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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06–694. Argued October 30, 2007—Decided May 19, 2008

After this Court found facially overbroad a federal statutory provision criminalizing the possession and distribution of material pandered as child pornography, regardless of whether it actually was that, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, Congress passed the pandering and solicitation provision at issue, 18 U. S. C. §2252A(a)(3)(B). Respondent Williams pleaded guilty to this offense and others, but reserved the right to challenge his pandering conviction's constitutionality. The District Court rejected his challenge, but the Eleventh Circuit reversed, finding the statute both overbroad under the First Amendment and impermissibly vague under the Due Process Clause.

Held:

1. Section 2252A(a)(3)(B) is not overbroad under the First Amendment. Pp. 6–18.

(a) A statute is facially invalid if it prohibits a substantial amount of protected speech. Section 2252A(a)(3)(B) generally prohibits offers to provide and requests to obtain child pornography. It targets not the underlying material, but the collateral speech introducing such material into the child-pornography distribution network. Its definition of material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *New York* v. *Ferber*, 458 U. S. 747, and *Miller* v. *California*, 413 U. S. 15: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct. The statute's important features include: (1) a scienter requirement; (2) operative verbs that are reasonably read to penalize speech that accompanies or seeks to induce a child pornography transfer from one

person to another; (3) a phrase—"in a manner that reflects the belief," *ibid.*—that has both the subjective component that the defendant must actually have held the "belief" that the material or purported material was child pornography, and the objective component that the statement or action must manifest that belief; (4) a phrase—"in a manner . . . that is intended to cause another to believe," *ibid* — that has only the subjective element that the defendant must "intend" that the listener believe the material to be child pornography; and (5) a "sexually explicit conduct" definition that is very similar to that in the New York statute upheld in *Ferber*. Pp. 6–11.

(b) As thus construed, the statute does not criminalize a substantial amount of protected expressive activity. Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *E.g., Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 388. The Eleventh Circuit mistakenly believed that this exclusion extended only to commercial offers to provide or receive contraband. The exclusion's rationale, however, is based not on the less privileged status of commercial speech, but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus enjoy no First Amendment protection. The constitutional defect in *Free Speech Coalition*'s pandering provision was that it went beyond pandering to prohibit possessing material that could not otherwise be proscribed. The Eleventh Circuit's erroneous conclusion led it to apply strict scrutiny to §2252A(a)(3)(B), lodging three fatal objections that lack merit. Pp. 11–18.

2. Section 2252A(a)(3)(B) is not impermissibly vague under the Due Process Clause. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill* v. *Colorado*, 530 U. S. 703, 732. In the First Amendment context plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494–495, and nn. 6 and 7. The Eleventh Circuit mistakenly believed that "in a manner that reflects the belief" and "in a manner . . . that is intended to cause another to believe" were vague and standardless phrases that left the public with no objective measure of conformance. What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is. See, *e.g., Coates* v. *Cincinnati*, 402 U. S. 611, 614. There is no such indeterminacy here.

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The statute's requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and juries every day pass upon the reasonable import of a defendant's statements and upon "knowledge, belief and intent." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411. Pp. 18–21.

444 F. 3d 1286, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined.