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

RESPONDENT'S BRIEF

RICHARD J. DIAZ, ESQ.
Counsel of Record
Attorney for Respondent
3127 Ponce de Leon Blvd.
Coral Gables, FL 33134
(305) 444-7181

OPHELIA M. VALLS, ESQ.
Attorney for Respondent
3127 Ponce de Leon Blvd.
Coral Gables, FL 33134
(305) 444-7181

LUIS I. GUERRA, ESQ.
Attorney for Respondent
3127 Ponce de Leon Blvd.
Coral Gables, FL 33134
(305) 461-3638

G. RICHARD STRAFER, ESQ.
Attorney for Respondent
2400 S. Dixie Highway
Suite 200
Miami, FL 33133
(305) 857-9090

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented is whether Title 18 U.S.C. Section 2252A(a)(3)(B) is overbroad, impermissibly vague and as such facially unconstitutional.

Title 18 U.S.C. Section 2252A(a)(3)(B) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing] or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material," is illegal child pornography.

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STATEMENT

The Respondent, Michael Williams, was the defendant in the district court and will be referred to as "Mr. Williams." The United States of America will be referred to as "the Petitioner."

Mr. Williams is incarcerated in the Federal Bureau of Prisons.

On May 13, 2004, Mr. Williams was charged in a two count indictment with promoting and distributing child pornography in violation of Title 18 U.S.C. § 2252A(a)(3)(B) and (b)(1) (Count I) and with possession of child pornography in violation of Title 18 U.S.C. § 2256(8)(A) and (B) (Count II).

On July 14, 2004, Mr. Williams moved to dismiss Count I of the indictment on the grounds that the applicable statute was unconstitutionally vague and overbroad. That motion was orally denied by the district court on July 19, 2004. A written order was subsequently filed on August 20, 2004.

On July 19, 2004, pursuant to a written plea agreement, Mr. Williams pled guilty to Counts I and II of the indictment. Mr. Williams, however, specifically preserved his right to appeal the order denying his motion to dismiss Count I of the indictment.

On September 22, 2004, the district court sentenced Mr. Williams to sixty (60) months of imprisonment as to Counts I and II, to run concurrently, followed by a term of supervised release for two (2) years and a $200.00 special assessment fee.

STATEMENT OF THE FACTS

On April 26, 2004, Special Agent Tim Devine ("SA Devine") was signed onto YIRC on a computer located at the USSS Miami Field Office, Miami, Florida, using the undercover screen name "Lisa_n_Miami" ("LNM"). SA Devine entered a child exploitation chat room entitled "per ten's action uncensored: 1" and observed a public message from the user "Twatjuicesucker2004" (T4) stating, "Dad of toddler has 'good' pic's of her and me for swap for your toddlers pics, or live cam." SA Devine contacted T4 via private message and identified himself as a 30-year-old female mother of a ten-year-old daughter. T4 stated his daughter was two years old and asked LNM to swap photographs of their daughters. T4 stated he had five photographs of his daughter. He also stated he permitted his friends to travel to Key Largo and engage in sexual activity with his daughter, "for a small price: like a case of Icehouse beer or something." T4 stated that LNM could engage in sexual activity with his daughter if LNM would bring her daughter for him to look at. In addition, T4 told LNM he engaged in sexual activity with an 11-month-old child and he had nude photographs of his daughter "in folder on puter."

Utilizing the YIRC file transfer system, T4 sent photographs to LNM. This file contained a photograph

displaying the body of a two- to three-year-old white child lying on a couch wearing a bathing suit. Using the YIRC file transfer system, LNM sent T4 an age regression photograph of a ten- to twelve-year-old female. T4 stated, "I've got hc pictures of me and dau, and other guys eating her out – do you??" Allegedly, hc is internet slang for "hard core."

On this same date, SA Devine accessed the "Photo Album" section of T4's YIRC profile. This section contained five photographs of a white female child approximately one- to two-years-old in various poses. One of the photographs depicted the child with her breast exposed and her pants down just below her waistline. In addition, one other photograph depicted the same child and another female approximately eight to ten years old.

Also on April 26, 2004, SA Devine observed T4 post public messages in the "per ten's action uncensored: 1" chat room accusing LNM of being a police officer and a fake. In response to these postings, SA Devine posted public messages in the "per ten's action uncensored: 1" chat room about T4 being a police officer and a fake. SA Devine then observed T4 post the hyperlink http://fl.pgbriefcase.yahoo.com in the "per ten's action uncensored: 1" chat room. SA Devine accessed the Yahoo briefcase via the http://fl.pgbriefcase.yahoo.com hyperlink. This briefcase contained photographs of nude children, approximately five to fifteen years old, displaying their genitals and/or engaged in sexual activity.

On April 27, 2004, SA Devine served a subpoena on Yahoo Internet Services for all customer information, including e-mail address and Internet Protocol (IP) report, related to the T4 username. On April 24, 2004, a Yahoo

Internet Services representative stated that the T4 username was assigned to e-mail address Twatjuicesucker2004 @Yahoo.com. The Yahoo representative also stated that "Twatjuicesucker2004@Yahoo.com" was accessed from IP addresses 12.77.240.152 on April 25, 2004 at 15:47:49 hours, 12.77.240.16 on April 22, 2004 at 20:06:57 hours, 12.77.238.168 at 19:49:37 hours. SA Devine conducted a "SamSpade.com" online inquiry for the above IP addresses. This inquiry revealed that these IP addresses were assigned to AT&T WorldNet Services.

On April 29, 2004, the U.S. Attorney's Office served a subpoena on AT&T WorldNet Services for all customer and billing information, including Automatic Numeric Identification (ANI) information for the above mentioned IP addresses. On the this same date, AT&T WorldNet Services Investigation Department stated that the above IP addresses were assigned to Michael Williams, 34 Avenue A, Key Largo, Florida. AT&T WorldNet Services also indicated that the Williams' AT&T e-mail address was "Miamimike50@Worldnet.AT&T.net" and Visa account number 4313 0340 9638 6312 was billed for Williams' Internet service. In addition, AT&T WorldNet Services stated the ANI for these IP addresses was (305) 451-3216.

Inquiries conducted through an online Autotrack and the Florida Department of Highway Safety and Motor Vehicles revealed an address of 34 Avenue A, Key Largo, Florida and Florida driver's license number W452-554-48-381-0. In addition, SA Devine conducted an online "Primeris Phone Finder" inquiry for telephone number (305) 451-3216. This inquiry revealed the above telephone number was assigned to the Key Largo switch or network of BellSouth Telecommunications.

On or about April 29, 2004, special agents of the Miami Electronic Crimes Task Force ("MECTF") sought and obtained a federal search warrant for 34 Avenue A, Key Largo, Florida and any computers located therein. They executed the search warrant on April 30, 2004. Inside the trailer, agents found two computers containing a total of three hard drives. On the computers examined, agents found approximately 20-25 images depicting children under the age of 18 engaged in various forms of sexual activity. However, notably, none of the images were of Mr. Williams' underaged daughter although earlier he described her as his "toddler." As such, with regards to Mr. Williams' prior statement, "I've got hc pictures of me and dau, an other guys eating her out, – do you?" Accordingly, Mr. Williams was falsely advertising the type of images he described and claimed to possess. On April 30, 2004, Mr. Williams was arrested and taken into custody.

SUMMARY OF ARGUMENT

The language of the Section is unconstitutionally vague and overboard for several reasons:

i). The pandered child pornography need only be purported to fall under the prohibition of the Section such that the promotional speech is criminalized when the touted materials are clean or do not even exist.

ii). The non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment. No regard is given to the actual nature or even existence of the underlying material and as such, liability can be established based solely on speech reflecting the mistaken belief that real

children are depicted in legal child erotica, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious.

iii). The Section criminalizes speech that "reflects the belief" that materials constitute obscene synthetic or "real" child pornography. Because no regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional speech reflecting the deluded belief that real children are depicted in legal child erotic, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious.

iv). The Section fails to define the core phrases "reflects the belief" and "cause another to believe," thereby allowing law enforcement officers unfettered discretion in applying and enforcing the law.

The Section was the product of Congress's attempt to remedy the constitutionally fatal language in the pandered materials provision previously struck down by this Court in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). But Congress still fell short of the mandates of the First Amendment and *Free Speech Coalition* because the words of the (new) Section: "reflects the belief, or that is intended to cause another to believe" are as overbroad and vague as the words "appears to be" and "conveys the impression of . . . " in *Free Speech Coalition*.

ARGUMENT: CONGRESS'S PROHIBITION OF OFFERING OR SOLICITING WHAT PURPORTS TO BE UNPROTECTED CHILD PORNOGRAPHY IS UNCONSTITUTIONAL:

While Congress has the power to proscribe offers or solicitations to transact in illegal narcotics or other contraband, including misleading offers of material purported to be contraband (App. Br. at p. 15), the language crafted by Congress in 18 U.S.C. § 2252A(a)(3)(B)[1] falls short of this Court's jurisprudence on overbreadth and vagueness. The Section is overbroad because it is easily capable of covering protected speech (whether commercial or non-commercial). The Section is also vague because it violates the Due Process Clause by using the words "in a manner that reflects the belief, or that is intended to cause another to believe" do not give fair warning of the prohibitions of the Section. Furthermore, those words do not adequately guide the discretion of law enforcement in the application of the Section to the conduct of citizens exercising not just any right, but rather the core value of our federal constitution – the First Amendment right to freedom of speech and expression.

I. SECTION 2252A(a)(3)(B) CAPTURES PROTECTED SPEECH AND IS OVERBROAD

The Section's plain language bans the communication of beliefs about constitutionally-protected material and is unconstitutionally overbroad because it suppresses speech and beliefs that are protected by the First Amendment in an impermissible way. The Section directly contravenes

[1] Hereafter referred to as "the Section."

the fundamental principle that "[sexually-explicit] speech that is neither obscene nor the product of sexual abuse [of a real minor] retains protection of the First Amendment." *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 251 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 764-65 (1982)).

Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. *Massachusetts v. Oakes*, 491 U.S. 576 (1989). The doctrine of overbreadth derives from the recognition that an unconstitutional restriction may deter protected speech by parties not before the court and thereby escape judicial review. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

In order to prevail on a facial attack on the constitutionality of a statute on grounds of overbreadth, the challenger must show either that every application of the statute creates impermissible risk of suppression of ideas, or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the court. *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988).

Petitioner argues that the First Amendment allows the prohibition of commercialized, truthful advertising of an illegal product and commercialized false advertising of any product. However, the Section is not limited to either form of commercial exploitation and still sweeps in non-commercial speech. Thus, the content-based restriction of the Section is subject to strict scrutiny, determining whether it represents the least restrictive means to advance

the government's compelling interest, or, contrarily, instead sweeps in a substantial amount of protected speech. *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803 (2000). The Section could easily have been drafted to advance the government's interest without sweeping in non-commercial speech.

Petitioner then argues that the Section does not capture protected speech, but that even if it does, it is not overbroad because it does not do so in a substantial way. (App. Br. at p. 17) Petitioner is incorrect for several reasons. The Section captures protected speech simply because a speaker can offer or solicit, without any intended benefit (trade, barter, sale, or money) materials, which are legal, and still be arrested for failing to use sufficiently descriptive words to identify the materials he or she is offering or soliciting. Also, under the Section, the speaker's criminality does not depend upon his or her intent, but rather on what the speaker's audience believes the speaker is talking about, even if that belief is deluded. Last, the Section criminalizes protected thought and expression – repugnant as it may be.

Moreover, the Section can be overboard even if it does not capture protected speech in a substantial way, but if every application of the Section creates an impermissible risk of suppression of ideas. The Section creates significant risk of suppression of ideas because the only way for a person to avoid a possible violation of the Section, due to the confusing, ambiguous words of same, is more prudent to guard silence than to express one's ideas. Simply put, why say anything to another person, which, if albeit mistakenly understood by such person, constitutes the speaker's desire to offer or solicit real or purported illegal child pornography, can land the speaker in jail with the

permanent brand on the speaker's head that he/she is a pedophile?

A. Section 2252A(a)(3)(B) reaches constitutionally protected speech

1. Offers or solicitations to sell, buy, or barter contraband – whether true or false – can be protected by the First Amendment

Petitioner only speaks of the Section as a pandering statute. The word pandering appears nowhere in the Section which, indeed, covers speech much broader than speech only involving "pandering." Rather, the Section uses, without any clear definition, the following words: "advertises," "promotes," "presents," "distributes" and "solicits." The traditional definitions of these words do not require an erotic expression to be made in relation to any "commercial" transaction. Thus, the Section touches protective speech.

Petitioner argues that there is absolutely no First Amendment protection on any offer or solicitation to sell, buy, or barter contraband whether the offer is true or false. (App. Br. at p. 17), citing *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). Petitioner is wrong for several reasons. First, under the Section, the materials might actually be clean or non-existent. Second, what makes the speaker's words criminal (or otherwise) is not the speaker's intent behind the words chosen, but rather, the belief or speculation of his or her audience as to what the speaker seeks to sell, buy or barter, regardless of the speaker's actual intent. Stated differently, the Section does not penalize the mens rea of the speaker but instead criminalizes the speaker by focusing on the mens rea of

the audience. Third, the Section captures protected non-commercial, non-inciteful speech.

The Section, as currently drafted, while appearing to one person to constitute an offer or solicitation to sell, buy or barter contraband – whether true or false – can appear to another person (listening to the same words of the speaker) to be an offer or solicitation to sell, buy, or barter something totally lawful and therefore, protected by the First Amendment. Thus, the Section impermissibly reaches constitutionally protected speech. Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected speech is invalid on its face. *Free Speech Coalition*, 535 U.S. 234 at 255 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Therefore, the statute is unconstitutional. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

The Section impermissibly criminalizes a person's desire to brag or lie about what he/she intends to offer or solicit regardless of the legal or illegal nature of the material. The Section also impermissibly criminalizes a mistaken offer or solicitation regarding such illegal materials. For example, if Person A says to Person B: "hey, look at these pictures of young hot babes with no clothes" and Person B believes, albeit mistakenly, that the pictures are child pornography, Person A has violated the Section. Here, the speaker's scienter is not determined based upon the speaker's state of mind. Rather, the speaker's scienter is determined based upon what the speaker's audience believes was the speaker's actual intent – a concept that runs afoul of one of the most basic elements of a crime – that the *offender* intended to commit the crime charged. If the Section is not held unconstitutionally overbroad,

people will be afraid to even talk about child pornography or about any subject whom a third party audience might think is child pornography even if that is not the subject of the conversation.

The Section is overbroad because it captures non-commercial, non-inciteful speech. Person A is having a casual conversation with Person B. Person A enjoys viewing illegal child pornography. Person A asks Person B "would you happen to have any child pornography that I can look at?" Person B says, "No." Person A has violated the Section. All Person A has done was expressed a desire – twisted or sick as the desire might be – to look at illegal child pornography that he/she hopes Person B possesses. There is no commerce to this solicitation and, of course, the request is non-inciteful. This concern becomes magnified because of how law enforcement can impermissibly target individuals in "sting" operations. Law enforcement could post an advertisement targeting potential purchasers for illegal child pornography but using non-specific words in the marketing language. An individual, believing he or she is purchasing legal pornography, could easily be lured into a "child pornography trap."

2. Non-commercial efforts to solicit, distribute, or offer to distribute illegal contraband are protected by the First Amendment

Since the pandering provision of the Prosecutorial Remedies and Other Tools to End Exploitation Children Act of 2003 No. 108-21, 117 Stat. 676 (PROTECT Act) is not limited to commercial speech but also extends to non-commercial promotion, presentation, distribution, and solicitation, the content based restriction is governed by a "strict scrutiny" standard.

Petitioner argues that the First Amendment does not protect a non-commercial effort to solicit, distribute or offer to distribute illegal contraband. *Lorrillard Tobacco Co. v. Reilly*, 533 U.S. 525, 579 (2001) (App. Br. at p. 19). Petitioner further relies on *Pittsburg Press Co. v Pittsburg Commissions on Human Relations*, 413 U.S. 376 (1973) (recognizing that a newspaper advertisement captioned "narcotics for sale" and "prostitutes wanted" did not receive First Amendment protection). However, the ad in *Pittsburg Press Co.* involved unambiguous words that were clearly involved in a commercial setting. We note that the issue is not whether the speech in *Williams v. United States*, 127 S. Ct. 3042 (2007) was commercial or non-commercial, but whether the Section, on its face is unconstitutionally overbroad and unconstitutionally vague.

The cases Petitioner relies upon do not address situations where non-commercial speech could be protected. For example, if Person A asks Person B to provide Person A with illegal child pornography, regardless of what Person B says, Person A can be arrested. In a case where Person B has no materials to offer, there can be no legislative concern that Person A's appetite can be whet because Person B's turndown can have two opposite affects on Person A, especially if Person B chastises Person A for daring to ask such a question – creating embarrassment to Person A. On the one hand, an argument can be made that the pedophile would become enraged and propelled to satisfy his desire by soliciting his material from another individual. However, a different argument can be made that Person B's criticism had such an impact on Person A causing Person A's desires to be suppressed resulting in Person A conscientiously refraining from soliciting such material ever again. In this latter case, it would seem that

the freedom of expression actually promotes the legislative intent behind the Section.

Subsections (i) and (ii) of the PROTECT Act pandering provision capture what is clearly child pornography both before and after *Free Speech Coalition* was decided whether involving actual or virtual child pornography. However, the PROTECT Act's pandering provision does not criminalize the speech expressed in the underlying materials in Sections (i) and (ii), but rather the speech soliciting and promoting such material, whether or not the material contains child pornography.

The lower court recognized that the government can punish the advertisement or solicitation of an illegal product or activity because neither is protected speech. *Williams,* 444 F.3d at p. 1297 (citing *Virginia State Bd. of Pharmacy,* 425 U.S. at p. 770). The lower court also correctly noted that if that is all the pandering provision stood for, then the government would not have to show that Congress had "narrowly tailored its restriction because neither of these scenarios involve protected speech." *Id.* at p. 1297. However, the Section, as written, addresses not only liability to the offered or solicited material but rather to the ideas and images communicated to the viewer by the representation of what those materials constitute, the First Amendment is necessarily implicated. *Id.* at p. 1297.

3. The imminent-incitement test of *Brandenburg v. Ohio* does apply to regulation of direct offers to provide, or solicitations to receive, illegal contraband

Petitioner argues that the lower court was wrong in its belief that the government could not regulate

non-commercial solicitations, or distribution of, or offers to distribute, illegal contraband except under the narrow circumstances of imminent incitement. (App. Br. at p. 24) citing, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action). Petitioner attempts to distinguish the *Brandenburg* imminent incitement test as not applying to the type of speech at issue under the Section, however, the Section clearly prohibits "any person" to "knowingly . . . promote[s] . . . obscene materials."

The Eleventh Circuit correctly applied the jurisprudence of this Court to the analysis of the government's ability to regulate non-commercial solicitation, or distribution of, or offers to distribute, illegal contraband. Although in *Free Speech Coalition*, the court contrasted the type of speech covered in *Brandenburg* with speech that has a "significantly stronger, more direct connecting" to "illegal conduct," such as "attempt, incitement, solicitation, or conspiracy," the principals of *Brandenburg* did not change and certainly, *Free Speech Coalition* did not overrule *Brandenburg*.

Petitioner also disagrees with the lower court's conclusion that the term "promote" speech is so dissimilar from the term "advocacy" speech as to render the *Brandenburg* case inapplicable to the instant case. (App. Br. at p. 27). Petitioner's reasoning is grounded in the interpretive canon *Noscitur a sociis*, which is a well-established and useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may

be sought to remove the obscurity or doubt by reference to the associated words. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923). However, rules of statutory construction are only to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful, they have no place, as this Court has many times held, except in the domain of ambiguity. *Id.* at p. 519 (emphasis added), citing to *Hamilton v. Rathbon*e, 175 U.S. 414 (1899). Moreover, this Court has said that these rules of statutory construction may not be used to create but only to remove doubt. *Russell Motor Car Co.*, 261 U.S. at 520. Where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in the question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, which construction must be given to it. *Platt v. Union Pacific Railroad Co.*, 99 U.S. 48 (1879).

The application of *Brandenburg* to the Section forces a recognition that non-commercial, non-incitement expressions cannot be criminalized.

4. Direct proposals to provide or to receive contraband enjoy First Amendment protection even if the materials are false, fraudulent or non-existent

Petitioner argues that without regard to false, fraudulent or non-existent materials, there is no First Amendment protection to any direct proposal to provide or to

receive contraband. (App. Br. at p. 29). This conclusion is erroneous because if in fact the touted materials are clean or non-existent, any braggart, exaggerator or outright liar who claims to have illegal child pornography would be subject to arrest. Moreover, there is a fourth category of individuals the Petitioner totally ignores – one 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. Here, an innocent speaker simply goes to jail. Thus, Petitioner's reliance on *Gertz v. Robert Welch Inc*., 418 U.S. 323 (1974) does not apply because an individual need not be intentionally lying or committing a careless mistake to be subject to arrest. Rather, a person would go to jail for an inability to sufficiently describe what he/she has to provide or he/she wants to receive.

Petitioner argues that the Section does capture liars, braggarts and exaggerators who have no First Amendment protection. (App. Br. at p. 29). This argument turns basic fundamental tenets of law on its head. Every criminal statute requires intent, whether general or specific. Such intent is measured against the subject or alleged offender, not the victim of a personal crime or the offense of the speakers' words. If a person lies, brags or exaggerates about what he/she has to offer, or wants to acquire, there is a total absence of any criminal intent. This is clearly what the lower court was concerned about. Of course, if a person intentionally lies for false advertising, then there are statutes on fraud, false advertising, and other consumer protection statutes that can address that conduct.

5. Even mistaken speech captured by Section 2252A(a)(3)(B), properly construed, is protected

Petitioner admits that the Section "does capture some speech by mistaken actors" (App. Br. at p. 32), but nevertheless argues that such speech is not constitutionally protected. In support of its argument, Petitioner states that the Section has both objective and subjective intent components, that the objective component of intent is addressed by the words "*in a manner* that reflects the belief, or that is intended to cause another to believe that the material or purported material, or contains" illegal child pornography. Petitioner argues that the words "in a manner" is an objective benchmark for both subsequent clauses of the Section and that a reasonable person must conclude the intention (its "manner") by either: 1) that the speaker has the "belief" that the proposed transaction will involve illegal child pornography; or 2) that the communication is "intended to cause another to believe" that the transaction will involve illegal child pornography.

Petitioner then puts its own spin and interpretation on the plain language of the Section to advance its argument, but to a reasonable and ordinary person, the Section does not make clear who the person is that the words "reflects the belief" applies to. Is it to the speaker? Is it to the intended audience? Or is it to an unintended person who simply overhears the speaker's utterance? Because the Section does not define *whose* belief we are talking about; because any of those three categories of individuals could have a "clean" belief of what the speaker is talking about and because criminal liability does not rest on the intent of the speaker but rather the understanding or interpretation of the listener, the Section clearly and

unavoidably captures mistaken, protected speech and is thus overbroad.

Petitioner argues that the Section has two subjective components, one that requires a showing that the speaker had "the belief" or "intended to cause another to believe" that the material was illegal child pornography, and, two, that the Section applies only to statements made "knowingly," (App. Br. pp. 33-34), claiming that the scienter requirement applies to each element of the Section, including the manner of communication, citing *United States v. X-Citement Video Inc.*, 513 U.S. 64, 78 (1994). For the same reasons stated above, the Petitioner is wrong here as well.

Petitioner says the lower court erred in construing the Section as imposing criminal liability based merely on the defendant's subjective belief that the materials are sexually arousing, (App. Br. at p. 34). Petitioner argues against that holding by stating that it is not enough for the defendant subjectively to believe that the material is lascivious, but rather, the defendant must offer to transact a material "in a manner that reflects the belief" that the material contains either: (i) an obscene visual depiction of a minor engaging in explicit conduct; or (ii) a visual depiction of an actual minor engaging in explicit sexual conduct.

The lower court was absolutely correct that the "reflects the belief" portion of the statute made a defendant's criminal liability conditioned upon a third party's belief rather than the speaker's intent.

Alarmingly, Petitioner argues that a mistaken speech – no less than intentional false speech – is wholly unprotected because it fuels the market for child pornography. (App. Br. at p. 36). This frightening position brings to

mind the following example: An elementary school sports coach[2] has pictures of his underage gymnastic students and innocently offers to exchange pictures of his team to a coach[3] from a competing school. The clean-minded coach does not know that this other coach is a closet pedophile. The pedophile coach believes that the pictures he is about to view (from the clean-minded coach) contain illegal child pornography. Clearly, this is protected/clean speech by the clean-minded coach that is advertised, promoted, presented, or distributed "material . . . in a manner that reflects the belief" – to the pedophile – that the material is illegal child pornography. The clean coach has violated the Section, and under Petitioner's argument, this is a commercial speech transaction because it is a trade or barter.

6. Section 2252A(a)(3)(B) proscribes protected speech

Petitioner argues that there is no per se protection for pandering and that pandering itself supports the conclusion that the materials are unconstitutionally protected. Citing *Ginzburg v. United States,* 383 U.S. 463 (1966) (App. Br. at p. 37). Petitioner is wrong because the Section, under a host of realistic everyday examples captures protected speech – particularly any non-commercial parlance between citizens who are simply exchanging their thoughts and ideas about child pornography. The Section misses the target and instead wrongfully punishes individuals for the non-inciteful expressions of their

[2] The "clean-minded coach."

[3] By using, for example, the following words: "Hey, wanna see these hot picks of my girls in a great locker room pose?"

thoughts and beliefs. However repugnant the conversations might be, the government cannot constitutionally suppress a person's belief that simulated depictions of children are real or that innocent depiction of children are salacious. *Williams,* 444 F.3d at 1300.

B. Section 2252A(a)(3)(B) is overbroad in relation to its plain legitimate sweep

In order for a party to successfully challenge a statute on its face for unconstitutional overbreadth, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plain legitimate sweep." *Broadrick,* 413 U.S. at 615.

Petitioner recognizes that the Section "might breach some actual instance of protected speech." (App. Br. at p. 38). Petitioner argues that Congress can enact laws that abridge protected speech if it does not do so in a substantial way (App. Br. at p. 38) citing *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 2007 (2003). The Section substantially encroaches protected speech because there is an infinite number of examples of speech which are protected and can be criminalized via the Section, as currently drafted. Petitioner argues that the lower court's "reliance on a few hypothetical scenarios does not substitute for proper overbreadth analysis" (App. Br. at p. 42). The lower court simply cited a few examples but not a universe of examples under which protected speech would be affected by the application of the Section, as currently drafted.

Petitioner then argues that the Section should not be stricken but actually dealt with on a case-by-case adjudication. *Virginia v. Hicks*, 539 U.S. 113 (2003). Petitioner's

only analysis is that Williams did not make a claim that his conduct was not covered by the Section. (App. Br. at p. 42). And while this Court tries "not to nullify more of a legislator's work than is necessary, . . . " (*Reagan v. Timer, Inc*., 468 U.S. 641, 652 (1984)), when a statute is as overbroad and vague as the Section, and particularly where it affects First Amendment freedom, the more frustrating remedy is to simply let Congress re-write the statute rather than risk speech freedoms of millions of people across the country every day and then burden witnesses, law enforcement, prosecutors, judges, juries and higher courts with trying to sort out the mess created by the Section on a case by case basis.

II. SECTION 2252A(a)(3)(B) IS IMPERMISSIBLY VAGUE

Petitioner argues that the Section is not impermissibly vague in that the Constitution does not impose "impossible standards of clarity," citing *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) and if the statue is "clear on what the [statute] as a whole prohibits," citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), it is not vague. The Section however has no standard of clarity and even when read as a whole, is unconstitutionally vague.

Laws that are insufficiently clear are void for three reasons: 1) to avoid punishing people for behavior that they could not have known was illegal; 2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and 3) to avoid any chilling effect on the exercise of sensitive First Amendment freedoms. *Grayned*, 408 U.S. at 108-109.

The vagueness of content-based regulations of speech raises special First Amendment concerns because of its obvious chilling effect on free speech. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1974). As such, reasonable certainty in statutes is more essential than usual when vagueness might induce individuals to forego their First Amendment rights for fear of violating an unclear law. *Scull v. Comp. of Va. Ex-Rel Committee on Law Reform and Racial Activities v. Virginia ex rel. Committee*, 359 U.S. 344 (1959).

Vague laws in any area suffer constitutional infirmity. But when First Amendment rights are involved, this Court looks even more closely at the statute lest, under the guise of regulating conduct that is reachable by the police power, a First Amendment freedom suffers. Because First Amendment freedoms need breathing space to survive, the government may regulate in this area only with narrow specificity. *Gooding, Warden v. Wilson*, 405 U.S. 518 (1972). A stricter standard of permissible statutory vagueness may be applied to a statute having a potential inhibiting effect on speech and the precision of regulation must be the touchstone in an area so closely involving our most precious freedoms. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

To pass constitutional acceptance, a statute challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352 at 357 (1983). Particular clarity is required when the statute implicates First Amendment rights. *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

The particular language of the statute here "in a manner that reflects the belief, or that is intended to cause another to believe" that touted or desired material contains illegal child pornography lacks the heightened level of clarity and precision demanded of criminal statutes by this Court as established in *Village of Hoffman Estates, Inc.,* 455 U.S. at 498. This language is vague and unclear because it lacks no standard or objective measure to educate the public as to what behavior is lawful versus what behavior is unlawful. The proscription allows law enforcement to subjectively determine what speech "reflects the belief or is intended to cause another to believe." This subjective determination gives unacceptable broad discretion to law enforcement officers to define *in their minds* whether a given utterance or writing violates the statute. *See City of Chicago v. Morales*, 527 U.S. 41 (1999).

There is no doubt that Congress can regulate the commercial distribution or solicitation of obscene child pornography and "real child pornography." But the Section intended to proscribe such conduct is, as the lower court held, "unnecessarily muddled by the nebulous 'purported material' and 'reflects the belief, or is intended to cause another to believe'" language of the Section. Because this language fails to convey the contours of its restriction with enough clarity to allow law-abiding persons to conform to its requirements and because such language gives law enforcement an unacceptable level of subjective determination and broad discretion to define what statement or writing constitutes a criminal offense, it is impermissibly vague.

Petitioner notes that federal courts have a duty, if possible, to construe statutes to provide clarity and to avoid unconstitutional vagueness. This, of course, is true.

However, the Section at issue is so fatally vague, it is *incapable* of correction or resurrection. Moreover, federal courts should not engage in legislating or rewriting statutes. Such conduct offends the checks and balances system of our country under the doctrine of a separation of powers of our government.

While federal courts have a duty, if fairly possible, to construe a federal statute to provide clarity and avoid unconstitutional vagueness, *X-Citement Video, Inc.*, 513 U.S. at 64 (1994), such courts must apply the strict scrutiny standard when the challenge implicates the First Amendment.

The lower court did not misunderstand the scope of the Section. (App. Br. p. 44). Rather, it specifically identified the particular vague, and therefore objectionable and unconstitutional language of the Section. *Williams* at 1306-07. The lower court did not have to make an "attempt to demonstrate that any of its purported vagueness concerns pertained to the conduct of the Respondent" (App. Br. p. 44) because its analysis and finding was on the facial validity of the statute, not under an "as applied" standard. The lower court correctly provided examples of its own to simply show how, in a real life setting, how and why the Section is unconstitutionally vague. *Id*. at 1306-07. Contrary to Petitioner's argument, the lower court did recognize that the problem was not necessarily with no actual material being required but rather because the word "purported" material, if described in a manner that depended not upon the state of mind of the speaker but rather on that of the audience, then the Section was unconstitutional.

Brief Amici Curiae of the National Law Center for Children and Families, Stop Child Predators, the Klaaskids Foundation, the Jessica Marie Lundsford Foundation, and the Joyful Child Foundation

The Brief Amici Curiae of the National Law Center for Children and Families, Stop Child Predators, the Klaaskids Foundation, the Jessica Marie Lundsford Foundation, and the Joyful Child Foundation initially argues that the Section was "carefully" drawn. The fact that the Section was carefully drawn does not make it valid or cure the unconstitutional infirmity of the language in the Section.

The brief argues that Congress recognized the need for a pandering section. This may be true. However, the issue is not whether Congress recognized the need for a pandering provision. The issue is whether the language used by Congress and the manner in which the Section is currently drafted, poses constitutional offense to the First Amendment.

The brief next argues that Congress's findings support the Section and those events subsequent the enactment of the Section demonstrate it has been effective. The issue not whether Congress's findings were supported or were later proven to be supported, rather, whether, as drafted, the Section is unconstitutionally overbroad or vague. The brief argues that the Section was narrowly tailored to pandering. The Section was not sufficiently "narrowly tailored" because it is fraught with overbreadth and vagueness problems. The brief argues that the Section does not reach non-commercial speech. It most certainly does, as already demonstrated by various examples. The brief also argues that all offers to transact in such materials are commercial. Not true, as demonstrated by example.

Lastly, the brief argues that even if the Section reaches some protected speech, it is not substantially overbroad. We have already addressed that issue as well. We note that nowhere, do these Amici Curiae even touch upon the constitutional *vagueness* issue.

Suppose Person A is sitting on a bus bench looking at a photo album not visible to another person B sitting on the same bench. Person A says: "Wow, these pictures of young hot babes are very, very, erotic." Person B says: "Can I see them?" Person A says "here take this one, for free, I have two copies of it and it's the best of the bunch." Person C is a plain clothes police officer who thinks that the photo offered by Person A contains child pornography, when, in reality, it is a Baywatch photo of Pamela Anderson and her fellow female lifeguards wearing skimpy red bathing suits on a southern California beach. Person A could be arrested and charged under the Section, yet Person A had no child pornography and no commerce was involved in this clearly non-commercial speech.

Brief Amicus Curiae of the National Legal Foundation

The Brief Amicus Curiae of the National Legal Foundation ("NLF") makes a single argument – that Williams' speech was "commercial" – as defined in *Bloger v. Youngs Drug Products Corp*., 463 U.S. 60 (1983). Respectfully, the NCF's entire brief (and argument) misses the only issue – whether the Section is overbroad and impermissibly vague, and thus *facially* unconstitutional. The issue is not whether the speech in Williams, was commercial. Thus the NLF's brief is not addressed further.

Amici Curiae Brief of the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and West Virginia

The crux of the States' argument is that the Section is not overbroad because it was designed to focus on the intent of the panderer and not the actual content of the material; "[b]y its terms, the statute applies only where the defendant *intentionally offers* to transact in pornography made with real children." *Amici Brief*, p. 3 (emphasis supplied). The States believe that the Section is necessary because it "allows prosecutors directly to target an offer to transact in illegal child pornography even in cases where the material cannot be located or has been digitally altered, or where a person is expanding the network for child pornography with material that may not otherwise be obscene. *Amici Brief*, p. 4.

There is no doubt that reducing or "drying-up" the market for child pornography is a compelling governmental interest, although, "the government may regulate the content of constitutionally protected speech in order to promote a compelling interest, and it must choose the *least* restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989) (emphasis added).

The States next argue that they themselves have statutes on their books that mirror the Section, thus "underscoring the legitimacy of Congress's concerns about the child pornography," and that "[t]he faulty reasoning of the Eleventh Circuit casts doubt on a number of very

sensible (and constitutional) state statutes. . . ." *See Amici Brief*, p. 7. The disturbing thought for that argument is that we should put the First Amendment on its head because too many states might be holding its feet up in the air. Any statute drafted as a mirror image of the challenged Section, would suffer similar constitutional infirmities as does the Section in dispute here.

The States further argue that the lower court also erred by finding the Section vague, because it "misread the statute and failed to give the key term "knowingly" its proper meaning." *Amici Brief*, p. 3. The States, say that in the Section the word "knowingly" is set apart from the rest of the Section because the word is intended to apply to each element of the crime. The states however, agree, that the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Amici Brief*, p. 21. *See also*, *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135 (W.D. Wash. 2003) (finding that a state statute was void for vagueness under the First Amendment because enforcement would require prosecutor and jury to discern subjective intent of the speaker and the statute lacked reference to objective standards and the statute did not provide a person of ordinary intelligence a reasonable opportunity to know the speech prohibited).

Part I of the States' brief argues that Congress recognized the need to close the network for child pornography, *Amici Brief*, p. 4, and that as currently written, many sound and important state statutes may face the same fate. *Amici Brief,* p. 10.

The reasoning behind the States' brief amounts to the concept, "the end justifies the means." Essentially, it is acceptable to turn the First Amendment on its head because the horrible crime of child pornography is so offensive that constitutional standards for the drafting of language in criminal statutes can simply be ignored. The issue is not whether the proliferation of this "virtual defense" has made prosecution of child pornography crimes more difficult and expensive. The issue is about the constitutional validity of the Section on its face, under overbreadth a vagueness standard. If difficult and/or expensive prosecutions are the justifications to simply surrender the First Amendment, then the war on pandered child pornography is far too high a price to pay. The First Amendment is simply not for trade, not for barter and not for sale. Moreover, if the twenty-seven states, as a result of this Court upholding the Eleventh Circuit's decision in *Williams*, have to re-write their correlating state statutes for fear of future attacks on such statutes – then so be it. Constitutional rights are the roots of this country, particularly, the First Amendment. If Congress or any state needs to rewrite an unconstitutionally overbroad or vague statute, then, writer's cramp should take the back seat to the most precious of our freedoms.

Parts II and III of the States Amici Curiae brief track points and arguments raised by the government and are fully addressed by Mr. Williams elsewhere in his brief in opposition.

Brief Amicus Curiae for the American Center for Law and Justice and Eighteen Members of Congress

This Brief Amicus Curiae starts by arguing that the Section only covers commercial speech because of the pandering nature of the Section, citing *Pinkus v. United States*, 436 U.S. 293, 303 (1978), totally ignoring a plethora of situations where the Section can cover non-commercial or private speech.

Next, the brief argues that the lower court erred in holding that the First Amendment protects misleading statements about the nature or existence of sexually explicit material, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This position ignores the Section's application to an innocent mistake and confuses the basic requirement that every criminal statute must have an intent element which cannot be satisfied if the speaker is careless or delusional about the words he or she uses to offer or solicit any material to or from any individual.

The brief then argues the cannon of constitutional avoidance, citing *Blodgett v. Holden*, 275 U.S. 142 (1927). Mr. Williams retorts that there is no way to interpret the words of the Section to avoid the arrest, prosecution and conviction of innocent individuals for simply misusing words to describe a desire to offer or solicit material which might not constitute illegal child pornography.

Lastly, the brief argues that under this Court's commercial speech precedents, the Section poses no threat to the First Amendment. As already argued by Mr. Williams, the Section absolutely offends protected speech under the First Amendment.

Brief Amici Curiae for the Lighted Candle Society and Family Leader Foundation

This brief argues the well intended passage of the Child Pornography Prevention Act of 1966, Pub. L. No. 104-208, 110 Stat. 3009-26 (1996).

The brief argues the importance of punishing "false pandering." Again, the Section does not only cover "false pandering." Rather, it covers mistaken, careless and diluted offers, solicitations, distribution, advertisement and presentment of materials that might be clean or nonexistent.

Next, the brief argues that pandering is largely, if not exclusively, a form of commercial speech. This position is wrong because pandering can just as easily take place in a non-commercial setting as otherwise.

Lastly, the brief argues that pandering of child pornography deserves First Amendment protection because child pornography is not properly categorized as a form of speech and because pandering of child pornography is a form of immediate incitement to unlawful activity. Because this Section covers much more than pandering and because there is no empirical evidence of immediate incitement to unlawful activity from "pandering," this argument is totally illusory.

Brief Amicus Curiae of Morality in Media, Inc.

This brief argues that *Ginzburg* stands for the "common sense" principle that explicit material that might otherwise enjoy First Amendment protection of it is marketed for its obscene pornographic qualities. Although *Ginzburg* has not been overturned, its precedential value is questionable following *Virginia State Bd. of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) which held that truthful, non-misleading commercial speech is protected by the First Amendment, although to a lesser degree than protected non-commercial speech.

Brief Amicus Curiae of the Rutherford Institute

Mr. Williams' response to all of the arguments raised in this brief are covered in Mr. Williams' response in to the brief filed by other amici curiae and/or the Petitioner.

CONCLUSION

Following this Court's decision in *Ashcroft v. Free Speech Coalition*, Congress enacted the PROTECT Act. However, the Section is still so unconstitutionally overbroad and vague that this Court cannot breathe constitutional meaning into the words "in a manner that reflects the belief, or that is intended to cause another to believe." The Section should simply be rewritten to avoid the constitutional infirmities on overbreadth and vagueness grounds.

"First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft*, 535 U.S. at 253.

In the final analysis, in the interest of protecting children, Congress launched its legislative net well beyond the permissible object of child pornography and into the waters of protected speech.

For all the foregoing reasons, the Eleventh Circuit Court of Appeals ruled correctly and its decision should be affirmed.

Respectfully submitted,

RICHARD J. DIAZ, ESQ.
Florida Bar No. 0767967
3127 Ponce de Leon Blvd.
Coral Gables, Florida 33134
Tel. (305) 444-7181
Fax (305) 444-8178