No. 06-694

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

MICHAEL WILLIAMS

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

## REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page



Constitution and statutes:

Statutes—Continued: Page



Miscellaneous:

Miscellaneous—Continued: Page

## REPLY BRIEF FOR THE UNITED STATES

Neither respondent nor his amici seriously challenge the well-settled First Amendment principles that establish the constitutionality of Section 2252A(a)(3)(B). The statute prohibits advertisements, promotions, presentations, distributions, or solicitations of material (or purported material) that is characterized as being illegal child pornography. That proscription "capture[s] perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App. 19a. The First Amendment permits Congress to ban such offers or solicitations to transact in contraband. Respondent nevertheless maintains that the statute impermissibly penalizes non-commercial, false, or mistaken descriptions and thereby fails First Amendment overbreadth analysis. He also maintains that the statute is impermissibly vague.

Respondent's contentions are based on a misunderstanding about the scope of the statute and a misinterpretation of First Amendment law. The statute proscribes only offers to provide, or attempts to obtain, material that is, or is purported to be, contraband—a category that is unprotected by the First Amendment. The statute contains two subjective mental elements to protect against coverage of innocent speech, and it requires proof of an objective element—that the manner of offering or soliciting refers to child pornography—in order to protect against coverage of harmless speech. The persons covered by the statute are, therefore, those who knowingly propose or purport to propose an illegal

transaction. That conduct is not constitutionally protected, whether the transaction is commercial or noncommercial and whether or not the underlying material exists. Because society's compelling interest in stamping out the child pornography market permits Congress to suppress offers to provide it or efforts to seek it, this Court should sustain the facial constitutionality of 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004).[1]

## I. SECTION 2252A(a)(3)(B) CAPTURES NO PROTECTED SPEECH AND, IN ANY EVENT, IS NOT OVERBROAD

### A. Section 2252A(a)(3)(B) Reaches No Constitutionally Protected Speech

1. *Commercial speech.* Neither respondent nor his amici point to any decision of this Court (or any other) holding that the First Amendment disables the government from proscribing speech that proposes an illegal commercial transaction. That is not surprising because, as explained in the government's opening brief (at 17-18), this Court repeatedly has stated that such speech falls entirely outside the scope of First Amendment protection. See, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of the Sup. Ct.*, 471 U.S. 626, 638 (1985); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (*Virginia Pharmacy*). Likewise, respondent points to no case holding that commercial speech that is false, deceptive, or misleading is protected. Indeed, this Court has repeatedly made clear that it is not. See, *e.g.*, *Zauderer*, 471 U.S. at 638; *Virginia Pharmacy*, 425 U.S. at 771.[2]

---

[1] Unless otherwise noted, all references to 18 U.S.C. 2252A(a)(3)(B) are to the Supp. IV 2004 edition.

[2] Amici The National Coalition Against Censorship, *et al.* (NCAC) suggest in a footnote (Br. 9 n.6) that this Court has afforded constitu-

Accordingly, as the court of appeals recognized (Pet. App. 20a-21a), the First Amendment poses no bar to Section 2252A(a)(3)(B)'s proscription of *commercial* solicitations of, or offers to make available, real child pornography, or false or misleading commercial efforts to do so.

2. *Non-commercial speech.* Neither respondent nor his amici cite any authority that *non-commercial* solicitations of or offers to engage in an illegal transaction enjoy any greater First Amendment protection than comparable commercial efforts.

a. Respondent argues that *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (see U.S. Br. 19-20), has no relevance here because that case involved explicit invitations to engage in illegal acts "in a commercial setting." Resp. Br. 13. But in holding that the gender-specific advertisements at issue were unprotected, *Pittsburgh Press* focused on their *illegal* nature, not on their commercial character. See *Pittsburgh Press*, 413 U.S. at 388-389; *Virginia Pharmacy*, 425 U.S. at 759. The logic of *Pittsburgh Press* thus applies to non-commercial promotions of illegal activity.

That conclusion makes sense. Neither respondent nor his amici explain why the Constitution would permit

---

tional protection to false or misleading commercial speech. But, in fact, the only two cases cited by amici state that if "commercial speech concerns unlawful activity or is misleading * * * then the speech is not protected by the First Amendment." *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 367-368 (2002) (analyzing the First Amendment claim after noting that there was no allegation that the speech was misleading); *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142-148 (1994) (analyzing First Amendment claim after stating that "false, deceptive, or misleading commercial speech may be banned").

suppression of offers to *sell* illegal goods or services, see *Pittsburgh Press*, 413 U.S. at 388, but not offers to give the contraband away for free. As explained in the government's opening brief (Br. 18-24), such non-commercial offers to provide and solicitations of contraband create the same harms as commercial offers and solicitations, and they are just as integrally tied to unlawful activity. Because child pornography is contraband whether it is given away or sold, the proscription in Section 2252A(a)(3)(B) against "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" such material does not infringe protected speech. Instead, it prevents market signaling and stimulation pertaining to a particularly destructive illegal item.

b. Respondent contends (Br. 14-16) that the imminent-incitement test of *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), applies to non-commercial applications of Section 2252A(a)(3)(B). But he acknowledges (Br. 15) that this Court in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), contrasted the type of speech covered in *Brandenburg*, with speech that has a "significantly stronger, more direct connection" to "illegal conduct," such as "attempt, incitement, solicitation, or conspiracy." 535 U.S. at 253-254. Respondent makes no attempt to explain why *Brandenburg* is relevant to the offers or solicitations here, or how that conclusion could be reconciled with other criminal statutes that outlaw criminal solicitation and that contain no immediacy or likelihood requirement. See *Free Speech Coal.*, 535 U.S. at 253-254; *Rice* v. *Paladin Enters., Inc.*, 128 F.3d 233, 265 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998); see also U.S. Br. 26. Notably, none of respondent's amici even cite *Brandenburg*, much less argue that its imminent-incitement test applies here.

Respondent asserts (Br. 15) that *Brandenburg* applies because of Congress's inclusion of the term "promote" in the statutory prohibition. But, as the government has explained (U.S. Br. 27), "promote[]" in Section 2252A(a)(3)(B) should "be given related meaning" to the words surrounding it. *Dole* v. *United Steelworkers*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989)). And "promotes" has a commonly used, comparable meaning to "advertises, * * * presents, distributes, [and] solicits" when used, as here, in relation to a product: "to present (merchandise) for public acceptance through advertising and publicity." *Webster's Third New International Dictionary* 1815 (1961). Contrary to respondent's assertion (Br. 15), construing "promote[]" to have this common meaning is not an improper use of the interpretive canon *noscitur a sociis*, but a proper search for *which* ordinary meaning of the word "promote" Congress intended in this context.[3] Given the company that "promote[]" keeps in this statute, as well as the constitutional questions that would arise if it were extended to encompass abstract advocacy, the word should not be given its broadest possible meaning. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 397 (1988); *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982).[4]

---

[3] Some common meanings of promote would be nonsensical in this context. See, *e.g.*, Amici The Free Speech Coalition, *et al.* (FSC) Br. 8 (suggesting that promote means "to advance in station, rank, or honor: raise").

[4] The government does not invoke the *noscitur a sociis* canon to contend that "only speech regarding commercial exchanges is regulated." NCAC Br. 19-20. To the contrary, the government's brief expressly acknowledges that the statute's proscription encompasses non-commercial speech. See U.S. Br. 18-28. The government's point is that, in the context of the statute, all of the words have a transactional connota-

3. *False or fraudulent speech.* Amici (NCAC Br. 9 n.6) take issue with the government's reliance (Br. 29-30) on *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), for the proposition that the liars, braggarts, and exaggerators who fall within the coverage of Section 2252A(a)(3)(B) are not protected by the First Amendment because knowingly false speech is of no constitutional value. But this Court has stated exactly that. See *Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact."). Although the Court has accorded a measure of protection to some false statements of fact, it has done so only in circumstances not applicable here: to protect closely-related truthful speech that matters. See *id.* at 341. Thus, in the defamation context, the Court has protected some defamatory falsehoods about public figures because such statements, if true, would be deserving of protection, and "a rule of strict liability" would "lead to intolerable self-censorship." *Id.* at 340. But speech advertising, promoting, presenting, distributing, or soliciting child pornography is even more obviously *not* protected speech when it is truthful. Moreover, even where false statements are protected to ensure a robust discussion of ideas of public importance, such protection does not extend to a statement made "with knowledge that it was false." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). Those who knowingly lie, brag, or exaggerate in offering (or purporting to offer) real child pornography can therefore be punished even under *New York Times* v. *Sullivan*'s speech-protective standard. *Ibid.*

---

tion (whether commercial or non-commercial) of offering to provide, or seeking to receive, and that "promotes" should be given a comparable construction.

Respondent also contends (Br. 17) that the statute cannot criminalize the conduct of persons who lie, brag, or exaggerate "about what he/she has to offer, or wants to acquire" because such persons have "a total absence of any criminal intent."[5] But such an individual has precisely the criminal intent required by Section 2252A(a)(3)(B). As the government explained (U.S. Br. 32-34), the statute's dual subjective-intent components train on (1) whether the defendant subjectively has "the belief," or "intend[s] to cause another to believe," that the material is child pornography, and (2) whether he "knowingly" engages in conduct (advertising, etc.) "in a manner" from which a reasonable jury would conclude that the materials, or purported materials, are illegal child pornography. 18 U.S.C. 2252A(a)(3)(B). A person who has those intents and engages in that conduct violates the statute even if he knows that the underlying materials are not actual child pornography. Such knowingly "[u]ntruthful speech, commercial or otherwise" has no value under the First Amendment. *Virginia Pharmacy*, 425 U.S. at 771.

4. *Mistaken speech.* Respondent contends (Br. 18-20) that Section 2252A(a)(3)(B) sweeps in constitutionally-protected mistaken speech. That claim misreads the statute and finds First Amendment protection where none exists.

a. Respondent argues (Br. 18) that the statutory phrase "reflects the belief" does not make clear whose belief is at issue and thus could refer to "the understanding or interpretation of the listener." By way of example, he contends (Br. 19-20) that, if a gymnastics coach

[5] As noted in the government's opening brief (Br. 29 n.9), the concern about false speech about what purports to be child pornography has salience only for the offering side of the transaction.

offers to exchange pictures of his underage team with another coach who is a closet pedophile and believes that the offered pictures contain illegal child pornography, the innocent coach's conduct violates the statute. That is so, respondent claims (Br. 20), because the innocent coach has offered the pictures "'in a manner that reflects the belief'—to the pedophile—that the material is illegal child pornography."

That is not a reasonable reading of the statute. The "reflects the belief" phrase in the statute self-evidently refers to the speaker's belief; the phrase "or that is intended to cause another to believe" refers to the speaker's intent to instill a belief in his audience. See 18 U.S.C. 2252A(a)(3)(B). A speaker cannot be found criminally liable based on the idiosyncratic subjective understandings of listeners.

Respondent mistakenly contends (Br. 17) that the statute would ensnare an innocent speaker "who neither has, nor wants to provide or receive, any illegal child pornography material, but who inarticulately offers or solicits material which another listening person believes does constitute illegal child pornography." But such a speaker would lack the requisite subjective intent: he would neither possess "the belief" that the material was proscribable child pornography nor would he "intend[] to cause another to believe" that it was. 18 U.S.C. 2252A(a)(3)(B).[6]

b. Amici take issue (NCAC Br. 17) with the government's position that the statute's "in a manner" phrase creates an "objective benchmark." Amici argue that "manner" is defined as "[a] way of doing something or

[6] As the government noted in its opening brief (Br. 33 n.11), this same result could be reached by limiting the "reflects the belief" language to solicitation prosecutions.

the way in which a thing is done or happens." *Ibid.* (quoting *American Heritage Dictionary of the English Language* 1065 (4th ed. 2000)). But that definition is consistent with reading the statute to require proof, to the satisfaction of a reasonable jury, that "the way in which" the defendant advertised, promoted, etc., the materials or purported materials reflected the belief or was intended to cause another to believe that the materials were real child pornography. The question is whether a defendant has engaged in conduct "in a manner" that violates the statute. That determination cannot be made by the standard of a deluded person or a pedophile, but only by that of a reasonable person familiar with the context of the communication in question.

c. Respondent (Br. 19) and amici (NCAC Br. 18-19) argue that the "knowingly" requirement of the statute does not apply to the "manner" in which material is represented. Amici go further by asserting (*id.* at 18) that the government has conceded that only a "tortured grammatical reading" of the statute could produce the government's understanding of the knowledge requirement. Both contentions are incorrect. The government merely acknowledged (Br. 34) that "knowingly" *could* be read to apply only to the immediately following clause ("advertis[ing], promot[ing], present[ing], distribut[ing] or solicit[ing]"). But it can be read equally plausibly to reach the "manner" of presentation as well. Courts are not required to select even the "most grammatical reading of [a] statute" when an alternative possibility exists that avoids constitutional concerns. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). Rather, the opposite is true. *Id.* at 78. Reading Section 2252A(a)(3)(B)'s "knowingly" element to encompass the "manner" in which the defendant represents material

constitutes a far more straightforward approach than the reading of 18 U.S.C. 2252 adopted in *X-Citement Video*, where the Court held that "knowingly" extended beyond the words immediately following it and qualified words in the next *subsection*. And to the extent that constitutional concerns would be raised by penalizing a person for advertising material when the person does not know that a reasonable person would interpret his words, in context, as referring to illegal child pornography (U.S. Br. 34), "[i]t is * * * incumbent upon [the Court] to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress." *X-Citement Video*, 513 U.S. at 78.

**B. Section 2252A(a)(3)(B) Reasonably Furthers Compelling Government Interests**

1. Contrary to the claims of respondent (*e.g.*, Br. 6) and amici, Section 2252A(a)(3)(B) was not "designed to * * * circumvent this Court's decision in *Free Speech Coalition*." NCAC Br. 4. Instead, Congress passed Section 2252A(a)(3)(B) to *comply* with "the limitations established by that decision," S. Rep. No. 2, 108th Cong., 1st Sess. 6 (2003), while furthering the government's compelling interest in combating the distribution of child pornography and the sexual abuse inherent in its creation. By "criminaliz[ing] offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography," *id.* at 10, Congress "remedie[d] the problem" identified by this Court of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." Pet. App. 16a. There is certainly nothing sinister about congressional efforts to narrow the scope of a prohibition to comply with prior

Supreme Court precedent. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 715 (2005) (upholding statute while recognizing it was a "[l]ess sweeping" congressional response to decision striking down earlier statute).

Respondent and his amici incorrectly argue that, because this Court rejected the contention that the provisions at issue in *Free Speech Coalition* were necessary to dry up the market for child pornography, that rationale cannot suffice to defend the different provision at issue here. See, *e.g.*, NCAC Br. 11. That argument overlooks the fundamental distinctions between Section 2252A(a)(3)(B) and the provisions struck down by the Court in *Free Speech Coalition*, banning virtual child pornography. The Court concluded that the connection between that ban and drying up the market for *actual* child pornography was too "remote." See *Free Speech Coal.*, 535 U.S. at 253-254. Here there is "a significantly stronger, more direct connection" between offers of and solicitations for what is characterized as illegal material and drying up the market for that very material. *Ibid.* *Free Speech Coalition* itself recognized that the government "of course, may * * * enforce criminal penalties for unlawful solicitation." *Id.* at 251-252. Individuals who offer or solicit what purports to be child pornography create the appearance of a demand or supply, and thereby fuel the market for such material.

For the same reason, amici are incorrect in arguing that Section 2252A(a)(3)(B) "suppress[es] lawful speech as the means to suppress unlawful speech." NCAC Br. 11 (quoting *Free Speech Coal.*, 535 U.S. at 255). The provision applies only to *unprotected* speech—speech that offers to make available, or solicits, contraband. Section 2252A(a)(3)(B) does not criminalize the underlying materials, whether they are protected, unprotected,

or non-existent; rather, it targets soliciting and pandering. That is constitutionally indistinguishable from banning offers to provide, or solicitations to receive, substances that are believed or represented to be illegal drugs. See *Pittsburgh Press*, 413 U.S. at 388.

2. Congress made specific findings that addressed the concerns of this Court in *Free Speech Coalition*. Congress's findings demonstrate that offers and solicitations stimulate the market for child pornography, thereby resulting in actual children being abused to satisfy that market. See U.S. Br. 5-6; U.S. Br. App. 11a-15a. In those statutory findings, Congress emphasized the harm to real children, finding that "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." PROTECT Act, Pub. L. No. 108-21, § 501(7), 117 Stat. 677. It further found that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760).

Amici argue (FSC Br. 19) that the objective of drying up the market for child pornography has no "logical nexus" to banning *fraudulent* offers to buy or to obtain child pornography. Congress expressly found, however, that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61-62 (2003). Congress's judgment accords with common sense: the greater the perceived demand for or supply of a particular item, the more likely that the item will be sought or purveyed. In any event, fraudulent offers or solicitations clearly enjoy no First Amendment

protection, and prohibiting such fraudulent offers and solicitations eases the prosecution of offers of and solicitations for actual child pornography, which undeniably fuel the market.

Amici also argue (FSC Br. 20-21) that, even before *Free Speech Coalition*, only a few defendants were acquitted for any reason, and none resulted from a "'virtual child' defense." But despite increases in successful prosecutions of child pornography, the very Department of Justice report on which amici rely states that, "with advances in computer technology and increased availability and popular use of the Internet," the distribution of child pornography has expanded exponentially, and the globalization of such pornography crimes poses significant investigatory and prosecutorial challenges. See Office of the Inspector General, DOJ, *Report No. I-2001-07, Review of Child Pornography and Obscenity Crimes* 1 (July 19, 2001). As this Court has recognized, Congress has a compelling interest in drying up the market for child pornography in order to protect the real children who are abused to create it. See *Ferber*, 458 U.S. at 759-760; *Osborne* v. *Ohio*, 495 U.S. 103, 109-110 (1990). Congress concluded that barring offers and solicitations of child pornography—whether commercial or non-commercial, whether true or false—furthers that goal. See § 501(7)-(14), 117 Stat. 677-678.

### C. Section 2252A(a)(3)(B) Is Not Overbroad In Relation To Its Plainly Legitimate Sweep

1. Respondent's amici claim that 18 U.S.C. 2252A(a)(3)(B) encompasses a wide range of commentary on fully protected sexually-explicit materials, including advertisements, movie reviews, and email discussions among friends about movies. See FSC Br. 12-

18; Amici American Booksellers Foundation for Free Expression, *et al.* (ABFFE) Br. 11-16; NCAC Br. 13-14. But amici's assertions sweep into the statute speech that it plainly does not cover.

If, as one amici brief claims, amici's products are "neither obscene nor child pornography," ABFFE Br. 13, then *accurately* advertising, promoting, presenting, or distributing those products would not violate Section 2252A(a)(3)(B). In suggesting otherwise, respondent and his amici gloss over the fact that the statute applies only if an advertiser, promoter, or presenter characterizes the materials as illegal child pornography (*i.e.*, "visual depiction[s] of an *actual* minor," or "obscene visual depiction[s] of a minor," engaging in sexually explicit conduct). 18 U.S.C. 2252A(a)(3)(B)(i) and (ii) (emphasis added). In addition, the advertiser, promoter, or presenter would have to know that a reasonable person would so interpret the promotions, and would have to believe that the material was illegal child pornography or intend to cause another person to so believe. *Ibid.* As Congress observed, the producers of mainstream movies "do not intend for viewers to believe that real children are actually engaging in sexual activity." S. Rep. No. 2, *supra*, at 10 n.6.[7]

[7] Amici suggest (FSC Br. 9-12) that, because movie producers intend for viewers to engage in a "willing suspension of disbelief," all movie producers "intentionally seek to create the belief within their viewers that what is happening on the screen * * * is happening in reality." *Id.* at 9. But the cinematic experience of *willing* "suspension of disbelief" does not mean that movie-goers forget that they are watching actors. Movies commonly depict wars, nuclear catastrophes, murders, marriages, and divorces, and no rational viewer believes these events

Thus, the statute does not ban truthful descriptions on Netflix.com or amazon.com of the plot of a movie that is not illegal child pornography. The speakers in such advertisements do not possess the requisite subjective or objective intent: they do not believe, or intend for others to believe, that the advertised or promoted movie is real child pornography.

Nor would a reasonable person using amazon.com understand the advertisements quoted by amici (FSC Br. 14-16), in context, as representations that the movie actually contains depictions of real children engaging in sexually explicit conduct, or obscene depictions of children engaging in sexually explicit conduct. For example, amici point to amazon.com's description of *Thirteen* stating "'Brace yourself' (Rolling Stone) for a raw, revealing insight into urban adolescence that's so intense and realistic . . . thirteen-year-old Tracy . . . goes to shocking lengths in order to befriend . . . the most popular girl in school . . . leaving Tracy's desperate mom . . . powerless to rescue her from a whirlwind of drugs, sex and crime" (FSC Br. 15-16), and amazon.com's description of *Y Tu Mama Tambien* as being about a "three-way odyssey of two 17-year-old Mexican boys . . . and a 28-year-old Spanish beauty" that has "enough male and female nudity to qualify as softcore porn" (FSC Br. 14). Neither of those advertisements would cause a reasonable viewer to believe, in context, that the movies *visually depict* an actual minor engaged in sexually explicit conduct on screen (as opposed to merely create an understanding that sexually explicit conduct is occurring as part of the storyline), or that the

---

are actually happening to the actors. Promotions of movies are understood in that light.

advertiser so believes or intends to cause the viewer to so believe.[8]

Although Section 2252A(a)(3)(B) could *theoretically* reach advertisements or promotions of movies whose storylines deal with sexually explicit themes involving underage characters, including ones where the viewers are meant to understand that those characters have engaged in sexually explicit conduct (*e.g.*, *The Lover*, *Y Tu Mama Tambien*, *Fast Times at Ridgemont High*), the statute would be implicated only if the movies are knowingly advertised or promoted in a manner that would suggest to a reasonable observer that the movie is or contains illegal child pornography. A knowing (and false) promotion of that kind (which presumably would claim that the underage actors were not acting and the sex scenes were real) would not enjoy constitutional protection.[9]

---

[8] Amici suggest (NCAC Br. 8-9) that advertisements, promotions, etc., of "materials that use adult actors or computer-generated images to portray minors engaged in sexually explicit conduct" and that are promoted as "hot pictures of kids having sex" could "not strictly be described as 'true' or 'false,'" yet could be ensnared by the statute. But if such promotions are knowingly done in a manner from which a reasonable observer would conclude that the materials depict actual children engaging in sexually explicit conduct, and the speaker intends to cause others to so believe, those promotions are not only patently false but also promotions of a transaction in contraband, and would and should be captured by the statute.

[9] Movies, of course, simulate activity that is not actually taking place, and allusions to simulated acts do not necessarily implicate Section 2252A(a)(3)(B). Nevertheless, "simulated" sexual activity by real minors can fall within the definition of "sexually explicit conduct" in 18 U.S.C. 2256(2)(A) (Supp. IV 2004), and promotions or advertisements that objectively and subjectively reflect or seek to instill the belief that real minors are simulating sex on screen *may* fall within Section 2252A(a)(3)(B). (Much would depend on the degree of detail and

Nor does Section 2252A(a)(3)(B) criminalize speech that is simply "about" sexually explicit materials (see NCAC Br. 4), or that merely critiques or describes such materials (see, *e.g.*, FSC Br. 12-18). Branding movies as "morally offensive" is not "promot[ion]" of such films.[10] As explained (U.S. Br. 27-28), the statutory proscription targets only those who knowingly purport to make available or solicit materials—whether for sale, for barter, or for free. It does not include speakers who simply express an opinion about or describe a movie that is independently distributed by others. Amici are thus incorrect in suggesting that the statute reaches "film critics, movie reviewers, and other persons interested in commenting on" movies. See FSC Br. 12-18.

Similarly, the statutory language does not encompass the hypothetical emails posited by amici NCAC (Br. 14-15). Senders who express disgust about a film (through sarcasm or otherwise), or who seek to block or boycott material they believe to be child pornography, are not "advertis[ing], promot[ing], present[ing], or distribut[ing]" that material within the meaning of Section

---

explicitness.) But the use of real minors to simulate sexually explicit activity *is* proscribable child pornography, wholly apart from any effort to promote or advertise it. See *Ferber*, 458 U.S. at 765 (noting that New York's child pornography statute reached "actual or simulated" described sex acts) (quoting N.Y. Penal Law § 263.00(3) (McKinney 1980)); *id.* at 763 (explaining that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized," or "[s]imulation outside of the prohibition of the statute could provide another alternative"). If films cross that line, promotions of them as such are not protected speech.

[10] Of the eight reviews by the Conference of Catholic Bishops cited by amici (FSC Br. 15-17), the Conference rates all but one "morally offensive." See, *e.g.*, <http://www.usccb.org/movies/f/fasttimesatridgemonthigh1982.shtml>.

2252A(a)(3)(B): they are not offering to transact in illegal pornography, nor would an objective observer conclude, in the context of the hypotheticals, that the sender was doing so. For that reason, the hypothetical library patron who seeks to block purported "kiddie porn" from the library's computers or the activist who seeks stricter laws (NCAC Br. 15) is not covered by the statute. Those scenarios are far removed from the intended applications of the statute.

In contrast, if an individual, like respondent, enters a chat room dedicated to child pornography, and offers to provide "hot pictures of kids having sex" or "steamy scenes of an old man having sex with a 12-year-old Lolita" (NCAC Br. 9), the individual could properly be prosecuted under the statute because such offers are reasonably construed as offering illegal child pornography. The question is one of context. As the district court recognized (Pet. App. 65a), the statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography."

2. Even if the statute, correctly construed, encompassed any protected expression, the reach of the statute would not be "sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Respondent must demonstrate that the overbreadth of the statute is "not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Neither respondent nor the court of appeals has compared the arguably impermissible applications to the

clearly constitutional sweep of the law. The plainly permissible applications are vast. The government regularly encounters pedophiles who offer to provide, through the file-sharing technology of the Internet, tens of thousands of photographs or videos of the sexual abuse of actual children.[11] Offers and solicitations by those pedophiles are the target of this provision. In stark contrast, respondent's amici point to fewer than twenty movies the advertisements and promotions of which they fear might be covered. Their fears are misplaced. But even if some of their examples *might* be covered, any impermissible applications can be avoided through case-by-case adjudication. *Virginia* v. *Hicks*, 539 U.S. 113, 124 (2003); *Ferber*, 458 U.S. at 773-774.

## II. SECTION 2252A(a)(3)(B) IS NOT IMPERMISSIBLY VAGUE

Respondent makes no attempt to argue that his statements (see U.S. Br. 6-8) fall outside of Section 2252A(a)(3)(B), or that law enforcement officers lacked sufficient guidance to apply the statute to his conduct. Therefore, if the Court rejects respondent's overbreadth challenge, it should not entertain his facial vagueness challenge. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497 (1982); *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). Respondent does not contend otherwise.[12]

---

[11] See, *e.g.*, *United States* v. *Sebolt*, 460 F.3d 910, 912-914 (7th Cir. 2006) (individual who possessed 27,000 images of child pornography operated a file server in which he would allow the download of three images for every one image uploaded); *United States* v. *Rowe*, 414 F.3d 271, 273-274 (2d Cir. 2005) (same, with 12,000 images and videos, offering to trade one picture for one picture).

[12] Although amici assert that "facial vagueness challenges are permitted if the law in question reaches 'a substantial amount of constitu-

Instead, respondent claims (Br. 24) only that the statute is vague as to others. He argues that the language "in a manner that reflects the belief, or that is intended to cause another to believe" provides "no standard or objective measure to educate the public as to what behavior is lawful versus what behavior is unlawful." Respondent's vagueness arguments, and those of his amici, fail for the same reasons as their overbreadth arguments: the arguments are based on an unduly expansive reading of the provision that ignores its language and the contextual parameters it provides. That language is not devoid of any readily identifiable "core." *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974). And the hypotheticals posited by respondent's amici do not establish the vagueness of the statute any more than did those of the court of appeals. See U.S. Br. 46-48. The fact that someone has "upload[ed] a video to the Internet with the description, 'Hot, Heavy, and Graphic Teen Sex'" (see NCAC Br. 25-26) would not be enough, without more context, to create liability under the statute. A statute is not rendered vague by positing scenarios that clearly fall outside its coverage.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

---

tionally protected speech [sic],'" NCAC Br. 24 n.16 (citing *Kolender*, 461 U.S. at 358 n.8), amici stop short of contesting the government's point: that respondent cannot challenge the statute as facially vague if the Court concludes that the statute is not constitutionally overbroad. U.S. Br. 44-45 & n.17.

PAUL D. CLEMENT
*Solicitor General*

SEPTEMBER 2007