

No. 06-694

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**In the Supreme Court of the United States**

UNITED STATES OF AMERICA, PETITIONER

*v.*

MICHAEL WILLIAMS, RESPONDENT

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

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

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### **QUESTION PRESENTED**

Whether 18 U.S.C. § 2252A(a)(3)(B), which prohibits “knowingly \* \* \* advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] \* \* \* any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material” is illegal child pornography, is overbroad and therefore facially unconstitutional.

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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*<sup>1</sup>

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

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

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

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

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

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

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

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

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

### STATEMENT

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

To combat the Internet-driven explosion in child pornography, Congress passed the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251 et seq.). The CPPA defined child pornography to include, among other things, any depiction of sexually explicit conduct that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003). This definition was known as the CPPA's "pandering" provision.

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

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

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

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

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<sup>3</sup> The new pandering provision subjects to criminal punishment any person who “advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

- (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
- (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.” 18 U.S.C. § 2252A(a)(3)(B).

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

After this exchange of photographs, Williams claimed to have nude photographs of his four-year-old daughter, stating, “I’ve got hc [hard core] pictures of me and dau, and other guys eating her out—do you??” *Ibid.* When the agent did not respond to Williams’s request for more photographs, Williams accused the agent of being a cop. The agent responded by accusing Williams of being a cop. After repeating these accusations in the public part of the chat room, Williams posted a message stating, “HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT.” *Id.* at 1289. Along with the message, Williams posted a computer hyperlink, which the agent accessed, and which contained seven images of actual minors, ages five to fifteen, engaging in sexual activity, displaying their genitals, or both.

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

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

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

### SUMMARY OF ARGUMENT

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

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

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

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

## ARGUMENT

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

The Eleventh Circuit struck down the PROTECT Act’s pandering provision because it prohibits pandering not only of child pornography, but also of material that is not child pornography—so long as the material is pandered “in a manner that reflects the belief, or that is intended to cause another to believe,” that the material is child pornography. 18 U.S.C. § 2252A(a)(3)(B). According to the Eleventh Circuit, Congress “failed to articulate specifically how the pandering and solicitation of *legal* images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct.” *Williams*, 444 F.3d at 1303 (emphasis added). Because the Eleventh Circuit failed to see a connection between the prohibition of false pandering and the government’s compelling interest in protecting children from sexual abuse in the production of pornography, the court refused to sustain the statute under the market deterrence rationale articulated in *Ferber* and *Os-*

