SUPREME COURT OF THE UNITED STATES

No. 00–795

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 16, 2002]

JUSTICE THOMAS, concurring in the judgment.

In my view, the Government's most persuasive asserted interest in support of the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq*., is the prosecution rationale—that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt. See Brief for Petitioners 37. At this time, however, the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a "computer-generated images" defense. See *id*., at 37–38, and n. 8. While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

The Court suggests that the Government's interest in

enforcing prohibitions against real child pornography cannot justify prohibitions on virtual child pornography, because "[t]his analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ante*, at 17. But if technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children. The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, see *ante*, at 18, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography. Thus, I concur in the judgment of the Court.