No. 06-694

In the
Supreme Court of the United States

United States of America,
Petitioner,

v.

Michael Williams,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, KANSAS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 2252A(a)(3)(B) is overbroad and impermissibly vague, and thus facially unconstitutional, when the statute prescribes punishment for one 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 is or contains" illegal child pornography.

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INTEREST OF AMICI

Child pornography was once traded by mail or by hand. Risk of detection and the resulting public humiliation was a built-in deterrent to a person tempted to participate in its distribution. And perhaps more importantly, there was never any question, and no difficulty of proving, that real flesh-and-blood children were involved in its creation.

But times have changed. Today computers provide pornographers and pedophiles with a cloak of anonymity. When pornographers gained the ability to trade images electronically and in secret, opportunities for "pandering" skyrocketed, and so (not surprisingly) did the incidents of trading in illegal child pornography. At the same time, pandering became a cyberspace crime without borders rather than a trade in physical goods at a physical location.

State and federal prosecutors struggle to keep up. The criminals can now digitally alter images of real children by making those images *appear* to be computer-generated. The pornographers claim that the images they transmit are not real child pornography, thus forcing prosecutors to prove otherwise and making it increasingly difficult to close the network for illegal child pornography. State and federal prosecutors need robust laws that account for the technological revolution and that will allow the government to protect children in the digital age. The Eleventh Circuit's decision in this case stripped away a vital prosecutorial tool – namely, the ability to target directly an intentional offer to trade in illegal material, irrespective of whether the prosecutor is able to locate the image or specifically to prove that it has been digitally altered to disguise a real child.

The States have a strong interest here because many of them have laws on the books – laws that protect children – that may be endangered by the Eleventh Circuit's decision. Moreover, the States recognize that child pornography is a uniquely pervasive, hidden, and borderless crime, and that

prosecutorial cooperation between state and federal agents is essential. The States therefore have an interest in seeing the United States possess the full panoply of anti-child pornography powers, lest State prosecutors become overwhelmed with too many criminals and too few tools to battle a national (and international) trade.

SUMMARY OF ARGUMENT

I. This Court has recognized that the government has a compelling interest in closing the network for illegal child pornography, and that is precisely what the PROTECT Act's pandering provision is designed to do. Current technology allows pornographers to take images made with real flesh-and-blood children and disguise them so that they appear to be computer-generated. In almost every prosecution, the criminals claim that they were trading virtual pornography and not the real thing. This stock "virtual defense" makes the prosecution of child pornography cases increasingly difficult and expensive. The statute at issue here serves an important need by directly targeting an offer to transact in unprotected material. It is critical in the digital age that pandering prosecutions do not remain dependent on the nature of the material, at least where, as here, there is a provable intent to expand the network for child pornography.

The congressional findings clearly demonstrate the link between the PROTECT Act's aims and the government's compelling interest in closing the network for child pornography. Congress' efforts are further supported by several state statutes that address distribution of child pornography in a similar manner. The Eleventh Circuit's analysis calls some of these statutes into question, demonstrating that much more is at stake here than a single law.

II. The PROTECT Act's pandering provision is not overbroad. Because there is nothing unconstitutional about criminalizing an offer to transact in child pornography, the

statute is not overbroad to the extent that it focuses on the intent of the panderer and not the actual content of the material. In fact, the statute does not prohibit or chill any protected speech, because it does not prohibit advocacy speech, straight-forward offers to exchange virtual pornography, or benign distribution of family photos. By its terms, the statute applies only where the defendant *intentionally offers* to transact in pornography made with real children.

III. Nor is the statute unconstitutionally vague. The Eleventh Circuit simply misread the statute and failed to give the key term "knowingly" its proper meaning. Correctly interpreted, the statute provides fair notice of what conduct is proscribed and properly restricts prosecutors' discretion.

ARGUMENT

The underlying facts of Williams' lurid crime are set forth in the Eleventh Circuit's opinion, *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006). Suffice it to say that Williams distributed *real* pictures of *real* children engaged in *real* sexually explicit conduct, and was charged with one count of "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), a provision of the PROTECT Act. *Id.* at 1289. Williams posted the illegal child pornography after an exchange with an undercover law enforcement officer in an internet chat room. Williams boasted, "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL – SHE CANT." *Id.* at 1288-89.

Williams entered into a plea agreement that reserved his right to challenge the constitutionality of the pandering provision. The Eleventh Circuit reversed Williams' conviction under the pandering provision on First Amendment grounds, holding that the provision was unconstitutionally overbroad and vague. The Eleventh

Circuit was wrong on both counts. It misapplied this Court's overbreadth analysis, misread the statute's express intent requirement, and in the process called into question many sound and important state laws.

I. THE PROTECT ACT'S PANDERING PROVISION IS NECESSARY TO ABOLISH THE NETWORK FOR CHILD PORNOGRAPHY.

The PROTECT Act's pandering provision is a critical prosecutorial tool, and an analysis of its usefulness will lend much-needed context to the overbreadth and vagueness issues in this case. The statute is necessary because of what the criminals can do with technology and because of the difficulty (perhaps soon to be impossibility) of proving that an image is, in fact, of a real child and not computer-generated. It allows prosecutors directly to target an offer to transact in illegal child pornography even in cases where the material cannot be located or has been digitally altered, or where a person is expanding the network for child pornography with material that may not otherwise be obscene. The congressional findings and comparable state statutes amply support Congress' efforts to close the network for child pornography through the PROTECT Act.

A. The Congressional Findings Amply Demonstrate the Necessity of the Protect Act's Pandering Provision.

Congress passed § 2252A(a)(3)(B) to close the network of illegal child pornography: "The 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). As this Court recognized in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), the government has a compelling interest in closing the child-pornography distribution network. *Ferber*, 458 U.S. at 759; *Osborne*, 495 U.S. at 109. The congressional findings

amply support the pandering provision and its vital connection to the government's interest.

Congress emphasized that technology currently exists – and, indeed, is inexpensive and readily available – to take images of real children and disguise them by making them appear to be computer-generated. Pub. L. No. 108-21, 117 Stat. 676 § 501(5), (11). Congress also recognized that as digital files are transferred over the internet again and again, they degrade "so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child." § 501(8).

Pornographers know that Congress' assessment is correct. They also know well this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which holds that the government cannot criminalize the possession or manufacturing of "virtual" child pornography.[1] Therefore, defendants arrested for dealing in unprotected child pornography *claim* routinely that their images are fake, thus requiring the government to prove beyond a reasonable doubt that images are in fact of real flesh-and-blood children. § 501(7), (10). The proliferation of this "virtual defense" [2] has made prosecution of child pornography crimes more difficult and expensive. § 501(9), (10).[3] Prosecutors, for

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[1] The amicus States disagree with this Court's holding in *Free Speech Coalition*. *See infra* at 13-14.

[2] Cases recognizing the availability of the "virtual defense" include, e.g., *United States v. Miller*, ___ F.Supp.2d ___, 2007 WL 188277 (N.D. Ohio Jan. 22, 2007); *United States v. O'Rourke*, 470 F.Supp.2d 1049 (D.Ariz. 2007); *United States v. Knellinger*, 471 F.Supp.2d 640, 647 n.6 (E.D.Va. 2007); and *United States v. Steiger*, ___ F.Supp.2d ___, 2006 WL 3450140 (M.D.Ala. Nov. 29, 2006).

[3] At the same time that prosecutions are becoming more difficult and expensive in light of the technology available to pornographers, the internet (and its anonymity) makes it easier for pornographers to distribute their wares. Because trades occur at computer terminals rather than in large cities' red light districts, the child pornography network is more widespread than ever. In 2001, only 30% of state prosecutor's

example, the prosecution may be required to present expert testimony that an image depicts a real child. *See e.g.*, *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 444 (1st Cir. 2007)

Recognizing that pornographers hide behind such dangerous claims, Congress drafted the PROTECT Act's pandering provision to reach those situations where it is difficult or impossible to prove that real children were involved. Even if an image of a real child has been digitally disguised to appear virtual, a panderer can be prosecuted where he holds the image out to be real (and illegal) child pornography.

It is critical that prosecutors be allowed to target offers to trade in illegal pornography and not just the images themselves. When pornographers trade images and hold them out as depicting real children, they expand the network for child pornography – whether or not the images are real and whether or not the government can locate the images and *prove* that they are real. The PROTECT Act works to undermine the market and network for illegal child pornography by reaching distribution of images that are advertised as the "real thing" in an effort to develop trade relationships.

B. State Obscenity Statutes Targeting Distribution of Child Pornography Demonstrate the Need for the PROTECT Act's Pandering Provision.

As technology increasingly causes widespread problems for prosecutors of child pornography cases, many state

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offices litigated crimes related to computer transmission of child pornography. Prosecutors in State Courts, 2001, p. 5 (http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf) (last visited May 24, 2007). By 2005, just four years later, that number had risen to *two-thirds* of state prosecutor's offices which had prosecuted such crimes. Prosecutors in State Courts, 2005, p. 5 (http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf) (last visited May 24, 2007).

legislatures have addressed the issue in their obscenity statutes. They have done so in a variety of ways, often by expanding the definition of child pornography. Several such statutes are summarized below. The amicus States reference these statutes to make two points: First, the very existence of these statutes underscores the legitimacy of Congress' concerns about the impact of technology on child pornography prosecutions. States have the same concerns, as shown by the fact that the issue shows up time and again in legislation. And second, more is at stake in this case than just the PROTECT Act. The faulty reasoning of the Eleventh Circuit casts doubt on a number of very sensible (and constitutional) state statutes as well.

Some of the state statutes summarized below address distribution or advertisement of "virtual" pornography, "morphed" images,[4] and digitally altered images. The CPPA, invalidated in *Free Speech Coalition*, also addressed such material (but in a different way and for a different purpose). Therefore, before discussing the state statutes at issue, it is important to emphasize that this is *not* a virtual porn case and *Free Speech Coalition* does not require affirmance of the Eleventh Circuit's judgment. In *Free Speech Coalition*, this Court held that the government may not criminalize the *possession* or *production* of virtual child pornography where real children were not involved in its creation. 535 U.S. at 256-57. The provision of the PROTECT Act at issue here addresses a very different issue: the *knowing* distribution or promotion of images, whether or not the images are illegal child pornography, where the distributor intentionally passes the images off as depicting real children (and where the distributor is therefore expanding the network and market for child pornography). The statutes have a very different focus, even though both the

[4] "Morphing" is the alteration of "innocent pictures of real children so that the children appear to be engaged in sexual activity." *Free Speech Coalition*, 535 U.S. at 242. The anti-morphing provisions in the CPPA were neither challenged nor addressed in *Free Speech Coalition*. *Id.*

CPPA and the PROTECT Act attempt to deal with the prosecutorial difficulties presented by technology.

State legislatures around the country are likewise attempting to deal with the same difficulties, further demonstrating that virtual porn, morphing, and digitally disguising real pornography are very real (and related) problems and that the PROTECT Act's pandering provision is a necessary prosecutorial tool. These statutes target the network for child pornography in a fashion similar to Congress' approach in the PROTECT Act:

- Georgia's child pornography statute defines "identifiable child" as any person under 16 "[w]ho was a child at the time the visual depiction was created, adapted, or modified or *whose image as a child was used in creating, adapting, or modifying the visual depiction*." O.C.G.A. § 16-12-100.2(b)(2)(A) (emphasis added).

- Hawaii's statute defines "child pornography" to include pictures or computer-generated images "created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct." H.R.S. § 707-751(2).

- In Kentucky, "[a] person is guilty of promoting [the] sale of obscenity when he knowingly, as a condition to a sale . . . of any . . . publication or other merchandise, requires that the purchaser or consignee receive any matter *reasonably believed* by the purchaser or consignee to be obscene . . . ." KRRS § 531.060(1) (emphasis added).

- Minnesota's statute defines "pornographic work" to include a picture or computer-generated image that "(ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or (iii) 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 sexual conduct." M.S.A. § 617.246(f) (emphasis added).

- Missouri's statute criminalizes the promotion and advertisement of "child pornography," defined to include pictures and computer-generated images of sexually explicit conduct where "such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." V.A.M.S. 573.010(2)(b)b.

- Rhode Island's statute criminalizes the distribution of "child pornography," defined to include visual depictions "created, adapted, or modified to display an identifiable minor engaging in sexually explicit conduct," R.I. Gen. Laws § 11-9-1.3(c)(iii), but makes it, an affirmative defense that "[t]he defendant did not *advertise, promote, present or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct*, § 11-9-1.3(d)(1)(iii) (emphasis added).

- Texas' statute criminalizes the promotion of obscene material, including promotion of "an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age." V.T.C.A. § 43.23(h)(2)

- Wyoming's statute defines "child pornography" to include a visual depiction "of explicit sexual conduct involving a child or an individual *virtually indistinguishable* from a child." Wyo. Stat. Ann. § 6-4-303(a)(ii)(B) (emphasis added).

These statutes show that the practical difficulties that led to passage of the PROTECT Act are felt, in a big way, on the

state level. The PROTECT Act and comparable state statutes simply must be flexible enough to reach pandering in cases where material is distributed in an intentional effort to expand the network for child pornography. If the judgment of the Eleventh Circuit stands, many sound and important state statutes may face the same fate as the PROTECT Act.

II. THE PROTECT ACT IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. The Government May Constitutionally Criminalize An Offer to Transact in Unprotected Material.

1. An Offer to Transact In Real Child Pornography Expands the Market Regardless of What Material the Panderer in Fact Possesses.

The Eleventh Circuit held that the PROTECT Act's pandering provision is overbroad because it criminalizes the pandering of material that may not be real child pornography:

> We echo Senator Leahy's concern that the provision thus "federally criminalize[s] talking dirty over the Internet or the telephone when the person never possesses any material at all." 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.

Williams, 444 F.3d at 1298. That is, a defendant who uplinks images with a tagline that says, "This is real child pornography - have more to trade," violates the pandering provision even if the images are *not* real child pornography. That does not, however, make the statute "overbroad." A statute is overbroad only to the extent that it criminalizes

protected speech. Here, the statute applies only when the panderer is intentionally offering to transact in unprotected materials. The First Amendment does not protect such conduct.

As an initial matter, the Eleventh Circuit was incorrect to label this speech as "non-commercial." As the facts of this case demonstrate, child pornographers are not in the business (typically, anyway) of distributing pornography for free. Exchanges may not always be made for a payment of money *per se*, but images are routinely swapped for other images or to build a relationship that will lead to future exchange. Bartering is the original commercial activity, and, even today, bartering is as much commercial activity as a sale for cash.[5]

Moreover, the "innocent" braggarts, exaggerators, and liars for whom the Eleventh Circuit's decision showed such concern are not really innocent at all. Whether they have a real image to distribute or not, only persons who intend to foster and expand the network of child pornography fall within the statute. Whether the distributor has pornography made with real children or "an empty pocket," *Williams*, 444

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[5] "Commercial speech" is "speech that *proposes* a commercial transaction." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989). Williams, like other panderers, proposed a commercial transaction, a trade or barter of illegal images. The transaction does not lose its commercial character simply because one image is traded for another instead of for cash. As commercial speech (to the extent the conduct at issue should be classified as "speech"), an offer to transact in child pornography can be regulated whether or not real children are depicted in the advertised image. If the image is in fact made with real material, it is illegal contraband, and advertisement for illegal items may be prohibited. *E.g. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). If it is *not* real child pornography but is advertised as such, the advertisement may be barred as false or fraudulent speech. *E.g. Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

F.3d at 1298, he either (i) believes that he is distributing illegal child pornography or (ii) is attempting to convince the recipient that a specific image is illegal child pornography. In either case, the panderer is intentionally offering to transact in unprotected material, and the government may constitutionally ban that conduct in furtherance of the government's acknowledged and compelling interest in closing the network for child pornography. *See Ferber*, 458 U.S. at 759; *Osborne*, 495 U.S. at 109.

In this case, Williams posted illegal child pornography in a public chat room to show that he was "for real" – that he had real images to exchange. He was demonstrating his product and was expanding and promoting the network of child pornography on both the supply and demand sides of the equation. Had Williams posted images that were *not* real pornography, but that were presented in such a manner, *Williams still would have promoted and expanded the network for illegal child pornography* because others in the chat room still would have identified Williams as a person who desired to trade in pornography made with real abused children. Williams' conduct thus expanded the market regardless of the nature of the image that he posted.[6]

2. A Market-Deterrence Rationale Is Sufficient To Support the PROTECT Act.

It is true that in *Free Speech Coalition*, this Court held that a market-deterrence theory alone could not support a ban on the production or possession of virtual pornography:

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[6] Even if Williams had posted a video of "Our Gang," *Williams*, 444 F.3d at 1298, or if the other participants in the chat room had concluded that Williams was mistaken or fraudulent about the nature of the images he had, Williams would have nonetheless identified himself as a user who desired to trade in illegal pornography. And had Williams been merely deluded about the nature of the image he posted, he would not have been prosecuted for his mistaken *beliefs*, but instead for his conduct of offering to transact in illegal child pornography.

> If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice . . . .
>
> Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Free Speech Coalition, 535 U.S. at 254. For two reasons, however, that does not mean that a market-deterrence theory is insufficient in this case.

First, even if market-deterrence was insufficient to support the CPPA, it is a better fit with the PROTECT Act. The pandering provision works to close a loophole created by technology (and, in candor, by *Free Speech Coalition*). It criminalizes conduct that directly and immediately expands the market for illegal child pornography even in cases where the distributor is mistaken, fraudulent, or unable to determine whether a real child was used in creation of the image. Here Congress did not address the viewing or creation of virtual porn, as it did in the CPPA. Instead, Congress prohibited intentional conduct – pandering – that directly and immediately expands the market for pornography made with real abused children.

Second, and with respect, this Court erred by concluding that the government's market-deterrence rationale was insufficient to support the CPPA. There is no support for this Court's assumption in *Free Speech Coalition* that "[i]f virtual images were identical to illegal child pornography," pornographers would stop photographing real children. *Id.* at 254. This Court assumed that if pornographers could create on their computers child pornography that is identical to the real thing, they would not create real child pornography because it presents the risk of prosecution. But that argument

presumes the rationality of pedophiles who are, by definition, irrational. In addition, even if child abusers stopped photographing children, that would not stop the sexual abuse of children that occurs separate from the production of child pornography. As Congress found with respect to the PROTECT Act,

> [a] 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.

§ 501(12).[7]

A market in *virtual* pornography, therefore, is not in any way, shape, form, or fashion good for children. It makes prosecution of real child pornography cases more difficult, increases the market for real child pornography, whets the appetite of sexual abusers, and may be used to lure children into abusive situations. While this Court can reverse the

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[7] Similarly, this Court was wrong in *Free Speech Coalition* when it rejected the government's argument that virtual pornography may be used to seduce children:

> There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.

535 U.S. at 251-52. A computer-generated image of children being sexually abused simply cannot be equated to a lollipop. Cartoons, video games, and candy are innocent things that can be perverted by evil people. Virtual images of children having sex, used to lure children into abusive situations and to convince them that sexual abuse is "normal," are evil *per se*. Images of children having sex, whether real or virtual, are not innocent in their creation and have no legitimate purpose.

Eleventh Circuit without abandoning its holding in *Free Speech Coalition*, the amicus States ask the Court to take this opportunity to (at the very least) clarify that virtual child pornography does *not* lead to less child abuse. Even if the law cannot ban all virtual pornography, it can ban the pandering of such material (as in the PROTECT Act), and the law certainly should not *encourage* the creation of virtual pornography.

3. Solicitation Statutes Show that Congress May Constitutionally Target the Panderer's Intent.

There simply is no constitutional difficulty in the fact that a person may be prosecuted for offering to transact in illegal child pornography even when the material he offers to share is not, in fact, unprotected material. There is a comparable offense in many solicitation statutes, such as Illinois', which define "solicitation" to include solicitation of one whom the defendant "*reasonably believes*" to be a minor. *See*, *e.g.*, 720 ILCS 5/11-6(a) ("A person . . . commits the offense of indecent solicitation of a child if the person . . . knowingly solicits a child *or one whom he or she believes to be a child* to perform an act of sexual penetration or sexual conduct . . . .") (emphasis added).[8] That is, a person may be prosecuted

[8] States with similar solicitation statutes include Alaska (AS § 11.41.452(a)(2)); Arkansas (A.C.A.. § 5-27-603(a)(1)); Florida (F.S.A. § 847.0135(3)); Georgia (Ga. Code. Ann. § 16-12-100.2(d)(1)); Idaho (I.C. § 18-1509A(1)); Maine (17-A M.R.S.A. § 259(I-A)(A)(3)); Minnesota (M.S.A. § 609.352(2)); Montana (Mont. Code Ann. § 45-5-625 (1)(c)); Nebraska (Neb.Rev.St. § 28-320.02(1)); New Hampshire (N.H. Rev. Stat. § 649-B:4); Ohio (R.C. § 2907.07(C)(2)); Oklahoma (21 Okl. St. Ann. § 1040.13a(B)); Rhode Island (R.I. Gen. Laws, § 11-37-8.8(a)); South Carolina (Code 1976 § 16-15-342(A)); South Dakota (SDCL § 22-24A-5(A)(2)); Tennessee (T.C.A. § 39-13-528 (a)); Texas (V.T.C.A. Penal Code § 33.021(a)(1)(B)); and West Virginia (W. Va. Code § 61-3C-14b). *See also*, *United States v. Sims*, 428 F.3d 945, 960 (10th Cir. 2005) (holding that "it is not a defense to an offense involving enticement and exploitation of minors[, in violation of 18 U.S.C. § 2242,] that the defendant falsely believed a minor to be involved") (citing *United States v. Meek*, 366 F.3d 705, 717 (9th Cir. 2004); *United States v. Root*, 296

for soliciting an actual minor or for soliciting an adult undercover police officer.

Normally, of course, it is not illegal to ask an *adult* for sex. But under these statutes it is illegal to do so if the defendant believes he is approaching a child (that is, if he *offers* to have sex with a child). In precisely the same manner, it normally is not illegal to distribute a picture that is not child pornography. However, under the PROTECT Act, it is illegal to do so if the defendant thereby *offers* to transact in illegal child pornography. In prosecutions under the solicitation statutes, the defendant is not prosecuted for his mistaken belief that his target is an actual minor. Instead, he is prosecuted for his offer to engage in illegal conduct, *i.e.*, sexual relations with a minor. Likewise, in prosecutions under the PROTECT Act's pandering provision, the defendant is not prosecuted for what he believes about any pictures, but rather for his intentional offer to transact in illegal child pornography. Like the solicitation statutes, the pandering provision is constitutional.

B. The PROTECT Act Does Not Criminalize Advocacy Speech.

The Eleventh Circuit also held that the PROTECT Act is unconstitutionally overbroad because "[t]he 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." *Williams*, 444 F.3d at 1298, citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, the PROTECT Act does not in any way criminalize advocacy speech, and the Eleventh Circuit misunderstands the statute to the extent it found otherwise.

In *Brandenburg*, this Court held that advocacy of racial violence, although repugnant, is protected by the First

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F.3d 1222, 1227 (11th Cir. 2002), *cert. denied*, *Root v. U.S.*, 537 U.S. 1176 (2003); and *United States v. Farner*, 251 F.3d 510, 512-13 (5th Cir. 2001)).

Amendment so long as it does not immediately incite violence or other criminal activity. *Id.* The conduct proscribed by the PROTECT Act is a far cry from the advocacy speech at issue in *Brandenburg*.

Williams could have entered a public chat room and proclaimed, "I like child pornography," or "Legalize child pornography!" Had he done so, he would have had nothing to fear from the PROTECT Act. As the definite article "the" in the statute makes clear, the pandering provision applies only to those who intentionally advertise, promote, present, distribute, or solicit *particular* material or purported material. *See* 18 U.S.C. § 2252A(a)(3)(b) ("in a manner that reflects the belief . . . that *the* material or purported material is or contains" illegal child pornography). It does not touch one who encourages, promotes, or advocates the *idea* of child pornography or the general subject matter.

The Eleventh Circuit simply misread the statute. The statute does not proscribe advocacy speech, and therefore cannot be overbroad on that ground.

C. The PROTECT Act Does Not Ban A Substantial Amount of Protected Speech.

A statute is not overbroad merely because a court can imagine a scenario under which a statute bars protected speech. *E.g.*, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-801 (1984). Instead, "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). *See also Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a *substantial amount* of protected speech is prohibited or chilled in the process.") (emphasis added); *Osborne*, 495 U.S. at 112 (accord).

Had the Eleventh Circuit engaged in a proper overbreadth analysis, it would have considered the scope of unprotected

speech banned by the PROTECT Act and compared it to the scope of protected speech arguably banned (and would have then determined that the statute is *not* overbroad). The Eleventh Circuit did not undertake these steps at all, but instead pointed to a few unrealistic examples of protected speech that, in fact, the statute clearly does not prohibit.

The pandering provision does not in any way dictate what a person may "see or read or speak or hear." *Free Speech Coalition*, 535 U.S. at 245. It does not, in and of itself, prohibit a person from producing or possessing real *or* computer-generated child pornography (or, for that matter, any other material). Instead, it prohibits only *conduct* – specifically, offers to distribute or trade in illegal child pornography or material that purports to be illegal child pornography. 18 U.S.C. § 2252A(a)(3)(B).[9] That conduct, as stated above, expands the network for child pornography.

Nor does the statute preclude an offer to transact in virtual pornography where the panderer is clear that the offered material is not real. Had Williams advertised, "The attached item is virtual pornography – looks like the real thing," he could not be prosecuted under the PROTECT Act, because no reasonable person would conclude that Williams was offering to exchange *real* child pornography, that he believed the material was made with flesh-and-blood children, or that he intended anyone else to believe so. No reasonable person would conclude that Williams was offering to transact in anything other than *virtual* items, which, however harmful they may be, are, under this Court's

[9] Because the statute does not preclude "pure speech," the overbreadth doctrine has less application here. The doctrine's "function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615.

decision in *Free Speech Coalition*, protected by the First Amendment.

In the same manner, the PROTECT Act's pandering provision has no bearing on works of art, such as the movies *Traffic* or *American Beauty* discussed in *Free Speech Coalition*. A theater or video rental establishment that promotes the movies as the works of art that they are has nothing to fear. Granted, a person who promotes images from these movies *as purported child pornography*, and thereby expands the network for unprotected speech, may be prosecuted under the PROTECT Act. The distributor would not be prosecuted for his belief or the nature of the materials, however, but rather for his conduct – his intentional offer to transact in illegal child pornography or purported illegal child pornography.

Likewise, a proud parent can confidently send baby pictures to friends and relatives without any concern for the PROTECT Act's reach, no matter how unintentionally ambiguous the description of the pictures. The Eleventh Circuit posed a hypothetical (as part of its vagueness analysis) that it obviously considered problematic. When dissected and applied to the statute as properly read, the hypothetical poses no First Amendment difficulty.

The hypothetical was this: "Suppose, for example, the government intercepts an email claiming that the attached photographs depict 'little Janie in the bath – hubba, hubba!" *Williams*, 444 F.3d at 1306. The Eleventh Circuit further posited that the attached pictures were not illegal child pornography, but instead were "innocent baby-in-the-bubbles snapshots or candid stills of the family Rottweiler in a No. 10 washtub . . . ." *Id.* The sender of this email has not violated any reasonable construction of the statute. The Eleventh Circuit's hypothetical is, with respect, rather silly because it never gets past the first element of the crime: *"knowingly."* Only a person who *intends* to offer to transact in illegal material violates the statute. No reasonable person could

conclude that the sender in the hypothetical has offered to transact in child pornography.

The Eleventh Circuit suggested another hypothetical. No need to worry there, either:

> 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.

Williams, 444 F.3d at 1306-07.

As in all of life, context matters. When a reasonable person considers the nature of the attachment, the relationship of the sender to the subject of the photograph, and the obvious intent of the sender, it is clear in the first two cases that the distribution is wholly innocent and that the sender is not at all offering to transact in unprotected material. It is equally clear that the sender in the third case has violated the PROTECT Act. The law is quite accustomed to considering the nuances of a situation in this manner. If all one knows is that one person shot and killed another man, the situation is ambiguous, but that does not mean that a murder/manslaughter statute is overbroad (or vague). When the layers of fact are peeled back, they may show that the shooter was a would-be thief, lying in wait for a helpless victim. Alternatively, the facts may show that the shooter was a police officer who pulled the trigger in self defense. One case is murder, one is not, even though facts overlap. Where intent is an element of a crime, as it is here, the statute may constitutionally apply to one sender with intent to transact in illegal child pornography, even though it

has no application to a distributor of the same photograph who clearly has no such intent.

In fact, the provision of the PROTECT Act at issue here does not prohibit or chill protected speech at all. Even if there might be isolated situations where protected speech is arguably proscribed, the statute is not unconstitutionally overbroad because the amount of protected speech that is covered is not "substantial" in relation to the statute's permissible scope. Any supposed overbreadth can and should be handled on a case-by-case basis. *See Ferber*, 458 U.S. at 773-774 (where "impermissible applications" of the statute are but "a tiny fraction of the materials within the statute's reach . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied"). There is therefore no call to apply the "strong medicine" of the overbreadth doctrine to this case. *See id.* at 769.

III. THE PROTECT ACT'S PANDERING PROVISION IS NOT UNCONSTITUTIONALLY VAGUE.

The Eleventh Circuit also held that the PROTECT Act's pandering provision is unconstitutionally vague. The court believed the statute to be "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," and that the statute "requires a wholly subjective determination by law enforcement personnel" of what conduct is prohibited. *Williams*, 444 F.3d at 1306. The Eleventh Circuit is wrong on both counts.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). When a statute is vague, federal courts "have the power to adopt narrowing constructions of federal

legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 330-331 (1988) (citations omitted). *See also*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (construing the Protection of Children Against Sexual Exploitation Act to contain a scienter requirement).

In finding the statute vague, the Eleventh Circuit misread the statute by ignoring the effect of the word "knowingly." The court believed that "the 'reflects the belief' portion of the statute has no intent requirement," and that the statute does not require "specific intent to traffic in illegal child pornography." *Williams*, 444 F.3d at 1306-07. That simply is not true.

The pandering provision provides 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).

18 U.S.C. § 2252A(a)(3)(B) (emphasis added).

The term "knowingly" is set apart from the other sections of the statute so that it applies to each element of the crime. There is no reasonable construction of the statute under which "knowingly" would apply to some terms and not others. Therefore, if a person does not specifically intend to offer to transact in unprotected child pornography, he does not violate the statute. Instead of applying the *X-Citement Video* rule and construing the statute to require scienter in order to avoid a constitutional difficulty, the Eleventh Circuit did the opposite, engaging in interpretive gymnastics to read the scienter requirement *out* of the statute and to *create* constitutional difficulty.

The statute gives fair notice of what it prohibits: An intentional distribution or promotion of material in such a manner that a reasonable person would conclude either (i) that the sender considers it to be illegal child pornography, or (ii) that the sender intends for others to so believe. The sender is offering to traffic in unprotected goods and is expanding the network for child pornography. A person who is surprised that such conduct is illegal is not due any sympathy.

There is no indication that prosecutors are abusing their discretion in choosing their targets under the PROTECT Act or comparable state statutes. The amicus States are not aware of a single person who has been prosecuted for sharing pictures of his kids with friends and family. Of course they haven't, because both prosecutors and defendants know what the statute does and does not proscribe. It is no more vague than it is overbroad, and the Eleventh Circuit's decision to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' judgment.

Respectfully submitted,

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