UNITED STATES
v.
MICHAEL WILLIAMS

___ U.S. ___, 128 S. Ct. 1830 (2008)

JUSTICE SCALIA delivered the opinion of the Court.

Section 2252A(a)(3)(B) of Title 18, United States Code, criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography. This case presents the question whether that statute is overbroad under the *First Amendment* or impermissibly vague under the *Due Process Clause of the Fifth Amendment*.

I

A

We have long held that obscene speech -- sexually explicit material that violates fundamental notions of decency -- is not protected by the *First Amendment*. See *Roth v. United States, 354 U.S. 476, 484-485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)*. But to protect explicit material that has social value, we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but nonobscene material. See *Miller v. California, 413 U.S. 15, 23-24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*; see also, *e.g., Jenkins v. Georgia, 418 U.S. 153, 161, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974)*.

Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography. See *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*; *Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)*; *New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)*. This consists of sexually explicit visual portrayals that feature children. We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the *First Amendment*. Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults..

The broad authority to proscribe child pornography is not, however, unlimited. Four Terms ago, we held facially overbroad two provisions of the federal Child Pornography Protection Act of 1996 (CPPA). *Free Speech Coalition, 535 U.S., at 258, 122 S. Ct. 1389, 152 L. Ed. 2d 403*. The first of these banned the possession and distribution of "'any visual depiction'" that "'is, or appears to be, of a minor engaging in sexually explicit conduct,'" even if it contained only youthful-looking adult actors or virtual images of children generated by a computer. *Id., at 239-241, 122 S. Ct. 1389, 152 L. Ed. 2d 403* (quoting *18 U.S.C. § 2256(8)(B)*). This was invalid, we explained, because the child-protection rationale for speech restriction does not apply to materials produced without children. See *535 U.S., at 249-251, 254, 122 S. Ct. 1389, 152 L. Ed. 2d 403*. The second provision at issue in *Free Speech Coalition* criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that. See *id., at 257, 122 S. Ct. 1389, 152 L. Ed. 2d 403* (citing *18 U.S.C. § 2256(8)(D)*). A person could thus face prosecution for possessing unobjectionable material that someone else had pandered. *535 U.S., at 258,*

122 S. Ct. 1389, 152 L. Ed. 2d 403. We held that this prohibition, which did "more than prohibit pandering," was also facially overbroad. *Ibid.*

After our decision in *Free Speech Coalition*, Congress went back to the drawing board and produced legislation with the unlikely title of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 117 Stat. 650. We shall refer to it as the Act. Section 503 of the Act amended *18 U.S.C. § 2252A* to add a new pandering and solicitation provision, relevant portions of which now read as follows:

> "(a) Any person who --
>
> "(3) knowingly --
>
> . . . . .
>
> "(B) 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 --
>
> "(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> "(ii)
>
> a visual depiction of an actual minor engaging in sexually explicit conduct,
>
> . . . . .
>
> "shall be punished as provided in subsection (b)." *§ 2252A(a)(3)(B) (2000 ed., Supp. V)*.

Section 2256(2)(A) defines "sexually explicit conduct" as

> "actual or simulated --
>
> "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> "(ii) bestiality;
>
> "(iii) masturbation;
>
> "(iv) sadistic or masochistic abuse; or
>
> "(v) lascivious exhibition of the genitals or pubic area of any person."

Violation of *§ 2252A(a)(3)(B)* incurs a minimum sentence of 5 years imprisonment and a maximum of 20 years. *18 U.S.C. § 2252A(b)(1)*.

The Act's express findings indicate that Congress was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children, as our decision in *Free Speech Coalition* required, would enable many child pornographers to evade conviction. See § 501(9), (10), 117 Stat. 677. The emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children -- even though "[t]here is no substantial evidence that

any of the child pornography images being trafficked today were made other than by the abuse of real children," virtual imaging being prohibitively expensive. § 501(5), (7), (8), (11), *id.*, at 676-678; see also Dept. of Justice, Office of Community Oriented Policing Services, R. Wortley & S. Smallbone, Child Pornography on the Internet 9 (May 2006), on line at hhtp://www.cops.usdoj.gov/mime/open.pdf?Item=1729 (hereinafter Child Pornography on the Internet) (as visited Jan. 7, 2008, and available in Clerk of Court's case file).

B

The following facts appear in the opinion of the Eleventh Circuit, *444 F.3d 1286, 1288 (2006)*. On April 26, 2004, respondent Michael Williams, using a sexually explicit screen name, signed in to a public Internet chat room. A Secret Service agent had also signed in to the chat room under the moniker "Lisa n Miami." The agent noticed that Williams had 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 struck up a conversation with Williams, leading to an electronic exchange of nonpornographic pictures of children. (The agent's picture was in fact a doctored photograph of an adult.) Soon thereafter, Williams messaged that he had photographs of men molesting his 4-year-old daughter. Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL -- SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic.

Williams was charged with one count of pandering child pornography under *§ 2252A(a)(3)(B)* and one count of possessing child pornography under *§ 2252A(a)(5)(B)*. He pleaded guilty to both counts but reserved the right to challenge the constitutionality of the pandering conviction. The District Court rejected his challenge, and sentenced him to concurrent 60-month sentences on the two counts. *No. 04-20299-CR-MIDDLEBROOKS, 2004 U.S. Dist. LEXIS 30603 (SD Fla., Aug. 20, 2004)*, App. B to Pet. for Cert. 46a-69a. The United States Court of Appeals for the Eleventh Circuit reversed the pandering conviction, holding that the statute was both overbroad and impermissibly vague. *444 F.3d at 1308-1309*.

We granted certiorari. *549 U.S. , 127 S. Ct. 1874, 167 L. Ed. 2d 363 (2007)*.

II

A

According to our *First Amendment* overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks, 539 U.S. 113, 119-120, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)*. 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. In order to maintain an appropriate balance, we have vigorously enforced the requirement

that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. . . .

The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. Generally speaking, *§ 2252A(a)(3)(B)* prohibits offers to provide and requests to obtain child pornography. The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in *Ferber*, *Osborne*, and *Free Speech Coalition*, which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute.

The statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct.

A number of features of the statute are important to our analysis:

First, the statute includes a scienter requirement. The first word of *§ 2252A(a)(3)* -- "knowingly" -- applies to both of the immediately following subdivisions, both the previously existing *§ 2252A(a)(3)(A)* and the new *§ 2252A(a) (3)(B)* at issue here. We think that the best reading of the term in context is that it applies to every element of the two provisions. . . .

Second, the statute's string of operative verbs -- "advertises, promotes, presents, distributes, or solicits" -- is reasonably read to have a transactional connotation. That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography -- via reproduction or physical delivery -- from one person to another. . . .

To be clear, our conclusion that all the words in this list relate to transactions is not to say that they relate to *commercial* transactions. One could certainly "distribute" child pornography without expecting payment in return. Indeed, in much Internet file sharing of child pornography each participant makes his files available for free to other participants -- as Williams did in this case. "Distribution may involve sophisticated pedophile rings or organized crime groups that operate for profit, but in many cases, is carried out by individual amateurs who seek no financial reward." Child Pornography on the Internet 9. To run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.

Third, the phrase "in a manner that reflects the belief" includes both subjective and objective components. "[A] manner that reflects the belief" is quite different from "a manner that would give one cause to believe." The first formulation suggests that the defendant must actually have held the subjective "belief" that the material or purported material was child pornography. 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. (It may, however, violate the "manner . . . that is intended to cause another to believe" prong if the misdescription is intentional.) There is also an objective component to the phrase "manner that reflects the belief." The statement or action must objectively manifest

a belief that the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.

Fourth, the other key phrase, "in a manner . . . that is intended to cause another to believe," contains only a subjective element: 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. (Of course in the ordinary case the proof of the defendant's intent will be the fact that, as an objective matter, the manner of "advertising, promoting, presenting, distributing, or soliciting" plainly sought to convey that the material was child pornography.)

Fifth, the definition of "sexually explicit conduct" (the visual depiction of which, engaged in by an actual minor, is covered by the Act's pandering and soliciting prohibition even when it is not obscene) is very similar to the definition of "sexual conduct" in the New York statute we upheld against an overbreadth challenge in *Ferber*. That defined "sexual conduct" as "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.'" *458 U.S., at 751, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. Congress used essentially the same constitutionally approved definition in the present Act. If anything, the fact that the defined term here is "sexually *explicit* conduct," rather than (as in *Ferber*) merely "sexual conduct," renders the definition more immune from facial constitutional attack. "[S]imulated sexual intercourse" (a phrase found in the *Ferber* definition as well) is even less susceptible here of application to the sorts of sex scenes found in R-rated movies -- which suggest that intercourse is taking place without explicitly depicting it, and without causing viewers to believe that the actors are actually engaging in intercourse. "Sexually *explicit* conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And "simulated" sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically, unlike in *Free Speech Coalition*, *§ 2252A(a)(3)(B)(ii)*'s requirement of a "visual depiction of an actual minor" makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse."

B

We now turn to whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity.

Offers to engage in illegal transactions are categorically excluded from *First Amendment* protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)*; *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 69 S. Ct. 684, 93 L. Ed. 834 (1949)*. One would think that this principle resolves the present case, since the statute criminalizes only offers to provide or requests to obtain contraband -- child obscenity and child pornography involving actual children, both of which are proscribed, see *18 U.S.C. § 1466A(a)*, *§ 2252A(a)(5)(B) (2000 ed., Supp. V)*, and the proscription of which is constitutional, see *Free Speech Coalition, 535 U.S., at 245-246, 256, 122 S. Ct. 1389, 152 L. Ed. 2d 403*. The Eleventh Circuit,

however, believed that the exclusion of *First Amendment* protection extended only to *commercial* offers to provide or receive contraband: "Because [the statute] is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny . . . ." *444 F.3d at 1298*.

This mistakes the rationale for the categorical exclusion. It is based not on the less privileged *First Amendment* status of commercial speech, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 562-563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)*, 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. Many long established criminal proscriptions -- such as laws against conspiracy, incitement, and solicitation -- criminalize speech (commercial or not) that is intended to induce or commence illegal activities. See, *e.g.*, ALI, Model Penal Code § 5.02(1) (1985) (solicitation to commit a crime); § 5.03(1)(a) (conspiracy to commit a crime). Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of *First Amendment* protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free. . . .

In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the *First Amendment*. Since the Eleventh Circuit erroneously concluded otherwise, it applied strict scrutiny to *§ 2252A(a)(3)(B)*, lodging three fatal objections. We address these objections because they could be recast as arguments that Congress has gone beyond the categorical exception.

The Eleventh Circuit believed it a constitutional difficulty that no child pornography need exist to trigger the statute. In its view, the fact that the statute could punish a "braggart, exaggerator, or outright liar" rendered it unconstitutional. *444 F.3d at 1298*. That seems to us a strange constitutional calculus. Although we have held that the government can ban *both* fraudulent offers, see, *e.g.*, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 611-612, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003)*, *and* offers to provide illegal products, the Eleventh Circuit would forbid the government from punishing *fraudulent offers to provide illegal products*. We see no logic in that position; if anything, such statements are doubly excluded from the *First Amendment*. . . .

The Eleventh Circuit found "particularly objectionable" the fact that the "reflects the belief" prong of the statute could ensnare a person who mistakenly believes that material is child pornography. *Ibid.* This objection has two conceptually distinct parts. First, the Eleventh Circuit thought that it would be unconstitutional to punish someone for mistakenly distributing virtual child pornography as real child pornography. We disagree. Offers to deal in illegal products or otherwise engage in illegal activity do not acquire *First Amendment* protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes -- acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes -- attempt and conspiracy, for example -- impossibility of completing the crime because the facts were not as the defendant believed is not a defense. "All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt." 2 W. LaFave, Substantive Criminal Law § 11.5(a)(2) (2d ed. 2003). (The author gives as an example "the intended sale of an illegal drug [that] actually involved a different substance." *Ibid.*) See also *United States v. Hamrick, 43 F.3d 877,*

885 (CA4 1995) (en banc) (holding that impossibility is no defense to attempt and citing the holdings of four other Circuits); ALI, Model Penal Code § 5.01, Comment (in attempt prosecutions "the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact").

Under this heading the Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is "lascivious." (*Clause (v)* of the definition of "sexually explicit conduct" is "lascivious exhibition of the genitals or pubic area of any person.") That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a "lascivious display of the genitals," the statute has no application.

Williams and *amici* raise other objections, which demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals. Williams argues, for example, that a person who offers nonpornographic photographs of young girls to a pedophile could be punished under the statute if the pedophile secretly expects that the pictures will contain child pornography. Brief for Respondent 19-20. That hypothetical does not implicate the statute, because the offeror does not hold the belief or intend the recipient to believe that the material is child pornography.

Amici contend that some advertisements for mainstream Hollywood movies that depict underage characters having sex violate the statute. Brief for Free Speech Coalition et al. as *Amici Curiae* 9-18. We think it implausible that a reputable distributor of Hollywood movies, such as Amazon.com, believes that one of these films contains *actual* children engaging in *actual or simulated* sex on camera; and even more implausible that Amazon.com would *intend* to make its customers believe such a thing. The average person understands that sex scenes in mainstream movies use nonchild actors, depict sexual activity in a way that would not rise to the explicit level necessary under the statute, or, in most cases, both.

There was raised at oral argument the question whether turning child pornography over to the police might not count as "present[ing]" the material. See Tr. of Oral Arg. 9-11. An interpretation of "presents" that would include turning material over to the authorities would of course be self-defeating in a statute that looks to the prosecution of people who deal in child pornography. And it would effectively nullify *§ 2252A(d)*, which provides an affirmative defense to the possession ban if a defendant promptly delivers child pornography to a law-enforcement agency. . . .

Finally, the dissent accuses us of silently overruling our prior decisions in *Ferber* and *Free Speech Coalition*. See *post*, at 12. According to the dissent, Congress has made an end-run around the *First Amendment's* protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves. But an offer to provide or request to receive virtual child pornography is not prohibited by the statute. A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children. It is simply not true that this means "a protected category of expression [will] inevitably be suppressed," *post*, at 13. Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. The dissent would require an exception from the statute's prohibition when, unbeknownst to one or both of the parties to the proposal, the completed transaction would not have been unlawful because it is

(we have said) protected by the *First Amendment*. We fail to see what *First Amendment* interest would be served by drawing a distinction between two defendants who attempt to acquire contraband, one of whom happens to be mistaken about the contraband nature of what he would acquire. Is Congress forbidden from punishing those who attempt to acquire what they believe to be national-security documents, but which are actually fakes? To ask is to answer. There is no *First Amendment* exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts.

III

As an alternative ground for facial invalidation, the Eleventh Circuit held that *§ 2252A(a)(3)(B)* is void for vagueness. [The Supreme Court disagreed.]

Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress **[*1847]** responded with a carefully crafted attempt to eliminate the *First Amendment* problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

The judgment of the Eleventh Circuit is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring.

My conclusion that this statutory provision is not facially unconstitutional is buttressed by two interrelated considerations on which JUSTICE SCALIA finds it unnecessary to rely. First, I believe the result to be compelled by the principle that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," . . .

Second, to the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters. It is abundantly clear from the provision's legislative history that Congress' aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose -- that is, with the intention of inciting sexual arousal. The provision was described throughout the deliberations in both Houses of Congress as the "pandering," or "pandering and solicitation" provision, despite the fact that the term "pandering" appears nowhere in the statute. . . .

It was against this backdrop that Congress crafted the provision we uphold today. Both this context and the statements surrounding the provision's enactment convince me that in addition to the other limitations the Court properly concludes constrain the reach of the statute, the heightened scienter requirements described *ante*, at 9-10, contain an element of lasciviousness.

The dissent argues that the statute impermissibly undermines our *First Amendment* precedents insofar as it covers proposals to transact in constitutionally protected material. It is true that proof that a pornographic but not obscene representation did not depict real children would place that representation on the protected side of the line. But any constitutional concerns that might arise on that score are surely answered by the construction the Court gives the statute's operative pro-

visions; that is, proposing a transaction in such material would not give rise to criminal liability under the statute unless the defendant actually believed, or intended to induce another to believe, that the material in question depicted real children.

Accordingly, when material which is protected -- particularly if it possesses serious literary, artistic, political, or scientific value -- is advertised, promoted, presented, distributed, or solicited for some lawful and nonlascivious purpose, such conduct is not captured by the statutory prohibition. Cf. *Miller v. California, 413 U.S. 15, 24-25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

. . . I accept the Court's explanation that Congress may criminalize proposals unrelated to any extant image. I part ways from the Court, however, on the regulation of proposals made with regard to specific, existing representations. Under the new law, the elements of the pandering offense are the same, whether or not the images are of real children. As to those that do not show real children, of course, a transaction in the material could not be prosecuted consistently with the *First Amendment*, and I believe that maintaining the *First Amendment* protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals. . . .

II

What justification can there be for making independent crimes of proposals to engage in transactions that may include protected materials? The Court gives three answers, none of which comes to grips with the difficulty raised by the question. The first, *ante,* at 17-18, says it is simply wrong to say that the Act makes it criminal to propose a lawful transaction, since an element of the forbidden proposal must express a belief or inducement to believe that the subject of the proposed transaction shows actual children. But this does not go to the point. The objection is not that the Act criminalizes a proposal for a transaction described as being in virtual (that is, protected) child pornography. The point is that some proposals made criminal, because they express a belief that they refer to real child pornography, will relate to extant material that does not, or cannot be, demonstrated to show real children and so may not be prohibited. When a proposal covers existing photographs, the Act does not require that the requisite belief (manifested or encouraged) in the reality of the subjects be a correct belief. Prohibited proposals may relate to transactions in lawful, as well as unlawful, pornography.

Much the same may be said about the Court's second answer, that a proposal to commit a crime enjoys no speech protection. *Ante*, at 11. For the reason just given, that answer does not face up to the source of the difficulty: the action actually contemplated in the proposal, the transfer of the particular image, is not criminal if it turns out that an actual child is not shown in the photograph. If *Ferber* and *Free Speech Coalition* are good law, the facts sufficient for conviction under the Act do not suffice to show that the image (perhaps merely simulated), and thus a transfer of that image, are outside the bounds of constitutional protection. For this reason, it is not enough just to say that the *First Amendment* does not protect proposals to commit crimes. For that rule rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all. Why should the general rule of unprotected criminal proposals cover a case like the proposal to transfer what may turn out to be fake child pornography?

The Court's third answer analogizes the proposal to an attempt to commit a crime, and relies on the rule of criminal law that an attempt is criminal even when some impediment makes it impossible to complete the criminal act (the possible impediment here being the advanced age, say, or simulated character of the child-figure). See *ante*, at 14-15. Although the actual transfer the speaker has in mind may not turn out to be criminal, the argument goes, the transfer intended by the speaker is criminal, because the speaker believes [2] that the contemplated transfer will be of real child pornography, and transfer of real child pornography is criminal. The fact that the circumstances are not as he believes them to be, because the material does not depict actual minors, is no defense to his attempt to engage in an unlawful transaction.

> 2 I leave largely aside the case of fraudulent proposals passing off virtual pornography as the real thing. The fact that fraud is a separate category of speech which independently lacks First Amendment protection changes the analysis with regard to such proposals, although it does not necessarily dictate the conclusion. The Court has placed limits on the policing of fraud when it cuts too far into other protected speech. *See, e.g.*, *Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 787-795, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)* (invalidating professional fundraiser regulation under strict scrutiny). Also relevant to the analysis would be that the Act is hardly a consumer-protection statute; Congress seems to have cared little for the interests of would-be child-pornography purchasers, and the penalties for violating the Act are quite onerous compared with other consumer-protection laws. A court could legitimately question whether the unprotected status of fraud enables the Government to punish the transfer of otherwise protected speech with penalties so apparently disproportionate to the harm that fraud is understood to cause.

But invoking attempt doctrine to dispense with *Free Speech Coalition*'s real-child requirement in the circumstances of this case is incoherent with the Act, and it fails to fit the paradigm of factual impossibility or qualify for an extended version of that rule. The incoherence of the Court's answer with the scheme of the Act appears from *§ 2252A(b)(1) (2000 ed., Supp. V)*, which criminalizes attempting or conspiring to violate the Act's substantive prohibitions, including the pandering provision of *§ 2252A(a)(3)(B)*. Treating pandering itself as a species of attempt would thus mean that there is a statutory, inchoate offense of attempting to attempt to commit a substantive child pornography crime. A metaphysician could imagine a system like this, but the universe of inchoate crimes is not expandable indefinitely under the actual principles of criminal law, let alone when *First Amendment* protection is threatened. See 2 W. LaFave, Substantive Criminal Law § 11.2(a), p. 208 (2d ed. 2003) ("[W]here a certain crime is actually defined in terms of either doing or attempting a certain crime, then the argument that there is no crime of attempting this attempt is persuasive").

The more serious failure of the attempt analogy, however, is its unjustifiable extension of the classic factual frustration rule, under which the action specifically intended would be a criminal act if completed. The intending killer who mistakenly grabs the pistol loaded with blanks would have committed homicide if bullets had been in the gun; it was only the impossibility of completing the very intended act of shooting bullets that prevented the completion of the crime. This is not so, however, in the proposed transaction in an identified pornographic image without the showing of a real child; no matter what the parties believe, and no matter how exactly a defendant's actions conform to his intended course of conduct in completing the transaction he has in mind, if there turns out to be reasonable doubt that a real child was used to make the photos, or

none was, there could be, respectively, no conviction and no crime. Thus, in the classic impossibility example, there is attempt liability when the course of conduct intended cannot be completed owing to some fact which the defendant was mistaken about, and which precludes completing the intended physical acts. But on the Court's reasoning there would be attempt liability even when the contemplated acts had been completed exactly as intended, but no crime had been committed. Why should attempt liability be recognized here (thus making way for "proposal" liability, under the Court's analogy)?

The Court's first response is to demur, with its example of the drug dealer who sells something else. *Ante*, at 14. (A package of baking powder, not powder cocaine, would be an example.) No one doubts the dealer may validly be convicted of an attempted drug sale even if he didn't know it was baking powder he was selling. Yet selling baking powder is no more criminal than selling virtual child pornography.

This response does not suffice, however, because it overlooks a difference between the lawfulness of selling baking powder and the lawful character of virtual child pornography. Powder sales are lawful but not constitutionally privileged. Any justification within the bounds of rationality would suffice for limiting baking powder transactions, just as it would for regulating the discharge of blanks from a pistol. Virtual pornography, however, has been held to fall within the *First Amendment* speech privilege, and thus is affirmatively protected, not merely allowed as a matter of course. The question stands: why should a proposal that may turn out to cover privileged expression be subject to standard attempt liability?

The Court's next response deals with the privileged character of the underlying material. It gives another example of attempt that presumably could be made criminal, in the case of the mistaken spy, who passes national security documents thinking they are classified and secret, when in fact they have been declassified and made subject to public inspection. *Ante*, at 18. Publishing unclassified documents is subject to the *First Amendment* privilege and can claim a value that fake child pornography cannot. The Court assumes that the document publication may be punished as an attempt to violate state-secret restrictions (and I assume so too); then why not attempt-proposals based on a mistaken belief that the underlying material is real child pornography? As the Court looks at it, the deterrent value that justifies prosecuting the mistaken spy (like the mistaken drug dealer and the intending killer) would presumably validate prosecuting those who make proposals about fake child pornography. But it would not, for there are significant differences between the cases of security documents and pornography without real children.

Where Government documents, blank cartridges, and baking powder are involved, deterrence can be promoted without compromising any other important policy, which is not true of criminalizing **[***58]** mistaken child pornography proposals. There are three dispositive differences. As for the first, if the law can criminalize proposals for transactions in fake as well as true child pornography as if they were like attempts to sell cocaine that turned out to be baking powder, **[**679]** constitutional law will lose something sufficiently important to have made it into multiple holdings of this Court, and that is the line between child pornography that may be suppressed and fake child pornography that falls within *First Amendment* protection. No one can seriously assume that after today's decision the Government will go on prosecuting defendants for selling child pornography (requiring a showing that a real child is pictured, under *Free Speech Coalition, 535 U.S., at 249-251, 122 S. Ct. 1389, 152 L. Ed. 2d 403*); it will prosecute for merely proposing a pornography transaction manifesting or inducing the belief that a photo is real child por-

nography, free of any need to demonstrate that any extant underlying photo does show a real child. If the Act can be enforced, it will function just as it was meant to do, by merging the whole subject **[*1854]** of child pornography into the offense of proposing a transaction, dispensing with the real-child **[***59]** element in the underlying subject. And eliminating the need to prove a real child will be a loss of some consequence. This is so not because there will possibly be less pornography available owing to the greater ease of prosecuting, but simply because there must be a line between what the Government may suppress and what it may not, and a segment of that line will be gone. This Court went to great pains to draw it in *Ferber* and *Free Speech Coalition;* it was worth drawing and it is worth respecting now in facing the attempt to end-run that line through the provisions of the Act.

The second reason for treating child pornography differently follows from the first. If the deluded drug dealer is held liable for an attempt crime there is no risk of eliminating baking powder from trade in lawful commodities. Likewise, if the mistaken spy is convicted of attempting to disclose classified national security documents there will be no worry that lawful speech will be suppressed as a consequence; any unclassified documents in question can be quoted in the newspaper, other unclassified documents will circulate, and analysts of politics and foreign policy will be able to rely on them. But if the Act can effectively eliminate the real-child requirement when a proposal relates to extant material, a class of protected speech will disappear. True, what will be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression. . . .

IV

I said that I would not pay the price enacted by the Act without a substantial justification, which I am at a loss to find here. I have to assume that the Court sees some grounding for the Act that I do not, however, and I suppose the holding can only be explained as an uncritical acceptance **[*1856]** of a claim made both to Congress and to this Court. In each forum the Government argued that a jury's appreciation of the mere possibility of simulated or virtual child pornography will prevent convictions for the real thing, by inevitably raising reasonable doubt about whether actual children are shown. The Government voices the fear that skeptical jurors will place traffic in child pornography beyond effective prosecution unless it can find some way to avoid the *Ferber* limitation, skirt *Free Speech Coalition,* and allow prosecution whether pornography shows actual children or not.

The claim needs to be taken with a grain of salt. There has never been a time when some such concern could not be raised. Long before the Act was passed, for example, pornographic photos could be taken of models one day into adulthood, and yet there is no indication that prosecution has ever been crippled by the need to prove young-looking models were underage.

Still, if I were convinced there was a real reason for the Government's fear stemming from computer simulation, I would be willing to reexamine *Ferber.* Conditions can change, and if today's technology left no other effective way to stop professional and amateur pornographers from exploiting children there would be a fair claim that some degree of expressive protection had to yield to protect the children. . . .

Without some convincing evidence to the contrary, experience tells us to have faith in the capacity of the jury system, which I would have expected to operate in much the following way, if the Act were not on the books. If the Government sought to prosecute proposals about extant images as attempts, it would seek to carry its burden of showing that real children were depicted

in the image subject to the proposal simply by introducing the image into evidence; if the figures in the picture looked like real children, the Government would have made its prima facie demonstration on that element. The defense might well offer expert testimony to the effect that technology can produce convincing simulations, but if this was the extent of the testimony that came in, the cross-examination would ask whether the witness could say that this particular, seemingly authentic representation was merely simulated. If the witness could say that (or said so on direct), and survived further questioning about the basis for the opinion and its truth, acquittal would have been proper; the defendant would have raised reasonable doubt about whether a child had been victimized (the same standard that would govern if the defendant were on trial for abusing a child personally). But if the defense had no specific evidence that the particular image failed to show actual children, I am skeptical that a jury would have been likely to entertain reasonable doubt that the image showed a real child.

Perhaps I am wrong, but without some demonstration that juries have been rendering exploitation of children unpunishable, there is no excuse for cutting back on the *First Amendment* and no alternative to finding overbreadth in this Act. I would hold it unconstitutional on the authority of *Ferber* and *Free Speech Coalition.*