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

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

JUSTICE KENNEDY delivered the opinion of the Court.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), *18 U.S.C. § 2251 et seq.*, abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who **[*240]** look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following *18 U.S.C. § 2251*.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)*, which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id. at 758*. As a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973)*. *Ferber* recognized that "the *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." *458 U.S. at 761*.

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The **[***415]** CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. *18 U.S.C. §§ 1460-1466*. Like the law in *Ferber*, the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.

I

]Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors. *18 U.S.C. § 2252 (1994 ed.)*. The CPPA retains that prohibition at *18 U.S.C. § 2256(8)(A)* and adds three other prohibited categories of speech, of which the first, *§ 2256(8)(B)*, and the third, *§ 2256(8)(D)*, are at issue in this case. *Section 2256(8)(B)* prohibits "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." The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated . . . sexual intercourse." *§ 2256(2)*. . . ..

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. . . .

II

. . . As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973)*, the Government must prove that the work, 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. *Id. at 24*. The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. **[**1400]** The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. 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 prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes 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 **[***419]** in art and literature throughout the ages. **[*247]** Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. . . .

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. See *New York v. Ferber, 458 U.S. at 761*. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. *Id. at 761, n. 12*; see also *id. at 775* (O'CONNOR, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas"). The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation." *Id. at 761, n. 12*.

Ferber 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. *Id. at 759*. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication

of the speech would cause new injury to the child's reputation and emotional well-being. 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. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material **[*250]** by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id. at 760*. Under either rationale, the speech **[***421]** 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 itself is 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, as were the materials in *Ferber. 458 U.S. at 759*.While the Government asserts that the images can lead to actual instances of child abuse, see *infra*, at 13-16, 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 says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. See *458 U.S. at 762* ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"). This argument, however, suffers from two flaws. First, *Ferber*'s judgment **[*251]** 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 protection of the *First Amendment*. See *id. at 764-765* ("The distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains *First Amendment* protection").

The second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court 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: "If it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id. at 763*. *Ferber,* then, not only referred to the **[***422]** distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well. . . .

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to **[***423]** engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia, 394 U.S. 557, 566, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). First Amendment* freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. . . .

The Government next argues that its objective of eliminating the market for pornography produced using real children **[**1404]** necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. See *Osborne, 495 U.S. at 109-110*. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. *E.g.*, *Bartnicki, supra, at 529* (market deterrence would not justify law prohibiting a radio commentator from distributing speech that had **[***424]** been unlawfully intercepted). We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. **[*255]** The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the *First Amendment* upside down. . . .

V

For the reasons we have set forth, the prohibitions of *§§ 2256(8)(B)* and *2256(8)(D)* are overbroad and unconstitutional. Having reached this conclusion, we need not address respondents' further contention that the provisions are unconstitutional because of vague statutory language.

The judgment of the Court of Appeals is affirmed.