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Protecting Our Children or Upholding Free Speech: Does One Exclude the Other? *United States v. Williams*

I. INTRODUCTION

The advent of new technology has presented new and difficult challenges for a Congress intent on curbing the growing national problems posed by the child pornography industry. The difficulty lies in the seeming inability to construct a law that effectively minimizes the societal harms caused by child pornography without violating First Amendment rights guaranteed by the Constitution.¹ Every statute implemented to prevent the production and possession of child pornography has faced constitutional challenges, and Congress's most recent attempt, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act),² is no different. In *United States v. Williams*,³ the most recent case evaluating the constitutionality of the PROTECT Act, the United States Supreme

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1. U.S. CONST. amend. I.
 2. 18 U.S.C. § 2252A (2006).
 3. 128 S. Ct. 1830 (2008).

Court held that the Act's pandering provision⁴ was constitutional.⁵ According to the Court, the PROTECT Act's pandering provision was neither overbroad nor impermissibly vague.⁶ For the time being, this decision identifies the PROTECT Act as a valuable tool for prosecutors charged with combating child pornography. However, like the child pornography statutes that came before it, the PROTECT Act will continue to face a bevy of constitutional challenges.

II. FACTUAL BACKGROUND

On April 26, 2004, Michael Williams signed into a public chat room under a sexually explicit screen name. Also in the chat room was a secret service agent, signed in under the screen name "Lisa n Miami."⁷ After Williams posted a message that read "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam," the agent conversed with Williams and later exchanged nonpornographic pictures of children.⁸ Williams also claimed to have pictures of men molesting his four-year-old daughter. After growing suspicious that "Lisa n Miami" was an undercover agent, Williams asked the agent for additional pictures. When the agent did not comply, Williams posted a public message with an attached hyperlink. The hyperlink contained nude images of actual children between the ages of five and fifteen engaging in sexually explicit conduct. During the execution of a search warrant on Williams's home, agents confiscated two hard drives containing over twenty images of actual minors engaged in sexually explicit conduct.⁹

Williams was charged with one count of pandering child pornography and one count of possession of child pornography under the newly enacted Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).¹⁰ Williams pleaded guilty to both counts, reserving the right to challenge the constitutionality of the pandering conviction.¹¹

The United States District Court for the Southern District of Florida rejected Williams's challenge and sentenced him to sixty months imprisonment on each count. Williams then appealed to the United

4. 18 U.S.C. § 2252A(a)(3)(B).

5. *Williams*, 128 S. Ct. at 1846-47.

6. *Id.*

7. *United States v. Williams*, 128 S. Ct. 1830, 1837 (2008).

8. *Id.*

9. *Id.* at 1837-38.

10. 18 U.S.C. §§ 2252A (a)(3)(B), (a)(5)(B) (2006).

11. *Williams*, 128 S. Ct. at 1838.

States Court of Appeals for the Eleventh Circuit, again asserting that his conviction for promotion of child pornography under the PROTECT Act was facially unconstitutional. The Eleventh Circuit reversed Williams's conviction for pandering, holding that the statute was both overbroad and impermissibly vague.¹²

As a result of the disagreement among the lower courts, the United States Supreme Court granted certiorari and reversed the Eleventh Circuit's decision, holding that the PROTECT Act was neither overbroad under the First Amendment¹³ nor impermissibly vague under the Due Process Clause of the Fifth Amendment.¹⁴

III. LEGAL BACKGROUND

In 1977 Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977 (1977 Act)¹⁵ in response to growing concerns about the abuse and exploitation of children resulting from the use of children in the production of sexually explicit material. The 1977 Act was the first statute prohibiting child pornography and was meant to curb this growing national problem by prohibiting the production, receipt, possession, transmission, and sale of materials involving minors engaging in sexually explicit conduct.¹⁶ However, the 1977 Act did not have the far-reaching effect that Congress intended. Congress amended the 1977 Act with the Child Protection Act of 1984¹⁷ in response to the United States Supreme Court's decision in *New York v. Ferber*.¹⁸

In *Ferber* a bookstore owner was convicted under a New York statute¹⁹ that prohibited "persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances."²⁰ The statute under which the bookstore owner was convicted did not require proof that the material was obscene. The New York Court of Appeals reversed, holding that the New York statute violated the First Amendment.²¹ Although the court noted that the State's "legitimate interest in protecting the welfare of minors . . . may transcend First Amendment concerns," it nevertheless

12. *Id.*

13. U.S. CONST. amend. I.

14. U.S. CONST. amend. V; *Williams*, 128 S. Ct. at 1846.

15. Pub. L. No. 95-225, 92 Stat. 7 (1978).

16. *Id.*

17. Pub. L. No. 98-292, 98 Stat. 204 (1984).

18. 458 U.S. 747 (1982); See H.R. REP. NO. 98-536, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 492-93.

19. N.Y. PENAL LAW § 263.15 (McKinney 1980).

20. *Ferber*, 458 U.S. at 749, 751-52.

21. *Id.* at 752; U.S. CONST. amend. I.

held the statute unconstitutional as both underinclusive and overbroad.²²

The United States Supreme Court reversed the court of appeals decision, upholding the New York statute as constitutional and holding that child pornography is not entitled to First Amendment protection.²³ The Court held that the statute prohibiting the production of material showing children engaged in sexual conduct was constitutional regardless of whether the material was obscene.²⁴ The Court stressed the importance of preventing the sexual exploitation and abuse of children, noting that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child” and to society as a whole.²⁵ Essentially, the Court held that the state’s interest in protecting children outweighed the need for First Amendment protection of child pornography.²⁶

In response to *Ferber*, under the 1984 amendments, the material in question no longer had to meet the legal requirements of “obscenity.”²⁷ Instead, the material need only involve a minor engaged in sexually explicit conduct in order to be proscribable.²⁸

The advancement of technology and the increasing popularity of personal computers and the internet posed new and difficult problems for a Congress striving to prevent the dissemination of child pornography. With these concerns in mind, Congress in 1988 again amended the 1977 Act, further prohibiting the distribution of child pornography through the use of computers.²⁹

Congress also passed the Child Pornography Prevention Act of 1996 (CPPA)³⁰ to deal with new technology, criminalizing the possession of computer disks with three or more images of child pornography.³¹ Most importantly, the CPPA broadened the range of proscribable material to include “any visual depiction, including any photograph, film, video,

22. *Ferber*, 458 U.S. at 752 (quoting *People v. Ferber*, 422 N.E.2d 523, 525-26 (1981)).

23. *Id.* at 774.

24. *Id.* at 760-61; *see also* *Miller v. California*, 413 U.S. 15, 21 (1973) (holding that a work is obscene if, taken as a whole, it appeals to the prurient interest of the average person, is patently offensive, and contains no serious literary, artistic, political, or scientific value).

25. *Ferber*, 458 U.S. at 758.

26. *See id.*

27. H.R. REP. NO. 98-536, at 5 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 496.

28. *Id.*

29. *See* Pub. L. No. 100-690, § 7511(b), 102 Stat. 4485 (1988).

30. Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996) (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256, 42 U.S.C. § 2000aa (2006)).

31. *Id.* § 121(2)(4) (codified as amended at 18 U.S.C. § 2252A(a)(5)(A)).

picture, or computer or computer-generated image or picture” that either “is, or appears to be, of a minor engaging in sexually explicit conduct”³² or “conveys the impression” that it depicts “a minor engaging in sexually explicit conduct.”³³ The CPPA expanded the definition of child pornography in response to

new photographic and computer imaging technologies [that] make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.³⁴

In effect, these computer imaging technologies make it possible to create realistic images of children without actually using any real children in the production process. This material is often referred to as “virtual child pornography.”³⁵

In 2002 the constitutionality of the CPPA’s ban on virtual child pornography³⁶ was challenged in *Ashcroft v. Free Speech Coalition*.³⁷ In *Free Speech Coalition*, an adult-entertainment trade association—fearing that the CPPA could restrict its activities—brought suit, alleging that the ban on virtual child pornography was unconstitutionally overbroad.³⁸ The Court held that the new provisions in the CPPA were unconstitutional.³⁹ In reaching this decision, the Court noted that the definition of child pornography, which included virtual or computer-generated images of children engaged in sexually explicit conduct, was overbroad because it prohibited speech that was neither obscene—and therefore not a crime—nor created by the exploitation of actual children.⁴⁰ Thus, according to the Court, under this statute, an image produced without any minor children is prohibited if it “appear[s] to depict” a minor engaged in sexual activity.⁴¹ As a result, the CPPA can be read to prohibit speech that has “serious literary, artistic, political, or

32. 18 U.S.C. § 2256(8)(B).

33. *Id.* (codified as amended at 18 U.S.C. §§ 2256(8)(B), (D)).

34. *Id.* § 121(1)(5).

35. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002).

36. 18 U.S.C. § 2556(8)(D).

37. 535 U.S. 234 (2002).

38. *Id.* at 243.

39. *Id.* at 258.

40. *Id.* at 246, 250.

41. *Id.* at 246.

scientific value,” even though no children were involved or harmed in the production process.⁴²

Furthermore, the CPPA defined child pornography as materials that are promoted “convey[ing] the impression” that the material contains sexually explicit depictions of minors, even if there are no such scenes.⁴³ Consequently, the statute prohibits the possession of material that is described or pandered as child pornography by someone earlier in the distribution chain even if no minors were actually used in the production process.⁴⁴ The Court in *Free Speech Coalition* held that because the “First Amendment requires a more precise restriction,” the ban on virtual child pornography was overbroad and violated the First Amendment.⁴⁵

In response to the decision in *Free Speech Coalition*, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).⁴⁶ The relevant portions of the pandering provision of the PROTECT Act are as follows:

Any person who . . . knowingly . . . advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains an obscene visual depiction of a minor engaging in sexually explicit conduct; or a visual depiction of an actual minor engaging in sexually explicit conduct . . . shall be punished.⁴⁷

The statute defines sexually explicit conduct as “actual 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.”⁴⁸

With the enactment of the PROTECT Act, Congress addressed the Court’s primary objection to the CPPA in *Free Speech Coalition*. The revised pandering provision corrects the problem of penalizing those in possession of material that was described or marketed as child pornography by someone earlier in the distribution chain by shifting the focus

42. *Id.*

43. Pub. L. No. 104-208, § 121(2)(4).

44. *Free Speech Coalition*, 535 U.S. at 258.

45. *Id.*

46. Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, 42, 47 U.S.C.).

47. 18 U.S.C. § 2252A(a)(3)(B)(i)-(ii).

48. *Id.* § 2256(2)(A)(i)-(v) (2006).

from the regulation of the underlying material to the regulation of the speech related to the material.⁴⁹ The enactment of the PROTECT Act represents the current state of child pornography law as it exists today.

IV. THE COURT'S RATIONALE

A. Majority's Statutory Analysis

Writing for the majority in a 7-2 decision, Justice Scalia began by conducting an in-depth analysis of the challenged statute because, as he noted, to determine whether a statute is overbroad, one must first determine what the statute actually covers.⁵⁰ Generally, the pandering provision of the PROTECT Act “prohibits offers to provide and requests to obtain child pornography”; there is no need to prove that actual child pornography exists.⁵¹ The majority emphasized this distinguishing feature of the statute from those used in both *New York v. Ferber*⁵² and *Ashcroft v. Free Speech Coalition*,⁵³ holding that the PROTECT Act proscribes the speech that introduces the child pornography into the distribution network rather than the actual material itself.⁵⁴

Before considering whether the PROTECT Act was overbroad, the Court discussed a number of important features of the statute.⁵⁵ First, the Court determined that the scienter requirement, “knowingly,” applies to every element of the challenged statute, so that one must consciously perpetrate each element of the statute in order to violate the statute.⁵⁶ Unlike many statutes where the grammar or structure of the statute allows some parts to be read apart from others, here, “knowingly” clearly applies to the entire provision.⁵⁷

Second, the Court established that the verbs used in the pandering provision—“advertises, promotes, presents, distributes, or solicits”—should be construed in a transactional nature so that the statute is read to prohibit speech that “accompanies or seeks to induce a transfer of child pornography . . . from one person to another.”⁵⁸ Furthermore,

49. *United States v. Williams (Williams I)*, 444 F.3d 1286, 1295 (11th Cir. 2006).

50. *United States v. Williams (Williams II)*, 128 S. Ct. 1830, 1838 (2008). Justice Scalia's majority opinion was joined by Chief Justice Roberts and Justices Stevens, Kennedy, Thomas, Breyer, and Alito. *Id.* at 1835.

51. *Id.* at 1838.

52. 458 U.S. 747 (1982).

53. 535 U.S. 234 (2002).

54. *Williams II*, 128 S. Ct. at 1838-39.

55. *See id.* at 1839-41.

56. *Id.* at 1839.

57. *Id.*

58. *Id.*

using the canon of *noscitur a sociis*, which states that words placed together in a statute should be read in the context of the other words with which they are associated, the Court reaffirmed its decision that the string of operative verbs related to transactions, though not necessarily commercial transactions.⁵⁹ Therefore, the majority established that for speech to violate the statute, it must merely “accompany or seek to induce the transfer of child pornography from one person to another.”⁶⁰

Third, the Court determined that the phrase “in a manner that reflects the belief” contains both subjective and objective elements.⁶¹ Under the subjective component, the defendant must have actually held the belief that the material was child pornography.⁶² “Thus, a misdescription that leads the listener to believe the defendant is offering child pornography, when the defendant in fact does not believe the material is child pornography, does not violate this prong of the statute.”⁶³ Under the objective component, the phrase requires the defendant to act or speak in a way that would lead a reasonable person to conclude that the defendant believes the material is child pornography.⁶⁴

Fourth, the Court determined that the phrase “in a manner . . . that is intended to cause another to believe” is purely subjective: “The defendant must ‘intend’ that the listener believe the material to be child pornography, and must select a manner of ‘advertising, promoting, presenting, distributing, or soliciting’ the material that *he* thinks will engender that belief—whether or not a reasonable person would think the same.”⁶⁵

Last, the Court noted that Congress, most likely on purpose, used a definition of “sexually explicit conduct” in the PROTECT Act that is strikingly similar to the definition of “sexual conduct” that the Court upheld in an overbreadth challenge in *Ferber*.⁶⁶ Furthermore, under the pandering provision’s requirement of a “visual depiction of an actual minor,” simulated sexual intercourse must involve actual children in order to be proscribable.⁶⁷ The Court noted that this change precluded virtual child pornography from being swept into the definition of

59. *Id.* at 1839-40.

60. *Id.* at 1840.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1840-41.

67. *Id.* at 1841; 18 U.S.C. § 2252A(a)(3)(B)(ii) (2006).

“simulated sexual intercourse,” as was the case in *Free Speech Coalition*.⁶⁸

B. Majority’s Overbreadth Analysis

Justice Scalia next turned to Williams’s overbreadth challenge.⁶⁹ He began this analysis by outlining the general process for analyzing a statute under the First Amendment’s overbreadth doctrine: “a statute is facially invalid if it prohibits a substantial amount of protected speech.”⁷⁰ The purpose of the doctrine, the majority noted, is to achieve an appropriate balance between competing social interests:

On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects.⁷¹

As a result, the Court stated that invalidation for overbreadth is a very powerful tool that should be used only when deemed absolutely necessary.⁷²

The majority next noted that offers to engage in illegal transactions, as a general category, are excluded from First Amendment protection.⁷³ However, an inconsistency arose between the decisions of the United States Court of Appeals for the Eleventh Circuit and the Supreme Court because the Eleventh Circuit held that the exclusion only applied to commercial offers to engage in illegal transactions.⁷⁴ The Court addressed the Eleventh Circuit’s mistaken rationale for the exclusion: “[The exclusion] is based not on the less privileged First Amendment status of commercial speech, but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection.”⁷⁵ According to the majority, whether an offer to provide or a request to obtain unlawful

68. *Williams II*, 128 S. Ct. at 1841.

69. *See id.* at 1838.

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.* at 1841.

74. *Id.*

75. *Id.* (internal citation omitted) (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 387-89 (1973)).

material is part of a commercial transaction is of no importance because neither are deserving of First Amendment protection.⁷⁶

In addition, the Court stressed that there is an important difference between an offer to engage in illegal activity and the advocacy of illegal activity.⁷⁷ In doing so, the Court distinguished the PROTECT Act from the Child Pornography Protection Act of 1996 (CPPA)⁷⁸ at issue in *Free Speech Coalition*, noting that the CPPA went so far as to prohibit the possession of material that could not constitutionally be prohibited.⁷⁹ The PROTECT Act, rather than prohibiting the advocacy of child pornography, only prohibits offers to obtain child pornography.⁸⁰ Thus, on the issue of overbreadth, the Court held that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”⁸¹

The majority then explained its decision by addressing the Eleventh Circuit’s objections to the PROTECT Act.⁸² First, the Court discussed the Eleventh Circuit’s objection that the “reflects the belief” prong of the statute could apply to someone who mistakenly believes that virtual child pornography is, in fact, real pornography.⁸³ The Court disagreed, stating that the pandering provision in the PROTECT Act is a type of inchoate crime, such as attempt or conspiracy, and “[a]ll courts are in agreement that . . . “factual impossibility” is no defense to a charge of attempt.”⁸⁴ Therefore, the fact that an offeror is mistaken about the facts surrounding his or her offer does not afford the offeror First Amendment protection.⁸⁵

Second, in interpreting the phrase “reflects the belief,” the Eleventh Circuit also reasoned that the statute could apply to someone who holds the subjective belief that a harmless picture of a child is sexually explicit.⁸⁶ The Court, however, disagreed, noting that “[t]he defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the

76. *Id.* at 1842.

77. *Id.*

78. Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996) (codified as amended at 18 U.S.C. §§ 2241, 2251(d), 2252, 2252A, 2256, 42 U.S.C. § 2000aa (2006)).

79. *Williams II*, 128 S. Ct. at 1842.

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.* at 1843 (quoting WAYNE LAFAVE ET AL., *SUBSTANTIVE CRIMINAL LAW* § 6.3(a)(2) (2d ed. 2003)).

85. *Id.*

86. *Id.*

statutory definition.”⁸⁷ The Court explained that if the material at issue is harmless and does not meet the statutory definition of sexually explicit conduct, the statute will not be applied.⁸⁸

As for the remaining objections raised by Williams and others, the Court explained that they “demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals.”⁸⁹ For example, at oral argument it was suggested that the statute could apply to documentary footage of tragic situations occurring in foreign countries, such as soldiers raping young children.⁹⁰ However, the Supreme Court held that this one exception would not render the statute “substantially” overbroad, noting that the “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.”⁹¹ Because the PROTECT Act does not give rise to any constitutional problems in the vast majority of its applications, the majority held that the PROTECT Act is not overbroad.⁹²

C. Majority’s Vagueness Analysis

Next, the majority addressed the Eleventh Circuit’s holding that the pandering provision of the PROTECT Act was void for vagueness.⁹³ The Court outlined the general rule for analyzing a statute for vagueness: a statute is vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁹⁴ However, the Court noted that “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”⁹⁵

The Eleventh Circuit provided several hypotheticals, arguing that because numerous “close cases” can be imagined, the statute should be rendered vague.⁹⁶ The Court addressed this rationale by stating that numerous close cases can be imagined under any statute.⁹⁷ Therefore,

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1844.

91. *Id.* (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)).

92. *Id.*

93. *See id.* at 1845.

94. *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

95. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

96. *Id.* at 1845-46.

97. *Id.* at 1846.

“[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”⁹⁸ The majority cited *Coates v. City of Cincinnati*⁹⁹ as an example of a case involving a vague statute.¹⁰⁰ In *Coates* the Court struck down a criminal statute that tied culpability to a defendant’s “annoying” conduct.¹⁰¹ The Court held that the statute was vague because it did not provide a standard of conduct to conform by and would cause “men of common intelligence [to] guess at its meaning.”¹⁰²

The majority here held that there is no difficulty in determining what fact must be proven in order to constitute a violation of the PROTECT Act: the defendant must either believe that the material is child pornography—and make a statement to that effect—or the defendant must communicate in a manner that is intended to cause another to believe that the material is child pornography.¹⁰³ Although it may sometimes be difficult to determine an individual’s state of mind, the majority pointed out that “courts and juries every day pass upon knowledge, belief and intent—the state of men’s minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.”¹⁰⁴ Thus, the Court held that the PROTECT Act was not impermissibly vague and therefore reversed the opinion of the Eleventh Circuit.¹⁰⁵

D. Justice Stevens’s Concurring Opinion

Justice Stevens’s concurring opinion, which was joined by Justice Breyer, reached the same conclusion as the majority, specifically that the PROTECT Act is not facially unconstitutional.¹⁰⁶ However, Justice Stevens arrived at this conclusion by applying a different rationale.¹⁰⁷ He believed that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”¹⁰⁸ In particular, Justice Stevens looked beyond the text of the statute to determine the

98. *Id.*

99. 402 U.S. 611 (1971).

100. *Williams II*, 128 S. Ct. at 1846.

101. *See Coates*, 402 U.S. at 611-16.

102. *Id.* at 614 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

103. *Williams II*, 128 S. Ct. at 1846.

104. *Id.* (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 411 (1950)).

105. *Id.* at 1847.

106. *Id.* (Stevens, J., concurring).

107. *Id.*

108. *Id.* (misquoted in original) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

intent of the statute's drafters.¹⁰⁹ After an examination of the Congressional Record surrounding the statute's enactment, Justice Stevens concluded that the statute should be read to "contain an element of lasciviousness."¹¹⁰ Therefore, to violate the statute, the material must be promoted with the purpose of inciting sexual arousal.¹¹¹ Accordingly, Justice Stevens concluded that the pandering provision of the PROTECT Act is not facially unconstitutional.¹¹²

E. Justice Souter's Dissent

Justice Souter's dissent, which was joined by Justice Ginsburg, agreed with the majority that the PROTECT Act may constitutionally prohibit child pornography that is produced using an actual child.¹¹³ However, Justice Souter believed that the PROTECT Act goes too far in criminalizing transactions dealing with sexually explicit material of what appears to be, but is not, an actual child.¹¹⁴ The dissent accused the majority of effectively overruling both *Ferber* and *Free Speech Coalition*, under which Congress could not prohibit such proposals.¹¹⁵ As a result, the dissent noted, the majority approved the protection of the material pandered while allowing the prosecution of the pandering of that same material.¹¹⁶ While noting that child pornography poses a serious threat to all of society, the dissent stated that the "[g]overnment does not get a free pass whenever it claims a worthy objective for curtailing speech."¹¹⁷ Therefore, Justice Souter concluded that the PROTECT Act was unconstitutionally overbroad on the authority of *Ferber* and *Free Speech Coalition*.¹¹⁸

V. IMPLICATIONS

The main implication emanating from *United States v. Williams*¹¹⁹ is the immense power it provides to prosecutors intent on minimizing the harms caused by the child pornography industry. By upholding the constitutionality of the PROTECT Act, the Court has eliminated the

109. *See id.*

110. *Id.* at 1848.

111. *Id.* at 1847.

112. *Id.* at 1848.

113. *Id.* (Souter, J., dissenting).

114. *Id.*

115. *Id.* at 1854.

116. *Id.* at 1849.

117. *Id.* at 1856.

118. *Id.* at 1858.

119. 128 S. Ct. 1830 (2008).

requirement that to be proscribable, a real child must have been used in the production process. Therefore, this construction of the statute aids prosecutions under the Act by eliminating the most effective defense available to those facing prosecution: that no real child was harmed in the process.

However, as the dissent noted, by eliminating the no real-child requirement, the majority decision has silently overruled both *New York v. Ferber*¹²⁰ and *Ashcroft v. Free Speech Coalition*.¹²¹ Under *Ferber* and *Free Speech Coalition*, the Court declined to criminalize either the possession of, or a transaction involving sexually explicit material of what appears to be, but is not, an actual child.¹²² Because these depictions did not contain actual children, under prior precedent they were, in fact, a class of protected speech. However, in *Williams*, the Court eliminated the real-child requirement and, in doing so, has likely suppressed a category of speech that was previously protected under “recent and carefully considered First Amendment precedents.”¹²³

In balancing the safety of our nation’s children against upholding free speech, it seems as though the majority focused the brunt of its attention “on the object of the most significant harm—the child.”¹²⁴ While the Court’s concern for children is commendable and perhaps the correct decision, the possible deleterious effect on free speech cannot be ignored. As Joan E. Bertin, the executive director of the National Coalition Against Censorship, has stated, “the decision fail[s] to offer protection against ‘over-zealous prosecutors.’”¹²⁵ As a result, along with much praise, the PROTECT Act should be expected to garner future criticism and will perhaps even find its way back to the Supreme Court in the near future.

The Court’s decision in *Williams* also represents the most recent binding authority in the area of First Amendment law. In just six months since the Court handed down its decision, the majority opinion has been cited as precedent in more than fifty different cases throughout the country. For example, in *United States v. Stevens*,¹²⁶ the United States Court of Appeals for the Third Circuit examined the case in some

120. 458 U.S. 747 (1982).

121. 535 U.S. 234 (2002); *Williams*, 128 S. Ct. at 1854 (Souter, J., dissenting).

122. See *Williams*, 128 S. Ct. at 1854.

123. *Id.*

124. Stephen T. Fairchild, Note, *Protecting the Least of These: A New Approach to Child Pornography Pandering Provisions*, 57 DUKE L.J. 163, 197 (2007).

125. Linda Greenhouse, *Supreme Court Upholds Child Pornography Law*, N.Y. TIMES, May 20, 2008, available at http://www.nytimes.com/2008/05/20/washington/20scotus.html?_r=1.

126. 533 F.3d 218 (3d Cir. 2008).

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detail in considering the constitutionality of a statute prohibiting depictions of animal cruelty.¹²⁷ While the majority opinion in *Stevens* distinguished itself from *Williams* to avoid recognizing a new category of speech that is unprotected by the First Amendment,¹²⁸ the dissent relied heavily on *Williams*, concluding that the animal cruelty statute was neither substantially overbroad nor unconstitutionally vague.¹²⁹

TAYLOR MCNEILL

127. *See id.* at 220 n.1.

128. *See id.*

129. *Id.* at 247-50 (Cowen, J., dissenting).