

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 06-694

6 MICHAEL WILLIAMS. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 30, 2007

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 a.m.

14 APPEARANCES:

15 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,
16 Department of Justice, Washington, D.C.; on behalf of
17 the Petitioner.

18 RICHARD J. DIAZ, ESQ., Coral Gables, Fla.; on behalf of
19 the Respondent.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF GEN. PAUL D. CLEMENT, ESQ. On behalf of the Petitioner	3
RICHARD J. DIAZ, ESQ. On behalf of the Respondent	29
REBUTTAL ARGUMENT OF GEN. PAUL D. CLEMENT, ESQ. On behalf of the Petitioner	52

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4
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6
7
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 06-694, United States v. Williams.

General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

This Court has made clear that speech proposing an unlawful transaction is not protected by the First Amendment.

And speech that falsely proposes an unlawful transaction is likewise unprotected.

The statute at issue here properly construed does no more than prohibit efforts to offer or solicit materials that are contraband and then prevents somebody from turning around after soliciting or offering contraband and suggesting that the materials either did not exist or were not contraband after all. The statute does not prohibit truthful speech about lawful materials.

Accordingly, the court of appeals erred in striking the statute down on its face.

1 CHIEF JUSTICE ROBERTS: But if I could start
2 with one of the more compelling hypotheticals on the
3 other side. Let's say I'm a movie reviewer. I write a
4 review saying this is an awful movie. It portrays child
5 pornography. Aren't I presenting information in a way
6 that would cause others to believe that the movie
7 contains child pornography, and wouldn't that be covered
8 by the statute?

9 GENERAL CLEMENT: Mr. Chief Justice, we do
10 not think that would be covered by the statute. We
11 don't think that that would involve -- in the first
12 point, we don't think it would involve presentation or
13 promotion of the movie in the meaning of this statute.

14 We think those terms are really limited to
15 efforts to make the product available to the market.

16 And I think if you read those terms in
17 conjunction with each other, they are all directed at
18 efforts to make the product available to the market.

19 Now, so if the person whose actually
20 distributing the film wants to try to market it as
21 actual child pornography, then I suppose that would come
22 within the ambit of the statute. But a movie reviewer
23 does not have anything to worry about in the first
24 instance because I don't think that would come within
25 the terms "promotion" --

1 JUSTICE KENNEDY: Suppose the distributor
2 attaches the movie review. It's in amazon.com, and then
3 it has the movie review.

4 GENERAL CLEMENT: Again, Justice Kennedy, it
5 might be conceptually possible for somebody to market,
6 let's say a mainstream movie, on the basis of a --
7 either their own statement or an attached review, that
8 misrepresents the nature of the movie and makes a claim
9 for the movie, that it's actual child pornography. I
10 suppose in that unusual circumstance, it would be
11 covered. But I guess it would be equally possible for
12 somebody to take one of the countless mainstream movies
13 that portrays a murder on screen, and say this is
14 actually a snuff film. There's actually -- this was a
15 snuff film. This was an actual murder. Now, somebody
16 who did that would be clearly misrepresenting the film.
17 I don't think they would turn around if somebody tried
18 to do something about that false or misleading speech
19 and be able to defend on that speech because it would be
20 clearly false and misleading speech.

21 And I think what is important here is if the
22 underlying movie is not child pornography, then truthful
23 efforts to promote that movie won't be captured.

24 JUSTICE STEVENS: Supposing the underlying
25 movie is a depiction of atrocities being committed in

1 some foreign country, in a war zone or something, by
2 soldiers who rape young kids, and so forth, so it comes
3 within the literal terms of the statute. And if one said,
4 I'd like you to take a look at this movie, wouldn't that
5 be covered by the statute?

6 GENERAL CLEMENT: If the movie itself comes
7 within the --

8 JUSTICE STEVENS: The movie itself would be
9 pictures of soldiers raping young kids.

10 GENERAL CLEMENT: And if it were done in a
11 sufficiently graphic way, that it was captured --

12 JUSTICE STEVENS: Well, it's just a -- it's
13 a news -- I'm thinking of a news reel -- somebody
14 makes an exhibit for a war crimes trial, or something
15 like that -- sees this actually happening. Now, as I
16 understand the language of the statute, if the person
17 who had that film described it to someone he wanted to
18 send it to, he would violate the statute.

19 GENERAL CLEMENT: Well, Justice Stevens,
20 there's -- I guess there's an anterior problem, which is
21 if the depictions were sufficiently graphic --

22 JUSTICE STEVENS: They are -- an assumption.

23 GENERAL CLEMENT: -- the person that would
24 have that film would be in possession of child pornography,
25 which itself would be a problem under the statute. He's

1 in the possession of it.

2 JUSTICE STEVENS: Well, but he just took a
3 picture of a war crime taking place? He saw that on
4 camera -- that would be a crime?

5 GENERAL CLEMENT: And that might be an
6 example where, starting with the basic prohibition on
7 the possession of child pornography, that might be a
8 situation where there was a valid as-applied challenge.
9 And that also might be a situation where there would be
10 a valid as-applied challenge to the pandering and
11 solicitation provision. But I think the proper way to
12 analyze that is to ask first whether or not something is
13 covered by the basic prohibition.

14 JUSTICE STEVENS: You do agree I guess that
15 there are some -- there would be some valid as-applied
16 challenges to this statute.

17 GENERAL CLEMENT: I agree, and I think in
18 theory, at least, there may be valid as-applied
19 challenges to the underlying prohibition. And this
20 Court of course in *Ferber* recognized that possibility in
21 upholding the basic prohibition on the promotion of
22 child pornography in that context.

23 JUSTICE GINSBURG: But *Ferber* confined the
24 meaning of child pornography to, I think, a greater
25 extent than this statute does. It talked about artistic

1 value, but this -- there were several examples given in
2 the briefs. One was this film depicts 12-year-old child
3 having sexual relations with an old man. Now that
4 statement could be perceived as this film shows child
5 pornography.

6 Just that statement. But it's a truthful
7 statement about "Lolita," is it not?

8 GENERAL CLEMENT: It is, Justice Ginsburg
9 but I think in context that would not be something that
10 comes within the ambit of the statute. And again, if
11 you start with the proposition --

12 JUSTICE GINSBURG: Why not? If you say --
13 if you say, 12-year-old child -- this film shows a 12-
14 year-old child, and it doesn't tell you that the person
15 who's playing the 12-year-old is a young adult?

16 GENERAL CLEMENT: I understand that, Justice
17 Ginsburg. What I would say is this statute in order to
18 apply, at least the way we interpret it, requires both
19 an objective and a subjective component. And so you
20 would have to have a situation where that promotion of
21 the movie objectively would lead somebody to believe
22 that you're marketing it in a manner that portrays it as
23 actual child pornography. Now I think what you've just
24 said right there would probably fail at the objective
25 test because I think particularly when you start talking

1 about it being a motion picture and the like, the
2 natural assumption, especially if it's a mainstream
3 motion picture, is going to be oh, that's just actors,
4 it's probably adult actors, or a body double or something.
5 I don't think that comes within the statute.

6 The other thing that's required, of course,
7 is a subjective component, and specific intent is the way
8 that we would read the statute. And clearly the person
9 who's marketing "Lolita" itself and wants people to go see
10 it in a mainstream box office does not have the intent
11 to convey to people that this is actual, forbidden child
12 pornography.

13 JUSTICE SOUTER: Well what if an individual
14 received actual child pornography in the mail that had
15 not been solicited, and he calls the chief of police in
16 town and says I just opened my mail, and this envelope
17 is full of child porn? And he's right. I mean, there
18 are no body doubles. This is the real thing in here.

19 He has presented child pornography to that
20 chief of police and he's violated the statute, hasn't
21 he?

22 GENERAL CLEMENT: Justice Souter, I would
23 say that the better answer is no, that he has not. Now
24 --

25 JUSTICE SOUTER: You say no, but you say no

1 because we won't enforce it that way. But the -- but
2 the objective component and the subjective component in
3 my example are both satisfied.

4 GENERAL CLEMENT: Justice Souter, I would
5 say no for a more fundamental reason, which is I think
6 you have to read two provisions of the statute here in
7 pari materia. And the other provision I think that is
8 relevant is the affirmative defense that's in subsection
9 (d) of the statute, which is at 6a of the appendix to
10 our opening gray brief. And that provides an
11 affirmative defense in the situation where somebody is
12 in possession of child pornography.

13 Now, cause the first problem the person who
14 gets child pornography in the mail has is that the statute
15 on -- that bans of possession would apply. Now, there's
16 an affirmative defense. The affirmative defense is
17 specific to possession, but one of the things that's a
18 prerequisite to qualify for the affirmative defense,
19 which is in (d)(2)(B), is that you have to afford that
20 material -- you have to afford the agency, the law
21 enforcement agency, access to the material. Now --

22 JUSTICE SOUTER: That's -- that's fine, but
23 before you get to that point, you have -- there's still
24 an indictable offense. You don't prevent -- you don't
25 present affirmative defenses until you're already

1 indicted.

2 GENERAL CLEMENT: You're right, Justice
3 Souter, but that is a problem both for the prohibition
4 on possession and it is not a unique problem for the
5 pandering and solicitation provision. And I don't think
6 the fact that you might have to if -- in that situation,
7 you might have to actually present your affirmative
8 defense in some case is a reason to strike a ban on
9 possession as overbroad, as this --

10 JUSTICE SOUTER: But the ban on possession
11 is not the real problem because, under a normal
12 possession statute, you would indeed have a problem not
13 merely in terms of -- that could be raised not merely by
14 affirmative defense but as an element of the statute.
15 If the possession is merely a matter of happenstance,
16 there's an intent problem and presumably there's no --
17 there's no offense. There's no knowing offense in
18 acquiring material for the possession.

19 But in the pandering statute, what we've got
20 here is there is -- as you put it earlier -- there is an
21 understanding which happens to be correct, objectively
22 correct, that there is child porn, and there is a very
23 clear intent to convey that message by way of presenting
24 this material to a third party, in this case the police.
25 So I think this is not merely comparable to the problem

1 of haphazard possession.

2 GENERAL CLEMENT: Well, Justice Souter, let
3 me try two responses. One is I do think you have a
4 problem even in possession because once you get it in
5 the mail, your possession of it is knowing. And that is
6 precisely why Congress included this affirmative defense
7 in the statute. The second thing I would say though is
8 again, we have to read these statutes in pari materia,
9 and if one of the ways you qualify for the affirmative
10 defense is you afford access to law enforcement agency
11 of the material, I don't think that which is a
12 prerequisite for qualifying for the affirmative defense
13 can be independently prohibited --

14 JUSTICE SCALIA: What if --

15 GENERAL CLEMENT: -- by the statute.

16 JUSTICE SCALIA: What if you call up your
17 neighbor and say God, I got this disgusting child porn
18 in the mail?

19 GENERAL CLEMENT: Well -- and, again, I
20 think if you did no more than that, I don't know that
21 you would necessarily be covered by the statute, but if
22 you said I got this disgusting child pornography in the
23 mail, it's clearly unlawful, here take a look, I mean I
24 suppose that is covered by the statute. But that
25 doesn't seem like a natural reaction.

1 JUSTICE BREYER: Wait, it is covered by
2 the statute? Because I read your brief as saying that
3 the statute applies only in instances where either
4 you're trying to sell it or trade it. That is what
5 you're trying -- now it seems to me a different matter
6 if it's covering only -- covering as well instances
7 where somebody's simply showing it to someone else to
8 show him what he got in the mail. I'd appreciate
9 clarity on that.

10 GENERAL CLEMENT: Justice Breyer, I think
11 that we would take the position that even if you are
12 presenting the material, making it available, but you're
13 not charging for it, you're not exchanging it, you're
14 just offering it for free, here's a quick free look,
15 it's still covered by the statute.

16 JUSTICE BREYER: If that's covered by the
17 statute, what you're going to do then is suddenly
18 criminalize what could be an awful lot of activity that
19 goes on in schools all over the place and somebody
20 has -- they think it's funny, and maybe it isn't funny,
21 but they think it is and it's kind of school-boy
22 behavior, and they're showing this stuff around, not
23 totally certain what it is. Suddenly that can become a
24 Federal crime. Seems like quite an extension. And I
25 thought you'd written your way out of that problem, and

1 now I think you haven't.

2 GENERAL CLEMENT: Well, Justice Breyer, I
3 mean, you know, I think you could certainly interpret
4 the statute to write around that problem if you wanted
5 to, but I do think the most natural reading of the terms
6 "promotes, distributes, presents, and advertises" is to
7 capture not just somebody who is making that available
8 to the market for sale or for barter, but also somebody
9 who says look, I have child pornography, I want to get
10 you interested in this, this is the real stuff, here
11 take a look.

12 CHIEF JUSTICE ROBERTS: Well, that's a very
13 different thing. I read your brief the same way Justice
14 Breyer did and particularly footnote 4 of the reply
15 brief, which I understood to be giving "presents," for
16 example in this statute, a promotional meaning in light
17 of the other words around it, "advertises, promotes."
18 And simply telling your -- you know, the neighbor, I got
19 this, what should I do about it or -- isn't "promotional."
20 It may be in a technical term "presents," but it's not
21 promotional.

22 And, again, I understood your brief to
23 suggest that you have to interpret all of those words in
24 an advertising, soliciting sense.

25 GENERAL CLEMENT: Well, Mr. Chief Justice,

1 here -- I mean I think my first cut at drawing the line
2 would to be say it's not a problem to say, can you
3 believe what I got in the mail, and talk to your
4 neighbor about it, describe it.

5 On the other hand, I do think you're
6 presenting the materials if you say, I got this in the
7 mail, look at this, isn't this disgusting, this is
8 clearly child pornography.

9 JUSTICE BREYER: All right. Then take it as
10 that.

11 GENERAL CLEMENT: If you think though --

12 JUSTICE BREYER: Take it as that. I would
13 say looking and presenting to schoolmates dirty pictures
14 is a fairly common adolescent and post-adolescent
15 activity. And I would suspect a very high-level
16 percentage of that class of people don't examine too
17 carefully what the age of the individuals depicted is,
18 and many might misrepresent what that age is. So this
19 sounds like a statute that has enormous reach, whereas
20 previously I thought it hadn't.

21 GENERAL CLEMENT: Well, Justice Breyer, if
22 you think that's the difference between expanding this
23 statute in some enormous way and not, then I would
24 invite you to have a more restrictive view of
25 "presents." And we certainly want you to interpret the

1 statute in a way that renders it not overbroad. And, of
2 course, this Court has made clear on a number of
3 occasions that, before you get to the overbreadth
4 analysis, you apply narrowing constructions to
5 make sure that the statute if possible --

6 JUSTICE GINSBURG: But --

7 GENERAL CLEMENT: -- is construed to be
8 constitutional. But if I could just -- I'm sorry.

9 JUSTICE GINSBURG: I just wanted to clarify
10 the footnote to which the Chief referred, that footnote
11 4 in your reply brief. It says, "to the contrary, the
12 government's brief expressly acknowledges that the
13 statute's proscription encompasses noncommercial speech."

14 So I think Justice Breyer's suggestion that
15 you said in your brief, that the statute is limited to
16 commercial speech, is something that you candidly say,
17 no, that's not so; we say it encompasses noncommercial
18 speech.

19 GENERAL CLEMENT: Well, Justice Ginsburg, I
20 think there may be a distinction to be drawn. We
21 certainly don't think that it's limited to commercial
22 speech if by "commercial speech" you mean only efforts
23 to buy or sell or even only efforts to barter. Because
24 we think that somebody that sort of systematically is
25 operating a website where they are giving away child

1 pornography and advertising it as such would be clearly
2 covered by the statute.

3 So, to the extent that the distinction
4 between commercial and noncommercial is at the line
5 where you would say you're giving it away gratis, we
6 think that's still covered. Now, I gather that maybe
7 Justice Breyer had a different conception in mind, that
8 you really have to be --

9 CHIEF JUSTICE ROBERTS: My understanding was
10 not that it was limited to commercial speech. That was
11 clear from the footnote that I cited. But that
12 "presents" was limited to promotional activity. It's
13 one thing to present and say either whether to law
14 enforcement or your neighbor; it's another thing to
15 promote the child pornography. And I thought your brief
16 was adopting a limited construction of words like
17 "presents" that would cover only promotional activity.

18 GENERAL CLEMENT: Well, in fairness,
19 Mr. Chief Justice, I think we had a slightly broader
20 conception of "presents." What we were thinking that
21 "presents" means is really when you are not just sort
22 of -- you know -- in some abstract way talking about
23 presenting the material, but you're actually furnishing
24 the material to somebody else.

25 JUSTICE ALITO: Well, General Clement, is

1 there --

2 GENERAL CLEMENT: And --

3 JUSTICE ALITO: Is there anything to suggest
4 that some of these hypotheticals, where people get child
5 pornography unsolicited in the mail or that kids at
6 school are showing each other not just dirty pictures
7 but actual child pornography, are situations that occur
8 with any frequency in the real world?

9 GENERAL CLEMENT: Not at all, Justice Alito,
10 and I think that's an important point with respect to
11 Justice Breyer's hypothetical. I mean you have to
12 remember that the materials that we're talking about
13 here are in the main materials that are unlawful even to
14 possess. And it is also true that the -- in the wake of
15 Ferber, a pretty good job was done of getting these
16 materials out of the real world. So the kind of
17 pictures that are being --

18 CHIEF JUSTICE ROBERTS: I'm sorry. I
19 lost -- in your answer, I lost a negative or something.
20 Are you saying that this type of activity frequently
21 occurs or infrequently occurs?

22 GENERAL CLEMENT: Infrequently occurs --
23 especially in the real world, which is to say when
24 pictures or magazines are being handed around from
25 adolescent to adolescent, there is really no reason in

1 the world to suspect that what's being handed from
2 adolescent to adolescent is child pornography as opposed
3 to adult pornography -- Playboy and that sort of thing.

4 Because the truth of the matter is in the
5 wake of Ferber, a pretty good job has been done in
6 stamping out child pornography in the real world. It
7 has moved, unfortunately, on to the Internet. And, in
8 that context, when people are promoting it as actual
9 child pornography or soliciting it as actual child
10 pornography --

11 JUSTICE STEVENS: Am I not right -- the
12 universe of child pornography includes activities of
13 17-year-olds.

14 GENERAL CLEMENT: It does, Justice Stevens,
15 but so, too, for the basic prohibition. And I think
16 what's important here is there may be some definitional,
17 you know, questions. Or you may have a view that there
18 are applications of the statute that would be
19 unconstitutional.

20 But what's important, I think, is that this
21 pandering and solicitation provision doesn't add some
22 new definition, some more aggressive definition. It
23 simply picks up the notion of the basic definition of
24 child pornography, and it says that if you're taking
25 materials and you are offering them to the market as

1 actual child pornography, if you are soliciting actual
2 child pornography, then the government can go after
3 those direct acts of solicitation and offering and --
4 and -- prosecute those acts without --

5 JUSTICE GINSBURG: Even though -- even
6 though what you are, in fact, showing or presenting does
7 not fit the definition? Even if what you're showing --
8 you say, have I got some hot child porn and here it is,
9 and the "it" is -- is -- an adult pretending to be a
10 child, or a virtual image.

11 So the -- the problem is not an accurate
12 representation that this is hardcore porn, and it is,
13 but saying, have I got the real stuff, but what you
14 possess is not at all the real stuff.

15 GENERAL CLEMENT: That's right, Justice
16 Ginsburg. If the scienter requirements are satisfied
17 and I'm consciously trying to get you to believe that
18 even though I have something that for some technical
19 reason is not the real thing, what I'm offering you is
20 the real thing, the statute does target that. But that
21 seems to me to not be a First Amendment problem.

22 It seems to be a natural consequence of
23 Congress taking the Court's advice in Free Speech
24 Coalition and moving from a prohibition on materials
25 that had been pandered to the actual acts of pandering

1 and solicitation themselves.

2 JUSTICE KENNEDY: And is that your answer to
3 the -- all of the hypotheticals that are put forth in
4 the Coalition for Free Speech, the Catholic Bishops, the
5 advertisement in amazon.com or Netflix, then?

6 GENERAL CLEMENT: Well, Justice Kennedy, we
7 think that all those hypotheticals are taken out with
8 more than one reason. I mean, I think from the Catholic
9 Bishops --

10 JUSTICE KENNEDY: Let's -- pardon me.

11 GENERAL CLEMENT: Sure.

12 JUSTICE KENNEDY: Let's assume for the
13 moment that there are minors, so that the content aspect
14 of it is for film.

15 GENERAL CLEMENT: Oh --

16 JUSTICE KENNEDY: That there are real minors
17 in some of these things.

18 GENERAL CLEMENT: But are there real minors
19 engaging in forbidden activities?

20 JUSTICE KENNEDY: Yes.

21 GENERAL CLEMENT: Is the underlying activity
22 actual child pornography?

23 JUSTICE KENNEDY: Yes.

24 GENERAL CLEMENT: Well, if the underlying
25 material is actually child pornography, then you may be

1 in a different situation. All of the hypotheticals in
2 that brief were with materials -- the underlying
3 materials were not child pornography.

4 And I think that's an important distinction,
5 because if you're taking a movie like "Traffic" or
6 "American Beauty," which is not child pornography --

7 JUSTICE KENNEDY: Right.

8 GENERAL CLEMENT: -- and you're simply
9 truthfully promoting it, you have nothing to worry about
10 with this statute.

11 Now, if you took something -- I also think
12 that the Catholic Bishop situation isn't covered,
13 because that is not "promoting, presenting, and
14 distributing" --

15 JUSTICE KENNEDY: There was one with a hand
16 held video at a school or something like that.

17 GENERAL CLEMENT: Well, I mean, again -- I
18 mean, if you had a hand held video and the video itself
19 was child pornography, and then you got that on the
20 Internet or otherwise and decided you wanted to promote
21 that, I mean would be covered by the statute.

22 JUSTICE KENNEDY: There are two things that
23 you -- that all of us have to work with here. One is
24 the scienter component here. Is that overly broad,
25 vague, and so forth? The other is the content.

1 And my concern is the same as that indicated
2 by Justice Stevens at the outset. There are some
3 terrible practices in the child-trafficking area where
4 children are held in brothels for the most debased of
5 acts. There are abuses in prisons, abuses in schools.

6 If there are videotapes showing those
7 things, it seems to me that the statute is -- that
8 they're clearly covered by the statute, and maybe even a
9 killing of a little girl in public might be sadistic.
10 Assume that that's covered by the statute.

11 Is there anything in the "presents" and the
12 "promotes" language in the scienter component of the
13 statute that gives some protection to these materials?
14 Is it just as-applied? Is that what we have to do?

15 GENERAL CLEMENT: Here is how I would try to
16 analyze it, Justice Kennedy, which is I would say that
17 there would be an as-applied challenge there because
18 the basic prohibition on child pornography that would
19 apply to the underlying materials, there would be an
20 as-applied exception to that. And therefore, the
21 pandering and the solicitation of that would be equally
22 outside the constitutional --

23 JUSTICE KENNEDY: So we want the public to
24 see this to show them how bad it is, and that is
25 permitted under the statute, because it is not

1 "presenting"?

2 GENERAL CLEMENT: I mean there would be
3 another way to try to get at that.

4 JUSTICE KENNEDY: I agree with you that we
5 have different motives.

6 GENERAL CLEMENT: Right.

7 JUSTICE KENNEDY: But I'm not sure that the
8 statute covers that.

9 GENERAL CLEMENT: Well, there might be a way
10 in which the statute could cover it, and it would be, as
11 follows, which basically is if I'm going to portray that
12 as material that is -- and I'm going to portray it only
13 in a way that makes it clear that I have a valid
14 as-applied challenge, then I'm not sure I would be
15 satisfying the objective and the subjective scienter
16 requirements for that statute. Because it would be
17 clear that, although I was presenting it as visual
18 depictions of children who had that happen to them, I
19 was presenting it exclusively for its scientific,
20 artistic, literary value. And, therefore, in a sense, I
21 was building my as-applied challenge into the way I was
22 marketing it. I think you could --

23 JUSTICE SCALIA: Of course, you have a
24 problem not just with the presenting, not just with the
25 pandering of it. You have a problem with the mere

1 possession of it. You have to find some exception for
2 that anyway. You have to find some as-applied
3 challenge exception for the mere possession of it, even
4 if you don't pander it.

5 GENERAL CLEMENT: Well, Justice Scalia,
6 that's exactly right. And that's why I would think the
7 logical way to proceed would be you would find an
8 as-applied exception to the basic prohibition. And
9 then, naturally, that would apply to the pandering
10 provision.

11 I was only sort of suggesting, if pressed,
12 that in some ways it might actually be easier to find a
13 way to get that outside the statute with respect to the
14 pandering and solicitation provision than it would be for
15 the possession prohibition.

16 JUSTICE SOUTER: But how would you do it in
17 the case -- you mentioned that if there is not actual
18 child porn shown, and there is a truthful or honest
19 statement about it, that there is nothing to worry
20 about.

21 But what about the movie reviewer who is
22 reviewing the latest re-release or something of the
23 "Lolita" film and says this depicts sexual activity with
24 a minor?

25 That statement is true. It would be taken

1 by some naive people as saying boy, this is what it
2 shows, the real thing. That is a truthful statement.
3 And yet, it would still fall within the prohibition of
4 the statute.

5 As I understand your position, the only way
6 that statement would be truthful in a way that would
7 excuse would be if the reviewer said this depicts sexual
8 activity with a minor, but of course the actor wasn't
9 really a minor. Isn't that correct?

10 GENERAL CLEMENT: No, that is not correct,
11 Justice Souter. And I would say that that hypothetical
12 is outside the ambit of the statute for two reasons.

13 First of all, I don't think that the movie
14 reviewer is promoting or presenting the underlying
15 materials. They would be out for that reason.

16 I also think they would be out because, when
17 you started applying the objective and the subjective
18 requirements of the statute, you would not find either
19 of them satisfied with respect to that.

20 If I know you're talking about a mainstream
21 movie, and you say it depicts sex with a minor, I'm not
22 going to naturally think that that comes within the ambit
23 of the statute, that it is actual child pornography
24 within the meaning of the statute.

25 JUSTICE SOUTER: What if you are 17-years-

1 old and you haven't gone to law school and you haven't
2 read these cases? You may very well assume that.

3 GENERAL CLEMENT: With respect, Justice
4 Souter, that's why I think it is important to have both
5 an objective and a subjective requirement. And I think
6 the objective requirement alone would take that out.

7 If I could reserve the remainder of --

8 JUSTICE SCALIA: Do we use a seven year old
9 for the objective requirement?

10 GENERAL CLEMENT: No, I wouldn't think so.

11 JUSTICE SCALIA: I thought we would use a
12 reasonable person or a --

13 GENERAL CLEMENT: I think we would use a
14 reasonable observer. Exactly. That's why --

15 JUSTICE SCALIA: -- reasonable adult, I had
16 thought.

17 GENERAL CLEMENT: Exactly, and that's why I
18 --

19 JUSTICE SOUTER: Wouldn't we use -- wouldn't
20 we use a reasonable person of the sort who goes to
21 movies?

22 GENERAL CLEMENT: That would be fine,
23 Justice Souter, and if --

24 JUSTICE SOUTER: I would suppose my 17-year-
25 old, non-law-school graduate would be within the ambit

1 of the reasonable class.

2 GENERAL CLEMENT: And I would submit that
3 even a 17-year-old, non-law student would know that
4 movies depict things that don't actually happen. When
5 they see a murder on screen, that's not actually a
6 murder. And so I think they would understand that
7 that's a movie. It's not child pornography.

8 If I could reserve the remainder of my time.

9 JUSTICE GINSBURG: But I think you said --
10 just one question. You mentioned a film, "Traffic,"
11 which I did not see, but one of the briefs said there
12 was an actual 17-year-old playing that part.

13 But you said that wouldn't be -- that
14 wouldn't fit.

15 GENERAL CLEMENT: "Traffic" is not child
16 pornography. I understand that the actress was 17 at
17 the time of the film, but we don't think that comes
18 within the ambit of the basic prohibition on child
19 pornography, because we think that simulated sexual
20 activity has to be interpreted with enough subtlety that
21 it doesn't capture that. And that's the position --

22 JUSTICE GINSBURG: But the statute says
23 simulated.

24 GENERAL CLEMENT: It does. But so did the
25 statute in Ferber. And we don't think that introduced

1 any overbreadth or vagueness that was fatal. This
2 statute here just picks up on that definition. It
3 doesn't add to it.

4 If I may reserve --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Clement.

7 Mr. Diaz.

8 ORAL ARGUMENT OF RICHARD J. DIAZ

9 ON BEHALF OF THE RESPONDENT

10 MR. DIAZ: Mr. Chief Justice, and may it
11 please the Court:

12 The pandering provision of the PROTECT Act
13 carries a 5-year mandatory minimum prison term and a
14 possible 20-year prison term, has no affirmative defense
15 provision. It is unconstitutionally vague and
16 overbroad, because on its face it captures protected
17 speech about materials. And it captures speech about
18 materials that may not even in fact exist.

19 The language "in a manner that reflects the
20 belief, or that is intended to cause another to
21 believe," does not sufficiently define prohibited
22 conduct giving law enforcement unfettered discretion to
23 subjectively enforce the statute.

24 In essence, as the Eleventh Circuit held,
25 the determination does not rest on what the materials

1 contain, but rather on how someone conveys his or her
2 impression about what the materials convey. In other
3 words, this statute, in short, punishes thought,
4 beliefs, expressions, and opinions.

5 CHIEF JUSTICE ROBERTS: Well, there's a
6 difference, isn't there, between beliefs and thoughts
7 about -- what, the legality of a particular type of
8 pornography or something like that, and a factual
9 matter? I thought this was child pornography? Saying
10 this regulates thoughts and beliefs, those are two quite
11 different questions, aren't they?

12 MR. DIAZ: Yes, it is, Mr. Chief Justice.
13 And one of the problems with the statute, and just
14 another example of what we've been talking about here --
15 amazon.com and Netflix -- is also, for example, a
16 series of photography that we've seen nationwide by
17 famous photographers of minors or children,
18 photographers of child modeling agencies --

19 JUSTICE BREYER: But none of those -- I
20 mean, we've gone through this with the Solicitor
21 General. He went through every example in his brief
22 that you've been able to produce, and he said they
23 aren't caught by the statute. What's wrong with what he
24 said? Why isn't that so?

25 MR. DIAZ: If --

1 JUSTICE BREYER: Photographers, for example.
2 That's not child pornography. And if it was, they would
3 have to act -- if it is child pornography under Ferber,
4 it isn't protected. If it isn't child pornography under
5 Ferber, well, then there's no problem. Okay. That's
6 their view of the photographers. And the same with
7 Amazon, the same with Netflix.

8 MR. DIAZ: Correct. The problem is if I
9 were to take anything such as the CNN video of an actual
10 sexually explicit conduct involving a minor, or if I
11 were to take any of these films, if I were to start an
12 Internet blog and say, look, this film contains sexual
13 conduct of a minor, and I think we should do something
14 about this, I think we should form a coalition or I
15 think we should boycott it. And I am conveying the
16 belief. I am intending to make you believe that what
17 those materials contain, albeit what they really have or
18 what they really are, is illegal.

19 JUSTICE BREYER: Same problem with Ferber,
20 he said. Same problem.

21 MR. DIAZ: Yes, sir.

22 JUSTICE BREYER: So what's your response to
23 what he said? It is worse with possession. You
24 possess these materials. What you are trying to do is
25 take them to the police and stop them. Under Ferber, is

1 that protected or not? If it is protected, as I think
2 it would be, so is it here.

3 MR. DIAZ: I do not think it would be
4 protected under Ferber, because --

5 JUSTICE BREYER: Then under Ferber he's
6 going to go right to jail because he has them. I would
7 think it would be protected. I can't imagine somebody
8 who collects, on these sites where they are molesting
9 children, material to prevent children being molested
10 and presents it to the proper authorities is going to be
11 prosecuted under the New York statute in Ferber.

12 MR. DIAZ: If the material substantively
13 violates the statute, then the mere possession of them
14 is illegal. And there is a defense under the possession
15 part of the statute for presenting them to the police
16 within a certain amount of time and within a certain
17 manner of your conduct.

18 What we're talking about here is not the
19 possession of the materials. We're talking about the
20 expression about what the materials contain. Even if
21 you're wrong about it, even if you're mistaken, even if
22 you're lying about it, even if you're bragging about it,
23 the traditional prankster, as Senator Leahy said in the
24 congressional report, one of the things we're concerned
25 about with the statute is that it could capture people

1 who are expressing salacious thoughts.

2 JUSTICE SCALIA: Or just good honest liars,
3 right? I had thought that the purpose of the First
4 Amendment was to protect speech that had some value, and
5 that the reason obscenity is excluded entirely from
6 First Amendment protection is that it has no redeeming
7 social value.

8 What social value do you find in being able
9 to lie about the content of what you're offering to
10 somebody else? You say somehow if you're lying about
11 it, oh, well, then the First Amendment protects it. I
12 would think if you're lying about it, it is clearer than
13 ever the First Amendment doesn't protect it. There is
14 no social value in protecting lies.

15 MR. DIAZ: One of the problems with the
16 issue of social value and lying is that we don't put
17 people in jail for 5 mandatory minimum years or 20 years
18 in prison for simply lying. We simply don't do that. I
19 agree with Your Honor --

20 JUSTICE SCALIA: But it depends on what
21 they're lying about. If they're lying about the value
22 of what they're selling, you know, it's fraud.

23 MR. DIAZ: And I agree with Your Honor --
24 that Justice Scalia, that we have a slew of State
25 statutes particularly in the area of consumer fraud.

1 If I pretend to have something that's illegal and
2 offer it to you or promote it to you or advertise it
3 to you, and I have nothing, then that person can and
4 should be punished, but not for -- not under this
5 statute.

6 JUSTICE SCALIA: Tell me what social value
7 are we protecting here, by protecting the lie about
8 whether this thing that really isn't child pornography
9 is? What -- why would we want to protect that?

10 MR. DIAZ: We necessarily do not want to
11 protect that. But we don't punish it with a 5 to
12 20-year prison sentence.

13 JUSTICE SCALIA: Are you complaining about
14 the degree of the penalty?

15 MR. DIAZ: It is not just the degree of the
16 penalty. The statute doesn't just cover liars, Justice
17 Scalia. It also covers people who are mistaken. It
18 covers exaggeration. It covers puffing.

19 For example, if I have a legitimate clean
20 videotape that I want to duplicate, I may be violating
21 trademark or other patent laws or whatnot, but I want to
22 take this and I want to sell it in the marketplace over
23 the Internet. And I exaggerate by the words that I
24 choose to use in promoting that tape, for a commercial
25 purpose, for example, and I'm exaggerating.

1 That person if they market the materials in
2 a way that causes the potential buyers to believe that
3 what it has is illegal, even if I'm just puffing or
4 bragging, the car salesman in a car sales situation, we
5 don't like it --

6 CHIEF JUSTICE ROBERTS: But that's an
7 entirely different thing to say that this car is a great
8 car and it turns out not to be a great car, and to say
9 what you have is either -- is not -- is child
10 pornography when, in fact, it's not. Those are two
11 different things.

12 MR. DIAZ: I think it could be very -- in
13 the real world I think it is very easy for a person to
14 puff about what materials contain that are lawful to
15 possess, such as "Titanic," "Lolita" or "American
16 Beauty." And all you would have to say is, put a
17 trailer on it and say that this is hot graphic teen
18 sex, and you're puffing about what it really is. We
19 know -- you know it really isn't.

20 CHIEF JUSTICE ROBERTS: The statute has an
21 objective component. To the objective observer, it must
22 reasonably cause them to believe that it's actually
23 child pornography. So that -- that would be -- that
24 would prevent sort of the vague puffery that you're
25 talking about from being covered while still covering

1 something that satisfies both the subjective and the
2 objective test.

3 MR. DIAZ: Mr. Chief Justice, I think that
4 if a person listens to or hears somebody describe
5 "Titanic," "Lolita," "American Beauty" or any of the
6 films of the like as hot graphic teen sex, I think a
7 reasonable and ordinary person could very well believe
8 that what is being portrayed is proscribed material,
9 even if it doesn't exist, or even if it exists and is
10 protected under Ferber.

11 JUSTICE SCALIA: You seem to think we are
12 punishing the lying. I don't read the statute as
13 punishing the lying.

14 MR. DIAZ: No, Justice Scalia.

15 JUSTICE SCALIA: You'd be punished even if
16 it were true. What is being punished is the pandering.
17 You are the one that's bringing in the lying example.
18 You say, my goodness, even if the pandering is a lie,
19 pandering is pandering. And I don't see why there is
20 some special protection against pandering when in
21 addition to pandering, you're lying.

22 Maybe you ought to get extra penalty.

23 (Laughter.)

24 JUSTICE SCALIA: But, in fact, the statute
25 does not provide extra penalty. It just provides a

1 penalty for pandering. And I don't know why it's a good
2 defense to that to say, oh, I was actually lying. I
3 mean --

4 MR. DIAZ: I don't think -- I think the
5 statute covers people who brag, people who puff, people
6 who tell the truth, who honestly believe --

7 JUSTICE GINSBURG: People who "present."
8 The word "pandering" itself is not used in the statute.
9 It uses a lot of words, "promote" and "advertise" --
10 well, maybe that's just redundant. I guess that would
11 be the government's position -- but "presents,"
12 "distributes" -- what else?

13 JUSTICE SCALIA: All of those verbs only
14 become pandering when they are attached to explicit
15 sexual material. When you promote explicit sex, you are
16 pandering. I mean, the word "pandering" does have a
17 sexual connotation. I -- I think -- I had thought it
18 was accepted that we have here a statute that's directed
19 against pandering.

20 MR. DIAZ: But the problem is the statute,
21 while it does capture pandering and illegal conduct, it
22 goes beyond that and captures a slew of innocent conduct
23 which we discussed this morning in the examples --

24 JUSTICE ALITO: What would you say is the
25 best realistic example that you can provide to show that

1 this is overbroad?

2 MR. DIAZ: The best and realistic example
3 would be any person, not necessarily amazon.com or
4 Netflix, it could be a private citizen. It could be a
5 religious leader of a religious group, regardless of
6 what type of religion we're talking about.

7 It could be any of those people --

8 JUSTICE ALITO: Doing -- doing what?

9 MR. DIAZ: Who look at the -- the Nan Goldin
10 pictures, who look at "Lolita," "Traffic" and all of
11 these other movies and harbor a belief that it is
12 obscene, which is one of the two types of materials
13 that's proscribed.

14 JUSTICE BREYER: Suppose we did this? What
15 would you think about an opinion, and why, which says
16 the following? We take every one of those examples and
17 all the ones listed here and put them in appendix A, and
18 the opinion says this is the Solicitor General's
19 interpretation of the statute, as amended, say with the
20 word "presentment," which comes out of promotion in
21 Ferber, and we think under that interpretation of the
22 statute, none of these things, nor anything like them,
23 could be prosecuted.

24 And if so understood, we can find no
25 example, at least none not present in Ferber itself,

1 where this would be overbroad. Therefore, it is
2 constitutional. I'm not saying that is my view. I am
3 saying simply I want to know your opinion about what
4 would be wrong with such an opinion.

5 MR. DIAZ: My opinion, Justice Breyer, is
6 that could be done. We could put a dozen or two dozen
7 or three dozen, an exponential number of examples, that
8 would be excluded. Essentially we would be writing an
9 affirmative defense into the statute or an absolute
10 defense that would prohibit even the prosecution. The
11 concern that that raises for me, in answer to Your
12 Honor's question, is you're still going to have a
13 chilling on free speech. There are still going to be
14 people out there who are not covered by one of these
15 examples who we haven't thought of, and that person is
16 going to be afraid to express opinions.

17 JUSTICE KENNEDY: Well, I suppose if we were
18 going to do that it would be simpler and maybe prudent
19 for us to reexamine our overbreadth rule. Your client
20 here falls within none of these examples. He was
21 convicted of having what everyone recognizes as not only
22 child pornography but involving a very small child. And
23 he knew what it was. And he -- and he conveyed that
24 belief.

25 Given the fact that it would appear that

1 child pornography is a growing problem, a serious
2 problem on the Internet, maybe we should examine the
3 overbreadth rule and just say that your client cannot
4 make this challenge.

5 MR. DIAZ: The Court can certainly do that,
6 Justice Kennedy. Essentially, though, I think what the
7 Court would be doing would be taking the four areas of
8 speech that have been taken out of the First Amendment
9 protection, which is defamation, the fighting words
10 under Brandenburg, Miller, which is obscenity, and the
11 additional extension of Ferber. Now what we would be
12 doing is carving yet another area of speech out of the
13 First Amendment, and we're just going to continue
14 chipping it away and chipping it away.

15 CHIEF JUSTICE ROBERTS: No. I don't think
16 that is responsive to Justice Kennedy's point. You
17 wouldn't be carving it out of the First Amendment. You
18 would be saying we're going to treat this area like
19 other areas, which would say that whoever is challenging
20 it has to show that they're a problematic case.

21 In other words, your client is relying -- he
22 didn't produce "Lolita." You're relying on the effect on
23 other people, and that is what our overbreadth doctrine
24 allows, if there's a substantial amount of speech that's
25 protected. And what I understood the question to

1 suggest is that we would wait basically for as-applied
2 challenges when "Lolita" is being prosecuted and we would
3 hear from them, but not in your case.

4 MR. DIAZ: That certainly could be done,
5 Mr. Chief Justice. Again, and as I suggested earlier,
6 the problem with that is that we're not talking about
7 anything less than a criminal statute, a criminal
8 statute that implicates the First Amendment, freedom and
9 thought which this Court since its very existence has
10 said we have to honor and respect, even if people are
11 thinking about nasty or dirty things.

12 That's what this country is based upon, and
13 the grave concern if we're going to do it on an
14 as-applied challenge, is people who might be afraid to
15 express their views about whether this is or is not
16 obscene. It's is the parent of a neighborhood group who
17 see a movie and wants to tell everybody about it and
18 say, look, I don't think --

19 JUSTICE ALITO: Here we have -- we have one
20 statute that covers "advertising, promoting, presenting,
21 distributing, and soliciting." Suppose that all of those
22 activities were not lumped together in one statute, and
23 there was a separate provision for each, and suppose
24 that the Court were to conclude that there is a problem
25 with one of them. Let's say "promotes" or "presents."

1 Would all of the others fall as well, under
2 the overbreadth doctrine, if they were set out in
3 separate statutory provisions?

4 MR. DIAZ: I believe that that would more
5 narrowly tailor the statute, but I don't believe,
6 Justice Alito, that it would solve the problem of
7 chilling speech.

8 JUSTICE SOUTER: No, but isn't the problem
9 the problem of your answer to Justice Breyer's
10 hypothetical. He said, you know, what if we have this
11 appendix and we list -- I forget what he said, three
12 dozen examples that the Solicitor General says wouldn't
13 be covered and that sounds fine to us. Your answer was
14 well, there would still be some examples not covered.

15 But isn't -- isn't the answer to that that
16 there would be some conceivable overbreadth, I suppose,
17 no matter what the appendix said? Somewhere out there
18 there would be an example not covered that would be the
19 basis for an as-applied challenge, but there wouldn't be
20 substantial overbreadth. And isn't that the case? That
21 if Justice Breyer's hypo were in fact the decision of
22 this case, there wouldn't be a fair argument that there
23 is any substantial overbreadth left to the statute,
24 isn't that so?

25 MR. DIAZ: That -- it could be, and that

1 would depend. I agree with Your Honor, Justice Souter,
2 that we have this world or this universe of overbroad
3 speech, and the appendix would shrink it and make it
4 narrower.

5 JUSTICE GINSBURG: And rewrite -- and
6 essentially rewriting the law, and that's my question
7 about this technique that Justice Breyer has proposed.
8 This Court is not generally in the business of writing
9 appendices that say well, the statute couldn't apply in
10 this situation, and it couldn't apply and as long as we
11 put those contours around it. Certainly the Court could
12 write an opinion that would inform Congress why this
13 particular statute as written is overbroad, and explain
14 what kind of statute wouldn't be overbroad.

15 But for the Court itself, I think that
16 that -- I don't know any instance in which we have
17 provided that kind of appendix that said things that are
18 like Traffic, they're okay, and things that are like
19 something else are not okay. I don't know.

20 MR. DIAZ: With respect, my initial response
21 to Justice Breyer's suggestion, if you will, was the
22 same as Your Honor, Justice Ginsburg. I don't know that
23 creating an appendix of examples is going to cure the
24 problem. I do concede that it would lessen the problem.
25 We would -- we would --

1 JUSTICE SCALIA: Why would it lessen? I
2 assume whatever you put in an appendix, saying all of these
3 other situations that are not before us are not covered.
4 Isn't that the most blatant dictum? But -- but -- and,
5 of course, we're not bound in later cases by our dicta.
6 But come to think of it, I guess the whole doctrine of
7 overbreadth rests upon dictum, doesn't it? It -- it
8 rests upon our determination in this case, which
9 involves somebody who undoubtedly was selling child
10 porn, and a horrible kind of child porn -- we say in
11 this case, oh, we can -- we can contemplate other cases,
12 where we would not hold the person guilty. That is all
13 dictum, too, isn't it?

14 So I guess the whole doctrine is -- is based
15 on dictum. So we may as well put it in all an appendix.
16 Let's put our dictum in an appendix. I agree.

17 MR. DIAZ: In answer to Your Honor's
18 question or comment --

19 (Laughter.)

20 MR. DIAZ: -- the -- I agree that the issue
21 of overbreadth is something where we're looking at
22 boundaries. And that's really what I think the Court
23 does in a situation of overbreadth analysis. You look
24 at the boundaries. How much -- how far we've gone
25 outside of the boundaries of what is protected.

1 CHIEF JUSTICE ROBERTS: Well, but it's the
2 boundary between what is -- what should be protected in
3 relation to what's unprotected.

4 So what's the ratio between legitimate films
5 like "Lolita" and illegitimate child pornography? In
6 other words, is, in fact, the protected material
7 substantial in relation to the law's legitimate sweep?

8 MR. DIAZ: The problem is we don't have an
9 empirical answer, a mathematical answer to that question.
10 What we do know is that films like "Lolita," "American
11 Beauty," and whatnot, which if presented in a certain way
12 can bring people under the coverage of the statute, have
13 received acclaim around the world, I mean all sorts of
14 Academy Awards. They're seen time and time again.
15 They're seen on Netflix. They're seen on cable TV. To
16 this day, some of these movies have been around for 30
17 years.

18 JUSTICE BREYER: Of course, the point of the
19 -- the point of the appendix, which unfortunately has
20 the failing of many charming metaphors, is that --

21 JUSTICE SCALIA: It has acquired a life of
22 its own.

23 (Laughter.)

24 JUSTICE BREYER: It distracts from the
25 question. But it -- as I read the Solicitor General's

1 interpretation of the statute, and amended it, taking
2 the word "presentment" from its context in Ferber, where
3 it was part of the definition of "promotion," I thought
4 that was the appendix. At least, that's my hypothetical
5 question. And so whether you like appendices or don't
6 like appendices, you could focus on why isn't it the
7 appendix I'm talking about?

8 He's filled it with qualifications using the
9 words "knowingly, reasonable," and a context that if it
10 is not purely commercial, as I understood, is at least
11 commercial plus a few things such as bartering.

12 That was really my question, and you've come
13 back to American Beauty and so forth, and if there's one
14 thing I think his definition keeps out of this
15 discussion, it is American Beauty and Traffic, because I
16 don't see under his interpretation how anyone could
17 conceivably be prosecuted even if he's talking to a
18 group who have never seen a movie. That isn't a
19 reasonable group of people. So what is your response to
20 what he said?

21 MR. DIAZ: My response, Justice Breyer, is
22 that if you take the word "present" and you give it the
23 meaning that it was given in Ferber, you make the
24 statute narrower. You make it -- bring it into more of
25 a constitutionally acceptable realm, but I respectfully

1 do not believe that it cures the entire problem, and my
2 basis for saying that is the question of Justice Souter of
3 the Solicitor General. You know -- the concern is, when
4 you don't have lawyers who understand these
5 hypertechnical meanings that the Court is going to give
6 and the interpretations we're going to put on them --

7 JUSTICE SOUTER: But isn't the answer to
8 that you may still have some overbreadth left, but it's
9 not substantial? Most 17-year-olds are, in fact, going
10 to realize that the real thing is not going on in, you
11 know, the "Lolita" movie. And if we accept that as a
12 factual proposition, which was the Solicitor General's
13 answer, and if we also accept, not by way of appendix
14 but by way of rationale in the opinion, that these
15 various activities have got to be given an essentially
16 commercial or quasi-commercial character, so that they
17 don't pick up the conversations with the neighbor, and
18 that's simply a matter of statutory interpretation that
19 could be part of our rationale. If we accept the
20 factual proposition about what reasonable viewers are
21 likely to know, and we engage in that kind of
22 interpretation following the Solicitor General's view of
23 how this serial list of activities should be construed,
24 don't we eliminate the possibility -- wouldn't we
25 eliminate the possibility of substantial overbreadth?

1 Some things may get by. There may still be legitimate
2 applied challenges, but substantial overbreadth, would
3 that be left?

4 MR. DIAZ: I think it would, but concededly
5 to a lesser degree, because once you make it clear as to
6 what matters are not covered by the statute, it makes it
7 easier for people to conform their conduct and their
8 words accordingly. The concern that I have is that it
9 still chills a -- it still chills free speech. If a
10 person looks at an appendix or looks at the rationale in
11 the Court's opinion in this case --

12 JUSTICE SOUTER: It can, but can you give me
13 an example of a class of activities that would not be,
14 in effect, insulated from indictment by these two steps
15 in the opinion, that would be of substantial character?

16 MR. DIAZ: Certainly, and I go back to the
17 question of Justice Breyer which is adolescents,
18 17-year-olds, 18-year-olds, who like to look at these
19 types of materials and one of them could simply say to
20 another over the Internet, you know, do you think we can
21 get some hardcore child porn? He's soliciting child porn
22 from another person, and that individual, that 17-year-
23 old kid, who's fantasizing or experimenting with his own
24 sexuality, can go to jail for 5 to 20 years. And we see
25 that in everyday America, in high schools all around the

1 country.

2 JUSTICE GINSBURG: Do we see them getting
3 prosecuted in any State?

4 MR. DIAZ: If he's soliciting materials
5 under sub (i) or sub (ii) of the statute, of the
6 pandering provision of the statute, yes. That person
7 can be prohibited. Excuse me, that person can be
8 prosecuted.

9 JUSTICE GINSBURG: I asked you have there
10 been such cases? A lot of States have pandering laws
11 now, and is the case that you posit a case that has
12 occurred in any of those States?

13 MR. DIAZ: Your Honor, I cannot cite a
14 specific example, but I can certainly tell Your Honor
15 this -- prosecutions from 1997 to 2004 have increased
16 over 452 percent. The conviction rate --

17 JUSTICE GINSBURG: Maybe that's because the
18 quantity of material has increased.

19 MR. DIAZ: Exactly. And the conviction rate
20 is 99.6 percent. And --

21 JUSTICE ALITO: And if one person says to
22 another, can we get some child pornography, how is that
23 solicitation?

24 MR. DIAZ: "Can you get me."

25 JUSTICE ALITO: Oh, "can you get me."

1 MR. DIAZ: "Can you get me."

2 JUSTICE ALITO: And you think that's
3 protected by the First Amendment? Asking someone for
4 child pornography is protected?

5 MR. DIAZ: First of all, it may not be
6 protected by the First Amendment, but it shouldn't be
7 captured by this statute, which puts that 17-year-old in
8 jail for 5 to 20 years.

9 JUSTICE GINSBURG: The only thing that
10 limits the statute is the First Amendment. What else --
11 you say it may not be covered by the First Amendment.
12 What else gives you a right to challenge the statute?

13 MR. DIAZ: I don't think that it is
14 necessarily not covered by the First Amendment. I think
15 certainly the First Amendment -- and this Court has
16 held, that we protect salacious thoughts, salacious
17 ideas.

18 JUSTICE ALITO: But it's not thought at that
19 point. It's a request to obtain contraband, which fuels
20 the production of the contraband. Is it protected by
21 the First Amendment or not, soliciting child
22 pornography?

23 MR. DIAZ: I think the First Amendment is
24 implied, but I don't think it becomes criminal conduct
25 until you get to either an attempt, solicitation, or a

1 conspiracy. You have to do more than just say I would
2 like to get it or can you get it for me, to be guilty of
3 the statute.

4 JUSTICE ALITO: To fall -- to fall under the
5 statute or to be protected by the First Amendment or not
6 protected by the First Amendment?

7 MR. DIAZ: Right.

8 JUSTICE ALITO: Which is it?

9 MR. DIAZ: To fall within the protection of
10 the First Amendment. And another example that comes to
11 mind is a person has material which they believe is
12 child pornography. They give it to somebody else, such
13 as "Lolita," for an opinion and they present to it that
14 person. One of the biggest problems or one of the
15 biggest -- the verb that's most objectionable in the
16 statute is "present," because it does not have to have
17 any commercial requirement.

18 JUSTICE ALITO: I mean, the Model Penal Code
19 has a general prohibition of soliciting illegal
20 activities. Are you saying that that's -- that
21 provision violates the First Amendment? Because it's
22 just words?

23 MR. DIAZ: Solicitation is a crime in and of
24 itself, and talking about or expressing a desire to
25 obtain is not -- doesn't quite go to the level of

1 solicitation or intent, where there has to be a
2 proximity in time, in immediacy, and a certain
3 geographical proximity between the words and the conduct
4 that you intend.

5 JUSTICE ALITO: But I thought the word in
6 the statute is "solicit."

7 MR. DIAZ: Well, there's "solicit" and
8 there's also "present." It works in both directions.

9 JUSTICE ALITO: If you're asking somebody
10 for child pornography, you're not presenting child
11 pornography.

12 MR. DIAZ: Correct. I agree.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Diaz.
15 General Clement, you have three minutes
16 remaining.

17 REBUTTAL ARGUMENT OF GEN. PAUL D. CLEMENT

18 ON BEHALF OF THE PETITIONER

19 GENERAL CLEMENT: Thank you, Mr. Chief
20 Justice.

21 Overbreadth, as this Court has reminded us
22 any number of times, is strong medicine, and that is
23 why, even in the First Amendment context, as-applied
24 challenges remain the basic building blocks of
25 adjudication. Rejection of this overbreadth challenge

1 here does not mean that the courts will not be open to
2 hear as-applied challenges going forward. Of course,
3 the Respondent here has no claim that the statute is
4 unconstitutional as applied to him.

5 JUSTICE KENNEDY: Can we reject the
6 overbreadth challenge here and still leave an
7 overbreadth doctrine for some other cases? I'm not sure
8 how we could do that.

9 GENERAL CLEMENT: Well, I think you could,
10 Justice Kennedy. You could -- I mean the burden here is
11 on the challenger who doesn't say that the statute's
12 unconstitutional as applied to them to show substantial
13 overbreadth in absolute terms and relative to the
14 statute's legitimate sweep. And it's interesting that
15 neither Respondent nor the court of appeals ever engaged
16 in that latter inquiry. And that's a critical inquiry.

17 JUSTICE GINSBURG: How is it different --
18 I mean, it would be strange to toss out the document --
19 the doctrine as I understand it is what we relied on
20 when we had the predecessor to this statute before us.

21 GENERAL CLEMENT: Justice Ginsburg, I'm not
22 urging that you get rid of overbreadth doctrine once and
23 for all, though it probably would be in the government's
24 interest. I am simply saying that if you apply overbreadth
25 analysis, the way it supposed to be applied, it's not

1 satisfied here. It's not just enough for you to envision a
2 couple of hypotheticals. It has to be -- the overbreadth has
3 to be substantial relative to the legitimate sweep of the
4 statute. This Court in Virginia against Hicks said --
5 faulted the lower court opinion because it had no
6 analyses whatsoever of valid versus invalid
7 applications. The proportionality aspect of this Court's
8 overbreadth jurisprudence was ignored entirely. That
9 could be verbatim the holding of this case. The Eleventh
10 Circuit did engage in that relative analysis. When my
11 brother was asked for empirical evidence about the
12 comparison, he said he didn't have any. With all due
13 respect, I think that's fatal to his case. Because
14 it's the burden --

15 JUSTICE GINSBURG: How did that occur in
16 Ashcroft v. Free Speech Coalition?

17 GENERAL CLEMENT: I think -- and in the way
18 I would explain that -- is I didn't think you didn't get
19 -- you found there was such absolute overbreadth that you
20 didn't even reach the proportionality inquiry. In any
21 event Hicks was decided afterwards, and I think Hicks
22 makes very clear that you have to have both absolute and
23 relative. I would say one last thing, though. This is
24 first and foremost you start with the facts of this case
25 and the facts of this case I think caution against

1 reading the word "presents" out of the statute or reading
2 it unduly narrowly.

3 The gravamen of the pandering here was not
4 just the offer of pictures of this individual and his
5 daughter, but was his claim that I can post these actual
6 images of child pornography on this group site because
7 I'm for real and I'm not an undercover agent. Now that
8 seems to be within the epicenter of the statute but it's
9 not for profit. It was doing it to establish his bona
10 fides. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, General.
12 The case is submitted.

13 (Whereupon, at 11:01 a.m., the case in the
14 above-entitled matter was submitted .)

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25

A				
able 5:19 30:22 33:8	additional 40:11	51:18 52:5,9	43:3,17,23	authorities 32:10
above-entitled 1:11 55:14	adjudication 52:25	allows 40:24	44:2,15,16	available 4:15 4:18 13:12 14:7
absolute 39:9	adolescent 15:14 18:25,25 19:2,2	Amazon 31:7	45:19 46:4,7	Awards 45:14
53:13 54:19,22	adolescents 48:17	amazon.com 5:2 21:5 30:15 38:3	47:13 48:10	awful 4:4 13:18
abstract 17:22	adopting 17:16	ambit 4:22 8:10	applications 19:18 54:7	a.m 1:13 3:2 55:13
abuses 23:5,5	adult 8:15 9:4 19:3 20:9 27:15	26:12,22 27:25 28:18	applied 48:2 53:4,12,25	
Academy 45:14	advertise 34:2 37:9	amended 38:19 46:1	applies 13:3	B
accept 47:11,13 47:19	advertisement 21:5	Amendment 3:13 20:21 33:4,6,11,13 40:8,13,17 41:8 50:3,6,10 50:11,14,15,21 50:23 51:5,6 51:10,21 52:23	apply 8:18 10:15 16:4 23:19 25:9 43:9,10 53:24	B 10:19
acceptable 46:25	advertises 14:6 14:17	America 48:25	applying 26:17	back 46:13 48:16
accepted 37:18	advertising 14:24 17:1 41:20	American 22:6 35:15 36:5 45:10 46:13,15	appreciate 13:8	bad 23:24
access 10:21 12:10	advice 20:23	amount 32:16 40:24	area 23:3 33:25 40:12,18	ban 11:8,10
acclaim 45:13	affirmative 10:8 10:11,16,16,18 10:25 11:7,14 12:6,9,12 29:14 39:9	analyses 54:6	areas 40:7,19	bans 10:15
accurate 20:11	afford 10:19,20 12:10	analysis 16:4 44:23 53:25 54:10	argument 1:12 2:2,7 3:3,7 29:8 42:22 52:17	barter 14:8 16:23
acknowledges 16:12	afraid 39:16 41:14	America 48:25	2:2,7 3:3,7 29:8 42:22 52:17	bartering 46:11
acquired 45:21	age 15:17,18	American 22:6 35:15 36:5 45:10 46:13,15	artistic 7:25 24:20	based 41:12 44:14
acquiring 11:18	agencies 30:18	amount 32:16 40:24	Ashcroft 54:16	basic 7:6,13,21 19:15,23 23:18 25:8 28:18 52:24
act 29:12 31:3	agency 10:20,21 12:10	analyses 54:6	asked 49:9 54:11	basically 24:11 41:1
activities 19:12 21:19 41:22 47:15,23 48:13 51:20	agent 55:7	analysis 16:4 44:23 53:25 54:10	asking 50:3 52:9	basis 5:6 42:19 47:2
activity 13:18 15:15 17:12,17 18:20 21:21 25:23 26:8 28:20	aggressive 19:22	analyze 7:12 23:16	aspect 21:13 54:7	Beauty 22:6 35:16 36:5 45:11 46:13,15
actor 26:8	agree 7:14,17 24:4 33:19,23 43:1 44:16,20 52:12	answer 9:23 18:19 21:2 39:11 42:9,13 42:15 44:17 45:9,9 47:7,13	assume 21:12 23:10 27:2 44:2	behalf 1:16,18 2:4,6,9 3:8 29:9 52:18
actors 9:3,4	Alito 17:25 18:3 18:9 37:24 38:8 41:19 42:6 49:21,25 50:2,18 51:4,8	anterior 6:20	assumption 6:22 9:2	behavior 13:22
actress 28:16		anyway 25:2	as-applied 7:8 7:10,15,18 23:14,17,20 24:14,21 25:2 25:8 41:1,14 42:19 52:23 53:2	belief 29:20 31:16 38:11 39:24
acts 20:3,4,25 23:5		appeals 3:24 53:15	attached 5:7 37:14	beliefs 30:4,6,10
actual 4:21 5:9 5:15 8:23 9:11 9:14 18:7 19:8 19:9 20:1,1,25 21:22 25:17 26:23 28:12 31:9 55:5		appear 39:25	attaches 5:2	believe 4:6 8:21 15:3 20:17 29:21 31:16 35:2,22 36:7 37:6 42:4,5 47:1 51:11
add 19:21 29:3		APPEARAN... 1:14	attempt 50:25	
addition 36:21		appendices 43:9 46:5,6		
		appendix 10:9 38:17 42:11,17		

best 37:25 38:2	brother 54:11	52:2	28:18 30:9,18	12:15,19 13:10
better 9:23	building 24:21	certainly 14:3	31:2,3,4 34:8	14:2,25 15:11
beyond 37:22	52:24	15:25 16:21	35:9,23 39:22	15:21 16:7,19
biggest 51:14,15	burden 53:10	40:5 41:4	39:22 40:1	17:18,25 18:2
Bishop 22:12	54:14	43:11 48:16	44:9,10 45:5	18:9,22 19:14
Bishops 21:4,9	business 43:8	49:14 50:15	48:21,21 49:22	20:15 21:6,11
blatant 44:4	buy 16:23	challenge 7:8,10	50:4,21 51:12	21:15,18,21,24
blocks 52:24	buyers 35:2	23:17 24:14,21	52:10,10 55:6	22:8,17 23:15
blog 31:12		25:3 40:4	children 23:4	24:2,6,9 25:5
body 9:4,18	C	41:14 42:19	24:18 30:17	26:10 27:3,10
bona 55:9	C 2:1 3:1	50:12 52:25	32:9,9	27:13,17,22
bound 44:5	cable 45:15	53:6	child-trafficki...	28:2,15,24
boundaries	call 12:16	challenger	23:3	29:6 52:15,17
44:22,24,25	calls 9:15	53:11	chilling 39:13	52:19 53:9,21
boundary 45:2	camera 7:4	challenges 7:16	42:7	54:17
box 9:10	candidly 16:16	7:19 41:2 48:2	chills 48:9,9	client 39:19 40:3
boy 26:1	capture 14:7	52:24 53:2	chipping 40:14	40:21
boycott 31:15	28:21 32:25	challenging	40:14	CNN 31:9
brag 37:5	37:21	40:19	choose 34:24	coalition 20:24
bragging 32:22	captured 5:23	character 47:16	Circuit 29:24	21:4 31:14
35:4	6:11 50:7	48:15	54:10	54:16
Brandenburg	captures 29:16	charging 13:13	circumstance	Code 51:18
40:10	29:17 37:22	charming 45:20	5:10	collects 32:8
Breyer 13:1,10	car 35:4,4,7,8,8	chief 3:3,9 4:1,9	cite 49:13	come 4:21,24
13:16 14:2,14	carefully 15:17	9:15,20 14:12	cited 17:11	44:6 46:12
15:9,12,21	carries 29:13	14:25 16:10	citizen 38:4	comes 6:2,6 8:10
17:7 30:19	carving 40:12	17:9,19 18:18	claim 5:8 53:3	9:5 26:22
31:1,19,22	40:17	29:5,10 30:5	55:5	28:17 38:20
32:5 38:14	case 3:4 11:8,24	30:12 35:6,20	clarify 16:9	51:10
39:5 43:7	25:17 40:20	36:3 40:15	clarity 13:9	comment 44:18
45:18,24 46:21	41:3 42:20,22	41:5 45:1	class 15:16 28:1	commercial
48:17	44:8,11 48:11	52:14,19 55:11	48:13	16:16,21,22
Breyer's 16:14	49:11,11 54:9	child 4:4,7,21	clean 34:19	17:4,10 34:24
18:11 42:9,21	54:13,24,25	5:9,22 6:24 7:7	clear 3:11 11:23	46:10,11 47:16
43:21	55:12,13	7:22,24 8:2,4	16:2 17:11	51:17
brief 10:10 13:2	cases 27:2 44:5	8:13,14,23	24:13,17 48:5	committed 5:25
14:13,15,22	44:11 49:10	9:11,14,17,19	54:22	common 15:14
16:11,12,15	53:7	10:12,14 11:22	clearer 33:12	comparable
17:15 22:2	Catholic 21:4,8	12:17,22 14:9	clearly 5:16,20	11:25
30:21	22:12	15:8 16:25	9:8 12:23 15:8	comparison
briefs 8:2 28:11	caught 30:23	17:15 18:4,7	17:1 23:8	54:12
bring 45:12	cause 4:6 10:13	19:2,6,9,9,12	Clement 1:15	compelling 4:2
46:24	29:20 35:22	19:24 20:1,2,8	2:3,8 3:6,7,9	complaining
bringing 36:17	causes 35:2	20:10 21:22,25	4:9 5:4 6:6,10	34:13
broad 22:24	caution 54:25	22:3,6,19	6:19,23 7:5,17	component 8:19
broader 17:19	certain 13:23	23:18 25:18	8:8,16 9:22	9:7 10:2,2
brothels 23:4	32:16,16 45:11	26:23 28:7,15	10:4 11:2 12:2	22:24 23:12

35:21	31:17 32:20	54:4,5	10:16,16,18	dicta 44:5
concede 43:24	35:14	courts 53:1	11:8,14 12:6	dictum 44:4,7
concededly 48:4	contains 4:7	Court's 20:23	12:10,12 29:14	44:13,15,16
conceivable	31:12	48:11 54:7	32:14 37:2	didn't 54:18
42:16	contemplate	cover 17:17	39:9,10	difference 15:22
conceivably	44:11	24:10 34:16	defenses 10:25	30:6
46:17	content 21:13	coverage 45:12	define 29:21	different 13:5
conception 17:7	22:25 33:9	covered 4:7,10	definition 19:22	14:13 17:7
17:20	context 7:22 8:9	5:11 6:5 7:13	19:22,23 20:7	22:1 24:5
conceptually 5:5	19:8 46:2,9	12:21,24 13:1	29:2 46:3,14	30:11 35:7,11
concern 23:1	52:23	13:15,16 17:2	definitional	53:17
39:11 41:13	continue 40:13	17:6 22:12,21	19:16	direct 20:3
47:3 48:8	contours 43:11	23:8,10 35:25	degree 34:14,15	directed 4:17
concerned 32:24	contraband	39:14 42:13,14	48:5	37:18
conclude 41:24	3:18,20,21	42:18 44:3	Department	directions 52:8
conduct 29:22	50:19,20	48:6 50:11,14	1:16	dirty 15:13 18:6
31:10,13 32:17	contrary 16:11	covering 13:6,6	depend 43:1	41:11
37:21,22 48:7	conversations	35:25	depends 33:20	discretion 29:22
50:24 52:3	47:17	covers 24:8	depict 28:4	discussed 37:23
confined 7:23	convey 9:11	34:17,18,18	depicted 15:17	discussion 46:15
conform 48:7	11:23 30:2	37:5 41:20	depiction 5:25	disgusting 12:17
Congress 12:6	conveyed 39:23	creating 43:23	depictions 6:21	12:22 15:7
20:23 43:12	conveying 31:15	crime 7:3,4	24:18	distinction
congressional	conveys 30:1	13:24 51:23	depicts 8:2	16:20 17:3
32:24	convicted 39:21	crimes 6:14	25:23 26:7,21	22:4
conjunction	conviction 49:16	criminal 41:7,7	describe 15:4	distracts 45:24
4:17	49:19	50:24	36:4	distributes 14:6
connotation	Coral 1:18	criminalize	described 6:17	37:12
37:17	correct 11:21,22	13:18	desire 51:24	distributing
consciously	26:9,10 31:8	critical 53:16	determination	4:20 22:14
20:17	52:12	cure 43:23	29:25 44:8	41:21
consequence	countless 5:12	cures 47:1	Diaz 1:18 2:5	distributor 5:1
20:22	country 6:1	cut 15:1	29:7,8,10	doctrine 40:23
conspiracy 51:1	41:12 49:1		30:12,25 31:8	42:2 44:6,14
constitutional	couple 54:2	D	31:21 32:3,12	53:7,19,22
16:8 23:22	course 7:20 9:6	d 1:15 2:3,8 3:1	33:15,23 34:10	document 53:18
39:2	16:2 24:23	3:7 10:9,19	34:15 35:12	doing 38:8,8
constitutionally	26:8 44:5	52:17	36:3,14 37:4	40:7,12 55:9
46:25	45:18 53:2	daughter 55:5	37:20 38:2,9	double 9:4
construction	court 1:1,12	day 45:16	39:5 40:5 41:4	doubles 9:18
17:16	3:10,11,24	debased 23:4	42:4,25 43:20	dozen 39:6,6,7
constructions	7:20 16:2	decided 22:20	44:17,20 45:8	42:12
16:4	29:11 40:5,7	54:21	46:21 48:4,16	drawing 15:1
construed 3:16	41:9,24 43:8	decision 42:21	49:4,13,19,24	drawn 16:20
16:7 47:23	43:11,15 44:22	defamation 40:9	50:1,5,13,23	due 54:12
consumer 33:25	47:5 50:15	defend 5:19	51:7,9,23 52:7	duplicate 34:20
contain 30:1	52:21 53:15	defense 10:8,11	52:12,14	D.C 1:8,16

E	ESQ 1:15,18 2:3 2:5,8	expanding 15:22	fatal 29:1 54:13	foremost 54:24
E 2:1 3:1,1	essence 29:24	experimenting 48:23	faulted 54:5	forget 42:11
earlier 11:20 41:5	essentially 39:8 40:6 43:6 47:15	explain 43:13 54:18	Federal 13:24	form 31:14
easier 25:12 48:7	establish 55:9	explicit 31:10 37:14,15	Ferber 7:20,23 18:15 19:5 28:25 31:3,5 31:19,25 32:4 32:5,11 36:10 38:21,25 40:11 46:2,23	forth 6:2 21:3 22:25 46:13
easy 35:13	everybody 41:17	exponential 39:7	fides 55:10	forward 53:2
effect 40:22 48:14	everyday 48:25	express 39:16 41:15	fighting 40:9	found 54:19
efforts 3:17 4:15 4:18 5:23 16:22,23	evidence 54:11	expressing 33:1 51:24	filled 46:8	four 40:7
either 3:20 5:7 13:3 17:13 26:18 35:9 50:25	exactly 25:6 27:14,17 49:19	expression 32:20	film 4:20 5:14 5:15,16 6:17 6:24 8:2,4,13 21:14 25:23 28:10,17 31:12	fraud 33:22,25
element 11:14	exaggerate 34:23	expressions 30:4	films 31:11 36:6 45:4,10	free 13:14,14 20:23 21:4 39:13 48:9 54:16
Eleventh 29:24 54:9	exaggerating 34:25	expressly 16:12	find 25:1,2,7,12 26:18 33:8 38:24	freedom 41:8
eliminate 47:24 47:25	exaggeration 34:18	extension 13:24 40:11	fine 10:22 27:22 42:13	frequency 18:8
empirical 45:9 54:11	examine 15:16 40:2	extent 7:25 17:3	first 3:4,13 4:11 4:23 7:12 10:13 15:1 20:21 26:13 33:3,6,11,13 40:8,13,17 41:8 50:3,5,6 50:10,11,14,15 50:21,23 51:5 51:6,10,21 52:23 54:24	frequently 18:20
encompasses 16:13,17	example 7:6 10:3 14:16 30:14,15,21 31:1 34:19,25 36:17 37:25 38:2,25 42:18 48:13 49:14 51:10	extra 36:22,25	fit 20:7 28:14	fuels 50:19
enforce 10:1 29:23	examples 8:1 37:23 38:16 39:7,15,20 42:12,14 43:23	F	Fla 1:18	full 9:17
enforcement 10:21 12:10 17:14 29:22	exception 23:20 25:1,3,8	face 3:25 29:16	focus 46:6	fundamental 10:5
engage 47:21 54:10	exchanging 13:13	fact 11:6 20:6 29:18 35:10 36:24 39:25 42:21 45:6 47:9	following 38:16 47:22	funny 13:20,20
engaged 53:15	excluded 33:5 39:8	facts 54:24,25	follows 24:11	furnishing 17:23
engaging 21:19	exclusively 24:19	factual 30:8 47:12,20	footnote 14:14 16:10,10 17:11	G
enormous 15:19 15:23	excuse 26:7 49:7	fail 8:24	forbidden 9:11 21:19	G 3:1
entire 47:1	exhibit 6:14	failing 45:20	foreign 6:1	Gables 1:18
entirely 33:5 35:7 54:8	exist 3:21 29:18 36:9	fair 42:22		gather 17:6
envelope 9:16	existence 41:9	fairly 15:14		GEN 1:15 2:3,8 3:7 52:17
envision 54:1	exists 36:9	fairness 17:18		general 1:15 3:6 3:9 4:9 5:4 6:6 6:10,19,23 7:5 7:17 8:8,16 9:22 10:4 11:2 12:2,15,19 13:10 14:2,25 15:11,21 16:7 16:19 17:18,25 18:2,9,22 19:14 20:15 21:6,11,15,18 21:21,24 22:8 22:17 23:15 24:2,6,9 25:5 26:10 27:3,10
epicenter 55:8		fall 26:3 42:1 51:4,4,9		
equally 5:11 23:21		falls 39:20		
erred 3:24		false 5:18,20		
especially 9:2 18:23		falsely 3:14		
		famous 30:17		
		fantasizing 48:23		
		far 44:24		

27:13,17,22 28:2,15,24 30:21 42:12 47:3 51:19 52:15,19 53:9 53:21 54:17 55:11 generally 43:8 General's 38:18 45:25 47:12,22 geographical 52:3 getting 18:15 49:2 Ginsburg 7:23 8:8,12,17 16:6 16:9,19 20:5 20:16 28:9,22 37:7 43:5,22 49:2,9,17 50:9 53:17,21 54:15 girl 23:9 give 46:22 47:5 48:12 51:12 given 8:1 39:25 46:23 47:15 gives 23:13 50:12 giving 14:15 16:25 17:5 29:22 go 9:9 20:2 32:6 48:16,24 51:25 God 12:17 goes 13:19 27:20 37:22 going 9:3 13:17 24:11,12 26:22 32:6,10 39:12 39:13,16,18 40:13,18 41:13 43:23 47:5,6,9 47:10 53:2 Goldin 38:9 good 18:15 19:5 33:2 37:1 goodness 36:18	government 20:2 government's 16:12 37:11 53:23 graduate 27:25 graphic 6:11,21 35:17 36:6 gratis 17:5 gravamen 55:3 grave 41:13 gray 10:10 great 35:7,8 greater 7:24 group 38:5 41:16 46:18,19 55:6 growing 40:1 guess 5:11 6:20 7:14 37:10 44:6,14 guilty 44:12 51:2	high 48:25 high-level 15:15 hold 44:12 holding 54:9 honest 25:18 33:2 honestly 37:6 honor 33:19,23 41:10 43:1,22 49:13,14 52:13 Honor's 39:12 44:17 horrible 44:10 hot 20:8 35:17 36:6 hypertechnical 47:5 hypo 42:21 hypothetical 18:11 26:11 42:10 46:4 hypotheticals 4:2 18:4 21:3,7 22:1 54:2	49:18 independently 12:13 indicated 23:1 indictable 10:24 indicted 11:1 indictment 48:14 individual 9:13 48:22 55:4 individuals 15:17 inform 43:12 information 4:5 infrequently 18:21,22 initial 43:20 innocent 37:22 inquiry 53:16,16 54:20 instance 4:24 43:16 instances 13:3,6 insulated 48:14 intend 52:4 intended 29:20 intending 31:16 intent 9:7,10 11:16,23 52:1 interest 53:24 interested 14:10 interesting 53:14 Internet 19:7 22:20 31:12 34:23 40:2 48:20 interpret 8:18 14:3,23 15:25 interpretation 38:19,21 46:1 46:16 47:18,22 interpretations 47:6 interpreted 28:20 introduced	28:25 invalid 54:6 invent 54:21 invite 15:24 involve 4:11,12 involves 44:9 involving 31:10 39:22 issue 3:16 33:16 44:20
	H			J
	hand 15:5 22:15 22:18 handed 18:24 19:1 haphazard 12:1 happen 24:18 28:4 happening 6:15 happens 11:21 happenstance 11:15 harbor 38:11 hardcore 20:12 48:21 hear 3:3 41:3 53:2 hears 36:4 held 22:16,18 23:4 29:24 50:16 Hicks 54:4,21 54:21	I		J 1:18 2:5 29:8 jail 32:6 33:17 48:24 50:8 job 18:15 19:5 jurisprudence 54:8 Justice 1:16 3:3 3:9 4:1,9 5:1,4 5:24 6:8,12,19 6:22 7:2,14,23 8:8,12,16 9:13 9:22,25 10:4 10:22 11:2,10 12:2,14,16 13:1,10,16 14:2,12,13,25 15:9,12,21 16:6,9,14,19 17:7,9,19,25 18:3,9,11,18 19:11,14 20:5 20:15 21:2,6 21:10,12,16,20 21:23 22:7,15 22:22 23:2,16 23:23 24:4,7 24:23 25:5,16 26:11,25 27:3 27:8,11,15,19 27:23,24 28:9 28:22 29:5,10 30:5,12,19 31:1,19,22 32:5 33:2,20 33:24 34:6,13

34:16 35:6,20 36:3,11,14,15 36:24 37:7,13 37:24 38:8,14 39:5,17 40:6 40:15,16 41:5 41:19 42:6,8,9 42:21 43:1,5,7 43:21,22 44:1 45:1,18,21,24 46:21 47:2,7 48:12,17 49:2 49:9,17,21,25 50:2,9,18 51:4 51:8,18 52:5,9 52:14,20 53:5 53:10,17,21 54:15 55:11	12:5 knowingly 46:9	listed 38:17 listens 36:4 literal 6:3 literary 24:20 little 23:9 logical 25:7 Lolita 8:7 9:9 25:23 35:15 36:5 38:10 40:22 41:2 45:5,10 47:11 51:13 long 43:10 look 6:4 12:23 13:14 14:9,11 15:7 31:12 38:9,10 41:18 44:23 48:18 looking 15:13 44:21 looks 48:10,10 lost 18:19,19 lot 13:18 37:9 49:10 lower 54:5 lumped 41:22 lying 32:22 33:10,12,16,18 33:21,21 36:12 36:13,17,21 37:2	29:13 33:17 manner 8:22 29:19 32:17 market 4:15,18 4:20 5:5 14:8 19:25 35:1 marketing 8:22 9:9 24:22 marketplace 34:22 materia 10:7 12:8 material 10:20 10:21 11:18,24 12:11 13:12 17:23,24 21:25 24:12 32:9,12 36:8 37:15 45:6 49:18 51:11 materials 3:18 3:20,23 15:6 18:12,13,16 19:25 20:24 22:2,3 23:13 23:19 26:15 29:17,18,25 30:2 31:17,24 32:19,20 35:1 35:14 38:12 48:19 49:4 mathematical 45:9 matter 1:11 11:15 13:5 19:4 30:9 42:17 47:18 55:14 matters 48:6 mean 9:17 12:23 14:3 15:1 16:22 18:11 21:8 22:17,18 22:21 24:2 30:20 37:3,16 45:13 51:18 53:1,10,18	meaning 4:13 7:24 14:16 26:24 46:23 meanings 47:5 means 17:21 medicine 52:22 mentioned 25:17 28:10 mere 24:25 25:3 32:13 merely 11:13,13 11:15,25 message 11:23 metaphors 45:20 MICHAEL 1:6 Miller 40:10 mind 17:7 51:11 minimum 29:13 33:17 minor 25:24 26:8,9,21 31:10,13 minors 21:13,16 21:18 30:17 minutes 52:15 misleading 5:18 5:20 misrepresent 15:18 misrepresenting 5:16 misrepresents 5:8 mistaken 32:21 34:17 Model 51:18 modeling 30:18 molested 32:9 molesting 32:8 moment 21:13 morning 3:4 37:23 motion 9:1,3 motives 24:5 moved 19:7 movie 4:3,4,6,13
K keeps 46:14 Kennedy 5:1,4 21:2,6,10,12 21:16,20,23 22:7,15,22 23:16,23 24:4 24:7 39:17 40:6 53:5,10 Kennedy's 40:16 kid 48:23 kids 6:2,9 18:5 killing 23:9 kind 13:21 18:16 43:14,17 44:10 47:21 knew 39:23 know 12:20 14:3 14:18 17:22 19:17 26:20 28:3 33:22 35:19,19 37:1 39:3 42:10 43:16,19,22 45:10 47:3,11 47:21 48:20 knowing 11:17	L language 6:16 23:12 29:19 latest 25:22 Laughter 36:23 44:19 45:23 law 10:20 12:10 17:13 27:1 29:22 43:6 lawful 3:22 35:14 laws 34:21 49:10 lawyers 47:4 law's 45:7 lead 8:21 leader 38:5 Leahy 32:23 leave 53:6 left 42:23 47:8 48:3 legality 30:7 legitimate 34:19 45:4,7 48:1 53:14 54:3 lessen 43:24 44:1 lesser 48:5 let's 4:3 5:6 21:10,12 41:25 44:16 level 51:25 liars 33:2 34:16 lie 33:9 34:7 36:18 lies 33:14 life 45:21 light 14:16 likewise 3:15 limited 4:14 16:15,21 17:10 17:12,16 limits 50:10 line 15:1 17:4 list 42:11 47:23	M magazines 18:24 mail 9:14,16 10:14 12:5,18 12:23 13:8 15:3,7 18:5 main 18:13 mainstream 5:6 5:12 9:2,10 26:20 making 13:12 14:7 man 8:3 mandatory		

4:22 5:2,3,6,8 5:9,22,23,25 6:4,6,8 8:21 22:5 25:21 26:13,21 28:7 41:17 46:18 47:11 movies 5:12 27:21 28:4 38:11 45:16 moving 20:24 murder 5:13,15 28:5,6	news 6:13,13 noncommercial 16:13,17 17:4 non-law 28:3 non-law-school 27:25 normal 11:11 notion 19:23 number 16:2 39:7 52:22	okay 31:5 43:18 43:19 old 8:3 27:1,8,25 48:23 once 12:4 48:5 53:22 ones 38:17 open 53:1 opened 9:16 opening 10:10 operating 16:25 opinion 38:15 38:18 39:3,4,5 43:12 47:14 48:11,15 51:13 54:5 opinions 30:4 39:16 opposed 19:2 oral 1:11 2:2 3:7 29:8 order 8:17 ordinary 36:7 ought 36:22 outset 23:2 outside 23:22 25:13 26:12 44:25 overbreadth 16:3 29:1 39:19 40:3,23 42:2,16,20,23 44:7,21,23 47:8,25 48:2 52:21,25 53:6 53:7,13,22,24 54:2,8,19 overbroad 11:9 16:1 29:16 38:1 39:1 43:2 43:13,14 overly 22:24	pandered 20:25 pandering 7:10 11:5,19 19:21 20:25 23:21 24:25 25:9,14 29:12 36:16,18 36:19,19,20,21 37:1,8,14,16 37:16,19,21 49:6,10 55:3 pardon 21:10 parent 41:16 pari 10:7 12:8 part 28:12 32:15 46:3 47:19 particular 30:7 43:13 particularly 8:25 14:14 33:25 party 11:24 patent 34:21 PAUL 1:15 2:3 2:8 3:7 52:17 Penal 51:18 penalty 34:14,16 36:22,25 37:1 people 9:9,11 15:16 18:4 19:8 26:1 32:25 33:17 34:17 37:5,5,5 37:7 38:7 39:14 40:23 41:10,14 45:12 46:19 48:7 perceived 8:4 percent 49:16 49:20 percentage 15:16 permitted 23:25 person 4:19 6:16 6:23 8:14 9:8 10:13 27:12,20 34:3 35:1,13 36:4,7 38:3	39:15 44:12 48:10,22 49:6 49:7,21 51:11 51:14 Petitioner 1:4 1:17 2:4,9 3:8 52:18 photographers 30:17,18 31:1 31:6 photography 30:16 pick 47:17 picks 19:23 29:2 picture 7:3 9:1,3 pictures 6:9 15:13 18:6,17 18:24 38:10 55:4 place 7:3 13:19 Playboy 19:3 playing 8:15 28:12 please 3:10 29:11 plus 46:11 point 4:12 10:23 18:10 40:16 45:18,19 50:19 police 9:15,20 11:24 31:25 32:15 porn 9:17 11:22 12:17 20:8,12 25:18 44:10,10 48:21,21 pornography 4:5,7,21 5:9,22 6:24 7:7,22,24 8:5,23 9:12,14 9:19 10:12,14 12:22 14:9 15:8 17:1,15 18:5,7 19:2,3,6 19:9,10,12,24 20:1,2 21:22 21:25 22:3,6
N	O	P		
N 2:1,1 3:1 naive 26:1 Nan 38:9 narrower 43:4 46:24 narrowing 16:4 narrowly 42:5 55:2 nasty 41:11 nationwide 30:16 natural 9:2 12:25 14:5 20:22 naturally 25:9 26:22 nature 5:8 necessarily 12:21 34:10 38:3 50:14 negative 18:19 neighbor 12:17 14:18 15:4 17:14 47:17 neighborhood 41:16 neither 53:15 Netflix 21:5 30:15 31:7 38:4 45:15 never 46:18 new 19:22 32:11	O 2:1 3:1 objectionable 51:15 objective 8:19 8:24 10:2 24:15 26:17 27:5,6,9 35:21 35:21 36:2 objectively 8:21 11:21 obscene 38:12 41:16 obscenity 33:5 40:10 observer 27:14 35:21 obtain 50:19 51:25 occasions 16:3 occur 18:7 54:15 occurred 49:12 occurs 18:21,21 18:22 October 1:9 offense 10:24 11:17,17 offer 3:17 34:2 55:4 offering 3:19 13:14 19:25 20:3,19 33:9 office 9:10 oh 9:3 21:15 33:11 37:2 44:11 49:25	P 3:1 PAGE 2:2 pander 25:4		

22:19 23:18 26:23 28:7,16 28:19 30:8,9 31:2,3,4 34:8 35:10,23 39:22 40:1 45:5 49:22 50:4,22 51:12 52:10,11 55:6 portray 24:11 24:12 portrayed 36:8 portrays 4:4 5:13 8:22 posit 49:11 position 13:11 26:5 28:21 37:11 possess 18:14 20:14 31:24 35:15 possession 6:24 7:1,7 10:12,15 10:17 11:4,9 11:10,12,15,18 12:1,4,5 25:1,3 25:15 31:23 32:13,14,19 possibility 7:20 47:24,25 possible 5:5,11 16:5 29:14 post 55:5 post-adolescent 15:14 potential 35:2 practices 23:3 prankster 32:23 precisely 12:6 predecessor 53:20 prerequisite 10:18 12:12 present 10:25 11:7 17:13 37:7 38:25 46:22 51:13,16	52:8 presentation 4:12 presented 9:19 45:11 presenting 4:5 11:23 13:12 15:6,13 17:23 20:6 22:13 24:1,17,19,24 26:14 32:15 41:20 52:10 presentment 38:20 46:2 presents 14:6,15 14:20 15:25 17:12,17,20,21 23:11 32:10 37:11 41:25 55:1 pressed 25:11 presumably 11:16 pretend 34:1 pretending 20:9 pretty 18:15 19:5 prevent 10:24 32:9 35:24 prevents 3:18 previously 15:20 prison 29:13,14 33:18 34:12 prisons 23:5 private 38:4 probably 8:24 9:4 53:23 problem 6:20,25 10:13 11:3,4 11:11,12,16,25 12:4 13:25 14:4 15:2 20:11,21 24:24 24:25 31:5,8 31:19,20 37:20 40:1,2 41:6,24	42:6,8,9 43:24 43:24 45:8 47:1 problematic 40:20 problems 30:13 33:15 51:14 proceed 25:7 produce 30:22 40:22 product 4:15,18 production 50:20 profit 55:9 prohibit 3:17,22 39:10 prohibited 12:13 29:21 49:7 prohibition 7:6 7:13,19,21 11:3 19:15 20:24 23:18 25:8,15 26:3 28:18 51:19 promote 5:23 17:15 22:20 34:2 37:9,15 promotes 14:6 14:17 23:12 41:25 promoting 19:8 22:9,13 26:14 34:24 41:20 promotion 4:13 4:25 7:21 8:20 38:20 46:3 promotional 14:16,19,21 17:12,17 proper 7:11 32:10 properly 3:16 proportionality 54:7,20 proposed 43:7 proposes 3:14	proposing 3:12 proposition 8:11 47:12,20 proscribed 36:8 38:13 proscription 16:13 prosecute 20:4 prosecuted 32:11 38:23 41:2 46:17 49:3,8 prosecution 39:10 prosecutions 49:15 protect 29:12 33:4,13 34:9 34:11 50:16 protected 3:12 29:16 31:4 32:1,1,4,7 36:10 40:25 44:25 45:2,6 50:3,4,6,20 51:5,6 protecting 33:14 34:7,7 protection 23:13 33:6 36:20 40:9 51:9 protects 33:11 provide 36:25 37:25 provided 43:17 provides 10:10 36:25 provision 7:11 10:7 11:5 19:21 25:10,14 29:12,15 41:23 49:6 51:21 provisions 10:6 42:3 proximity 52:2 52:3 prudent 39:18	public 23:9,23 puff 35:14 37:5 puffery 35:24 puffing 34:18 35:3,18 punish 34:11 punished 34:4 36:15,16 punishes 30:3 punishing 36:12 36:13 purely 46:10 purpose 33:3 34:25 put 11:20 21:3 33:16 35:16 38:17 39:6 43:11 44:2,15 44:16 47:6 puts 50:7 <hr/> Q <hr/> qualifications 46:8 qualify 10:18 12:9 qualifying 12:12 quantity 49:18 quasi-commer... 47:16 question 28:10 39:12 40:25 43:6 44:18 45:9,25 46:5 46:12 47:2 48:17 questions 19:17 30:11 quick 13:14 quite 13:24 30:10 51:25 <hr/> R <hr/> R 3:1 raised 11:13 raises 39:11 rape 6:2
--	--	--	--	--

raping 6:9	39:21	27:3 41:10	salesman 35:4	sell 13:4 16:23
rate 49:16,19	redeeming 33:6	43:20 54:13	satisfied 10:3	34:22
ratio 45:4	redundant	respectfully	20:16 26:19	selling 33:22
rationale 47:14	37:10	46:25	54:1	44:9
47:19 48:10	reel 6:13	Respondent	satisfies 36:1	Senator 32:23
reach 15:19	reexamine	1:19 2:6 29:9	satisfying 24:15	send 6:18
54:20	39:19	53:3,15	saw 7:3	sense 14:24
reaction 12:25	referred 16:10	response 31:22	saying 4:4 13:2	24:20
read 4:16 9:8	reflects 29:19	43:20 46:19,21	18:20 20:13	sentence 34:12
10:6 12:8 13:2	regardless 38:5	responses 12:3	26:1 30:9 39:2	separate 41:23
14:13 27:2	regulates 30:10	responsive	39:3 40:18	42:3
36:12 45:25	reject 53:5	40:16	44:2 47:2	serial 47:23
reading 14:5	Rejection 52:25	rest 29:25	51:20 53:24	series 30:16
55:1,1	relation 45:3,7	restrictive 15:24	says 9:16 14:9	serious 40:1
real 9:18 11:11	relations 8:3	rests 44:7,8	16:11 19:24	set 42:2
14:10 18:8,16	relative 53:13	review 4:4 5:2,3	25:23 28:22	seven 27:8
18:23 19:6	54:3,10,23	5:7	38:15,18 42:12	sex 26:21 35:18
20:13,14,19,20	relevant 10:8	reviewer 4:3,22	49:21	36:6 37:15
21:16,18 26:2	relied 53:19	25:21 26:7,14	Scalia 12:14,16	sexual 8:3 25:23
35:13 47:10	religion 38:6	reviewing 25:22	24:23 25:5	26:7 28:19
55:7	religious 38:5,5	rewrite 43:5	27:8,11,15	31:12 37:15,17
realistic 37:25	relying 40:21,22	rewriting 43:6	33:2,20,24	sexuality 48:24
38:2	remain 52:24	re-release 25:22	34:6,13,17	sexually 31:10
realize 47:10	remainder 27:7	RICHARD 1:18	36:11,14,15,24	short 30:3
really 4:14 17:8	28:8	2:5 29:8	37:13 44:1	show 13:8 23:24
17:21 18:25	remaining 52:16	rid 53:22	45:21	37:25 40:20
26:9 31:17,18	remember	right 8:24 9:17	school 18:6	53:12
34:8 35:18,19	18:12	11:2 15:9	22:16 27:1	showing 13:7,22
44:22 46:12	reminded 52:21	19:11 20:15	schoolmates	18:6 20:6,7
realm 46:25	renders 16:1	22:7 24:6 25:6	15:13	23:6
reason 10:5 11:8	reply 14:14	32:6 33:3	schools 13:19	shown 25:18
18:25 20:19	16:11	50:12 51:7	23:5 48:25	shows 8:4,13
21:8 26:15	report 32:24	ROBERTS 3:3	school-boy	26:2
33:5	representation	4:1 14:12 17:9	13:21	shrink 43:3
reasonable	20:12	18:18 29:5	scienter 20:16	side 4:3
27:12,14,15,20	request 50:19	30:5 35:6,20	22:24 23:12	simpler 39:18
28:1 36:7 46:9	required 9:6	40:15 45:1	24:15	simply 13:7
46:19 47:20	requirement	52:14 55:11	scientific 24:19	14:18 19:23
reasonably	27:5,6,9 51:17	rule 39:19 40:3	screen 5:13 28:5	22:8 33:18,18
35:22	requirements		second 12:7	39:3 47:18
reasons 26:12	20:16 24:16	S	see 9:9 23:24	48:19 53:24
REBUTTAL	26:18	S 2:1 3:1	28:5,11 36:19	simulated 28:19
2:7 52:17	requires 8:18	sadistic 23:9	41:17 46:16	28:23
received 9:14	reserve 27:7	salacious 33:1	48:24 49:2	sir 31:21
45:13	28:8 29:4	50:16,16	seen 30:16 45:14	site 55:6
recognized 7:20	respect 18:10	sale 14:8	45:15,15 46:18	sites 32:8
recognizes	25:13 26:19	sales 35:4	sees 6:15	situation 7:8,9

8:20 10:11 11:6 22:1,12 35:4 43:10 44:23 situations 18:7 44:3 slew 33:24 37:22 slightly 17:19 small 39:22 snuff 5:14,15 social 33:7,8,14 33:16 34:6 soldiers 6:2,9 solicit 3:17 52:6 52:7 solicitation 7:11 11:5 19:21 20:3 21:1 23:21 25:14 49:23 50:25 51:23 52:1 solicited 9:15 soliciting 3:19 14:24 19:9 20:1 41:21 48:21 49:4 50:21 51:19 Solicitor 1:15 30:20 38:18 42:12 45:25 47:3,12,22 solve 42:6 somebody 3:18 5:5,12,15,17 6:13 8:21 10:11 13:19 14:7,8 16:24 17:24 32:7 33:10 36:4 44:9 51:12 52:9 somebody's 13:7 sorry 16:8 18:18 sort 16:24 17:21 19:3 25:11 27:20 35:24	sorts 45:13 sounds 15:19 42:13 Souter 9:13,22 9:25 10:4,22 11:3,10 12:2 25:16 26:11,25 27:4,19,23,24 42:8 43:1 47:2 47:7 48:12 special 36:20 specific 9:7 10:17 49:14 speech 3:11,14 3:22 5:18,19 5:20 16:13,16 16:18,22,22 17:10 20:23 21:4 29:17,17 33:4 39:13 40:8,12,24 42:7 43:3 48:9 54:16 stamping 19:6 start 4:1 8:11,25 31:11 54:24 started 26:17 starting 7:6 State 33:24 49:3 statement 5:7 8:4,6,7 25:19 25:25 26:2,6 States 1:1,3,12 3:4 49:10,12 statute 3:16,21 3:25 4:8,10,13 4:22 6:3,5,16 6:18,25 7:16 7:25 8:10,17 9:5,8,20 10:6,9 10:14 11:12,14 11:19 12:7,15 12:21,24 13:2 13:3,15,17 14:4,16 15:19 15:23 16:1,5 16:15 17:2	19:18 20:20 22:10,21 23:7 23:8,10,13,25 24:8,10,16 25:13 26:4,12 26:18,23,24 28:22,25 29:2 29:23 30:3,13 30:23 32:11,13 32:15,25 34:5 34:16 35:20 36:12,24 37:5 37:8,18,20 38:19,22 39:9 41:7,8,20,22 42:5,23 43:9 43:13,14 45:12 46:1,24 48:6 49:5,6 50:7,10 50:12 51:3,5 51:16 52:6 53:3,20 54:4 55:1,8 statutes 12:8 33:25 statute's 16:13 53:11,14 statutory 42:3 47:18 steps 48:14 Stevens 5:24 6:8 6:12,19,22 7:2 7:14 19:11,14 23:2 stop 31:25 strange 53:18 strike 11:8 striking 3:25 strong 52:22 student 28:3 stuff 13:22 14:10 20:13,14 sub 49:5,5 subjective 8:19 9:7 10:2 24:15 26:17 27:5 36:1	subjectively 29:23 submit 28:2 submitted 55:12 55:14 subsection 10:8 substantial 40:24 42:20,23 45:7 47:9,25 48:2,15 53:12 54:3 substantively 32:12 subtlety 28:20 suddenly 13:17 13:23 sufficiently 6:11 6:21 29:21 suggest 14:23 18:3 41:1 suggested 41:5 suggesting 3:20 25:11 suggestion 16:14 43:21 suppose 4:21 5:1 5:10 12:24 27:24 38:14 39:17 41:21,23 42:16 supposed 53:25 Supposing 5:24 Supreme 1:1,12 sure 16:5 21:11 24:7,14 53:7 suspect 15:15 19:1 sweep 45:7 53:14 54:3 systematically 16:24	14:11 15:9,12 27:6 31:9,11 31:25 34:22 38:16 46:22 taken 21:7 25:25 40:8 talk 15:3 talked 7:25 talking 8:25 17:22 18:12 26:20 30:14 32:18,19 35:25 38:6 41:6 46:7 46:17 51:24 tape 34:24 target 20:20 technical 14:20 20:18 technique 43:7 teen 35:17 36:6 tell 8:14 34:6 37:6 41:17 49:14 telling 14:18 term 14:20 29:13,14 terms 4:14,16 4:25 6:3 11:13 14:5 53:13 terrible 23:3 test 8:25 36:2 Thank 29:5 52:13,14,19 55:10,11 theory 7:18 thing 9:6,18 12:7 14:13 17:13,14 19:3 20:19,20 26:2 34:8 35:7 46:14 47:10 50:9 54:23 things 10:17 21:17 22:22 23:7 28:4 32:24 35:11 38:22 41:11
--	---	--	--	--

T

T 2:1,1
tailor 42:5
take 5:12 6:4
12:23 13:11

43:17,18 46:11 48:1 think 4:10,11,12 4:14,16,24 5:17,21 7:11 7:17,24 8:9,23 8:25 9:5 10:5,7 11:5,25 12:3 12:11,20 13:10 13:20,21 14:1 14:3,5 15:1,5 15:11,22 16:14 16:20,21,24 17:6,19 18:10 19:15,20 21:7 21:8 22:4,11 24:22 25:6 26:13,16,22 27:4,5,10,13 28:6,9,17,19 28:25 31:13,14 31:15 32:1,3,7 33:12 35:12,13 36:3,6,11 37:4 37:4,17 38:15 38:21 40:6,15 41:18 43:15 44:6,22 46:14 48:4,20 50:2 50:13,14,23,24 53:9 54:13,17 54:18,21,25 thinking 6:13 17:20 41:11 third 11:24 thought 13:25 15:20 17:15 27:11,16 30:3 30:9 33:3 37:17 39:15 41:9 46:3 50:18 52:5 thoughts 30:6 30:10 33:1 50:16 three 39:7 42:11 52:15	time 28:8,17 32:16 45:14,14 52:2 times 52:22 Titanic 35:15 36:5 toss 53:18 totally 13:23 town 9:16 trade 13:4 trademark 34:21 traditional 32:23 Traffic 22:5 28:10,15 38:10 43:18 46:15 trailer 35:17 transaction 3:12 3:15 treat 40:18 trial 6:14 tried 5:17 true 18:14 25:25 36:16 truth 19:4 37:6 truthful 3:22 5:22 8:6 25:18 26:2,6 truthfully 22:9 try 4:20 12:3 23:15 24:3 trying 13:4,5 20:17 31:24 Tuesday 1:9 turn 5:17 turning 3:19 turns 35:8 TV 45:15 two 10:6 12:3 22:22 26:12 30:10 35:10 38:12 39:6 48:14 type 18:20 30:7 38:6 types 38:12	48:19 <hr/> U <hr/> unconstitutio... 19:19 53:4,12 unconstitutio... 29:15 undercover 55:7 underlying 5:22 5:24 7:19 21:21,24 22:2 23:19 26:14 understand 6:16 8:16 26:5 28:6 28:16 47:4 53:19 understanding 11:21 17:9 understood 14:15,22 38:24 40:25 46:10 undoubtedly 44:9 unduly 55:2 unfettered 29:22 unfortunately 19:7 45:19 unique 11:4 United 1:1,3,12 3:4 universe 19:12 43:2 unlawful 3:12 3:14 12:23 18:13 unprotected 3:15 45:3 unsolicited 18:5 unusual 5:10 upholding 7:21 urging 53:22 use 27:8,11,13 27:19,20 34:24 uses 37:9 <hr/> V <hr/>	v 1:5 3:4 54:16 vague 22:25 29:15 35:24 vagueness 29:1 valid 7:8,10,15 7:18 24:13 54:6 value 8:1 24:20 33:4,7,8,14,16 33:21 34:6 various 47:15 verb 51:15 verbatim 54:9 verbs 37:13 versus 54:6 video 22:16,18 22:18 31:9 videotape 34:20 videotapes 23:6 view 15:24 19:17 31:6 39:2 47:22 viewers 47:20 views 41:15 violate 6:18 violated 9:20 violates 32:13 51:21 violating 34:20 Virginia 54:4 virtual 20:10 visual 24:17 <hr/> W <hr/> wait 13:1 41:1 wake 18:14 19:5 want 14:9 15:25 23:23 34:9,10 34:20,21,22 39:3 wanted 6:17 14:4 16:9 22:20 wants 4:20 9:9 41:17 war 6:1,14 7:3 Washington 1:8	1:16 wasn't 26:8 way 4:5 6:11 7:11 8:18 9:7 10:1 11:23 13:25 14:13 15:23 16:1 17:22 24:3,9 24:13,21 25:7 25:13 26:5,6 35:2 45:11 47:13,14 53:25 54:17 ways 12:9 25:12 website 16:25 went 30:21 We'll 3:3 we're 18:12 32:18,19,24 38:6 40:13,18 41:6,13 44:5 44:21 47:6 we've 11:19 30:14,16,20 44:24 whatnot 34:21 45:11 whatsoever 54:6 Williams 1:6 3:5 word 37:8,16 38:20 46:2,22 52:5 55:1 words 14:17,23 17:16 30:3 34:23 37:9 40:9,21 45:6 46:9 48:8 51:22 52:3 work 22:23 works 52:8 world 18:8,16 18:23 19:1,6 35:13 43:2 45:13 worry 4:23 22:9 25:19 worse 31:23
---	---	---	---	---

wouldn't 4:7 6:4 27:10,19,19 28:13,14 40:17 42:12,19,22 43:14 47:24	48:18 1997 49:15			
write 4:3 14:4 43:12	2 2 10:19 20 33:17 48:24 50:8			
writing 39:8 43:8	20-year 29:14 34:12			
written 13:25 43:13	2004 49:15 2007 1:9			
wrong 30:23 32:21 39:4	29 2:6			
X	3 3 2:4			
x 1:2,7	30 1:9 45:16			
Y	4 4 14:14 16:11			
year 27:8	452 49:16			
years 33:17,17 45:17 48:24 50:8	5 5 33:17 34:11 48:24 50:8			
year-old 8:14	5-year 29:13			
York 32:11	52 2:9			
young 6:2,9 8:15	6 6a 10:9			
Z	9 99.6 49:20			
zone 6:1				
0				
06-694 1:5 3:4				
1				
10:02 1:13 3:2				
11:01 55:13				
12 8:13				
12-year-old 8:2 8:13,15				
17 28:16				
17-year 27:24 48:22				
17-years 26:25				
17-year-old 28:3 28:12 50:7				
17-year-olds 19:13 47:9 48:18				
18-year-olds				