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]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join as to Part II, concurring in the judgment in part and dissenting in part.

The Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq*., proscribes the "knowin[g]" reproduction, distribution, sale, reception, or possession of images that fall under the statute's definition of child pornography, §2252A(a). Possession is punishable by up to 5 years in prison for a first offense, §2252A(b), and all other transgressions are punishable by up to 15 years in prison for a first offense, §2252A(a). The CPPA defines child pornography to include "any visual depiction . . . of sexually explicit conduct" where "such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct," §2256(8)(B) (emphasis added), or "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," §2256(8)(D) (emphasis added). The statute defines "sexually explicit conduct" as "actual or simulated- . . . sexual intercourse . . . ; . . . 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 CPPA provides for two affirmative defenses. First, a defendant is not liable for possession if the defendant possesses less than three proscribed images and promptly destroys such images or reports the matter to law enforcement. §2252A(d). Second, a defendant is not liable for the remaining acts proscribed in §2252A(a) if the images involved were produced using only adult subjects and are not presented in such a manner as to "convey the impression" they contain depictions of minors engaging in sexually explicit conduct. §2252A(c).

This litigation involves a facial challenge to the CPPA's prohibitions of pornographic images that "appea[r] to be . . . of a minor" and of material that "conveys the impression" that it contains pornographic images of minors. While I agree with the Court's judgment that the First Amendment requires that the latter prohibition be struck down, I disagree with its decision to strike down the former prohibition in its entirety. The "appears to be . . . of a minor" language in §2256(8)(B) covers two categories of speech: pornographic images of adults that look like children ("youthful-adult pornography") and pornographic images of children created wholly on a computer, without using any actual children ("virtual-child pornography"). The Court concludes, correctly, that the CPPA's ban on youthful-adult pornography is overbroad. In my view, however, respondents fail to present sufficient evidence to demonstrate that the ban on virtual-child pornography is overbroad. Because invalidation due to overbreadth is such "strong medicine," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), I would strike down the prohibition of pornography that "appears to be" of minors only insofar as it is applied to the class of youthful-adult pornography.

I

Respondents assert that the CPPA's prohibitions of youthful-adult pornography, virtual-child pornography,

and material that "conveys the impression" that it contains actual-child pornography are overbroad, that the prohibitions are content-based regulations not narrowly tailored to serve a compelling Government interest, and that the prohibitions are unconstitutionally vague. The Government not only disagrees with these specific contentions, but also requests that the Court exclude youthful-adult and virtual-child pornography from the protection of the First Amendment.

I agree with the Court's decision not to grant this request. Because the Government may already prohibit obscenity without violating the First Amendment, see *Miller* v. *California*, 413 U. S. 15, 23 (1973), what the Government asks this Court to rule is that it may also prohibit youthful-adult and virtual-adult pornography that is merely indecent without violating that Amendment. Although such pornography looks like the material at issue in *New York* v. *Ferber*, 458 U. S. 747 (1982), no children are harmed in the process of creating such pornography. *Id.,* at 759. Therefore, *Ferber* does not support the Government's ban on youthful-adult and virtual-child pornography. See *ante*, at 10–13. The Government argues that, even if the production of such pornography does not directly harm children, this material aids and abets child abuse. See *ante,* at 13–16. The Court correctly concludes that the causal connection between pornographic images that "appear" to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech. See *ante,* at 12.

I also agree with the Court's decision to strike down the CPPA's ban on material presented in a manner that "conveys the impression" that it contains pornographic depictions of actual children ("actual-child pornography"). 18 U. S. C. §2256(8)(D). The Government fails to explain how this ban serves any compelling state interest. Any speech covered by §2256(8)(D) that is obscene, actual-child por-

nography, or otherwise indecent is prohibited by other federal statutes. See §§1460–1466 (obscenity), 2256(8)(A), (B) (actual-child pornography), 2256(8)(B) (youthful-adult and virtual-child pornography). The Court concludes that §2256(8)(D) is overbroad, but its reasoning also persuades me that the provision is not narrowly tailored. See *ante*, at 19–20. The provision therefore fails strict scrutiny. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000).

Finally, I agree with Court that that the CPPA's ban on youthful-adult pornography is overbroad. The Court provides several examples of movies that, although possessing serious literary, artistic or political value and employing only adult actors to perform simulated sexual conduct, fall under the CPPA's proscription on images that "appea[r] to be . . . of a minor engaging in sexually explicit conduct," 18 U. S. C. §2256(8)(B). See *ante*, at 9–10 (citing Romeo and Juliet, Traffic, and American Beauty). Individuals or businesses found to possess just three such films have no defense to criminal liability under the CPPA. §2252A(d).

II

I disagree with the Court, however, that the CPPA's prohibition of virtual-child pornography is overbroad. Before I reach that issue, there are two preliminary questions: whether the ban on virtual-child pornography fails strict scrutiny and whether that ban is unconstitutionally vague. I would answer both in the negative.

The Court has long recognized that the Government has a compelling interest in protecting our Nation's children. See *Ferber*, *supra*, at 756–757 (citing cases). This interest is promoted by efforts directed against sexual offenders and actual-child pornography. These efforts, in turn, are supported by the CPPA's ban on virtual-child pornography. Such images whet the appetites of child molesters,

§121, 110 Stat. 3009–26, Congressional Findings (4), (10)(B), in notes following 18 U. S. C. §2251, who may use the images to seduce young children, *id.*, finding (3). Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual-child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated. *Id.*, finding (6)(A). Respondents may be correct that no defendant has successfully employed this tactic. See, *e.g., United States* v. *Fox*, 248 F. 3d 394 (CA5 2001); *United States* v. *Vig*, 167 F. 3d 443 (CA8 1999); *United States* v. *Kimbrough*, 69 F. 3d 723 (CA5 1995); *United States* v. *Coleman*, 54 M. J. 869 (A. Ct. Crim. App. 2001). But, given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable. Computer-generated images lodged with the Court by *Amici Curiae* National Law Center for Children and Families et al. bear a remarkable likeness to actual human beings. Anyone who has seen, for example, the film Final Fantasy: The Spirits Within (H. Sakaguchi and M. Sakakibara directors, 2001) can understand the Government's concern. Moreover, this Court's cases do not require Congress to wait for harm to occur before it can legislate against it. See *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 212 (1997).

Respondents argue that, even if the Government has a compelling interest to justify banning virtual-child pornography, the "appears to be . . . of a minor" language is not narrowly tailored to serve that interest. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). They assert that the CPPA would capture even cartoon-sketches or statues of children that were sexually suggestive. Such images surely could not be used, for instance, to seduce children. I agree. A better interpretation of "appears to be . . . of" is "virtually indistinguishable from"—an interpretation that would not cover the exam-

ples respondents provide. Not only does the text of the statute comfortably bear this narrowing interpretation, the interpretation comports with the language that Congress repeatedly used in its findings of fact. See, *e.g.,* Congressional Finding (8) following 18 U. S. C. §2251 (discussing how "visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children" may whet the appetites of child molesters). See also *id.,* finding (5), (12). Finally, to the extent that the phrase "appears to be . . . of" is ambiguous, the narrowing interpretation avoids constitutional problems such as overbreadth and lack of narrow tailoring. See *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

Reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual-child pornography is narrowly tailored, but would also assuage any fears that the "appears to be . . . of a minor" language is vague. The narrow reading greatly limits any risks from "discriminatory enforcement." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 872 (1997). Respondents maintain that the "virtually indistinguishable from" language is also vague because it begs the question: from whose perspective? This problem is exaggerated. This Court has never required "mathematical certainty" or "meticulous specificity" from the language of a statute. *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972).

The Court concludes that the CPPA's ban on virtual-child pornography is overbroad. The basis for this holding is unclear. Although a content-based regulation may serve a compelling state interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific

value or that does not threaten the harms sought to be combated by the Government. If so, litigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. See *Reno*, *supra*, at 896 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (citing *Broadrick*, 413 U. S., at 615). Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer-generated and contain images that "appea[r] to be . . . of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.

III

Although in my view the CPPA's ban on youthful-adult pornography appears to violate the First Amendment, the ban on virtual-child pornography does not. It is true that both bans are authorized by the same text: The statute's definition of child pornography to include depictions that "appea[r] to be" of children in sexually explicit poses. 18 U. S. C. §2256(8)(B). Invalidating a statute due to overbreadth, however, is an extreme remedy, one that should be employed "sparingly and only as a last resort." *Broadrick*, *supra*, at 613. We have observed that "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily." *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484–485 (1989).

Heeding this caution, I would strike the "appears to be" provision only insofar as it is applied to the subset of cases involving youthful-adult pornography. This approach is similar to that taken in *United States* v. *Grace*, 461 U. S. 171 (1983), which considered the constitutionality of a federal statute that makes it unlawful to "parade, stand,

or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U. S. C. §13k (1994 ed.). The term "Supreme Court . . . grounds" technically includes the sidewalks surrounding the Court, but because sidewalks have traditionally been considered a public forum, the Court held the statute unconstitutional only when applied to sidewalks.

Although 18 U. S. C. §2256(8)(B) does not distinguish between youthful-adult and virtual-child pornography, the CPPA elsewhere draws a line between these two classes of speech. The statute provides an affirmative defense for those who produce, distribute, or receive pornographic images of individuals who are actually adults, §2252A(c), but not for those with pornographic images that are wholly computer generated. This is not surprising given that the legislative findings enacted by Congress contain no mention of youthful-adult pornography. Those findings focus explicitly only on actual-child pornography and virtual-child pornography. See, *e.g.,* finding (9) following §2251 ("[T]he danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct"). Drawing a line around, and striking just, the CPPA's ban on youthful-child pornography not only is consistent with Congress' understanding of the categories of speech encompassed by §2256(8)(B), but also preserves the CPPA's prohibition of the material that Congress found most dangerous to children.

In sum, I would strike down the CPPA's ban on material that "conveys the impression" that it contains actual-child

pornography, but uphold the ban on pornographic depictions that "appea[r] to be" of minors so long as it is not applied to youthful-adult pornography.