No. 13-3681

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES' RESPONSE TO PETITION FOR PANEL REHEARING

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I. THIS COURT'S DECISION IS FULLY CONSISTENT WITH *REED V. TOWN OF GILBERT*

In the first appeal in this case, this Court directed the district court to evaluate the constitutionality of 18 U.S.C. §§ 2257 and 2257A ("the Statutes") under intermediate First Amendment scrutiny. See *Free Speech Coal., Inc. v. Attorney General*, 677 F.3d 519, 535 (3d Cir. 2013) ("*FSC I*"). In the current appeal, reviewing the district court's judgment after trial, this Court sustained the constitutionality of the Statutes as applied to those plaintiffs with standing. *Free Speech Coal., Inc. v. Attorney General*, No. 13-3681, slip op. 14 (3d Cir. May 14, 2015) ("*FSC II*"). FSC now seeks rehearing, urging that *Reed v. Town of Gilbert*, No. 13-502 (U.S. June 18, 2015), requires re-evaluation of the Statutes under strict scrutiny.

This Court's holding in *FSC I* that the Statutes are subject to intermediate scrutiny is correct and follows directly from controlling Supreme Court precedent, and nothing in *Reed* requires the Court to reconsider that holding. Under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and its progeny, laws directed at non-communicative "secondary effects" of sexually explicit speech are subject to intermediate First Amendment scrutiny. The D.C. Circuit, the Sixth

Circuit, and this Court have all recognized that the Statutes are subject to intermediate scrutiny because they are designed to forestall an especially pernicious secondary effect of the production and distribution of sexually explicit speech – namely, the sexual exploitation of minors. The Supreme Court's recent decision in *Reed* does not overrule *Renton* and does not address – indeed, does not even mention – *Renton*'s secondary-effects doctrine. Because *Renton* prescribes the use of intermediate scrutiny here, and because *Reed* leaves *Renton*'s authority undisturbed, *Reed* provides no reason for the panel to reconsider its original holding that the Statutes are subject to intermediate scrutiny. In light of *Reed*'s gloss on *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989), slip op. 8-10, however, this Court may wish to make clearer its reliance on *Renton*'s secondary-effects doctrine.

A. This Court correctly applied intermediate First Amendment scrutiny to Sections 2257 and 2257A.

Three courts of appeals, including this one, have unanimously held that the Statutes are appropriately reviewed under intermediate scrutiny rather than strict scrutiny, notwithstanding the fact that they apply only to sexually explicit productions. *See FSC I,* 677 F.3d at 535; *Am. Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1995) ("*ALA*");

Connection Distrib. Co. v. Holder, 557 F.3d 321, 328 (6th Cir. 2009) (en banc). All three courts have recognized that intermediate scrutiny is the correct standard of First Amendment review because the Statutes address a non-communicative harm associated with the production of sexually explicit speech — the sexual exploitation of minors — rather than the content of the speech itself.

Exploiting minors in the production of pornographic materials is profoundly "harmful to the physiological, emotional, and mental health of the child," and "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757-58 & n.9 (1982). The Statutes' age verification and recordkeeping requirements further that vital objective not by preventing the production and distribution of sexually explicit images, but by ensuring that minors are not exploited in the production process. "Congress singled out the types of depictions covered by the Statutes not because of their effect on audiences or any disagreement with their underlying message but because doing so was the only pragmatic way to enforce its [underlying] ban on child pornography." *FSC I*, 677 F.3d at 534. *See also ALA*, 33 F.3d at 86

("Congress enacted [the Statutes] not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography.").

In *Renton*, the Supreme Court employed intermediate scrutiny, rather than strict scrutiny, to review a local zoning ordinance that limited the location of adult movie theaters. Intermediate scrutiny applied because the ordinance was directed not at the communicative effect of pornographic movies on audiences, but at wholly non-communicative "*secondary effects* of such theaters on the surrounding community," such as increased crime and lower property values. 475 U.S. at 47-48. Further, intermediate scrutiny applied although the regulation's scope was limited to theatres that displayed films of a particular content. *See id.* at 48; *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (plurality opinion); *id.* at 445-47 (Kennedy, J., concurring in the judgment); *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 158 (3d Cir. 1997) (under *Renton*, government may "regulate constitutionally protected but sexually explicit speech as long as the regulation is directed solely towards ameliorating the purported secondary effects of such speech and is not

directed at its content."). More generally, *Renton*'s secondary-effects framework governs if a regulation is "justified on the basis of conduct that is associated with certain types of protected expression (but is not the direct result of the expression's content)." *Brown v. City of Pittsburgh*, 586 F.3d 263, 280 n.17 (3d Cir. 2009).

The Statutes are quintessential examples of secondary-effects regulations. Like the zoning ordinance in *Renton*, the Statutes are concerned with non-communicative harms associated with sexually explicit productions. In *Renton*, the non-communicative harms arose from the distribution of the speech; here, the harms arise from its production, in the form of the sexual abuse of minors. This Court has acknowledged that the Statutes are targeted towards those collateral harms and were not enacted to suppress speech. *See FSC I*, 677 F.3d 530 ("'it is clear that Congress enacted the Act not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography'") (quoting *ALA*, 33 F.3d at 86). The Statutes ban no speech and suppress no expressive content the images might convey; they simply impose recordkeeping obligations upon those who produce pornography. As this

Court explained, "[a]ny impact by the Statutes on Plaintiffs' protected speech is collateral to the Statutes' purpose of protecting children from pornographers." *FSC I*, 677 F.3d at 534.

As regulations aimed at the secondary effects associated with sexually explicit productions, the Statutes are properly reviewed under intermediate scrutiny under *Renton*. *See* 475 U.S. at 48. Thus, while all three courts of appeals to review the Statutes cited and applied *Ward*, *see ALA*, 33 F.3d at 84; *Connection*, 557 F.3d at 328; *FSC I,* 677 F.3d at 533, all three also recognized that intermediate scrutiny follows from *Renton*'s secondary-effects doctrine. In *ALA*, the D.C. Circuit invoked *Renton* and its secondary-effects test, emphasizing that "[c]ases like *Renton* make clear * * * that a 'valid basis for according differential treatment to even a content-defined subclass of proscribable speech [exists when] the subclass happens to be associated with particular 'secondary effects' of the speech.'" 33 F.3d at 86 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)). The Sixth Circuit likewise relied on *Renton*, citing it as authority for employing intermediate scrutiny "when [a] law addresses the collateral or 'secondary effects' of the expression, not the effect the expression itself will have on others."

Connection, 557 F.3d at 328. This Court followed suit, citing *Renton* and adopting the analysis of *ALA* and *Connection* in rejecting FSC's contention that strict scrutiny is required because the Statutes apply only to sexually explicit speech. 677 F.3d at 533-34.

B. *Reed* does not affect *Renton*'s analysis or authority.

The Supreme Court's recent decision in *Reed* does not affect the continued authority of *Renton* and the secondary-effects doctrine. *Reed* involved First Amendment challenges to a local sign code that subjected outdoor signs to significantly different restrictions according to the messages the signs conveyed. *See Reed*, slip op. at 1-3. The Court regarded the sign code as content-based under the First Amendment because it regulated speech according to its expressive content: "The restrictions in the Sign Code that apply to any given sign depend entirely on the communicative content of the sign." *Id.* at 7. *See also id.* at 12 (sign code is "a paradigmatic example of content-based discrimination" because, for example, "[i]deological messages are given more favorable treatment than messages concerning a political candidate"). The Court in *Reed* applied strict scrutiny to the sign code, seeing "no need to consider the government's justifications or purposes

for enacting the Code" in light of the Code's overt regulation of expressive content. *Id.* at 12.

Reed cautioned that laws regulating the expressive content of speech require strict scrutiny, and clarified that *Ward* does not support using intermediate scrutiny for such laws, based upon a view of the government's regulatory purpose. *See Reed*, slip op. at 8-10. But *Reed* does not overrule *Renton*. The Court's opinion in *Reed* does not mention *Renton* and the Court's other secondary-effects cases. Nor does *Reed* address or undermine the Court's reasoning in *Renton*. FSC's contention that *Reed* requires strict First Amendment scrutiny of the Statutes is mistaken because it focuses exclusively upon the "content-neutrality" analysis in *Ward* and overlooks *Renton*. *See* Pet. 5.

Under *Renton*, intermediate scrutiny is employed *despite* the fact that regulations on their face refer to content (*e.g.*, apply to productions involving sexually explicit conduct but not other productions). In *Renton* and its progeny, therefore, the fact that the regulation refers to the content of speech is irrelevant for First Amendment purposes. Thus in *Renton*'s adult business zoning context, the Court explained that regulations directed towards the *effects* of the display of the films may

"not appear to fit neatly into either the 'content-based' or the 'content-neutral' category * * *." 535 U.S. at 47. Critically, though, the city had not attempted to impermissibly regulate the expressive content of speech, but had merely decided "'to treat certain movie theaters differently because they have markedly different effects upon their surroundings," *id.* at 49. In this context, the Court held, First Amendment concerns are fully and properly addressed under intermediate scrutiny. *See id.* at 49-50.

The Court's subsequent decision in *Alameda Books* clarifies *Renton*'s logic. In *Alameda Books*, the Court relied on *Renton* and used intermediate scrutiny to uphold an ordinance that limited the number of adult entertainment businesses to one per building. A plurality of the Court deemed the ordinance to be content neutral in the same way that the zoning ordinance in *Renton* "was deemed content neutral." *Alameda Books*, 535 U.S. at 434. Justice Kennedy, concurring in the judgment, agreed with the plurality's reliance on *Renton* and its use of intermediate scrutiny. But he pointed out that *Renton*'s characterization of a zoning ordinance that addressed only sexually

explicit speech as "content neutral" was "something of a fiction," one that "is perhaps more confusing than helpful, " *id.* at 448.

Justice Kennedy stated that regulations that apply to only one type of speech "are content based, and we should call them so." *Id.* But *Renton*'s use of intermediate scrutiny was nevertheless correct, he reasoned, because a regulation "designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* Intermediate scrutiny protects First Amendment freedoms in this setting, Justice Kennedy explained, because regulations targeting harmful non-communicative effects of speech "do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima face legitimate purpose" independent from the speech: counter-acting injurious effects that are unrelated to expressive content. *Id.*

The Ninth Circuit has recognized that because Justice Kennedy's concurrence "is the narrowest opinion joining in the judgment of the Court," it "may be regarded as the controlling opinion" in *Alameda Books. Center For Fair Pub. Policy v. Maricopa Cnty.,* 336 F.3d 1153, 1161 (9th Cir. 2003) (citing *Marks v. United States,* 430 U.S. 188, 193

(1976)). Justice Kennedy's opinion makes clear that the use of intermediate scrutiny in secondary-effects cases like *Renton* does not ultimately rest on the distinction between content-based and content-neutral regulations. And the plurality opinion and Justice Kennedy's concurrence both agree that intermediate scrutiny is appropriate for regulations addressing harmful non-communicative secondary effects of speech, even if those effects are associated with speech of a specific type.

FSC is therefore mistaken when it contends that this Court, "[n]ot having the benefit of *Reed*'s analysis," Pet. 4, erred in holding in *FSC I* that the Statutes are subject to intermediate scrutiny as content-neutral regulations of speech. 677 F.3d at 533. Content neutrality is not the rationale for applying intermediate scrutiny in secondary-effects cases like *Renton*. And while *Reed* states broadly 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," *Reed*, slip op. at 8, that general statement, made in the context of regulation addressing the expressive content of speech, is not conclusive here. *Reed* nowhere suggests that it intended to sweep away the Court's secondary-

effects cases, which employ the language of content neutrality as (in Justice Kennedy's words) "something of a fiction," using that label as a shorthand way of discussing the fact that they target the non-communicative effects of specific displays that produce those effects. *See, e.g., Alameda Books,* 535 U.S. at 434; *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296 (2000) (plurality) (nude dancing ban was "properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with [adult] clubs is unrelated to the suppression" of any erotic message the dancing conveyed).

If the Court in *Reed* had intended to overrule its secondary-effects cases that employ intermediate scrutiny to sustain zoning ordinances, nudity bans and other commonplace measures to curb the collateral effects of sexually explicit productions and events, it would have said so. It did not. FSC appears to suggest that *Reed* overrules *Renton* and the other secondary effects cases, such as *Alameda Books* and *City of Erie*, by implication. But the Supreme Court has squarely rejected such reasoning: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls,

leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477, 484 (1989). *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997). This Court has "steadfastly" adhered to the principle that controlling Supreme Court precedents must be followed until and unless they are expressly overruled, emphasizing that even if a recent Supreme Court decision has thrown earlier cases into doubt, "the obligation to follow applicable Supreme Court precedent is in no way abrogated." *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 156 (3d Cir. 2005).

Thus, even if *Reed*'s reasoning called *Renton* and the secondary-effects doctrine into question – and it does not – "the obligation to follow applicable Supreme Court precedent" would still require this Court to adhere to *Renton* and its progeny. Under those cases, the Statutes are subject to intermediate scrutiny, as this Court correctly held (*see FSC I*, 677 F.3d at 535), and rehearing on the basis of *Reed* is unwarranted.

FSC is mistaken, as well, in contending (Pet. 3) that strict scrutiny applies on the ground that Congress drew content-based distinctions in 18 U.S.C. § 2257A(h), which provides "an exemption for certain commercial producers" of depictions of simulated sexual conduct

and lascivious exhibitions of the genitals. *FSC I*, 677 F.3d at 527. Section 2257A(h) makes distinctions based not upon the content of any production, but upon the type of speaker characteristics that do not raise the specter of content-based discrimination. The exemption is available to any producer (including any FSC member) that can provide the necessary certification. *See* 18 U.S.C. § 2247A(h)(1)(a)(ii).

Nothing in the exception for commercial producers requires strict scrutiny or offends the First Amendment: "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645 (1994) (upholding regulation of cable TV channels). Section 2257A(h) simply reflects an informed congressional judgment that Hollywood movie-makers and similar commercial producers are "subject to other regulatory schemes that adequately achieve the same age-verification ends as the Statutes." *FSC I*, 677 F.3d at 534 n.11. Congress did not violate the First Amendment by declining to regulate commercial speech whose production poses no risk to minors.

II. *CITY OF LOS ANGELES V. PATEL* DOES NOT REQUIRE REHEARING

The Supreme Court in *City of Los Angeles v. Patel*, No. 13-1175 (U.S. June 22, 2015), clarified the contours of the administrative search doctrine. This Court, however, has already held that the inspection regulations Plaintiffs challenge cannot be justified as administrative searches. *See FSC II*, slip op. 56-64. The Department of Justice is preparing to revise the regulations to comply both with this Court's ruling and with *Patel*. As a result, *Patel* provides no occasion for further consideration by this Court of the administrative search issue.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing should be denied.

Respectfully submitted,

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AUGUST 2015

Certificate of Service

I hereby certify that on August 5, 2015, I electronically filed the foregoing Response to Petition for Panel Rehearing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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s/*Anne Murphy*

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