Case Nos. 18-3188 & 18-3189

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FREE SPEECH COALITION, INC.; AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.; THOMAS HYMES; TOWNSEND ENTERPRISES, INC., DBA Sinclair Institute; BARBARA ALPER; CAROL QUEEN; BARBARA NITKE; DAVID STEINBERG; MARIE L. LEVINE, a/k/a Nina Hartley; DAVE LEVINGSTON; BETTY DODSON; CARLIN ROSS

Appellees/Cross-Appellants,

– vs –

ATTORNEY GENERAL UNITED STATES OF AMERICA,

Appellant/Cross-Appellee

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(No. 2-09-cv-04607)

PRINCIPAL AND RESPONSE PROOF BRIEF OF APPELLEES/CROSS-APPELLANTS

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 18-3188/18-3189

Free Speech Coalition, Inc., et al

v.

Attorney General United States

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Free Speech Coalition, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

/s/ J. Michael Murray
(Signature of Counsel or Party)

Dated: 10/15/18

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, American Society of Media Photographers, Inc. (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

/s/ J. Michael Murray
(Signature of Counsel or Party)

Dated: 10/15/18

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The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Townsend Enterprises, Inc. dba Sinclair Institute (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

/s/ J. Michael Murray
(Signature of Counsel or Party)

Dated: 10/15/18

ORAL ARGUMENT REQUESTED

This case is before the Court for the fourth time. As in the two previous appeals and on rehearing, oral argument will offer this Court an opportunity to fully explore the important constitutional issues raised here. Appellees/Cross-Appellants, therefore, request oral argument in this case.

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STATEMENT OF JURISDICTION

Plaintiffs filed this action in the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. §§ 1331, 1346 (a)(3). The district court entered final judgment on August 3, 2018, resolving all claims. JA xx. The Government filed a timely notice of appeal on October 1, 2018, JA xx, and Plaintiffs filed a timely notice of cross-appeal on October 2, 2019. JA xx. This Court has jurisdiction to review the judgment of the district court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

ISSUES ON CROSS-APPEAL:

I. Whether 18 U.S.C. §§ 2257, 2257A (the Statutes) and their implementing regulations, 28 C.F.R. § 75.1 *et seq.,* fail strict scrutiny and are, therefore, unconstitutional under the First Amendment. JA xx, xx.

II. Whether upon finding the Statutes and their implementing regulations failed the narrow tailoring and least restrictive means components of strict scrutiny in certain respects, the district court erred in not striking down the Statutes in their entirety as unconstitutional under the First Amendment and in upholding two of their provisions. JA xx, xx.

III. Whether the Free Speech Coalition and the American Society of Media Photographers had standing to assert as-applied claims to the challenged Statutes and their implementing regulations under strict scrutiny on behalf of their members. JA

xx, xx.

IV. Whether 18 U.S.C. §§ 2257, 2257A and their implementing regulations are unconstitutionally overbroad. JA xx, xx.

ISSUES RAISED BY THE GOVERNMENT'S APPEAL:

I. Whether the challenged Statutes and their implementing regulations, as applied to the Plaintiffs, satisfy strict scrutiny.

II. Whether the district court, having found that portions of the challenged Statutes and their implementing regulations fail strict scrutiny as applied to Plaintiffs, abused its discretion in granting injunctive relief that was not limited to the named Plaintiffs.

STATEMENT OF RELATED CASES

Earlier opinions of the Court in this case are reported at 677 F.3d 519; 787 F.3d 142 (opinion vacated on panel rehearing); and 825 F.3d 149.

STATEMENT OF THE CASE

In *Reed v. Town of Gilbert* 135 S.Ct. 2218 (2015), the Court held that "a law that is content-based on its face is subject to 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 2228. Prior to *Reed*, lower courts, including this Circuit, reviewed the constitutionality of content-based regulations,

claimed to be justified by content-neutral reasons, like those at issue here, under intermediate, rather than strict, scrutiny. *See Free Speech Coalition, Inc. v. Attorney General, U.S.,* 787 F.3d 142, 151 (3rd Cir. 2015).[1]

In the wake of *Reed*, Plaintiffs moved for rehearing, which the panel granted. On rehearing, this Court concluded that under *Reed*, strict, not intermediate, scrutiny applied. *FSC III*, 825 F.3d at 158. It recognized that certain flaws in the Statutes, tolerated under intermediate scrutiny, might threaten their survival under strict scrutiny:

> [In finding the Statutes satisfied intermediate scrutiny,] we noted that the Statutes may not have been able to survive strict scrutiny. Specifically, we "reject[ed] the Government's contention that age verification of all performers regardless of their actual age always furthers the Government's interest in preventing the sexual exploitation of minors." [787 F.3d] at 156. Moreover, "the number of performers to whom the Statutes apply, yet for whom requiring identification does not protect children, is not insignificant." *Id*. at 158. Nonetheless, the Statutes satisfied intermediate scrutiny because, unlike strict scrutiny, "the Government need not employ the least restrictive or least intrusive means." *Id*. at 157.

Id. at 158. *See also*, *FSC II*, 787 F.3d at 164 ("Plaintiffs have proved not only that

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[1] This Court has issued three opinions in this case. For clarity's sake, *Free Speech Coalition, Inc. v. Attorney General of U.S.*, 677 F.3d 519 (3rd Cir. 2012) is designated as *FSC I*; *Free Speech Coalition, Inc. v. Attorney General U.S.*, 787 F.3d 142 (3rd Cir. 2015) (vacated on panel rehearing) is designated as *FCS II*; and *Free Speech Coalition, Inc. v. Attorney General of U.S.*, 825 F.3d 149 (3rd Cir. 2016) is designated as *FSC III*.

the problematic applications of the Statute are neither hypothetical nor imaginary, but also that they are not isolated in scope.").

Because the record had been "developed with an understanding that the Statutes were subject to the lesser standard of intermediate scrutiny," the panel remanded the case to the district court so it could "determine whether the record require[d] further development,"[2] *FSC III*, 825 F.3d at 164, and evaluate "whether the

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[2] On remand, the district court asked the parties if they wished to supplement the record. The Government told the Court it would offer no additional evidence. Plaintiffs, with no objection from the Government, submitted excerpts from the DOJ's report to Congress regarding the Statutes' enforcement history as well as the enforcement history of federal criminal laws pertaining to child pornography. JA xx.

After briefing was concluded, the district court held a hearing. At that hearing, the district court told the Government it was giving it "another opportunity to revisit [its] disinterest in introducing any more evidence." JA xx. At the conclusion of the hearing, the court instructed Government counsel to consult with her colleagues about presenting additional evidence, telling counsel that it would have no choice but to strike the Statutes down unless the Government "could come up with better testimony about less restrictive alternatives." JA xx.

More than sixteen months after the case was remanded and more than four months after briefing had been concluded, the Government, at the district court's urging, produced three written declarations as supplemental evidence. The district court accepted the Declarations as evidence. Plaintiffs objected on hearsay grounds and requested that Declarants' testimony be taken in open court subject to cross-examination. Plaintiffs' Br. in Response to Declarations (Doc. 266) at 18–19.

The Declarations averred that 2257 recordkeeping computer software had been developed and was available to producers, JA xx, and that child pornography continued to be produced and was available on the Internet, Dougher, JA xx–while reflecting that reports pertaining to child pornography in U.S. domestic locations had

Statutes [withstood] strict scrutiny."*Id.* at 153. It also remanded Plaintiffs' overbreadth challenge as well as the issue of whether the organizational Plaintiffs satisfied associational standing since the change in the level of scrutiny affected both those issues. *Id.* at 164 n.12. With regard to Plaintiffs' Fourth Amendment challenge, the Court found the inspection regime facially unconstitutional and remanded to the district court to enter judgment accordingly. *Id.* at 172–73.[3]

In evaluating Plaintiffs' challenge to the Statutes under strict scrutiny, the district court parsed the Statutes, analyzed their various provisions independently, and concluded that most of the provisions were not narrowly tailored nor the least restrictive means of advancing the Government's interest in protecting children. JA xx–xx.

Specifically, the court found the following provisions of the Statutes unconstitutional as applied to Plaintiffs: (1) the recordkeeping requirements set forth in 18 U.S.C. §§ 2257 (a), (b)(3), (c); 2257A (a), (b)(3), (c) and 28 C.F.R. §§ 75.2–75.4 and the associated criminal penalties set forth in 18 U.S.C. §§ 2257 (f)(1)–(f)(2); 2257A (f)(1)–(f)(2); (2) the labeling requirements set forth in 18 U.S.C.

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been cut by two-thirds between 2014 and 2016. JA xx.

[3] The Government does not challenge the district court's judgment on the Fourth Amendment issue on appeal.

§§ 2257 (e)(1), (e)(2); 2257A (e)(1), (e)(2) and 28 C.F.R. §§ 75.6, 75.8 and the associated criminal penalties set forth in 18 U.S.C. §§ 2257 (f)(3), (f)(4); 2257A (f)(3), (f)(4); and (3) the criminal penalties set forth in 18 U.S.C. §§ 2257 (i), 2257A (i), except for those in prosecutions of violations of the identification and age verification requirements of 18 U.S.C. §§ 2257 (b), 2257A (b). JA xx. It also found that the Statutes as applied to secondary producers are unconstitutional. JA xx.

The court, however, upheld two sub-subsections, 18 U.S.C. §§ 2257, 2257A (b)(1) and (b)(2), requiring producers of visual depictions of sexually explicit expression to examine photo identification to confirm a performer's name and birth date and to ascertain any other names used by the performer. JA xx.

It also found the Statutes were not unconstitutionally overbroad and determined that the Free Speech Coalition (FSC) and the American Society of Media Photographers (ASMP) still lacked standing to assert as-applied challenges to the Statutes on behalf of their members. JA xx.

The Government appealed, and Plaintiffs cross-appealed.

SUMMARY OF ARGUMENT

To establish the Statutes are constitutional under strict scrutiny, the Government was required to prove–with evidence, not "predictive judgments" or "conjecture"–that the Statutes and their implementing regulations: (1) served a compelling interest by directly addressing an actual problem, (2) eliminated and targeted no more than the source of the evil they sought to remedy, and (3) were the least restrictive means, among available alternatives, to achieve its asserted interest. The Government failed to carry that burden.

Plaintiffs agree–as they have from the first day of this lawsuit, Memo in Support of Motion for Preliminary Injunction (Doc. 3) at 21–that the government's interest in protecting children from sexual exploitation is compelling. But "to recite the Government's compelling interests is not to end the matter." *United States v. Alvarez,* 567 U.S. 709, 725 (2012). Rather, strict scrutiny requires the Government to come forward with evidence demonstrating the existence of the problem the Statutes claim to address–minors being used by adult film makers in the production of sexual images–and that regulation of constitutionally protected speech depicting adults will eliminate that problem. The Government produced evidence of neither.

The Government was also required to demonstrate that the Statutes were narrowly tailored. Again, the Government failed to meet that burden. The Statutes'

application to clearly mature adults, to couples' private sexual expression in their homes, to private sexual images exchanged between adults on their phones and computers, and to secondary producers, who are not involved in producing sexually explicit expression and have no contact with the performers, does not advance their objective of preventing the use of minors in the production of sexually explicit expression.

And finally, strict scrutiny requires the Government to prove that the Statutes are the least restrictive means of achieving its stated interest. Plaintiffs identified a number of less restrictive alternatives that would have achieved the Government's interest in protecting children. The Government was unable to demonstrate why any of these alternatives would not be effective.

Moreover, because under strict scrutiny, evaluation of the specific sexual images produced by members of FSC and ASMP was no longer essential to the as-applied analysis (unlike under intermediate scrutiny), those organizational Plaintiffs were proper parties who had standing to challenge the constitutionality of the Statutes on behalf of their members.

Plaintiffs additionally challenged the Statutes as unconstitutionally overbroad under the First Amendment. Because under strict scrutiny, in contrast to intermediate scrutiny, the fit between the governmental interest and the speech regulated must be

more exact, the same applications that prove fatal under strict scrutiny–to clearly mature adults, to couples' private expression in their homes and exchanged on cell phones, and to secondary producers not involved in its production–likewise prove fatal under the overbreadth doctrine.

For all these reasons, the district court should have struck down the Statutes in their entirety.

To the extent the district court found that several provisions of the Statutes, in fact, failed the narrow tailoring and least restrictive means components of strict scrutiny, the district court correctly struck down the provisions as unconstitutional as applied to the Plaintiffs. The Government's argument in support of its appeal does nothing to undermine that conclusion.

Finally, the district court was well within its discretion, on this record, and given the fact that the distinction between facial and as-applied challenges is not well-defined, to enjoin the unconstitutional provisions in their entirety, not just as to Plaintiffs.

ARGUMENT

STANDARD OF REVIEW

Plaintiffs' challenges to the constitutionality of 18 U.S.C. §§ 2257, 2257A and their implementing regulations under the First Amendment are reviewed de novo. *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 186–87 (3rd Cir. 2008). In a First Amendment challenge, the appellate court must conduct an independent review of the factual record to assure the judgment does not "constitute a forbidden intrusion" on free speech. *FSC II,* 787 F.3d at 151 (citations omitted). The question of standing is subject to plenary review. *Goode v. City of Philadelphia*, 539 F.3d 311, 316 (3d Cir.2008). The scope of injunctive relief is reviewed for abuse of discretion. *City of Philadelphia v. Attorney General,* 916 F.3d 276, 284 (3rd Cir. 2019). *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.")

INTRODUCTION

"Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). Specifically, the Government must show that a content-based statute satisfies strict scrutiny, which requires that it:

> (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of

> advancing that interest. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Mukasey, 534 F.3d at 190. And if the Government fails to make that showing, the regulation must be struck down root and branch. It cannot be selectively parsed to salvage clauses and subsections, as the district court did in this case.

Supreme Court precedent illustrates the point. In United *States v. Alvarez*, 567 U.S. 709 (2012), the Court, in assessing the constitutionality of the content-based Stolen Valor Act under strict scrutiny, measured its sweep. *Id.* at 722. It found the Act applied to Mr. Alvarez's "lie ...made at a public meeting," and "with equal force to personal, whispered conversations within a home." *Id.* at 723. The Act, the Court found, sought "to control and suppress all false statements on this one subject in almost limitless times and settings." *Id*. It went on to conclude that the Government had failed to show that the Stolen Valor Act was the "least restrictive means among available, effective alternatives" in protecting the integrity of the military honors system and therefore, was unconstitutional–not just as to Mr. Alvarez, but in its entirety. *Id*. at 729.

In *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), the Court evaluated a California law aimed to protect children from psychological harm associated with violent video games under strict scrutiny. *Id.* at 798–804. Finding California had failed to produce evidence that violent video games were directly

linked to psychological harm in children as well as finding the law was both overinclusive and underinclusive, the Court concluded: "Legislation such as this...cannot survive strict scrutiny." *Id.* at 805. Therefore, the entire law fell.

In *Playboy,* the Court examined a restriction on sexually explicit programming on cable television under strict scrutiny, recognizing "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." 529 U.S. at 818. It went on to explain:

> When First Amendment compliance is the point to be proved, the risk of non-persuasion–operative in all trials–must rest with the Government, not with the citizen.

Id. "Basic speech principles" compelled the Court to affirm the lower court's "holding finding the statute violated the First Amendment," because the Government had failed to show that its programming restriction was "the least restrictive means for addressing a real problem." *Id.* at 826–27.

In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court assessed whether, under strict scrutiny, the content-based Son of Sam law was narrowly tailored to advance its compelling interest in compensating victims from fruits of the crime. *Id.* at 120–21. The Court focused on the "wide range of literature"–including *The Autobiography of Malcolm X* and works by Thoreau and St. Augustine–subject to the law's sweep that did "not enable a

criminal to profit from his crime while a victim remains uncompensated" to conclude that it was not narrowly tailored to achieve its objective. *Id*. at 121–23. Again, the Court did not perform surgery on the law in an attempt to salvage various provisions; it struck it down in its entirety.

Requiring the Statutes to be evaluated under strict scrutiny changes the overbreadth analysis as well. *FSC III,* 825 F.3d at 164 n.12 ("We remand both the as-applied and overbreadth claims, as the level of scrutiny is a key factor in both as-applied and overbreadth challenges."). The overbreadth analysis of a content-based regulation of expression is "akin" to the narrow tailoring inquiry under strict scrutiny. *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 266 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004).[4] Under strict scrutiny, a statute must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). In reviewing a content-based ban on "virtual child pornography," the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), "employ[ed] the tools of this most skeptical level of review," and found the ban unconstitutionally overbroad because it "did not hew

[4] Intermediate scrutiny requires a less demanding fit between the statutory means and the statute's purpose. *FSC III,* 825 F.3d at 164 n.12. *See Conchatta v. Miller*, 458 F.3d 258, 267 (3rd Cir. 2006) (measuring the overbreadth of a content-neutral regulation of expression with respect to the intermediate scrutiny standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968)).

closely enough to any of the government's asserted interests...." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 333 (6th Cir. 2009)(en banc).

Thus, the change in the level of scrutiny can alter the Statutes' fate under the overbreadth doctrine.

I. 18 U.S.C. §§ 2257, 2257A AND THEIR IMPLEMENTING REGULATIONS FAIL STRICT SCRUTINY.

The Government failed to satisfy its burden under all three requirements of strict scrutiny.

A. The Government Failed to Prove Adult Film Makers Have Ever Used Minors in Their Productions, Which Was the Problem the Statutes Were Ostensibly Enacted to Address, and the Unrebutted Evidence Shows They Never Have.

Throughout this litigation, Plaintiffs have always agreed that the protection of children from sexual exploitation is a compelling interest. *FSC III*, 825 F.3d at 164 n.11. But as the Court in *Alvarez* stated: "[T]o recite the Government's compelling interests is not to end the matter." *Alvarez,* 567 U.S. at 725. It explained:

> The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. *Entertainment Merchants Assn.*, 564 U.S., at , 131 S.Ct., at 2738. There must be a direct causal link between the restriction imposed and the injury to be prevented. See *ibid*.

Id. Therefore, "[t]he [Government] must specifically identify an 'actual problem' in need of solving," and demonstrate "a direct causal link" between the expression

sought to be regulated and the harm it seeks to remedy. *Entertainment Merchants Assn.,* 564 U.S. at 799.

This Court articulated the specific problem the Statutes sought to address:

> Despite...direct prohibitions on child pornography, producers of sexually explicit materials continued to utilize youthful-looking performers....Law enforcement was viewed as ill-equipped to visually determine these performers' ages, and, as a consequence, the risk that children were being used in pornographic materials remained.

FSC III, 825 F.3d at 154 (citations omitted). The problem Congress sought to address was "the risk that children were being used in pornographic materials" as a result of adult film makers' use of youthful-looking adults in their productions. So in order to satisfy strict scrutiny, the Government was required to prove that the adult film industry's use of youthful–looking performers actually made the risk that minors would be used in sexually explicit materials a reality. *Playboy*, 529 U.S. at 819; *Entertainment Merchants Ass'n*, 564 U.S. at 800. The record, however, establishes no such thing.[5]

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[5] Under strict scrutiny–in contrast to intermediate scrutiny–a legislature's "predictive judgments," or "ambiguous proof," will not suffice to satisfy the Government's burden to produce evidence of the "actual problem" or of a direct causal link between it and the expression sought to be regulated. *Entertainment Merchants*, 564 U.S.. at 799-800. *See also, McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014) ("We 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'" (citation omitted)). The Government must come forward with evidence.

At trial, the Government focused its evidence–not on the appearance of minors in sexually explicit expression–but rather on the appearance of young adults in that expression. The latter is constitutionally protected, the former is not. *See Ashcroft,* 535 U.S. at 251 (expression depicting "a person over the statutory age who perhaps looked younger" is fully protected under the First Amendment). It is the appearance of ***minors*** in sexually explicit expression that forms the basis of the Government compelling interest, however, and is the problem the Statutes are asserted to address.

While the Government introduced hundreds of images of sexually explicit conduct depicting youthful-looking adult performers, not a single one depicted a minor. In fact, it offered no evidence regarding the prevalence of ***minors*** in that material, or that without the requirements of the Statutes, the widespread prevalence of youthful-looking performers in the adult industry, had or would actually lead to the use of underage performers. To say that minors are at risk is one thing, to "articulate the true nature and extent of the risk" is another. *Playboy*, 529 U.S. at 819. As in *Playboy*, the Government failed to satisfy its burden of producing evidence of the actual problem the Statutes were intended to address. *See e.g.* JA xx, xx, xx.

The testimony of Janis Wolak, the Government's expert on child pornography, supplied the reason for this lack of evidence. She testified that the majority of child pornography is produced by family members or acquaintances like coaches, youth

group leaders, priests and neighbors, as the legislative record reflected,152 Cong. Rec. H5724 (2006) and that it is distributed–not commercially, but via peer to peer networks. JA xx–xx, xx.

The Statutes' enforcement history–or more accurately, absence of an enforcement history– underscores the non-existence of the problem in commercially produced movies. Not a single prosecution has been brought under 18 U.S. C. § 2257A. As for 18 U.S.C. § 2257, between 2002 and 2015, the number of prosecutions brought for violating its provisions total ***nine***. JA xx, JA xx.

The Government's case is, therefore, built on a sleight of hand. It has taken the effect of the Statutes–verifying the age of adults appearing in sexually explicit expression–and posited that as its interest. And based on that re-stated interest, the Government argues, the prevalence of young adults in that expression demonstrates proof of the problem. But that was the very strategy rejected by the Supreme Court in *Simon & Schuster*, 502 U.S. at 510–11. Again, the actual problem the Government must prove is, not the prevalence of youthful performers in the adult film industry, but that that prevalence actually results in the employment of minors in the production of sexually explicit materials. Absent that proof, the Statutes impose unnecessary burdens on constitutionally protected expression without solving an actual problem. And that is fatal under strict scrutiny.

In fact, the record here is even thinner than the one the Court in *Playboy* found wanting. In determining the Government had failed to establish proof of the prevalence of exposure of sexual images to children as a result of signal bleed –which was the harm the challenged regulation sought to address–the Court discussed the insufficiency of the evidence:

> There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another. Under § 505, sanctionable signal bleed can include instances as fleeting as an image appearing on a screen for just a few seconds. The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this. Although the parties have taken the additional step of lodging with the Court an assortment of videotapes, some of which show quite explicit bleeding and some of which show television static or snow, there is no attempt at explanation or context; there is no discussion, for instance, of the extent to which any particular tape is representative of what appears on screens nationwide.

Id. at 819.

Quoting the district court, the Court wrote:

> "The Government has presented evidence of only a handful of isolated incidents over 16 years since 1982 when Playboy started broadcasting. The Government has not presented any survey-type evidence on the magnitude of the 'problem.'" *Id*., at 709 (footnote and record citations omitted).

Id. at 820. The Court went on to describe additional evidence adduced by the

Government at the district court's behest and its insufficiency in sustaining the Government's burden of connecting the expression to the harm its regulation sought to advance:

> Spurred by the District Court's express request for more specific evidence of the problem, see 945 F.Supp., at 779, n.16, the Government also presented an expert's spreadsheet estimate that 39 million homes with 29.5 million children had the potential to be exposed to signal bleed, 30 F.Supp.2d, at 708–709. The Government made no attempt to confirm the accuracy of its estimate through surveys or other field tests, however. Accordingly, the District Court discounted the figures and made this finding: "[T]he Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed." *Id*. at 709. ***The finding is not clearly erroneous; indeed it is all but required.***

Id. at 820–21 (emphasis added). The Court found the Government failed to prove "an actual problem," justifying the statutory restrictions:

> This is not to suggest that a 10,000–page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.

Id. at 822–23.

Here, in addition to failing to demonstrate the actual problem the Statutes were enacted to address, the Government has failed to offer evidence establishing "a direct causal link" between the production of adult movies and the production of child

pornography. *Entertainment Merchants Ass'n*, 564 U.S. at 800. The Court in *Entertainment Merchants* determined the Government's evidence had demonstrated "at best some correlation" between violent video games and harmful effects on children, which was not enough to carry its burden. *Id*. Here, the evidence fails to make even that showing.

The unrebutted evidence produced by Plaintiffs demonstrated that adult film makers and photographers creating sexually explicit expression commercially simply do not use, and never have used, underage performers in their work.

Jeffrey Douglas, the Chair of the Board of Directors of the Free Speech Coalition, whom the district court credited as an attorney with "a lot of expertise in the background of the [adult entertainment] industry," JA xx–xx, explained that FSC and its members universally condemn child pornography. JA xx. They are dedicated to its eradication, have encouraged enforcement of the laws against the use of minors, and have offered rewards for tips used in successfully prosecuting it. JA xx–xx. *See also* JA xx ("[T]he general consensus was that anybody using minors should be covered in honey and tied to an ant hill."); JA xx–xx ("Well, not only did they not have an interest, I think they would have been appalled... it's just something they wouldn't tolerate.").

Even before the enactment of the Statutes, Douglas explained, adult film

producers checked identification documents and secured model releases from their performers, as a matter of industry practice. JA xx. Plaintiff Marie Levine, who has been a performer in adult movies since 1984, confirmed that checking performers' IDs has been a standard industry practice since the 1980s. JA xx–xx, xx. And Barbara Nitke, who began her career taking still photographs on the sets of sexually explicit films in 1982, testified that on each of the sets of the 20 or 30 producers for whom she worked, it was standard practice to verify that a performer was an adult by requiring two forms of identification and photographing that documentation. JA xx–xx.

Because the Government failed to produce evidence demonstrating "an actual problem" or demonstrating "a direct causal link between the restriction imposed and the injury to be prevented," *Alvarez,* 567 U.S. at 726, the Statutes fail strict scrutiny. And as in *Alvarez* and *Entertainment Merchants*, they should be struck down in their entirety for that reason.

B. The Statutes Are Not Narrowly Tailored.

Under intermediate scrutiny, the fit between the statutory means and its objective must be "reasonable," "not necessarily perfect." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014). Strict scrutiny demands far more: the Statutes must "target[] and eliminate[] no more than the exact source of the 'evil'

[they] seek[] to remedy." *Frisby*, 487 U.S. at 485. Narrow tailoring under strict scrutiny is to be measured by "the standards of Versace," not those of "Omar the tentmaker." *See Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting).

The first step in measuring whether a law is narrowly tailored is to determine its scope. The Statutes apply to "***whoever*** produces ***any*** book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image" depicting actual or simulated sexually explicit conduct. 18 U.S.C. §§ 2257 (a), 2257A (a) (emphasis added). That language defines the scope of all of their burdens: Their age verification, recordkeeping, and labeling requirements apply to anyone who produces any material depicting sexual conduct, simulated or actual. In short, they apply to every conceivable sexual image.

Given the Statutes' expansive scope, it is no surprise that a number of their applications are problematic. This Court wrote:

> Requiring identification and recordkeeping for clearly mature performers does nothing to prevent children from appearing in sexually explicit materials because, by definition, a minor could not be mistaken for a clearly mature adult.

FSC II, 787 F.3d. at 156. It consequently found "the Government has not established that imposing some age cutoff would necessarily undermine the Statutes' effectiveness in preventing the exploitation of children." *Id*. at 157.

The Court underscored the point with examples in the record. Plaintiffs' own

work depicted "a substantial number of individuals for whom requiring identification does not promote the Government's interests." *Id*. at 159. There was a "quantum" of "non-negligible" examples of expression from other producers as well that likewise was not necessary to achieve the statutory objectives. *Id*. at 162.

In addition, this Court assessed the Statutes' application to "private, non-commercial depictions," requiring "additional sensitivity to the core of First Amendment values implicated in this case." *Id*. at 162, 167. It described their reach to this expression as "expansive." *Id*. at 162. It found the Statutes reached "essentially the entire universe of sexually explicit images, including private, noncommercial depictions created and viewed by adults in their homes." *Id*. at 161. It also found, based on Plaintiffs' experts' research, "there may be a significant number of private sexually explicit images shared between young adults" on their cell phones and other devices, and concluded "there is some substantial amount of private sexually explicit images that the Statutes unnecessarily burden." *Id*. at 163.

The Statutes' application to secondary producers who are not involved in the production of sexually explicit expression but simply publish or reproduce it is also problematic, as the district court found. JA xx. They "'chill[] protected expression' and [are] overinclusive" when applied to people who, by their very definition are not actually making sexually explicit images. JA xx.

The Statutes extend far beyond the "exact source of the evil" they seek to remedy. The Government, therefore, failed to meet its burden of showing the Statutes were narrowly tailored as strict scrutiny required. Given that failure, the proper remedy was to strike down the Statutes as unconstitutional in their entirety. *Mukasey,* 534 F.3d at 197–98.

C. The Statutes Do Not Employ the Least Restrictive Means.

Plaintiffs identified a number of effective, less restrictive alternatives to 18 U.S.C. §§ 2257, 2257A, each of which renders them unconstitutional under strict scrutiny. The district court explicitly rejected two of those alternatives: a law limited to people under a certain age and existing state and federal criminal laws punishing the substantive offense of child pornography. It, however, agreed that some of alternatives proposed by Plaintiffs would be effective, less restrictive alternatives to the Statutes. But the court did not follow that finding to its inevitable conclusion– that the entire statutory scheme failed to satisfy strict scrutiny and was unconstitutional under the First Amendment.

1. An age-verification law limited to persons under a certain age who might reasonably appear to be minors is an effective less restrictive alternative to the Statutes.

In its earlier analysis of the Statutes under intermediate scrutiny, this Court rejected the premise that "age verification of all performers regardless of their actual

age always furthers the Government's interest in preventing the sexual exploitation of minors." *FSC III*, 825 F.3d at 158; *FSC II*, 787 F.3d at 156. It found:

> Requiring identification and recordkeeping for clearly mature performers does nothing to prevent children from appearing in sexually explicit materials because, by definition, a minor could not be mistaken for a clearly mature adult.

FSC II, 787 F.3d at 156.

It went on to explain:

> Here, given that the Government's own expert testified that at a certain advanced age, no individual could be mistaken for a minor, the Government has not established that imposing some age cutoff would necessarily undermine the Statutes' effectiveness in preventing the exploitation of children.

Id. at 157.[6]

Nevertheless, under intermediate scrutiny, this Court found these problematic applications were acceptable. Stressing that narrow tailoring under that less exacting level of scrutiny need not employ the least restrictive or least intrusive means, it

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[6] Legislation regulating sales of tobacco and alcohol to minors adopts this approach. See e.g., N.Y. Pub. Health Law § 1399-cc (McKinney) (for sales of tobacco "identification need not be required of any individual who reasonably appears to be at least twenty-five years of age...."); 21 C.F.R. § 1140.14 (no age verification required for sale of tobacco for any person over the age of 26); Oregon Administrative Rule 845-006-0335 (requiring age verification if person appears to be under the age of 26 for sale of alcohol); Me. Rev. Stat. tit. 28-A, § 706 (prohibiting sale of alcohol to anyone under the age of 27 unless age verified by photo identification); Me. Rev. Stat. tit. 22, § 1555-B (same re: tobacco).

wrote: "[W]e need not address whether the Government in a different case and on a different record can prove that requiring identification for performers who appear over 30 helps protect children." *Id.* at 158 n.9.

This is that different case, however, and that was what the Government was required to prove under strict scrutiny.

But the Government offered no evidence in support of that proposition. In fact, it recognized that the Statutes' objectives would be achieved if they limited their application "to images depicting young people under 30 years old,"when it urged the court below to adopt that limiting construction as a means of upholding the Statutes. JA xx.

Despite the Government's acknowledgment that the Statutes so limited would be effective, the district court rejected that alternative. Taking no notice of this Court's observations about why the Statutes' application to mature adults was problematic or why subjectivity in determining someone's age does not impair the government's objective when an erroneous determination would not pose the risk that a minor would appear in sexually explicit expression, *FSC II*, 787 F.3d at 156–157, the district court cited Congress's adoption of the "'strict demarcation line' at age 18" drawn by child pornography laws and found that "Congress perceived the need to protect children (under 18) from being performers...and this must be respected and

upheld." JA xx–xx.

But that observation cannot justify a law that fails to employ an effective less restrictive means under strict scrutiny:

> If a less restrictive alternative would serve the Government's purpose, ***the legislature must use that alternative***....To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.

Playboy, 529 U.S. at 813 (emphasis added).

The district court should have struck down the Statutes in their entirety.

2. A law limited to commercial productions is an effective less restrictive alternative to the Statutes.

This Court determined the Statutes apply to sexually explicit expression "including private, non-commercial depictions created and viewed by adults in their homes." *FSC II*, 787 F.3d at 161, *quoting FSC I*, 677 F.3d at 583. It also found "there may be a significant number of private sexually explicit images shared" via sexting. *Id.* at 163.[7] Consequently, the Court found "there is some substantial amount of private sexually explicit images that the Statutes burden unnecessarily." *FSC II*, 787

[7] Sending sexually explicit depictions via cell phones or mobile applications –"sexting"– continues to be the subject of academic study. *See e.g.*, D. Crimmins, K. Seigfried-Spellar, *Adults Who Sext: Exploring Differences in Self-Esteem, Moral Foundations, and Personality*, International Journal of Cyber Criminology, Vol. 11, Issue 2 (July–Dec. 2017), p. 169 ("Our findings suggest sexting is a common behavior among adults, especially those in their 20s and 30s, not just a 'common and normalized practice among young people' (i.e., 16–29 years of age)." *Id.* at 178.).

F.3d at 163.

As with the proposed alternative limiting regulation to those under a certain age, the Government effectively concedes that a law limited to sexual images produced for sale or trade would be an effective alternative to the Statutes' wide sweep. Gov't Opening Br. at 27 n.6 (reaffirming its contention rejected by this Court that the Statutes are subject to a limiting construction excluding their application to "images produced for purely private purposes.")

The district court nevertheless declined to consider that alternative in evaluating the Statutes' constitutionality. Because it found "almost all of [Plaintiffs'] work had a commercial or profit motive,"[8] it decided that it was not appropriate for it to consider an alternative limited to sexually explicit expression produced for sale or trade in evaluating the Statutes under strict scrutiny. JA xx.

But a law's survival under strict scrutiny does not turn on a showing that an effective less restrictive alternative would benefit the particular plaintiff. *See Thomas v. Schroer*, 248 F.Supp. 3d 868, 891 (W.D. Tenn. 2017). Rather, its survival depends on a showing that among the means available to the legislature, the content-based regulation at issue was the least restrictive means of achieving the government's

[8] Plaintiff Barbara Alper photographed herself and her husband in moments of private sexual intimacy. JA xx. That she later sold the images for publication does not diminish the private nature of this expression when she created it.

interest. *Playboy,* 529 U.S. at 813. Demanding less would allow Congress to "restrict speech without an adequate justification, a course the First Amendment does not permit." *Id.* The district court should have struck down the Statutes in their entirety under strict scrutiny for that reason.

3. A law limited to "primary producers" of sexually explicit expression–as opposed to "secondary producers" who simply publish or reproduce it–is an effective less restrictive alternative to the Statutes.

The district court agreed with Plaintiffs that a law that limits its application to persons who actually produce expression–"primary producers," in the parlance of the Statutes–and who are, therefore, in the best position to evaluate and verify a performer's age, is an effective, less restrictive alternative. The Statutes, however, impose recordkeeping obligations on people far removed from its actual production–"secondary producers," who publish images made by others. A "secondary producer" is any individual or entity who "produces, assembles, manufactures, publishes, duplicates, reproduces or reissues" a visual depiction of sexual imagery for commercial distribution. 28 C.F.R. § 75.1 (c)(2).

The district court found "the Government has certainly not met its evidentiary burden of showing that a statute applying only to primary producers would be less effective." JA xx. It stated:

To the contrary, maintaining the requirements of the Statutes as to

> primary producers would sufficiently satisfy the Congressional and law enforcement considerations of protecting children as stated above, and would reduce a substantial burden on others in the adult pornography business.

JA xx.

The Government argues that imposing requirements on secondary producers "serves important ends" because it requires secondary producers to verify that the material is not child pornography. Gov't Opening Brief at 33. But strict scrutiny is not satisfied by showing that the challenged regulation "has some additional ability to achieve" the government's objectives. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). As the court in *Mukasey* put it, if the belt works, the Government cannot also require suspenders. 534 F.3d at 204.

In order to justify the Statutes' application to secondary producers, the Government was required to come forward with evidence demonstrating that, even if primary producers collected the records and labeled their expression, minors would still be used in the production of sexually explicit expression, and application of the recordkeeping requirements to secondary producers would eliminate the problem. It produced no evidence supporting that premise, however.

The district court properly found that a law limited to persons who actually produce sexually explicit expression was an effective less restrictive alternative.

4. A certification procedure like that found in 18 U.S.C. § 2257A (h) is an effective less restrictive alternative to the Statutes.

Another example of a less restrictive alternative is found in the statutory scheme itself. *See e.g., Playboy*, 529 U.S. at 823; *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 756 (1996). 18 U.S.C. § 2257A (h), permits Hollywood producers who, like adult film producers, maintain identification documents as a matter of compliance with other laws or in accordance with industry practice, to certify to the Attorney General that they regularly obtain and keep identification documents for their performers.18 U.S.C. § 2257 (h)(1)(A)(ii). Those producers who make that certification are exempt from 18 U.S.C. § 2257A's provisions.

This certification procedure is a perfect example of a more targeted regulation that would serve the Government's interest in preventing the appearance of minors in commercially produced sexually explicit expression—allowing commercial producers to satisfy recordkeeping obligations by certifying they maintain records establishing their performers' ages, which, the evidence established they do. JA xx; JA xx; (Doc. 223), JA xx–xx. *See also, Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (certification procedure allowing non-profits to exclude coverage for contraception serves as example of less restrictive measure that could be applied to accommodate religious convictions of closely held corporations under RFRA).

The certification option recognizes that Hollywood producers, in compliance with other laws or as part of the practices and standards of the industry, already maintain records that verify their performers' ages. But as the unrebutted testimony of Jeffrey Douglas, Marie Levine, and Barbara Nitke demonstrate, so do adult film producers–for many of the same reasons Hollywood producers do.

The Government offered no evidence demonstrating that a certification procedure like the one Congress put in place for producers of works containing simulated sexual conduct would not be an effective alternative to the Statutes' more restrictive requirements, as it must to prevail. *Mukasey*, 534 F.3d at 198.

While the district court found a certification option would be an equally effective alternative, it limited its finding to the Statutes' recordkeeping provisions. JA xx–xx. Again, the district court erred in striking down only a portion of the Statutes on that basis. The availability of a less restrictive alternative meant the Statutes failed strict scrutiny and required them to be held unconstitutional in their entirety.

5. Industry standards and intellectual property laws are effective less restrictive alternatives to the Statutes.

Existing industry standards and intellectual property laws are also effective, less restrictive alternatives to the Statutes' content–based regulations, and therefore, doom the statutes for the same reason that the certification procedure dooms them.

They are the "belt that works as effectively as [the Statutes'] suspenders." *Mukasey,* 534 F.3d at 204.

Jeffrey Douglas testified that for years, it has been an industry practice to check identification documents and secure model releases. JA xx. He explained the reasons why: the industry regards the use of minors as immoral and wrong, JA xx; failure to verify the performer is an adult poses the risk that the producer will be subject to criminal prosecution, punishable by a lengthy mandatory prison term under federal law, JA xx, xx; any material created using a minor is contraband, which must be recalled, and for which a producer must provide credit to its customers who purchased it, JA xx–which, in turn, affects the producer's reputation and good will and gives its competitors an advantage. JA xx.

Similarly, Eugene Mopsik, the Executive Director of the American Society of Media Photographers, testified that photographers uniformly require their models to execute releases in order to secure their rights to publish and license their work. A release executed by a minor, however, may be voidable. So to assure that the releases are legally binding, photographers verify that their models are adults–not minors–who are bound by the release. JA xx–xx. Mopsik explained: "[W]hen a photographer goes to a client, just part of the job is just creating the image. The other issues involve rights and clearances and permissions, and it's important that the photographer

deliver a job to a client that he's then able to use." JA xx.

Photographers and movie producers must, therefore, confirm the age of their subjects to ensure they can earn money from their work. The industry standards and intellectual property laws that prompt them to do so are effective, less restrictive means of assuring that minors are not used in producing sexually explicit expression.

6. Criminal laws prohibiting and punishing child pornography are effective less restrictive alternatives to the Statutes.

There are numerous state and federal laws imposing "substantial...criminal penalties for creating and distributing child pornography, see generally 18 U.S.C. §§ 2251–2254, 2256; Pornography Report 602–08 (summarizing federal and state child pornography laws)...." *FSC I*, 677 F.3d at 547 (Rendell, J., concurring). These laws directly targeting child pornography serve as less restrictive alternatives. The data demonstrate their effectiveness.

Between 2002 and 2012, nearly 4,000 federal prosecutions were brought for child pornography offenses under 18 U.S.C. § 2252A. JA xx. Between 2013 and 2015, more than 7,000 federal prosecutions were brought for child pornography offenses under 18 U.S.C. §§ 2251, 2252, 2252A. JA xx. Janis Wolak, the Government's expert on child pornography, testified that the success rate of these federal prosecutions is "extremely high."(Doc. 224), JA xx.

In addition to federal prosecutions, the enforcement efforts of each of the fifty

states cannot be overlooked. The Final Report of the Attorney General's Commission on Pornography observed:

> The federal interest in protecting children, of course, is secondary to that of the states, which act as principal guardians against abuse or neglect of the young. It was indeed a ***state*** law substantially broader than the 1977 Act which prompted the landmark decision in *New York v. Ferber*. States are not limited, as is the federal government, to regulation of child pornography in or affecting interstate commerce; they have the power to prohibit ***all*** production and trafficking in such materials.

Final Report at 607 (emphasis *sic*).

The Statutes must be evaluated in the context of this comprehensive network of state and federal laws criminalizing the production, distribution, and possession of child pornography. This Court's observation in *United States v. Stevens*, is apt here:

> [W]e have suggested that the compelling governmental interest should be redefined as "preventing cruelty of animals that state and federal statutes ***directly*** regulating animal cruelty under-enforce." And once this reformulation of the interest targeted by § 48 is accepted, we do not see how a sound argument can be made that the Free Speech Clause is outweighed by a statute whose primary purpose is to aid in the enforcement of an already comprehensive state and federal anti-animal cruelty regime.

533 F.3d 218, 233 (3rd Cir. 2008) (en banc), *aff'd* 559 U.S. 460 (2010) (emphasis *sic*). *See also McCullen v. Coakley*, 573 U.S. 464, 490–92 (2014) (cataloguing the various state laws already on the books that addressed the Commonwealth's interest in ensuring public safety, preventing harassment, and combating obstruction and that

demonstrated the challenged law's failure to be sufficiently tailored even under intermediate scrutiny).

While more than 11,000 prosecutions have been brought under the substantive federal laws prohibiting the production, transfer and possession of child pornography between 2002 and 2015, a total of ***nine*** prosecutions were brought under 18 U.S.C.§ 2257 during that same time period. JA xx, JA xx. And not a single prosecution has ever been brought under 18 U.S.C. § 2257A since its enactment. JA xx. *See also* JA xx (Defendant's supplemental answer to Plaintiffs' Interrogatories indicating that CEOS leadership had no knowledge of 2257 records being used in any child pornography case).

FSC's Jeffrey Douglas testified that given the severity of the punishment meted out by these criminal laws for using an underage performer, it would be "utterly mindless" for a person in the business of producing sexually explicit expression to use a performer who had not yet reached 18 years of age. JA xx–xx.[9] The Supreme Court made a similar point in *Ashcroft*: "Few pornographers would risk prosecution abusing real children if fictional, computerized images would suffice." 535 U.S. at 254.

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[9] It is important to stress that FSC and its members universally condemn the appearance of minors in sexually explicit material and participate in efforts to eradicate it. *See* JA xx–xx, JA xx; JA xx–xx.

The district erred court in rejecting Plaintiffs' contention that laws directly outlawing child pornography were effective, less restrictive alternatives to the Statutes. *See* JA xx–xx.

The Statutes are unconstitutional under strict scrutiny for this reason as well.

7. A recordkeeping law enforced by administrative sanction is an effective less restrictive alternative to the Statutes.

Congress has enacted laws that require businesses to keep records in connection with their operations, which are enforced through administrative action. *See e.g.* 8 U.S.C. § 1324a (imposing duty on employers to examine identification documents for every hired employee and administrative penalties for failure to create and preserve I-9 forms and associated records, but not criminalizing otherwise lawful employment). Paperwork violations under these regimes are enforced by administrative sanction, rather than felony prosecutions. Against the dense backdrop of criminal laws prohibiting the use of underage performers in sexually explicit expression, this less restrictive means effectively insures that producers will verify their performers' ages and maintain copies of their identification documents–particularly since maintaining age–verification records has been a uniform practice of adult film producers for decades.

The district court agreed that punishment by administrative sanction "would be equally effective and less restrictive." JA xx. The Government challenges that

conclusion, not by pointing to rebutting evidence, but by arguing that Congress has the authority to adopt any means it deems appropriate to accomplish its ends and its choice to impose criminal sanctions does not offend the First Amendment. Gov't Opening Br. at 36, 37. But that is no answer to what the Government must prove to satisfy strict scrutiny: that an age-verification and recordkeeping scheme enforced by administrative sanction would be less effective in preventing the use of minors in the production of sexually explicit expression–particularly when the use of minors itself is punished by severe criminal sanction.

II. FSC AND ASMP HAVE STANDING TO ASSERT AS-APPLIED CHALLENGES TO THE STATUTES UNDER STRICT SCRUTINY ON BEHALF OF THEIR MEMBERS.

In *FSC II*, this Court evaluated whether FSC and ASMP had associational standing to assert as-applied challenges to the Statutes under intermediate scrutiny on behalf of their members. 787 F.3d at 153.[10] It concluded they did not.

> An organization has standing to assert claims on behalf of its members when:
>
> (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. quoting Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278,

[10] FSC's and ASMP's associational standing to challenge the Statutes on their face was not questioned.

283 (3rd Cir. 2002) (*quoting Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

This Court did not take issue with the organizations' associational standing under the first two factors, but found problems under the third. *FSC II*, 787 F.3d at 154, 149 n.2. While the relief requested posed no issue since Plaintiffs sought only declaratory and injunctive relief, *Hunt*, 432 U.S. at 344, this Court's concern was with proof regarding "the degree to which [an] individual producer's speech is unnecessarily burdened, " under the narrow tailoring prong of intermediate scrutiny. *FSC II*, 787 F.3d at 154. That inquiry, it found, required an "individualized inquiry" into the burdens on specific members of FSC and ASMP. It therefore concluded the two organizations did not satisfy the third factor necessary for associational standing. *Id.*

After granting rehearing and concluding that the appropriate level of review for the challenged Statutes is strict, not intermediate, scrutiny, this Court remanded the issue to the district court and asked it to determine if FSC and ASMP had associational standing under strict scrutiny, since the change in the level of scrutiny changed the associational standing analysis. *FSC III*, 825 F.3d at 164 n.12.

On remand, the district court concluded that the organizational Plaintiffs still had not satisfied the third prong of associational standing because it found the narrow

tailoring analysis of Plaintiffs' as-applied challenge under strict scrutiny still required a particularized inquiry. JA xx. But the district court was mistaken.

FSC has about 800 members who are engaged in all aspects of the production and distribution of sexually explicit expression. JA xx. *See FSC II*, 787 F.3d at 154. Douglas testified FSC was a trade association for "people who make their living in adult entertainment"JA xx–in all its aspects:

> writers, technicians, like camera people, lighting, sound, the creative side, the photographers, the directors, the producers, everyone involved in the creation of prerecorded sexually explicit material, creators of nonrecorded, that is, live distribution, and then everyone that sells, either on a wholesale level or retail level, those materials down further in the stream of commerce.

JA xx. Each is subject to and burdened by the Statutes' age verification and recordkeeping requirements.

ASMP has some 400 members who are working publication photographers in a broad range of genres–including fine art, editorial, and documentary photographers who take sexually explicit photos. JA xx, xx–xx. *See FSC II*, 787 F.3d at 154. They are subject to and burdened by the Statutes as well.

Unlike intermediate scrutiny, strict scrutiny does not evaluate "the degree to which [an] individual producer's speech is unnecessarily burdened." Rather it scrutinizes whether the ***Government*** has come forward with evidence justifying the burdens the content-based Statutes impose on FSC's and ASMP's members'

expression under its three requirements. That evaluation does not involve any individualized inquiry or participation by FSC's or ASMP's members.

FSC and ASMP meet all three factors of *Hunt* and have standing to assert as-applied challenges to the Statutes under strict scrutiny on behalf of their members.

III. THE STATUTES ARE UNCONSTITUTIONALLY OVERBROAD.

The overbreadth doctrine's analysis is akin to the narrow tailoring inquiry under the respective tests of intermediate and strict scrutiny. *Am. Civil Liberties Union*, 322 F.3d at 266. The level of scrutiny is, therefore, "a key factor" in determining a statute's overbreadth. *FSC III*, 825 F.3d at 164 n.12. Because the district court had evaluated the Statutes "with an understanding that [they] were...subject to the lesser standard of intermediate scrutiny," this Court remanded the overbreadth issue for evaluation under strict scrutiny. *Id.*

Strict scrutiny–in contrast to intermediate scrutiny– accepts far less play in the fit of a statute's means with its purpose. Intermediate scrutiny asks whether a law "suppress[es] 'substantially more speech than...is necessary." *FSC II*, 787 F.3d at 152 (citation omitted). Under that "less exacting" standard:

> [E]ven if a significant amount of speech is burdened in a manner that is not strictly necessary to fulfill the Government's stated interest, a regulation may in some circumstances still be sufficiently tailored if the nature of the actual burden imposed on that speech is minimal.

Id.

That is not true under strict scrutiny. It demands that the statutory means "hew closely" to the government's asserted interest. *Connection Dist.*, 557 F.3d at 333. There is no give. A law subject to strict scrutiny must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. That difference affects the evaluation of a law's overbreadth.

The Statutes flunk under that measure. They burden a significant body of expression that is far removed from the exact source of the problem they seek to remedy. They "reach essentially the entire universe of sexually explicit images, 'including private, noncommercial depictions created and viewed by adults in their homes.'" *FSC II*, 787 F.3d at 161 *quoting FSCI*, 677 F.3d at 538. They impose their restrictions on "some substantial amount of private sexually explicit images" shared between adults on their cell phones. *Id.* at 163. They burden images–not a "negligible quantum"–depicting clearly mature adults. *Id.* at 162.

They also apply to and burden all sexually explicit expression published by secondary producers–people who were not in any way involved in its production. Requiring persons who did not produce the expression to, nonetheless, be subject to the morass of criminal recordkeeping provisions does not serve to protect children and dangerously chills protected expression. JA xx.

While this Court concluded that the Statutes were not overbroad under the

narrow tailoring standard of intermediate scrutiny, the same is not true under strict scrutiny. The district court erred in finding otherwise.

IV. THE DISTRICT COURT PROPERLY ENJOINED THE GOVERNMENT FROM ENFORCING THE UNCONSTITUTIONAL PROVISIONS OF THE STATUTES.

In addition to defending the constitutionality of the Statutes under strict scrutiny, the Government, on appeal, argues that the district court abused its discretion in entering an injunction not limited to the individual Plaintiffs. Gov't Opening Br. at 37–53. Plaintiffs contend that the injunction entered by the district court was warranted by the constitutional issues raised in this case and well within the court's discretion.

At all times in the proceedings below on remand–in briefing, Plaintiffs' Br. in Support of their Motion (Doc. 246); Plaintiffs' Reply (Doc. 252) and at oral argument, Transcript of Hearing, Sept. 28, 2017 (Doc. 257) –Plaintiffs contended that when the Statutes were evaluated under strict scrutiny–whether as-applied or on their face–they were unconstitutional and should be struck down as such. Plaintiffs had, in fact, asserted challenges to the Statutes both on their face and as applied under strict scrutiny in their Complaint and Amended Complaint. JA xx, xx; JA xx, xx.

In response to the Plaintiffs' opening brief on remand, the Government argued that the Statutes "should be upheld under strict scrutiny as applied to Plaintiffs."

Defendant's Br. (Doc. 249) at 9.[11] The district court similarly labeled Plaintiffs' challenge under strict scrutiny to be an "as-applied" challenge in evaluating them. JA xx.

At no point did the Plaintiffs restrict their challenge to the Statutes as only applied to them. It would have made little sense to do so. The strict scrutiny evaluation is essentially the same for as-applied and facial challenges. The Statutes' constitutionality under strict scrutiny rose or fell on whether the Government had satisfied its burden of demonstrating that they were narrowly tailored to serve a compelling interest using the least restrictive means. The court's determination that the Government had not met that burden with regard to various provisions did ***not*** turn on the Statutes' particular application to the Plaintiffs' sexual images versus those of other producers. Rather, it depended on whether the Government had overcome the burden of the Statutes' presumptive unconstitutionality by producing evidence in satisfaction of strict scrutiny's demands.

For that same reason, even accepting that the district court's finding of unconstitutionality was limited to Plaintiffs' as-applied challenge, it was well within

[11] In a footnote in its decision remanding the case, this Court had referred to Plaintiffs' challenge to the Statutes under strict scrutiny as "the as-applied" claim in distinguishing it from their facial challenge under overbreadth. *FSC III*, 825 F.3d at 164 n.12.

the court's discretion to enjoin enforcement of the unconstitutional provisions of the Statutes in their entirety.

After determining that portions of the Statutes failed strict scrutiny, the district court directed "counsel to consider [its] rulings and propose a decree with precise language to carry out the Court's decision." JA xx. Plaintiffs' proposed entry would have enjoined the Defendant from enforcing the unconstitutional provisions of the Statutes in their entirety, JA xx; Defendant's proposed entry would have limited injunctive relief to the named Plaintiffs. JA xx.

The court requested additional briefing on the issue, and subsequently adopted Plaintiffs' position that the proper relief was to enjoin Defendant from enforcing those provisions it found to be unconstitutional under strict scrutiny in their entirety, not just as to the Plaintiffs. JA xx. It issued a Memorandum surveying relevant case authority and recognizing there was no "strict dividing line between the relief that would be proper when a statute is facially unconstitutional, as opposed to a statute being declared unconstitutional 'as applied.'" JA xx. It specifically relied on the Supreme Court's determination in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2307 (2016), that "[n]othing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims." JA xx, xx..

In enjoining the enforcement of the provisions of the Statutes it found to be

unconstitutional, the district court explicitly recognized that Plaintiffs had challenged the Statutes and their implementing regulations as unconstitutional content-based laws ***on their face and as applied*** under strict scrutiny. JA xx–xx. It concluded that Plaintiffs were, therefore, entitled to the relief requested in their pleadings. JA xx.

As noted above, whether a challenge is designated "as-applied" or "on its face" makes little, if any, difference under strict scrutiny; the analysis is essentially the same for both. *See Citizens United v. F.E.C,* 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges is not so well-defined."). "No general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases." *Id. quoting* R. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000).

The law review article relied on by the Court in *Citizens United* explains why:

> In order to raise a constitutional objection to a statute, a litigant must always assert that the statute's application to her case violates the Constitution. But when holding that a statute cannot be enforced against a particular litigant a court will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality. In a practical sense, doctrinal tests of constitutional validity can thus produce what are effectively facial challenges.

R. Fallon, 113 Harv. L. Rev. at 1327–28.

Strict scrutiny is such a doctrinal test.[12] Supreme Court precedent evaluating content-based regulations under strict scrutiny demonstrates this point. In case after case, when the Court determined a content-based regulation of speech could not survive strict scrutiny, it struck it down in its entirety; it did not limit relief to the individual plaintiffs who challenged it.

In *Playboy*, a single plaintiff challenged § 505 of the Telecommunications Act on the ground that it was a content-based regulation that infringed its First Amendment rights. 529 U.S. at 827.The Court, agreeing with the plaintiff that § 505 was content-based, found the challenged provision "[could] stand only if it satisfie[d] strict scrutiny." *Id*. at 813. That meant it "must be narrowly tailored to promote a compelling Government interest," and the Court stressed: "If a less restrictive alternative would serve the Government's purpose, the ***legislature*** must use that alternative." *Id.* (emphasis added). The Court went on to explain:

> When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.

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[12] Fallon identified "suspect-content" tests requiring inquiry into whether a statute is narrowly tailored to a compelling governmental interest, citing *Simon & Schuster*, as an example of a doctrinal test that "produces what [is] effectively [a] facial challenge[]," *Id*. at 1338 n. 96, in the context of an as-applied challenge. In those instances, Fallon writes: "A statute that fails a suspect-content test is invalid in whole." *Id*. at 1338.

Id. at 816. The Court found, just as the district court did here, that the Government had not met that burden, agreeing with the district court that the Government had failed to prove that the less restrictive alternative identified by Playboy would be an ineffective alternative. *Id*. at 816. It affirmed that finding.

The Court, however, took issue with the relief the district court had fashioned. Rather than simply declaring § 505 unconstitutional and enjoining its enforcement, the district court attempted to repair the statute by implementing the less restrictive alternative by judicial decree. *Id*. at 823. The Court explained the district court's error:

> [T]o the extent the District Court erred, it was only in attempting to implement the less restrictive alternative through judicial decree by requiring Playboy to provide for expanded notice in its cable service contracts. The appropriate remedy was not to repair the statute, ***it was to enjoin the speech restriction. Given the existence of a less restrictive means, if the Legislature wished to improve its statute, perhaps in the process giving careful consideration to other alternatives, it then could do so.***

Id. at 823–24 (emphasis added).

The same point was made in *Alvarez*. There, Xavier Alvarez challenged application of the Stolen Valor Act to him on the ground that it was a content-based suppression of his speech. 567 U.S. at 716. The Court determined that strict scrutiny applied and found that the Act was not the least restrictive means to protect the integrity of the military awards system. *Id*. at 729. Because the Stolen Valor Act did

not satisfy strict scrutiny, the Court struck down the Act in its entirety, not just as applied to Xavier Alvarez.

The same is true of *Reed*. In *Reed*, Pastor Clyde Reed and the Good News Community Church wanted to advertise the time and location of their Sunday church services, but the town's sign code restricted where and when they could post their signs–imposing different restrictions based on the information a sign conveyed. *Id*. at 2224–25. Plaintiffs filed suit, "arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments." *Id*. at 2226. (The Ninth Circuit expressly found that Plaintiffs' challenge was "as applied." *Reed v. Town of Gilbert*, 587 F.3d 966, 974 (9th Cir. 2009), 707 F.3d 1057, 1062 (9th Cir. 2013)).

The Supreme Court held that the code provisions imposing more stringent restrictions on Plaintiffs' Sunday services' signs than on others were content-based regulations subject to strict scrutiny, which they failed: "We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny." *Reed*, 135 S.Ct. at 2224. It did not, as the Government urges here, declare that the sign code provisions "may not be validly applied" against Pastor Reed and the Good News Community Church; it struck the unconstitutional provisions down in their entirety.

The Supreme Court in *Whole Woman's Health* expressly found that "facial relief" may be an appropriate remedy for as-applied claims. 136 S.Ct. at 2307. The Government attempts to explain the Court's statement away by suggesting that the Supreme Court only meant that ***it*** could afford such relief in as-applied claims, because of its "far greater latitude. Gov't Opening Br. at 44–45. But the Government's contention does not hold up.

The ***district court*** in *Whole Woman's Health* awarded "facial relief" on the plaintiffs' as-applied claims. The Court wrote: "[Plaintiffs'] evidence and arguments convinced the District Court that the provision was unconstitutional across the board." *Id.* It, therefore, enjoined the provision's enforcement. The court of appeals found the district court erred in granting facial relief on Plaintiffs' as-applied challenge. *Id.* The Supreme Court found the court of appeals was wrong, explaining:

> The Federal Rules of Civil Procedure state that (with an exception not relevant here) a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Rule 54(c). And we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 333, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); see *ibid*. (in "the exercise of its judicial responsibility" it may be "necessary ... for the Court to consider the facial validity" of a statute, even though a facial challenge was not brought); cf. Fallon, As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L. Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"). Nothing

> prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims.

Id. It is that authority on which the district court relied in enjoining the unconstitutional provisions of the Statutes in their entirety.

The Government relies heavily on *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875 (3rd Cir. 1986), a case bearing no resemblance to this one, as support for its contention that injunctive relief should have been limited to the named Plaintiffs.

In *Ameron*, a rejected bidder on a government contract for the cleaning and repair of sewer lines, filed a protest with the Comptroller General under the Competition in Contracting Act. *Id.* at 879. Under the Act, the filing of a protest automatically stayed the awarding of the contract or any action on it until the Comptroller General resolved the case. *Id.* at 880. The problem was that after President Reagan signed the Act, he declared the automatic stay provision unconstitutional and consequently the Office of Management and Budget issued instructions in a bulletin to executive agencies to ignore the stay provisions. *Id.* at 879. After Ameron filed its protest, it filed suit in federal court seeking to challenge the award of the bid and to enforce the stay under the Act.

The district court sided with Ameron and found, among other things, that the stay provisions of the Act were constitutional. *Id.* at 880. It issued a judgment

declaring the Act to be constitutional and enjoining the Defendants from applying the OMB's bulletin insofar as it conflicted with the Act within the District of New Jersey. *Id.* at 888, 891. It also enjoined the Defendants to secure the issuance of new regulations complying with and implementing the Act. *Id.*

This Court affirmed the district court's order, but found it "went beyond that which was necessary to secure Ameron's rights." *Id.* at 888. It modified the injunction to limit injunctive relief to Ameron, which it found provided complete relief "under the circumstances of [that] case." *Id.* at 890.

The proper scope of injunctive relief due a single rejected bidder for a government contract for sewer repair is no yardstick for the scope of relief due when, in a case brought by "numerous Plaintiffs, representing many different aspects," of the adult industry, JA xx, a court finds, as the district court did here, that a federal criminal law violates the right to free speech.

This Court's recent decision in *City of Philadelphia v. Attorney General*, 916 F.3d 276 (3rd Cir. 2019) articulated the controlling principle in granting injunctive relief: "Equitable relief should be 'dictated by the extent of the violation established.'" *Id.* at 292 (citation omitted). In *City of Philadephia*, this Court affirmed the district court's finding that the Attorney General, without requisite authority, had placed immigration-related conditions on funding under a grant assistance program

and, therefore, the conditions had been unlawfully imposed. *Id.* at 279. It affirmed the issuance of injunctive relief enjoining enforcement of the unlawful funding conditions–finding, "as the District Court rightly decided, that equitable relief was warranted...." *Id.* at 291.

The district court, however, had, as part of that equitable relief, ordered federal agencies to secure a judicial warrant before seeking transfer of an illegal immigrant in the custody of the City of Philadelphia to federal custody. *Id.* This Court determined that portion of the injunction went too far. The judicial warrant requirement went "beyond the bounds of the complaint" and extended into disputes that were not part of the case and controversy before the court. *Id.* It "was not requested in the District Court" nor "defended with any vigor at oral argument" by the Plaintiffs. *Id.* This Court, therefore, vacated that portion of the district court's order. *Id.* at 293.

In this case, "the extent of the violation" warrants relief beyond just the named Plaintiffs. The district court detailed the reasons why. It noted that this was not–unlike some of the cases on which the Government relied–a single plaintiff case. JA xx. Rather, "there are numerous Plaintiffs, representing many different aspects of the adult pornography industry." *Id.* They include "producers, performers, artists, promoters" whose activities were described "in significant detail." *Id.* Plaintiffs were

not, as the Government characterizes them, "highly atypical producers of sexual imagery." Govt's Opening Br. at 38.

The district court wrote:

> Thus, the Court's decision, holding at least some aspects of the Statutes and regulations, invalid under the First Amendment, considered, in practical effect, a trial record concerning all aspects of the adult pornography industry.

JA xx–xx.

On that basis, the district court determined it was proper and appropriate to enter relief enjoining enforcement of the Statutes in their entirety. That determination should be affirmed as well within the court's discretion.

CONCLUSION

On their cross-appeal, Appellees/Cross-Appellants request this Court to hold that the Statutes and their implementing regulations fail to satisfy strict scrutiny and are therefore, unconstitutional in their entirety. They request that the district court's judgment upholding 18 U.S.C. §§ 2257, 2257A (b)(1) and (b)(2) be reversed. Additionally, they request this Court to reverse the district court's determination that FSC and ASMP do not have standing to challenge the Statutes as applied under strict scrutiny on behalf of their members. And further, Appellees/Cross-Appellants request that this Court reverse the district court's finding that the Statutes are not unconstitutionally overbroad. Accordingly, they request that this Court declare the

Statutes unconstitutional under the First Amendment and remand with instructions to permanently enjoin their enforcement in their entirety.

On the Government's appeal, Appellees/Cross-Appellants request that this Court affirm the district court's finding that portions of the Statutes are unconstitutional under strict scrutiny and affirm its issuance of injunctive relief against the enforcement of the Statutes' unconstitutional provisions on their face.

Respectfully submitted,

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

Pursuant to Fed. R. App. R.32(g) 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. 32(a)(7)(B)(iii), THE BRIEF IS IN COMPLIANCE WITH FED. R. APP. 28.1 (E)(2)(B)(I). IT CONTAINS: 12,687 words.

THE BRIEF HAS BEEN PREPARED:

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3. A COPY OF THE FOREGOING APPELLEES/CROSS-APPELLANTS' PROOF BRIEF WAS FILED ELECTRONICALLY ON APRIL 25, 2019. BY USING THE APPELLATE CM/ECF SYSTEM, NOTICE OF THE FILING WAS SENT TO THE PARTIES WHO ARE ALL REGISTERED USERS. A COPY OF APPELLEES/CROSS-APPELLANTS' BRIEF CONTAINING REFERENCES TO THE RECORD WAS SENT SEPARATELY TO APPELLANT/CROSS-APPELLEE.

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