Supreme Court of the United States

UNITED STATES

v.

WILLIAMS

Argued Oct. 30, 2007.
Decided May 19, 2008.

Justice SCALIA delivered the opinion of the Court.

Section 2252A(a)(3)(B) of Title 18, United States Code, criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography. This case presents the question whether that statute is overbroad under the First Amendment or impermissibly vague under the Due Process Clause of the Fifth Amendment.

I

A

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. . . We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment. Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.

The broad authority to proscribe child pornography is not, however, unlimited. Four Terms ago, we held facially overbroad two provisions of the federal Child Pornography Protection Act of 1996 (CPPA). [*Free Speech Coalition.*] The first of these banned the possession and distribution of "'any visual depiction'" that "'is, or appears to be, of a minor engaging in sexually explicit conduct,'" even if it contained only youthful-looking adult actors or virtual images of children generated by a computer. This was invalid, we explained, because the child-protection rationale for speech restriction does not apply to materials produced without children. The second provision at issue in *Free Speech Coalition* criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that. A person could thus face prosecution for possessing unobjectionable material that someone else had pandered. We held that this prohibition, which did "more than prohibit pandering," was also facially overbroad.

After our decision in *Free Speech Coalition,* Congress went back to the drawing board and produced legislation with the unlikely title of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003. We shall refer to it as the Act. Section 503 of the Act amended 18 U.S.C. § 2252A to add a new pandering and solicitation provision, relevant portions of which now read as follows:

(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 as provided in subsection (b).

The Act's express findings indicate that Congress was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children, as our decision in *Free Speech Coalition* required, would enable many child pornographers to evade conviction. The emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children-even though "[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," virtual imaging being prohibitively expensive.

B

The following facts appear in the opinion of the Eleventh Circuit . . . . Soon thereafter, Williams messaged that he had photographs of men molesting his 4-year-old daughter. Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL-SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic.

Williams was charged with one count of pandering child pornography under § 2252A(a)(3)(B) and one count of possessing child pornography under § 2252A(a)(5)(B). . . .

II

A

According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance

between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional-particularly a law directed at conduct so antisocial that it has been made criminal-has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

The first step in overbreadth analysis is to construe the challenged statute . . . . Generally speaking, § 2252A(a)(3)(B) prohibits offers to provide and requests to obtain child pornography. The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in *Ferber, Osborne,* and *Free Speech Coalition,* which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute.

The statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller* . . . .

First, the statute includes a scienter requirement. . . . We think that the best reading of the term in context is that it applies to every element of the two provisions. . . .

Second, the statute's string of operative verbs—“advertises, promotes, presents, distributes, or solicits”—is reasonably read to have a transactional connotation. . . .

. . . To run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.

Third, the phrase “in a manner that reflects the belief” includes both subjective and objective components. . . . Thus, a misdescription that leads the listener to believe the defendant is offering child pornography, when the defendant in fact does not believe the material is child pornography, does not violate this prong of the statute. . . . The statement or action must objectively manifest a belief that the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.

Fourth, the other key phrase, “in a manner . . . that is intended to cause another to believe,” contains only a subjective element: The defendant must “intend” that the listener believe the material to be child pornography, and must select a manner of “advertising, promoting, presenting, distributing, or soliciting” the material that *he* thinks will engender that belief-whether or not a reasonable person would think the same. . . .

Fifth, the definition of “sexually explicit conduct” (the visual depiction of which, engaged in by an actual minor, is covered by the Act's pandering and soliciting prohibition even when it is not obscene) is very similar to the definition of “sexual conduct” in the New York statute we upheld against an overbreadth challenge in *Ferber*. . . . Critically, unlike in *Free Speech Coalition*, § 2252A(a)(3)(B)(ii)'s requirement of a “visual depiction of an actual minor” makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term

"simulated sexual intercourse."

B

We now turn to whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity.

Offers to engage in illegal transactions are categorically excluded from First Amendment protection. One would think that this principle resolves the present case, since the statute criminalizes only offers to provide or requests to obtain contraband-child obscenity and child pornography involving actual children, both of which are proscribed.

This mistakes the rationale for the categorical exclusion. It is based not on the less privileged First Amendment status of commercial speech, but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection. Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities. Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.

. . . The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. There is no doubt that this prohibition falls well within constitutional bounds. The constitutional defect we found in the pandering provision at issue in *Free Speech Coalition* was that it went *beyond* pandering to prohibit possession of material that could not otherwise be proscribed.

In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. . . .

*   *   *

The Eleventh Circuit found "particularly objectionable" the fact that the "reflects the belief" prong of the statute could ensnare a person who mistakenly believes that material is child pornography. . . . Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes-acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes-attempt and conspiracy, for example-impossibility of completing the crime because the facts were not as the defendant believed is not a defense. "All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt."

Under this heading the Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is "lascivious." (Clause (v) of the definition of "sexually explicit conduct" is "lascivious exhibition of the genitals or pubic area of any person.") That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. . . .

*   *   *

Finally, the dissent accuses us of silently overruling our prior decisions in *Ferber* and *Free Speech Coalition*. According to the dissent, Congress has made an end-run around the First Amendment's protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves. But an offer to provide or request to receive virtual child pornography is not prohibited by the statute. A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children. It is simply not true that this means "a protected category of expression [will] inevitably be suppressed." Simulated child pornography will be as available as ever, so long as it is offered and sought *as such,* and not as real child pornography. . . .

III

As an alternative ground for facial invalidation, the Eleventh Circuit held that § 2252A(a)(3)(B) is void for vagueness. Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."

*   *   *

But the Eleventh Circuit's error is more fundamental than merely its selection of unproblematic hypotheticals. Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.

What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"-wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

There is no such indeterminacy here. . . . To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent-the state of men's minds-having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." . . .

*   *   *

It is so ordered.

Justice STEVENS, with whom Justice BREYER joins, concurring.

My conclusion that this statutory provision is not facially unconstitutional is buttressed by two interrelated considerations on which Justice SCALIA finds it unnecessary to rely. First, I believe the result to be compelled by the principle that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Second, to the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters. It is abundantly clear from the provision's legislative history that Congress' aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose-that is, with the intention of inciting sexual arousal. . . .

* * *

It was against this backdrop that Congress crafted the provision we uphold today. Both this context and the statements surrounding the provision's enactment convince me that in addition to the other limitations the Court properly concludes constrain the reach of the statute, the heightened scienter requirements described contain an element of lasciviousness.

* * *

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

* * *

The Court holds it is constitutional to prohibit these proposals, and up to a point I do not disagree. In particular, I accept the Court's explanation that Congress may criminalize proposals unrelated to any extant image. I part ways from the Court, however, on the regulation of proposals made with regard to specific, existing representations. Under the new law, the elements of the pandering offense are the same, whether or not the images are of real children. As to those that do not show real children, of course, a transaction in the material could not be prosecuted consistently with the First Amendment, and I believe that maintaining the First Amendment protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals. In failing to confront the tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material, and in allowing the new pandering prohibition to suppress otherwise protected speech, the Court undermines *Ferber* and *Free Speech Coalition* in both

reasoning and result. This is the significant element of today's holding, and I respectfully dissent from it.

I

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The easy cases for constitutional application of the Act are over, however, when one gets to proposals for transactions related to extant pornographic objects, like photos in a dealer's inventory, for example. These will in fact be the common cases, as the legislative findings attest. Congress did not pass the Act to catch unsuccessful solicitors or fraudulent offerors with no photos to sell; rather, it feared that "[t]he 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 . . . . This threatens to render child pornography laws that protect real children unenforceable."

. . . Congress understood that underlying most proposals there will be an image that shows a child, and the proposal referring to an actual child's picture will thus amount to a proposal to commit an independent crime such as a transfer of child pornography. But even when actual pictures thus occasion proposals, the Act requires no finding that an actual child be shown in the pornographic setting in order to prove a violation. And the fair assumption (apparently made by Congress) is that in some instances, the child pornography in question will be fake, with the picture showing only a simulation of a child, for example, or a very young-looking adult convincingly passed off as a child; in those cases the proposal is for a transaction that could not itself be made criminal, because the absence of a child model means that the image is constitutionally protected. But under the Act, that is irrelevant. What matters is not the inclusion of an actual child in the image, or the validity of forbidding the transaction proposed; what counts is simply the manifest belief or intent to cause a belief that a true minor is shown in the pornographic depiction referred to.

The tension with existing constitutional law is obvious. *Free Speech Coalition* . . . . The Act, however, punishes proposals regarding images when the inclusion of actual children is not established by the prosecution, as well as images that show no real children at all; and this, despite the fact that, under *Free Speech Coalition,* the first proposed transfer could not be punished without the very proof the Act is meant to dispense with, and the second could not be made criminal at all.

II

. . . The first [of the Court's three justifications] says it is simply wrong to say that the Act makes it criminal to propose a lawful transaction, since an element of the forbidden proposal must express a belief or inducement to believe that the subject of the proposed transaction shows actual children. But this does not go to the point. The objection is not that the Act criminalizes a proposal for a transaction described as being in virtual (that is, protected) child pornography. The point is that some proposals made criminal, because they express a belief that they refer to real child pornography, will relate to extant material that does not, or cannot be, demonstrated to show real children and so may not be prohibited. . . .

Much the same may be said about the Court's second answer, that a proposal to commit a

crime enjoys no speech protection. For the reason just given, that answer does not face up to the source of the difficulty: the action actually contemplated in the proposal, the transfer of the particular image, is not criminal if it turns out that an actual child is not shown in the photograph. . . .

The Court's third answer analogizes the proposal to an attempt to commit a crime, and relies on the rule of criminal law that an attempt is criminal even when some impediment makes it impossible to complete the criminal act (the possible impediment here being the advanced age, say, or simulated character of the child-figure). . . .

. . . The incoherence of the Court's answer with the scheme of the Act appears from § 2252A(b)(1) (2000 ed., Supp. V), which criminalizes attempting or conspiring to violate the Act's substantive prohibitions, including the pandering provision of § 2252A(a)(3)(B). Treating pandering itself as a species of attempt would thus mean that there is a statutory, inchoate offense of attempting to attempt to commit a substantive child pornography crime. . . .

. . . Thus, in the classic impossibility example, there is attempt liability when the course of conduct intended cannot be completed owing to some fact which the defendant was mistaken about, and which precludes completing the intended physical acts. But on the Court's reasoning there would be attempt liability even when the contemplated acts had been completed exactly as intended, but no crime had been committed. . . .

* * *

Finally, if the Act stands when applied to identifiable, extant pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally, and when a case as well considered and as recently decided as *Free Speech Coalition* is put aside (after a mere six years) there ought to be a very good reason. . . .

* * *

IV

Still, if I were convinced there was a real reason for the Government's fear stemming from computer simulation, I would be willing to reexamine *Ferber.* Conditions can change, and if today's technology left no other effective way to stop professional and amateur pornographers from exploiting children there would be a fair claim that some degree of expressive protection had to yield to protect the children.

* * *