

REHNQUIST, C. J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 00–795

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.,
PETITIONERS *v.* THE FREE SPEECH
COALITION ET AL.

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

[April 16, 2002]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA
joins in part, dissenting.

I agree with Part II of JUSTICE O’CONNOR’s opinion concurring in the judgment in part and dissenting in part. Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so. *Turner Broadcasting System, Inc. v. FCC*, 520 U. S. 180, 195 (1997) (we “accord substantial deference to the predictive judgment of Congress” in First Amendment cases).

I also agree with JUSTICE O’CONNOR that serious First Amendment concerns would arise were the Government ever to prosecute someone for simple distribution or possession of a film with literary or artistic value, such as “Traffic” or “American Beauty.” *Ante*, at 3–4 (opinion concurring in judgment in part and dissenting in part). I write separately, however, because the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq.*, need not be construed to reach such materials.

We normally do not strike down a statute on First Amendment grounds “when a limiting instruction has been or could be placed on the challenged statute.” *Broadrick v. Oklahoma*, 413 U. S. 601, 613 (1973). See, *e.g.*, *New*

REHNQUIST, C. J., dissenting

York v. Ferber, 458 U. S. 747, 769 (1982) (appreciating “the wide-reaching effects of striking down a statute on its face”); *Parker v. Levy*, 417 U. S. 733, 760 (1974) (“This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied”). This case should be treated no differently.

Other than computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA’s definition of “sexually explicit conduct” is quite explicit in this regard. It makes clear that the statute only reaches “visual depictions” of:

“[A]ctual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; . . . or lascivious exhibition of the genitals or pubic area of any person.” 18 U. S. C. §2256(2).

The Court and JUSTICE O’CONNOR suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to “simulated” intercourse. *Ante*, at 9–11 (majority opinion); *ante*, at 4 (opinion concurring in judgment in part and dissenting in part). Read as a whole, however, I think the definition reaches only the sort of “hard core of child pornography” that we found without protection in *Ferber, supra*, at 773–774. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depic-

REHNQUIST, C. J., dissenting

tions, and thus fall outside the purview of the statute.¹

The reference to “simulated” has been part of the definition of “sexually explicit conduct” since the statute was first passed. See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 92–225, 92 Stat. 8. But the inclusion of “simulated” conduct, alongside “actual” conduct, does not change the “hard core” nature of the image banned. The reference to “simulated” conduct simply brings within the statute’s reach depictions of hard core pornography that are “made to look genuine,” Webster’s Ninth New Collegiate Dictionary 1099 (1983)—including the main target of the CPPA, computer generated images virtually indistinguishable from real children engaged in sexually explicit conduct. Neither actual conduct nor simulated conduct, however, is properly construed to reach depictions such as those in a film portrayal of Romeo and Juliet, *ante*, at 9–11 (majority opinion); *ante*, at 4 (O’CONNOR, J., concurring in judgment in part and dissenting in part), which are far removed from the hard core pornographic depictions that Congress intended to reach.

Indeed, we should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication—from text or legislative history—that such a result was intended. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. As the Court of Appeals for the First Circuit has observed:

“[T]he legislative record, which makes plain that the [CPPA] was intended to target only a narrow class of images—visual depictions ‘which are virtually indis-

¹Of course, even the narrow class of youthful looking adult images prohibited under the CPPA is subject to an affirmative defense so long as materials containing such images are not advertised or promoted as child pornography. 18 U. S. C. §2252A(c).

REHNQUIST, C. J., dissenting

tinguishable to unsuspecting viewers from unre-touched photographs of actual children engaging in identical sexual conduct.” *United States v. Hilton*, 167 F. 3d 61, 72 (1999) (quoting S. Rep. No. 104–358, pt. I, p. 7 (1996)).

Judge Ferguson similarly observed in his dissent in the Court of Appeals in this case:

“From reading the legislative history, it becomes clear that the CPPA merely extends the existing prohibitions on ‘real’ child pornography to a narrow class of computer-generated pictures easily mistaken for real photographs of real children.” *Free Speech Coalition v. Reno*, 198 F. 3d 1083, 1102 (CA9 1999).

See also S. Rep. No. 104–358, *supra*, pt. IV(C), at 21 (“[The CPPA] does not, and is not intended to, apply to a depiction produced using *adults* engaging i[n] sexually explicit conduct, even where a depicted individual may appear to be a minor” (emphasis in original)); *id.*, pt. I, at 7 (“[The CPPA] addresses the problem of ‘high tech kiddie porn’”). We have looked to legislative history to limit the scope of child pornography statutes in the past, *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 73–77 (1994), and we should do so here as well.²

This narrow reading of “sexually explicit conduct” not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was understood prior to the broadening gloss the Court gives it today. Indeed, had “sexually explicit conduct” been thought to reach the sort of material the Court says it does, then films such as “Traffic” and “American Beauty” would not have been made the way they were. *Ante*, at 9–10 (dis-

²JUSTICE SCALIA does not join this paragraph discussing the statute’s legislative record.

REHNQUIST, C. J., dissenting

cussing these films' portrayals of youthful looking adult actors engaged in sexually suggestive conduct). "Traffic" won its Academy Award in 2001. "American Beauty" won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court, *ante*, at 6 ("[F]ew legitimate movie producers . . . would risk distributing images in or near the uncertain reach of this law"), has apparently never been felt by those who actually make movies.

To the extent the CPPA prohibits possession or distribution of materials that "convey the impression" of a child engaged in sexually explicit conduct, that prohibition can and should be limited to reach "the sordid business of pandering" which lies outside the bounds of First Amendment protection. *Ginzburg v. United States*, 383 U. S. 463, 467 (1966); *e.g., id.*, at 472 (conduct that "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed" may lose First Amendment protection); *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 831–832 (2000) (SCALIA, J., dissenting) (collecting cases). This is how the Government asks us to construe the statute, Brief for United States 18, and n. 3; Tr. of Oral Arg. 27, and it is the most plausible reading of the text, which prohibits only materials "*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) (emphasis added).

The First Amendment may protect the video shopowner or film distributor who promotes material as "entertaining" or "acclaimed" regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus, materials promoted as conveying the impression

REHNQUIST, C. J., dissenting

that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner. See *Ginzburg, supra*, at 474–476; cf. *Jacobellis v. Ohio*, 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting) (“In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene”). I would construe “conveys the impression” as limited to the panderer, which makes the statute entirely consistent with *Ginzburg* and other cases.

The Court says that “conveys the impression” goes well beyond *Ginzburg* to “prohibi[t] [the] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain.” *Ante*, at 19–21. The Court’s concern is that an individual who merely possesses protected materials (such as videocassettes of “Traffic” or “American Beauty”) might offend the CPPA regardless of whether the individual actually intended to possess materials containing unprotected images. *Ante*, at 10; see also *ante*, at 4 (“Individuals or businesses found to possess just three such films have no defense to criminal liability under the CPPA”) (O’CONNOR, J., concurring in judgment in part and dissenting in part)).

This concern is a legitimate one, but there is, again, no need or reason to construe the statute this way. In *X-Citement Video, supra*, we faced a provision of the Protection of Children Against Sexual Exploitation Act of 1977, the precursor to the CPPA, which lent itself much less than the present statute to attributing a “knowingly” requirement to the contents of the possessed visual depictions. We held that such a requirement nonetheless applied, so that the Government would have to prove that a person charged with possessing child pornography actually knew that the materials contained depictions of real minors engaged in sexually explicit conduct. 513 U. S., at

REHNQUIST, C. J., dissenting

77–78. In light of this holding, and consistent with the narrow class of images the CPPA is intended to prohibit, the CPPA can be construed to prohibit only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer generated images virtually indistinguishable from real minors engaged in sexually explicit conduct. The mere possession of materials containing only suggestive depictions of youthful looking adult actors need not be so included.

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be “substantial . . . in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U. S., at 615. The aim of ensuring the enforceability of our Nation’s child pornography laws is a compelling one. The CPPA is targeted to this aim by extending the definition of child pornography to reach computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

For these reasons, I would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals’ judgment, and uphold the statute in its entirety.