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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN D. ASHCROFT, :
ATTORNEY GENERAL, ET AL., :
Petitioners :
v. : No. 00-795
THE FREE SPEECH COALITION, ET AL. :
- - - - - X

Washington, D.C.

Tuesday, October 30, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:00 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Petitioners.

H. LOUIS SIRKIN, ESQ., Cincinnati, Ohio;
on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-795, John Ashcroft versus the Free Speech
5 Coalition. Mr. Clement.

6 ORAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE PETITIONERS

8 MR. CLEMENT: Mr. Chief Justice and may it
9 please the court: In 1996 Congress updated the child
10 pornography laws to keep pace with technological
11 developments. Congress extended the existing prohibitions
12 on visual depictions of actual children engaged in
13 sexually explicit conduct to cover virtually
14 indistinguishable images in material pandered as child
15 pornography. These provisions are constitutional for the
16 same basic reason that other laws prohibiting child
17 pornography have been upheld. They protect real children
18 from real abuse.

19 They do so in two important ways. First, by
20 preventing the publication and production of materials
21 that are as effective as traditional child pornography in
22 seducing children, and second, by allowing the government
23 to effectively prosecute cases involving traditional forms
24 of child pornography.

25 First, these provisions allow the government to

1 attack material that poses the same risk of enticing
2 children into illicit sexual activities and to pose for
3 child pornography as traditional child pornography.

4 The government has a clear and compelling
5 interest in targeting such material; indeed, this court in
6 Osborne against Ohio used that rationale to uphold Ohio's
7 prohibition on the possession of child pornography.

8 Second and equally important, the government has
9 a clear interest in promoting the effective prosecution of
10 the traditional laws against traditional forms of child
11 pornography. The advent and increasing availability of
12 computer technology has allowed individuals to generate
13 computer images that are virtually indistinguishable from
14 traditional photographs. This allows criminal defendants
15 to inject reasonable doubt arguments into virtually every
16 case.

17 QUESTION: Has any case, to your knowledge, been
18 lost on that ground in which that was a substantial
19 argument?

20 MR. CLEMENT: No case has been lost on that
21 ground but that is largely a result of the 1996 Act, which
22 has taken that argument away from criminal defendants.
23 And to give you one very specific example, the case that
24 the Fifth Circuit heard in the Fox case, United States
25 against Fox which is one of the cases where the lower

1 courts upheld this law in an as applied context, the
2 government's expert witness, Special Agent Barkhausen was
3 forced on cross-examination to admit that she could not
4 tell definitively whether or not the image was of a real
5 child. Now that concession prior to the 1996 Act would
6 likely have been fatal to the government's prosecution.

7 QUESTION: Was that because she couldn't tell
8 whether the real child was over 18 or under 18 or because
9 she couldn't tell whether it was a real person?

10 MR. CLEMENT: That case was because she couldn't
11 tell it was a real person.

12 QUESTION: Wouldn't she have the same difficulty
13 on the distinction between an 18-year-old and a
14 19-year-old?

15 MR. CLEMENT: In the cases where the line that
16 the courts are concerned with is the line between 18 and
17 19, there's an additional aspect of the statute that
18 clears up many of the problems and that's the affirmative
19 defense which allows individuals to produce and distribute
20 materials if they make clear they involve actual
21 individuals who are over 18.

22 QUESTION: But in terms of what you outlined, in
23 terms of the two dangers, you say just the same as if it
24 were an actual child. Well, if it's a very young adult
25 who looks like a child, it seems to me everything that you

1 said about the virtual pornography would apply to a young
2 adult who looks like a child.

3 MR. CLEMENT: That's certainly true, but I think
4 Congress in recognizing an affirmative defense for
5 materials that were produced using people who had reached
6 the age of majority struck a balance and recognized that
7 this Court has provided additional protection to
8 pornographic depictions involving actual adults.

9 QUESTION: Okay, well the question of the
10 balance raises the question of tailoring, and what I
11 wanted to ask you was if it's appropriate to have the
12 affirmative defense that the children or that the people
13 depicted were in fact over 18, why isn't it equally
14 appropriate to have an affirmative defense to the effect
15 that the depiction does not have anyone who is not a real
16 child under 18. In other words, if the government's
17 interests are protected by the affirmative defense in the
18 real child case, why shouldn't there be a comparable
19 affirmative defense for the simulation.

20 MR. CLEMENT: I think there are at least two
21 reasons for that differential treatment. One is with
22 respect to age that's a fact that's uniquely verifiable
23 and in a lot of contexts we recognize that somebody's age
24 is something that one can verify. And in fact what we're
25 really talking about in most of these cases where the

1 affirmative defense for age would be implicated are films
2 and the like where there would be witnesses who could
3 testify that somebody was of a particular age on a
4 particular date.

5 QUESTION: But in effect you're depending on the
6 witness to say that the actors here were in fact over 18.
7 Maybe they'll produce facsimiles of birth certificates or
8 maybe they'll produce children or whatnot. Why can't you
9 have the same evidence to the effect that there were no
10 real children being used in manufacturing the film?
11 You're depending on witnesses in each case.

12 MR. CLEMENT: Well, in most of the cases when
13 you're talking about somebody who's going to make the
14 claim that they actually generated the photographs
15 themselves, there will be no witnesses. But I think more
16 important than the presence or absence of witnesses is --

17 QUESTION: But that's a question of proof and I
18 suppose that if the only person who steps up to the stand
19 and says, there were no live children here, is the person
20 who was accused of the pornography, that person may have
21 something to worry about in not having a very convincing
22 affirmative defense. But that's the defendant's problem,
23 not the government's problem.

24 And so I don't think that answers the question,
25 why if the government is sufficiently protected with the

1 affirmative defense in the one class of cases it wouldn't
2 be in the other.

3 MR. CLEMENT: And I do think that age rather
4 than whether an image is computationally generated is
5 something that is uniquely subject to verification and
6 this Court in its Ferber decision confronted the argument
7 that the New York statute was overbroad because it didn't
8 limit its protections to photographs and images that were
9 produced in the state of New York.

10 And the court rejected that overbreadth argument
11 for two reasons; one, that it would be virtually
12 impossible for anybody to prove what was the state of
13 origin for the photo. And I think the same analysis
14 applies for a computer generated image. The second reason,
15 of course, was that even materials --

16 QUESTION: Why is it -- why is it that witnesses
17 can explain the age but cannot explain whether it was
18 computer generated?

19 MR. CLEMENT: Because, again, in sort of the
20 stylized case that the person who's computer generated an
21 image, that's not something that requires a film crew to
22 be brought in so there aren't necessarily going to be
23 witnesses. In the case --

24 QUESTION: But that's not the government's
25 problem. I mean, that may be the problem of the person

1 who has the burden of proof to carry on the affirmative
2 defense and if it is a problem then the government is the
3 -- in effect going to be the winning party in resolving
4 that problem, but like Justice Stevens, I don't see what
5 is essentially unique in the probative process to acclaim
6 that it was a computer generation rather than a claim that
7 the kid shown was over 18.

8 MR. CLEMENT: Well, I'm not sure it's absolutely
9 unique but I do think age is uniquely subject to
10 verification. And if I could get to the second reason
11 that this Court pointed out in Ferber why you didn't need
12 to have a limitation just to pictures generated in the
13 State of New York, the Court recognized in footnote 19
14 that those materials, even if produced outside the State
15 of New York, pose harms and potential risk to children
16 inside the State of New York.

17 QUESTION: Mr. Clement, may I ask you a question
18 again relating to the affirmative defenses or youthful
19 adult pornography. There appears to be no affirmative
20 defense for possession of something that in fact used
21 adults, is that right?

22 MR. CLEMENT: That's right as a matter of the
23 statute. There's no express affirmative defense for
24 possession.

25 QUESTION: Well, let's relate that to something

1 that perhaps a number of people in this courtroom have
2 seen. The film, Traffic, which depicts I guess someone
3 who purports to be under 18 engaged in conduct that would
4 fit under the definition of the statute to be banned,
5 right.

6 MR. CLEMENT: I believe that's true.

7 QUESTION: Did you see it?

8 MR. CLEMENT: I did see it.

9 (Laughter.)

10 QUESTION: Okay. So presumably it would be
11 covered. Now, there is no defense to someone who rents
12 the movie, they possess it, no affirmative defense.

13 MR. CLEMENT: There's no affirmative defense for
14 possession but I think what the statute does is it
15 effectively makes it so that in virtually, in the vast
16 majority of cases where the producers and distributors of
17 a film will be able to claim the affirmative defense, the
18 individual possessor will be able to claim the affirmative
19 defense because of a failure of the government's ability
20 to prove scienter, because if you think about the
21 affirmative defense it gives people the ability to
22 distribute a movie if it involves actors. But if they
23 have the right to distribute a movie that nobody can
24 lawfully possess, it doesn't give them much, that's not
25 much comfort to them.

1 QUESTION: I don't understand. I mean I buy at
2 the video store three films, Traffic, Lolita, and Titanic.
3 Each film has a scene of simulated sexual behavior by
4 17-year-olds, all right? I think that was the question.
5 The question is, why am I not guilty under your
6 interpretation of the statute of a federal crime for
7 possessing those three films?

8 MR. CLEMENT: There's two reasons. One is
9 precisely in order to deal with this anomaly that they
10 don't want to be producing a film that nobody can lawfully
11 possess, the affirmative defense gives an incentive to
12 producers and distributors to make it clear in the
13 marketing of the material that those scenes that you're
14 talking about were scenes that were produced using adults
15 or scenes used with body doubles, and so in that sense
16 through the marketing of the material they can make it
17 clear to people that it involved adults.

18 QUESTION: There is the defense for the
19 producer, but there isn't for the person who rents the
20 film. It's just I --

21 MR. CLEMENT: Exactly.

22 QUESTION: -- I'm struck by what we're supposed
23 to do with a statute like this.

24 MR. CLEMENT: There is a requirement, though,
25 that the government prove scienter with respect to age in

1 any prosecution for possession and I don't see how the
2 government could prove scienter as to age in the case of
3 these films where they're marketed in a way where it's
4 clear that they involve adult actors.

5 There's a second aspect in which this Court
6 could find the affirmative defense to cover individuals
7 and that -- individual possessors, and that is the statute
8 does give an affirmative defense for receipt and as the
9 government argued in its briefs that naturally would cover
10 possession incident to receipt.

11 What it doesn't cover, though, and why I think
12 Congress didn't have a blanket affirmative defense for
13 possession is it doesn't apply to somebody who receives
14 some material that's marketed in a way or has a disclaimer
15 that makes it clear that it involves adult actors, but
16 then the individual somehow modifies it, strips out the
17 disclaimer. In that case, the possession is covered by
18 the statute and I think rightly so.

19 QUESTION: Does it trouble you at all that the
20 statute would prohibit a motion picture company from
21 employing an 18-year-old actress to play the three roles
22 that Justice Breyer identified?

23 MR. CLEMENT: Well, it would trouble me if the
24 statute had that effect but it doesn't have that effect.
25 The affirmative defense makes it crystal clear.

1 QUESTION: Even though the actress is under the
2 statutory age, 18?

3 MR. CLEMENT: Oh, I'm sorry, I thought you said
4 18.

5 QUESTION: Would it trouble you that the statute
6 would prohibit an 18-year-old who is a child under the
7 statute from performing those three roles?

8 MR. CLEMENT: Well, I think it's 17, but in any
9 event it doesn't trouble me if it's a 17-year-old is
10 prohibited because they wouldn't be prohibited from
11 playing those roles if -- the studio would have two
12 options. They could either not include the sexually
13 explicit conduct which is all that's covered by the
14 statute, and I think it would be possible to have made the
15 film Traffic without involving simulated sexual activity.

16 But putting that to the side, the other option
17 is to use a body double and make it clear in the marketing
18 of the film that that's precisely what you've done.

19 QUESTION: I take it your answer to the question
20 if this afternoon I go out, go to the video store, buy the
21 three films and bring them home is, yes, I am guilty of a
22 federal crime.

23 MR. CLEMENT: Not at all. You could not be
24 guilty because the government could not prove scienter and
25 because you would have lawful --

1 QUESTION: What do you mean you can't prove
2 scienter? It says that it is a crime to buy, to possess a
3 film that has simulated sexual activity by persons who
4 appear to be under the age of 18. Well, I would tell you
5 right now, I think that film did contain simulated sexual
6 activity by persons who appeared to be under the age of
7 18.

8 MR. CLEMENT: And again --

9 QUESTION: I don't think it was real activity, I
10 think it was simulated, and I think they did appear to me
11 to be under the age of 18. So am I guilty or not?

12 MR. CLEMENT: You are not guilty for the two
13 reasons that I've said and let me just say that you would
14 have the same problem with respect to the statute at issue
15 in Ferber.

16 QUESTION: Mr. Clement, I'm not sure what
17 simulated sexual activity consists of. I didn't see any
18 of these movies.

19 (Laughter.)

20 QUESTION: They were pretty good actually.

21 (Laughter.)

22 QUESTION: One described in the briefs
23 supposedly was the shot of a juvenile, whether played by a
24 juvenile or not, from the waist up supposedly engaged in
25 sexual activity. Would you consider that to be covered by

1 the statute as sexually explicit conduct? I mean what if
2 it was just the hand?

3 MR. CLEMENT: Well, certainly if it was just the
4 hand and certainly -- I think there would be certainly a
5 number of ways --

6 QUESTION: Don't you think, I mean the
7 definition of sexually explicit conduct is and what the
8 statute prohibits is this conduct by minors under 17 or
9 younger, sexual intercourse, engaging in sexual
10 intercourse, bestiality, masturbation, sadistic or
11 masochistic abuse or lascivious exhibition of the genitals
12 or pubic area. Now, the government has not made the
13 argument that at least as applied to juveniles this is
14 unprotected speech anyway and consists of obscenity which
15 a state or federal government is free, if it wishes, to
16 prohibit?

17 MR. CLEMENT: To the contrary, the government
18 has argued throughout this case that it's all unprotected
19 speech because it's child pornography. And I think --

20 QUESTION: Not because it's obscenity, you're
21 creating, you would have us create yet another category of
22 prohibitive, something that falls totally outside the
23 first amendment. Have you claimed, as Justice Scalia
24 suggested you might have, that at least some of this
25 material is obscene and therefore covered without regard

1 to any new, any child pornography catalog -- category.

2 MR. CLEMENT: Well, I want to be clear, I think
3 government would take the position that virtually all the
4 material covered by this statute is independently obscene,
5 but that's not how the government chose to regulate it.

6 QUESTION: If the scene of a head of a person
7 who the other information in the movie makes it appear
8 they're engaged in sexual intercourse and all that is seen
9 is the head of a male and a female kissing one another,
10 that would come covered by the statute.

11 MR. CLEMENT: No, I don't think that would be
12 covered by the statute.

13 QUESTION: Why not? It's simulated sexual
14 intercourse.

15 MR. CLEMENT: I think you have to read the term
16 simulated sexual intercourse in conjunction with the other
17 terms in the statute.

18 QUESTION: It expressly says there's no patently
19 offensive requirement.

20 MR. CLEMENT: That's certainly true but I think
21 if you read the statute in context, I think there's some
22 requirement that the sexual intercourse that would be
23 depicted would require some display of nudity in the
24 process. Certainly -- well, it doesn't -- it may not say
25 that and the statute itself may not address that case.

1 And I would suggest that the proper way to resolve that
2 case is in an as applied challenge. Wait for the
3 government to bring that prosecution. In fact, I think
4 the government won't bring that prosecution. I mean, it's
5 interesting to talk about the film version of Lolita and
6 the like but that involves just a tiny fraction of
7 materials covered by this statute, and if you want to bet
8 --

9 QUESTION: Ferber pretty much said that child
10 pornography is of almost no value, did it not?

11 MR. CLEMENT: Absolutely, and that's why this
12 material that we're talking about is all probably
13 virtually, the government could capture it as obscenity
14 but of course if it tried to do that it couldn't ban the
15 possession, and child pornography was treated as a
16 different case in Ferber.

17 QUESTION: Child pornography is a different case
18 but very much like obscenity.

19 MR. CLEMENT: Absolutely, like obscenity, what
20 this Court said in Ferber is the reason the statute was
21 permissible is because it defined a category of conduct
22 that could be proscribed and was outside the protection of
23 the First Amendment.

24 QUESTION: There's a vast difference between an
25 actual child who was violated and a picture, a simulation

1 in Ferber that you have relied on so heavily, what do you
2 make of a sentence that is not in the footnote, it is the
3 text, that simulation outside the prohibition and the
4 prohibition was using an actual child, simulation outside
5 the prohibition could provide an alternative?

6 MR. CLEMENT: Well, let me just clarify one
7 thing because the statute in Ferber itself also covered
8 simulated sexual activity so all these line drawing
9 problems about what, you know, at what point does the
10 scene in Traffic come under the coverage of the statute
11 also applied in Ferber because it also captured simulated
12 acts involving adults. So the only difference between the
13 coverage of this statute and Ferber is that this statute
14 does attempt to prohibit materials that do not involve
15 actual individuals but are virtually indistinguishable
16 from --

17 QUESTION: Yes, but even that sentence in Ferber
18 said we're not touching in this case, here we have an
19 actual child simulation outside that prohibition could
20 provide an alternative.

21 MR. CLEMENT: With respect, I don't think that's
22 what Ferber meant to say. I mean, Ferber, after all, was
23 decided in 1982.

24 QUESTION: It used those words. It used those
25 words.

1 MR. CLEMENT: It did, but it was decided in 1982
2 before this technology even existed. And interestingly,
3 if you look at footnote 20 in the Ferber opinion the Court
4 went out of its way to invoke the general doctrine that
5 you don't apply cases before they arise and you don't
6 adopt a rationale any broader than necessary to decide the
7 case before it. And it just seems to me --

8 QUESTION: What if we read that sentence as
9 though it were not there?

10 MR. CLEMENT: No I think you read it in the
11 context --

12 QUESTION: Not in the opinion.

13 MR. CLEMENT: -- with respect, I think you treat
14 it in the context of what was prohibited by the New York
15 statute and the technology that was available at the time.
16 And I think what's important here is any avenues for
17 speech that were left open in Ferber are left open by the
18 statute in conjunction with the affirmative defense. The
19 only materials that are covered by the statute and not
20 covered by Ferber are materials that didn't exist at the
21 time of Ferber and it seems to me that Congress is
22 entitled to update the tech -- the pornography and
23 obscenity laws to deal with technological developments.

24 The first federal obscenity statute in 1842
25 didn't cover photographs because the technology wasn't in

1 widespread use at the time. Subsequently Congress added
2 photographs to the cover to the obscenity statutes because
3 technology developed and new problems arose.

4 QUESTION: The Court relied very heavily on the
5 notion that if you use actual children they are harmed,
6 they are actually harmed, so what is the primary reliance
7 that you make for applying the same prohibition to these
8 video images?

9 MR. CLEMENT: Well I think there's -- I would
10 make two responses. First, I think this Court has never
11 strictly limited itself to the protection of the child
12 depicted in the image and it recognizes that legislatures
13 in Congress have an interest in protecting all children
14 but secondly --

15 QUESTION: It did seem to me that the Court, and
16 I was here, played heavy reliance on harm to children.

17 MR. CLEMENT: Absolutely.

18 QUESTION: Actual children. So I'm asking you
19 what is your primary reliance when you don't have that?

20 MR. CLEMENT: Well, I don't know that we have to
21 answer that question in this case because we do have that,
22 because this statute enables the government to continue to
23 prosecute effectively cases involving traditional forms of
24 child pornography, because the advent --

25 QUESTION: But that's not an answer to Justice

1 O'Connor's question. Basically we're talking here about
2 overbreadth and the government's argument seems to be that
3 since there is a class of materials that we can proscribe,
4 the fact that it's overly broad is the respondent's
5 problem. But the law works the other way around, you have
6 to show that this statute is precise as to its coverage
7 and that it covers no more and let's just for argument's
8 sake, although I don't think that's the law, concede not
9 substantially more than what can be prohibited. And
10 Justice O'Connor's question was directed to this latter
11 problem and it seems to me you're not answering the
12 question.

13 MR. CLEMENT: Well, I'm trying to and I think
14 that, I mean, first of all, even in an overbreadth
15 challenge the burden does lie on the party challenging the
16 statute and they have to show things from actual fact in
17 order to challenge the statute and I don't think they've
18 carried that burden.

19 Second, this statute is responsive to the
20 problem of protecting both the children depicted in the
21 image and all children who can be seduced or enticed into
22 this kind of activity can be depicted themselves.

23 QUESTION: But the gravamen of her question,
24 Justice O'Connor can explain her own question, but as I
25 understood it, is that there's a substantial area here

1 where adults who are play acting roles of children are
2 covered, and the question is what is the government's
3 interest in that?

4 MR. CLEMENT: There isn't an interest in those
5 play acting cases and that's why the affirmative defense
6 allows those to take place. But again, the question is as
7 you indicated substantial overbreadth and these questions
8 we're talking about, about Traffic and the film version of
9 Lolita really are a tiny fraction of the cases covered by
10 the statute.

11 QUESTION: Why is it that the question I really
12 would like you to get to if you can is one that's really
13 bothering me very much is the question that Justice Scalia
14 asked and the thing in this area I do not understand, in
15 the entire area is why doesn't Miller work? There is
16 obviously a set of materials which Justice Stewart used to
17 refer to as I know it when I see it and that material does
18 not have at its object communication. It has at its
19 object a certain activity which is not communication. Now
20 that's all over our society, and why, given this Court's
21 decision in Miller, is that so? And if I knew the answer
22 to that question I would be better able to deal with this
23 kind of case.

24 MR. CLEMENT: Well, let me first try to say two
25 reasons why I don't think Miller is directly relevant and

1 if those aren't responsive to your questions, maybe --

2 QUESTION: I'd rather not hear why it's directly
3 -- not directly relevant because my question, which is my
4 own problem, not your problem, is I'm trying to understand
5 the area. There are several cases in this area coming up,
6 this is not the only one, and I want to know from the
7 government why it is, you've read in this area, maybe you
8 just should direct me to an article. The problem I
9 personally am having as a judge is I think what Justice
10 Scalia was driving at, maybe, that's his question, is why
11 doesn't Miller work. Now maybe you'll tell me that it
12 does, but that's contrary to my experience because it
13 seems to me I see much material that would have flunked
14 Justice Stewart's test all over the place. And it seems
15 to me that that's the material that parents are worried
16 about their children getting a hold of.

17 Now, if I knew why Miller was insufficient to
18 deal with that problem I would know better how to deal
19 with this kind of a case.

20 MR. CLEMENT: Well, one reason that Miller is a
21 difficult case and doesn't -- isn't terribly satisfying is
22 it requires a case by case adjudication of that
23 three-prong test which I would say with deference is not
24 self-defining. And what Congress decided to do in this
25 context is follow the lead of Ferber where it said that

1 Miller wasn't the test of child pornography and defined a
2 much clearer class of material than whether or not it
3 applies in Miller, whether or not the work as a whole is
4 implicated, this is a definable class of material that is
5 outside the protection of the First Amendment.

6 If you have concerns about the Miller test then
7 you really should seize upon this statute and Ferber and
8 the analysis in Osborne as one way to deal with that
9 problem because here's a test that doesn't rely on
10 community standards or other difficult considerations to
11 apply in practice. It has a test that says when we're
12 talking about visual depictions only, we're not talking
13 about novels here, and we're talking about material that
14 depicts children engaged in sexually explicit conduct then
15 we don't have to look to the value of the work as a whole.
16 You can put all the Shakespeare around these visual
17 depictions you'd like and they're still visual depictions
18 of children engaged in sexually explicit conduct.

19 QUESTION: Mr. Clement, before you finish
20 there's something of great concern to me too because it
21 seems that this is a big step away from actual child,
22 injury to an actual child to the effect on the viewer and
23 the same thing could be said for women with respect to
24 pornography, portraying women in a degrading way. The
25 same thing could be said for hate speech. So this, where

1 there is no actual child victim, where it's a picture and
2 you're talking about the effect of that on the viewer, why
3 isn't it the same for all these other things that can have
4 a very bad effect on the viewer?

5 MR. CLEMENT: Well, I think there are two
6 principal reasons why you shouldn't be worried about that
7 particular slippery slope. One is this Court already put
8 one foot down that slope in Osborne when it relied on the
9 seduction rationale in conjunction with the concern for
10 the children who were depicted. And in the same way this
11 statute responds both to harm, potential harm, to other
12 children in the seduction rationale and to children
13 actually depicted because as a matter of practical reality
14 it's become very difficult for the government to prosecute
15 cases involving actual, traditional child pornography.

16 QUESTION: If you have this out you can use
17 simulated children, that will protect the actual children
18 from being exploited. Why can't you say one as much as
19 the other?

20 MR. CLEMENT: Because I think, as I indicated
21 before, there are real verifiability problems that don't
22 arise in the context of age that do arise in computer.

23 The second reason, though, I think that you have
24 to be less worried about the slippery slope in this
25 context is the government has consistently gone to the

1 courts and told them to interpret appears to be to cover
2 images that are virtually indistinguishable from
3 traditional child pornography. It doesn't seem to put this
4 Court on a slippery slope to say that material that is
5 virtually indistinguishable from material that's already
6 been held to be outside the protection of the First
7 Amendment also will be outside the protection of the First
8 Amendment.

9 QUESTION: Are you asking us to read that phrase
10 into the statute, the virtually indistinguishable phrase?

11 MR. CLEMENT: Well, the virtually
12 indistinguishable phrase already appears in the text of
13 the statute, it just doesn't appear in the operative
14 provision. So what we're asking you to do is to read that
15 term, appears to be, in light of the legislative finding,
16 where it's not just the legislative finding where it's
17 virtually indistinguishable.

18 QUESTION: You're asking us to construe the
19 statute narrowly to apply only to things that are
20 virtually indistinguishable from actual behavior, it would
21 eliminate cartoons and that sort of stuff?

22 MR. CLEMENT: That's absolutely right and that's
23 the position we've taken in all the lower courts.

24 QUESTION: Even the language that says conveys
25 the impression, you want us to give the same meaning to

1 that?

2 MR. CLEMENT: Well, I actually think that the
3 conveys the impression language could be given that
4 meaning but I think the conveys the impression language is
5 much less problematic from a constitutional standpoint if
6 you understand subsection D of the statute to be addressed
7 to pandering and in that context the concerns about
8 vagueness are much reduced because you're not going to be
9 focused on just the image, you're going to be focused on
10 the way it's marketed, and I think in that context it
11 won't be difficult to see whether or not it conveys the
12 image. I'd like to reserve the remainder of my time for
13 rebuttal.

14 CHIEF JUSTICE REHNQUIST: Very well, Mr.
15 Clement. Mr. Sirkin, we'll hear from you.

16 ORAL ARGUMENT OF H. LOUIS SIRKIN

17 ON BEHALF OF THE RESPONDENTS

18 MR. SIRKIN: Mr. Chief Justice and may it please
19 the Court: The petitioner's argument if adopted would
20 have three radical tragic consequences for First Amendment
21 jurisprudence. First in the name of protecting children
22 all visual messages of adolescent sexuality will be
23 forever barred regardless of their scientific, artistic or
24 educational value.

25 Second, countless visual depictions --

1 QUESTION: Excuse me, such as what? Such as
2 what? You know, I try to think what great works of art
3 would be taken away from us if we were unable to show
4 minors copulating or any of the other acts set forth in
5 the definition here. Can you give me a couple of
6 examples?

7 MR. SIRKIN: Certainly, in the film area.

8 QUESTION: Lolita?

9 MR. SIRKIN: Lolita, Traffic.

10 QUESTION: That would be a great -- leaving the
11 book, the movie Lolita, the book is perfectly okay, right?
12 This only applies to the movie?

13 MR. SIRKIN: That's correct.

14 QUESTION: The great work of western art.

15 MR. SIRKIN: It's gotten critical acclaim. The
16 movie Traffic, I think, won an Academy Award. There's the
17 movie Tin Drum.

18 QUESTION: What else besides the movie Lolita
19 would we be deprived of in order to prevent little
20 children from being exploited?

21 MR. SIRKIN: There's the movie Traffic, there's
22 the movie Tin Drum, there's a whole bunch of, you know,
23 there's the Brooke Shields movies that maybe some people
24 don't enjoy, but again it's there, the Blue Lagoon and the
25 series of movies such as that.

1 QUESTION: In respect, this is not, you know,
2 the Mona Lisa or Venus de Milo or anything that has lasted
3 more than 30 years.

4 MR. SIRKIN: It could very well affect, I think,
5 painters because the statute -- excuse me.

6 QUESTION: How about Romeo and Juliet? It
7 interprets one scene there that way.

8 MR. SIRKIN: It could, if the movie -- a movie
9 of Romeo and Juliet were made.

10 QUESTION: Gee, you've seen a different version
11 of that play than I have.

12 (Laughter.)

13 MR. SIRKIN: Well, it depends on how they wanted
14 to portray it. I think they would have to be prevented
15 from showing or simulated sexual activity because if they
16 are in fact, you know, to be considered to be underage.
17 And secondly, countless visual depictions of adult
18 sexuality will be prohibited where the adults depicted
19 appear to some unknown censor to be younger than 18. And
20 third, it would open the door to banning other forms of
21 expression simply because the expression could be misused
22 and/or abused by a small segment of society.

23 QUESTION: Very well, how should it be read?
24 How would you write the statute so that it did take
25 Justice Stewart's material that flunks.

1 MR. SIRKIN: One is, I think, enforcement of the
2 obscenity laws would be one way.

3 QUESTION: Apparently that doesn't work and
4 that's why I'm puzzled. And where children, where you're
5 depicting children engaged in this activity, let's say
6 that flunks the Algerian seaman test or whatever it was he
7 used to have.

8 MR. SIRKIN: Your honor, there's --

9 QUESTION: How is Congress to write a statute in
10 the area of children that gets at that problem, which is a
11 problem?

12 MR. SIRKIN: I believe that Title 18, section
13 2251 covers that problem. In the past there have been
14 numerous prosecutions, I think, prior to the passages of
15 this Act. In 1995 a member of the Department of Justice
16 testified before the Senate committee that heard evidence
17 about this statute and indicated that there had been a
18 conviction rate of over 97 percent in cases that had been
19 brought against people for the possession or dissemination
20 of material containing a depiction of a minor.

21 So that in fact has not been a problem in the
22 past and apparently in this all in umbrella statute where
23 they used any visual depiction, which in fact if you use
24 the terminology any visual depiction it's not just limited
25 to virtually indistinguishable --

1 QUESTION: You have no problem then with the
2 statute before it was amended.

3 MR. SIRKIN: I have no problem, this is a new
4 statute, 2251 and 2252 did exist.

5 QUESTION: What did it do? How did it change
6 the law?

7 MR. SIRKIN: It used the terminology, it created
8 a category of computer images that would be nonreal or
9 other pictures or images that are nonreal and that are
10 fictional characters into the act and it would be
11 prohibited if disseminated or possessed.

12 QUESTION: So, well, whatever was going to be
13 threatened in the way of free expression and so forth
14 under the new act was simply computer images of things
15 that were already prohibited if done by real people?

16 MR. SIRKIN: No it did not, it included, it said
17 any visual depiction, that would include that could be
18 considered cartoons, illustrations, drawings, paintings.

19 QUESTION: If the statute is construed to be,
20 say, virtually indistinguishable then I think cartoons
21 would not be covered.

22 MR. SIRKIN: But the problem is it would still
23 suffer from the vagueness because what would happen is
24 that in fact I had a computer image of a fictional
25 character I'd never have a defense because I could not

1 come forward and prove that that fictional character was
2 over 18. So if someone believed --

3 QUESTION: That seems way out at the fringes
4 somewhat.

5 MR. SIRKIN: Well but that leaves it to the
6 discretion. It may be that the current administration may
7 not enforce this language but down the road nobody knows
8 what will happen.

9 QUESTION: You could cross that bridge when you
10 come to it then.

11 MR. SIRKIN: Well, I believe when you begin to
12 talk about First Amendment rights to put it on to a case
13 by case basis I think you are abridging, you know, a
14 fundamental right and I think that in addition to that you
15 have the problem that if I get charged you're not just
16 being charged with a violation of an obscenity law, you're
17 being accused of being a child pornographer and that does
18 have some connotation and that has some ill effects just
19 from the fact of being charged. And I would have no
20 defense.

21 QUESTION: Well, does it cover things beyond
22 obscene speech?

23 MR. SIRKIN: Well --

24 QUESTION: In your view.

25 MR. SIRKIN: In this it does, it would cover,

1 you know, the morphing situation --

2 QUESTION: Excuse me?

3 MR. SIRKIN: I'm using the term morphing where
4 you use an identifiable and you can merge it in on the
5 computer to, you know, into similar --

6 QUESTION: Images of obscenity.

7 MR. SIRKIN: That's correct, or of a sexual act
8 --

9 QUESTION: That is the expansion, is covering
10 images of obscenity.

11 MR. SIRKIN: Well, it would be images, it would
12 be copying images of obscenity with an identifiable
13 individual or in sexual conduct and that is harm to a real
14 child because that person is an identifiable child and
15 that becomes a permanent record.

16 QUESTION: But does it cover depictions of
17 something more than obscenity?

18 MR. SIRKIN: Well, when you use the terminology
19 simulated sexual activity it would, you know, it depends,
20 I guess that goes community to community. But what you
21 have is like in the movie Trafficking where you have a
22 young lady under a cover with a man on top of her, you
23 only see their heads but, you know, the simulated means
24 the appearance of, and that in fact does give the
25 appearance and, you know, in that situation it is a

1 representation in the movie that that person is under the
2 age of 18 --

3 QUESTION: Don't you think the statute can
4 reasonably be read giving the definition of the activities
5 covered not to cover two people under a bed with no
6 depiction of sexual organs or anything else.

7 MR. SIRKIN: The problem is, is that the statute
8 uses the term actual sexual activity and/or simulated, and
9 again --

10 QUESTION: It depends on what you mean by sexual
11 activity. If it's just a depiction without any indication
12 of the sexual organs it's certainly reasonable to say that
13 that isn't covered.

14 MR. SIRKIN: But that's not what the statute
15 says, though.

16 QUESTION: Well, the statute does say explicit.
17 Doesn't that cover what Justice Scalia --

18 MR. SIRKIN: No it doesn't, because it says
19 explicit sexual conduct, actual or simulated and I guess
20 it depends on how you read that word simulated.

21 QUESTION: You say explicit. What work does the
22 term explicit do?

23 MR. SIRKIN: It means clearly and again clearly
24 would mean to me that if it appears that they're under the
25 blanket and that's what they're doing I think it's a

1 reasonable inference to be made and I think that it would
2 cover that as simulated activity.

3 QUESTION: But explicit certainly can mean
4 something different than clearly.

5 MR. SIRKIN: It can, but it's not defined in the
6 statute. They could have gotten rid of the word
7 simulated.

8 QUESTION: Then maybe the courts will define it
9 so that it wouldn't cover the kind of thing you're talking
10 about.

11 QUESTION: It is defined in the statute,
12 sexually explicit conduct that was in quotes means actual
13 or simulated sexual intercourse.

14 MR. SIRKIN: And some other things, and it uses
15 masturbation and --

16 QUESTION: It includes sexual intercourse, it
17 seems to me it's sexual intercourse whether you see the
18 entire body or only part of it.

19 MR. SIRKIN: I agree with Your Honor that it
20 would be simulated if they're under the blanket and you
21 see the heads.

22 QUESTION: I think the question is whether you
23 could, a court could say well, to keep this within
24 constitutional bounds we will read into the statute this
25 broad requirement that there be an actual showing of

1 sexual organs.

2 MR. SIRKIN: You know, legislatures write
3 statutes, I think the courts interpret them and I think to
4 construe it you'd be basically rewriting the statute if
5 you did that, if you eliminated that terminology and I
6 don't think the government has urged that.

7 QUESTION: Am I not correct in remembering that
8 one of the amendments to this series of statutes by
9 Congress specifically eliminated the requirement of
10 patently offensive and the like?

11 MR. SIRKIN: They've done that in the child
12 pornography area a long time ago. They did that in Ferber
13 when they said that it, just if it merely is children
14 involved in sexual activity it's a violation of the law
15 and it's not subject to the three-prong test of Miller and
16 the patently offensive is a part of the Miller test.

17 QUESTION: Do you have any examples of the use
18 of computer generated images covered by this statute where
19 it has serious literary or educational value or scientific
20 value?

21 MR. SIRKIN: Well --

22 QUESTION: Do we have examples of that?

23 MR. SIRKIN: Today I don't know that we have
24 examples today of that. I mean, I would think that if we
25 convert the videos and the films that are being made today

1 into DVD, those are, that's a computer, digital computer
2 --

3 QUESTION: Because your concern is with the
4 expansion to these images of things that are already
5 prohibited and yet I don't think we have examples of any
6 serious use of them in --

7 MR. SIRKIN: Well, if I --

8 QUESTION: -- areas which would be of concern.
9 The examples that we've talked about today and that I
10 think you've identified seem to be of films using youthful
11 adults.

12 MR. SIRKIN: Well, that would be correct but I
13 think it's not, you know, too in the distant future that
14 we will be making films that will be virtual reality.

15 QUESTION: But they're their strongest argument
16 is -- I mean, I thought their argument is you're right,
17 those things you're talking about are not covered.
18 They're not covered today because everybody knows they're
19 not really under the age of 18, the actors. And tomorrow
20 if we have a new system we'll worry about it tomorrow on a
21 case by case basis. Maybe all they'd have to do is put on
22 the top these are not real, I don't know what they'd have
23 to do, but they're so few and far between that we
24 shouldn't strike the statute down on its face.

25 Now that's why I think people are asking you for

1 particular examples because if you have to make up an
2 imaginary example that doesn't really exist then maybe the
3 correct thing to do is say the statute shouldn't be struck
4 down on its face and we'll proceed case by case as a
5 reasonable literary or scientific virtue to a particular
6 thing. Of course the person can't be convicted. Now
7 that's case by case. I'm putting what I take it is their
8 argument here.

9 MR. SIRKIN: But the problem with that is it
10 creates a chilling effect because who's going to take the
11 chance? I mean that's it, if the government says if it's
12 close to the line I think the petitioners have indicated
13 in their brief that if it's close to the line then just
14 don't do it, you know, don't publish it, don't make it,
15 and that's censorship.

16 QUESTION: What about the other argument which
17 is look, we're trying to protect the real children who are
18 the subjects of the film and the reason we need this to
19 protect them is because there is no way for any expert or
20 anyone else to say when they see a film whether this is a
21 film of a real person or whether it is a fake film made
22 through virtual technology. The experts just can't tell
23 us.

24 MR. SIRKIN: Well, I think that becomes, you
25 know, an excuse.

1 QUESTION: Is it true?

2 MR. SIRKIN: It is not true.

3 QUESTION: All right. You think it is not true,
4 they think it is true. Is there somewhere in the record I
5 could look or some place I could find out as to what
6 experts think?

7 MR. SIRKIN: Yes, because I think you can look
8 at the Senate hearing report where it's indicated that in
9 1995 in relation to cases that were brought there was a
10 conviction rate of 97.6 percent. In addition to that, that
11 since the enactment of this law the government has not
12 lost a case and it was raised in the Kimbrough case and it
13 was raised in the Fox case, they were able to get a
14 conviction.

15 QUESTION: You say the congressional finding is
16 wrong then because the statute begins with, among other
17 findings, new photographic and computer imaging
18 technologies make it possible to produce by electronic,
19 mechanical or other means visual depictions of what appear
20 to be children engaging in sexually explicit conduct that
21 are virtually indistinguishable to the unsuspecting viewer
22 from unretouched photographic images. You say that that
23 congressional finding is wrong?

24 MR. SIRKIN: That congressional finding, I don't
25 think it was empirically, there was no empirical evidence

1 that was really shown to Congress that that is correct,
2 that the computer, and I believe, and I think it's clear
3 --

4 QUESTION: So you have both your opponent and
5 the Congress who think you're wrong on this point.

6 MR. SIRKIN: Yes.

7 QUESTION: Okay. But your point still is, I
8 take it is, even if in fact the Congress is correct on
9 that, there's no evidence that cases are being lost
10 because of this virtual indistinguishability problem,
11 cases involving real children.

12 MR. SIRKIN: That's correct. And I believe if
13 you want to make it easier for the government to make
14 convictions I think that we could get rid of the Bill of
15 Rights and it would be much easier for the government then
16 to get convictions.

17 QUESTION: Mr. Clement gave an example of
18 another case in which the government did obtain a
19 conviction but only because of the new statute in which
20 the government witness was unable to say.

21 MR. SIRKIN: That was that government witness.
22 That doesn't mean that there are not witnesses out there
23 and experts that can make that distinction that if, you
24 know, there clearly would be, pardon?

25 QUESTION: This was just a bad government

1 witness, you say?

2 MR. SIRKIN: It could have been. I didn't hear
3 the testimony in that case but they did in fact get a
4 conviction in that case. But I think it's equally as
5 dangerous to create a barrier to First Amendment.

6 QUESTION: Wouldn't have gotten a conviction if
7 the law had been what you want it to be, isn't that right?

8 MR. SIRKIN: We don't know they wouldn't have
9 gotten a conviction with that -- the testimony in that
10 case was that the expert indicated that he was not sure
11 and could not positively say whether it was real or not
12 real.

13 QUESTION: And on that basis can you find beyond
14 a reasonable doubt that it was a depiction of an actual
15 minor.

16 MR. SIRKIN: It creates an inference and a jury
17 can draw inferences from the evidence.

18 QUESTION: Suppose the law put the burden on
19 you, on the defendant to show that this depiction does not
20 use an actual child. The defendant, because of this proof
21 problem, is not brought out, the confusion is it a real
22 child, is it a simulation. Suppose it were made the
23 defendant's burden to show that no actual child was used
24 in this picture, would you have a constitutional objection
25 to that?

1 MR. SIRKIN: Yes, I would. And the reason being
2 is that at least in the possession area that is not an
3 affirmative defense because all it has to be in the
4 affirmative defense, there is no, the element of age, of
5 being able to come forward and show that it's not a real
6 child or that it's underage is not available --

7 QUESTION: Okay, let's assume that that too was
8 fixed. Those two features, Justice Ginsburg's and the
9 inclusion of the possession is subject to the defense,
10 would the statute then be constitutional?

11 MR. SIRKIN: I, the possessor though, you'd be
12 switching the burden of proof then I believe and I think
13 that would be an unconstitutional shifting of the burden.

14 QUESTION: Well, you'd be making, you be -- are
15 you saying that the affirmative defense therefore is, in
16 effect, has got to be constitutionally relevant across the
17 board?

18 MR. SIRKIN: I believe that it is. I think the
19 affirmative defense that's in this statute is
20 unconstitutional.

21 QUESTION: So there's no way to tailor it by
22 affirmative defense in effect is your argument.

23 MR. SIRKIN: That's correct.

24 QUESTION: And how would that affirmative
25 defense prevent some of the evils that the government is

1 trying to prevent, for example the seduction of minors to
2 sexual conduct by showing things that appear to be minors?
3 How would this, affirm -- the existence of this
4 affirmative defense still enable the government to do
5 that?

6 MR. SIRKIN: There are currently, there are
7 currently lots of laws that deal with anyone who attempts
8 to entice a child and I believe that those laws could be
9 enforced and I believe that the penalties could be
10 increased and that could be a deterrent effect on that.
11 We're talking about the use of this material potentially
12 by a very small segment of the population and I think it
13 affects --

14 QUESTION: Well, you could say the same thing
15 about a murder statute, you know, you don't expect a whole
16 lot of people to go out and commit murders but that
17 doesn't mean Congress can't legislate against it.

18 MR. SIRKIN: But here you can't legislate that
19 if it's not, if it's a virtual murder and there has been
20 no murder, you don't go out and arrest people. Here if
21 you use a virtual, a fictional character you can go out
22 and arrest people.

23 QUESTION: Well, if you want to talk about a
24 very small portion of the population I would think there's
25 a very small portion of the population that wants either

1 to produce or to watch adolescents and children engaging
2 in sexual conduct of the sort described in this statute.
3 You're dealing with a small portion of the population to
4 begin with.

5 MR. SIRKIN: But if you use the principle that's
6 involved here then I do believe you begin the slippery
7 slope. You go from the idea you can use this and expand
8 it, you can use it, you know, that if you have depictions
9 such as, you know, the movie the Godfather, the movie Pulp
10 Fiction which are cult, you know, movies that are
11 attractive to children, someone could come out and say,
12 hey, look, join my gang, look how much fun it can be if we
13 go out and become extremely violent.

14 QUESTION: What's worrying me about what you're
15 saying now is that if their factual hypothesis is true,
16 which I tend to doubt, but I'm not an expert, that there
17 is no technical way to distinguish between a photograph of
18 a real child and an imaginary child, if it were true,
19 there is no expert who could tell you the difference and
20 you tell me I can not have an affirmative defense, then
21 the government cannot prosecute real child pornography.

22 MR. SIRKIN: I think they can --

23 QUESTION: Because there would be no way to
24 prove beyond a reasonable doubt that it was a real child.
25 So if you deny the government the possibility of the

1 affirmative defense weapon you are denying them the
2 possibility of prosecuting real child pornography.

3 MR. SIRKIN: That's not correct because they've
4 been able to get convictions and they've gone forward and
5 they've gotten convictions.

6 QUESTION: Well, presumably people think that it
7 is possible to distinguish between the real child and the
8 virtual fake.

9 MR. SIRKIN: But I don't believe, you know, at
10 least currently they've not lost any of the cases and
11 there's only been the one where someone has raised the
12 issue and that expert had indicated that they weren't
13 sure.

14 QUESTION: I think what you're doing is in
15 effect varying the question, you're saying, look, in the
16 real world it doesn't happen, they can tell. But if you
17 assume the hypothesis that Justice Breyer started with,
18 the factual hypothesis that if these are well enough made
19 you can't tell the difference, then doesn't it follow that
20 if you rule out the affirmative defense route for the
21 government, the government simply won't be able to prove
22 the case in the instances in which real children are being
23 used.

24 MR. SIRKIN: I'm going to go back and I'm not
25 begging the question, again, if I have, if there is

1 virtual murder that looks so real on the screen, I don't
2 go out and charge anyone with murder.

3 QUESTION: Well, we can distinguish attraction
4 to other forms of socially damaging behavior from that
5 particular category of social -- socially damaging
6 behavior that has for hundreds of years been treated as
7 obscenity. I don't think there's any risk of the Court
8 suddenly declaring that excessive violence constituted
9 obscenity. We know what obscenity is. There have been
10 laws against this particularly infectious kind of
11 solicitation to conduct for centuries. I don't know why
12 you think we're going to suddenly flop over into
13 prohibiting the Godfather because that also portrays
14 socially undesirable conduct.

15 MR. SIRKIN: If you take the logic that's behind
16 here about people, you're getting at the person who is
17 misusing the material and there certainly I think is, you
18 can't even do medical --

19 QUESTION: Sexual material in a category called
20 obscenity which has traditionally for hundreds of years
21 been regulable by government.

22 MR. SIRKIN: But the obscenity here we're making
23 just because it's a fictional character visually
24 participating in an activity that I can write about, we're
25 now saying you cannot express, that we're saying, we're

1 giving it a social status, and I think when we start to do
2 that then we start to eliminate, we can start eliminating
3 other areas equally.

4 I further believe that, you know, as I've
5 indicated, that the affirmative defense seems to be
6 inadequate. It certainly does not cover the individual
7 possession and that individual is in a position where if
8 he has three images, if he gets a DVD movie and he takes,
9 and it has more than three images in it, he's now, you
10 know, can be prosecuted for possession of child
11 pornography. And, again, with the definition, when you
12 put it together with the definition of simulated.

13 I think that it is not narrowly tailored, it is
14 overly broad because I think, again, it covers literary
15 material, it carries certainly for medical research, one
16 cannot, there is no bona fide exception here for medical,
17 scientific or educational or artistic merit, it's a
18 blanket across the board prohibition. I believe the Court
19 clearly indicated in Ferber --

20 QUESTION: But what if we accept the
21 government's limiting construction, the government is
22 urging that we use this, take the congressional finding,
23 read it into the text of the statute and then it would cut
24 out all the good things.

25 MR. SIRKIN: I believe that the Court has

1 indicated in the past in Turner Broadcasting and in the
2 landmark communications case that it's not for the Court
3 to be rewriting statutes as they come out of Congress and
4 particularly in the area when it deals in areas of First
5 Amendment. And I think that the Act, you know, and what
6 we're proposing here --

7 QUESTION: Supposing that -- suppose we could
8 consult Congress, they would say yeah, preserve as much of
9 this as is constitutional. We wanted to do a whole lot
10 but if the constitution only allows us to do a little we'd
11 rather have the Court say that than to throw out our
12 entire product.

13 MR. SIRKIN: All we're asking is, is the Court
14 sever out two phrases and that is that is, is it appears
15 to be and that it, you know, and where it conveys the
16 impression that a minor is engaged in sexual activity.

17 QUESTION: Well, in X-Citement Video we did
18 something not too different from this, reading in a
19 requirement that wasn't express in the statute.

20 MR. SIRKIN: You did read in the elements of
21 knowingly and you have to do that. Basically the
22 government is doing the same thing in this particular
23 statute because the knowingly appears in this statute
24 exactly as it appeared in the statute that was interpreted
25 by the Court in X-Citement Video. It says knowingly in

1 relation to mailing or to transporting, it doesn't say
2 knowing as to the knowledge of the particular minority.

3 QUESTION: But that's an example of a case where
4 there was a First Amendment challenge where we have read
5 something into a statute that we might not necessarily
6 have done.

7 MR. SIRKIN: The Court has the power to do that.

8 QUESTION: And there's precedent for our doing
9 it.

10 MR. SIRKIN: Yes, in X-Citement Video the Court
11 did do that. But we're urging here that the fact is that
12 the Ferber and Osborne were based upon the harm to real
13 children and we're now limiting something because of the
14 message. We are socially making a determination here that
15 this is speech we don't like.

16 QUESTION: Are you saying that if real children
17 are not used in the depiction of simulated sexual activity
18 that it cannot be barred unless it meets the Miller
19 standard?

20 MR. SIRKIN: Yes. It would mean --

21 QUESTION: Eight year olds, ten year olds,
22 twelve year olds.

23 MR. SIRKIN: They're fictional characters,
24 because I think they do have a valid use in medical
25 research.

1 QUESTION: Suppose you said -- suppose you said
2 -- suppose I -- I don't know how I'd do it, suppose I
3 could draft a statute which had a medical research
4 exemption.

5 MR. SIRKIN: It would make it narrower.

6 QUESTION: Would it be constitutional?

7 MR. SIRKIN: Again, I'd have to see the whole
8 statute and, again, I think that it would depend on how it
9 works and whether it still had the problems with the
10 affirmative defense.

11 QUESTION: Suppose you took -- I just want to
12 follow up on what Justice Kennedy said. Suppose you took
13 Miller and said where you have clearly minors we as a
14 matter of law assume that it's patently`offensive.

15 MR. SIRKIN: That could be done.

16 QUESTION: That could be done, you'd still have
17 the other two parts.

18 MR. SIRKIN: Yes, and I think that most
19 communities would feel, I think that all communities would
20 feel that that is patently offensive.

21 QUESTION: I wonder if Miller would work more
22 satisfactorily if you did that in the case of people who
23 clearly appear to be minors.

24 MR. SIRKIN: I believe that it would.

25 QUESTION: You think it would.

1 MR. SIRKIN: Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you Mr. Sirkin,
3 Mr. Clement you have one minute remaining.

4 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

5 ON BEHALF OF THE PETITIONERS

6 MR. CLEMENT: Thank you Mr. Chief Justice.
7 Counsel for Respondent notes the 97 percent conviction
8 figure. Well, that reflects a couple of things. One, it
9 reflects that the 1996 Act has allowed us to prosecute
10 cases even where there is a reasonable doubt about whether
11 it is a virtual image or not. The other thing that the 97
12 percent conviction rate reflects is that we are not out
13 there prosecuting people who pick up Traffic at the
14 Blockbuster. It's no accident that the one court that
15 considered this case in a facial challenge struck the
16 statute down, but the four courts of appeals that
17 considered it in an as applied challenge upheld the
18 statute.

19 Those cases give you an illustration of what the
20 statute is really applied to. The Mento case involved
21 over 100 images of prepubescent children. The Acheson
22 case in the 11th Circuit --

23 QUESTION: Is there any precedent that we judge
24 a free speech statute based on the kind of prosecutions
25 the government has been bringing?

1 MR. CLEMENT: There is precedent and the best
2 one I can think of is Ferber for waiting until as applied
3 challenges to deal with the fringe cases, the tiny
4 fraction cases. And I think, as in Ferber, if you wait
5 for those cases to be brought you'll find that they are
6 not brought in these cases.

7 Another point I think worth emphasizing is that
8 I don't think given that this statute only covers explicit
9 sexual conduct that there'll be much medical research
10 involved.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Clement. The case is submitted.

13 (Whereupon, at 10:58 a.m., the case in the
14 above-entitled matter was submitted.)

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