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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL.

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

No. 00–795. Argued October 30, 2001—Decided April 16, 2002

The Child Pornography Prevention Act of 1996 (CPPA) expands the federal prohibition on child pornography to include not only pornographic images made using actual children, 18 U. S. C. §2256(8)(A), but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," §2256(8)(B), and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct," §2256(8)(D). Thus, §2256(8)(B) bans a range of sexually explicit images, sometimes called "virtual child pornography," that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. Section 2256(8)(D) is aimed at preventing the production or distribution of pornographic material pandered as child pornography. Fearing that the CPPA threatened their activities, respondents, an adult-entertainment trade association and others, filed this suit alleging that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling production of works protected by the First Amendment. The District Court disagreed and granted the Government summary judgment, but the Ninth Circuit reversed. Generally, pornography can be banned only if it is obscene under *Miller* v. *California*, 413 U. S. 15, but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process, *New York* v. *Ferber*, 458 U. S. 747, 758, and

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in prosecuting those who promote such sexual exploitation, *id.,* at 761. The Ninth Circuit held the CPPA invalid on its face, finding it to be substantially overbroad because it bans materials that are neither obscene under *Miller* nor produced by the exploitation of real children as in *Ferber*.

Held: The prohibitions of §§2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. Pp. 6–21.

(a) Section 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller,* and the reasons the Government offers in support of limiting the freedom of speech have no justification in this Court's precedents or First Amendment law. Pp. 6–19.

(1) The CPPA is inconsistent with *Miller*. It extends to images that are not obscene under the *Miller* standard, which requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value, 413 U. S., at 24. Materials need not appeal to the prurient interest under the CPPA, which proscribes any depiction of sexually explicit activity, no matter how it is presented. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards. The CPPA also prohibits speech having serious redeeming value, proscribing the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature for centuries. A number of acclaimed movies, filmed without any child actors, explore themes within the wide sweep of the statute's prohibitions. If those movies contain a single graphic depiction of sexual activity within the statutory definition, their possessor would be subject to severe punishment without inquiry into the literary value of the work. This is inconsistent with an essential First Amendment rule: A work's artistic merit does not depend on the presence of a single explicit scene. See, *e.g., Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.,* 383 U. S. 413, 419. Under *Miller*, redeeming value is judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois* v. *Wisconsin,* 408 U. S. 229, 231 *(per curiam).* The CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the obscenity definition. Pp. 6–11.

(2) The CPPA finds no support in *Ferber*. The Court rejects the Government's argument that speech prohibited by the CPPA is vir-

tually indistinguishable from material that may be banned under *Ferber*. That case upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. 458 U. S., at 759. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. See *id.*, at 759, and n. 10. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. *Id.*, at 760. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came. In contrast to the speech in *Ferber*, speech that is itself the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts. The Government's argument that these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech, see *id.,* at 762, suffers from two flaws. First, *Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the First Amendment's protection. See *id.,* at 764–765. Second, *Ferber* did not hold that child pornography is by definition without value. It recognized some works in this category might have significant value, see *id.*, at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression, *id.*, at 763. Because *Ferber* relied on the distinction between actual and virtual child pornography as supporting its holding, it provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well. Pp. 11–13.

(3) The Court rejects other arguments offered by the Government to justify the CPPA's prohibitions. The contention that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children runs afoul of the principle that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See, *e.g., Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 130–131. That the evil in question depends upon the actor's unlawful conduct, defined as criminal quite apart from any link to the speech in question, establishes that the speech ban is not narrowly drawn. The argument that virtual child pornog-

raphy whets pedophiles' appetites and encourages them to engage in illegal conduct is unavailing because the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, *Stanley* v. *Georgia*, 394 U. S. 557, 566, absent some showing of a direct connection between the speech and imminent illegal conduct, see, *e.g., Brandenburg* v. *Ohio,* 395 U. S. 444, 447 *(per curiam).* The argument that eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well is somewhat implausible because few pornographers would risk prosecution for abusing real children if fictional, computerized images would suffice. Moreover, even if the market deterrence theory were persuasive, the argument cannot justify the CPPA because, here, there is no underlying crime at all. Finally, the First Amendment is turned upside down by the argument that, because it is difficult to distinguish between images made using real children and those produced by computer imaging, both kinds of images must be prohibited. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 612. The Government's rejoinder that the CPPA should be read not as a prohibition on speech but as a measure shifting the burden to the accused to prove the speech is lawful raises serious constitutional difficulties. The Government misplaces its reliance on §2252A(c), which creates an affirmative defense allowing a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is insufficient because it does not apply to possession or to images created by computer imaging, even where the defendant could demonstrate no children were harmed in producing the images. Thus, the defense leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones. Pp. 13–19.

(b) Section 2256(8)(D) is also substantially overbroad. The Court disagrees with the Government's view that the only difference between that provision and §2256(8)(B)'s "appears to be" provision is that §2256(8)(D) requires the jury to assess the material at issue in light of the manner in which it is promoted, but that the determination would still depend principally upon the prohibited work's content. The "conveys the impression" provision requires little judgment about the image's content; the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexu-

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ally explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on how the speech is presented, not on what is depicted. The Government's other arguments in support of the CPPA do not bear on §2256(8)(D). The materials, for instance, are not likely to be confused for child pornography in a criminal trial. Pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. See *Ginzburg* v. *United States*, 383 U. S. 463, 474. Where a defendant engages in the "commercial exploitation" of erotica solely for the sake of prurient appeal, *id.,* at 466, the context created may be relevant to evaluating whether the materials are obscene. Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg*'s rationale. Proscribed material is tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." Thus, the CPPA does more than prohibit pandering. It bans possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contains no youthful actors but has been packaged to suggest a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. Pp. 19–20.

(c) In light of the foregoing, respondents' contention that §§2256(8)(B) and 2256(8)(D) are void for vagueness need not be addressed. P. 21.

198 F. 3d 1083, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined as to Part II. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined except for the paragraph discussing legislative history.