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

SUPPLEMENTAL BRIEF OF APPELLANTS

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MISCELLANEOUS

I. 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.

Reed v. Town of Gilbert, Az., 135 S.Ct. 2218, 2228 (2015) 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." The statutes at issue here burden a particular category of protected expression based on its content–that is, expression containing sexual imagery. Additionally, they draw content-based distinctions between categories of sexually explicit expression–treating expression depicting actual sexual conduct less favorably than expression depicting simulated sexual conduct. Consequently, they must be evaluated under strict scrutiny.

The Government argues, however, that *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986) controls, not *Reed*, and that under *Renton,* intermediate scrutiny applies. The Government is wrong.

Renton involved a challenge to a zoning ordinance that prohibited adult movie theaters from locating within 1,000 feet from any residential zone and from certain specified uses. At issue was whether a municipality could exercise its zoning power–which inherently takes into account the use of land and buildings in establishing zoning districts and location restrictions–to restrict the location of adult

movie theaters. *See Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926) (recognizing that a municipality has "the power ... to forbid the erection of a building of a particular kind or for a particular use...by considering it in connection with the circumstances and the locality").

The Court began its analysis with the recognition that resolution of the issue was largely dictated by its decision in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976). *Id.* at 46. *Young*, like *Renton*, involved a challenge to zoning restrictions imposed on adult theaters. The City of Detroit had enacted an Anti-Skid Row Ordinance that imposed location restrictions on certain "regulated uses"(which included, among others, bars, pawnshops, shoeshine parlors, and taxi dance halls), it found to be "injurious to a neighborhood when...concentrated in limited areas." *Id.* at 54. Detroit then amended its ordinance to add adult motion picture theaters and adult book stores to the list of regulated uses subject to the location restrictions. *Id.* Two adult theater operators challenged the amendments, contending they violated due process and equal protection and imposed prior restraints in violation of the First Amendment. *Id.* at 58.

The Court in *Young* observed:

> The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be

> dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

Id. at 62. The Court, therefore, rejected the plaintiffs' challenges and upheld the amendments to Detroit's ordinance.

In *Renton,* the Court addressed the question of what level of scrutiny applied to zoning ordinances like Renton's, under the First Amendment:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters.

Id. at 47. But in the zoning context, where the City of Renton was exercising its authority to create legislative classifications to prohibit the "right thing in the wrong place," *Ambler*, 272 U.S. at 388, the Court determined Renton's ordinance was "aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community," *Renton*, 475 U.S. at 47 (emphasis *sic*)–just like regulations aimed at pawn shops and "taxi dance halls." "This," the Court wrote, "after all, is the essence of zoning." *Id.* at 54. It, therefore, determined that intermediate scrutiny applied and upheld the ordinance as a content-neutral regulation.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) further

clarified *Renton's* secondary-effects doctrine. Justice Kennedy (in what the Government acknowledges is the controlling opinion in that case, Response to Petition for Rehearing at 10-11) explained:

> 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).

Justice Kennedy concluded that "these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers," and stressed that "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-effects doctrine cannot be divorced from the context in

which it arose–namely, the exercise of a municipality's zoning power to restrict the location of brick and mortar businesses disseminating sexually explicit expression that were associated with crime and blight–"adverse secondary effects"–on their surrounding communities. It was in that context that the Court determined Renton's and Los Angeles's zoning regulations of adult uses, aimed at the adverse secondary effects of crime and blight, could be reviewed under intermediate, rather than strict scrutiny.

That premise has no application here. 18 U.S.C. §§ 2257, 2257A regulate 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 expression containing 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–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.

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

The Government, nonetheless, argues: "[T]he Statutes are...designed to forestall an especially pernicious secondary effect of the production and distribution of sexually explicit speech–namely, the sexual exploitation of minors." Response to Petition for Rehearing at 2. 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 v. Rock Against Racism*, 491 U.S. 781 (1989).

It is those justifications that the Court in *Reed* has now rejected. 135 S.Ct. at 2227-29. *See Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (recognizing *Reed* abrogated that circuit's case law characterizing content-neutral regulations as those "justified without reference to the content of regulated speech").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 2228. It stressed: "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.*

The Supreme Court has confined application of the secondary-effects doctrine to local regulation of adult bookstores and theaters, and nude dancing in nightclubs.[2] It has never applied that theory to any other regulation of sexually-oriented speech, *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

[2] Indeed, an entire body of discrete case law has developed, applying *Renton* and *Alameda Books*, always in the context of laws regulating adult bookstores and nightclubs. *See e.g., Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460 (7th Cir. 2009); *Annex Books, Inc. v. City of Indianapolis, Ind.,* 624 F.3d 368 (7th Cir. 2010); *Abilene Retail # 30, Inc. v. Dickinson Cty, Kan.,* 508 F.3d 958 (10th Cir. 2007); *H & A Land Corp. v. Kennedale,* 480 F.3d 336 (5th Cir. 2007); *Richland Bookmart, Inc. v. Knox County,* 555 F.3d 512 (6th Cir. 2009); *SOB, Inc. v. Cnty. of Benton,* 317 F.3d 856 (8th Cir. 2003); *World Wide Video of Washington, Inc. v. Spokane*, 368 F.3d 1186 (9th Cir. 2004); *White River Amusement Pub, Inc. v. Hartford*, 481F.3d 163 (2d Cir. 2007); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736 (4th Cir. 2010); *Daytona Grand, Inc. v. Daytona Beach*, 490 F.3d 860 (11th Cir. 2007). *See also, Conchatta Inc. v. Miller*, 458 F.3d 258, 267-68 (3rd Cir. 2006).

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 can the Government identify any "adverse secondary effects" justifying 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.

If *Renton's* secondary-effects doctrine is unmoored from its roots, it can 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 clutter caused by the presence of temporary directional signs, the Court could have invoked that doctrine to justify the use of intermediate scrutiny.

II. IF THIS COURT WERE TO APPLY THE SECONDARY-EFFECTS DOCTRINE TO THIS CASE, IT WOULD BE REQUIRED TO RE-EVALUATE THE EVIDENCE UNDER THE BURDEN-SHIFTING PARADIGM ESTABLISHED IN *ALAMEDA BOOKS*.

In finding 18 U.S.C. §§ 2257, 2257A constitutional under intermediate scrutiny, this Court evaluated whether the statutes were content neutral because they served purposes unrelated to the content of the expression regulated under *Ward*. *Free Speech Coalition, Inc. v. Attorney General,* 787 F.3d 142, 151(3rd Cir. 2015) ("*FSC II* ") citing *Free Speech Coalition, Inc. v. Attorney General,* 677 F.3d 519, 533-35 (3rd Cir. 2012) ("*FSC I*"). But again, *Reed* rejected that theory.

Thus, if this Court were to accept the new theory championed by the Government that *Renton's* secondary-effects doctrine applies, it could no longer rely on the analysis it employed in *FSC II* under *Ward*. Rather, it would be required to assess the statutes under the framework of the secondary-effects doctrine. That would

require it to re-evaluate the evidence under the burden-shifting paradigm established in *Alameda Books* to test the Government's claim that the production of sexual images of adults causes the adverse secondary effect of the sexual exploitation of children.

In *Alameda Books*, the Court explained that a city, in support of its claim that a zoning ordinance reduces adverse secondary effects of adult uses, must come forward with evidence that is reasonably believed to be relevant for demonstrating a connection between the speech being regulated and harmful secondary effects. *Alameda Books*, 535 U.S. at 438. To satisfy this burden, a city need not "conduct new studies or produce evidence independent of that already generated by other cities." *Renton*, 475 U.S. at 51. But the Court in *Alameda Books* went on to instruct:

> ***This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.*** If plaintiffs fail to cast direct doubt on this rationale, either by ***demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

535 U.S. at 438-39 (emphasis added).

Thus, under *Alameda Books*, this Court would be required to assess whether the Government has satisfied its burden of producing evidence establishing a

connection between sexually explicit expression depicting adults and the adverse secondary effect it claims it produces: the sexual exploitation of minors. It would also be required to assess whether Plaintiffs have adduced evidence that has "cast direct doubt on this rationale, either by demonstrating that the [Government's] evidence does not support its rationale or by furnishing evidence that disputes the [Government's] factual findings." *Id.* at 438-39.

The Government has not met its burden. It has produced no evidence demonstrating a connection between constitutionally protected expression depicting adults and the sexual exploitation of minors–no studies, no findings. The only support it has offered for the statutes in the course of this litigation is the Final Report of the Attorney General's Commission on Pornography (1986). But even the Commission was quite candid about the "admittedly severe limitations of the evidence" on which it relied in crafting its findings and recommendations. Final Report at 888. Indeed, it characterized its "findings and recommendations" as "largely tentative." *Id.* at 852-54. And that evidence, of course, is more than a quarter-century old.

Nor did the testimony of the Government's witnesses establish a connection between sexually explicit expression depicting adults and child pornography. The testimony of Janis Wolak, the Government's expert on child pornography, proved the converse. She testified that the vast majority of child pornography was produced by family members and acquaintances who created it intentionally and that it was traded

in "closed groups" on peer-to-peer networks, by email, and on bulletin boards. App. at 6094, 6097, 6074-75. And while Gail Dines, Ph.D., testified about the prevalence of "youthful-looking adults" in commercially produced sexual imagery, at no point did she testify that commercial producers of adult material used minors in its production.

Plaintiffs, on the other hand, offered evidence demonstrating that commercial producers of adult expression and the Plaintiffs themselves, as a matter of their own practice and professional and industry standards, verified that the persons who appeared in their expression were adults to assure that minors did not appear in their expression. 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," App. at 6124-25, testified that since the 1980s, it had been an industry practice to check identification documents to verify that performers in its productions were adults. App. at 5566. (He also testified that the industry condemns child pornography and has taken an active role in its eradication. App. at 5564.). Douglas testified there had been only a handful of instances in which underage performers had appeared in adult films–all by use of a fraudulent identification document. App. at 5566-70. Marie Levine, a performer in adult films since 1984, confirmed Douglas's testimony in all respects, App. at 5845-47, 5853, as did Barbara Nitke, who began taking still photos on the sets of adult

films in 1982. App. at 5941-43.

The evidence also demonstrated that each of the Plaintiffs, who testified they were absolutely opposed to the depictions of minors in sexual imagery, as a matter of practice, verified that the subject of their work was an adult by checking identification. Mopsik, Tr. (6-3-13) at 21 (members of American Society of Media Photographers verify age in connection with models releases, a standard of the profession); Wilson, Tr. (6-3-13) at 228; Queen, Tr. (6-4-13) at 66, 68, 80; Steinberg, Tr. (6-4-13) at 139; Ross, Tr. (6-4-13) at 160, 171, 187-88; Alper, Tr. (6-4-13) at 224, 231; Levine, Tr. (6-5-13) at 49; Levingston, Tr. (6-5-13) at 99; Nitke, Tr. (6-7-13) at 166-67.

In the parlance of *Alameda Books*, the Plaintiffs have "cast direct doubt" on the Government's secondary effects rationale by demonstrating the Government's "evidence does not support its rationale" and by "furnishing evidence that disputes" it.

III. *RENTON* DOES NOT SURVIVE *REED*.

Moreover, given the clear and unqualified holding in *Reed*, *Renton* no longer survives, in any event. The Court's holding in *Reed* was straight-forward and unqualified: content-based regulations of speech are subject to strict scrutiny, regardless of any content-neutral justification they may have.

Justice Kagan urged the Court to relax the application of its

holding–specifically citing *Renton*[3] as an example of authority applying intermediate scrutiny to content-based regulations that should be left intact. *Reed*, 135 S.Ct. at 2238 (Kagan, J., concurring). But the majority of the Court declined to do so.

Had *Renton* been viewed as an exception to *Reed's* holding, the Court would have said so. The sign ordinance at issue in *Reed*[4] was, in fact, part of the town's zoning code. 135 S.Ct. at 2224 n.1. (It appeared in the code section immediately preceding the section that contained regulations pertaining to adult uses,[5] the very type of regulation at issue in *Renton*.). It, therefore, made far more sense to consider whether that provision of the town's zoning code was subject to review under *Renton's* secondary-effects doctrine than the federal criminal statutes at issue here.

As the Seventh Circuit in *Norton v. City of Springfield, Ill.,*concluded:

> The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

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[3] 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

[4] Gilbert, Arizona, Land Development Code, ch. 1, § 4.402. The Court noted that the town code was available online at http://www.gilbertaz.gov/departments/development-services/planning-development/land-development-code and was available in the Clerk of Court's case file. *Id.* at 2224 n.1.

[5] Gilbert, Arizona, Land Development Code, ch.1, § 4.5011.

612 F. App'x 386, 387 (7th Cir. 2015).

18 U.S.C. §§ 2257, 2257A are content-based regulations of speech that must be evaluated under strict scrutiny, which they cannot survive.

Respectfully submitted,

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– CERTIFICATE OF SERVICE –

A copy of the foregoing Supplemental Brief of Appellants was filed electronically on November 13, 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.

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