

**THE BIRTH OF CRIMINAL
“PANDERING” AND THE DEATH
OF *FREE SPEECH COALITION’S*
“ACTUAL CHILD”
REQUIREMENT: THE
IMPLICATIONS OF *UNITED
STATES v. WILLIAMS***

I. INTRODUCTION

The harm to children victimized by child pornography is indisputable, and the government’s interest in protecting these children is clear. In recent years, problems associated with regulating child pornography have grown substantially due to the Internet.¹ The Internet not only makes it easy for creators of child pornography to distribute such material, it also makes it more difficult for the government to prevent its creation and distribution.² One of the many difficulties in regulation arises from the use of computer generated images (CGIs) that are indistinguishable from images portraying actual children.³ This CGI material is called “virtual child pornography,”⁴ and its existence greatly complicates efforts to combat online child pornography.⁵ Congress’ most recent attempt, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, was at issue in *United States v. Williams*.⁶

1. RICHARD WORTLEY & STEPHEN SMALLBONE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U. S. DEP’T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET (2006), <http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf>.

2. See *United States v. Williams*, 444 F.3d 1286 (11th Cir. Fla 2006), *rev’d*, 128 S. Ct. 1830, 1850 (2008).

3. *Id.*

4. *Id.* at 1849 (explaining that “fake” child pornography could be made by splicing photographs together or using adult models that appear young enough to pass for children).

5. *Id.* 1849-50.

6. *Id.* at 1841.

Before the enactment of the PROTECT Act, prosecution for child pornography required the existence of pornography involving an actual child.⁷ Historically, without a minor victim the protective rationale behind any pornography legislation would fail.⁸ *United States v. Williams*, however, eliminates this requirement.⁹ After *Williams*, a person may be prosecuted for “pandering” child pornography despite the absence of an actual child in the pornographic work.¹⁰

Supreme Court approval for a law that criminalizes the pandering of illegal materials, even when the actual materials are not illegal, represents an unprecedented change in the law. This Note first addresses the the statutory regulation of child pornography. Next, the rationale and reasoning behind *Williams* are covered. Finally, the Note explores the doctrinal significance of *Williams*.

II. LEGISLATIVE REGULATION OF CHILD PORNOGRAPHY BEFORE *U.S. v. WILLIAMS*

Before analyzing the U.S. Supreme Court opinion, it is worthwhile to review the precise statutory language at issue. Child pornography has been regulated by statutes and case law.¹¹ Once the Internet created new regulatory problems, Congress attempted to respond.¹² An early effort, the Child Pornography Prevention Act of 1996,¹³ was held unconstitutional.¹⁴

In an effort to prohibit the abuse of children, and especially their sexual exploitation, Congress passed the Child Pornography Prevention Act of 1996 (CPPA).¹⁵ The central purpose of the CPPA was to restrict the dissemination of child pornography over the Internet.¹⁶ A pre-enforcement challenge was brought against certain provisions of the

7. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

8. *Id.* at 250.

9. See *Williams*, 128 S. Ct. at 1850.

10. *Id.*

11. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-60 (1996). See *Rosen v. United States*, 161 U.S. 29 (1896); *Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Stanley v. Georgia*, 394 U.S. 557 (1964); *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982); *Osbourne v. Ohio*, 495 U.S. 103 (1990); *Free Speech Coalition*, 535 U.S. 234.

12. See Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-60 (1996).

13. *Id.*

14. See *Free Speech Coalition*, 535 U.S. 234.

15. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-60 (1996).

16. *Id.*

CPPA by the Free Speech Coalition.¹⁷ The Court held that sections 2256(8)(B) and 2256(8)(D) of the CPPA were unconstitutionally overbroad.¹⁸ Section 2256(8)(B) prohibited “any visual depiction, including . . . computer generated image[s]” that “[are,] *or appear to be*, of a minor engaging in sexually explicit conduct.”¹⁹ Section 2256(8)(D) prohibited images of sexually explicit conduct that is “advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”²⁰ The CPPA provisions were struck down because they attempted to prohibit obscenity in general by merging actual child pornography with virtual child pornography.²¹ However, in doing so, the CPPA restricted a substantial amount of protected speech.²²

Undeterred, Congress made another attempt to regulate child pornography over the Internet by enacting the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003. Section 2252A(a)(3)(B) prohibits offers and requests for child pornography without requiring that any actually exist.²³ Specifically, it is directed at

any person who . . . knowingly . . . advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains [child pornography depicting] a minor engaging in sexually explicit conduct False.²⁴

The PROTECT Act differs from its predecessor, the CPPA, by directly prohibiting speech about child pornography, rather than possession and distribution of the material.²⁵ Section 2252A(a)(3)(B) of the PROTECT Act also imposes a scienter requirement limiting the prosecutorial reach of the PROTECT Act.²⁶ Furthermore, the operative

17. See *Free Speech Coalition*, 535 U.S. at 243. (describing the Coalition as “a California trade association for the adult-entertainment industry. The Coalition alleged they do not use minors, but feared some of their publications might be banned by the statute).

18. *Id.* at 258.

19. 18 U.S.C. § 2256 (8)(B) (1996) (emphasis added).

20. 18 U.S.C. § 2256 (8)(D) (1996) (emphasis added).

21. *Free Speech Coalition*, 535 U.S. at 257.

22. See *id.* at 234.

23. See 18 U.S.C. § 2252A(a)(3)(B) (2003).

24. *Id.*

25. *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).

26. 18 U.S.C. § 2252A(a)(3)(B) (2003).

verbs used in the statute have a transactional connotation:²⁷ “advertises, promotes, presents, distributes, or solicits.”²⁸ This limits the barred speech to typical marketplace speech,²⁹ without requiring that the transfer be for money. It thereby covers those who trade for consideration, or share for free.³⁰

The phrase, “in a manner that reflects the belief,” requires an *actual* belief on the part of the defendant that the material or purported material at issue is actual child pornography.³¹ If the defendant does not hold this belief – is knowingly trafficking in “fake” child pornography – there is no violation of the statute.³² The clause requiring defendant to have the “inten[tion] to cause another to believe” adds a further subjective element.³³ The defendant must not only intend for his audience to believe that the content of the material is actual child pornography.³⁴ The defendant must also convey that belief in such a manner that would cause a reasonable person to recognize the defendant holds such a belief.³⁵

Finally, although the definition of “sexual conduct” is similar to that previously upheld in *New York v. Ferber*,³⁶ the Act adds the word “explicit.”³⁷ This word connotes an actual display of sex, not just the suggestion of its occurrence.³⁸ This does not mean that it must be real, only that a reasonable person would believe it is real.³⁹ Since the previous and broader definition was already upheld, the definition here should not be vulnerable to a facial challenge.⁴⁰

All these limitations taken together are meant to ensure that the PROTECT Act is constitutional. Petitioners in *United States v. Williams*, however, challenged the PROTECT Act as overbroad and vague.

27. *Williams*, 128 S. Ct. at 1838-39.

28. 18 U.S.C. § 2252A(a)(3)(B) (2003).

29. *Williams*, 128 S. Ct. at 1840.

30. *Id.* at 1840.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Williams*, 128 S. Ct. at 1840.

36. *New York v. Ferber*, 458 U.S. 747, 751 (1982) (defining sexual conduct as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals).

37. 18 U.S.C. § 2252A(a)(3)(B) (2003).

38. *Williams*, 128 S. Ct. at 1841.

39. *Id.*

40. *Id.* at 1840.

III. UNITED STATES V. WILLIAMS

A. *Factual Background*

On April 26, 2004, the Secret Service went undercover into an Internet chat room.⁴¹ There, a United States Secret Service Special Agent (SA) using the name “Lisa n Miami” spotted another user (Williams) with a sexually graphic screen name and a public posting stating, “Dad of toddler has ‘good’ pics of her an [sic] me for swap of your toddler pics, or live cam.”⁴² The SA then joined a private chat room where the two traded pictures of a non-pornographic nature.⁴³ Shortly thereafter, Williams stated, “I’ve got hc [hard core] pictures of me and dau, and other guys eating her out-do you??” and requested more pictures.⁴⁴ When these pictures were not furnished, Williams accused “Lisa n Miami” of being a cop.⁴⁵ The SA then returned the accusation.⁴⁶ Back in the public chat room, the same unidentified screen name posted a link with the message, “HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL-SHE CAN’T.”⁴⁷ The link was followed by the SA and multiple images of actual child pornography were discovered.⁴⁸

The sexually graphic screen name was traced back to Williams.⁴⁹ The SA obtained a search warrant for Williams’ home and seized two computer hard drives.⁵⁰ On the hard drives the police discovered twenty-two images containing sexually explicit conduct, lascivious display of genitalia, prepubescent children, sado-masochistic conduct and other depictions of pain.⁵¹ In the District Court of Florida, Williams was charged with one count of possession of child pornography and one count of pandering under Section 2252A(a)(3)(B) of the PROTECT

41. *United States v. Williams*, 444 F.3d 1286, 1288 (11th Cir. 2006).

42. *Id.*

43. *Id.* (stating that the picture given by the SA was non-sexual, and it was of a college-aged female regressed to appear between the ages of ten and twelve).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Williams*, 444 F.3d at 1289.

48. *Id.* (depicting seven images of children, between the ages of five and fifteen, engaging in explicit sexual conduct and showing their genitals).

49. *Id.* at 1288.

50. *Id.* at 1289.

51. *Id.*

act.⁵² Williams filed a motion to dismiss the second count.⁵³ While that motion was pending, a plea agreement was reached.⁵⁴ Williams pleaded guilty to both counts and was sentenced to two concurrent terms of sixty months.⁵⁵ On appeal, Williams challenged the constitutionality of Section 2252A(a)(3)(B),⁵⁶ and his conviction under the pandering provision was reversed.⁵⁷

B. Procedural History at the Eleventh Circuit

1. Williams' Overbreadth Challenge to the PROTECT Act

Williams' challenge to the PROTECT Act was brought under the overbreadth doctrine.⁵⁸ Under this doctrine, a statute that is so broad that it deters free expression can be struck down.⁵⁹ Here the issue was whether the statute prohibits a substantial amount of constitutionally protected speech which would make the statute invalid on its face.⁶⁰ The Eleventh Circuit began its analysis by pointing out that the material covered by the PROTECT Act, "an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct," is constitutionally restrictable.⁶¹ The Act, however, does not criminalize the material, but rather, the speech promoting and soliciting it.⁶² Thus, the law must be analyzed as a restriction on speech.

With regard to commercial speech, the government may freely prohibit advertisement and solicitation of illegal materials or illegal actions.⁶³ The same restrictions apply to false or misleading advertisements.⁶⁴ Following this reasoning, it is not necessary to apply a strict overbreadth analysis.⁶⁵ Instead, under the applicable standards

52. 18 U.S.C. § 2252A(a)(3)(B) (2003); 2004 U.S. v. Williams, 2004 WL 5388528 SD FLA 2004*1.

53. *Williams*, 444 F.3d at 1289.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1309.

58. *Id.* at 1289.

59. BLACK'S LAW DICTIONARY 505 (3rd pocket ed. 2006) (defining the overbreadth doctrine).

60. *Williams*, 444 F.3d. at 1296.

61. *Id.*

62. *Id.* at 1296-97.

63. *Id.* at 1297.

64. *Id.*

65. *Id.*

for restricting commercial speech, the government can criminalize the buying or selling of child pornography as an illegal product.⁶⁶ A law may also criminalize an unsuccessful attempt to offer such material. For example, one who offers child pornography is criminally liable even when the offeror cannot actually transfer child pornography because factually the material is not what the offeror believed it to be.⁶⁷

The Eleventh Circuit found that applying the analysis for commercial speech to pandering of child pornography was problematic.⁶⁸ First, the purpose behind restrictions on commercial speech are not the same as the purpose for prohibiting child pornography.⁶⁹ Commercial restrictions are meant to protect buyers from wrongful acts by sellers, such as fraud and misrepresentation.⁷⁰ The purpose behind child pornography restrictions, however, are to safeguard children.⁷¹ The second problem recognized by the Eleventh Circuit is how the Act punishes different crimes in an identical fashion. Specifically, the Act imposes a minimum sentence of five years and maximum of twenty years.⁷² This means that a person violating the commercial speech regulation would be subject to the same penalty as if they committed a crime more intimately connected to actual child pornography. The court found this punishment scheme to be disproportionate.⁷³ Third, the court noted that the Act also proscribes some non-commercial speech.⁷⁴ Since the Act prohibits non-commercial speech, including the “promot[ion], present[ation], distribut[ion], and solicit[ation]” of the material, the pandering provision must be subjected to strict scrutiny.⁷⁵ This standard applies to any regulation of non-commercial speech aimed at the communicative impact of the speech.⁷⁶

66. *Williams*, 444 F.3d at 1297.

67. *Id.*

68. *Id.* at 1286.

69. *Id.*

70. *See generally* Lanham Act, 15 U.S.C.A. § 1125 (2006) (partly created to protect the public from false and misleading advertising).

71. *See Williams*, 444 F.3d at 1286.

72. *Id.* (stating the violation consequences for paragraphs (1), (2), (3), (4), or (6) of subsection (a)).

73. *See Williams*, 444 F.3d at 1297-98.

74. *Id.* at 1298.

75. *Id.*

76. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976). When a regulation on speech is “content based” the words spoken or action performed is what is being regulated, not the mere fact of its occurrence. *See id.*

Under strict scrutiny analysis, a statute must be narrowly tailored to restrict the least amount of the protected speech as possible.⁷⁷ Because the Act criminalizes material “purported” to be child pornography, as well as material that “reflects the belief” that it is child pornography, it punishes speech that would otherwise be protected by the First Amendment. The Act’s disregard for the actual content of the material is problematic, because the same punishment applies even if the material is not actually child pornography.⁷⁸ The law also punishes another category of protected speech: speech that advocates, encourages, or approves of illegal activities but does not incite them.⁷⁹ The Appellate Court did not view the regulated speech in question here as “inciting,” and therefore deemed it protected.⁸⁰

The government has a compelling interest in protecting children from being sexually exploited. Congress has attempted to carry its interest out by eradicating the child pornography market.⁸¹ Previous prohibitions of child pornography were validated by the courts because of their production-based rationale.⁸² The Supreme Court once believed that restricting the market for child pornography would decrease profits to pornographers, which in turn would remove the motive to exploit real children.⁸³ However, this theory was later rejected in *Ashcroft v. Free Speech Coalition*.⁸⁴ As the Eleventh Circuit pointed out, the government failed to show how legal images not involving actual children further an illegal market for child pornography.⁸⁵

Advancements in computer technology complicates prosecution, as it is more and more difficult to determine whether particular images contain actual children.⁸⁶ Congress sought to address this difficulty in the Act,⁸⁷ by specifically creating a pandering provision that allows conviction without proof that the underlying material contains real

77. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

78. *Williams*, 444 F.3d at 1298 (stating that “dirty talk” unjustly falls into the category of purported child pornography).

79. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

80. *Williams*, 444 F.3d at 1298.

81. *Id.* at 1303; see *Prosecutorial Remedies & Other Tools To End The Exploitation Of Children Today Act (PROTECT ACT)* 18 U.S.C. § 2256 (1996).

82. *New York v. Ferber*, 458 U.S. 747, 760 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

83. *Ferber*, 458 U.S. at 762.

84. See 535 U.S. 234 (2002).

85. *Williams*, 444 F.3d at 1303.

86. *Id.* at 1303-04.

87. *Id.*

children.⁸⁸ Congress saw this change as a necessary tool to prevent the harm to children perpetuated by the child pornography market.⁸⁹ The Eleventh Circuit was unpersuaded. The court reiterated the principle that “[t]he government may not suppress lawful speech as the means to suppress unlawful speech,” and called for the government to do its job in determining whether any unlawful material behind the pandering actually exists.⁹⁰

The government analogized the pandering provision to the criminalization of offers to buy or sell illegal drugs.⁹¹ Like such offers, solicitation or pandering of illegal drugs is an inchoate offense; one that involves an action toward the commission of another crime.⁹² Such offers are illegal regardless of whether any actual drugs exist.⁹³ Similarly, the government argued against a requirement that actual child pornography exists. The intent to distribute illegal materials is not required here.⁹⁴ The only requirement is mens rea – a belief that the illegal materials exist or the intent to make another believe they exist. However, as the court noted, another requirement of an inchoate crime is a substantial movement toward completing the crime.⁹⁵ The only requirement under the Act is talking.⁹⁶

On this basis, the Eleventh Circuit concluded that Section 2252A(a)(3)(B) of the PROTECT Act was overbroad.⁹⁷

2. *Williams’ Vagueness Challenge to the PROTECT Act*

The Eleventh Circuit also addressed whether the PROTECT Act was unconstitutionally vague, despite the fact government argued the claim was waived when it was not reserved along with the overbreadth challenge.⁹⁸ The Constitution requires that “a person of ordinary

88. See 18 U.S.C. § 2252A(a)(3)(B) (2003).

89. *Williams*, 444 F.3d at 1303.

90. *Id.* at 1304 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

91. *Id.* at 1304.

92. BLACK’S LAW DICTIONARY 505 (3d pocket ed. 2006) (defining an inchoate offense as “a step toward the commission of another crime, the step in itself being serious enough to merit punishment”).

93. *Williams*, 444 F.3d at 1304.

94. *Id.*

95. *Id.*

96. *Id.* at 1305; see 18 U.S.C. § 2252A(a)(3)(B) (2003).

97. *Williams*, 444 F.3d at 1298.

98. *Id.* at 1305 (referring to how the court views the plea bargain as a contract that should be interpreted with the parties’ intent and when the waiver of constitutional rights is involved it should be read against the government).

intelligence [must have] a reasonable opportunity to know what is prohibited”⁹⁹ and invalidates laws too vague to meet this standard. Three characteristics of laws held unconstitutional for vagueness are: (a) absence of a clear reading of what is prohibited, (b) subjective enforcement due to arbitrary and discriminatory interpretation, and (c) chilling effects on First Amendment freedoms.¹⁰⁰

Consider a photograph accompanied by the statement: “little Janie in the bath-hubba, hubba!”¹⁰¹ To the court, the same phrase can be used by a pedophile and a proud grandparent.¹⁰² Yet, the criminal consequences are the same under the Act.¹⁰³ The phrases “purported material” and “reflects the belief, or is intended to cause another to believe” are, according to the Eleventh Circuit, too vague for a citizen to conform their actions to the law and thus also too vague for a uniform interpretation by enforcing officials.¹⁰⁴

C. Opinion of the United States Supreme Court

1. Overbreadth Revisited

The court notes that the statute only bans activity in furtherance of a crime.¹⁰⁵ The underlying material in question is proscribable under *Free Speech Coalition*,¹⁰⁶ and falls outside of First Amendment protection.¹⁰⁷ However, according to the Eleventh Circuit, the broad prohibition only applies to commercial offers.¹⁰⁸ The Eleventh Circuit distinguished between commercial and non-commercial speech relating to child pornography, and applied strict scrutiny to restrictions on the free distribution of the material over the Internet since that material is non commercial.¹⁰⁹ On this basis, the Eleventh Circuit found the restriction overbroad.

The Supreme Court rejected this analysis. First, according to the Supreme Court, it is not the commercial nature of speech that takes it

99. *Williams*, 444 F.3d at 1306.

100. *Id.* at 1305.

101. *Id.* at 1306.

102. *See id.*

103. *Id.*

104. *Id.* at 1307.

105. *Williams*, 444 F.3d at 1841-42.

106. *Free Speech Coalition*, 535 U.S. at 245-46.

107. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

108. *Williams*, 444 F.3d at 1297.

109. *Id.* at 1298.

outside of First Amendment protection, but the fact that the speech amounts to illegal conduct and is therefore of no social value.¹¹⁰ Whether the conduct is commercial or not, it is illegal. A main concern of the lower court was the lack of a requirement of *actual* child pornography.¹¹¹ The Supreme Court overcame that concern by pointing out the government's ability to proscribe fraudulent offers,¹¹² as well as offers for illegal products.¹¹³ Therefore, where a fraudulent offer for illegal material is at issue, as here, the need for a requirement of actual child pornography would be illogical.¹¹⁴

The Court next turns to the argument that "non-commercial, non-inciteful promotion of illegal child pornography" is protected speech under *Brandenburg*.¹¹⁵ In *Brandenburg*, a leader of the Ku Klux Klan in Ohio invited a reporter to a rally where he made a speech that made reference to the possibility of revenge on "niggers," "Jews" and those who supported them¹¹⁶ and announced plans for a march on Washington to be held on July 4th.¹¹⁷ *Brandenburg* was convicted of advocating violence under an Ohio statute.¹¹⁸ The Supreme Court reversed the conviction and rationalized that statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action.¹¹⁹ Keeping this distinction in mind, criminalizing promotion is overreaching.¹²⁰ The Court, in *Williams*, answers this concern by clarifying what the word "promotes" means in the statute at issue. The statute refers to the "recommendation of a particular piece of purported child pornography with the intent of initiating a transfer,"¹²¹ not, as the lower court discussed, an abstract (and protected) type of advocacy.¹²²

110. *United States v. Williams*, 128 S. Ct. at 1841 (2008).

111. *Williams*, 444 F.3d at 1292-94 (emphasis added).

112. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.* 538 U.S. 600, 611-12 (2003).

113. *See generally* *Employment Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660 (1988).

114. *Williams*, 128 S. Ct. at 1842.

115. *Williams*, 444 F.3d at 1298; *see* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

116. *Brandenburg*, 395 U.S. at 444-46.

117. *Id.* at 446.

118. *Id.* at 444-45.

119. *Id.* at 449.

120. *Williams*, 128 S. Ct. at 1842.

121. *Id.*

122. *Id.*

The Eleventh Circuit also expressed concern that the statutory language, “reflects the belief” might ensnare mistaken parties.¹²³ The Eleventh Circuit provided two scenarios for this possibility.¹²⁴ First, the statute could punish someone who distributed fake child pornography, mistakenly believing it to be real.¹²⁵ The Court agreed, but stated that factual impossibility is not a defense.¹²⁶ A defendant’s inability to complete his crime because he is mistaken as to the facts does not exculpate him.¹²⁷ The Model Penal Code similarly states that in attempt prosecutions, “the defendant’s conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact.”¹²⁸ From the Supreme Court’s point of view, such a prosecution would be proper.

Second, the statute could punish someone who subjectively believes an objectively inoffensive picture is “lascivious,”¹²⁹ and distributes it under that belief. The ordinary meaning of the word lascivious is “tending to excite lust; lewd; indecent; obscene.”¹³⁰ If a defendant finds the material to be lascivious, but it would not be so regarded by others, he would not be punished under his own subjective definition, but under that of the statute.¹³¹ In that scenario, the material would not be “lascivious” under the statute and would therefore not ensnare such a defendant.

At oral argument, Williams’ attorneys also argued that the term “presents” in the statute could be read to include the delivery of such materials to the police.¹³² To read the statute this way would be counterproductive and precedent does not support such a claim. The goals of the Act, reducing child pornography and preventing exploitation of children, would not be met if the law made criminals out of persons who wished to report the material to the proper authorities. With respect to precedent, the Court’s ruling in *Ferber* validated a similar statute that included the term “presents,” and there has been no such prosecution under that statute.¹³³ In practice, the word “presents”

123. *Williams*, 444 F.3d at 1306.

124. *Id.* at 1306-07.

125. *Id.* at 1306.

126. *Id.* at 1307.

127. *Williams*, 128 S. Ct. at 1843.

128. MODEL PENAL CODE § 5.01 Comment.

129. *Williams*, 444 F.3d at 1298.

130. BLACK’S LAW DICTIONARY 409 (3d pocket ed. 2006).

131. *Williams*, 128 S. Ct. at 1843.

132. *Id.*

133. *See New York v. Ferber*, 458 U.S. 747 (1982).

does not include turning over evidence to the police, and under this statute should be read along the lines of promoting a particular item for sale or trade.¹³⁴

Still another challenge was based on the suggestion that foreign atrocities compiled into documentary footage for education would fall within the statute, because such materials occasionally depict horrors in foreign countries such as soldiers raping children.¹³⁵ Without denying its possibility, the Court suggested this scenario would have to await an as-applied challenge.¹³⁶ If such a challenge were filed, the court stated it would weigh the educational interest of the material against the government's interest in preventing any harm to the child by way of the dissemination.¹³⁷ If such a documentary was found to be of higher educational value, that value would outweigh the statute's chilling effect on speech. As a result, the statute would not offend the First Amendment.¹³⁸ Furthermore, a possible exception to a statute would not render it overbroad.¹³⁹

The Court briefly addressed the dissent's accusation that the Court has "made an end-run around the First Amendment's protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves."¹⁴⁰ The dissent is correct that "virtual" child pornography (not involving actual children) is not generally prohibited.¹⁴¹ The only restriction placed on it here is that it is now prohibited where the material is sought or portrayed as being real child pornography.¹⁴² That is due to a general principle of criminal law that an attempted crime is not negated by a mistake of fact preventing the completion of a crime, as discussed *infra*.¹⁴³

On this basis, the Supreme Court concluded that the challenged section of the PROTECT Act was not unconstitutionally overbroad.¹⁴⁴

134. *Williams*, 128 S. Ct. at 1843-44.

135. *Id.* at 1844.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Williams*, 128 S. Ct. at 1844.

141. *Id.*

142. *Id.*

143. *Id.* at 1845.

144. *Id.*

2. *Vagueness Revisited*

A vagueness challenge implicates the Due Process Clause of the Fifth Amendment.¹⁴⁵ A statute must convey to a person of ordinary intelligence fair notice of what they are proscribed by law from performing, and have clear standards in order to avoid discriminatory and arbitrary enforcement.¹⁴⁶ The Eleventh Circuit held that the PROTECT Act was unconstitutionally vague for two reasons: the unbounded discretion of prosecution under the “reflects the belief” prong of the statute; and the fact that senders of the same picture (the bathtub photo), in the same “manner” (for example, attached to an email), can be prosecuted, whether one is a proud grandparent, a chronic forwarder of cute pictures with racy titles, or a child molester wanting more graphic pictures.¹⁴⁷ The Court responded by acknowledging that each of the scenarios provided would need more facts to lead to prosecution.¹⁴⁸

More significantly, the Court held that a hypothetical close case, such as one with problems of proof, is not what makes a statute vague.¹⁴⁹ It is the impossibility of determining what facts warrant prosecution that produces unconstitutional vagueness.¹⁵⁰ The statute here provides the requirement of belief or intent to cause another to believe, a known standard.¹⁵¹ Whether it can be shown in a particular case is a matter of proof for a jury.¹⁵²

On this basis, the Supreme Court found the challenged sections of the PROTECT Act neither unconstitutionally overbroad, nor vague, and upheld the statute.

D. Concurring Opinion

Justice Stevens, in his concurring opinion, joined by Justice Breyer, drew attention to the procedural aspects, as additional support for finding the statute constitutional.¹⁵³ First, “every reasonable construction must be resorted to, in order to save a statute from

145. *Id.*

146. *Williams*, 128 S. Ct. at 1845.

147. *United States v. Williams*, 444 F.3d 1286, 1306-07 (11th Cir. 2006).

148. *Williams*, 128 S. Ct. at 1846.

149. *Id.*

150. *Id.*

151. 18 U.S.C. § 2252A(a)(3)(B) (2003).

152. *Williams*, 128 S. Ct. at 1846.

153. *Id.* at 1847-48 (Stevens, J. concurring).

unconstitutionality.”¹⁵⁴ There is also an obligation to look beyond the statute where the statutory text is unclear.¹⁵⁵ Looking beyond requires attention to the intent of Congress (the intent of the legislature is scattered throughout the legislative deliberations in both houses).¹⁵⁶ The definition of the word “pandering” is elaborated upon since it is used quite often to describe the statute.¹⁵⁷ This elaboration illustrates the legislative intent behind creating a statute that is geared towards criminalizing such an act. The word “pandering” is similarly defined in the Oxford English Dictionary,¹⁵⁸ Black’s Law Dictionary,¹⁵⁹ and *Ginzburg v. United States*.¹⁶⁰ The mere use of the word suggests the intent to criminalize the offer of or requests for child pornography; an intent the PROTECT Act has carried out.

The concurring opinion squarely addresses the dissent’s argument that proposals to transact in virtual child pornography are constitutionally protected and cannot be prohibited under the applicable precedent.¹⁶¹ The scienter requirement (the defendant must believe or intend another to believe the material is actual child pornography) distinguishes this case from the prior cases, and clarifies that material is free from restriction as long as it is (and is portrayed as) virtual child pornography, and not as actual child pornography.¹⁶²

E. Dissenting Opinion

A dissent was filed by Justice Souter, and joined by Justice Ginsburg. According to Justice Souter, prior cases mandate different treatment for actual and virtual child pornography.¹⁶³ Pornography, but not child pornography, is generally protected by the First

154. *Id.* at 1847 (quoting *Hooper v. California*, 155 U.S. 648 (1895)); *see also* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (collecting cases).

155. *Williams*, 128 S. Ct. at 1847.

156. *Id.*; *see, e.g.*, 149 Cong. Rec. 4227 (2003).

157. *See* Trial of Oral Arg. 9-11, Oct. 30, 2007.

158. 11 OXFORD ENGLISH DICTIONARY 129 (2d ed. 1989) (defining pander as, to minister to the gratification of another’s lust).

159. BLACK’S LAW DICTIONARY 1142 (8th ed. 2004) (defining pandering as the act or offense of selling or distributing textual or visual material openly advertised to appeal to the recipient’s sexual interest).

160. *Ginzburg v. United States*, 383 U.S. 463, 467 (1966) (quoting *Roth v. United States*, 354 U.S. 476, 495-96 (1957)).

161. *United States v. Williams*, 128 S. Ct. 1830, 1848 (2008).

162. *Id.*

163. *Id.* at 1853-55 (Souter, J., dissenting).

Amendment.¹⁶⁴ To Souter, if the justification for the difference in protection is the need to stop the use of children;¹⁶⁵ actual children must be depicted in order to justify the ban.¹⁶⁶ In *Ashcroft v. Free Speech Coalition*, the Court struck down a provision of the CPPA¹⁶⁷ which “outlaw[ed] particular material merely represented to be child pornography, but not necessarily depicting actual children.”¹⁶⁸ To Justice Souter, the majority’s approval of the PROTECT Act reaches a contrary conclusion.¹⁶⁹

The dissent does not dispute the criminalization of the offer or request for illegal child pornography, or fraudulent conduct, where it is unrelated to any existing image.¹⁷⁰ The difference of opinion arises where the statute addresses proposals about existing representations.¹⁷¹ The dissent claims there is a departure from precedent because the PROTECT Act criminalizes “pandering” of material that the law could not regulate before.¹⁷² Without an image of a child, pedophiles presume a photo’s authenticity because those requesting such material do not want it to be “fake.”¹⁷³ To the extent that the offeror cannot provide the material he offered, he is punished for his fraudulent acts.¹⁷⁴ To the extent the offeror mistakenly believed he could obtain such material for transfer, he is punishable under factual impossibility.¹⁷⁵ The dissent is not troubled by these outcomes.¹⁷⁶

Where the dissent disagrees is where there are actual, existing images.¹⁷⁷ Here, there is no presumption that the material is real child pornography; instead, the presumption is that the offer includes only what is in the image.¹⁷⁸ Under these circumstances, the Act gives no consideration to the legality of the underlying material.¹⁷⁹ The majority

164. See *Stanley v. Georgia*, 394 U.S. 557 (1964); *New York v. Ferber*, 458 U.S. 747 (1982).

165. *Ferber*, 458 U.S. at 759-60.

166. *Williams*, 128 S. Ct. at 1848.

167. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

168. *Williams*, 128 S. Ct. at 1848.

169. *Id.* at 1849.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Williams*, 128 S. Ct. at 1849.

175. *Id.* at 1849-50.

176. *Id.*

177. *Id.* at 1850.

178. *Id.*

179. *Id.*

does not address this argument specifically, but the overall opinion reflects a greater attention to the defendant's intention to participate in a crime, rather than his ability to do so.¹⁸⁰ Under the majority's view, it would be irrelevant if the underlying material is found to be something other than what the defendant thought, and a panderer would not be given the benefit of discovering that the material offered does not depict real children.¹⁸¹ This is analogous to factual impossibility.¹⁸² Where the defendant performs the same actions, with the same intent, whether the material exists or not, its content is irrelevant.¹⁸³

The dissent notes that under *Free Speech Coalition*, an actual child must have been involved to prosecute.¹⁸⁴ The PROTECT Act is a departure from that precedent. The dissent gives great weight to the possibility that the material may turn out to be something that has previously been labeled protected speech.¹⁸⁵ However, under the Act, a crime has been committed prior to the analysis of the material.¹⁸⁶ Therefore, it is not a departure from such a requirement, but a separate crime altogether based on the defendant's intent. The previous requirement is not being ignored, but rather is effectively preempted. The only result of such an investigation of the material would be to relieve the defendant from criminal liability based on the "luck" that the underlying material happened to be "virtual" as opposed to what the defendant believed, or hoped, it would be (actual child pornography). Giving panderers this "out" would not serve justice.

The dissent also notes that § 2252A(b)(1) of the Act even criminalizes attempts to violate the Act, including the pandering provision, which itself is potentially an "attempt" crime (because no actual material exists). Thus, it creates a crime of "attempt to attempt, to engage in prohibited conduct."¹⁸⁷ The dissent notes that the expansion of inchoate crimes cannot be indefinite.¹⁸⁸ The logical outcome would be that the crime would be an attempt crime, then an attempt to attempt, and so on. The path of such thought could have a

180. *See Williams*, 128 S. Ct. at 1835-47 (majority opinion).

181. *See id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1851, (Souter J., dissenting) (referring to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)).

185. *See id.* at 1830 (majority opinion).

186. *Williams*, 128 S. Ct. 1830.

187. *Id.* at 1852 (Souter, J., dissenting).

188. *Id.*

snowball effect that leads to something so far removed and confusing that it cannot be adhered to.

Justice Souter's commitment to Constitutional protection for virtual child pornography leads him to resist the majority's analogy between the attempt to sell baking powder as cocaine and the offer or request for what turns out to be virtual child pornography in the belief that actual children are depicted in a sexually explicit way.¹⁸⁹ Yet in both situations, when the product is presented as illegal contraband, that presentation is an attempted crime in both scenarios.¹⁹⁰ Justice Souter argues that the difference is that the virtual child pornography is protected under the First Amendment, while selling baking powder is not.¹⁹¹ It is irrelevant what the underlying material actually is when the defendant believes it is illegal contraband. The material could be legal, or protected, it does not matter where the crime was committed prior to the discovery of that fact. In such a situation, that finding would be like a stroke of luck for the defendant that exculpates him without any action on his part.

The majority's analogy comes from a general principle of criminal law that an attempted crime is not negated by a mistake of fact preventing the completion of a crime.¹⁹² Thus, where a defendant attempts to sell drugs, but the drugs turn out to be a legal substance, the fact that there were no real illegal drugs does not negate the attempted sale of the illegal substance.¹⁹³ By the same token, where a defendant attempts to transact in actual child pornography, but the images turn out to be virtual, the fact that there were no real children involved should not negate the attempted transaction of the illegal material.¹⁹⁴ This is an appropriate act for punishment due to the defendant's mindset in intending to perform an illegal act. A contrary interpretation would grant defendants a "get out of jail free" card for their own mistake or failure. Because the underlying material has already been treated by the defendant as illegal, he should be held accountable according to that belief regardless of whether the underlying material actually is legal or constitutionally protected.

189. *Id.* at 1848.

190. *See Williams*, 128 S. Ct. 1830.

191. *Id.* at 1853 (Souter, J., dissenting).

192. *Id.* at 1852.

193. *Id.* at 1853.

194. *Id.*

The dissent next offers its own scenario, where one tries to commit murder, but the bullets are blanks.¹⁹⁵ There, the crime of attempted murder has been fulfilled, because had real bullets been present, a murder would have taken place.¹⁹⁶ In comparison, where the defendant has in mind a particular image for transfer, that transaction is what should be analyzed.¹⁹⁷ Meaning, if the material is transferred and there is no actual child in the depiction, there is no crime.¹⁹⁸ However, where one believes one possesses real child pornography, and tries to transfer it, had the facts been as the person believed, it would be a crime. This is the approach of the majority, to focus on the defendant's intent as opposed to the factual outcome.¹⁹⁹

In opposing pandering as an attempt crime, the dissent identifies three differences in the scenarios. The restriction here impacts a constitutionally protected area of speech, unlike the sale of baking powder.²⁰⁰ As an attempt crime, the Act merges real, fake, and virtual child pornography, and blurs the line between what can be regulated and what cannot be regulated.²⁰¹ A response to this is that a burden is placed on the defendant to label the material as virtual or fake, removing them from the possible "merged" area. It would be a small task.

The second difference is that some protected speech may be eliminated altogether.²⁰² However, this outcome can be avoided if one properly labels the protected material as virtual or fake. All that is lost is a belief that one is dealing in actual or real child pornography when one is not, but that is no concern of the government when protecting free speech. Last, *Williams*, in overruling *Ferber* and *Free Speech Coalition*, may damage confidence in precedent.²⁰³ As previously explained, this is not the case. It is not a departure from precedent, but a development of a crime that is committed prior to the evaluation of the underlying material. The dissent wants the decision to prosecute to depend solely on the content of the underlying material.²⁰⁴ The majority

195. *Id.* at 1852.

196. *Williams*, 128 S. Ct. at 1852.

197. *Id.*

198. *Id.*

199. *Id.* at 1845 (majority opinion).

200. *Id.* at 1853 (Souter, J., dissenting).

201. *Id.* at 1854.

202. *Williams*, 128 S. Ct. at 1854.

203. *Id.*

204. *Id.* at 1848.

places the focus on the defendant's intentions.²⁰⁵ In order to avoid prosecution, materials need only be clearly labeled, either as not containing actual depictions of children, or in such a way as to make clear that although actual children are depicted, there is no belief that the material is obscene, pornographic, or sexually explicit.

Justice Souter is correct that the PROTECT Act limits some speech. However, it is an insignificant and perfectly legal limitation. The only limitation is on misleading speech of one particular kind—the presentation of virtual child pornography as the genuine article. Virtual child pornography remains protected speech. If any material is truthfully labeled as simulated or fake then there would be no restriction on it. The speech now regulated, virtual pornography passed off as real, is that which previously perpetuated the need of the people interested in child pornography to believe that what they were looking at was real child pornography. This should not be protected. Only virtual child pornography is protected, and it should be understood to remain so.

IV. CONCLUSION

The real significance of this case is that it affirmed Congress' creation of a new crime. Pandering of child pornography, without necessary reference to any material that contained depictions of actual children, was not previously a crime. Under this statute, the actual belief or intent to cause others to believe that the material is actual child pornography criminalizes the offer to sell or request to obtain those materials. The *Williams* decision goes further than *Free Speech Coalition*, but does not reverse or contradict it. It takes a different path in order to serve the same purpose of restricting child pornography to prevent harm to children. The requirement of actual child pornography created obstacles to proving material portrayed actual children and not computer-generated images of them. Drafting a statute to avoid infringing on the First Amendment, while simultaneously regulating the area of child pornography is very difficult. Virtual (simulated or computer-generated) child pornography is protected and is often indistinguishable by appearance from actual child pornography. Although *Williams* was rightly decided, the effective suppression of child pornography requires Congress to go further. Congress should consider criminalizing transmissions made with a reckless disregard as to whether the contents are illegal. Such a law would require that

205. *Id.* at 1841 (majority opinion).

persons take reasonable efforts to assure that they are not transmitting illegal pornography containing actual children. “Fake” is the only type of speech that has been given protection when regarding child pornography. Without deciding whether even virtual child pornography should remain protected, anything other than that may be prohibited. If an image contains a child depicted pornographically, anyone in possession of it will be liable if an actual child is depicted. Therefore, everyone should take reasonable measures to assure that no actual child is depicted, or face potential criminal liability. When a defendant possesses a bag of a white powdery substance he should destroy it or make sure it’s a legal substance. He should not pass it along to his friends without bothering to find out whether it is real cocaine or not. If it turns out to be real, he will be prosecuted. The person trafficking in child pornography should bear the same burden.

The efforts of the legislature to protect children from the harm that could potentially come upon them through their sexual exploitation are commendable. It is a difficult task to regulate the harmful happenings in society while preserving the rights that this nation is founded on. The shift away from the line of case law requiring an actual child in pornography does not negate such law in regards to crimes outside of the pandering provision. The pandering provision is a new inchoate crime in and of itself. Black’s Law Dictionary defines an inchoate offense as “a step toward the commission of another crime, the step in itself being serious enough to merit punishment.” The offer or request for actual child pornography is so serious, it merits punishment as a step towards completion. This is what the PROTECT Act accomplishes.

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