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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in case 06-694, United States v.  
5 Williams.

6 General Clement.

7 GENERAL CLEMENT: Mr. Chief Justice, and may  
8 it please the Court:

9 This Court has made clear that speech  
10 proposing an unlawful transaction is not protected by  
11 the First Amendment.

12 And speech that falsely proposes an unlawful  
13 transaction is likewise unprotected.

14 The statute at issue here properly construed  
15 does no more than prohibit efforts to offer or solicit  
16 materials that are contraband and then prevents somebody  
17 from turning around after soliciting or offering  
18 contraband and suggesting that the materials either did  
19 not exist or were not contraband after all. The statute  
20 does not prohibit truthful speech about lawful  
21 materials.

22 Accordingly, the court of appeals erred in  
23 striking the statute down on its face.

24 CHIEF JUSTICE ROBERTS: But if I could start  
25 with one of the more compelling hypotheticals on the

1 other side. Let's say I'm a movie reviewer. I write a  
2 review saying this is an awful movie. It portrays child  
3 pornography. Aren't I presenting information in a way  
4 that would cause others to believe that the movie  
5 contains child pornography, and wouldn't that be covered  
6 by the statute?

7 GENERAL CLEMENT: Mr. Chief Justice, we do  
8 not think that would be covered by the statute. We  
9 don't think that that would involve -- in the first  
10 point, we don't think it would involve presentation or  
11 promotion of the movie in the meaning of this statute.

12 We think those terms are really limited to  
13 efforts to make the product available to the market.

14 And I think if you read those terms in  
15 conjunction with each other, they are all directed at  
16 efforts to make the product available to the market.

17 Now, so if the person whose actually  
18 distributing the film wants to try to market it as  
19 actual child pornography, then I suppose that would come  
20 within the ambit of the statute. But a movie reviewer  
21 does not have anything to worry about in the first  
22 instance because I don't think that would come within  
23 the term --

24 JUSTICE KENNEDY: Suppose the distributor  
25 attaches the movie review. It's in amazon.com, and then

1 it has the movie review.

2           GENERAL CLEMENT: Again, Justice Kennedy, it  
3 might be conceptually possible for somebody to market,  
4 let's say a mainstream movie, on the basis of a --  
5 either their own statement or an attached review, that  
6 misrepresents the nature of the movie and makes a claim  
7 for the movie, that it's actual child pornography. I  
8 suppose in that unusual circumstance, it would be  
9 covered. But I guess it would be equally possible for  
10 somebody to take one of the countless mainstream movies  
11 that portrays a murder on screen, and say this is  
12 actually a snuff film. There's actually -- this was a  
13 snuff film. This was an actual murder. Now, somebody  
14 who did that would be clearly misrepresenting the film.  
15 I don't think they would turn around if somebody tried  
16 to do something about that false or misleading speech  
17 and be able to defend on that speech because it would be  
18 clearly false and misleading speech.

19           And I think what is important here is if the  
20 underlying movie is not child pornography, then truthful  
21 efforts to promote that movie won't be captured.

22           JUSTICE STEVENS: Supposing the underlying  
23 movie is a depiction of atrocities being committed in  
24 some foreign country, in a war zone or something, by  
25 soldiers who rape young kids. And so it comes within

1 the literal terms of the statute. And if one said I'd  
2 like to take a look at this movie, wouldn't that be  
3 covered by the statute?

4 GENERAL CLEMENT: If the movie itself comes  
5 within the --

6 JUSTICE STEVENS: The movie itself would be  
7 pictures of soldiers raping young kids.

8 GENERAL CLEMENT: And if it were done in a  
9 sufficiently graphic way, that it was captured --

10 JUSTICE STEVENS: If the news -- I'm  
11 thinking of the news reel -- somebody makes as exhibit  
12 at a war crimes trial, or something like that -- sees  
13 this actually happening. Now, as I understand the  
14 language of the statute, if the person who had that film  
15 described it to someone he wanted to send it to, he  
16 would violate the statute.

17 GENERAL CLEMENT: Well, Justice Stevens,  
18 there's -- I guess there's an anterior problem, which is  
19 if the depiction were sufficiently graphic --

20 JUSTICE STEVENS: They are.

21 GENERAL CLEMENT: The person that would have  
22 that film would be in possession of child pornography,  
23 which itself would be a problem under the statute. He's  
24 in the possession of it.

25 JUSTICE STEVENS: Depiction of a war crime

1 taking place? He saw that on camera -- that would be a  
2 crime?

3 GENERAL CLEMENT: And that might be an  
4 example where, starting with the basic prohibition on  
5 the possession of child pornography, that might be a  
6 situation where there was a valid as-applied challenge.  
7 And that also might be a situation where there would be  
8 a valid as-applied challenge to the pandering and  
9 solicitation provision. But I think the proper way to  
10 analyze that is to ask first whether or not something is  
11 covered by the basic prohibition.

12 JUSTICE STEVENS: You do agree I guess that  
13 there are some -- there would be some valid as-applied  
14 challenges to this statute.

15 GENERAL CLEMENT: I agree, and I think in  
16 theory, at least, there may be valid as-applied  
17 challenges to the underlying prohibition. And this  
18 Court of course in Ferber recognized that possibility in  
19 upholding the basic prohibition on the promotion of  
20 child pornography in that context.

21 JUSTICE GINSBURG: But Ferber confined the  
22 meaning of child pornography to, I think, the greater  
23 extent than this statute does. It talks about artistic  
24 value, but this -- there were several examples given in  
25 the briefs. One was this film depicts 12 year old child

1 having sexual relations with an old man. Now that  
2 statement could be perceived as this film shows child  
3 pornography.

4 Just that statement. But it's a truthful  
5 statement about Lolita, is it not?

6 GENERAL CLEMENT: It is, Justice Ginsburg  
7 but I think in context that would not be something that  
8 comes within the ambit of the statute. And again, if  
9 you start with the proposition that --

10 JUSTICE GINSBURG: Why not? If you say --  
11 if you say, 12 year old child -- this film shows a 12  
12 year old child, and it doesn't tell you that the person  
13 who's playing a 12 year old is a young adult?

14 GENERAL CLEMENT: I understand that, Justice  
15 Ginsburg. What I would say is this statute in order to  
16 apply, at least the way we interpret it, requires both  
17 an objective and a subjective component. And so you  
18 would have to have a situation where that promotion of  
19 the movie objectively would lead somebody to believe  
20 that you're marketing in a manner that portrays it as  
21 actual child pornography. Now I think what you've just  
22 said right there would probably fail at the objective  
23 test because I think particularly when you start talking  
24 about it being a motion picture and the like, the  
25 natural assumption -- let's say it's a mainstream motion



1 picture, is going to be oh, that's just actors, it's  
2 probably adult actors, or a body double or something. I  
3 don't think that comes within the statute.

4 The other thing that's required, of course,  
5 is a subjective component -- specific intent is the way  
6 that we would read the statute. And clearly the person  
7 who's marketing Lolita itself and wants people to go see  
8 it in a mainstream box office does not have the intent  
9 to convey to people that this is actual, forbidden child  
10 pornography.

11 JUSTICE SOUTER: Well what if an individual  
12 received actual child pornography in the mail that had  
13 not been solicited. And he calls the chief of police in  
14 town and says I just opened my mail, and this envelope  
15 is full of child porn. And he's right. I mean, there  
16 are no body doubles. This is the real thing in here.

17 He has presented child pornography to that  
18 chief of police and he's violated the statute, hasn't  
19 he?

20 GENERAL CLEMENT: Justice Souter, I would  
21 say that the better answer is no, that he has not. Now  
22 --

23 JUSTICE SOUTER: You say no, but you say no  
24 because we won't enforce it that way. But the -- but  
25 the objective component and the subjective component in

1 my example are both satisfied.

2 GENERAL CLEMENT: Justice Souter, I would  
3 say no for a more fundamental reason, which is I think  
4 you have to read two provisions of the statute here in  
5 pari materia. And the other provision I think that is  
6 relevant is the affirmative defense that's in subsection  
7 (d) of the statute, which is at 6a of the appendix to  
8 our opening gray brief. And that provides an  
9 affirmative defense in the situation where somebody is  
10 in possession of child pornography.

11 Now, the first problem the person who gets  
12 child pornography in the mail has is that the statute --  
13 the bans of possession would apply. Now, there's an  
14 affirmative defense. The affirmative defense is  
15 specific to possession, but one of the things that's a  
16 prerequisite to qualify for the affirmative defense,  
17 which is in (d)(2)(B) is that you have to afford that  
18 material -- you have to afford the agency, the law  
19 enforcement agency, access to the material. Now --

20 JUSTICE SOUTER: That's -- that's fine, but  
21 before you get to that point, you have -- there's still  
22 an indictable offense. You don't prevent -- you don't  
23 present affirmative defenses until you're already  
24 indicted.

25 GENERAL CLEMENT: You're right, Justice

1 Souter, but that is a problem both for the prohibition  
2 on possession and it is not a unique problem for the  
3 pandering solicitation provision. And I don't think the  
4 fact that you might have to if -- in that situation, you  
5 might have to actually present your affirmative defense  
6 in some case is a reason to strike a ban on possession  
7 as overbroad. But the --

8 JUSTICE SOUTER: But the ban on possession  
9 is not the real problem because, under a normal  
10 possession statute, you would indeed have a problem not  
11 merely in terms of -- that could be raised not merely by  
12 affirmative defense but as an element of the statute.  
13 If the possession is merely a matter of happenstance,  
14 there's an intent problem and presumably there's no --  
15 there's no offense. There's no knowing offense in  
16 acquiring material for the possession.

17 But in the pandering statute, what we've got  
18 here is there is -- as you put it earlier, there is an  
19 understanding which happens to be correct, objectively  
20 correct, that there is child porn, and there is a very  
21 clear intent to convey that message by way of presenting  
22 this material to a third party, in this case the police.  
23 So I think this is not merely comparable to the problem  
24 of haphazard possession.

25 GENERAL CLEMENT: Well, Justice Souter, let

1 me try two responses. One is I do think you have a  
2 problem even in possession because once you get it in  
3 the mail, your possession of it is knowing. And that is  
4 precisely why Congress included this affirmative defense  
5 in the statute. The second thing I would say though is  
6 again, we have to read these statutes in pari materia,  
7 and if one of the ways you qualify for the affirmative  
8 defense is you afford access to law enforcement agency  
9 of the material, I don't think that which is a  
10 prerequisite for qualifying for the affirmative defense  
11 can be independently prohibited --

12 JUSTICE SCALIA: What if --

13 GENERAL CLEMENT: -- by the statute.

14 JUSTICE SCALIA: What if you call up your  
15 neighbor and say God, I got this disgusting child porn  
16 in the mail?

17 GENERAL CLEMENT: Well -- and, again, I  
18 think if you did no more than that, I don't know that  
19 you would necessarily be covered by the statute, but if  
20 you said I got this disgusting child pornography in the  
21 mail, it's clearly unlawful, here take a look, I mean I  
22 suppose that is covered by the statute. But that  
23 doesn't seem like a natural reaction.

24 JUSTICE BREYER: Indeed, it is covered by  
25 the statute because I read your brief as saying that the

1 statute applies only in instances where either you're  
2 trying to sell it or trade it. That is what you're  
3 trying -- now it seems to me a different matter if it's  
4 covering only -- covering as well instances where  
5 somebody's simply showing it to someone else to show him  
6 what he got in the mail. Well, I'd appreciate clarity  
7 on that.

8               GENERAL CLEMENT: Justice Breyer, I think  
9 that we would take the position that even if you are  
10 presenting the material, making it available, but you're  
11 not charging for it, you're not exchanging it, you're  
12 just offering it for free, here's a quick free look,  
13 it's still covered by the statute.

14              JUSTICE BREYER: If that's covered by the  
15 statute, what you're going to do then is suddenly  
16 criminalize what could be an awful lot of activity that  
17 goes on in schools all over the place and somebody  
18 has -- they think it's funny, and maybe it isn't funny,  
19 but they think it is and it's kind of school-boy  
20 behavior, and they're showing this stuff around, not  
21 totally certain what it is. Suddenly that can become a  
22 Federal crime. Seems like quite an extension. And I  
23 thought you'd written your way out of that problem, and  
24 now I think you haven't.

25              GENERAL CLEMENT: Well, Justice Breyer, I

1 mean, you know, I think you could certainly interpret  
2 the statute to write around that problem if you wanted  
3 to, but I do think the most natural reading of the terms  
4 "promotes, distributes, presents, and advertises" is to  
5 capture not just somebody who is making that available  
6 to the market for sale or for barter, but also somebody  
7 who says look, I have child pornography, I want to get  
8 you interested in this, this is the real stuff, here  
9 take a look.

10 CHIEF JUSTICE ROBERTS: Well, that's a very  
11 different thing. I read your brief the same way Justice  
12 Breyer did and particularly footnote 4 of the reply  
13 brief, which I understood to be giving "presents," for  
14 example in this statute, a promotional meaning in light  
15 of the other words around it, "advertises, promotes" and  
16 simply telling your -- you know, your neighbor, I got  
17 this, what should I do about it, isn't promotional. It  
18 may be in a technical term "presents," but it's not  
19 promotional.

20 And, again, I understood your brief to  
21 suggest that you have to interpret all of those words in  
22 an advertising, soliciting sense.

23 GENERAL CLEMENT: Well, Mr. Chief Justice,  
24 here -- I mean I think my first cut at drawing the line  
25 would to be say it's not a problem to say, can you

1 believe what I got in the mail, and talk to your  
2 neighbor about it, describe it.

3 On the other hand, I do think you're  
4 presenting the materials if you say, I got this in the  
5 mail, look at this, isn't this disgusting, this is  
6 clearly child pornography.

7 JUSTICE BREYER: All right. Then take it as  
8 that.

9 GENERAL CLEMENT: If you think though --

10 JUSTICE BREYER: Take it as that. I would  
11 say looking and presenting to schoolmates dirty pictures  
12 is a fairly common adolescent and post-adolescent  
13 activity. And I would suspect a very high-level  
14 percentage of that class of people don't examine too  
15 carefully what the age of the individuals depicted is,  
16 and many might misrepresent what that age is. So this  
17 sounds like a statute that has enormous reach, whereas  
18 previously I thought it hadn't.

19 GENERAL CLEMENT: Well, Justice Breyer, if  
20 you think that's the difference between expanding this  
21 statute in some enormous way and not, then I would  
22 invite you to have a more restrictive view of  
23 "presents." And we certainly want you to interpret the  
24 statute in a way that renders it not overbroad. And, of  
25 course, this Court has made clear on a number of

1 occasions that, before you get to the overbreadth  
2 analysis, you are applying the early constructions to  
3 make sure that the statute if possible --

4 JUSTICE GINSBURG: But --

5 GENERAL CLEMENT: -- is construed to be  
6 constitutional. But if I could just -- I'm sorry.

7 JUSTICE GINSBURG: I just wanted to clarify  
8 the footnote to which the Chief referred, that footnote  
9 4 in your reply brief. It says, to the contrary, the  
10 government's brief expressly acknowledges that the  
11 statute's proscription encompasses noncommercial speech.

12 So I think Justice Breyer's suggestion that  
13 you said in your brief, that the statute is limited to  
14 commercial speech, is something that you -- say, no,  
15 that's not so; we say it encompasses noncommercial  
16 speech.

17 GENERAL CLEMENT: Well, Justice Ginsburg, I  
18 think there may be a distinction to be drawn. We  
19 certainly don't think that it's limited to commercial  
20 speech if by "commercial speech" you mean only efforts  
21 to buy or sell or even only efforts to barter. Because  
22 we think that somebody who sort of systematically is  
23 operating a web site where they are giving away child  
24 pornography and advertising it as such would be clearly  
25 covered by the statute.



1                   So, to the extent that the distinction  
2   between commercial and noncommercial is at the line  
3   where you would say you're giving it away gratis, we  
4   think that's still covered. Now, I gather that maybe  
5   Justice Breyer had a different conception in mind, that  
6   you really have the --

7                   CHIEF JUSTICE ROBERTS: My understanding was  
8   not that it was limited to commercial speech. That was  
9   clear from the footnote that I cited. But that  
10  "presents" was limited to promotional activity. It's  
11  one thing to present and say either whether to law  
12  enforcement or your neighbor; it's another thing to  
13  promote the child pornography. And I thought your brief  
14  was adopting a limited construction of words like  
15  "presents" that would cover only promotional activity.

16                  GENERAL CLEMENT: Well, in fairness,  
17  Mr. Chief Justice, I think we had a slightly broader  
18  conception of "presents." What we were thinking that  
19  "presents" means is really when you are not just sort  
20  of -- you know -- in some abstract way talking about  
21  presenting the material, but you're actually furnishing  
22  the material to somebody else.

23                  JUSTICE ALITO: Well, General Clement, is  
24  there --

25                  GENERAL CLEMENT: And --

1 JUSTICE ALITO: Is there anything to suggest  
2 that some of these hypotheticals, where people get child  
3 pornography unsolicited in the mail or that kids at  
4 school are showing each other not just dirty pictures  
5 but actual child pornography, are situations that occur  
6 with any frequency in the real world?

7 GENERAL CLEMENT: Not at all, Justice Alito,  
8 and I think that's an important point with respect to  
9 Justice Breyer's hypothetical. I mean you have to  
10 remember that the materials that we're talking about  
11 here are in the main materials that are unlawful even to  
12 possess. And it is also true that the -- in the wake of  
13 Ferber, a pretty good job was done of getting these  
14 materials out of the real world. So the kind of  
15 pictures that are --

16 CHIEF JUSTICE ROBERTS: I'm sorry. I  
17 lost -- in your answer, I lost a negative or something.  
18 Are you saying that this type of activity frequently  
19 occurs or infrequently occurs?

20 GENERAL CLEMENT: Infrequently occurs --  
21 especially in the real world, which is to say when  
22 pictures or magazines are being handed around from  
23 adolescent to adolescent, there is really no reason in  
24 the world to suspect that what's being handed from  
25 adolescent to adolescent is child pornography as opposed

1 to adult pornography -- Playboy and that sort of thing.

2 Because the truth of the matter is in the  
3 wake of Ferber, a pretty good job has been done in  
4 stamping out child pornography in the real world. It  
5 has moved, unfortunately, on to the Internet. And, in  
6 that context, when people are promoting it as actual  
7 child pornography or soliciting it as actual child  
8 pornography --

9 JUSTICE STEVENS: The universe of child  
10 pornography includes activities of 17-year olds.

11 GENERAL CLEMENT: It does, Justice Stevens,  
12 but so, too, for the basic prohibition. And I think  
13 what's important here is there may be some definitional,  
14 you know, questions. Or you may have a view that there  
15 are applications of the statute that would be  
16 unconstitutional.

17 But what's important, I think, is that this  
18 pandering and solicitation provision doesn't add some  
19 new definition, some more aggressive definition. It  
20 simply picks up the notion of the basic definition of  
21 child pornography, and it says that if you're taking  
22 materials and you are offering them to the market as  
23 actual child pornography, if you are soliciting actual  
24 child pornography, then the government can go after the  
25 direct acts of solicitation and offering and -- and --

1 prosecute those acts without --

2 JUSTICE GINSBURG: Even though -- even  
3 though what you are, in fact, showing or presenting does  
4 not fit the definition? Even if what you're showing --  
5 you say, have I got some hot child porn and here it is,  
6 and the "it" is -- is -- an adult pretending to be a  
7 child, or a virtual image.

8 So the -- the problem is not an accurate  
9 representation that this is hardcore porn, and it is,  
10 but saying, have I got the real stuff, but what you  
11 present is not at all the real stuff.

12 GENERAL CLEMENT: That's right, Justice  
13 Ginsburg. If the scienter requirements are satisfied  
14 and I'm consciously trying to get you to believe that  
15 even though I have something that for some technical  
16 reason is not the real thing, what I'm offering you is  
17 the real thing, the statute does target that. But that  
18 seems to me to not be a First Amendment problem.

19 It seems to be a natural consequence of  
20 Congress taking the Court's advice in Free Speech  
21 Coalition and moving from a prohibition on materials  
22 that had been pandered to the actual acts of pandering  
23 and solicitation themselves.

24 JUSTICE KENNEDY: And is that your answer to  
25 the -- all of the hypotheticals that are put forth in

1 the Coalition for Free Speech, the Catholic Bishops, the  
2 advertisement in amazon.com or Netflix, then?

3 GENERAL CLEMENT: Well, Justice Kennedy, we  
4 think that all those hypotheticals are taken out with  
5 more than one reason. I mean, I think from the Catholic  
6 Bishops --

7 JUSTICE KENNEDY: Let's -- pardon me.

8 GENERAL CLEMENT: Sure.

9 JUSTICE KENNEDY: Let's assume for the  
10 moment that there are minors, so that the content aspect  
11 of it is film.

12 GENERAL CLEMENT: Oh --

13 JUSTICE KENNEDY: That there are real minors  
14 in some of these things.

15 GENERAL CLEMENT: But are there real minors  
16 engaging in forbidden activity?

17 JUSTICE KENNEDY: Yes.

18 GENERAL CLEMENT: Actual child pornography?

19 JUSTICE KENNEDY: Yes.

20 GENERAL CLEMENT: Well, if the underlying  
21 material is actually child pornography, then you may be  
22 in a different situation. All of the hypotheticals in  
23 that brief were with materials -- the underlying  
24 materials were not child pornography.

25 And I think that's an important distinction,

1 because if you're taking a movie like "Traffic" or  
2 "American Beauty," which is not child pornography --

3 JUSTICE KENNEDY: Right.

4 GENERAL CLEMENT: -- and you're simply  
5 truthfully promoting it, you have nothing to worry about  
6 with this statute.

7 Now, if you took something -- I also think  
8 that the Catholic Bishop situation isn't covered,  
9 because that is not promoting, presenting and  
10 distributing --

11 JUSTICE KENNEDY: If one had a hand held  
12 video at a school or something like that?

13 GENERAL CLEMENT: Well, I mean, again -- I  
14 mean, if you had a hand held video and the video itself  
15 was child pornography, and then you got that on the  
16 Internet or otherwise and decided you wanted to promote  
17 that, I mean would be covered by the statute. But --

18 JUSTICE KENNEDY: There are two things that  
19 you -- that all of us have to work with here. One is  
20 the scienter component here. Is that overly broad,  
21 vague, and so forth? The other is the content.

22 And my concern is the same as that indicated  
23 by Justice Stevens at the outset. There are some  
24 terrible practices in the child-trafficking area where  
25 children are held in brothels for the most debased of

1 acts. There are abuses in prisons, abuses in schools.

2 If there are videotapes showing those  
3 things, it seems to me that the statute is -- that  
4 they're clearly covered by the statute, and maybe even a  
5 killing of a little girl in public might be sadistic.  
6 Assume that that's covered by the statute.

7 Is there anything in the "presents" and the  
8 "promotes" language in the scienter component of the  
9 statute that gives some protection to these materials?  
10 Is it just as-applied? Is that what we have to do?

11 GENERAL CLEMENT: Here is how I would try to  
12 analyze it, Justice Kennedy, which is I would say that  
13 there would be an as- applied challenge there because  
14 the basic prohibition on child pornography that would  
15 apply to the underlying materials, there would be an  
16 as-applied exception to that. And therefore, the  
17 pandering and the solicitation of that would be equally  
18 outside the constitutional --

19 JUSTICE KENNEDY: So we want the public to  
20 see this to show them how bad it is, and that is  
21 permitted under the statute, because it is not  
22 "presenting"?

23 GENERAL CLEMENT: I mean there would be  
24 another way to try to get at that.

25 JUSTICE KENNEDY: I agree with you that we

1 have different motives.

2 GENERAL CLEMENT: Right.

3 JUSTICE KENNEDY: But I'm not sure that the  
4 statute covers that.

5 GENERAL CLEMENT: Well, there might be a way  
6 in which the statute could cover it, and it would be, as  
7 follows, which basically is if I'm going to portray that  
8 as material that is -- and I'm going to portray it only  
9 in a way that makes it clear that I have a valid  
10 as-applied challenge, then I'm not sure I would be  
11 satisfying the objective and the subjective scienter  
12 requirements for that statute. Because it would be  
13 clear that, although I was presenting it as visual  
14 depictions of children who had that happen to them, I  
15 was presenting it exclusively for its scientific,  
16 artistic, literary value. And, therefore, in a sense, I  
17 was building my as-applied challenge into the way I was  
18 marketing it. I think you could --

19 JUSTICE SCALIA: Of course, you have a  
20 problem not just with the presenting, not just with the  
21 pandering of it. You have a problem with the mere  
22 possession of it. You have to find some exception for  
23 that anyway. You have to find some as- applied  
24 challenge exception for the mere possession of it, even  
25 if you don't pander it.



1                   GENERAL CLEMENT: Well, Justice Scalia,  
2     that's exactly right. And that's why I would think the  
3     logical way to proceed would be you would find an  
4     as-applied exception to the basic prohibition. And  
5     then, naturally, that would apply to the pandering  
6     provision.

7                   I was only sort of suggesting, if pressed,  
8     that in some ways it might actually be easier to find a  
9     way to get that outside the statute with respect to the  
10    pandering and solicitation provision than for the  
11    possession for this.

12                  JUSTICE SOUTER: But how would you do it in  
13    the case -- you mentioned that if there is not actual  
14    child porn shown, and there is a truthful or honest  
15    statement about it, that there is nothing to worry  
16    about.

17                  But what about the movie reviewer who is  
18    reviewing the latest re-release or something of the  
19    "Lolita" film and says this depicts sexual activity with  
20    a minor?

21                  That statement is true. It would be taken  
22    by some naive people as saying boy, this is what it  
23    shows, the real thing. That is a truthful statement.  
24    And yet, it would still fall within the prohibition of  
25    the statute.

1           As I understand your position, the only way  
2   that statement would be truthful in a way that would  
3   excuse would be if the reviewer said this depicts sexual  
4   activity with a minor, but of course the actor wasn't  
5   really a minor. Isn't that correct?

6           GENERAL CLEMENT: No, that is not correct,  
7   Justice Souter. And I would say that that hypothetical  
8   is outside the ambit of the statute for two reasons.

9           First of all, I don't think that the movie  
10  reviewer is promoting or presenting the underlying  
11  materials. They would be out for that reason.

12          I also think they would be out because, when  
13  you started applying the objective and the subjective  
14  requirements of the statute, you would not find either  
15  of them satisfied with respect to that.

16          If I know you're talking about a mainstream  
17  movie, and you say it depicts sex with a minor, I'm not  
18  going to naturally think that comes within the ambit of  
19  the statute, that it is actual child pornography within  
20  the meaning of the statute.

21          JUSTICE SOUTER: What if you are 17 years  
22  old and you haven't gone to law school and you haven't  
23  read these cases? You may very well assume that.

24          GENERAL CLEMENT: With respect, Justice  
25  Souter, that's why I think it is important to have both

1 an objective and a subjective requirement. And I think  
2 the objective requirement alone would take that out.

3 If I could reserve the remainder of --

4 JUSTICE SCALIA: Do we use a seven year old  
5 for the objective requirement?

6 GENERAL CLEMENT: No, I wouldn't think so.

7 JUSTICE SCALIA: We would use a --

8 GENERAL CLEMENT: I think we would use a  
9 reasonable person. That's why --

10 JUSTICE SCALIA: -- reasonable adult, I had  
11 thought.

12 GENERAL CLEMENT: Exactly, and that's why I  
13 --

14 JUSTICE SOUTER: Wouldn't we use -- wouldn't  
15 we use a reasonable person of the sort who goes to  
16 movies?

17 GENERAL CLEMENT: That would be fine,  
18 Justice Souter, and if --

19 JUSTICE SOUTER: I would suppose my 17 year  
20 old, non-law-school graduate would be within the ambit  
21 of the reasonable class.

22 GENERAL CLEMENT: And I would submit that  
23 even a 17 year old, non-law student would know that  
24 movies depict things that don't actually happen. When  
25 they see a murder on screen, that's not actually a

1 murder. And so I think they would understand that  
2 that's a movie. It's not child pornography.

3 If I may reserve the remainder of my time.

4 JUSTICE GINSBURG: You could -- just one  
5 question. You mentioned a film, "Traffic," which I did  
6 not see, but one of the briefs said there was an actual  
7 17 year old playing that part.

8 But you said that wouldn't be -- that  
9 wouldn't fit.

10 GENERAL CLEMENT: "Traffic" is not child  
11 pornography. I understand that the actress was 17 at  
12 the time of the film, but we don't think that comes  
13 within the ambit of the basic prohibition on child  
14 pornography, because we think that simulated sexual  
15 activity has to be interpreted with enough subtlety that  
16 it doesn't capture that. And that's the position --

17 JUSTICE GINSBURG: But the statute says  
18 simulated.

19 GENERAL CLEMENT: It does. But so does the  
20 statute in Ferber. And we don't think that introduced  
21 any overbreadth or vagueness that was fatal. This  
22 statute here just picks up on that definition. It  
23 doesn't add to it.

24 If I may reserve --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Clement.

2 Mr. Diaz.

3 ORAL ARGUMENT OF RICHARD J. DIAZ

4 ON BEHALF OF RESPONDENT

5 MR. DIAZ: Mr. Chief Justice, and may it  
6 please the Court:

7 The pandering provision of the PROTECT Act  
8 carries a 5-year mandatory minimum prison term and a  
9 possible 20-year prison term, has no affirmative defense  
10 provision. It is unconstitutionally vague and  
11 overbroad, because on its face it captures protected  
12 speech about materials. And it captures speech about  
13 materials that may not even in fact exist.

14 The language "in a manner that reflects the  
15 belief, or that is intended to cause another to  
16 believe," does not sufficiently define prohibited  
17 conduct giving law enforcement unfettered discretion to  
18 subjectively enforce the statute.

19 In essence, as the Eleventh Circuit held,  
20 the determination does not rest on what materials  
21 contain, but rather on how someone conveys his or her  
22 impression about what the materials convey. In other  
23 words, this statute, in short, punishes thought,  
24 beliefs, expressions, and opinions.

25 CHIEF JUSTICE ROBERTS: Well, there's a

1 difference, isn't there, between beliefs and thoughts  
2 about -- what, the legality of a particular type of  
3 pornography or something like that, and a factual  
4 matter? I thought this was child pornography? Saying  
5 this regulates thoughts and beliefs, those are two quite  
6 different questions, aren't they?

7 MR. DIAZ: Yes, it is, Mr. Chief Justice.  
8 And one of the problems with the statute, and just  
9 another example of what we've been talking about here --  
10 amazon.com and Netflix -- there's also, for example, a  
11 series of photography that we've seen nationwide by  
12 famous photographers of minors or children,  
13 photographers of child modeling agencies --

14 JUSTICE BREYER: But none of those -- I  
15 mean, we've gone through this with the Solicitor  
16 General. He went through every example in his brief  
17 that you've been able to produce, and he said they  
18 aren't caught by the statute. What's wrong with what he  
19 said? Why isn't that so?

20 MR. DIAZ: If --

21 JUSTICE BREYER: Photographers, for example.  
22 That's not child pornography. And if it was, they would  
23 have to act -- if it is child pornography under Ferber,  
24 it isn't protected. If it isn't child pornography under  
25 Ferber, well, then there's no problem. Okay. That's

1 their view of the photographers. And the same with  
2 Amazon, the same with Netflix.

3 MR. DIAZ: Correct. The problem is if I  
4 were to take anything such as the CNN video of an actual  
5 sexually explicit conduct involving a minor, or if I  
6 were to take any of these films, if I were to start an  
7 Internet blog and say, look, this film contains sexual  
8 conduct of a minor, and I think we should do something  
9 about this, I think we should form a coalition or I  
10 think we should boycott it. And I am conveying the  
11 belief. I am intending to make you believe that what  
12 those materials contain, albeit what they really have or  
13 what they really are, is illegal.

14 JUSTICE BREYER: Problem with Ferber, you  
15 said. Same problem.

16 MR. DIAZ: Yes, sir.

17 JUSTICE BREYER: So what's your response to  
18 what he said? It is the -- with possession. You  
19 possess these materials. What you are trying to do is  
20 take them to the police and stop them. Under Ferber, is  
21 that protected or not? If it is protected, as I think  
22 it would be, so is it here.

23 MR. DIAZ: I do not think it would be  
24 protected.

25 JUSTICE BREYER: Then under Ferber he's

1 going to go right to jail because he has them. I would  
2 think it would be protected. I can't imagine somebody  
3 who collects, on these sites where they are molesting  
4 children, material to prevent children being molested  
5 and presents it to the proper authority is going to be  
6 prosecuted under the New York statute in Ferber.

7 MR. DIAZ: If the material substantively  
8 violates the statute, then the mere possession of them  
9 is illegal. And there is a defense under the possession  
10 part of the statute for presenting them to the police  
11 within a certain amount of time and within a certain  
12 manner of your conduct.

13 What we're talking about here is not the  
14 possession of the materials. We're talking about the  
15 expression about what the materials contain. Even if  
16 you're wrong about it, even if you're mistaken, even if  
17 you're lying about it, even if you're bragging about it,  
18 the traditional prankster, as Senator Leahy said in the  
19 congressional report, one of the things we're concerned  
20 about with the statute is that it could capture people  
21 who are expressing salacious thoughts.

22 JUSTICE SCALIA: Or just good honest liars,  
23 right? I had thought that the purpose of the First  
24 Amendment was to protect speech that had some value, and  
25 that the reason obscenity is excluded entirely from



1 First Amendment protection is that it has no redeeming  
2 social value.

3 What social value do you find in being able  
4 to lie about the content of what you're offering to  
5 somebody else? You say somehow if you're lying about  
6 it, oh, well, then the First Amendment protects that. I  
7 would think if you're lying about it, it is clearer than  
8 ever the First Amendment doesn't protect it. There is  
9 no social value in protecting lies.

10 MR. DIAZ: One of the problems with the  
11 issue of social value and lying is that we don't put  
12 people in jail for 5 mandatory minimum years or 20 years  
13 in prison for simply lying. We simply don't do that. I  
14 agree with Your Honor --

15 JUSTICE SCALIA: But it depends on what  
16 they're lying about. If they're lying about the value  
17 of what they're selling, you know, it's fraud.

18 MR. DIAZ: And I agree with Your Honor --  
19 Justice Scalia, that we have a slew of State statutes  
20 particularly in the area of consumer fraud. If I  
21 pretend to have something that's illegal and offer it to  
22 you or promote it to you or advertise it to you, and I  
23 have nothing, then that person can and should be  
24 punished, but not for -- not under this statute.

25 JUSTICE SCALIA: Tell me what social value

1 are we protecting here, by protecting the lie about  
2 whether this thing that really isn't child pornography  
3 is? What -- why would we want to protect that?

4 MR. DIAZ: We necessarily do not want to  
5 protect that. But we don't punish it with a 5 to  
6 20-year prison sentence.

7 JUSTICE SCALIA: Are you complaining about  
8 the degree of the penalty?

9 MR. DIAZ: It is not just the degree of the  
10 penalty. The statute doesn't just cover liars, Justice  
11 Scalia. It also covers people who are mistaken. It  
12 covers exaggeration. It covers puffing.

13 For example, if I have a legitimate clean  
14 videotape that I want to duplicate, I may be violating  
15 trademark or other patent laws or whatnot, but I want to  
16 take this and I want to sell it in the marketplace over  
17 the Internet. And I exaggerate by the words that I  
18 choose to use in promoting that tape for commercial  
19 purpose, for example, and I'm exaggerating.

20 That person if they market the materials in  
21 a way that causes the potential buyers to believe that  
22 what it has is illegal, even if I'm just puffing or  
23 bragging, the car salesman in a car sales situation, we  
24 don't like it --

25 CHIEF JUSTICE ROBERTS: But that's an

1 entirely different thing to say that this car is a great  
2 car and it turns out not to be a great car, and to say  
3 what you have is either -- is not -- is child  
4 pornography when, in fact, it's not. Those are two  
5 different things.

6 MR. DIAZ: I think it could be very -- in  
7 the real world I think it is very easy for a person to  
8 puff about what materials contain that are lawful to  
9 possess, such as Titanic, Lolita or American Beauty.  
10 And all you would have to say is, put a trailer on it  
11 and say that this is hot graphic teen sex, and you're  
12 puffing about what it really is. We know -- you know it  
13 really isn't.

14 CHIEF JUSTICE ROBERTS: The statute has an  
15 objective component. To the objective observer, it must  
16 reasonably cause them to believe that it's actually  
17 child pornography. So that -- that would be -- that  
18 would prevent sort of the vague puffery that you're  
19 talking about from being covered while still covering  
20 something that satisfies both the subjective and  
21 objective test.

22 MR. DIAZ: Mr. Chief Justice, I think that  
23 if a person listens to or hears somebody describe  
24 Titanic, Lolita, American Beauty or any of the films of  
25 the like as hot graphic teen sex, I think a reasonable

1 ordinary person could believe that what is being  
2 portrayed is proscribed material, even if it doesn't  
3 exist, or even if it exists and is protected under  
4 Ferber.

5 JUSTICE SCALIA: You seem to think we are  
6 punishing the lying. I don't read the statute as  
7 punishing the lying.

8 MR. DIAZ: No, Justice Scalia.

9 JUSTICE SCALIA: You'd be punished even if  
10 it were true. What is being punished is the pandering.  
11 You are the one that's bringing in the lying example.  
12 You say, my goodness, even if the pandering is a lie,  
13 pandering is pandering. And I don't see why there is  
14 some special protection against pandering when in  
15 addition to pandering, you're lying.

16 Maybe you ought to get extra penalty.

17 (Laughter.)

18 JUSTICE SCALIA: But, in fact, the statute  
19 does not provide extra penalty. It just provides a  
20 penalty for pandering. And I don't know why it's a good  
21 defense to that to say, oh, I was actually lying. I  
22 mean --

23 MR. DIAZ: I don't think -- I think the  
24 statute covers people who brag, people who puff, people  
25 who tell the truth, who --

1 JUSTICE GINSBURG: What about "present"?  
2 The word "pandering" itself is not used in the statute.  
3 It uses a lot of words, "promote" and "advertise" --  
4 well, maybe that's just redundant. I guess that would  
5 be the government's position -- but "present,"  
6 "distribute" -- what else?

7 JUSTICE SCALIA: All of those verbs only  
8 become pandering when they are attached to explicit  
9 sexual material. When you promote explicit sex, you are  
10 pandering. I mean, the word pandering does have a  
11 sexual connotation. I -- I think -- I had thought it  
12 was accepted that we have here a statute that's directed  
13 against pandering.

14 MR. DIAZ: But the problem with the statute,  
15 while it does capture pandering and illegal conduct, it  
16 goes beyond that and captures a slew of innocent conduct  
17 which we discussed this morning in the examples --

18 JUSTICE ALITO: What would you say is the  
19 best realistic example that you can provide to show that  
20 this is overbroad?

21 MR. DIAZ: The best and realistic example  
22 would be any person, not necessarily amazon.com or  
23 Netflix, it could be a private citizen. It could be a  
24 religious leader of a religious group, regardless of  
25 what type of religion we're talking about.

1                   It could be any of those people --

2                   JUSTICE ALITO:   Doing -- doing what?

3                   MR. DIAZ:   Who look at the -- the Nan Goldin  
4   pictures, who look at Lolita, Traffic and all of these  
5   other movies and harbor a belief that it is obscene,  
6   which is one of the two types of materials that's  
7   proscribed.

8                   JUSTICE BREYER:   Suppose we did this?   What  
9   would you think about an opinion, and why, which says  
10   the following?   We take every one of those examples and  
11   all the ones listed here and put them in appendix A, and  
12   the opinion says this is the Solicitor General's  
13   interpretation of the statute, as amended, say with the  
14   word presentment, which comes out of promotion infer,  
15   and we think under that interpretation of the statute,  
16   none of these things, nor anything like them, could be  
17   prosecuted.

18                   And if so understood, we can find no  
19   example, at least none not present in Ferber itself,  
20   where this would be overbroad.   Therefore, it is  
21   constitutional.   I'm not saying that is my view.   I am  
22   saying simply I want to know your opinion about what  
23   would be wrong with such an opinion.

24                   MR. DIAZ:   My opinion, Justice Breyer, is  
25   that could be done.   We could put a dozen or two dozen

1 or three dozen, an exponential number of examples, that  
2 would be excluded. Essentially we would be writing an  
3 affirmative defense into the statute or an absolute  
4 defense that would prohibit even the prosecution. The  
5 concern that that raises for me, in answer to Your  
6 Honor's question, is you're still going to have a  
7 chilling on free speech. There are still going to be  
8 people out there who are not covered by one of these  
9 examples who we haven't thought of, and that person is  
10 going to be afraid to express opinions.

11 JUSTICE KENNEDY: Well, I suppose if we were  
12 going to do that it would be simpler and maybe prudent  
13 for us to reexamine our overbreadth rule. Your client  
14 here falls within none of these examples. He was  
15 convicted of having what everyone recognizes as not only  
16 child pornography but involving a very small child. And  
17 he knew what it was. And he -- and he conveyed that  
18 belief.

19 Given the fact that it would appear that  
20 child pornography is a growing problem, a serious  
21 problem on the Internet, maybe we should examine the  
22 overbreadth rule and just say that your client cannot  
23 make this challenge.

24 MR. DIAZ: The Court can certainly do that,  
25 Justice Kennedy. Essentially, though, I think what the

1 Court would be doing would be taking the four areas of  
2 speech that have been taken out of the First Amendment  
3 protection, which is defamation, the fighting words  
4 under Brandenburg, Miller, which is obscenity, and the  
5 additional extension of Ferber. Now what we would be  
6 doing is carving yet another area of speech out of the  
7 First Amendment, and we're just going to continue  
8 chipping it away and chipping it away.

9 CHIEF JUSTICE ROBERTS: No. I don't think  
10 that is responsive to Justice Kennedy's point. You  
11 wouldn't be carving it out of the First Amendment. You  
12 would be saying we're going to treat this area like  
13 other areas, which would say that whoever is challenging  
14 it has to show that they're a problematic case.

15 In other words, your client is relying -- he  
16 didn't produce Lolita. You're relying on the effect on  
17 other people, and that is what our overbreadth doctrine  
18 allows, if there's a substantial amount of speech that's  
19 protected. And what I understood the question to  
20 suggest is that we would wait basically for as-applied  
21 challenges when Lolita is being prosecuted and we would  
22 hear from them, but not in your case.

23 MR. DIAZ: That certainly could be done,  
24 Mr. Chief Justice. Again, and as I suggested earlier,  
25 the problem with that is that we're not talking about



1 anything less than a criminal statute, a criminal  
2 statute that implicates the First Amendment, freedom and  
3 thought which this Court since its very existence has  
4 said we have to honor and respect, even if people are  
5 thinking about nasty or dirty things.

6 That's what this country is based upon, and  
7 the grave concern if we're going to do it on an  
8 as-applied challenge, is people who might be afraid to  
9 express their views about whether this is or is not  
10 obscene. It's is the parent of a neighborhood group who  
11 see a movie and wants to tell everybody about it and  
12 say, look --

13 JUSTICE ALITO: Here we have -- we have one  
14 statute that covers advertising, promoting, presenting,  
15 distributing, and soliciting. Suppose that all of those  
16 activities were not lumped together in one statute, and  
17 there was a separate provision for each, and suppose  
18 that the Court were to conclude that there is a problem  
19 with one of them. Let's say promotes or presents.

20 Would all of the others fall as well, under  
21 the overbreadth doctrine, if they were set out in  
22 separate statutory provisions?

23 MR. DIAZ: I believe that that would more  
24 narrowly tailor the statute, but I don't believe,  
25 Justice Alito, that it would solve the problem of

1 chilling speech.

2 JUSTICE SOUTER: No, but isn't the problem  
3 the problem of your answer to Justice Breyer's  
4 hypothetical. He said, you know, what if we have this  
5 appendix and we list -- I forget what he said, three  
6 dozen examples that the Solicitor General says wouldn't  
7 be covered and that sounds fine to us. Your answer was  
8 well, there would still be some examples not covered.

9 But isn't -- isn't the answer to that that  
10 there would be some conceivable overbreadth, I suppose,  
11 no matter what the appendix said? Somewhere out there  
12 there would be an example not covered that would be the  
13 basis for an as-applied challenge, but there wouldn't be  
14 substantial overbreadth. And isn't that the case? That  
15 if Justice Breyer's hypo were in fact the decision of  
16 this case, there wouldn't be a fair argument that there  
17 is any substantial overbreadth left to the statute,  
18 isn't that so?

19 MR. DIAZ: That -- it could be, and that  
20 would depend. I agree with Your Honor, Justice Souter,  
21 that we have this world or this universe of overbroad  
22 speech, and the appendix would shrink it and make it  
23 narrower.

24 JUSTICE GINSBURG: And rewrite -- and  
25 essentially rewriting the law, and that's my question

1 about this technique that Justice Breyer has proposed.  
2 This Court is not generally in the business of writing  
3 appendices that say well, the statute couldn't apply in  
4 this situation, and it couldn't apply and as long as we  
5 put those contours around it. Certainly the Court could  
6 write an opinion that would inform Congress why this  
7 particular statute as written is overbroad, and explain  
8 what kind of statute wouldn't be overbroad.

9 But for the Court itself, I think that  
10 that -- I don't know any instance in which we have  
11 provided that kind of appendix that said things that are  
12 like Traffic, they're okay, and things that are like  
13 something else are not okay. I don't know.

14 MR. DIAZ: With respect, my initial response  
15 to Justice Breyer's suggestion, if you will, was the  
16 same as Your Honor, Justice Ginsburg. I don't know that  
17 creating an appendix of examples is going to cure the  
18 problem. I do concede that it would lessen the problem.  
19 We would -- we would --

20 JUSTICE SCALIA: Why would it lessen? I  
21 assume whatever you put in an appendix, saying all these  
22 other situations that are not before us are not covered.  
23 Isn't that the most blatant dictum? But -- but -- and,  
24 of course, we're not bound in later cases by our dicta.  
25 But come to think of it, I guess the whole doctrine of

1 overbreadth rests upon dictum, doesn't it? It -- it  
2 rests upon our determination in this case, which  
3 involves somebody who undoubtedly was selling child  
4 porn, and a horrible kind of child porn -- we say in  
5 this case, oh, we can -- we can contemplate other cases,  
6 where we would not hold the person guilty. That is all  
7 dictum, too, isn't it?

8               So I guess the whole doctrine is -- is based  
9 on dictum. So we may as well put it in all an appendix.  
10 Let's put our dictum in an appendix. I agree.

11              MR. DIAZ: In answer to Your Honor's  
12 question or comment --

13              (Laughter.)

14              MR. DIAZ: -- the -- I agree that the issue  
15 of overbreadth is something where we're looking at  
16 boundaries. And that's really what I think the Court  
17 does in a situation of overbreadth analysis. You look  
18 at the boundaries. How much -- how far we've gone  
19 outside of the boundaries of what is protected.

20              CHIEF JUSTICE ROBERTS: Well, but it's the  
21 boundary between what is -- what should be protected in  
22 relation to what's unprotected.

23              So what's the ratio between legitimate films  
24 like Lolita and illegitimate child pornography? In  
25 other words, is, in fact, the protected material

1 substantial in relation to the law's legitimate sweep?

2 MR. DIAZ: The problem is we don't have an  
3 empirical answer, a mathematic answer to that question.  
4 What we do know is that films like Lolita, American  
5 Beauty, and whatnot, which if presented in a certain way  
6 can bring people under the coverage of the statute, have  
7 received acclaim around the world, I mean all sorts of  
8 academy awards. They're seen time and time again.  
9 They're seen on Netflix. They're seen on cable TV. To  
10 this day, some of these movies have been around for 30  
11 years.

12 JUSTICE BREYER: Of course, the point of the  
13 -- the point of the appendix, which unfortunately has  
14 the failing of many charming metaphors, is that it has  
15 acquired a life of its own.

16 (Laughter.)

17 JUSTICE BREYER: It distracts from the  
18 question. But it -- as I read the Solicitor General's  
19 interpretation of the statute, and amended it, taking  
20 the word "presentment" from its context in Ferber, where  
21 it was part of the definition of promotion, I thought  
22 that was the appendix. At least, that's my hypothetical  
23 question. And so whether you like appendices or don't  
24 like appendices, you could focus on why isn't it the  
25 appendix I'm talking about?

1           He's filled it with qualifications using the  
2 words "knowingly, reasonable," and a context that if it  
3 is not purely commercial, as I understood, is at least  
4 commercial plus a few things such as bartering.

5           That was really my question, and you've come  
6 back to American Beauty and so forth, and if there's one  
7 thing I think his definition keeps out of this  
8 discussion, it is American Beauty and Traffic, because I  
9 don't see under his interpretation how anyone could  
10 conceivably be prosecuted even if he's talking to a  
11 group who have never seen a movie. That isn't a  
12 reasonable group of people. So what is your response to  
13 what he said?

14           MR. DIAZ: My response, Justice Breyer, is  
15 that if you take the word "present" and you give it the  
16 meaning that it was given in Ferber, you make the  
17 statute narrower. You make it -- bring it into more of  
18 a constitutionally acceptable realm, but I respectfully  
19 do not believe that it cures the entire problem, and my  
20 basis for saying that the question of Justice Souter of  
21 the Solicitor General. You know -- the concern is, when  
22 you don't have lawyers who understand these  
23 hypertechnical meanings that the Court is going to give  
24 and the interpretations we're going to put on them --

25           JUSTICE SOUTER: But isn't the answer to

1     that you may still have some overbreadth left, but it's  
2     not substantial? Most 17 year olds are, in fact, going  
3     to realize that the real thing is not going on in, you  
4     know, the Lolita movie. And if we accept that as a  
5     factual proposition, which was the Solicitor General's  
6     answer, and if we also accept, not by way of appendix  
7     but way of rationale in the opinion, that these various  
8     activities have got to be given an essentially  
9     commercial or quasi-commercial character, so that they  
10    don't pick up the conversations with the neighbor, then  
11    that's simply a matter of statutory interpretation that  
12    could be part of our rationale. If we accept the  
13    factual proposition about what reasonable viewers are  
14    likely to know, and we engage in that kind of  
15    interpretation following the Solicitor General's view of  
16    how this serial list of activities should be construed,  
17    don't we eliminate the possibility -- wouldn't we  
18    eliminate the possibility of substantial overbreadth?  
19    Some things may get by. There may still be legitimate  
20    applied challenges, but substantial overbreadth, would  
21    that be left?

22               MR. DIAZ: I think it would, but concededly  
23    to a lesser degree, because once you make it clear as to  
24    what matters are not covered by the statute, it makes it  
25    easier for people to conform their conduct and their

1 words accordingly. The concern that I have is that it  
2 still chills a -- it still chills free speech. If a  
3 person looks at an appendix or looks at the rationale in  
4 the Court's opinion in this case --

5 JUSTICE SOUTER: It can, but can you give me  
6 an example of a class of activities that would not be,  
7 in effect, insulated from indictment by these two steps  
8 in the opinion, that would be of substantial character?

9 MR. DIAZ: Certainly, and I go back to the  
10 question of Justice Breyer which is adolescents, 17 year  
11 olds, 18 year olds, who like to look at these types of  
12 materials and one of them could simply say to another  
13 over the Internet, you know, do you think we can get  
14 some hardcore child porn? He's soliciting child porn  
15 from another person, and that individual, that 17 year  
16 old kid, who's fantasizing or experimenting with his own  
17 sexuality, can go to jail for 5 to 20 years. And we see  
18 that in everyday America, in high schools around the  
19 country.

20 JUSTICE GINSBURG: Do we see them getting  
21 prosecuted in any state?

22 MR. DIAZ: If he's soliciting materials  
23 under sub (i) or sub (ii) of the statute, of the  
24 pandering provision of the statute, yes. That person  
25 can be prohibited. Excuse me, that person can be



1 prosecuted.

2 JUSTICE GINSBURG: I asked you have there  
3 been such cases? A lot of states have pandering laws  
4 now, and is the case that you posit a case that has  
5 occurred in any of those states?

6 MR. DIAZ: Your Honor, I cannot cite a  
7 specific example, but I can certainly tell Your Honor  
8 this -- prosecutions from 1997 to 2004 have increased  
9 over 452 percent. The conviction rate --

10 JUSTICE GINSBURG: Maybe that's because the  
11 quantity of material has increased.

12 MR. DIAZ: Exactly. And the conviction rate  
13 is 99.6 percent. And --

14 JUSTICE ALITO: And if one person says to  
15 another, can we get some child pornography, how is that  
16 solicitation?

17 MR. DIAZ: "Can you get me."

18 JUSTICE ALITO: Oh, "can you get me."

19 MR. DIAZ: "Can you get me."

20 JUSTICE ALITO: And you think that's  
21 protected by the First Amendment? Asking someone for  
22 child pornography is protected?

23 MR. DIAZ: First of all, it may not be  
24 protected by the First Amendment, but it shouldn't be  
25 captured by this statute, which puts that 17 year old in

1 jail for 5 to 20 years.

2 JUSTICE GINSBURG: The only thing that  
3 limits the statute is the First Amendment. What else --  
4 you say it may not be covered by the First Amendment.  
5 What else gives you a right to challenge the statute?

6 MR. DIAZ: I don't think that it is  
7 necessarily not covered by the First Amendment. I think  
8 certainly the First Amendment -- and this Court has  
9 held, that we protect salacious thoughts, salacious  
10 ideas.

11 JUSTICE ALITO: But it's not thought at that  
12 point. It's a request to obtain contraband, which fuels  
13 the production of the contraband. Is it protected by  
14 the First Amendment or not, soliciting child  
15 pornography?

16 MR. DIAZ: I think the First Amendment is  
17 implied, but I don't think it becomes criminal conduct  
18 until you get to either an attempt, solicitation, or a  
19 conspiracy. You have to do more than just say I would  
20 like to get it or can you get it for me, to be guilty of  
21 the statute.

22 JUSTICE ALITO: To fall -- to fall under the  
23 statute or to be protected by the First Amendment or not  
24 protected by the First Amendment?

25 MR. DIAZ: Right.

1 JUSTICE ALITO: Which is it?

2 MR. DIAZ: To fall within the protection of  
3 the First Amendment. And another example that comes to  
4 mind is a person has material which they believe is  
5 child pornography. They give it to somebody else, such  
6 as Lolita, for an opinion and they present to it that  
7 person. One of the biggest problems or one of the  
8 biggest -- the verb that's most objectionable in the  
9 statute is "present," because it does not have to have  
10 any commercial requirement.

11 JUSTICE ALITO: I mean the model penal code  
12 has a general prohibition of soliciting illegal  
13 activities. Are you saying that that's -- that  
14 provision violates the First Amendment? Because it's  
15 just words?

16 MR. DIAZ: Solicitation is a crime in and of  
17 itself, and talking about or expressing a desire to  
18 obtain is not -- doesn't quite go to the level of  
19 solicitation or intent, where there has to be a  
20 proximity in time, in immediacy, and a certain  
21 geographical proximity between the words and the comment  
22 that you intend.

23 JUSTICE ALITO: But I thought the word in  
24 the statute is "solicit."

25 MR. DIAZ: Well, there's "solicit" and

1     there's also "present." It works in both directions.

2                   JUSTICE ALITO: If you're asking somebody  
3     for child pornography, you're not presenting child  
4     pornography.

5                   MR. DIAZ: Correct. I agree.

6                   Thank you, Your Honor.

7                   CHIEF JUSTICE ROBERTS: Thank you, Mr. Diaz.

8                   General Clement, you have three minutes  
9     remaining.

10                  REBUTTAL ARGUMENT OF GEN. PAUL D. CLEMENT

11                               ON BEHALF OF THE PETITIONER

12                  GENERAL CLEMENT: Thank you, Mr. Chief  
13     Justice.

14                  Overbreadth, as this court has reminded us  
15     any number of times, is strong medicine, and that is  
16     why, even in the First Amendment context, as-applied  
17     challenges remain the basic building blocks of  
18     adjudication. Rejection of this overbreadth challenge  
19     here does not mean that the courts will not be open to  
20     here as-applied challenges going forward. Of course,  
21     the Respondent here has no claim that the statute is  
22     unconstitutional as applied to him.

23                  JUSTICE KENNEDY: Can we reject the  
24     overbreadth challenge here and still leave an  
25     overbreadth doctrine for some other cases? I'm not sure

1    how we could do that.

2                   GENERAL CLEMENT:   Well, I think you could,  
3   Justice Kennedy.  You could -- I mean the burden here is  
4   on the challenger who doesn't say that the statute's  
5   unconstitutional as-applied to them to show substantial  
6   overbreadth in absolute terms and relative to the  
7   statute's legitimate sweep.  And it's interesting that  
8   neither Respondent nor the court of appeals ever engaged  
9   in that latter inquiry.  And that's a critical inquiry.

10                  JUSTICE GINSBURG:  How is it different it  
11   would be strange to trust out the document -- the  
12   doctrine as I -- as I understand it is what we relied on  
13   when we had the predecessor to this statute before.

14                  GENERAL CLEMENT:  Justice Ginsburg I'm not  
15   urging that you get rid of overbreadth doctrine once and  
16   for all -- probably be in the government's interest.  I  
17   am simply saying that if you apply overbreadth analyses,  
18   the way it supposed to be applied it's not satisfied  
19   here.  It's not just enough for you to envision a couple  
20   of hypotheticals.  It has to be the overbreadth has to  
21   be substantial relative to the legitimate sweep of the  
22   statute.  This Court in Virginia against Hicks said  
23   faulted the lower court opinion because it had no  
24   analyses whatsoever of valid versus invalid  
25   applications.  The proportionality aspect of this courts

1 overbreadth jurisprudence was ignored entirely. That  
2 could be verbatim the holding of this case. The 11  
3 circuit did engage in that relative analysis. When my  
4 brother was asked for empirical evidence about the  
5 comparison he said he didn't have any. With all due  
6 respect, I think that's fatal to his case.

7 JUSTICE GINSBURG: How did that occur in --  
8 free speech coalition.

9 GENERAL CLEMENT: I think, in the way I  
10 would explain that is I didn't think you get -- you  
11 found there was such absolute overbreadth that you  
12 didn't even reach the proportionality inquiry. In any  
13 event Hicks was decided afterwards, and I think Hicks  
14 makes very clear that you have to have both absolute and  
15 relative. I would say one last thing, though. This is  
16 first and foremost you start with the facts of this case  
17 and the facts of this case I think caution against  
18 reading the word presents out of the statute or reading  
19 it unduly narrowly.

20 The gravamen of the pandering here was not  
21 just the offer of pictures of this individual and his  
22 daughter, but was his claim that I can post these actual  
23 images of child pornography on this group site because  
24 I'm for real and I'm not an undercover agent. Now that  
25 seems to be within the epicenter of the statute but it's

1 not for profit. It was doing it to establish his bona  
2 fide. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you general  
4 the case is submitted.

5 (Whereupon, at 11:01 a.m., the case in the  
6 above-entitled matter was submitted .)

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