Case No. 10-4085

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FREE SPEECH COALITION, INC., *et al.,*
Plaintiffs - Appellants,

– vs –

ATTORNEY GENERAL OF THE UNITED STATES,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT.

The Government contends the District Court properly dismissed Plaintiffs' Complaint under FRCP 12(b)(6) because it presented not a single plausible claim. But a considered review of the Complaint and the law demonstrates that it presented a number of viable and meritorious constitutional claims that should not have been discarded on a motion to dismiss, but, at the very least, deserved the development of a factual record.

The Government argues no such record was required because it was able to satisfy its burden of demonstrating the statutes' constitutionality by simply relying on the legislative findings–citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II),* and, its predecessor, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (*Turner I*) in support of this premise. Appellee's Br. at 21, 24-25. Those decisions, however, compel the opposite conclusion.

In *Turner I*, the Court examined the constitutionality of the 1992 Cable Act, requiring cable television operators to carry local broadcast stations. 512 U.S. at 634. Agreeing that the asserted governmental interests for the Act were important, *id.* at 662, the Court went on to state, however:

> That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests... [The Government] must do more than simply "posit the

> existence of the disease sought to be cured"....It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Id. at 664 (citations omitted).

The Court then evaluated the evidentiary support offered by the Government for its claim that the regulations were necessary to protect the viability of broadcast television. *Id.* It found it wanting:

> The parties disagree about the significance of [the] statistics [contained in a 1988 FCC study showing that 20 percent of cable systems reported dropping local broadcast stations in the absence of must-carry regulations.] But even if one accepts them as evidence that a large number of broadcast stations would be dropped or repositioned in the absence of must-carry, the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result. ***Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge made by these appellants.***

Id. at 667 (emphasis added). The Court vacated the district court's entry of summary judgment in favor of the Government and remanded to the district court–noting that it was necessary "to permit the parties to develop a more thorough factual record." *Id.* at 668.

The case returned to the Court after "18 months of factual development...'yielding a record of tens of thousand of pages' of evidence...

comprised of materials acquired during Congress' three years of preenactment hearings...as well as expert submissions, sworn declarations and testimony, and industry documents obtained on remand." *Id.* at 187. It was only against ***this*** evidentiary backdrop, that the Court concluded the Government had carried its burden of establishing that the must-carry provisions passed muster under the First Amendment. *Id.* at 224-25.

This case is one step removed from *Turner I*, in which the Court reversed the district court's entry of summary judgment. Here, the court below dismissed the Complaint under FRCP 12 (b)(6) without the submission of ***any*** evidence by the parties.

II. PLAINTIFFS' COMPLAINT PRESENTS A PLAUSIBLE CLAIM THAT 18 U.S.C. §§ 2257 AND 2257A ARE UNCONSTITUTIONAL UNDER INTERMEDIATE SCRUTINY.

A. TITLE 18 U.S.C. § 2257 AND 18 U.S.C. § 2257A DO NOT ADVANCE AN IMPORTANT GOVERNMENTAL INTEREST IN A DIRECT AND MATERIAL WAY.

Throughout its brief, the Government identifies a single harm that serves as the entire justification for these statutes. It claims that the legislation was enacted to address the risk that underage performers might be used in the production of adult films. As support, the Government points to evidence presented to Congress more than twenty years ago showing that the performers appearing in adult films were

youthful looking. *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing Before Senate Committee on the Judiciary*, 100th Cong. (1988) at 27, 37, 88, 298-99. This singular harm is offered by the Government as the entire justification for the statutory scheme that imposes its burdens on all constitutionally protected sexually explicit speech involving adults.

The problem is, no evidence has been adduced to demonstrate that this harm exists.

The Government relies heavily on the Final Report of the Attorney General's Commission on Pornography (1986) for support. Appellee's Br. at 4, 24-25, 29, 31-32. The Commission was quite candid about the "admittedly severe limitations of the evidence" on which it relied in crafting its findings and recommendations. Final Report at 888. Indeed, it characterized its "findings and recommendations" as "largely tentative." *Id.* at 852-54. Add to the equation the fact that this evidence is nearly a quarter century old, and its value leeches away further. *See Connection Distributing v. Holder*, 557 F.3d 321, 354 (6th Cir. 2009) (*en banc*) (evaluating the evidence of the Final Report and Senate Hearing, the dissent noted: "This is a lot of weight to put on evidence from the 1980s (1986 and 1988 respectively)...."(Kennedy dissenting)); *Northwest Municipal Util. Dist. v. Holder,* 129 S.Ct. 2504, 2512 (2009).

One of the statements in the Report that the Government trumpets as

compelling support for the record-keeping requirements demonstrates the unreliability of those findings and the sloppiness underlying the Commission's conclusions.

The Government states that "demand for sexually explicit images of the young was satisfied, in part, when '[p]ornographers use[d] minors as performers in films,'" Appellee's Br. at 25, citing the Final Report at 618 as the source of this claim. To be sure, the following statement appears on that page: "Pornographers use minors as performers in films and other visual depictions." The Report cites the discussion in Part Four of the Report as support for this statement. Final Report at 618, n.458. But the discussion in Part Four–particularly the section on "Age," *id.* at 855-56–offers ***no*** support for the premise that minors were used in adult films. To the contrary, the evidence cited demonstrates the opposite. *See Id.* at 855, n. 969 (listing "the ages at which some prominent 'X'-rated film models began performing"–all of whom were above the age of majority and listing the ages at which two of the actresses began their respective careers as 28 and "fortyish.")

It is this tentative, dated evidence on which the Government depends to show that the "recited harm" is sufficiently real to justify imposing the heavy burdens on that which is not child pornography, but rather is protected expression depicting adults.

The Government identifies several statements in the Report in support of the risk that older adolescents might appear in adult films: "the pornography industry's appetite for youth poses a risk of child exploitation"; there is a "consumer demand for youthful performers"; the "single most common feature" of persons in adult films is "their relative, and in the vast majority of cases, absolute youth." Appellee's Br. at 4, 24. But observations that performers in adult films appear youthful-looking do not constitute evidence that adult films have been or are being made using minors. There is simply no factual support for any such claim. To the contrary, evidence was presented supporting the conclusion that is not the case. *Senate Hearing* at 402. Indeed, the Commission found it important to note that child pornography "is largely distinct from any aspect" of the adult film industry, *Final Report* at 406, and that domestic production of child pornography had already been substantially curtailed by then-existing child pornography laws. *Id.* at 409; *see also, Id.* at 299, n.973, 410 1365-76. At best, the legislative findings describe a harm that is merely "conjectural."

The Government's position becomes completely undone once the allegations of the Complaint–which are to be accepted as true on a motion to dismiss, *Ashcroft v. Iqbal*,129 S.Ct. 1937, 1950 (2009)–are taken into account. Those allegations demonstrate that the alleged harm with which Congress was concerned simply does

not exist. Specifically, Plaintiffs assert that producers of adult material condemn the use of underage performers and "actively employ measures to assure that minors simply do not appear in their expression." Complaint, ¶19, App. at 157. Had Plaintiffs been given the opportunity, they would have adduced evidence showing that this has been a longstanding practice.[1]

This single conjectural harm cannot justify the hefty burdens the record-keeping and labeling requirements impose on the entire universe of constitutionally protected sexual images of adults–particularly given the fact that those burdens have grown more and more cumbersome and oppressive as Congress has amended the law and propounded new regulations implementing it over the years.

In this regard, it is important to remember that the original version of 18 U.S.C. § 2257 merely created a rebuttable presumption: if the producer of sexually explicit expression did not conform to the record-keeping and labeling requirements of the statute, it would be presumed that the person depicted was a minor. *Senate Hearing* at 38, 353. The producer, however, could rebut this presumption by producing documentation showing that the performer was an adult at the time the depiction was created.

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[1] In fact, even the Commission's contention that all films produced by the adult industry portray youthful-looking actors is incorrect. Adult films encompass many genres portraying adults of all ages. Plaintiffs would have established as much, had they been given the opportunity to do so.

In this form, the record-keeping requirement was represented to be a burden "only for producers of material which, by its very nature, poses a risk of serious harm to children." *Id.* at 53. In the legislative hearings on the original legislation, Alan Sears, Executive Director of the Attorney General's Commission on Pornography, explained:

> The record keeping requirements in this section are ***not*** [emphasis in original] unduly burdensome. Producers of material depicting "actual sexually explicit conduct" who use only performers appearing over eighteen are not going to face prosecution for sexual exploitation of children and, ***so, may disregard this section's requirements.*** In the unlikely event that a prosecution began because some performers' ages appeared questionable and the presumption of minority was used, the presumption could easily be rebutted by the introduction of each performers' birth certificate or other indication of age or identity. Also, the requirement only applies to when ***actual*** [emphasis in original] sexually explicit conduct is depicted. There is no record keeping requirement for film or other works depicting only simulated sexually explicit activity. Therefore, the only producers 'burdened' by this record keeping are those who create 'hard core' sexually explicit material ***and*** [emphasis in original] employ performers who could be underage.

Senate Hearing at 266 (emphasis added, except where noted).

Since the law was first enacted, however, Congress has turned it from a provision that could be entirely "disregarded" by any producer who used only adults and could produce evidence, if it ever became necessary, to demonstrate that he did, into a law that punishes non-compliance by anyone producing sexually explicit expression as a felony.

The statute has been amended to expand its reach, increase its burdens, and stiffen its penalties. It now covers, not only actual sexual conduct, but simulated sexual conduct and the lascivious display of the genitals; it now is enforced by direct criminal sanction–not a rebuttable presumption–which, through the years has increased from a term of imprisonment of two years to a term of imprisonment of five years;[2] it now applies not only to visual depictions in magazines, books, and films, but to depictions posted on the internet; it now punishes refusal to allow the warrantless search and seizure of the requisite records; and it now permits the Government to use the records it requires producers to keep as evidence against them in obscenity prosecutions.[3] The statute that Mr. Sears described as one imposing no

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[2] In this way, Congress merely masked rather than eliminated the statute's unconstitutional presumption, *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989) *vacated as moot*, *American Library Ass'n v. Barr,* 956 F.2d 1178 (D.C. Cir. 1992) and exacerbated the unconstitutional burden on protected expression. For Congress shifted the burden from the government to all producers of sexually explicit expression (which is presumptively protected by the First Amendment) to prove that their expression is ***not unprotected***– by requiring them to maintain records and label their expression in accordance with the statute's dictates. And thus, the statute reverses the presumption of protection conferred on all expression merely because it might resemble unprotected speech. *Cf., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

[3] In the legislative hearings on 18 U.S.C. § 2257, H. Robert Showers, Executive Director of the Justice Department's National Obscenity Enforcement Unit, expressly acknowledged that the Fifth Amendment prevented this very thing. *Senate Hearing* at 90-91 ("The basic prohibition on the use of information in the records themselves in prosecution of child pornography and obscenity cases is (continued...)

burdens on the constitutionally protected expression of responsible producers such as Plaintiffs, who never use underage performers and check IDs, is a distant artifact, far removed from the statutes that are found in the U.S. Code today.

B. THE RECORD-KEEPING LAWS ARE NOT NARROWLY TAILORED.

In evaluating whether a regulation of speech passes constitutional muster under intermediate scrutiny, it must be assessed to determine whether it is narrowly tailored to achieve the governmental interest justifying it. In making that determination, the regulation must be measured against the same interest that the Government has identified as its justification under the first step of intermediate scrutiny. *Simon & Schuster, Inc. v. Members of the New York State Crime Bd.*, 502 U.S. 105,120 (1991). Neither the Government nor its amicus quibbles with this basic premise.

The tailoring of the laws at issue here, therefore, must be measured with respect to the governmental interest in suppressing child pornography–which is the interest that the Government claims justifies them. But that is not the interest by which the District Court measured the statutes' fit. Rather the District Court measured the

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[3](...continued)
constitutionally required and is derived from 26 U.S.C. § 5848 which places similar restrictions on the evidentiary use of information contained in firearms registration records.... *United States v. Freed*, 401 U.S. 601 (1971). *See Marchetti v. United States*, 390 U.S. 39 (1968) and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965).")

record-keeping requirements against the Government's interest in having all producers establish that their expression is not child pornography. Opinion, App. at 71-74. And as explained in Appellants' opening brief, this interest is an improper one, Appellants' Br. at 30-32; it reverses the presumption of constitutionality conferred on all expression and shifts the burden to the producer of proving that his expression is, in fact, protected expression depicting adults and not illegal child pornography depicting minors.

And while the Government denies that to be true, it, in fact, admits as much in its Brief, writing in its Statement of the Case: "These statutes require producers to create and maintain records ***establishing*** that any real people shown engaging in actual or simulated sexually explicit conduct (as defined by the statutes) are at least eighteen years old." Appellee's Br. at 3 (emphasis added). It uses this redefined interest in an attempt to justify the statutes' application to expression that is not child pornography under the narrow tailoring analysis. *See e.g.*, Appellee's Br. at 30-31, 35, 37-38, 41-42.

The point can perhaps best be made by analogy. Imagine a statute enacted to reduce the risk that unprotected libel would be published and that "merely required" newspaper publishers "to ***establish*** in a reliable manner," Appellee's Br. at 28 (emphasis added), the truth of what they published, by compelling them–on penalty

of criminal sanction–to create and maintain records documenting its truth and to affix labels to their publications identifying the location of those records. This hypothetical law would unquestionably reverse the First Amendment presumption afforded such expression and shift the burden to their publishers of establishing that their speech was protected. It would be struck down as unconstitutional in a heartbeat. *See Near v. Minnesota*, 283 U.S. 697, 721 (1931). Yet that is the precise operation and effect of the statutes at issue here.

The Government argues that the substantial burdens on protected expression imposed by the statutory scheme are essential to "prevent[] subjective determinations of age." Appellee's Br. at 38-39. But it has produced no evidence establishing that to be true. In fact, the certification procedure contained in 18 U.S.C. § 2257A (h) provides a persuasive rebuttal to that very premise. For this procedure demonstrates one way a regulation could be narrowly tailored.

The same could be said of a simple age-check rule, at least with respect to commercial producers who plan their photography in advance. When creating sexually explicit images, such producers follow similar precautions already, not only in order to avoid the serious crimes connected with child pornography but also to make sure that critical intellectual property releases signed by their performers are fully valid and enforceable.

Congress employs such a prophylactic rule in addressing issues regarding unauthorized immigrants where, unlike here, no express constitutional provision such as the First Amendment limits the burdens that Congress may impose. The regulations require that employers verify the immigration status of their employees by examining their immigration documentation and keeping a record of such documentation. 8 U.S.C. § 1324a (b); 8 U.S.C. § 1324a(e)(5); 8 C.F.R. §2274a; 8 C.F.R. §1274a. It is not a crime to fail to maintain records of the employee's documentation (infractions are punished by civil penalty, 8 U.S.C. § 1324a(e)(5)), nor does it become a crime to hire a U.S. citizen or legal resident if an employer fails to verify his or her status and maintain documentation of it, nor must an employer require his employees to wear a badge identifying where his immigration status documents are located.

C. THE STATUTES ARE OVERINCLUSIVE AND BURDEN SUBSTANTIALLY MORE SPEECH THAN IS NECESSARY.

The statutes impose their restrictions on all sexually explicit expression. Their plain language makes clear that they apply to the entire universe of expression that contains depictions of persons engaged in actual or simulated sexually explicit conduct–whether in adult films produced by members of the Free Speech Coalition whose performers are decisively adults and by Plaintiffs Conners and Levine who achieved the age of majority decades ago, Complaint, ¶¶18-19, 25, 45, App. at 156-

57, 160, 169-70; whether in educational videos produced by Plaintiff Sinclair Institute, Complaint, ¶30, App. at 162; whether published in fine art books of erotica like the photographs of Plaintiffs Alper, Nitke, Steinberg, and Levingston, Complaint, ¶¶34, 39, 43, 47, App. at 164, 166-67, 169, 170; whether in academic materials on human sexuality like those of Plaintiffs Queen and Dodson, Complaint, ¶¶36, 49, App. at 165, 171; whether accompanying journalistic accounts documenting sexual abuse, the adult industry, or other matters involving sex, like the work of members of Plaintiffs American Society of Media Photographers or Thomas Hymes, Complaint, ¶¶21, 29, App. at 158, 161; whether created as erotic works commissioned by married couples from a portrait photographer like Plaintiff Barone, Complaint, ¶22, App. at 159; or whether created by adults who want to share sexually candid depictions as part of their communication with one another about their sexual views, desires, or interests. The individual dilemmas of each Plaintiff here demonstrate quite vividly the unnecessary burdens that the statutes place on protected expression. Complaint, ¶¶18-50, App. at 156-72.

For instance, Plaintiff Steinberg, an accomplished photographer and writer, is the American Coordinating Editor of *Cupido*, a Norwegian journal of erotic art and prose. Complaint, ¶43, App. at 168. Because the journal contains the photography of European artists who do not keep age verification records and because the journal

does not bear the requisite label identifying the location of the requisite records, Steinberg is absolutely prohibited from distributing the journal in this country. *Id.* In this regard, the statutes do indeed ban protected speech. *Cf.* Appellee's Br. at 34 ("the provisions here ban no speech at all....")

Plaintiff Levingston–contrary to the Government's claim, Appellee's Br. at 11–does not create his expression as part of "a business or enterprise," but rather is a retired photojournalist and public affairs air force officer. Complaint, ¶48, App. at 170. Levingston "creates photographic expression, not for commercial purposes, but for its own sake." *Id.* Although Levingston has created erotic expression that has been displayed at the Kinsey Institute, featured on websites, and appeared in photography books, he has stopped producing any expression that might be subject to the record-keeping requirements because he is unable to comply with them. He cannot withstand the expense of making and maintaining copies of all his photos or the administrative burden of indexing his body of work. Complaint, ¶48, App. at 170-71. Nor can Levingston remain at home the requisite twenty hours per week to allow the inspection of his records because he travels to pursue his art. *Id.*

Plaintiff Barone is a professional photographer who, among other things, is commissioned by couples to create intimate, erotic portraits of themselves for their own private use. Complaint, ¶23, App. at 159. He is prohibited from creating any of

these personal portraits, however, if the couple refuses to provide him with copies of their photo IDs to be maintained by him for inspection by the Government. *Id.* And if the couple agrees to provide the requisite IDs, they have no choice but to have a label affixed to their portrait, identifying the location where the records with their IDs are maintained. So the statutes inflict a double assault–on Barone's right to create expression and on the couple's right to appear in and view such expression.

The burdens freighted on the other Plaintiffs serve as equally compelling evidence of the record-keeping requirements' ill-fit in meeting the Government's objective.[4]

III. THE COMPLAINT PRESENTED A WELL-PLEADED CHALLENGE TO THE STATUTES ON OVERBREADTH GROUNDS.

Title 18 U.S.C. § 2257 reads in relevant part:

> ***Whoever*** produces ***any*** book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which...contains one or more visual depictions...of actual sexually explicit conduct...shall create and maintain individually identifiable records pertaining to every performer

[4] The Government is mistaken in contending that Appellants, on appeal, have argued that the statutes are unconstitutional as applied only to the adult industry. Appellee's Br. at 26. Appellants contend that the statutes are unconstitutional, not only on their face but also as applied to all Plaintiffs, and given the opportunity, will adduce evidence in support of those claims. Appellants advanced those arguments in their opening brief on behalf of all the Plaintiffs and reasserts them here. Appellants' Br. at 22-40.

portrayed in such a visual depiction.

(emphasis added).

The statutes' text[5] makes clear that they apply universally–in the Government's parlance–to all expression that contains depictions of actual or simulated sexual conduct, including the lascivious display of the genitals. The Government, apparently in acknowledgment that the statutes' application to "purely private conduct" would doom the statutes under the overbreadth doctrine, urges this Court to apply a narrowing construction to avoid the "grave" constitutional questions raised by the statutes' application to private expression. Appellee's Br. at 46.

But the Supreme Court in *United States v. Stevens*, rejected a similar invitation by the Government in that case. It stressed that it could "impose a limiting construction on a statute ***only if it is 'readily susceptible' to such a construction.***" 130 S.Ct. 1577, 1592 (2010), *citing Reno v. American Civil Liberties Union,* 521 U.S. 844, 884 (1997) (emphasis added). The construction of the statute urged by the Government, the Court found, required "rewriting, not just interpretation." *Id.*

The Government, in the face of unambiguous statutory language here, argues that the statutes apply only to "pornography offered for sale or trade," Appellee's Br.

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[5] Title 18 U.S.C. § 2257A is nearly identical except that it reads: "contains 1 or more visual depictions of simulated sexually explicit conduct." 18 U.S.C. § 2257A (a)(1).

at 48, do not apply to "purely private," noncommercial expression and thus, should not be struck down as unconstitutionally overbroad. No court has accepted this proposed gloss, however. *Connection,* 557 F.3d at 338. *Stevens* compels its rejection.

In *Stevens*, the Government argued that a provision in a statute criminalizing depictions of animal cruelty that exempted "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value" narrowed the statute's reach to bring it within constitutional boundaries. 130 S.Ct. at 1590. It urged the Court to construe the exemption as excluding all but depictions of crush videos, animal fighting (excluding bullfighting), and extreme acts of animal cruelty. *Id.*

The Court found, however, that the text of the exemption could not support the reading the Government urged: "[T]he text says 'serious' value, and 'serious' should be taken seriously. We decline the Government's invitation-advanced for the first time in this Court-to regard as 'serious' anything that is not 'scant.'" *Id.*

The Government persists in advancing an interpretation of the statutes here that finds even thinner support than that advanced in *Stevens*. It relies not on the language of the statutes, but on the preamble to the regulations as the basis for the "limiting" construction it urges here. Appellee's Br. at 55. However, an assertion in the preamble to regulations–particularly one that is self-serving and appears to be at odds

with Congressional intent–serves as no support nor merits any deference. *Wyeth v. Levine*, 129 S.Ct. 1187, 1200-03 (2009). This is particularly true where, as here, the plain language of the rules themselves do not contain the actual limitation that the Government advocates in the preamble.

The plain language of the statutes (and of the regulations as well) defines their reach as extending, not only to commercial expression, expression offered for trade, and private expression posted on social networks and on tube sites, as the Government concedes, but also to other private expression–whether captured on a cell phone, attached to an email, or stored on a digital camera. *See* Appellants' Brief at 34-37. There is absolutely no hint by Congress that it intended to exclude this particular expression from the statutes' requirements. The legislative history, in fact, indicates otherwise. *See* 152 Cong. Record-House, July 25, 2006, H5724-25 ("[C]hildren are forced to pose for pornographic pictures or act in pornographic videos by family members....Home pornographers use digital cameras, Polaroid cameras and video cameras to make pornographic pictures and videos of children....")

Indeed, the distinction that the Government draws between expression posted on social networks and tube sites (which it says ***is*** subject to the statutes' requirements) and that sent by cell phone, attached to an email, or displayed on a digital camera (which it says is not) goes begging for any support in the language of

the statute or the regulations. Nowhere in the statute is there any textual support for the Government's argument that a person who posts a sexually explicit image on an adult social network website must comply with the statutory record-keeping and labeling requirements, but a person who attaches that same image to an email, does not.

Under a plain reading of the statutory language, a vast body of intimate expression between husbands and wives, lovers, and other consenting adults is subject to the record-keeping provisions of these two federal criminal statutes.

Even under the construction of the statutes proposed by the Government as excluding "sexting" and email messages shared only between intimates (and not shared with a third party, Appellee's Br. at 51, n. 13), the statutes still burden vast quantities of protected expression by ordinary citizens. They bring within their sweep constitutionally protected expression of millions of Americans communicating information, thoughts, opinions, and views of human sexuality posted on adult social network websites and tube sites. *Connection*, 557 F.3d at 370 (White dissenting) ("[W]e know that millions of adults exchange or share personally-produced sexually-explicit depictions.") [6]

[6] That social networks and tube sites serve as vibrant and important avenues for the exchange of ideas should not be overlooked in analyzing the restrictions that (continued...)

The persons who create this expression and wish to share it with other like-minded adults are private citizens not engaged in any trade or business. Nevertheless, even under the Government's proposed construction of the statutes, these citizens must maintain age verification records, properly cross-reference and index them, label their expression with the location of those records, and be available at least twenty hours per week to allow inspection of those records without advance notice. If that individual does not maintain "at least 20 normal business hours per week," he or she must write to the Attorney General–just as Plaintiff Conners has, Complaint, ¶26, App. at 160-61–and notify him of when he or she will be available, "which in no case may be less than 20 hours per week." 28 C.F.R. § 75.5(c).

Plaintiffs should have been given the opportunity to create an evidentiary record to allow them to develop these serious issues regarding the statutes' overinclusiveness and overbreadth and to demonstrate that the category of constitutionally protected expression burdened by the statutes (sexually explicit expression depicting adults) is vastly larger than the category of expression (child pornography) legitimately targeted by the statutes. *See e.g.*, *Conchatta v. Miller*, 458

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[6](...continued)
the Government champions. *See e.g.*, "Bullets stall youthful push for Arab Spring," http://www.nytimes.com/2011/03/18/world/middleeast/18youth.html (last visited June 2, 2011); "Saudi Arabian women defy driving ban," http://www.pri.org/politics-society/saudi-arabian-women-defy-driving-ban3997.html (last visited June 2, 2011).

F.3d 258 (3d Cir. 2006); *American Civil Liberties Union v. Reno*, 217 F.3d 162, 170, 177 (3d Cir. 2000); *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

IV. THE STATUTES ARE CONTENT-BASED AND SHOULD BE EXAMINED UNDER STRICT SCRUTINY.

The content-based nature of 18 U.S.C. § 2257 is underscored by a provision contained in its companion statute, 18 U.S.C. § 2257A, that provides an exemption from the record-keeping provisions for commercial producers of expression that depicts simulated sexual conduct. A producer of expression who stands in the otherwise identical shoes of a producer who qualifies for the exemption under 18 U.S.C. § 2257A, but whose expression depicts actual–as opposed to simulated–sexual conduct must fully comply with the record-keeping requirements and is subject to criminal sanction if he does not; his counterpart who produces expression containing simulated sexual conduct, does not. The ***only*** distinction between the two is the content of the expression they produce.

The Government and its amicus argue that the distinction is not a content-based one at all; rather they tell us that the exemption simply applies to businesses that already keep records documenting the age of their performers and does not arise from any antipathy toward actual sexually explicit imagery or preference for simulated

sexually explicit imagery. Appellee's Br. at 29-30; NFL Br. at 3. The Government's Brief demonstrates otherwise, however.

It states that the exemption was designed to apply to ***"'mainstream'" images***, such as sex scenes in "'R'-rated Hollywood movies" which depict "nonchild actors," where "the producers of such movies keep records that include objective proof of age." Appellee's Br. at 42-43 (emphasis added). But Plaintiffs, who "actively employ measures to assure that minors simply do not appear in their expression" Complaint, ¶19, App. at 157, likewise use "nonchild actors," they likewise "keep records that include objective proof of age," and likewise "keep comprehensive age verification records in the ordinary course of business" just as their mainstream counterparts. The Government, nonetheless, states:

> By creating a limited certification procedure for ***particular images and producers***, Congress did not oblige itself to provide similar options for pornographers producing images of actual sexual intercourse, bestiality, masturbation and sadistic and masochistic abuse, 18 U.S.C. § 2256(2)(A), ***who do not keep comprehensive age verification records in the ordinary course of business***.

Appellee's Br. at 43. (emphasis added). But if, as Plaintiffs maintain, they do keep such records, then the only distinction between those who qualify for the exemption (those who produce "'mainstream' images") and those who do not, is the "particular images" forming the content of their expression.

The comments of Senator Leahy describing the basis for the exemption demonstrates this hostility to expression depicting actual sexual conduct. *See* 152 Cong. Record-Senate, July 20, 2006, H8027 (justifying the exemption on the grounds that producers of expression depicting ***simulated*** sexual conduct are "law-abiding, legitimate businesses" engaging in "first-amendment-protected activities" in contrast to producers of expression that depicts ***actual*** sexual conduct–a distinction based solely on the content of the expression).

At the very least, the Plaintiffs must be given the opportunity to adduce evidence to establish that they, too, "use nonchild actors" and keep "comprehensive age verification records in the ordinary course of business," Appellee's Br. at 43, demonstrating that, in fact, the distinction is content-based.

V. PLAINTIFFS FREE SPEECH COALITION AND CONNERS ARE NOT COLLATERALLY ESTOPPED FROM CHALLENGING 18 U.S.C. § 2257 ON FIRST AMENDMENT GROUNDS.

As explained in Appellants' Brief at 45-48, Plaintiffs Free Speech Coalition and Conners are not collaterally estopped from challenging 18 U.S.C. § 2257 on First Amendment grounds. *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980); FRCP Rule 52(b); *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001).

Appellee does not address the Supreme Court authority cited by Appellants, but

instead claims that *Greenleaf v. Garlock,* 174 F.3d 352 (3d Cir. 1999) and *In re Brown,* 951 F.2d 564 (3d Cir. 1991) support the application of collateral estoppel to Free Speech Coalition and Conners. They do not.

Both *Greenleaf* and *Brown* involved the application of state law to determine whether, under the laws of Pennsylvania and New Jersey, respectively, collateral estoppel applied to preclude adjudication of an issue. *Greenleaf,* 174 F.3d at 357; *Brown,* 951 F.2d at 569. Those cases were, therefore, decided under the law of Pennsylvania and New Jersey and are not controlling here.

This case involves the application of federal law; the binding authority set forth in *Allen* and *Semtek* precludes the application of collateral estoppel here.

Moreover, Plaintiffs in the Colorado litigation did not advance the claim, raised here, that 18 U.S.C. § 2257 reversed the constitutional presumption of protection conferred on all expression nor raise the issue regarding the Government reliance on this improper interest–requiring all producers to establish that their speech was protected–in attempting to show that the statute was narrowly tailored. Thus, collateral estoppel does not preclude consideration of these issues that were neither advanced nor decided in *Free Speech Coalition v. Gonzales.*

VI. PLAINTIFFS' COMPLAINT PRESENTED A VIABLE, PLAUSIBLE CLAIM UNDER THE FOURTH AMENDMENT.

Contrary to the Government's contention, Plaintiffs' Fourth Amendment challenge to the statutes does not "focus[] primarily upon hypothetical searches of private homes." Appellee's Br. at 60. To be sure, private homes where records are kept like those of Plaintiffs Barone, Conners, Hartley, Nitke, and the many members of ASMP who operate their businesses from their homes, are fair game under the inspection scheme and thus illustrate a particularly egregious aspect of the intrusion it permits. But as the discussion in Appellants' Brief makes clear–particularly its discussion of *Marshall v. Barlow's Inc,* 436 U.S. 307 (1978), Appellant's Br. at 55-58–the warrantless searches and seizures of offices, studios, other business premises as well as homes authorized by the statutes and their implementing regulations offend the Fourth Amendment.

The statute and regulations are clear: they authorize the government to enter private premises without a warrant to search through and copy the papers, documents, files, and records that the Plaintiffs, who as producers of expression with sexual imagery, must maintain. Every inspection conducted pursuant to their provisions is thus a warrantless entry and search. Plaintiffs' claims challenging the inspection regime are, therefore, ripe for review. *See, Medimmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007).

The Government attempts to justify the warrantless search and seizure permitted by the inspection scheme under the administrative search exception to the Fourth Amendment. As explained in Appellants' Brief, Appellants' Br. at 53-55, the administrative search exception applies only to closely regulated industries. *New York v. Burger*, 482 U.S. 691, 701(1987). There is no closely regulated industry here. Under the Government's own interpretation of the statutes' scope, they apply to artists, free lance photographers, journalists, sex educators and therapists, adult film producers, as well as to persons who post sexually explicit expression on social network web sites and tube sites.

The Government, nevertheless, argues that this disparate group of people constitutes a "closely regulated industry" for purposes of permitting warrantless searches and seizures of their offices, studios and homes because "they all participate in the enterprise of producing images of actual people engaging in sexually explicit conduct." Appellee's Br. at 65, n.19. The Government can only arrive at this conclusion by completely discarding the case law that construes that exception to apply only to businesses that are subject to frequent, periodic inspection and scrutiny. *United States v. 4,432 Mastercases of Cigarettes,* 448 F.3d 1168, 1176 (9th Cir. 2006).

The untenability of the Government's position is illustrated by what it permits: Plaintiffs' homes and businesses in addition to the homes of millions of Americans who post sexually explicit expression on adult social networking websites, or who

post such expression on tube sites may be entered by government agents who, without notice or warrant, are authorized to search through records consisting of private information and expression that the statutes demand be maintained. If a citizen refuses to permit this warrantless inspection, he or she faces prosecution for violating the statutes. *Compare Kentucky v. King*, No. 09-1272, *slip op.* at 16 (U.S.Sup. Ct., May 16, 2011) 2011 WL 1832821 (noting, in absence of a warrant, when a law enforcement officer knocks on the door, a citizen has no obligation to open the door or speak to the officer).

And even if the statutes were limited to the adult industry, that industry is certainly not a "closely regulated" one. The First Amendment stands as a huge roadblock to that claim as does the industry's complete lack of resemblance to those industries–like stone quarrying and mining, junkyards, transportation of hazardous materials–that have been found to qualify as such. Indeed, the Government never even bothered to inspect this industry at all for nearly two decades while Section 2257 stood unused. Complaint ¶9, App. at 153.

Moreover, the exception applies ***only*** to ***commercial premises***. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) ("***[U]nlike searches of private homes***, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of ***commercial property*** do not necessarily violate the Fourth

Amendment."(emphasis added).) Here, of course, the statutes and implementing regulations authorize warrantless entry into private homes, if that is, in fact, where the records are maintained. For that reason alone, the administrative search exception fails to rescue the inspection scheme.

But even apart from this basic and fundamental obstacle to the administrative search exception, the inspection scheme fails to comport with the other requirements of that exception. *Burger*, 482 U.S. at 702-03; *Watson v. Abington Township*, 478 F.3d 144, 152 (3d Cir. 2007).

For example, the regulations permit government agents to "exercise otherwise lawful investigative prerogatives" without limitation and to "seize any evidence of the commission of a felony." 28 C.F.R. § 75.5(f), (g). They do not, therefore, sufficiently limit the inspections.

Indeed, if a warrant were issued that authorized the seizure of "any evidence of the commission of a felony," it would be roundly struck down as a general warrant. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). Aggravating the constitutional flaws even more is the fact that the regulations authorize the search and seizure–not only of the records they require to be kept–but also the expressive materials to which they pertain, that are protected by the First Amendment.

The statutes thus fail under the firmly established precedent demanding meticulous adherence to the Fourth Amendment when a search involves expression.

Marcus v. Search Warrant, 367 U.S. 717, 724 (1961); *Stanford v. Texas*, 379 U.S. 476, 485-86 (1965).

VII. APPELLANTS HAVE NOT WAIVED ANY CLAIMS.

In support of their request for reversal, Plaintiffs, in the Statement of Issues Presented for Review, specifically raised the dismissal of all of the claims under the First, Fourth, and Fifth Amendments set forth in the Complaint as error and identified those portions of the record below where they had raised those claims. Appellant's Br. at 1-2. Moreover, in the Argument section of their brief, Appellants argued that the District Court erred in dismissing the Complaint because it presented detailed allegations presenting plausible claims that the challenged statutes and regulations were unconstitutional. Appellants' Br. at 17-19. In addition to certain claims under the First and Fourth Amendments that were comprehensively briefed, Appellants identified with particularity other plausible claims, contained in their Complaint and supported by argument in the court below, specifically that the statutes unconstitutionally suppress anonymous speech, impose a prior restraint on speech, unconstitutionally impose strict liability, violate equal protection, are unconstitutionally vague, and violate the privilege against self-incrimination. Appellants' Br. at 58-59.

Given the limitations imposed by the appellate rules on the length of Appellants' brief, this discussion was adequate to present and preserve these issues

for this Court's review of the District Court's dismissal of their Complaint. *See Friends and Residents of St. Thomas v. St. Thomas Dev.,* 176 Appx. 219, 223, n.9 (3d Cir. 2006).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the judgment of the court below and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 32 (a) (7)(B), FEDERAL RULES OF APPELLATE PROCEDURE AND RULES 28.3 AND 31.1 3RD CIRCUIT LOCAL APPELLATE RULES AND SERVICE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Third Cir. R. 28.3 and 31.1, the undersigned certifies:

1. THE UNDERSIGNED IS A MEMBER OF THE BAR OF THIS COURT;

2. EXCLUSIVE OF THE EXEMPTED PORTIONS IN FED. R. APP. P. 32(a)(7)(B)(iii), THE REPLY BRIEF CONTAINS: 6995 words.

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4. THE TEXT OF THE ELECTRONIC REPLY BRIEF IS IDENTICAL TO THE TEXT OF THE PAPER COPIES;

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/s/ J. Michael Murray
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