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 OF THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, STOP CHILD PREDATORS, THE KLAASKIDS FOUNDATION, THE JESSICA MARIE LUNSFORD FOUNDATION, AND THE JOYFUL CHILD FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The National Law Center for Children and Families ("National Law Center"), based in Alexandria, Virginia, is a non-profit legal organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws across the nation. Through its legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop child pornography and its concomitant harms of sexual exploitation of children, women, and families. The National Law Center has participated in numerous *amici curiae* briefs in this Court, including *Osborne v. Ohio*, *Alexander v. United States*, and *Jacobson v. United States*.

Stop Child Predators is a non-profit organization based in Washington, D.C. and brings together law enforcement organizations, community groups, and victims' rights advocates to lead targeted public awareness campaigns to prevent crimes against children. Through outreach, education, and advocacy, Stop Child Predators is dedicated to advancing three goals in all 50 States: implementing mandatory sentencing minimums and tougher penalties for those guilty of crimes against children; promoting an efficient and integrated nationwide sex offender registry; and providing for victims' representation during both the sentencing of child predators and again prior to the offender's release into the community.

The KlaasKids Foundation is a non-profit corporation that was founded in September 1994. Its mission is to stop crimes

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters to that effect have been lodged with the Clerk of the Court.

against children by focusing on three goals: increased awareness and education; partnerships among government, law enforcement, social-service and non-profit organizations, community organizations, and individuals; and criminal-justice legislative reform. To encourage these goals, the KlaasKids Foundation has created, researched, supported, and engaged in many programs and activities.

The Jessica Marie Lunsford Foundation ("Lunsford Foundation"), based in Homosassa Springs, Florida, is a section 501(c)(3) non-profit organization, dedicated to educating the community about the dangers created by sex offenders, protecting children in crisis, and promoting legal efforts to stop the pedophiles, sex offenders, and predators who prey on children across the nation. In conjunction with its goals, the Lunsford Foundation supports a wide variety of educational programs and child-fingerprint drives throughout the country.

The Joyful Child Foundation (in Memory of Samantha Runnion) is a non-profit public benefit corporation formed in 2002. The Foundation's programs focus on proactive approaches in dealing with the difficult issues of violence against children while celebrating the gift that is every child. Among the activities supported by the Foundation are community "child watch" programs, research concerning child predator and recidivism prevention, and programs that serve in the prevention of child abuse and/or abduction.[2]

SUMMARY OF ARGUMENT

The Court of Appeals wrongly invalidated an effective and constitutional tool for staunching the marketing and traffick-

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[2] *Amici* also note that their undersigned counsel of record previously served as an Associate Deputy Attorney General, and in that capacity had a substantial role in the process leading up to the enactment of the PROTECT Act. *See* note 3 *infra* (summarizing legislative hearings leading up to the Act).

ing of child pornography over the Internet. By criminalizing the unprotected act of *advertising or promoting* child pornography (as opposed to the actual possession or distribution itself), the PROTECT Act's "pandering" provision properly allows the Government to prosecute a would-be purveyor or consumer of child pornography without necessarily having to prove that that the defendant actually had or received any real child pornography. 18 U.S.C. § 2252A(a)(3)(B).

As Congress recognized, the availability of this narrowly drawn pandering charge is essential to ensuring that technological changes do not eviscerate the practical enforceability of the nation's child pornography laws. In enacting the PROTECT Act, Congress correctly found that the availability of "virtual" imaging technology and other techniques have allowed criminal defendants increasingly to argue, with some success, that there is a reasonable doubt as to whether the images they trafficked or possessed were virtual or real. Unfortunately, the available evidence since the PROTECT Act vindicates Congress's pessimism on this score: there is clear evidence that the virtual image defense is hindering the effective enforcement of child pornography laws by (1) allowing defendants to escape prosecution; (2) substantially increasing the time and resources that must be devoted to win a child pornography case, including time-consuming battles over expert testimony; and (3) distorting the mix of cases that are charged in favor of only those cases involving images of *identified* minors.

The Court of Appeals' rationale for invalidating this important statute rests on both statutory and constitutional error. The court acknowledged that the PROTECT Act's pandering provision avoids the specific constitutional problems of the predecessor provision invalidated in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and the court likewise acknowledged that, if the provision reaches only commercial or unprotected speech, it is not facially invalid. Pet. App.

19a-22a. The court nonetheless held the provision impermissibly overbroad because (in the court's view) it was "not limited to commercial exploitation and continues to sweep in non-commercial speech." Pet. App. 22a. The statutory text makes clear, however, that the provision criminalizes only *speech that, as in this case, proposes a transaction in child pornography—i.e.*, offers or solicitations to purchase, trade, or otherwise distribute child pornography. Contrary to the lower court's suggestion, all of this expression constitutes either commercial or unprotected speech for purposes of the First Amendment, and the pandering provision therefore falls squarely within the Government's power to prohibit speech that proposes an illegal transaction or that is false and misleading.

ARGUMENT

Because the decision below threatens to undermine the Government's ability to address the persistent and serious threat posed by child pornography, and because it does so on the basis of a flawed statutory and constitutional analysis, this Court should reverse the judgment and uphold the validity of the PROTECT Act's "pandering" provision.

I. THE PROTECT ACT'S "PANDERING" PROVISION WAS CAREFULLY DRAWN TO TARGET UNPROTECTED "OFFERS TO TRANSACT" IN CHILD PORNOGRAPHY

As this Court recognized long ago, "[t]he most expeditious if not the only practical method of law enforcement" in fighting 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." *New York v. Ferber*, 458 U.S. 747, 760 (1982) (emphasis added). The child pornography "pandering" provision that was facially invalidated in this case, 18 U.S.C. § 2252A(a)(3)(B), was an outgrowth of Congress's effort to

do just that—to strike at the *hawking* of child pornography, as opposed to its actual possession or distribution (which are covered by other provisions of the criminal code).

In drafting this provision, Congress sought simultaneously to satisfy two important objectives. First, Congress endeavored to frame the statute in a way that would comply fully with the requirements of the First Amendment as construed by this Court in *Free Speech Coalition*. *See* S. REP. NO. 108-2, at 6 (2003) ("S. 151 has been carefully written to work within the limitations established by that decision."). Second, Congress sought to write the provision so that prosecutors would be able to establish unlawful pandering *without* having to undertake the potentially difficult task of proving whether the panderer could actually have delivered "real" child pornography (*i.e.*, pornography produced by using real children). *Id*. at 12; *see also* H.R. REP. NO. 107-526, at 22-23 (2002) (discussing predecessor bill).

The Eleventh Circuit concluded that Congress's twin objectives were incompatible, because in order to comply with the First Amendment, the "Government must do its job to determine whether illegal material is behind the pander." Pet. App. 35a. As we explain below, the Court of Appeals' erroneous conclusion rested on a misapprehension of both the meaning of § 2252A(a)(3)(B) and the relevant First Amendment principles. *See infra* at 18-30. But in order to understand fully why the lower court's statutory and constitutional analysis were so plainly mistaken, it is useful to review in some detail the practical considerations that motivated Congress to draft § 2252A(a)(3)(B) the way that it did. Far from trying to excuse the Government from "do[ing] its job," Congress sought to fashion new and constitutionally valid tools to address the growing threat presented by computer technology to the enforceability of the nation's child pornography laws.

A. Congress Properly Found that Recent Technological Advances Threaten to Impede the Practical Enforceability of Traditional Prohibitions of Child Pornography

For more than a decade, Congress has sought proactively to address the risk that advances in computer technology may make it harder, *as a practical matter*, to enforce prohibitions against child pornography. *See* PROTECT Act, Pub. L. No. 108-21, § 501, 117 Stat. 650, 676-78 (Apr. 30, 2003) (congressional findings), *reprinted at* Pet. App. 72a-76a; Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, § 121, subsec. 1, 110 Stat. 3009-26, 3009-26 to 3009-27 (Sept. 30, 1996) (congressional findings). Congress's primary concern has been that, although a flat prohibition against the possession or distribution of child pornography is unquestionably constitutional, *see Osborne v. Ohio*, 495 U.S. 103, 110 (1990), technological developments could create practical enforcement problems that would substantially eviscerate the Government's ability to enforce these vital prohibitions, which protect real children from real abuse. PROTECT Act, § 501(2)-(3), (13)-(14), Pet. App. 72a, 75a-76a. In drafting the PROTECT Act, Congress explicitly articulated these concerns at some length in the form of detailed factual findings set forth in the statute itself. *Id*., § 501, Pet. App. 72a-76a.[3]

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[3] These findings were based on extensive hearings that were held in both houses over the course of two different sessions of Congress. *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision, Ashcroft v. Free Speech Coalition: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. (May 1, 2002) ["May 1, 2002 House Hearing"], available at <http://judiciary.house.gov/media/pdfs/printers/107th/79366. pdf>; *Child Obscenity and Pornography Prevention Act of 2002 and the Sex Tourism Prohibition Improvement Act of 2002: Hearing on H.R. 4623 and H.R. 4477 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. (May 9, 2002) ["May 9, 2002 House Hearing"], available at <http://judiciary.house.gov/

1. Congress's Findings in the PROTECT Act

With the rise of the Internet, the "vast majority" of the child pornography traded or possessed today consists of "images contained on computer hard drives, computer disks, and/or related media." PROTECT Act, § 501(6), Pet. App. 73a. It is currently "prohibitively expensive" to "computer generate realistic images of child pornography" and is likely to remain so "for the foreseeable future." *Id*., § 501(11), Pet. App. 75a; *see also* May 1, 2002 House Hearing, *supra*, at 7, 11 (statement of Special Agent Michael J. Heimbach, Chief, Crimes Against Children Unit, F.B.I.). Accordingly, "[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." PROTECT Act, § 501(7), Pet. App. 73a.

However, it is not "difficult or expensive to use readily available technology to disguise … depictions of real children to make them unidentifiable or to make them appear computer-generated." *Id*., § 501(11), Pet. App. 75a; *see also id*., § 501(5), Pet. App. 73a (finding that such technology already exists); May 1, 2002 House Hearing, *supra*, at 18 (statement of Ernest E. Allen, President, National Center for Missing and Exploited Children ["NCMEC"]) ("We are already seeing perpetrators modify existing images to make them look more like 'virtual' images.").[4] Moreover, the "retransmission of

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media/pdfs/printers/107th/79526.pdf>; *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Oct. 2, 2002) ["Oct. 2, 2002 Senate Hearing"], available at <http://www.access.gpo.gov/congress/senate/pdf/107hrg/88680.pdf>; *Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (Mar. 11, 2003) ["Mar. 11, 2003 House Hearing"], available at <http://judiciary.house.gov/media/pdfs/printers/108th/85642.pdf>.

[4] NCMEC vividly illustrated the point by presenting a photographic array of four children, only one of whom was real (the others were "virtual chil-

images" over the Internet "can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child." PROTECT Act, § 501(8), Pet. App. 74a; *see also* May 1, 2002 House Hearing, *supra*, at 7, 11. The expert's task is even harder if the image was created by being "scanned from a paper version into a digital format," because "proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it." PROTECT Act, § 501(8), Pet. App. 74a; *see also* May 1, 2002 House Hearing, *supra*, at 7, 11.

As a result of these technological issues, "many criminal defendants have suggested that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated." PROTECT Act, § 501(7), Pet. App. 73a. Such challenges "increased significantly" after this Court's decision in *Free Speech Coalition*, and "[s]ome of these defense efforts have already been successful." *Id*., § 501(7), (10), Pet. App. 74a-75a.[5]

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dren"). May 1, 2002 House Hearing, *supra*, at 22-23, 39. (The array is reproduced as Appendix A to this brief.) The child on the lower left of the array is real; the child on the lower right is entirely virtual; and the remaining two depictions are "morphed" images created from pictures of real children. *See id*. at 22-23; *see also* Susan S. Kreston, *Defeating the Virtual Defense in Child Pornography Prosecutions*, 4 J. High. Tech. L. 49, 73-74 (2004) (describing the array in more detail). Confirming Congress's finding that the technology for creating virtual images was not yet cost-effective for pornographers, NCMEC has stated that it took their forensic imaging specialist 2½ days to create the virtual image, even though the image only shows the child from the shoulders up. *Id*. at 74.

[5] This latter finding was supported by testimony from the Department of Justice at the House hearing held in early 2003:

> In *Free Speech Coalition*, Justice Thomas' concurring opinion had noted that the Government had thus far been unable to point to any specific cases in which a "computer-generated images" defense had been successful. 122 S. Ct. at 1406. That is no longer the case. We have suffered several adverse judgments, including a partial directed

Congress also recognized that this problem was only going to get worse over time. *Id.*, § 501(13), Pet. App. 75a-76a. As technological advances continued, there would be an increasing threat that defendants would be able to "create a reasonable doubt in every case of computer images even when a real child was abused." *Id.* And even if the Government could show through expert forensic analysis that a particular image was not virtual, a defendant might still be able to create reasonable doubt as to *scienter* by claiming that *he* believed the images were virtual. *Id.*

Moreover, Congress recognized that the impact of this problem cannot be measured solely in terms of the number of cases in which defendants *successfully* assert a virtual child pornography defense. The increased drain on resources associated with rebutting such defenses (*e.g.*, through expert testimony or through case-specific investigation of the origin of the relevant images) exacts its own significant cost: "the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedi-

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verdict of acquittal, as a result of the assertion of such defenses in child pornography cases. *See, e.g.*, *United States v. Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in *Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images); *United States v. Bunnell*, 2002 WL 927765 (D. Me. 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted); *see also United States v. Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted; court held that the Government must prove beyond a reasonable doubt that *the defendant knew* that the images depicted real children).

Mar. 11, 2003 House Hearing, *supra*, at 8-9 (statement of Daniel P. Collins, Assoc. Dep. Att'y Gen.); *see also* May 1, 2002 House Hearing, *supra*, at 22 (statement of Lt. William C. Walsh, Dallas Police Dep't) (noting example of a case in which the prosecution was dropped because "the prosecutor knew that he could not identify the children depicted as real individuals").

cated to each child pornography case now are significantly higher than ever before." *Id.*, § 501(10), Pet. App. 75a; *see also* Oct. 2, 2002 Senate Hearing, *supra*, at 32-37 (describing in detail the resource problems associated with disproving "virtual" pornography defenses).

In addition to the potential impact on the *number* of cases being filed, the ability to raise such defenses had already led to a discernible shift in the *mix* of cases that were being accepted for prosecution. Thus, Congress found that, after the Ninth Circuit's 1999 decision in *Free Speech Coalition* (which was affirmed by this Court in 2002), "prosecutions generally have been brought" in that Circuit "only in the most clear-cut cases in which the government *can specifically identify the origin of the image*"—which represents only "a fraction of meritorious child pornography cases." PROTECT Act, § 501(9), Pet. App. 74a (emphasis added); *see also* Mar. 11, 2003 House Hearing, *supra*, at 9; May 1, 2002 House Hearing, *supra*, at 10-11, 25.

2. Events Subsequent to the PROTECT Act Strongly Confirm Congress's Findings

Subsequent events have confirmed that all of the concerns identified by Congress in the PROTECT Act remain well-founded. The available data demonstrate that the virtual image defense is hindering the effective enforcement of the child pornography laws by (1) allowing defendants to escape prosecution; (2) substantially increasing the time and resources that must be devoted to win a child pornography case; and (3) distorting the mix of cases that are charged.

In particular, a study conducted by NCMEC and the Crimes Against Children Research Center at the University of New Hampshire surveyed state prosecutors across the country to assess the practical impact of the *Free Speech Coalition* decision. *See Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile*

Online Victimization Study (2005), available at <http://www.missingkids.com/en_US/publications/NC144.pdf>. The study found that, within one year of the decision, 40% of state prosecutors reported that the virtual image defense had been raised in cases in their offices, and that nearly 10% of prosecutors reported declining cases they would have pursued before *Free Speech Coalition*. *Id*. at 22-23. Moreover, the study confirmed Congress's prediction that prosecutors would shift their mix of cases in favor of those involving identified victims: nearly *two-thirds* of all offices reported using victim-identification as a means of complying with the Court's decision. *Id*. at 23-24.

The reported cases confirm and illustrate these practical problems. For example, in an Ohio case, a defendant was partially successful in asserting a virtual image defense at trial, and (at least for now) *fully* successful in pressing the defense on appeal. *See State v. Tooley*, No. 2004-P-0064, 2005 WL 3476649 (Ohio App. Dec. 16, 2005), *appeal pending*, No. 2006-0216 (Ohio S. Ct.). At a bench trial, the State presented an agent who testified that the persons depicted in three of the charged images were real because the agent was able to cross-reference the images with the National Child Victim Identification System. 2005 WL 3476649 at *2, ¶ 8. The defendant, in turn, presented an expert who testified that "it would be impossible to determine, by the makeup of the image alone, whether a digital image had been altered or was entirely fake." *Id*., ¶ 10. The court partially accepted the virtual image defense, because it convicted the defendant *only* on the counts involving the three images identified in the victim database and *acquitted* the defendant on the remaining counts. *Id*., ¶ 11. On appeal, the Ohio Court of Appeals facially invalidated the statute, but also held, in the alternative, that the defendant was entitled to *a judgment of acquittal* on the remaining counts because the agent's testimony about the database identifications was inadmissible hearsay. *Id*. at *9-*12, ¶¶ 88-102; *see also* Oct. 2, 2002 Senate Hearing,

supra, at 34 (noting case in which, because of hearsay objections, Government had to produce victim-identification witnesses from Germany and the U.K.).[6]

The substantial costs, as well as the future risks, associated with the "virtual" child pornography defense are vividly illustrated by the recent 2-1 decision in *United States v. Rodriguez-Pacheco*, 475 F.2d 434 (1st Cir. 2007). In that case, the defendant raised the virtual image defense at *sentencing* in connection with the application of the guidelines enhancement for possessing 10 or more images. *Id*. at 437-38. In response, the Government presented the testimony of an F.B.I. expert who explained and applied a methodology for determining whether images were those of real children. *Id*. at 438. Subsequent review of the transcript revealed, however, that the expert had only testified as to nine images, and the district court filled the resulting gap by finding that the court could itself adopt and apply the expert's methodology to the tenth image. *Id*. On appeal, the majority held this to be sufficient, *id*. at 445-46, but Judge Torruella issued a lengthy dissent, *id*. at 446-64.

Judge Torruella relied heavily on the fact that the Government's own expert had conceded that it was technologically possible, with sufficient time, to "'create a perfect fake image.'" *Id*. at 453 (quoting expert's testimony). Because it was thus "beyond scientific dispute that it is possible to create virtual photographic images that can only be detected (with difficulty) by experts," Judge Torruella concluded that "experts are *required* before factfinders can make their findings on this issue." *Id*. at 464 (emphasis added). That the Govern-

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[6] In another Ohio case, the state court of appeals affirmed the dismissal of an indictment because the defendant's virtual-images expert (who happened to be the same expert who testified in *Tooley*) was rendered unavailable when the federal Government executed a search warrant on his residence. *See State v. Brady*, No. 2005-A-0085, 2005 WL 1113969 (Ohio App. Apr. 13, 2007).

ment went to the trouble of presenting the expert testimony in the first place—at sentencing, no less—is proof enough of the costs created by the virtual image defense; but if the dissenting judge's view of the technology (and the law) is adopted by other courts, the costs will be considerably higher.

Other cases amply confirm Congress's prediction that the increasing role of complex expert testimony in child pornography cases would become a source of protracted and expensive satellite litigation. For example, in one case pending in Massachusetts, a defendant raising a virtual image defense brought a successful motion to exclude the Government's contrary expert testimony as not satisfying the standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See United States v. Frabizio*, 445 F. Supp. 2d 152 (D. Mass. 2006), *reh'g granted in part*, 463 F. Supp. 2d 111 (D. Mass. 2006) (granting the Government another opportunity to try to establish admissibility). Notably, the opinion in *Frabizio* observed that the *Daubert* hearing lasted *three days*, and that the Government's first proffered expert was withdrawn after cross-examination revealed that his computer program for analyzing images had a potential error rate as high as 30%. *See* 445 F. Supp. 2d at 154 n.2.

Indeed, the use of the virtual image defense has become so widespread that Congress in 2006 enacted regulatory provisions designed to ensure that defense forensic experts in child pornography cases would generally be required to conduct their pretrial inspections and examinations at Government facilities. 18 U.S.C. § 3509(m). This, in turn, has created yet another layer of litigation as to the meaning and validity of these restrictions. *See, e.g.*, *United States v. Kellinger*, 471 F. Supp. 2d 640 (E.D. Va. 2007); *United States v. O'Rourke*, 470 F. Supp. 2d 1049 (D. Ariz. 2007).

B. Congress Crafts a Narrow Provision Focused on "Offers to Transact in" Child Pornography

In light of these concerns, Congress sought to come up with constitutionally valid tools that would allow prosecutors to combat the market for child pornography without having to undertake the potentially difficult task of proving the origin of particular images. One approach was to aim at the *advertising or promotion* of child pornography, as opposed to its actual production and distribution. However, Congress's first effort at crafting such a law, 18 U.S.C. § 2256(8)(D) (2000 ed.) (since repealed), was facially invalidated by this Court in *Free Speech Coalition*. 535 U.S. at 257-58. As this Court's decision makes clear, the problem was that Congress had crossed wires in drafting the provision: rather than attacking the marketing directly, Congress instead proscribed the possession and distribution of *materials* depending upon how they were marketed. 535 U.S. at 257. As the Court explained:

> "Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described…. [*The statute*] *prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain.* The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. *Possession is a crime even when the possessor knows the movie was mislabeled.* The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment."

Id. (emphasis added).

In response to *Free Speech Coalition*, Congress held extensive hearings in both the 107th and the 108th Congress as to

how it might fix the problems this Court had identified. *See* note 3 *supra*. The House and Senate bills that were the subject of these hearings all contained substantially similar language that sought to amend the "pandering" prohibition in a way that would address the constitutional concerns identified in *Free Speech Coalition* by focusing directly on the *marketing* of child pornography.[7]

As first introduced, the House version would have added a new section creating the related offenses of "pandering" and "solicitation" of child pornography. *See* H.R. 4623, 107th Congress (2002). The "pandering" provision focused on the marketing of child pornography by making it a crime to

> "offer[], agree[], attempt[], or conspire[] to provide or sell a visual depiction to another, and … in connection therewith knowingly [to] advertise[], promote[], present[], or describe[] the visual depiction with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct."

Id., § 3 (proposing a new 18 U.S.C. § 2252B(a)).[8] The Department of Justice argued in its testimony that, by "regulating the marketing itself," this provision should avoid "con-

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[7] Much of the debate over the PROTECT Act focused on a separate set of provisions under which Congress proscribed (subject to an affirmative defense) a very narrow class of digital or computer images that were visually "indistinguishable" from hard-core child pornography. 18 U.S.C. § 2256(8)(B); *see also id*., §§ 2252A(c), 2256(2)(B), 2256(11). These latter provisions were intended to address this Court's invalidation of the more broadly worded prohibition on "virtual" child pornography that had been contained in prior law. *Free Speech Coalition*, 535 U.S. at 244-56. No issue concerning these provisions of the PROTECT Act is before the Court in this case.

[8] A separate subsection of the House bill would have created an analogous offense of soliciting child pornography. H.R. 4623, *supra*, § 3 (proposing a new 18 U.S.C. § 2252B(b)).

stitutional difficulty":

> "There is no constitutional limitation on the ability of the legislature to establish inchoate offenses (attempt, conspiracy, solicitation, etc.) respecting conduct that is aimed at unlawful transactions. For example, offering to provide or sell illegal drugs can be criminalized, even where the offeror does not actually have such drugs in hand."

Oct. 2, 2002 Senate Hearing, *supra*, at 109-10.

As reported by the Judiciary Committee, the Senate version of the "pandering" provision likewise targeted the marketing directly by making it a crime "knowingly—… [to] *advertise[], promote[], present[], distribute[]*, or solicit[]… any material or purported material in a manner that conveys the impression that the material or purported material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct." S. 2520, 107th Cong., § 3 (as reported by S. Comm. on the Judiciary, Nov. 14, 2002) (emphasis added).[9]

At the Senate hearing on this legislation, the concern was raised that the deliberate elimination of any requirement to prove that the defendant *actually* had child pornography might render the pandering provision unconstitutional. *See* Oct. 2, 2002 Senate Hearing, *supra*, at 152 (testimony of Prof. Schauer). Professor Schauer acknowledged, however, that

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[9] The Senate version, however, would have required that the material or purported material be advertised as *both* obscenity and child pornography. The feature was eliminated when the Senate Judiciary Committee reexamined the matter at the start of the 108th Congress. *See infra* at 17-18. Moreover, as originally introduced in the 107th Congress, the Senate version would have added "describes" to the italicized list of verbs shown above, but that language was eliminated in the Judiciary Committee after the Justice Department objected that it would extend beyond marketing and would thereby render the provision unconstitutional. *See* Oct. 2, 2002 Senate Hearing, *supra*, at 110.

"[i]t is possible that advertising for an unlawful product when the product does not in fact exist is also outside of the protection of commercial advertising …." *Id*. at 152 n.3. Picking up on this latter point, the Justice Department explained at length why it would be constitutional to prohibit "all offers to provide materials that are intentionally *advertised* in a manner designed to cause recipients to believe that the material is child pornography":

> "If the materials are, in fact, child pornography, then the offer may unquestionably be proscribed (as Professor Schauer admits). On the other hand, if the materials were not child pornography, but had been advertised intentionally as if they were, then the offeror is, in effect, engaged in a species of false advertising…. There is little doubt that such false advertising purporting to offer an illegal product is not constitutionally protected. Thus, *because the First Amendment allows the prohibition of both truthful advertising of an illegal product and false advertising of any product, it cannot be unconstitutional to prohibit all advertising that offers an illegal product*, regardless of whether the purveyor can actually make good on the promise…."

Id. at 31 (emphasis added).

The differences between the competing House and Senate versions were not resolved before the end of the 107th Congress, but both houses moved promptly to pass legislation at the beginning of the 108th Congress. In adopting the prohibition on "pandering" that became 18 U.S.C. § 2252A(a)(3)(B), the Senate Judiciary Committee reaffirmed that the pandering offense did *not* require proof that the materials offered or solicited actually existed:

> "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*. Thus, for example, this provision prohibits an individual from offering to dis-

> tribute 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."

S. REP. NO. 108-2, at 12 (2003). The House-Senate Conference Committee subsequently adopted the Senate version. H.R. REP. NO. 108-66, at 61 (2003).

II. BECAUSE THE PANDERING PROVISION REACHES ONLY COMMERCIAL OR UNPROTECTED SPEECH, THE COURT OF APPEALS ERRED IN FACIALLY INVALIDATING THE PROVISION

Notably, the Court of Appeals explicitly agreed with the underlying premise on which Congress had concluded that the pandering provision would be constitutional: "the government may prohibit completely the advertisement or solicitation of an illegal product or activity as well as false or misleading advertisement because neither is protected speech." Pet. App. 20a; *accord Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976). Thus, if a person offers or solicits actual child pornography, he has proposed an illegal transaction "that the government may constitutionally proscribe." Pet. App. 20a. Conversely, if a person offers or solicits child pornography under false pretenses, he has "engaged in false or misleading advertising, which the government may likewise punish." *Ibid.* Similarly, the Court of Appeal recognized that, if the pandering provision reached only commercial or unprotected speech, the "strict overbreadth" doctrine was inapplicable. *Ibid.* (citing

Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989)).

Nonetheless, the Court of Appeals facially invalidated the provision, because it concluded that the statute extends to "*non-commercial* promotion, presentation, distribution, and solicitation." Pet. App. 22a (emphasis added). In reaching this conclusion, the lower court plainly misconstrued both the reach of the provision and the commercial speech doctrine. Properly construed, the pandering provision extends only to offers to transact in child pornography: speech that proposes a sale or purchase of child pornography images, an exchange or trade of such images, or the distribution of such images free of charge. Because such speech by definition either proposes an illegal transaction or constitutes a fraudulent offer to transact, the scope of the pandering provision is precisely coextensive with the government's power to ban commercial or unprotected speech.

A. The Pandering Provision Criminalizes Only Offers or Solicitations to Transact in Child Pornography

The PROTECT Act provides that a person commits a crime if he or she "knowingly … advertises, promotes, presents, distributes, or solicits" any material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material is either actual child pornography or obscene virtual child pornography. 18 U.S.C. § 2252A(a)(3)(B). Under the plain meaning of this provision, a defendant is guilty of pandering only if he intentionally offers to provide or solicits material that is or purports to be child pornography.

Each of the verbs used by Congress to define the prohibited activities denotes an affirmative effort either to furnish child pornography to other people or to obtain it from them. To "advertise[]" means to "issue a public statement ... of something offered or wanted," WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY 31 (1968), and to "promote[]" means "to present (merchandise) for public acceptance through advertising or publicity," *id.* at 1815. Someone "presents" something when he or she "lay[s] or put[s] [it] before a person for acceptance," *id.* at 1793, and "distributes" it by "giv[ing] out or deliver[ing]" it, particularly "to the members of a group," *id.* at 550. The verb "solicits" also connotes active effort; it means "to endeavor to obtain by asking or pleading." *Id.* at 2169.

By requiring that these actions be taken "in a manner that" reflects or intentionally induces the belief that the subject material is real child pornography, Congress made clear that the offer or solicitation must objectively indicate the (illegal) nature of what is being offered or sought. And the use of the modifier "knowingly" ensures that criminal liability will be limited to defendants who act with scienter—*viz.*, knowing that their actions would reasonably be understood as offers or requests for child pornography or obscenity. *Cf. United States v. X-Citement Video*, 513 U.S. 64, 78 (1994) (construing the word "knowingly" in a statute prohibiting the interstate transportation of sexually explicit depictions of minors to modify not just the "surrounding verbs," but also the age elements criminalizing the materials).

The legislative history of the PROTECT Act confirms what is apparent from the statutory text: the pandering provision requires an intentional offer to furnish, or request to obtain, actual child pornography. As Congress explained, "[t]his provision bans the offer to *transact* in unprotected materials, coupled with proof of the offeror's specific intent." H.R. REP. NO. 108-66, *supra*, at 61 (emphasis added); *see also* S. REP. NO. 108-2, *supra*, at 12 ("[t]he crux of what this provision bans is the offer to transact in unprotected material"). In focusing on the pandering activity itself, Congress consciously departed from the approach of the provision invalidated in *Free Speech Coalition*, which had criminalized the

mere possession of materials pandered as child pornography. H.R. REP. NO. 108-66, *supra*, at 22. Instead, Congress sought to prevent anyone from "offering to distribute anything that he specifically intends to cause a recipient to believe to be actual or obscene child pornography," or "from soliciting what he believes to be" such materials. S. REP. NO. 108-2, *supra*, at 12.

When the statutory text and Congress's express intent are given effect, it is clear that the pandering provision is limited to speech that specifically *proposes a distribution of child pornography*, regardless of whether consideration is sought in exchange (and regardless of the form of any such consideration). Thus, by its terms, the statute would apply to anyone who solicits child pornography for purchase or who advertises such images for sale. It would apply to anyone who, like the defendant in this case, offered to trade child pornography images. And it would apply to anyone who offered to furnish child pornography images for free. But it would *not* apply to speech that is unconnected to an offer to distribute child pornography.

B. The Expression Prohibited by the Pandering Provision is Unprotected Commercial Speech

1. Offers to Transact in Materials or Services Are Commercial for Purposes of the First Amendment Regardless of Whether Any Consideration Is Paid

This Court's cases make clear that, at a minimum, the commercial speech doctrine embraces speech "proposing a commercial transaction." *Virginia Bd. of Pharmacy*, 425 U.S. at 762; *cf. Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (noting that commercial speech may more broadly include "'expression related solely to the economic interest of its speaker and audience'") (citation omitted). There can be no question that offers for the purchase or sale of child por-

nography propose a form of commercial transaction, and thus constitute (unprotected) commercial speech. Pet. App. 20a. Similarly, as discussed below, *see infra* at 24-26, any offer to trade or exchange child pornography is, contrary to the Court of Appeals' view, also a form of (unprotected) commercial speech. But even requests or offers to furnish child pornography *without* any consideration fall within the scope of the commercial speech doctrine (and, again, are unprotected).

The commercial speech doctrine has never been restricted to speech proposing the purchase or sale of goods for cash, nor has it been defined in terms of the consideration supporting the proposed transaction. The scope of the doctrine turns, instead, on the reasons for according commercial speech less protection: its close relationship to *transactions* that the government may regulate. *See Edenfield v. Fane*, 507 U.S. 761, 767 (1992) (noting that commercial speech is "'linked inextricably' with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself") (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)); *accord 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality) ("the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech"). It is because the government has the authority to proscribe fraud and to ban certain goods, then, that it has greater leeway to regulate "the commercial aspects" of speech involving such goods. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96 (1976).

The government's traditional interests in regulating commercial speech apply whether or not a proposed transaction for goods or services is supported by consideration. An offer to give away commodities or services free of charge "occurs in an area traditionally subject to government regulation" no less than speech proposing a sale, purchase, or trade. *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

The Court has left "no doubt that a newspaper constitutionally could 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), and the same principle logically extends to advertisements offering to give away contraband. Similarly, the government's long-recognized interest in protecting consumers from fraudulent or unlawful transactions, *Virginia Bd. of Pharmacy*, 425 U.S. at 771-72, attaches regardless of whether the speaker is offering the materials or services free of charge.

What is critical, for First Amendment purposes, is that the speech serves an "informational purpose" in the marketplace, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980), with the speaker offering to provide such goods or services, or soliciting them from others. In this respect, speech that proposes the distribution of a free product or service bears many of the characteristics distinguishing commercial speech "from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1994). A person who offers to give away a commodity or to provide a service for free announces the availability of a good to people in the marketplace. *Cf. Virginia Bd. of Pharmacy*, 425 U.S. at 748 (advertising is the "dissemination of information as to who is producing and selling what product, for what reason, and at what price"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1982) (including "the reference to a specific product" among factors that collectively indicated the claimant's speech was commercial). Whether or not he or she expects something in return, a party who proposes a distribution of goods is an "offeror[] communicating offers to offerees," *Linmark*, 431 U.S. at 96, and is engaged in "transaction-driven speech," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). One could hardly argue, for example, that because the use of internet search engines is free to

consumers, the companies providing such services have a right to lie about their features.[10]

2. The Court of Appeals Improperly Treated Offers to Trade and Exchange Materials as Noncommercial

The Court of Appeals also assumed that offers to *exchange and trade* child pornography do not amount to commercial speech, asserting that "most child pornography is discussed and exchanged in a *non-commercial* setting." Pet. App. 34a (emphasis added). The court provided no support for this startling assertion, which is both factually and legally erroneous. It is factually wrong because there is plenty of evidence that a significant volume of child pornography is sold for cash over the Internet. *See, e.g.*, May 1, 2002 House Hearing, *supra*, at 20-22. Indeed, Congress recently expressly found that the advent of the Internet has had "the unfortunate result of greatly increasing the interstate market in child pornography," and that this market was composed of a for-profit industry and a network of private parties exchanging child por-

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[10] Even if they did not constitute (unprotected) commercial speech, offers or solicitations of free contraband would still be unworthy of overbreadth's "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Because someone offering to give away contraband can "determine more readily than others whether his speech is truthful and protected," the overbreadth doctrine "is not necessary to further its intended objectives" of avoiding "uncertainty" and chill. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977). The marginal First Amendment protection afforded by the doctrine here does not outweigh the "substantial social costs" of facially invalidating a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (quoting *Broadrick*, 413 U.S. at 615). This is especially so because speech proposing the free distribution of contraband directly implicates the state's interests in suppressing the banned material and in preventing fraud.

nography. *See* Pub. L. 109-248, 501, 120 Stat. 587, 623 (2006). As Congress explained:

> "A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving child pornography in return."

Ibid.

In addition to being factually an oxymoron, the Court of Appeals' concept of "non-commercial" child-pornography exchange is *legally* erroneous. The constitutional commercial speech doctrine does not even require that the underlying transaction be supported by *any* consideration, *see supra* at 21-24, and, in addition, this Court has long recognized that barter and exchange *are* core commercial activities. *See, e.g.*, *Welton v. Missouri*, 91 U.S. 275, 280 (1875) (noting that, for purposes of the Commerce Clause, the term commerce includes "the transportation, purchase, sale, and *exchange* of commodities") (emphasis added); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895) (observing that Congress's Commerce Clause power clearly extends to "[c]ontracts to buy, sell, or exchange goods to be transported among the several states"); *Gibbons v. Ogden*, 9 U.S. (Wheat.) 1, 229 (1824) (Johnston, J., concurring) ("commerce, in its simplest signification, means an exchange of goods…"); *cf. also United States v. Brown*, 333 F.3d 850, 853 (7th Cir. 2003) (explaining that "pecuniary gain is a broad concept itself and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration"); *accord United States v. Laney*, 189 F.3d 954, 958-61 (9th Cir. 1999). And in the Internet age, which has vastly facilitated barter in child pornography, the Court of Appeals' suggestion that speech proposing such barter is "non-commercial" is quite untenable.

See United States v. Richardson, 238 F.3d 837, 842 (7th Cir. 2002) (Posner, C.J.) ("Use of the Internet enhances the dangers that child pornography poses, because it is a more discreet and efficient method of distribution ..."); S. REP. NO. 108-2, *supra*, at 4 (noting that child pornography images "increasingly are appearing on a computer or digital image that is sold, *traded*, *bartered*, *exchanged*, or simply downloaded over the internet") (emphasis added); H.R. REP. NO. 107-526, *supra*, at 12 (noting that pedophiles "also like to trade these pictures with other pedophiles to validate their actions" and that there are "those who sell it for a profit").

C. The Court of Appeals Erred in Holding that the Pandering Provision Reached Fully Protected Speech

When, as in this case, a statute is susceptible of a constitutionally sound construction, it is manifestly improper for a reviewing court to adopt an interpretation that "would create the necessity" for deciding a constitutional question. *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 355, 408 (1909). That, however, is precisely what the Eleventh Circuit did in the opinion below. The court invoked the overbreadth doctrine on the theory that the pandering provision "sweep[s] in non-commercial speech" and "fully protected" expression. Pet. App. 22a-23a. As explained above, this conclusion rests not only on the Court's crabbed understanding of the commercial speech doctrine, but also on its erroneously expansive interpretation of the pandering provision.

The Court of Appeals expressed concern that the pandering provision might "criminalize[] talking dirty over the Internet or telephone," Pet. App. 22-23a (citation omitted), and might impermissibly proscribe "the description or advocacy of illegal acts," *id.* at 23a. But the statutory text requires more than a generalized discussion about, or advocacy of, child pornog-

raphy; as noted above, *see supra* at 19-21, it imposes criminal liability only if the defendant intentionally *offers* or *solicits* actual child pornography. Someone who merely referenced child pornography as part of a lewd discussion or extolled its purported value would not be pandering it in the specific way required by the statute.

Because the verbs used by Congress have clear meanings, the Court of Appeals was obligated to "'enforce [the pandering provision] according to its terms.'" *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. __, 126 S. Ct. 2455, 2459 (2006) (citation omitted). By ignoring the statutory text, the Court improperly expanded the provision's intended scope. Indeed, far from prohibiting the mere "description" of child pornography, Pet. App. 23a, Congress struck language in an earlier version of the PROTECT Act that would have treated as pandering the act of "describing" material as child pornography. *See* note 9 *supra*.

The Court of Appeals held that the pandering provision could capture ambiguously worded speech about photographs and images, because the court concluded that the element requiring the defendant to act "in a manner that reflects the belief" that the material is child pornography "has no intent requirement." Pet. App. 40a. That is wrong. The most natural reading of the phrase is that the defendant must *have* the belief that his or her actions reflect. Moreover, the text and structure of the provision make clear that the "manner" of pandering prohibited by the statute is modified by the adverb "knowingly." That word is set forth in paragraph (a)(3), which modifies the entire clause describing the *actus reus*, *i.e.*, subparagraph (a)(3)(B). Under fundamental rules of grammar and statutory construction, "knowingly" must be read to modify not just the verbs in subparagraph (a)(3)(B), but also the phrase "in a manner that reflects …." *See X-Citement Video*, 513 U.S. at 72 ("the presumption in favor of a scienter requirement should apply to each of the statutory

elements that criminalize otherwise innocent conduct"). Indeed, this Court in *X-Citement Video* interpreted "knowingly" to modify language defining criminal conduct even when it did not result in "[t]he most natural grammatical reading." *Id.* at 68.[11]

Finally, the Court of Appeals erred in concluding that the pandering provision would impinge upon "[f]reedom of the mind" by criminalizing a defendant's private view that "legal materials" were child pornography. Pet. App. 26a. To be liable under the provision, a defendant must do more than express his subjective views about an image; he must objectively offer it as actual child pornography, and must do so knowing that his speech carries this implication. As the District Court explained, the defendant must intentionally "create[] the context which would cause others to believe" the material is child pornography. Pet. App. 65a.[12]

III. EVEN IF THE PANDERING PROVISION COULD REACH SOME PROTECTED SPEECH, IT IS NOT SUBSTANTIALLY OVERBROAD

Even if the pandering provision reached some fully protected speech, it would not be facially invalid unless it is *substantially* overbroad, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 539 U.S. at 120. To invoke the overbreadth doctrine, Respondent had the burden to demonstrate, "'from the text of [the statute] and from actual fact,'" that substantial

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[11] Thus, even assuming *arguendo* the lower court's dubious assumption that an email describing an attached file as "little Janie in the bathtub" or "Good pics of kids in bed" (Pet. App. 40a) otherwise satisfied the elements of the statute, a "proud and computer-savvy grandparent" (*ibid.*) would obviously lack the requisite intent to pander.

[12] For substantially the same reasons, the court below plainly erred in holding that § 2252A(a)(3)(b) was void for vagueness. Pet. App. 37a-42a.

overbreadth exists. *Id.* (citation omitted). This he has not done and cannot do.

The statute's text makes clear that the overwhelming proportion of its applications will be constitutional. As even the Court of Appeals acknowledged (Pet. App. 20a), the First Amendment does not preclude convictions under the pandering provision for "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" child pornography in a commercial setting. The statute may therefore apply, consistent with the First Amendment, to any proposed purchase or sale of child pornography, whether it takes place on a website, through the mail, or in any other channel of interstate commerce. And because offers to exchange or trade child pornography clearly constitute (unprotected) commercial speech, *see supra* at 24-26, any such offer may also be punished under the provision without raising First Amendment concerns. The provision would properly apply to requests to exchange child pornography that are made by email, in an online chatroom, or in website postings.

Even assuming the statute would actually apply in the far-fetched scenarios posited by the Court of Appeals, Respondent failed to show—and the Court of Appeals failed to determine—that any such applications were either realistic or likely to occur in a substantial number of cases. As this Court has explained, a reviewing Court may not hold a statute overbroad merely because it "can conceive of *some* impermissible application of a statute." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (emphasis added). This principle applies with particular force here, because the Court of Appeals' hypothetical cases were, at best, the kind of "marginal applications" that cannot justify facial invalidation. *Parker v. Levy*, 417 U.S. 733, 760 (1974). Pandering prosecutions centering on photographs of "the family Rottweiler" are likely to be rare indeed, as are prosecutions based on innocuously labeled images of "toddlers in

footie pajamas." Pet App. 40a. A finding of overbreadth requires much more than the cobbling together of a few strained hypotheticals.

The Court of Appeals also failed to engage in a comparative assessment of such "problematic" applications in relation to the wide range of cases in which the provision can be constitutionally applied. The error is fatal, for this Court has made clear that a statute is not overbroad "unless it reaches a substantial amount of impermissible applications." *Ferber*, 458 U.S. at 771. Similarly, even if gratuitous offers of child pornography were fully protected speech—and they are not—there is nothing in the record to suggest that prosecutions of such offers would be substantial compared to other applications. To the contrary, Congress's findings on the growth of the interstate market for child pornography suggest that the overwhelming number of participants either trade child pornography or purchase it. *See supra* at 24-25.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

[Photo array from May 1, 2002 House Hearing, *supra*, at 39.]