of tools to achieve its aim, making clear that efforts to stimulate, feed, or capitalize on a market for what purports to be child pornography deserve no sanctuary. While other provisions address aspects of the problem, see, *e.g.*, 18 U.S.C. 1466A (Supp. IV 2004), 2251(d)(1)(A) (Supp. IV 2004), this provision is applicable where the government cannot prove that the materials depict actual children—or cannot locate the materials at all. This Court should review the court of appeals' holding that the Constitution precludes Congress's method for achieving its goal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-15128

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL WILLIAMS, DEFENDANT-APPELLANT

Apr. 6, 2006

Before: BARKETT, WILSON and REAVLEY [*], Circuit Judges.

REAVLEY, Circuit Judge:

Michael Williams appeals his conviction for promotion of child pornography under 18 U.S.C. § 2252A(a)(3)(B) on the grounds of facial unconstitutionality. For this reason, we reverse that conviction. Williams was also convicted of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), and he appeals his sentence for that offense on the grounds that the court unconstitutionally enhanced his sentence under a mandatory guidelines scheme in violation of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005). Because there was no

[*] Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.

reversible *Booker* error, we affirm Williams's sentence of 60-months' imprisonment.

I. The Charges

On April 26, 2004, as part of an undercover operation aimed at combating child exploitation on the Internet, United States Secret Service Special Agent (SA) Timothy Devine entered an Internet "chat" room using the screen name "Lisa n Miami" (LMN). SA Devine observed a public message posted by a user employing a sexually graphic screen name, which was later traced to the defendant Williams. Williams's public message stated that "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." SA Devine as LNM engaged Williams in a private Internet chat during which they swapped non-pornographic photographs. Williams provided a photograph of a two to three-year-old female lying on a couch in her bathing suit, and five photographs of a one to two-year-old female in various non-sexual poses, one of which depicted the child with her breast exposed and her pants down just below her waistline. LNM sent a non-sexual photo of a college-aged female digitally regressed to appear ten to twelve years old, who LNM claimed was her daughter.

After the initial photo exchange, Williams claimed that he had nude photographs of his four-year-old daughter, stating "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you? ?" Williams asked for additional pictures of LNM's daughter. When these pictures were not received, Williams accused LNM of being a cop. LNM responded by accusing Williams of being a cop. After repeating

these accusations in the public part of the chat room, Williams posted a message stating "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." The message was followed by a computer hyperlink, which SA Devine accessed. The computer hyperlink contained, among other things, seven images of actual minors engaging in sexually explicit conduct. The nude children in the photos were approximately five to fifteen years old, displaying their genitals and/or engaged in sexual activity.

Secret Service agents executed a search warrant of Williams's home. Two computer hard drives seized during the search held at least twenty-two images of actual minors engaged in sexually explicit conduct or lascivious display of genitalia. Most of the images depicted prepubescent children and also depicted sado-masochistic conduct or other depictions of pain.

Williams was charged with one count of promoting, or "pandering," material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography in violation of 18 U.S.C. § 2252A(a)(3)(B), which carries a sixty-month mandatory minimum sentence. Williams was also charged with one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B).

Williams filed a motion to dismiss the pandering charge on the grounds that 18 U.S.C. § 2252A(a)(3)(B) is unconstitutionally overbroad and vague. While the motion was pending before the trial court, the parties reached a plea agreement by which Williams would plead guilty to both counts but reserve his right to challenge the constitutionality of the pandering provision on appeal. The court sentenced Williams to sixty-months'

imprisonment for the pandering charge and sixty months for the possession charge, to be served concurrently.

II. Williams's Facial Challenge to 18 U.S.C. § 2252A(a)(3)(B)

A. Standard of Review

We review a district court's conclusion as to the constitutionality of a challenged statute de novo.[1]

B. The Child Pornography Problem

In this case, we consider the constitutionality of a law aimed at curbing the promotion, or "pandering,"[2] of child pornography. Relevant to this case, there are two types of child pornography. Roughly speaking, "actual" or "real" child pornography depicts true minors engaged

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[1] *United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003).

[2] "Pandering" is defined as the catering to or exploitation of the weaknesses of others, especially "to provide gratification for others' desires." *See* MERRIAM WEBSTER ONLINE DICTIONARY, http://www.m-w.com (last visited March 23, 2006). As a legal concept, pandering is most commonly associated with prostitution. In that context, pandering provisions are statutes penalizing various acts by intermediaries who engage in the commercial exploitation of prostitution and are aimed at those who, as agents, promote prostitution rather than against the prostitutes themselves. The term pandering, in some instances, is applied by Congress and the courts to the promotion of obscenity. *See, e.g.*, 39 U.S.C. § 3008 (prohibiting pandering advertisements of sexually provocative materials by mail), *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L.Ed.2d 31 (1966) (considering obscene nature of erotically advertised publications). Congress has characterized both the child pornography regulation at issue in this case (18 U.S.C. 2252A(a)(3)(B)) and its unconstitutional predecessor (18 U.S.C. § 2256(8)(D) (1996)) as "pandering" provisions.

in sexual conduct. In contrast, "virtual" child pornography depicts what appear to be actual minors engaged in sexual conduct, but in reality consists of computer-generated or enhanced images. Child pornography images of both types are typically circulated through the Internet. While society has benefitted greatly from the technological advances of the last decade, an unfortunate byproduct of sophisticated imaging technology and the rise of the Internet has been the proliferation of pornography involving children.[3]

The anonymity and availability of the online world draws those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals. The result has been the development of a dangerous cottage industry for the production of child pornography as well as the accretion of ever-widening child pornography distribution rings.[4] Our concern is

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[3] Total federal prosecutions of child pornography cases increased more than 452% from 1997 to 2004. Statement of Laura H. Parsky, Deputy Asst. Attorney General, Criminal Division before the Comm. On Commerce, Science, and Transportation, United States Senate Concerning Protecting Children on the Internet. January 19, 2006.

[4] In 1998, police cracked the "Wonderland Club," an Internet child pornography ring that involved members across twelve countries, and whose "chairman" was an American, uncovering some 750,000 images of children. Membership rules required each member to possess at least 10,000 images of pre-teen children and to agree to exchange them with other members. Other rings promote the worst imaginable forms of child pornography, such as "custom" child pornography (images of child rape created to order for the consumer) and "real time" child pornography, where members may watch the online rape of children as it occurs. In early 2006, federal authorities shut down an Internet web site called "Kiddypics & Kiddyvids" that streamed video of live child molestations involving children as young as eighteen months.

not confined to the immediate abuse of the children depicted in these images, but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children. Regulation is made difficult, not only by the vast and sheltering landscape of cyberspace, but also by the fact that mainstream and otherwise innocuous images of children are viewed and traded by pedophiles as sexually stimulating.

Over the years, Congress has, by large bipartisan majorities, enacted legislation designed to punish those who produce, peddle, or possess child pornography. Congress has struggled to draft legislation that captures the truly objectionable child-exploitative materials while staying within the boundaries of the Supreme Court's First Amendment jurisprudence. The protection of our children against sexual abuse and predatory pedophiles is of extraordinary importance. We do not question that strong federal laws are needed, but they must pass constitutional muster. In other words, Congress may not "burn the house to roast the pig."[5] Whether that difficult balance has been struck in the instant legislation is the issue before us.

C. The Law and Child Pornography

We begin with a brief overview of child pornography law, which as a distinct body, is of relatively recent vintage. The regulation of child pornography was initially rooted in the Supreme Court's obscenity doc-

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[5] *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957).

trine. In *Miller v. California*,[6] the Court set forth the three-prong social merit test for determining whether materials are obscene, and therefore proscribable as a category of unprotected speech. In *Stanley v. Georgia*,[7] the Court held that privacy interests protect the right to possess obscene materials in one's own home, but subsequently clarified that this sanction does not extend to the distribution or receipt of obscenity, which may be regulated on interstate commerce grounds even if the transportation is for the recipient's personal use.[8] Against this backdrop, Congress passed its first child pornography legislation, the Protection of Children against Sexual Exploitation Act, in 1977.[9] It was keyed to the Miller standard, outlawing the use of children in the production of obscene materials and criminalizing the knowing distribution of such materials for commercial purposes.

In 1982, the Supreme Court first dealt directly with the issue of child pornography. In *New York* v. *Ferber*,[10] a unanimous Court proclaimed that child pornography was a distinct new category of speech without First

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[6] 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973). The *Miller* test defines obscenity as a work that (1) taken as a whole, appeals to the prurient interest under contemporary community standards, (2) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S. Ct. at 2615.

[7] 394 U.S. 557, 568, 89 S. Ct. 1243, 1259-50, 22 L.Ed.2d 542 (1969).

[8] *See United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed. 2d 513 (1973).

[9] Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2423, 2251-2253).

[10] 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

Amendment protection, holding that the government may constitutionally prohibit the creation or promotion of pornography featuring real children even though it does not meet the *Miller* standard. The primary rationale of *Ferber* was that child pornography must be prohibited because of the intrinsic harm done to children in its production.[11] The Court reasoned that child pornography not only documents an underlying act of abuse—the sexual use of a child—but the recording of the act and subsequent circulation of the images perpetuates the injury to the depicted child.[12]

In response to *Ferber*, Congress passed the Child Protection Act of 1984 (CPA),[13] which was modeled on the New York statute upheld in *Ferber*. The CPA expanded the definition of child pornography to include non-obscene but sexually suggestive pictures of children and eliminated the commercial purposes requirement of earlier proscriptions. Interstate commerce advertisements and solicitations for child pornography were banned by the Child Sexual Abuse and Pornography Act of 1986.[14]

Congress first addressed the connection between child pornography and emerging computer technology in the Child Protection and Obscenity Enforcement Act

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[11] *Id.* at 758, 102 S. Ct. at 3355.

[12] *Id.* at 759, 102 S.Ct. at 3355-56.

[13] Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2254, 2256, 2516).

[14] Pub. L. No. 99-628, 100 Stat. 3510 (1986) (codified as amended in scattered sections of 18 U.S.C.).

of 1988,[15] which prohibited the use of computers to transport, distribute, or receive child pornography. Shortly thereafter, the Court held in *Osborne v. Ohio*[16] that the *Stanley* right to private possession does not extend to child pornography involving actual children because, unlike adult obscenity, it springs from a grievous harm to children.

In the wake of *Ferber* and subsequent legislation, much of the child pornography industry was driven underground. Then, during the 1990s, advances in photographic and computer-imaging technology made production of child pornography possible without directly employing children. Visual depictions of what appeared to be children engaging in sexually explicit conduct, and that were virtually indistinguishable from images of actual children engaging in such conduct, could be generated. Further, with the advent of the Internet, these "virtual" child pornography images, along with "real" child pornography images, could be readily distributed. However, because the *Ferber* standard only addressed "live performances," and the visual recordation of same, the existing law left loopholes for the computer-generated images.[17]

To keep pace with these technological developments, Congress passed the Child Pornography Prevention Act of 1996 (CPPA).[18] Congress reasoned that these images, while not involving the use of actual children in their

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[15] Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251, 2252).

[16] 495 U.S. 103, 109-11, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990).

[17] *Ferber*, 458 U.S. at 764-65, 102 S. Ct. at 3358.

[18] Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251 et seq.)

production, would still cause sufficient harm to children to justify banning them in the same way as "real" child pornography. Under the CPPA, the definition of child pornography was extended to cover any visual image that "is, or appears to be, of a minor engaging in sexually explicit conduct"[19] or that has been promoted in a manner that "conveys the impression" that a minor engaging in sexually explicit conduct is depicted.[20] The latter prohibition was referred to as the CPPA's "pandering" provision. The circuit courts that considered challenges to the CPPA were split, with four circuits sustaining the Act as constitutional[21] while the Ninth Circuit struck it down as overbroad and vague.[22] The Supreme Court granted certiorari in the Ninth Circuit case to resolve the circuit split.

D. The Supreme Court's Decision in Free Speech Coalition

In *Ashcroft v. Free Speech Coalition*,[23] the Supreme Court struck down as unconstitutionally overbroad the two above-referenced subsections of the CPPA's definition of child pornography. The first defined child pornography as any visual depiction, including a computer-generated depiction that "is, or appears to be,

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[19] 18 U.S.C. § 2256(8)(B) (1996) (invalidated 2002, amended 2003).

[20] 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003).

[21] *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001), *vacated by* 535 U.S. 1014, 122 S. Ct. 1602, 152 L. Ed.2d 617 (2002); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999).

[22] *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999).

[23] 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

of a minor engaging in sexually explicit conduct."[24] The second, CPPA's "pandering" provision, defined child pornography as a "visual depiction [that] is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[25] The Court held that these definitions reached more than what could constitutionally be banned as unprotected speech under current obscenity law.[26]

The first definition was deemed overbroad because it prohibited speech (virtual or computer depictions, artistic works, or cinematic depictions of youthful actors) that was not obscene under *Miller*, and which recorded no crime and created no victims through its production, as did the "real" child pornography in *Ferber*.[27] The second definition, the "pandering" provision, was deemed overbroad because it defined as child pornography materials that had been promoted "convey[ing] the impression" that sexually explicit depictions

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[24] 18 U.S.C. § 2256(8)(B) (1996) (invalidated 2002, amended 2003).

[25] 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003).

[26] *See Free Speech Coalition*, 535 U.S. at 240, 251, 122 S. Ct. at 1396, 1402 (citing *Miller*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and *Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

[27] The Court noted that, although they clearly could not be considered obscene under *Miller*, Renaissance paintings, productions of Shakespeare's "Romeo and Juliet," and noteworthy films such as "Traffic" and "American Beauty" could be swept within the ambit of the CPPA, since arguably they contain some graphic depictions that "appear to be" of minors engaging in sexual activity (even though such images neither involve nor harm children in the production process), and because the CPPA provided no pause for inquiry into the work's redeeming value considered in totality. 535 U.S. at 246-48, 122 S. Ct. at 1400.

involving minors would be found within the material, even when, in fact, there were no such scenes. This subsection thus criminalized downstream possession of material described, or pandered, as child pornography by someone earlier in the distribution chain even if no minors were actually involved in the production. Finding the government's evidence insufficient to show any harm in material merely pandered as containing child pornography, the Court criticized the provision because it criminalized speech based solely "on how the speech is presented" rather than on "what is depicted."[28]

Although the Court found the CPPA inconsistent with *Miller* and lacking support in *Ferber*, the government attempted to justify the definitions in other ways. The government argued that virtual child pornography can be used to seduce children into participating in sexual activity, and that such material[] also "whets the appetites" of pedophiles, encouraging them to engage in illegal conduct.[29] The Court rejected these arguments, noting that other laws, such as those that prohibit unlawful solicitation of a minor, more closely regulate the unsavory use of virtual child pornography; and that the government may not prohibit speech on the grounds that it may merely encourage, and not incite, pedophiles to engage in illicit conduct.[30]

The government next argued that its objective of eliminating the market for "real" child pornography necessitates a prohibition on virtual images as well because, since they are often indistinguishable and

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[28] *Id.* at 257, 122 S. Ct. at 1405-06.

[29] *Id.* at 251-53, 122 S. Ct. at 1402-03.

[30] *Id.* at 251-54, 122 S. Ct. at 1402-04.

traded in the same market, the synthetic images promote the trafficking of works produced through the exploitation of real children.[31] The Court rejected this market deterrence theory, noting that, "[i]n the case of the material covered by *Ferber* [depictions of actual minors engaged in sexual acts], the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive."[32] In other words, because no crime underlies the production of virtual child pornography, the production-based rationale set forth in *Ferber* does not apply to synthetic images.

Finally, the Court rejected the government's argument that, since advanced technology makes it difficult to tell whether pictures were made with real children or computer imaging, thus thwarting prosecutorial efforts, both kinds of images must be banned. The Court stated that the argument, "that protected speech may be banned as a means to ban unprotected speech . . . . turns the First Amendment upside down."[33]

E. The PROTECT Act

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[31] *Id.* at 254, 122 S. Ct. at 1404.

[32] *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103, 109-110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)).

[33] *Id.* at 255, 122 S. Ct. at 1404. The Court also found that the CPPA's affirmative defense, which allowed offenders in some cases to avoid conviction for nonpossession offenses by showing that materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children, was insufficient to rescue the statute from overbreadth because it was incomplete and shifted the burden to the defendant to prove his speech was not unlawful. *Id.*

Almost immediately after the *Free Speech Coalition* decision was handed down, Congress began an effort to craft responsive legislation. Two pieces of proposed legislation aimed at revising the objectionable provisions of the CPPA were introduced in the Senate and the House.[34] There was significant debate about key provisions in the competing bills, including the proposed revisions to the pandering provision.[35] Despite ongoing disagreement, the houses compromised and passed the PROTECT Act, now codified in scattered sections of 18 U.S.C.

The revised pandering provision of the PROTECT Act at issue in this case, 18 U.S.C. § 2252A(a)(3)(B), provides that any person who knowingly—

> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in 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—

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[34] The Senate introduced S. 151, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), and the House introduced H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003 (COPPA).

[35] To illustrate, after the House reviewed the Senate's version, it offered an "amendment" to the Senate bill on March 27, 2003, which, in reality, was a recommendation that the Senate's language be replaced in its entirety with the House's version found in the COPPA. (Compare House Amendment to S. 151, Title §§ 501-512 (March 27, 2003) with H.R. 1161, 108th Cong. at §§ 1-4 (2003) (identical language)).

(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;

commits a criminal offense. For the purposes of this provision, a "minor" means "any person under the age of eighteen years"[36] and "sexually explicit conduct" is defined as "actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person."[37]

Any person who violates, or attempts or conspires to violate, the pandering prohibition is subject to a fine and imprisonment for a minimum of five years and up to twenty years.[38] It is an affirmative defense for certain reproducers, distributors, recipients, and possessors of child pornography charged under other subsections of § 2252A that the alleged child pornography depicts actual adults rather than minors or that no "actual" minors were involved in the production.[39] However, the

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[36] 18 U.S.C. § 2256(1).

[37] 18 U.S.C. § 2256(2).

[38] 18 U.S.C. § 2252A(b)(1).

[39] 18 U.S.C. § 2252A(c).

affirmative defense expressly does not apply to the pandering provision.[40]

F. What Congress Has Done Differently

At the outset of our discussion, we note that the new pandering provision allays certain concerns voiced by the Court in *Free Speech Coalition*. First, the Court's primary objection to the CPPA's pandering provision was that pandered materials were criminalized for all purposes in the hands of any possessor based on how they were originally pandered.[41] By moving the pandering provision from the definitions section to a stand-alone status, and using language that targets only the act of pandering, the new provision has shifted from regulation of the underlying material to regulation of the speech related to the material. This remedies the problem of penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography.

With respect to its legislative findings for the PROTECT Act, Congress largely abandons the secondary effects and market deterrence justifications found wanting by the Court in *Free Speech Coalition*, although it does reiterate the need to ensure that the result of *Ferber*—driving illegal child pornography from the bookshelves—is extended to extinguish the "open and notorious trafficking in such materials" on the In-

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[40] *Id.*

[41] 535 U.S. at 257-58, 122 S. Ct. at 1405-06 ("Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described.").

ternet.[42] Congress instead focuses primarily on beefing up its findings that technological advancements since *Free Speech Coalition* have increased the prosecutorial difficulties raised by the ready availability of technology able to disguise depictions of real children (proscribable under *Ferber*) to make them unidentifiable or to make them appear computer-generated (defensible under *Free Speech Coalition*).[43]

Finally, the PROTECT Act provides a new definition for child pornography, which in addition to "real" child images includes (1) any digital or computer-generated image that is "indistinguishable" from that of a minor engaging in sexually explicit conduct,[44] and (2) a visual depiction that has been created or modified to appear as an identifiable minor engaging in sexually explicit conduct.[45] The PROTECT Act also amended the general obscenity statute to define a new category of unprotected synthetic child pornography that incorporates, in part, the *Miller* definition. That law now prohibits the production, distribution, receipt or possession, in an

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[42] Congressional Findings, § 501 at (15).

[43] *Id.* at (4)-(13).

[44] The definition of sexually explicit conduct for "indistinguishable" images is slightly narrower than the one attached to the pandering provision as set out above, requiring that depictions of sexual intercourse or lascivious exhibitions of the genital or pubic area also be "graphic" (18 U.S.C. § 2256(2)(B)), meaning "that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted . . ." 18 U.S.C. § 2256(10).

[45] 18 U.S.C. § 2256(8). As discussed above, the affirmative defense that no real child was involved in the production of child pornography, which the Court found incomplete under the CPPA, has been extended to most possessors and distributors of these defined materials.

interstate commerce setting, of (1) obscene visual depictions of any kind that depict a minor engaging in sexually explicit conduct, and (2) any visual depiction that is, or appears to be, of a minor engaging in certain enumerated "hard core" acts and lacks serious literary, artistic, political, or scientific value.[46] Thus a virtual depiction of a minor involved in any of the expressly listed acts is outlawed even where only one of the three *Miller* prongs is explicitly satisfied.[47] Because the materials Williams possessed were unquestionably depictions of "real" children, these new virtual child pornography definitions are not directly at issue in this case, but the limitations of their reach have implications regarding Congress's purpose for enacting the pandering provision, as we discuss below. For example, the definitions do not capture innocent pictures of children that pedophiles view, collect, and trade as "dirty" pictures. And it remains to be seen whether the Supreme Court will find acceptable the PROTECT Act's truncation of the *Miller* obscenity standard with respect to child pornography.

G. Williams's Overbreadth Challenge

Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected speech is invalid on its face.[48] Williams asserts

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[46] 18 U.S.C. § 1466A(a)-(d). The enumerated acts are "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 . . ." *Id.* at § 1466A(a)(2)(A).

[47] The general obscenity statute provides no affirmative defense that no real child was involved in the production of the image.

[48] *Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. at 1404 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d

that the PROTECT Act prohibition of speech that "reflects the belief, or that is intended to cause another to believe" that materials contain illegal child pornography is no different than the CPPA's prohibition of images that "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct that was struck down as overbroad in *Free Speech Coalition*.

We begin our analysis with the recognition that subsections (i) and (ii) of the PROTECT Act pandering provision capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same. As reviewed above, the government may constitutionally regulate, on interstate commerce grounds, the transportation and distribution of obscene material, even if it is legal to hold privately (i.e. non-real child pornography),[49] and may outlaw "real" child pornography for all purposes, including private possession.[50] However, the PROTECT Act pandering provision criminalizes not the speech expressed in the underlying materials described in (i) and (ii), but the speech promoting and soliciting such materials. The question before us is whether the restriction on that speech is too broad.

1. *The Government may wholly prohibit commercial speech that is false or proposes an illegal transaction.*

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830 (1973)).

[49] *Orito*, 413 U.S. at 141, 93 S. Ct. at 2676.

[50] *Osborne*, 495 U.S. at 110, 110 S. Ct. at 1696; *Ferber*, 458 U.S. at 760, 102 S. Ct. at 3359.

We recognize that, if we consider the pandering provision as purely a restriction of commercial speech, we do not apply strict overbreadth analysis.[51] Instead, we determine whether the government has narrowly tailored any content-based regulation on protected speech, that is neither misleading nor related to unlawful activities, to achieve its desired legitimate objectives.[52] Under this analysis, the government may prohibit completely the advertisement or solicitation of an illegal product or activity as well as false or misleading advertisement because neither is protected speech.[53] If a person possessing or seeking either obscene synthetic child pornography or "real" child pornography, offers to sell or buy it, this is unlawful commercial activity that the government may constitutionally proscribe. If a person does not have obscene or "real" child pornography but offers such things for sale, then the offeror is engaged in false or misleading advertising, which the government may likewise punish.

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[51] *See Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 477-81, 109 S. Ct. 3028, 3033-35, 106 L. Ed. 2d 388 (1989) (holding that the "least restrictive means" test does not apply to commercial speech cases); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463 n. 20, 98 S. Ct. 1912, 1922, 56 L. Ed. 2d 444 (1978) (observing that "the justification for applying overbreadth analysis applies weakly, if at all, in the ordinary commercial context" because "[c]ommercial speech is not as likely to be deterred as noncommercial speech" and therefore does not require the added protection afforded by the overbreadth doctrine to third parties not before the bar).

[52] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (setting out the constitutional test for restrictions on commercial speech).

[53] *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S. Ct. 1817, 1829-30, 48 L. Ed. 2d 346 (1976).

If all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were, the Government need not show that it has narrowly tailored its restriction because neither of these scenarios involve protected speech. We observe, however, that false or misleading commercial advertising is already addressed under other state and federal laws, which are aimed at protecting consumers from fraud. Here, under legislation aimed at protecting children, the only person who is harmed by misleading speech, even if it preys on the basest of motives, is the would-be buyer of illegal child pornography, and that individual is scarcely in a position to complain. Also, although the penalties for false commercial advertising are not specifically raised here,[54] we note that a mere false commercial advertiser is punished on par with an actual child pornographer, without regard to the actual content or even existence of underlying material. Thus, a person offering for sale a copy of Disney's Snow White on false claims that it contains depictions of minors engaged in sexually explicit conduct has committed a crime punishable by a fine and at least five- and up to twenty-years' imprisonment,[55] a decidedly disproportionate and draconian penalty.

Because the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product and because, in the commercial context, we have before us no

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[54] The materials touted by Williams in this case were clearly illegal child pornography and we do not, in the commercial context, consider the overbreadth chilling effect on third parties not before the court.

[55] 18 U.S.C. § 2252A(b)(1).

challenge to the severity of punishment meted out for such behavior, the pandering provision would likely pass our muster as a prohibition of unprotected forms of commercial speech, if that were all it proscribed. However, the law is not limited to commercial exploitation and continues to sweep in non-commercial speech. Accordingly, we must move to the question of whether the restriction on such non-commercial speech is constitutionally overbroad.

2. The PROTECT Act pandering provision continues to sweep in protected non-commercial speech.

Because it is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny, determining whether it represents the least restrictive means to advance the government's compelling interest or instead sweeps in a substantial amount of protected speech.[56] Under this analysis, we find the language of the provision problematic for three reasons.

First, that pandered child pornography need only be "purported" to fall under the prohibition of § 2252A(a)(3)(B) means that promotional or [*sic*] speech is criminalized even when the touted materials are clean or non-existent. We echo Senator Leahy's concern that the provision thus "federally criminalize[s] talking dirty over the Internet or the telephone when the person

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[56] *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000).

never possesses any material at all."[57] In a non-commercial context, any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials is a criminal punishable by up to twenty years in prison, even if what he or she actually has is a video of "Our Gang," a dirty handkerchief, or an empty pocket.

Further, while the commercial advertisement of an unlawful product or service is not constitutionally protected, this feature of the Supreme Court's commercial speech doctrine does not apply to non-commercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement. The First Amendment plainly protects speech advocating or encouraging or approving of otherwise illegal activity, so long as it does not rise to "fighting word" status.[58] Thus, the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment.

Finally, we find particularly objectionable the criminalization of speech that "reflects the belief" that materials constitute obscene synthetic or "real" child pornography. Because no regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional

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[57] S. Rep. No. 108-2, title VIII, at 23 (2003).

[58] *See Free Speech Coalition*, 535 U.S. at 253, 122 S. Ct. at 1403 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (holding advocacy of racist violence protected speech)). *See also Kingsley Int'l Pictures Corp. v. Regents of the Univ. of State of N.Y.*, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959) (holding advocacy of immoral activities was protected speech).

speech reflecting the deluded belief that real children are depicted in legal child erotica, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious.[59]

Because lascivious is not defined under the PROTECT Act, we apply its ordinary meaning of "exciting sexual desires; salacious."[60] What exactly constitutes a forbidden "lascivious exhibition of the genitals or pubic area"[61] and how that differs from an innocuous photograph of a naked child (e.g. a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model) is not concrete. Generally, courts must determine this with respect to the actual depictions themselves.[62] While the pictures needn't always be "dirty" or even nude depictions to qualify, screening materials through the eyes of a neutral factfinder limits the potential universe of objectionable images.[63]

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[59] 18 U.S.C. §§ 2252A(a)(3)(B)(ii), 2256(2)(A)(v).

[60] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 4th Ed. (2000)[.]

[61] 18 U.S.C. § 2256(2)(A)(v).

[62] Virtually all lower courts that have addressed the meaning of "lascivious exhibition" have embraced the widely followed "Dost" test, originally developed by a California district court and affirmed in an opinion by the Ninth Circuit. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) *judgm't aff'd*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The test identifies six factors that are relevant to the determination of whether a picture constitutes a "lascivious exhibition of the genitals or pubic area" under child pornography law.

[63] The Third Circuit has held that a depiction can constitute "lascivious exhibition of the genitals" even if a child is wearing clothes. *United States v. Knox*, 32 F.3d 733, 746 (3d Cir. 1994) (discussing the discernability of young girls' genitals through "thin but opaque clothing").

In this case, however, the law does not seek to attach liability to the materials, but to the ideas and images communicated to the viewer by those materials. This shifts the focus from a community standard to the perverted but privately held belief that materials are lascivious. Through this lens, virtually all depictions of children, whom to pedophiles are highly eroticized sexual objects, are likely to draw a deviant response. Many pedophiles collect and are sexually stimulated by nonpornographic depictions of children such as commercially produced images of children in clothing catalogs, television, cinema, newspapers, and magazines —otherwise innocent pictures that are not traditionally seen as child pornography and which non-pedophiles consider innocuous.[64] As illustrated in this case, relatively innocent candid snapshots of children, such as those initially exchanged by the defendant Williams and the undercover agent, are also collected and used as a

Although the material was purchased by Knox for sexual stimulation, the videotapes seized from him did not portray explicit sexual acts nor even depict nudity; rather, they contained "vignettes of teenage and preteen females" engaged in baton twirling and gymnastics routines and sometimes "striking provocative poses for the camera." *Id.* We note that the requirement that lascivious exhibitions be "graphic" under the PROTECT Act's amended obscenity definition likely eliminates a *Knox* result under the obscenity statute. *See* n.46, *supra.* However, that narrower definition does not apply to the pandering provision.

[64] Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L.REV. 209, 259-260 (2001). The highly eroticized use of children in fashion, television, and advertising is now the "soft porn" of child pornography. *Id.* Members of the North American Man Boy Love Association (NAMBLA—an organization for pedophiles, many of whom are in prison) reportedly find erotic stimulation by watching children on network television, the Disney channel, and mainstream films. *Id.* at 260. As one investigator put it: "I had found NMBLA's 'porn' and it was Hollywood." *Id.* (citation omitted)

medium of exchange. We cannot, however, outlaw those legal and mainstream materials and we may not outlaw the thoughts conjured up by those legal materials.

Freedom of the mind occupies a highly-protected position in our constitutional heritage. Even when an individual's ideas concern immoral thoughts about images of children, the Supreme Court has steadfastly maintained the right to think freely. As the Court stated in *Free Speech Coalition*, "First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[65] The Court reiterated that the concern with child pornography is "physiological, emotional, and mental health" of children, and thus regulation is permissible only when targeted at the evils of the production process itself, and not the effect of the material on its eventual viewers.[66] The PROTECT Act pandering provision misses that target and, instead, wrongly punishes individuals for the non-inciteful expression of their thoughts and beliefs.[67] However repugnant we may find them, we may not constitutionally suppress a defendant's beliefs that simulated depictions of children

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[65] 535 U.S. at 253, 122 S. Ct. at 1403 (finding that the fact that possession of non-obscene virtual child pornography may cause sexually immoral thoughts about children was not enough to justify banning it).

[66] *Id.*

[67] *Stanley*, 394 U.S. at 566, 89 S. Ct. at 1249 (stating that legislators "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts").

are real or that innocent depictions of children are salacious.

3. The Supreme Court's decision in Ginzburg *does not support pandering as an independent offense*

The Government's central justification for the pandering provision, found convincing by the district court, relies on the Supreme Court's decision in *Ginzburg v. United States*,[68] for the proposition that an individual may be found criminally liable for promoting material as appealing to prurient interests even though the material actually being promoted might not fall outside the First Amendment's protection. We believe that reliance is ill-grounded.

In *Ginzburg*, erotic publications that were not "hard core" pornography, and may not have been obscene per se, became the subjects of conviction because their prurient qualities were exploited, or pandered, by the defendant for commercially sexual purposes. The Court found that evidence of the manner in which the publications were advertised and mailed "was relevant in determining the ultimate question of obscenity," and that evidence of such pandering on the basis of salacious appeal "may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."[69] In *Free Speech Coalition*, the Court recognized the limited scope of the pandering rationale expressed in *Ginzburg*: that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and

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[68] 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966).

[69] *Id.* at 470, 476, 86 S. Ct. at 947, 950.

thus satisfy the [obscenity] test."[70] The Court also suggested that *Ginzburg* has no application where, as in the case of the CPPA, "[t]he statute does not require that the context be part of an effort at commercial exploitation."[71]

We disagree with the district court that *Ginzburg* supports a prohibition of pandering as a stand-alone crime without regard to the legality, or even to the existence, of the pandered material. First, we note that, notwithstanding its brief mention by the Court in *Free Speech Coalition*, there is some question as to the continued vitality of the *Ginzburg* pandering rationale. Shortly after *Ginzburg* was decided, the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[72] that truthful, non-misleading commercial speech is protected by the First Amendment, although to a lesser degree than protected non-commercial speech. The sort of pandering that caused the publications in *Ginzburg* to be found obscene, in other words, has since gained some First Amendment protection. In one of two post-*Ginzburg* cases in the 1970s, a dissent joined by four justices states that "*Ginzburg* cannot survive *Virginia Pharmacy*."[73] While the Supreme Court has not sub-

[70] 535 U.S. at 258, 122 S. Ct. at 1406 (quoting *Ginzburg*, 383 U.S. at 474, 86 S. Ct. at 942). The Court in *Ginzburg* applied the test for obscenity set out in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), which preceded the current *Miller* test, but the differences between the tests are immaterial for the purposes of our analysis.

[71] *Id.* (internal quotation marks and citation omitted).

[72] 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)[.]

[73] *Splawn v. California*, 431 U.S. 595, 603 n. 2, 97 S. Ct. 1987, 52 L. Ed. 2d 606 (1977) (Stevens, J., dissenting).

stantially addressed the *Ginzburg* pandering rationale since the 1970s, Justice Stevens more recently reiterated that, since *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, a proposal that otherwise legal material be deemed obscene on the basis of its titillating marketing, is "anachronistic."[74] Consequently, although *Ginzburg* has not been overturned, its precedential value is questionable.

Even if the *Ginzburg* pandering rationale remains viable, the PROTECT Act pandering provision, as discussed above, is not limited to the commercial context. In considering the CPPA pandering provision at issue in *Free Speech Coalition*, the Court clearly suggested that, even if the *Ginzburg* pandering rationale remains viable, it would only apply in a the commercial context.[75] The PROTECT Act pandering provision, like the CPPA pandering provision found unconstitutional in *Free Speech Coalition*, does "not require that the context be part of an effort at 'commercial exploitation.'"[76]

Finally, to the extent that the *Ginzburg* pandering rationale remains valid, it lends little constitutional support to the pandering provision at issue here. With respect to the "obscene" virtual or simulated material described under subsection (i), if the pandering rationale remains valid, then it might be the basis for a court to uphold a conviction under the PROTECT Act for distributing material of questionable social value that

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[74] *Playboy Entm't Group, Inc.*, 529 U.S. at 829, 120 S. Ct. 1878 (Stevens, J., concurring).

[75] 535 U.S. at 258, 122 S. Ct. at 1406 (2002).

[76] *Id.* (citation and internal quotation marks omitted).

would not be deemed obscene but for the defendant's promotion of it suggesting that it was. But if the rationale holds, then this would be the case under existing obscenity law and the pandering provision adds nothing in that respect. The rationale does not justify a prosecution under the PROTECT Act that goes farther than existing obscenity law by attempting to convict a defendant for distributing material that is *clearly* not obscene, merely because the defendant pandered it as obscenity.[77]

With respect to "real" child pornography as described under subsection (ii), the *Ginzburg* pandering rationale is of no relevance. If the pandering rationale remains relevant to determinations of obscenity, it does so because such determinations are made by a subjective test that weighs a publication's degree of social value under the *Miller* test. *Ginzburg* held only that pandering may be probative of those factors. Determinations of "real" child pornography as described in subsection (ii), on the other hand, are made by a purely

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[77] A congressional report offers the example of the movie "Carnal Knowledge," which the Supreme Court found not to be obscene because it was not patently offensive. *See* H. Cohen, CRS Report for Congress: Child Pornography: Constitutional Principles and Federal Statutes Produced Without an Actual Child: Constitutionality of 108th Congress Legislation (2003) (citing *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974)). Under the PROTECT Act, if a defendant distributed "Carnal Knowledge" "in a manner that 'reflects the belief, or that is intended to cause another to believe' that it contained an obscene visual depiction of a child, then the defendant would be guilty of a crime." *Id.* But the pandering rationale of *Ginzburg* allows merely "that in close cases evidence of pandering may be probative" of obscenity. *Id*. "Carnal Knowledge," because of the Supreme Court decision, is not a close case; therefore, to distribute it in a pandering manner would not make it obscene. *Id.*

objective test: whether or not the material visually depicts an actual minor engaged in sexually explicit conduct. The manner in which the material is promoted has no bearing on the answer to this question. As one commentator observed, "[n]o amount of pandering, even misleading pander, can convert a virtual child into a real child."[78]

In sum, the Government urges us to read the PROTECT Act as writing the *Ginzburg* pandering rationale into the law. We note that at least one state law concerning obscene visual depictions of children has succinctly done just that.[79] But the Government asks us to stretch that rationale much farther, to support pandering as an independent crime rather than only as evidence of the crime of obscenity or child pornography. We believe such an interpretation of *Ginzburg* butts directly against the holding of *Free Speech Coalition* and, accordingly, find that *Ginzburg* does not rescue the PROTECT Act pandering provision from substantial overbreadth.[80]

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[78] *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S. 2520 Before the Senate Comm. On the Judiciary*, 107th Cong. (2002) (testimony of Harvard School of Law Professor Frederick Schauer).

[79] *See, e.g.*, Ala.Code § 13A-12-195 (2005), providing that "[w]here the circumstances of the dissemination or public display of matter indicates that it is being commercially exploited by the defendant for its prurient appeal, such evidence may be considered in determining whether the matter appeals to the prurient interest, is patently offensive, or lacks serious literary, artistic, political or scientific value."

[80] Because it was an issue much debated by Congress and commentators in the wake of *Free Speech Coalition*, we do not ignore the "Romeo and Juliet" problem discussed at length in that case. *See* n.27, *supra*. The Court's concern with outlawing material either containing a depiction that "appear[ed] to be" a minor engaging in sexually explicit

4. The PROTECT Act pandering provision is not justified by legislative findings.

The pandering provision of the PROTECT Act, for reasons we have discussed, is inconsistent with *Miller* and *Ferber*, as reaffirmed in *Free Speech Coalition*, and is not sustainable under *Ginzburg*. The Government, however, seeks to justify its prohibitions in other ways.

First, noting the state's compelling interest in protecting children from those who sexually exploit them, Congress relies on *Ferber* and *Osborne* for the proposition that this interest extends to stamping out the

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conduct or that was presented or promoted "in a manner that convey[ed] the impression" that it contained such depictions, was that the whole aim of dramatic presentation is to make fictional happenings "appear" to be real. Under the overbroad definition of the CPPA, non-obscene movies employing youthful actors to simulate minors engaged in apparent sexually explicit conduct could be ensnared, even though no child was involved in the production[.]

Here, Williams urges that the PROTECT Act's "intended to cause another to believe" language is no different than the "appears to be" and "conveys the impression that" language found overbroad by the Court. While the Government argues it is a cure, we do not, for reasons discussed in this section, find the insertion of the word "obscene" into the material description particularly meaningful in avoidance of sweeping in meritorious works where the statute is punishing activity that is unrelated to the actual contents of the material. And if there is otherwise a constitutionally relevant distinction between the sweep of PROTECT and CPPA in this regard, it is a fine one. Whether, in an industry that functions on the suspension of disbelief, legitimate presenters and promoters of artistically meritorious films intend that viewers truly "believe" real minors are involved in such productions or, rather, simply invite the viewer to imagine, is debatable. Because we find the Act infirm on a number of other fronts, we need not split this hair.

market for child pornography.[81] However, Congress has not adequately explained why the mere pandering of otherwise legal material should be prohibited in the pursuit of this interest.

In the PROTECT Act's Conference Report, Congress mentions that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material."[82] This appears to be a resurrection of the market-deterrence theory advanced by the Government, and rejected by the Court, in *Free Speech Coalition*. As the Court recognized, the prohibitions of "real" child pornography in *Ferber* and *Osborne* were upheld on a production-based rationale. The Court in *Ferber* allowed market deterrence restrictions because they destroyed the profit motive to exploit real children. Congress has again failed to articulate specifically how the pandering and solicitation of legal images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct.

Next, the Government points to the legislative findings of the PROTECT Act that articulate the difficulties in successful prosecution of child pornography possession cases where advancements in computer technology allow images to be so altered as to cast rea-

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[81] Congressional Findings (501) at (2)-(3) (citing *Osborne v. Ohio*, 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) and quoting *New York v. Ferber*, 458 U.S. 747, 760, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) ("The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons, selling, advertising, or otherwise promoting the product.")).

[82] H.R. Rep. No. 108-66, Title V, at 62 (2003).

sonable doubt on whether they involve real children.[83] Congress characterizes the pandering provision as "an important tool for prosecutors to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes."[84] The Government argues that, grounded on these findings, the pandering provision allows prosecutions to go forward against persons who not only have the intent to participate in the child pornography market, but who actively solicit others to participate in that market, regardless of whether the government can prove whether the underlying material is real child pornography or not. Without such prosecutorial tools, it argues, the child pornography market will flourish, harming real children.[85]

This argument not only attempts, once again, to revive the rejected market proliferation rationale but also disregards the firmly established principle that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech."[86] And when the "technical reason" is that the material being described or exchanged does not fall within one of the two proscribable categories—but instead is legal child erotica, innocent pictures of children arousing only in the minds of certain viewers, or non-existent—the Government cannot circumvent the criminal procedure process. In a non-commercial setting, in which most child pornography is discussed and exchanged, pan-

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[83] *See* Findings 501 at (10)-(13).

[84] S. Rep. No. 108-2, Title VIII, at 23 (2003) (remarks of Sen. Patrick Leahy).

[85] *See* Findings 501 at (13).

[86] *Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. at 1404.

dering at most either raises actionable suspicion that illegal materials are possessed[87] or is evidentiary of the social merit of questionable materials. The Government must do its job to determine whether illegal material is behind the pander.

The Government urges that we consider this simply an inchoate crime, arguing that only those with specific intent to traffic in illegal child pornography will be ensnared[88] and noting, for example, that offers to buy or sell illegal drugs can be punished even if no drugs actually exist. However, the inchoate offenses—attempt, solicitation, conspiracy—are covered elsewhere in the code.[89] Further, the intent element only applies to one portion of the provision—promoting material in a

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[87] A number of courts have held that affidavits that defendants had joined Internet e-groups that members used to exchange child pornography provided probable cause to search their home, although there was no evidence that the defendants had ever downloaded any illegal visual depictions. *See*, *e.g.*, *United States v. Martin*, 426 F.3d 83 (2d Cir. 2005) *petition for cert. filed*, 2006 WL 451674 (U.S. Feb. 16, 2006) (No. 05-1073) (holding that textual email about child pornography exchanged by members of the e-group was not protected speech); *United States v. Coreas*, 426 F.3d 615 (2d Cir. 2005) (same); *United States v. Froman*, 355 F.3d 882 (5th Cir. 2004)(same); *United States v. Hutto*, 84 Fed. Appx. 6 (10th Cir. 2003) (unpublished) (same).

[88] *See* H. R. Rep. No. 108-66 (2003) (stating that the instant pandering provision "bans the offer to transact in unprotected material, coupled with proof of the offender's specific intent."); S. Rep. No. 108-2, at 10 n.6 (2003) (stating that the provision requires the government to establish that the defendant acted with the specific intent to traffic in obscene material or actual child pornography).

[89] *See* 18 U.S.C. § 2252A(b)(1) (which expressly applies to the pandering provision) and 18 U.S.C. § 1466A(a) (criminalizing the attempt or conspiracy to produce or distribute obscene or real child pornography).

manner "that is intended to cause another to believe" it is illicit—and, to be a violator, one need not intend to distribute illegal materials, but only intend that another believe the materials one has are lascivious. Also, a defendant may be liable for promoting, distributing, or soliciting perfectly legal materials that only he or she personally believes are lascivious. As Professor Schauer notes, "when the non-existence of illegality is a function not of the non-existence of an illegal product but rather the non-illegality of an existing product, the First Amendment returns to the picture."[90] Finally, with any inchoate offense the government must show some substantial movement toward completing the crime, must prove, in other words, something beyond mere talk. Under the PROTECT Act pandering provision, mere talk is all that is required for liability and that does not square with Supreme Court First Amendment jurisprudence.

In sum, we recognize that Congress has a compelling interest in protecting children and, to that end, may regulate in interstate commerce settings the distribution or solicitation of the materials described in subsections

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[90] *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S. 2520 Before the Senate Comm. On the Judiciary*, 107th Cong. (2002) (testimony of Professor Frederick Schauer). We note that this is also what differentiates the instant pandering provision from state laws that criminalize the pandering of prostitution. While a defendant may be convicted, for example, for soliciting sex from an undercover police officer, even though the officer has no intention of actually consummating the deal, in a jurisdiction that has outlawed prostitution, there is no circumstance under which sex for money may be legal. For this reason, the Government's "phantom" drug analogy is also unpersuasive.

(i) (obscene child pornography) and (ii) ("real" child pornography) of the PROTECT Act pandering provision. However, the pandering provision goes much farther than that. The provision abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep, and the reasons the Government offers in support of such limitations have no justification in the Supreme Court's First Amendment precedents. Accordingly, we find it unconstitutionally overbroad.

H. Williams's Vagueness Challenge

The Government contends that, since the written plea agreement references only Williams's right to appeal his pandering conviction on grounds of overbreadth, he has waived his vagueness challenge. We disagree. We recognize that vagueness and overbreadth doctrines, although "logically related and similar," are distinct.[91] However, plea bargains, as we have noted, are like contracts and should be interpreted in accord with the parties' intent.[92] Further, a written plea agreement should be viewed against the background of the negotiations, avoiding interpretation that directly contradicts an oral understanding; and, because it constitutes a waiver of substantial constitutional rights, should be read, where in doubt, against the government.[93] The record in this case clearly reflects the parties' intent to preserve Williams's constitutional challenges under both overbreadth and vagueness doc-

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[91] *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

[92] *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005).

[93] *United States v. Nyhuis*, 8 F.3d 731, 742 (11th Cir. 1993) (quoting *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990)).

trines.[94] That the written memorialization of that agreement omitted the latter of these related grounds is insufficient to support waiver.

Laws that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of sensitive First Amendment freedoms.[95] Thus, to pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.[96] Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and

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[94] Williams's motion to dismiss was expressly raised on grounds that the pandering provision was both overbroad and vague. The remarks of counsel during the plea colloquy reference the parties' agreement that Williams was preserving challenges under both doctrines and the importance of a ruling on that motion to ensure preservation, especially as to the vagueness claim, was discussed at some length by the parties and the court.

[95] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972). With respect to chilling effects, the problems of vagueness and overbreadth are, plainly, closely intertwined since those persons covered by the statutes are bound to limit their behavior to that which is unquestionably safe.

[96] *Kolender*, 461 U.S. at 357, 103 S. Ct. at 1858 (1983); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F.3d 1542 (11th Cir. 1997).

precision is demanded of criminal statutes because their consequences are more severe.[97]

In this case, considering a penal statute that both restricts speech and carries harsh criminal penalties, it is not at all clear what is meant by promoting or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe" that touted or desired material contains illegal child pornography. This language is so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed. Moreover, the proscription requires a wholly subjective determination by law enforcement personnel of what promotional or solicitous speech "reflects the belief" or is "intended to cause another to believe" that material is illegally pornographic. Individual officers are thus endowed with incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates.[98]

Suppose, for example, the government intercepts an email claiming that the attached photographs depict

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[97] *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

[98] *See City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (holding unconstitutionally vague an anti-loitering ordinance, which defined loitering as remaining in place with "no apparent purpose," finding that standard "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene."); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (finding unconstitutionally vague a city ordinance prohibiting speech that "in any manner" interrupts a police officer in the performance of his duties, without limitation to fighting words or to obscene or opprobrious language).

"little Janie in the bath—hubba, hubba!" Does this "reflect a belief" on the sender's part that the photos are lascivious? As discussed above, the law does not require the pandered material to contain any particular content nor, in fact, that any "purported" material need actually exist. Since the "reflects the belief" portion of the statute has no intent requirement, the government establishes a violation with proof of a communication that it deems, with virtually unbounded discretion, to be reflective of perverse thought. Regardless of what is actually depicted in the photos in our example—whether they are innocent baby-in-the-bubbles snapshots or candid stills of the family Rottweiler in a No. 10 washtub—regardless, in fact, of whether *any* photos are attached, this communication could be interpreted as criminal behavior. And because the PROTECT Act's affirmative defense does not apply to the pandering provision, it is no defense to show that the underlying materials are not, in fact, illegal child pornography.

Even more complex is the determination of what constitutes presentation in a "manner that is intended to cause another to believe" that material contains illegal child pornography. Let us consider, for example, an email entitled simply "Good pics of kids in bed." Let us also imagine that the "pics" are actually of toddlers in footie pajamas, sound asleep. Sender One is a proud and computer-savvy grandparent. Sender Two is a chronic forwarder of cute photos with racy tongue-in-cheek subject lines. Sender Three is a convicted child molester who hopes to trade for more graphic photos with like-minded recipients. If what the statute required was a specific intent to traffic in illegal child pornography, the identity of the sender and the actual content of the photos would be probative. Senders One and Two would

be off the hook while Sender Three may warrant further investigation.

But again, the pandering provision requires no inquiry into the actual nature or even existence of the images and provides no affirmative defense that the underlying materials are not, in fact, illegal child pornography. The offense is complete upon communication "in a manner that," in the discretionary view of law enforcement, "is intended to cause another to believe" that materials are illegal child pornography. Here, the "manner" of presentation, as well as the plainly legal underlying material, are identical in all three instances. And Sender Two clearly intended that his recipients believe, however briefly, that the attached photos were sexually explicit depictions of minors.

While posting in a known child pornography chat room would clearly spotlight the true child abuser, in open cyberspace, which of these communicators is a criminal?[99] The pandering provision is devoid of any contextual parameters for the restriction on conduct that might illuminate its meaning and rescue it from vagueness.[100] Absent such a contextual backdrop, the

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[99] *See Reno v. ACLU*, 521 U.S. 844, 876, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (recognizing that overly vague restrictions may curtail a significant amount of protected speech in the relatively borderless architecture of the Internet).

[100] *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 332, 108 S. Ct. 1157, 1169-70, 99 L. Ed. 2d 333 (1988)[ ] (noting that the court's interpretation of the challenged statute as protecting the "peace" was sufficiently precise because of the particular context of the peace of an embassy); *Grayned*, 408 U.S. at 112, 92 S. Ct. at 2304 (finding that an anti-noise ordinance was not vague where it was written specifically to forbid disturbance of schools because "prohibited disturbances are easily measured by their impact on normal activities of the school").

language of this law is too imprecise a standard to provide sufficient guard against arbitrary deprivation of a significant liberty interest.

We again recognize that Congress may regulate the distribution or solicitation of the illegal materials described in subsections (i) (obscene child pornography) and (ii) ("real" child pornography) of the pandering provision. If that were all the provision did, we would find no constitutional infirmity on vagueness grounds. However, the statute is unnecessarily muddled by the nebulous "purported material" and "reflects the belief, or is intended to cause another to believe" language. Because of this language, the pandering provision fails to convey the contours of its restriction with sufficient clarity to permit law-abiding persons to conform to its requirements. Because of this language, the provision is insusceptible of uniform interpretation and application by those charged with the responsibility of enforcing it. Accordingly, we find it impermissibly vague.

III. Williams's Booker *Challenge*

A. Standard of Review

Where, as here, there is a timely objection, we review a defendant's *Booker* claim in order to determine whether the error was harmless.[101] There are two harmless error standards, one of which applies to *Booker* constitutional errors, the other to *Booker* statutory errors.[102] Statutory errors are subject to the less demanding test that is applicable to non-constitutional

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[101] *United States v. Mathenia*, 409 F.3d 1289, 1291 (11th Cir. 2005).

[102] *Id.*

errors.[103] A non-constitutional *Booker* error is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the sentence, or had but very slight effect.[104] If one can say with fair assurance that the sentence was not substantially swayed by the error, the sentence is due to be affirmed even though there was error.[105] Because this is a *Booker* statutory error case we will apply that standard.

B. No Reversible Booker *Error*

Williams was assessed (1) a two-level sentence enhancement for use of a computer for transmission, receipt or distribution of child pornography (2) a two-level sentence enhancement for possession of child pornography because the pornographic material at issue involved minors under age twelve, and (3) a four-level sentence enhancement because the material involved portrayed sadistic or masochistic conduct or other depictions of violence. Because these enhancements were applied under a mandatory guidelines scheme, error occurred.[106] However, because Williams admitted to the factual basis for his sentence, which included the facts underlying these enhancements, there was no Sixth Amendment *Booker* error.[107]

We conclude that, viewing the proceedings in their entirety, the sentence was not substantially swayed by the statutory error. Williams was sentenced above the

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[103] *Id.*

[104] *Id.* (citation and internal quotation marks omitted).

[105] *Id.*

[106] *See United States v. Shelton*, 400 F.3d 1325, 1331 (11th Cir. 2005).

[107] *Id.* at 1329-30.

bottom of the 57 to 71 month guideline range for the possession count, and the district court, exercising its discretion, expressly declined his request for a lower sentence within that range. The court also stated that, even if not bound by the guidelines, it had doubts that the sentence would be any lower, and it may have been higher. While the judge declined to issue an alternative sentence in anticipation of *Blakely*'s application to the guidelines given the then-settled state of that issue in this circuit, he explained his decision thoroughly enough that we are confident that he would not lower the sentence in this case on remand.

IV. Conclusion

In the wake of *Free Speech Coalition*, sexually explicit speech regarding children that is neither obscene nor the product of sexual abuse of a real minor retains protection of the First Amendment. We believe the Court's decision in *Free Speech Coalition* leaves Congress ample authority to enact legislation that allows the Government to accomplish its legitimate goal of curbing child abuse without placing an unacceptably heavy burden on protected speech. Certainly Congress took many cues from the Court in drafting the legislation at issue in this case.

Given the unique patterns of deviance inherent in those who sexually covet children and the rapidly advancing technology behind which they hide, we are not unmindful of the difficulties of striking a balance between Congress's interest in protecting children from harm with constitutional guarantees. However, the infirmities of the PROTECT Act pandering provision reflect a persistent disregard of time-honored and constitutionally-mandated principles relating to the

Government's regulation of free speech and its obligation to provide criminal defendants due process. Because we find the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional, we reverse Williams's conviction under that section. However, because we find no reversible *Booker* error in his sentencing for possession of illegal child pornography, we affirm his sentence of 60-months imprisonment.

CONVICTION REVERSED AND SENTENCE ON COUNT ONE VACATED; SENTENCE ON COUNT TWO AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 04-20299-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL WILLIAMS, DEFENDANT

[Filed Aug. 20, 2004]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT I OF INDICTMENT

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss Count I (DE 37) filed on July 14, 2004 ("Motion"). The United States of America filed to the Motion (DE 42) on July 16, 2004. The Court has reviewed the Motion, the entire record and is otherwise fully advised in the premises.

On April 29, 2004, Michael Williams ("Williams") was signed onto a public chat room. A conversation began between Williams and an undercover agent ("Agent"). Where they discussed swapping pictures of their daughters over the internet. Williams invited the Agent to access his photo album on line where the Agent viewed five pictures of a one to two year old child in various poses. As the conversation continued, Williams

requested that the Agent provide pictures. When the Agent failed to produce such pictures, Williams accused the Agent of being a cop. Shortly thereafter, Williams posted a message to the chat room which stated "HERE ROOM: I CAN PUT UP LINK CUZ IM FOR REAL - SHE CAN'T" followed by a hyperlink to child pornography. Based on the above detailed conduct Count One of the indictment charges Williams with violating 18 U.S.C. §2252A(a)(3)(B). On July 19, 2004, Williams plead[ed] guilty to Count I of the indictment but reserved his right to challenge the constitutionality of 18 U.S.C. §2252A(a)(3)(B). Pursuant to Fed. R. Crim. P. 11(a)(2), the plea agreement entered into by Williams and the Government states that the parties "agree that the defendant's right to appeal whether 18 U.S.C. §2252A(a)(3)(B) is constitutionally overbroad under the First Amendment to the U.S. Constitution is preserved." Plea Agreement ¶8.

Accordingly, Williams seeks to have the Court rule that 18 U.S.C. §2252A(a)(3)(B) is unconstitutional on its face because it is vague and overbroad. Thus, Williams seeks to have Count One of the indictment dismissed. 18 U.S.C. §2252A(a)(3)(B) subjects a person to criminal penalties if the person knowingly:

> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in 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.

Williams argues that the statute is unconstitutional because it does not reasonably provide notice as to what it criminalized. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged." *United States v. Greenpeace, Inc.*, 314 F. Supp.2d 1252, 1258 (S.D. Fla. 2004) (*quoting United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963)). Williams' Motion makes only a peripheral "void for vagueness" challenge. He does not articulate any particular words in the statu[t]e which are so vague that they fail to provide notice. His Motion appears to more appropriately argue his position in terms of an overbreadth challenge. In addition, his plea agreement only refers to his overbreadth challenge. Therefore, in light of the lack of substance of Williams' vagueness argument the Court finds it unnecessary to address the substance of a vagueness challenge to this statute; particularly, where the Court finds that the argument, even if made with more fervor, would not be successful. Defendant also argues that the statute is overbroad because it can be violated without the underlying material actually being child pornography. In its Response, the Government asserts that the speech which the statute criminalizes is not afforded any First Amendment protection.

Standard of Review

Pursuant to Fed. R. Crim. P. 12(b) a defendant can bring a pretrial motion based on "any defense, objection, or request that the court can determine without a trial on the general issues." Fed. R. Crim. P. 12(b)(3)(B) specifically addresses a defendant's ability to bring such a motion to allege a deficiency in the indictment. Where the alleged deficiency in the indictment involves a matter of law and the pertinent facts are not disputed, the motion is proper for disposition by the district court without a trial. *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977);[1] see also *United States v. Torkington*, 812 F.2d 1347, 1154 (11th Cir. 1987). Williams argues that 18 U.S.C. §2252A(a)(3)(B) is unconstitutional on its face. This argument is properly addressed by the district court without the need for a trial as it is purely a matter of law.

Facial Challenges

Williams challenges the statu[t]e, not because of [*sic*] it is inapplicable to his conduct as described above, but because he claims the statute is unconstitutionality [*sic*] on its face. To conduct a facial challenge, the Court must look beyond the facts in the indictment. A facial challenge requires the Court to analyze the statute and its possible applications. Adjudicating this type of challenge gives me pause. The Supreme Court has cautioned federal judges to be ever mindful of the [*sic*] "two of the cardinal rules governing the federal courts["]: "[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of

[1] The Eleventh Circuit has adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (citations omitted). In fact, the Supreme Court recently noted, while deciding a defendant's facial challenge to a federal criminal statute, that such facial challenges are discouraged. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004) (discussing how facial challenges require courts to make decisions on fact-poor records and require a relaxation of the standing requirement); *see also Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (discussing the social costs created by the over-breadth doctrine where it blocks prosecution of constitutionally unprotected speech or conduct). Despite this admonition, the Supreme Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Id.* (internal citations omitted). Free speech is one of the overbreadth settings listed by the Court in *Hicks*. *Id.* (citing *Broderick v. Oklahoma*, 413 U.S. 601 (1973)). My reluctance to entertain a facial challenge, moreover, is both limited and informed, by the Supreme Court's decisions in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004),[2] both of which addressed facial First Amendment challenges to recent legislation passed by Congress. The Court's decision in *Ashcroft I* is of particular importance because it decided a facial

[2] Throughout the remainder of this Order, the Court will refer to *Ashcroft v. Free Speech Coalition*, 535 U.S. 261 (2002) as *Ashcroft I*, so as not to confuse it with *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004) which recently addressed the First Amendment's effect on the Child Online Protection Act (COPA), 47 U.S.C. § 231.

challenge to the statute which was the predecessor to the statute currently before this Court. *Ashcroft I*, 535 U.S. at 244 (stating that "[t]his case provides a textbook example of why we permit facial challenges to statutes that burden expression"). Therefore, although with substantial reluctance I believe I must decide this case not based merely on the facts presently before the Court, but also upon consideration of what possible protected speech the statute "may unintentionally ensnare." *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).

"The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled." *Id.* at 255. As Judge Edmonson has pointed out there has been some disagreement among members of the Supreme Court as to what standard should be employed in a court's analysis of such challenges. *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir. 1996).[3] Judge Edmonson stated that the disagreement centered on two alternative standards. *Id.* Specifically, some Justices indicated that "a statute is not facially invalid unless there is no set of circumstances in which it would operate constitutionally; others contend the cases require only that a statute would operate unconstitutionally in most cases." *Meggs*, 87 F.3d at 459 (citations omitted). Both of these standards to which Judge Edmonson referred continue to be used in facial challenges in general. Compare *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir.

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[3] Judge Edmonson's discussion is in the context of a First Amendment case. However, he does not articulate whether or not there is a separate test used specifically for overbreadth challenges. He does note that "facial challenges may succeed more often" as a result of the overbreadth doctrine. *Meggs*, 87 F.3d at 459 n. 2 (citation omitted).

2001) (asserting that a facial challenge will only be successful when it is established that no set of circumstances could be constitutionally applied to the statute) with *Ward v. County of Orange*, 217 F.3d 1350, 1355 (11th Cir. 2000) (stating that a statute is "facially invalid under the First Amendment only if it is [']substantially overbroad, that is, its application would be unconstitutional in a substantial portion of cases[']") (citations omitted).

However, when it comes to facial challenges premised on the First Amendment, it appears that the disagreement as to the applicable [*sic*] is a more subtle one.[4] In fact, the Supreme Court recently articulated the standard in a First Amendment facial overbreadth challenge as allowing a statute to be found invalid only where the challenger

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[4] Justice Kennedy writing for the majority states that under the overbreadth principle a statute "is unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft I*, 535 [U.S.] at 244 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). Justice O'Connor, concurring in part and dissenting in part, wrote in Part II of her opinion that litigants who bring facially overbroad challenges "bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech." *Id.* at 265. Chief Justice Rehnquist, whom Justice Scalia joined in his opinion, joined in Part II of Justice O'Connor's opinion. Justice Rehnquist further articulated that a statute is not normally struck down on First Amendment grounds "when a limiting construction has been or could be placed on the challenged statute." *Id.* at 268 (*quoting Broadrick*, 413 U.S. at 613). None of these opinions require[s] that a statute be held facially unconstitutional where an individual articulates *an* unconstitutional application. Instead, as indicated by the [*sic*] all of the opinions in *Ashcroft I* and by those in *Hicks* and *Bonner*, the term substantial is key to this analysis. *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002). Therefore, finding one standard articulated both by the Supreme Court and the Eleventh Circuit, the Court does not find it necessary to analyze this statutory provision under multiple tests as Judge Edmonson did in *Meggs*.

establishes that the challenged statute prohibits a "[']substantial['] amount of protected free speech, [']judged in relation to the statute's plainly legitimate sweep.[']" *Hicks*, 539 U.S. at 118-119 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). The Eleventh Circuit used nearly identical language when it recently discussed an overbreadth First Amendment challenge. *See Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002). This appears to be the standard I should employ in determining if Williams' challenge is a successful one. Therefore, the question is whether Williams has shown that 18 U.S.C. § 2252A(a)(3)(B) prohibits a substantial amount of speech protected by the First Amendment when judged in relation to the legitimate sweep of the statute. With this in mind, the Court turns to the analysis of the statute.

The PROTECT Act of 2003 and Its History

It is undisputed that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 759 (1982). However, technological advances together with First Amendment concerns present ever growing impediments to achieve this objective. Congress has passed seven different pieces of legislation in an attempt to deal with the problem of sexual exploitation of children.[5]

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[5] The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978); The Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; The Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510; The Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7511, 102 Stat. 4485; The Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818; The Child Pornography Prevention Act of 1996, Pub. L. No. 104-

The statutory provision at issue in the instant action, 18 U.S.C. § 2252A(a)(3)(B), is the pandering provision of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("The PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650. Congress passed the PROTECT Act in an effort to respond to the United States Supreme Court's decision in *Ashcroft I*. In *Ashcroft I*, the Supreme Court found sections of the Child Pornography Prevention Act of 1996 ("CPPA"), passed by Congress in 1996, to be unconstitutional. *Ashcroft I*, 535 U.S. at 258. CPPA was one of Congress' first attempts to proscribe child pornography on the internet. The PROTECT Act is Congress' second effort at dealing with the new hurdle of preventing the sexual abuse of children in light of the new markpetplace for child pornography created on the internet.[6]

In drafting the PROTECT Act, Congress began with the premise that "[t]he Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective." Congressional Findings at § 501(3) ("Findings"). In *Ferber*, the Supreme Court recognized that the most "expeditious, if not the only practical method of law enforcement may be to dry up the market" for child pornography. *Id.* (*citing Ferber*, 458 U.S. at 760). However, law enforcement's ability to "dry up the market" has been hindered by new technology. The *Ferber* decision resulted

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208, § 121, 110 Stat. 3009, 3009-26; and the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

[6] As Senator Hatch articulated in his introduction of the PROTECT Act, "[d]isgusting as child pornography is, the growth of technology and the rise of the internet have flooded our nation with it." 149 Cong. Rec. S231-01, S236-237.

in the eradication of child pornography from adult bookstores. *Id.* at (15). The PROTECT Act seeks to achieve a similar eradication—the cessation of the trafficking of child pornography completely, including, its existence on the internet. *Id.*

The Supreme Court in *Ashcroft I* expressed its doubt about the link between computer generated child pornography and the abuse of children.[7] However, Congress' findings attempt to respond to the Court's skepticism regarding the strength of this link. Congress found that "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." Findings at (7). Furthermore, for the time being, the technology available to create child pornography using virtual children is cost prohibitive. *Id.* at (11). Accordingly, instead of creating child pornography using virtual children, pornographers make it with actual children and escape prosecution using non-cost prohibitive technology to alter the images of real children just enough to cast a reasonable doubt as to the real or virtual nature of the images. *Id.* Moreover, even if the technology necessary to create virtual child pornography becomes cheaper, there is no indication that being able to easily create virtual child pornography will somehow have a positive impact on the rates of sexual abuse of children. *Id.* The argument against child pornography is not based on the proposition that children are sexually

[7] The Government argued that the "objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well." *Ashcroft I*, 535 U.S. at 254. The Supreme Court found such "hypothesis [] somewhat implausible," questioning why child pornographers would use real children in the production of their pornography and risk prosecution when they could use virtual children and escape prosecution. *Id.*

abused merely for the creation of child pornography. Rather "the production of child pornography is a by-product of, and not the primary reason for, the sexual abuse of children." *Id.* at (12).

Child sexual abuse is insidious and is already difficult to detect and prevent. The internet has made it even more problematic for society in its efforts to stop the sexual abuse of children. The internet has created a whole new venue for those interested in child pornography. Individuals who sexually abuse children can exchange pictures of the children over the internet, make arrangements to swap children, and make contact with children directly. It is not their ability to communicate over the internet which makes it more difficult to prosecute those who sexually abuse children. It is the ability to escape prosecution by using pictures which falsely appear computer generated. *Id.* at (5). This evasive technique has placed an additional hurdle on the Government wholly created by the use of technology. *Id.* at (9). As a result, there is a decrease in the number of successful child pornography prosecutions because the Government is restricted to only prosecuting those rare child pornography cases where the child in the image can be identified or the origin of the image is known. *Id.* Moreover, this has also resulted in a dramatic increase in the costs of prosecuting these cases. *Id.* at (10). It is the combination of the proliferation of child pornography on the internet and the rising difficulty of prosecuting child pornography cases that prompted Congress to pass the PROTECT Act, which included the provision now before the Court. In analyzing the constitutionality of this section of the PROTECT Act, it is useful to first examine cases which dealt with the constitutionality of previous statutes designed to prevent the proliferation of child pornography.

Child Pornography and the First Amendment

The Supreme Court has held that First Amendment protections are not absolute, but come with some well established limitations. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). These include "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." *Ferber*, 458 U.S. at 764. The Supreme Court first addressed the Government's ability to prohibit the promotion and distribution of child pornography in *Ferber*. In *Ferber*, the issue was whether or not a state could proscribe speech which was not obscene, but involved children engaged in sexual conduct. *Ferber*, 458 U.S. at 753. In *Ferber*, two undercover police officers purchased two films from a bookstore which were "devoted almost exclusively to depicting young boys masturbating." *Id.* at 752. The owner of the bookstore was convicted of violating a New York law which controlled the dissemination of child pornography. *Id.* The New York Court of Appeals held that the statute at issue violated the First Amendment. *Id.* In overturning the New York Court of Appeals' decision, the Supreme Court articulated five reasons which supported its decision that "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 756. The reasons articulated in *Ferber* have no less strength today than twenty years ago, when *Ferber* was decided.

The Court began by articulating the state's compelling interest in protecting children based on a democratic society's need for healthy well-rounded children who mature into citizens for its livelihood. *Id.* at 757. Second, distribution of items which memorialize a child's participation in sexual activity is "intrinsically related to the sexual abuse of children in at least two ways." *Id.* at 759.

The harm to a child is aggravated (1) by the child's knowledge that their participation is memorialized and (2) because a permanent record will continue to circulate in the marketplace. *Id.* The Court noted that the market must be closed if "the sexual exploitation of children is to be effectively controlled." *Id.* at 759. The third reason relied on by the Court in determining that states could criminalize the selling or advertising of child pornography was that such conduct provided an economic incentive for people to produce child pornography, the production of which was "illegal throughout the Nation." *Id.* at 762 (citations omitted). The Court also noted that there is little, if any, artistic or literary value to images or performances which include children engaging in lewd sexual conduct. *Id.* at 762. Last, the Court stated that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not, incompatible with [the Court's] earlier decisions." *Id.* at 763.

The Supreme Court again visited the issue of whether an individual's right to free speech under the First Amendment extends to child pornography in *Osborne v. Ohio*, 495 U.S. 103 (1990). The issue in *Osborne* was whether a state "may constitutionally proscribe the possession and viewing of child pornography." *Osborne*, 495 U.S. at 108 (discussing the issue before the Court in comparison to the Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969) where the Court held a statute criminalizing the private possession of obscene material unconstitutional). The Court reasoned that a state has more leeway in proscribing the private possession of child pornography, than the private possession of obscenity because in regulating child pornography the state is not merely concerned about the "poison[ed] minds of its

viewers," but with attempting "to protect the victims of child pornography" and "destroy a market for the exploitative use of children." *Osborne*, 495 U.S. at 109. "Given the gravity of the State's interests in this context, [the Court] f[ou]nd that [the state] may constitutionally proscribe the possession and viewing of child pornography." *Id.* at 111.

It is the gravity of the interests articulated by the states which led the Supreme Court to find that states can proscribe various conduct involving child pornography and not offend the First Amendment. The production, promotion, advertisement, and private possession of child pornography have all been able to be criminalized without running afoul of the First Amendment. The question before this Court is whether Congress' attempt to regulate the pandering of child pornography can survive a facial First Amendment challenge.

Pandering

Williams correctly points out that the statute does not require the speech it prohibits to be child pornography or obscenity. Instead, the statute criminalizes the use of material or purported material which one knowingly uses in a manner to reflect the belief or intend to cause another to believe that the material or purported material is, or includes obscenity or actual child pornography. 18 U.S.C. § 2252A(a)(3)(B). This provision, known as the pandering provision, was intended to be a strong tool for prosecutors to allow them "to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes." S. Rep. 108-2 at 23-24. An individual who panders "caters to or profits from the weaknesses or vices of others." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1401 (2nd ed. 1987). This is not the first time a court has dealt with the

Government's ability to hold an individual criminally liable for promoting material as that which is unprotected despite a finding that the material actually being promoted does not fall outside the First Amendment's protection. *See Ginzburg v. United States*, 383 U.S. 463 (1966).

In *Ginzburg*, an individual was convicted under a federal obscenity statute for the distribution of material which standing alone was not obscene. *Id.* at 464-65. The Court held that the context in which one presented material, including evidence of pandering, could be used to determine if an individual violated a federal obscenity statute. *Id.* at 472-74. The material underlying the defendants' convictions in a neutral environment may not have been considered obscene, however, in an environment where the defendants "proclaimed its obscenity," the Court held the First Amendment was not violated by holding the defendants culpable under the obscenity statute. *Id.* at 472. "[T]he fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthen[ed] the conclusion that the transactions" were not constitutionally protected. *Id.* at 474-75. The defendants in *Ginzburg* were not challenging the validity of the statute they were charged with violating. Their challenge was one of the statute's application to their conduct. However, the protection they sought under the First Amendment is similar to that which Williams seeks in the instant case. Just as the *Ginzburg* defendants claimed to those they communicated with that the materials they were offering were obscene, Williams communicated to the chat board that he had access to child pornography and asked them to view it as well. The context involved in the instant case, wherein the Defendant proclaimed the unlawful nature of the materials he

was disseminating, is the same as that in the *Ginzburg* case.

Applying *Ginzburg* to the statutory provision at issue, it becomes clear that Williams' First Amendment challenge must fail. First, the instant statute involved herein is more narrowly targeted than the statute in *Ginzburg*. It criminalizes only pandering. Further, the statute in *Ginzburg* prohibited the mailing of certain obscene, lewd, lascivious, and indecent materials, but the statute in the instant case criminalizes a narrower sector of speech than that criminalized by the *Ginzburg* statute. Moreover, the instant statute was promulgated to serve a more compelling governmental interest than the interest involved in the *Ginzburg* statute. *See Osborne*, 495 U.S. at 111 (discussing the gravity of the state's interest in regulating child pornography compared to the state's interest in regulating obscenity). The combination of these three facts leads the Court to believe that Count One of the indictment charging Defendant with violating 18 U.S.C. § 2252A(a)(3)(B) does not violate the First Amendment. However, before finishing our analysis[,] it is necessary to examine the effect of *Ashcroft I* on Williams' facial challenge.

Ashcroft v. Free Speech Coalition

Williams relies on the Supreme Court's recent decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) in arguing that the statute at issue is unconstitutional. In *Ashcroft I*, the Unites States Supreme Court held that two provisions of the Child Pornography Prevention Act of 1966 (CPPA) were overbroad and thus unconstitutional. *Id.* at 256 (holding 18 U.S.C. § 2256(8)(B) and 18 U.S.C. § 2256(8)(D) unconstitutional). Section 2256(8)(B) "prohibit[ed] "[']any visual depiction, including any

photograph, film, video, picture, or computer or computer-generated image or picture,[’] that [‘]is, or appears to be, of a minor engaging in sexually explicit conduct.[’]” *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B)). “Section 2256(8)(D) define[d] child pornography to include any sexually explicit image that was [‘]advertised, promoted, presented, described, or distributed in such a manner that conveys the impression[’] it depicts [‘]a minor engaging in sexually explicit conduct.[’]” *Id.* at 242 (quoting 18 U.S.C. § 2256(8)(D)). 18 U.S.C. § 2256(8)(D) was the section of the CPPA directed at images pandered as child pornography. *Id.* at 242 (citing S. Rep. No. 104-358, p. 22 (1996)).

There is only a small portion of the *Ashcroft I* decision devoted to the discussion of the pandering provision at issue in that case. See *id.* at 257-259. However, the Court looks to the decision as a whole for guidance on the issue of the First Amendment’s applicability to child pornography. The *Ashcroft I* opinion begins by noting that in order to uphold the CPPA, the Court would have to hold that virtual child pornography should be added to the list of categories of unprotected speech. *Id.* at 246. The Court rejected that principle and stated that child pornography is not without First Amendment protection because of its content, but because the images depicted in child pornography are the result of the sexual abuse of children. *Ashcroft I*, 535 U.S. at 249. After an examination of the *Ferber* and *Osborne* opinions, which the Court stated were rooted in a concern for those who participate in child pornography, the Court found that “[v]irtual child pornography [wa]s not “intrinsically related” to the sexual abuse of children.” *Ashcroft I*, 535 U.S. at 250 (internal citations omitted).

In *Ashcroft I*, the Government argued that virtual child pornography, despite the lack of involvement of actual children, should be constitutionally proscribed because (1) virtual child pornography can be use by pedophiles to seduce children; (2) virtual child pornography encourages pedophiles to abuse children by whetting the appetites of pedophiles; (3) when virtual child pornography and actual child pornography are indistinguishable, the trafficking in virtual pornography promotes the trafficking in child pornography produced using actual children; and (4) it is difficult to prosecute child pornography cases where even expert witnesses cannot determine if the images at issue were created using real children or virtual images. *Ashcroft I*, 535 U.S. at 251-255. The Supreme Court was not persuaded by any of these arguments. In *Ashcroft I*, the Court did not find any support in First Amendment law for a limitation of free speech based on the reasons articulated by the Government. *Id.* The Court found 18 U.S.C. § 2256(8)(B) overbroad and unconstitutional. *Id.* at 256.

At the end of its opinion, the Court turned to the second section of the CPPA at issue in the case, 18 U.S.C. § 2256(8)(D). *Id.* at 257. This provision banned "depictions of sexually explicit conduct that are [']advertised, promoted, presented, described, or distributed in such a manner that conveys the impressions that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[']" *Id.* (quoting 18 U.S.C. § 2256(8)(D)). While this section of the CPPA was aimed at pandering, it also prohibited possession of the material described above. *Id.* at 258. Individuals who were merely in possession of materials that were not child pornography, but that had previously been pandered as child pornography at some point, could be held criminally liable

under this statute without ever having been involved in the pandering. *Id.* The Court found that this restriction on speech was too broad to find support in the rationale of *Ginzburg*. *Id.* In addition, the Court stated that the legislative findings were silent as to the harm posed by material being pandered as child pornography. *Id.* Therefore, the Court held that 18 U.S.C. § 2256(8)(D) was overbroad in violation of the that First Amendment. *Id.*

18 U.S.C. § 2252A

Williams argues that 18 U.S.C. § 2252A(a)(3)(B) suffers the same infirmities as 18 U.S.C. § 2256(8)(D), the pandering provision addressed by the Court in *Ashcroft I*. Accordingly, Williams asserts that 18 U.S.C. § 2252A(a)(3)(B) similarly violates the First Amendment and is overbroad. While there are similarities between the two statutes, they are not dispositive. First, both statutes were passed in an attempt to hold individuals who promote child pornography criminally liable. Second, as the Government points out it their Response, both statutes are "content neutral in that the material being promoted as containing child pornography need not actually contain child pornography." Response at 5. As articulated in this Court's discussion of *Ginzburg*, neither of these facts necessarily induce[s] a finding that this statute prohibits a substantial amount of speech protected by the First Amendment. Instead, the dispositive question before this Court[] is if the statute prohibits a "[']substantial['] amount of protected free speech, [']judged in relation to the statute's plainly legitimate sweep.[']" *Hicks*, 539 U.S. at 118-119 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

18 U.S.C. § 2252A(a)(3)(B) prohibits an individual from knowingly presenting, advertising, or promoting material in a manner which is intended to persuade the recipient of such communication that the underlying material is either obscene or actual child pornography. The statute only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornograpy. Unlike the pandering section at issue in *Ashcroft I*, 18 U.S.C. § 2252A(a)(3)(B) does not criminalize mere possession of material. This statute prohibits exactly what it was intended to prohibit, the pandering in material which is not protected by the First Amendment.

The statutes at issue in *Ashcroft I* were aimed at defining child pornography. *Ashcroft I*, 535 [U.S.] at 24. This statute does not attempt to change the definitions of obscenity or child pornography. It criminalizes the pandering of material involving either category of speech, both of which states have been able to regulate without violating the First Amendment.

Furthermore, any First Amendment protection *Ashcroft I* provides for virtual child pornography is not implicated by the language of this statute. The child pornography prong of the statute explicitly requires that the individual pandering the material must knowingly pander the material as material involving the a [*sic*] visual depiction of an actual minor. See 18 U.S.C. § 2252A(A)(3)(B)(ii) (emphasis added). If an individual was to pander material as computer generated child pornography their conduct would fall outside of the

statute.[8] Therefore, the Court's concern for First Amendment protection of computer generated pornography is not present in the instant statute.

Another concern articulated by the Court in *Ashcroft I* which is not present in the instant case is the lack of legislative findings which addressed the harm caused by material being pandered as child pornography. *Ashcroft I*, 535 U.S. at 257. Relying in part on the Supreme Court's analysis in *Ferber*, Congress articulated the harm of pandering child pornography being that the existence of a market for child pornography causes real children harm. Findings at (3) (citing *Ferber*, 458 U.S. at 760). Individuals who solicit others based on their interest in child pornography are integral to the existence of a child pornography market. While such a market can no longer exist in bookstores, it can and does exist over the internet. The Government has an interest in "stamping out the vice of child pornography at all levels in the distribution chain." Findings at (2) (citing *Osborne*, 495 U.S. at 110). The instant pandering provision "bans the offer to transact in unprotected material, coupled with proof of the offender's specific intent." H.R. Conf. Rep. 108-66, 2003 U.S.C.A.N. 683, 696. Such offers are one level of the distribution chain which make up the market for child pornography. The Supreme Court has on at least two occasions, both in *Ferber* and *Osborne*, recognized that a state's interest in squelching the market for child pornography is related to the sexual abuse of children. The move of this market

[8] Of course it is possible that a computer generated visual depiction of a minor engaging in sexually explicit behavior could violate the statute under subsection (i) if it is obscene. However, that prong passes constitutional muster under *Ginzburg*, *Roth*, and *Miller*. *Ginzburg*, 383 U.S. 463; *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

from bookstores to the internet should not weaken the link between the child pornography market and the sexual abuse of children which caused the Court to determine that states could proscribe conduct involving child pornography with less likelihood of running afoul of the First Amendment. The market's existence on the internet does not change the fact that it is a "market for the exploitative use of children." *Osborne*, 495 U.S. at 109.

The legislative findings of the PROTECT Act also articulate the Government's interest in being able to effectively prosecute child pornographers. Where images can be altered so as to cast a reasonable doubt on whether or not they involve real children, it has become more difficult to successfully prosecute possession of child pornography cases. Findings at (10). A pandering provision, such as the one currently before the Court, allows prosecutions to go forward against individuals who, not only have the intent to participate in the child pornography market, but actively solicit another to participate, regardless of if the Government can prove the underlying material is real child pornography or not.[9] Without such prosecutorial tools, individuals will continue to proliferate the child pornography market while escaping any real threat of prosecution. Findings at (13). This Court is satisfied that in contrast to the legislative findings in *Ashcroft I*, the instant legislative findings articulate a harm produced by the conduct proscribed such that its proscription does not violate the First Amendment.

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[9] In addition, this pandering provision by including the "purported material" language may permit a prosecution to go forward where the individual who panders does not follow through in the transmission of the underlying materials. See Anne M. Coughlin, Letter to Senator Leahy, November 28, 2002, 149 Con[g]. Rec. S231-01, S244.

The First Amendment does not thwart this product of Congress' persistent efforts to protect real children from child pornography and sexual abuse. The Congressional findings of the PROTECT Act and the statutory provision at issue display Congress' attempt to follow *Ferber* and *Ginzburg* in an attempt to respond to any First Amendment concerns while eradicating child pornography. If there is any protected speech which this statute prohibits, it is not substantial, particularly in light of the statute's logical sweep. This statute is a legitimate effort to close the market for child pornography, which has seen a revival as a result of technology. The Supreme Court has acknowledged that destroying the market for child pornography is one step we can take in putting an end to the sexual abuse of children. *See Ferber*, 458 U.S. at 759; *see also Osborne*, 495 U.S. at 109. I agree with Justice Rehnquist that "[t]he First Amendment does not . . . protect the panderer" of child pornography depicting actual children. *Ashcroft I*, 535 U.S. at 272 (J. Rehnquist, dissenting). Congress has passed a statute which is more specifically tailored to its objective, the desire to extinguish the market for actual child pornography, than the pandering provision at issue in *Ashcroft I*. Based on the foregoing, I find that Count One of Williams' indictment survives his constitutional challenge and should not be dismissed.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is DENIED.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 20 day of August, 2004.

/s/ DONALD M. MIDDLEBROOKS
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

———————

No. 04-15128-JJ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL WILLIAMS, DEFENDANT-APPELLANT

———————

On Appeal from the United Sates District Court
for the Southern District of Florida

———————

[Filed: July 17, 2006]

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

———————

Before: BARKETT, WILSON AND REAVLEY*, Circuit Judges.

PER CURIAM:

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* Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Congressional Findings Relating to Obscenity and Child Pornography

Pub. L. 108-21, Title V, § 501, Apr. 30, 2003, 117 Stat. 676, provided:

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under *Miller* v. *California*, 413 U.S. 15 (1973) (obscenity), or *New York* v. *Ferber*, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *New York* v. *Ferber*, 458 U.S. 747, 757 (1982), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Ferber*, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided *Ferber*, the technology did not exist to—

(A) computer generate depictions of children that are indistinguishable from depictions of real children;

(B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or

(C) disguise pictures of real children being abused by making the image look computer-generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such

challenges increased significantly after the decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002).

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact of the *Free Speech Coalition* decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in *Free Speech Coalition*, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful. In addition, the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before.

(11) 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. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.

(12) 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. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse.

(13) In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the

technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.

(14) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(15) The Supreme Court's 1982 *Ferber* v. *New York* decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet.

APPENDIX E

18 U.S.C. 2252A (2000 & Supp. IV 2004) provides:

Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in 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;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer,

for purposes of inducing or persuading a minor to participate in any activity that is illegal.[1]

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, Section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

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[1] So in original.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.