Case No. 13-3681

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 TO UNITED STATES' RESPONSE TO PETITION FOR PANEL REHEARING

J. MICHAEL MURRAY (0019626)
jmmurray@bgmdlaw.com
LORRAINE R. BAUMGARDNER (0019642)
lbaumgardner@bgmdlaw.com
BERKMAN, GORDON, MURRAY & DEVAN
55 Public Square, Suite 2200
Cleveland, Ohio 44113
Telephone: 216-781-5245
Fax: 216-781-8207

Counsel for Plaintiffs-Appellants

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UNDER *REED V. TOWN OF GILBERT,* THE CHALLENGED STATUTES ARE CONTENT-BASED REGULATIONS OF SPEECH SUBJECT TO REVIEW UNDER STRICT SCRUTINY; *CITY OF RENTON V. PLAYTIME THEATRES, INC.*, DOES NOT APPLY TO THIS CASE.

Throughout the course of this litigation, the Government has consistently argued that the challenged statutes were content neutral because they were not enacted as a result of any "disagreement with the message [the speech] conveys," but rather were adopted to "achieve a purpose unrelated to the content of the speech." Brief of Appellee, Case No. 10-4085 at 28, *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); Defendant's Memorandum in Opposition to Motion for Preliminary Injunction and in Support of Motion to Dismiss, Case No. 09-4607 at 13-15. Therefore, the Government argued, intermediate scrutiny applied. This Court agreed with that position. *Free Speech Coalition v. Attorney General*, 677 F.3d 519, 533 (3rd Cir. 2012) ("*FSC I*"). But under *Reed v. Town of Gilbert, Ariz.*, No. 13-502 (U.S. June 18, 2015), that rationale no longer supports review of 18 U.S.C. §§ 2257, 2257A under intermediate scrutiny.

The Court in *Reed* determined that when a law, on its face, regulates speech based on its content–as the challenged statutes do here–it is content based and must be reviewed under strict scrutiny, "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 8 (citations omitted). *Reed* went on to explain that *Ward*'*s*

analysis applied only to laws that were content neutral on their face.

In a procedural posture similar to this case, the Seventh Circuit Court of Appeals, less than two weeks ago, granted a petition for rehearing and determined that *Reed* required the panhandling ordinance before it to be reviewed under strict scrutiny and declared unconstitutional, rather than upheld under intermediate scrutiny, as it had previously decided. *Norton v. City of Springfield, Illinois*, Case No. 13-3581, 2015 WL 4714073 (7th Cir., Aug. 7, 2015).

To avoid that same result, the Government argues *Reed* does not control the analysis here, but *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), does. Response to Petition for Rehearing at 1.

At no point–until now–has the Government contended that *Renton* served as authority for review of the statutes under intermediate scrutiny. Nor was this Court's determination that intermediate scrutiny applied, based on *Renton. FSC I* , 677 F.3d at 533. For good reason.

Renton involved a municipal ordinance prohibiting adult movie theaters from locating within 1,000 feet of certain uses as a means to address their adverse impact on their surroundings. To justify using its zoning power in this way, the city relied on the extensive record of "the adverse effects of the presence of adult motion picture theaters," and the "long period of study and discussion of the problems of adult movie

theaters in residential areas" by the City of Seattle documented in *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709 (1978). *Renton*, 475 U.S. at 50-51. The district court upheld the ordinance, *id.* at 45, but the court of appeals reversed, finding that Renton could not rely on the experience of other cities as evidence of adult theaters' effects on its own neighborhoods and concluding that the city had not shown that its interests were not "unrelated to the suppression of expression." *Id.* at 46.

The Supreme Court began its review by noting that Renton's ordinance did not "appear to fit neatly into either the 'content-based' or the 'content-neutral' category."*Id.* at 47. It concluded, however, Renton's zoning ordinance was more akin to a content-neutral regulation since it "treat[ed] certain movie theaters differently because they have markedly different effects upon their surroundings." *Id.* at 49. Key to that decision was its finding that the constitutionally protected expression displayed inside adult theaters caused crime and reduced property values in the neighborhoods surrounding them. In other words, those were the adverse ***effects caused*** by the expression being offered in those theaters.

Justice Kennedy in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), (in what the Government acknowledges is the controlling opinion in that case, Response at 10-11) explained further:

Speech can produce tangible consequences. It can change minds. It can

> prompt actions. These primary effects signify the power and necessity of free speech. Speech can also ***cause*** secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may ***cause*** pollution, and a billboard may obstruct a view. These ***secondary consequences*** are not always immune from regulation by zoning laws even though they are produced by speech.
>
> Municipal governments know that high concentrations of adult businesses can damage the value and integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech.
>
> * * *
>
> In *Renton,* the Court determined that while the material inside adult bookstores and movie theaters is speech, the ***consequent*** sordidness is not.

Id. at 444-45 (emphasis added). He concluded:

> As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.

Id. at 449.

Renton's secondary-effect doctrine is predicated on the determination that a body of constitutionally protected expression–that is, sexually-oriented material offered by adult brick-and-mortar bookstores and movie theaters–causes adverse secondary effects, such as crime and neighborhood blight, on their surrounding

communities. It was on that basis that the Court determined Renton's and Los Angeles's zoning regulations aimed at the adverse secondary effects of crime and blight said to be caused by the constitutionally protected speech offered by adult bookstores and theaters could be reviewed under intermediate scrutiny, rather than strict scrutiny.

That premise has no application here. The speech regulated by 18 U.S.C. §§ 2257, 2257A is constitutionally protected sexually explicit expression depicting adults in all manner of genres, including artistic, journalistic, educational, and private expression. Indeed, this is a First Amendment case precisely because the statutes and regulations burden constitutionally protected images of adults.[1] For the *Renton* adverse secondary-effects theory to be even analogous, (let alone applicable), it would be necessary to conclude that constitutionally protected sexual images of adults ***causes*** the adverse secondary effect of unprotected child pornography, which, by definition, it does not. Protected expression does not cause unprotected expression. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). Child pornography is not an effect[2]–secondary or otherwise–of that expression, like the harms of crime and

[1] If the statutes applied only to unprotected child pornography, they might escape review under the First Amendment altogether.

[2] The words of the secondary-effects theory themselves expose the disconnect: (continued...)

reduced property values said to be caused by constitutionally protected expression in adult bookstores and adult nightclubs. To suggest otherwise is a non-sequitur. This is not a secondary effects case.

And that explains why the Government did not advance the argument that this case falls under *Renton's* secondary-effects theory–until now–and why neither this Court nor the district court based its determination that intermediate scrutiny applied, on *Renton*.

The Government attempts to blur the distinction between laws aimed at addressing *effects caused* by the regulated speech, like Renton's zoning ordinance, and those–like 18 U.S.C. §§ 2257, 2257A–simply aimed at a purpose unrelated to the content of the regulated speech. It claims "the Statutes are...designed to forestall an especially pernicious secondary effect of the production and distribution of sexually

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[2](...continued)
Effect is defined as: "1. Something brought about by a cause or agent; result:...2. The way in which something acts upon or influences an object:...3. The final or comprehensive result; an outcome. 4. The power or capacity to achieve the desired result; efficacy; influence...." The American Heritage Dictionary of the English Language (1971). Child pornography is not "brought about" or "achieved" by sexually explicit speech depicting adults.

Cause is defined as: "To be the cause of; make happen; bring about." *Id.* Again, protected speech comprised of sexually explicit images of adults does not make child pornography "happen."

explicit speech–namely, the sexual exploitation of minors." Response at 2.[3] But the sexual exploitation of minors is not a "secondary effect" of constitutionally protected expression depicting adults.

Rather–as the Government has argued and this Court accepted–the statutes' purpose in preventing the creation of sexually explicit images of minors (whether inadvertently or purposely) is a "content-neutral justification" "unrelated to the content of the speech" enacted with a "benign motive," and with a "lack of 'animus toward the ideas' contained in the regulated speech." It is for that reason the Government and this Court saw this as a case governed by *Ward*.

It is those justifications that the Court in *Reed* has now rejected. *Reed,* slip op. at 9-10. The Court specifically noted*:* "[T]he United States [who appeared as Amicus Curiae] misunderstand[s] our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face." *Id*. at 9.

The Supreme Court has confined application of the secondary-effects doctrine to local regulation of adult bookstores and theaters, and nude dancing in nightclubs. It has never applied that theory to any other regulation of sexually-oriented speech,

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[3] The Government makes no serious effort to explain how *Renton* justifies the statutes' distinction in treatment between speech depicting actual sexual conduct and speech depicting simulated sexual conduct, or for that matter, how *Renton's* secondary-effects doctrine justifies the statutes' restrictions on secondary producers.

Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115 (1989); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 673 (2004)–even when the law had as its benign purpose, the protection of children. *Id.*

The Court in *Ashcroft* explained:

> In contrast to the speech in [*New York v.*] *Ferber*, [458 U.S. 747 (1982)], speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*, 458 U.S., at 759, 102 S.Ct. 3348. While the Government asserts that the images can lead to actual instances of child abuse, see *infra*, at 1402-1404, the causal link is contingent and indirect. The harm does not necessarily follow from the speech but depends upon some unquantified potential for subsequent criminal acts.

535 U.S. at 250. That same conclusion applies with equal force to the broad range of constitutionally protected expression depicting adults regulated by 18 U.S.C. §§ 2257, 2257A.

Nor has this Court applied *Renton* outside of cases involving the zoning and regulation of adult bookstores and nightclubs. *See e.g., Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008). *Brown v. City of Pittsburgh*, 586 F.3d 263

(3rd Cir. 2009), contrary to the Government's suggestion, serves as no exception. Response at 5. *Brown* involved an ordinance aimed at addressing harassment and obstruction by protesters outside medical facilities, which created "buffer zones" prohibiting anyone from "congregat[ing], patrol[ing], picket[ing], or demonstrat[ing]" within 15 feet of the entrances of those facilities. The ordinance exempted police and public safety officers, fire and rescue personnel, emergency workers, and others engaged in assisting patients in entering or exiting medical facilities from the buffer zones' prohibitions. *Id.* at 273-74. After construing the exemption to apply only to "safety functions" performed by the exempted individuals–and not to "advocacy activities"–the court concluded the exemption did not create a content-based distinction, and analyzed the ordinance as a classic *Ward* time-place-manner, content-neutral regulation. *Id.* at 275-76.

Nor, as the Government has also suggested, did this Court and the courts in *Connection Distrib. Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc) and *Am. Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994) "invoke" or "rely on" the secondary-effects doctrine to find intermediate scrutiny applied to the challenged statutes. Response at 6-7.The courts in both *Connection* and *Am. Lib. Ass'n* followed *Ward's* approach of examining whether the regulation could be "justified without reference to the content of the regulated speech," and whether it was adopted because

of disagreement with the message of the speech being regulated–the very bases that *Reed* found will not justify intermediate scrutiny of a law that is content based on its face. *Connection,* 557 F.3d at 328-29; *Am. Lib. Ass'n*, 33 F.3d at 84-85.Both courts cited *Renton,* not as authority for applying its secondary-effects doctrine (which they didn't), but as an example of a case where the law's purpose was unrelated to the content of the expression. *Connection*, 557 F.3d at 328; *Am. Lib. A.,* 33 F.3d at 85. This Court, employing a similar analysis, did the same. *FSC I*, 677 F.3d at 533.[4]

Under the Government's logic, the secondary-effects theory could be used as a "circular" means to "sidestep" strict scrutiny of almost any content-based law. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) ("[T]he Board has taken the effect of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored."). The harm at which a content-based regulation is aimed need simply be dubbed a "secondary effect" of the speech being regulated to justify relaxing the level of scrutiny due. Indeed, in *Reed* itself, simply by characterizing Gilbert's sign ordinance as one aimed at the secondary effects of driver distraction and visual litter

[4] While the Court does not have to reach the issue, because *Renton* does not apply to this case, *Renton* itself does not survive *Reed.*

caused by the presence of temporary directional signs, the Court could have invoked that doctrine to justify the use of intermediate scrutiny.[5]

Under *Reed*, 18 U.S.C. §§ 2257, 2257A–and the content-based distinctions they draw on their face–must be evaluated under strict scrutiny, which they cannot survive.

Like the Seventh Circuit in *Norton*, 2015 WL 4714073, this Court should grant the petition for rehearing and apply *Reed* to 18 U.S.C. §§ 2257, 2257A.

Respectfully submitted,

/s/ J. Michael Murray

J. MICHAEL MURRAY (0019626)
jmmurray@bgmdlaw.com
LORRAINE R. BAUMGARDNER (0019642)
lbaumgardner@bgmdlaw.com
BERKMAN, GORDON, MURRAY & DEVAN
55 Public Square, Suite 2200
Cleveland, Ohio 44113
Telephone: 216-781-5245
Fax: 216-781-8207
Counsel for Plaintiffs-Appellants

[5] The United States as Amicus Curiae, in fact, argued in *Reed,* that *Renton* served as a basis for applying intermediate scrutiny there. Brief for the United States, *Reed v. Town of Gilbert*, Case No. 13-502 at 18-20. The Government's brief is available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-502_pet_amcu_usa.authcheckdam.pdf

– CERTIFICATE OF SERVICE –

A copy of the foregoing Appellants' Reply to United States' Response to Petition for Panel Rehearing was filed electronically on August 18, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ J. Michael Murray
J. MICHAEL MURRAY (0019626)
LORRAINE R. BAUMGARDNER (0019642)
BERKMAN, GORDON, MURRAY & DEVAN

Counsel for Plaintiffs-Appellants