No. 06-694

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

MICHAEL WILLIAMS, RESPONDENT

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

## BRIEF FOR THE LIGHTED CANDLE SOCIETY AND FAMILY LEADER FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


LINDA T. COBERLY
*Winston & Strawn LLP*
*35 West Wacker Drive*
*Chicago, IL 60601*
*(312) 558-5600*

GENE C. SCHAERR
*Counsel of Record*
STEFFEN N. JOHNSON
ANDREW C. NICHOLS
LANORA E. WILLIAMS
LUKE W. GOODRICH
*Winston & Strawn LLP*
*1700 K Street, N.W.*
*Washington, D.C. 20006*
*(202) 282-5000*

*Counsel for* Amici Curiae

## QUESTION PRESENTED

Whether 18 U.S.C. § 2252A(a)(3)(B), which 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, is overbroad and therefore facially unconstitutional.

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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

In passing the PROTECT Act, Congress correctly recognized that child pornography is an enormous social problem that not only imposes serious injury on the children involved, but also injures those who may become addicted to viewing the resulting images, and their families. Unfortunately, the Eleventh Circuit struck down the Act's pandering provision based on a fundamental misunderstanding of both the market for child pornography and the applicable First Amendment principles.

The market for child pornography is grounded largely on a system of barter, in which child pornography is not only the desired commodity, but also the currency of the realm. Before the PROTECT Act, entrants into this market could use false or exaggerated claims about their non-pornographic (or even nonexistent) materials as a costless and low-risk means of acquiring child pornography. The PROTECT Act's prohibition on this "false pandering" imposes a significant cost on this form of "counterfeit" currency, thus serving as an important (if difficult to measure) component of the effort to dry up the market for child pornography. Because the Eleventh Circuit missed this aspect of the market for child pornography, it erroneously concluded that the prohibition on false pandering contributes nothing to Congress's compelling interest in protecting children from the harms associated with child pornography.

In the same way, the Eleventh Circuit wrongly concluded—without analysis—that most pandering is a form of non-commercial speech and thus entitled to full First

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, the *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Amendment protection. But given its commonplace use as a negotiating tool in the child pornography marketplace, pandering is largely, if not exclusively, a form of commercial speech. The pandering provision therefore does not reach a substantial amount of protected, non-commercial speech, and invocation of the overbreadth doctrine was thus inappropriate.

Finally, operating on an outdated understanding of child pornography as a form of speech, the Eleventh Circuit accorded full First Amendment protection to the promotion of that "speech," in spite of substantial scientific evidence that child pornography is not received by its viewers as speech at all. Properly understood, child pornography is not a form of speech any more than the consumption of addictive drugs or the use of a prostitute's services. And because the possession of child pornography (like the consumption of illicit drugs or use of a prostitute's services) is itself a crime, the pandering of child pornography is a form of immediate incitement to unlawful activity. As such, pandering is entitled to little, if any, First Amendment protection, and for that reason as well the Act does not restrict a substantial amount of protected speech.

*Amici curiae* Lighted Candle Society (LCS) and Family Leader Foundation have a strong interest in the proper resolution of these issues. LCS is a nonprofit organization dedicated to educating society about the dangers of pornography. To that end, the LCS conducts scientific research into the harms and addictive nature of pornography, and publishes information revealing the sources and effects of pornography. LCS is interested in this case because of its importance both in setting the limits of how government can combat child pornography, and in shaping society's attitudes toward such pornography.

The Family Leader Foundation (FLF) is a non-profit organization, with members nationwide, devoted to promoting principles and policies that strengthen traditional

families. FLF is interested in this case because of the serious adverse consequences of pornography, and particularly child pornography, on the families of both the children involved and older individuals who may view and perhaps become addicted to it.

## STATEMENT

Since *New York* v. *Ferber*, 458 U.S. 747 (1982), this Court has recognized the harm inherent in the production and dissemination of child pornography, as well as the government's concomitant interest in prohibiting it. Although the Court's decision in *Ferber* (along with subsequent state and federal legislation) went a long way toward driving child pornography underground, the rise of the Internet has ignited an explosion of child pornography. By one estimate, over one million pornographic images of children are available on the Internet at any time, and over 200 new images are added each day.[2]

To combat the Internet-driven explosion in child pornography, Congress passed the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251 et seq.). The CPPA defined child pornography to include, among other things, any depiction of sexually explicit conduct 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." 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003). This definition was known as the CPPA's "pandering" provision.

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[2] Wortley, Richard and Smallbone, Steven, *Child Pornography on the Internet, Problem-Oriented Guides for Police Problem-Specific Guides Series*, No. 41 at 12 (pub. avail. May 2006), (avail. at http://www.cops.usdoj.gov/mime/open.pdf?Item=1729) (citing Wellard, S.S., "Cause and Effect." *Community Care*, at 26–27, Mar. 15–21 (2001)).

In *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), the Court struck down the pandering provision as unconstitutionally overbroad, reasoning that it "punishe[d] even those possessors who took no part in pandering." *Id.* at 242-43. That is, even if an image was not child pornography, once it had been pandered as child pornography, it became "tainted and unlawful in the hands of all who receive[d] it," even if those who received it had nothing to do with the original pandering. *Id.* at 258.

In response to *Free Speech Coalition*, Congress passed a new pandering provision in the PROTECT Act. Instead of *defining* child pornography to include any image that had been pandered as child pornography at any time, the PROTECT Act created a separate offense of pandering. Thus, instead of punishing the downstream possession of materials that had, at some point, been pandered, the Act targets the act of pandering itself.[3]

The instant challenge to the new pandering provision arose when defendant Michael Williams encountered an undercover federal agent in an Internet chat room. Williams had posted a public message in the chat room, stating, "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." 444 F.3d at 1288. Recognizing the chat room as one devoted to child pornog-

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[3] The new pandering provision subjects to criminal punishment any person who "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." 18 U.S.C. § 2252A(a)(3)(B).

raphy, the agent engaged Williams in a private Internet chat, during which they traded non-pornographic images. Williams sent a photograph of a two- to three-year-old female lying on a couch in a bathing suit, along with several images of a one- to two-year-old female in various poses, "one of which depicted the child with her breast exposed and her pants down just below her waistline." *Ibid.* The agent sent Williams a photo of a college-aged female digitally regressed to look like a ten- to twelve-year-old, whom the agent claimed was her daughter.

After this exchange of photographs, Williams claimed to have 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??" *Ibid.* When the agent did not respond to Williams's request for more photographs, Williams accused the agent of being a cop. The agent 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." *Id.* at 1289. Along with the message, Williams posted a computer hyperlink, which the agent accessed, and which contained seven images of actual minors, ages five to fifteen, engaging in sexual activity, displaying their genitals, or both.

Williams pled guilty to violating the PROTECT Act's pandering provision, but reserved the right to challenge its constitutionality. Although the district court rejected his constitutional challenge, the Eleventh Circuit reversed, striking down the pandering provision as both vague and unconstitutionally overbroad.

The court first acknowledged that the prohibition on pandering *actual* child pornography raised no constitutional difficulties. The problem, according to the court, was with the prohibition on "false pandering"—that is, pandering material that is *not* child pornography "in a manner that reflects the belief, or that is intended to cause

another to believe" that the material *is* child pornography. *Ibid.* And even then, the prohibition on false pandering was problematic only insofar as it applied to non-commercial speech, for, as the court acknowledged, "the First Amendment allows the absolute prohibition of . . . false advertising of any product . . . in the commercial context." *Id.* at 1298. Thus, the court focused its analysis on false pandering in the non-commercial context—such as "a non-commercial . . . braggart, exaggerator, or outright liar[,] who claims to have illegal child pornography . . . [but] actually has [only] a video of 'Our Gang,' a dirty handkerchief, or an empty pocket"—i.e., no child pornography at all—and concluded that the pandering provision was constitutionally overbroad because it "prohibits a substantial amount of constitutionally protected speech." *Id.* at 1296, 1298.

## SUMMARY OF ARGUMENT

In striking down the PROTECT Act's pandering provision, the Eleventh Circuit committed three errors that infected its analysis and require reversal.

First, the court below fundamentally misunderstood the market for child pornography. "False pandering"—i.e., pandering material that is *not* child pornography as if it *is*—is a key form of currency in the barter-based child pornography marketplace. Prohibiting false pandering thus serves as an important (if difficult to quantify) component of the effort to dry up the market for child pornography.

Second, the Eleventh Circuit erred in concluding that pandering is primarily a form of non-commercial speech entitled to full First Amendment protection. To the contrary, pandering is largely, if not exclusively, a form of commercial speech, and the pandering provision therefore does not reach a substantial amount of protected, non-commercial speech. Accordingly, that provision also falls outside the overbreadth doctrine.

Third, the Eleventh Circuit erroneously assumed that the receipt of pornographic images is an act of expression subject to the usual panoply of First Amendment protections. In fact, however, substantial scientific evidence indicates that child pornography is not received by its viewers as speech at all. Properly understood, the viewing of child pornography is not a form of speech any more than is the use of drugs or the services of a prostitute. And because the possession of child pornography (like the use of illicit drugs or a prostitute's services) is itself a crime, the pandering of child pornography is a form of immediate incitement to unlawful activity. Pandering, therefore, is entitled to little, if any, First Amendment protection. And for this reason too, the Act's pandering provision does not reach a substantial amount of protected speech.

## ARGUMENT

### I. Punishing False Pandering Is An Important Means Of Restricting Participation In The Market For Child Pornography.

The Eleventh Circuit struck down the PROTECT Act's pandering provision because it prohibits pandering not only of child pornography, but also of material that is not child pornography—so long as the material is pandered "in a manner that reflects the belief, or that is intended to cause another to believe," that the material is child pornography. 18 U.S.C. § 2252A(a)(3)(B). According to the Eleventh Circuit, Congress "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." *Williams*, 444 F.3d at 1303 (emphasis added). Because the Eleventh Circuit failed to see a connection between the prohibition of false pandering and the government's compelling interest in protecting children from sexual abuse in the production of pornography, the court refused to sustain the statute under the market deterrence rationale articulated in *Ferber* and *Os-*

*borne*. See *Ferber*, 458 U.S. at 760 ("The most expeditious if not the only practical method of law enforcement [against child pornography] may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").

This conclusion is wrong not only because it disregards specific congressional findings about the market for child pornography, but also because it fundamentally misunderstands the characteristics of that market. As the PROTECT Act's Conference Report explains: "*even fraudulent offers* to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R. Rep. No. 108-66, Title V, at 62 (2003) (emphasis added).

Although credit cards and other forms of electronic payment fuel the online child pornography industry to the tune of billions of dollars each year, a large swath of the child pornography marketplace is fueled not by cash purchases but by barter—where child pornography is both the product and the currency. See Creighton, Susan J., *Child Pornography: Images of the Abuse of Children*, NSPCC Research Briefing (Nov. 2003) (available at http://www.nspcc.org.uk/Inform/Research/Briefings/ImagesOfChildAbuse_ifega45952.html) ("The use of child pornography for barter . . . has increased with the advent of the Internet[,] . . . [and] the desire for new pictures can lead some consumers to abuse their own, or neighbouring children, in order to supply fresh images for barter . . . ."). A wide variety of fora, such as peer-to-peer networks, email, or chat rooms, allow users to exchange images freely and anonymously over the Internet. *Regarding Peer-to-Peer Networks and Child Pornography*, 109th Cong. (Sept. 9, 2003) (statement of John Malcolm, Deputy Assistant Att'y Gen., Criminal Division, U.S. Dep't of Justice). In short, the medium of exchange is often not money, but more child pornography. *Ibid.*

Before completing an exchange, child pornographers often engage in lengthy and elaborate negotiations. Some users "set up 'rules' for access to [their] file collection. Thus, for example, a user will allow another user to download five images only if that person first uploads three images." *Ibid.* Other negotiations can be quite complex and take place over weeks or months. As in this case, child pornographers are wary of law enforcement agents posing as fellow pornographers. Accusations of being an undercover officer are common, and traders often begin by exchanging non-pornographic images, and working their way up to actual child pornography.

This bartering process is almost invariably accompanied by inflated claims of value—both of the volume and type of child pornography a pornographer has. And, as in other markets, many transactions do not take place because the parties are unable to agree upon satisfactory terms, or because the claims of one or both parties prove false or inflated.

Nevertheless, this sort of pandering—this "puffing" or "hawking" of one's wares, including both false and inflated claims as well as truthful ones—is an essential part of the child pornography marketplace. False and inflated claims actually serve as a form of currency (albeit counterfeit), allowing seekers of child pornography to "trade up" for more and "better" images even if they lack a broad collection of hard core images of their own. They are, in effect, an important expression of the "demand" for child pornography, thus driving the supply of actual child victims. See H.R. Rep. No. 108-66, Title V, at 62 (2003).

The punishment of pandering, therefore—even when the pandered material is not actually child pornography or does not exist at all—imposes a significant cost on the child pornography market. When false pandering goes unpunished, child pornographers have an essentially risk-free form of currency. They can enter chat rooms, negotiate with false promises of providing "hard core" images,

and obtain images from other pornographers, all without actually possessing illicit images. Punishing false pandering therefore serves an important purpose: it increases the risk (and cost) to those who would otherwise "trade up" (or enter the market for the first time) based on false promises to provide illicit images.

While the impact on the market of this increased cost is difficult to quantify, that difficulty should not categorically preclude Congress from choosing to target an important expression of the demand for child pornography. To the contrary, the documented and important role of false pandering in accessing and expanding the market for illicit images provides a powerful justification for Congress' action, and rebuts the Eleventh Circuit's suggestion that no such connection exists. As Congress found: "dry[ing] up the market" for child pornography by "imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product" is an important tool in combating child pornography, and the government's compelling interest in preventing child sexual abuse "extends to stamping out the vice of child pornography at all levels in the distribution chain." Pub. L. 108-21 § 501(2)-(3). These findings are entitled to substantial deference. *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 196 (1997).

## II. Because False Pandering Is Largely, If Not Exclusively, A Form Of Commercial Speech, The Pandering Provision Does Not Reach A Substantial Amount Of Protected, Non-Commercial Speech.

An equally significant problem with the Eleventh Circuit's decision is its assumption, without analysis, that "most child pornography is discussed and exchanged" (and thus pandered) "[i]n a non-commercial setting," and there-

fore most pandering constitutes non-commercial speech.[4] 444 F.3d at 1304. The court acknowledged that "the pandering provision would likely pass our muster as a prohibition of unprotected forms of commercial speech" if commercial speech were all it covered. 444 F.3d at 1298. In that case, the court explained, the pandering provision would simply be a prohibition on truthful advertising of illegal products and false advertising of legal (or nonexistent) products—both of which are unprotected speech. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). But because the court believed that the pandering provision prohibited a substantial amount of protected, *non-commercial* speech, it struck down the provision as overbroad. 444 F.3d at 1298.[5]

The assumption that most pandering (and, specifically, false pandering) of child pornography is non-commercial speech is baffling. Child pornography, like other contraband such as illicit drugs, firearms, or the services of a prostitute, is a highly valuable commodity. It drives billions of dollars in sales each year (not to mention related advertising), and it is traded on what may be an even

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[4] Commercial speech is typically defined as "speech proposing a commercial transaction," or "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 561-62 (1980).

[5] Even if pandering is non-commercial speech (which it is not), the Eleventh Circuit did not explain why *false* pandering, which necessarily consists of false statements of fact, is entitled to First Amendment protection in light of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). There, the Court emphasized that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Ibid.* False pandering is precisely such valueless speech.

greater scale. "Advertis[ing], promot[ing], [and] solicit[ing]" that valuable commodity is quintessentially a form of commercial speech. Just because the commodity is illegal does not mean that it is non-commercial.

Moreover, as noted above, false pandering in particular is an integral part of the negotiations in child pornography transactions, and can even serve as a form of currency. The "advertising, promoting, presenting, or distributing" of non-pornographic material in a manner that causes another to believe that the material is child pornography is, essentially, a form of bait and switch (or counterfeit) purchasing. It allows for low-cost (or no-cost) participation in the market for child pornography and gives pornographers with sparse collections an opportunity to amass more and harder-core images.

Similarly, another important type of false pandering is the "soliciting" of material in a manner that reflects the belief that the material is child pornography even when it is not—in other words, attempting to obtain illegal child pornography unsuccessfully, either because the material is not illegal or does not exist. False solicitation is often the flipside of false pandering. One party falsely panders material as if it is child pornography, while the other solicits what he believes to be child pornography. Both practices are an extremely common form of participation in the market for child pornography, and both are critical components of longer-term schemes to facilitate transfers of actual child pornography.

It is precisely this type of commercial conduct that Congress targeted in the false pandering provision of the PROTECT Act. As the House Conference Report explains:

> [The pandering] 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.

> The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent. Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material.

H.R. Conf. Rep. 108-66 at 61-62 (2003). The vast majority of what is technically pandering will fall into one of these two categories of commercial speech.

In short, notwithstanding the Eleventh Circuit's far-fetched hypotheticals, the "plainly legitimate applications" of the pandering provision far outstrip its "application to protected speech," and the "expansive remedy" of overbreadth invalidation is therefore inappropriate. *Virginia* v. *Hicks*, 539 U.S. 113, 119-20 (2003).

## III. Pandering Of Child Pornography Deserves Reduced First Amendment Protection Because Child Pornography Is Not Properly Categorized Scientifically As A Form Of Speech And Because Pandering Of Child Pornography Is A Form Of Immediate Incitement To Unlawful Activity.

Whether or not a panderer actually has child pornography, the material he claims to have, even if it existed, would not be processed by its recipient as speech. This too confirms that the panderer's "speech" is entitled to reduced constitutional protection, and further undermines the Eleventh Circuit's conclusion that the PROTECT Act violates the First Amendment.

Scholarly research shows that emotionally charged material—such as pornography, and especially child pornography—is evaluated and stored in a separate portion of the brain from material triggering rational thought. The thinking and comprehending portion of the brain is the neocortex; the emotional center of the brain is the limbic system.

According to Dr. Daniel Goleman, emotional visual signals bypass the neocortex and go directly to the limbic system. Relying on the work of Joseph LeDoux, a neuroscientist at the Center for Neural Science in New York, Goleman notes that the brain has a "back alley" that allows its emotional centers to receive "direct inputs from the senses before they are fully registered by the neocortex." Daniel Goleman and Richard Davidson, eds., *Consciousness, Brain, States of Awareness, and Mysticism* 18 (1979) (cited in Judith A. Reisman, *The Psychopharmacology of Pictorial Pornography: Restructuring Brain, Mind & Memory & Subverting Freedom of Speech* 14 (July 2003)). When this happens, "[t]he limbic system can become so highly activated that it overwhelms rational thought, making a person speechless with fury or joy." *Ibid.* Pictorial sex stimuli are so strong that they take advantage of this process and "dominate the limbic system." *Id.* at 17.

In other words, "the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process." Frederick Schauer, *Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language*, 67 Geo. L. J. 899, 922-923 (1979). Pornography is thus not a form of speech, but "a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means." *Ibid.* As Professor Sunstein argues, because "[t]he effect and intent of pornography . . . are to produce sexual arousal, and not in any sense to affect the courts of self-government . . . pornography does not have the special properties that single out speech for special protection; it is more akin to a sexual aid than a communicative expression." Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589, 602-608.

This conclusion accords with common experience. "When information is passed using words, the listener typically weighs and assesses the believability of the mes-

sage. Often the listener is counter-arguing inside [her] head against a verbally presented message." Mary Anne Layden, Dir. Ctr. for Cognitive Therapy, Dep't of Psychiatry, Univ. of Pennsylvania, Testimony before the Senate Committee on Commerce, Science, and Transportation (Mar. 4, 1999) (available at http://commerce.senate.gov/hearings/0304lay.pdf).

By contrast, images, especially graphic images, "are mentally processed as events, as facts and are stored unbuffered and unchallenged." *Id.* Indeed, "of all our senses, sight is the most likely to involve recall. And the more bizarre the visual image the more likely we are to see and remember it. . . . To Aristotle, this formation of mental images was like tracing a signet ring on wax." Reisman, at 8 (citing Richard Restak, *The Brain,* New York's Bantam (1984)). Relying on this same principle, Adolph Hitler held that "propaganda must be addressed to the emotions and not to the intelligence . . . vicious and gruesome, with lurid photographs . . . sexual and physical. . . [T]he masses need a thrill of horror." Anthony Rhodes, *Propaganda: The Art of Persuasion: World War II,* 12-15 The Wellfleet Press (1987) (cited in Reisman, *supra* at 14).

In short, scientific literature and common sense confirm that pornographic pictures literally short-circuit the brain, circumventing the speech and logic regions and lodging deeply in the brain's emotional centers. This is *a fortiori* true of pornographic images of children, which are emotionally supercharged. It follows that pornographic images of children are not properly categorized scientifically as speech.

Because pornographic images of children are not speech, neither the pandering nor receipt of such images is entitled to First Amendment protection. As the Court has recognized, "[t]he fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution." *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 67-68

(1973). The pandering of child pornography, which is not speech but a sexual surrogate, is much more closely related to the pandering of a prostitute or sale of drugs than it is to the promotion and distribution of political pamphlets, or even to the advertising of a typical commercial product. And there is, of course, "no doubt that a newspaper constitutionally [can] be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

In this sense, the pandering of child pornography is simply a form of "incit[ement] [to] imminent lawless action" entitled to no First Amendment protection under *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). As the Court explained in *Brandenburg*, the government may suppress speech advocating a violation of law if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Ibid*; see also *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) ("A direct solicitation of unlawful activity may of course be proscribed.").

The pandering of child prostitution incites precisely such action, for the panderer advertises, promotes, presents, distributes, or solicits material the mere possession of which constitutes a crime. See 18 U.S.C. § 2252A(a)(5). And, of course, the same immediate incitement is present whether the panderer actually possesses illegal materials or not—just as the solicitation of prostitution may be criminalized even if the person solicited turns out to be not a prostitute but an undercover agent.

Thus, not only is child pornography "more akin to a sexual aid than a communicative expression" and therefore not speech, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589, 602-608, but it is also a sexual aid the mere possession of which constitutes criminal conduct. The pandering of such material, therefore—whether or not the panderer possesses it—is an im-

mediate incitement to unlawful activity not entitled to First Amendment protection.

For that reason as well, the Act's pandering provisions cannot be said to reach a substantial amount of protected speech, and the Eleventh Circuit was therefore wrong to invoke the overbreadth doctrine.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted.

LINDA T. COBERLY
*Winston & Strawn LLP*
*35 West Wacker Drive*
*Chicago, IL 60601*
*(312) 558-5600*

GENE C. SCHAERR
*Counsel of Record*
STEFFEN N. JOHNSON
ANDREW C. NICHOLS
LANORA E. WILLIAMS
LUKE W. GOODRICH
*Winston & Strawn LLP*
*1700 K Street, N.W.*
*Washington, D.C. 20006*
*(202) 282-5000*

*Counsel for* Amicus Curiae

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