IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 05-cv-1126-EDM-BNB

FREE SPEECH COALITION, INC.,
et al.,

Plaintiffs,

v.

THE HONORABLE ALBERTO R. GONZALEZ,
Attorney General of the United States,

Defendant.

DEFENDANT'S OPPOSITION TO MOTION
FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

With this lawsuit and motion for a temporary restraining order ("TRO Motion"), plaintiffs seek to deprive the government of an important tool in the fight against child pornography. 18 U.S.C. § 2257 and the regulations implementing that statute require producers of pornography depicting actual sexual activity to verify, and maintain records confirming, the ages and identities of the individuals depicted. As courts have recognized in rejecting First Amendment challenges to the statute and regulations, the purpose of these provisions is (1) to prevent the exploitation of children by ensuring that those responsible for videotaping or filming sexually explicit acts secure proof of the performer's age; (2) to deny child pornographers access to commercial markets by requiring that "secondary producers" verify that the performers were adults at the time of the creation of the pornography; and (3) to establish a system enabling law

enforcement officials in possession of such materials to identify the performers and verify compliance with the Act.

Almost thirty days ago, the Attorney General published new regulations designed to implement section 2257, as amended by Congress two years ago. But plaintiffs do not seek merely to enjoin certain new aspects of the regulations that they assert harm them. Instead, using the pending regulations as an entering wedge, plaintiffs ask this Court to enjoin enforcement of the entire statutory and regulatory framework, which has been in place for well over a decade. Plaintiffs, however, fail to satisfy any of the prerequisites for the extraordinary relief that they seek. Their First Amendment claim will not succeed because, as the D.C. Circuit Court of Appeals held, "it seems obvious" that "the requirements of section 2257 advance the abatement of child pornography in fundamental ways." Their *ex post facto* claim will not succeed because it is premised upon a misunderstanding of such a claim and of the regulations. And their statutory claim will not succeed because the 2003 Amendments to section 2257 preclude their argument that an Internet publisher of tens of thousands of sexually explicit photos is not subject to the Act as long as the publisher is careful to acquire the photographs from third-party photographers. The Tenth Circuit precedent on which plaintiffs rely preceded those amendments, and also addressed a construction of the statute that DOJ does not advance in this case.

Plaintiffs have also failed to establish an imminent threat of irreparable harm. One plaintiff is an Internet pornography publisher who is capable of publishing tens of thousands of pornographic photographs on more than 600 web-sites, but who somehow lacks the "computer programming ability" to store age-verification records electronically, or to hire someone to help

him do so. The other individual plaintiff is a pornography wholesaler who claims that the labeling requirements are excessively burdensome, even though he has been in business since 1986 and has been subject to ths statute's and regulations' labeling requirements for more than a decade. The only other assertions of harm come from a representative of the Free Speech Coalition describing purported burdens to unnamed businesses without identifying the harm (if any) that would occur in the limited period prior to a preliminary injunction hearing or a full hearing on the merits.

Moreover, the harm to the government and to the public interest from a temporary restraining order would dwarf any claimed harm to the pornography industry that would result from a denial. A temporary restraining order would greatly increase the likelihood of the distribution of child pornography during this period, a result that would be most serious in the Internet context where, as plaintiffs' own affidavits demonstrate, the potential for expeditious distribution is so massive. At bottom, the statute and regulations are wholly lawful because they are narrowly tailored to serve the significant government interest in preventing child pornography, while the balance of harms from a temporary restraining order tips decidedly in favor of rejecting such extraordinary relief.

STATUTORY AND REGULATORY BACKGROUND

Section 2257 imposes a set of record-keeping requirements upon producers of visual depictions of sexually explicit conduct. The record keeping requirements were based initially upon the findings and recommendations of the Attorney General's Commission on Pornography.

The Report recommended the adoption of comprehensive record-keeping requirements to "afford protection to minors through every level of the pornography industry." Attorney General's Commission on Pornography, *Final Report*, 619 (July 1986). The Report recommended that producers "be required to obtain proof of the age of the performer" on signed release forms. *Id*. at 619. The producers would then be required to identify the location of the forms "in the opening or closing footage of a film, the inside cover of the magazine, or standard locations in or on other material containing visual depictions." *Id*. at 620.

Congress enacted the first version of these requirements as part of the Child Protection and Obscenity Enforcement Act of 1988, P.L. 100-690, 102 Stat. 4487-89, and then modified them as part of the Child Protection Restoration and Penalties Enhancement Act of 1990, P.L. 101-647, 104 Stat. 4816-17. The salient features of the statute have thus existed for well over a decade. The current version of the statute provides:

> Whoever produces any book, magazine, periodical, film, videotape, or other matter which – (1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and (2) is produced in whole or in part with materials which have been mailed or shipped in interstate commerce . . . shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

18 U.S.C. § 2257(a).

The words "produces" means:

> to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted[.]

18 U.S.C. § 2257(h)(3).

Congress most recently modified the definition of "produces" through section 511 of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("the PROTECT Act"), adding the words "computer generated image, digital image, or picture." P.L. 108-21, 117 Stat. 650, 685 (2003). In addition to clarifying this definition, Congress made "detailed legislative findings" in section 501 of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act ("PROTECT") of 2003, discussed in greater detail *infra*, and "extensive amendments to the child exploitation statutory scheme." 70 Fed. Reg. 29607, 29608.

Any person to whom section 2257(a) applies (hereinafter a "producer") must "ascertain, by examination of an identification document containing such information, the performer's name and date of birth" and must also ascertain any additional names used by the performer. 18 U.S.C. § 2257(b). The producer must maintain the records containing such information "at his business premises," or any other place that the Attorney General may designate. 18 U.S.C. § 2257(c). The producer must also cause to be affixed to all such visual depictions a statement identifying where the records may be located. 18 U.S.C. § 2257(e)(1).

On June 25, 2004, the Department of Justice published a proposed rule updating the record-keeping regulations that DOJ had promulgated on April 24, 1992. 69 Fed. Reg. 35547; *see also* 57 Fed. Reg. 15017. The regulations at issue in this case, like the old regulations, were promulgated pursuant to authority granted by 18 U.S.C. § 2257(g). After modifying the proposed regulations to account for various comments received in response to the notice, DOJ announced

the final rule at issue in this case on May 24, 2005. *See* 70 Fed. Reg. 29607, 29608. DOJ explained in the announcement that the final rule comports with Congress' findings in the PROTECT Act, which contained "extensive amendments to the child exploitation statutory scheme." *Id.* The rule "provides greater details for the record-keeping and inspection process in order to ensure that minors are not used as performers in sexually explicit depictions." 69 Fed. Reg. 35547, 35548; *see also* 70 Fed. Reg. 29607, 29608. DOJ also amended the rule to account for "the growth of Internet facilities in the past five years, and the proliferation of pornography on Internet computer sites or services. . . ." *Id.*

Rather than requiring every producer to obtain identification directly from performers, both the old and the new regulations require certain types of producers ("secondary producers") only to obtain and maintain copies of the records secured by "primary producers" from the performer. This distinction between primary and secondary producers, which has been in place since the enactment of the 1992 regulations, addresses concerns that it would be unconstitutionally burdensome to require that producers with no contact with performers obtain identification directly from those performers. *See American Library Association v. Thornburgh*, 713 F. Supp. 469, 477 (D.D.C. 1989).

The current regulations define a "primary producer" as "any person who actually films, videotapes, photographs, or creates a digitally-or-computer-manipulated image, a digital image, or picture of, or digitizes an image of, a visual depiction of an actual human being engaged in actual sexually explicit conduct." 28 C.F.R. § 75.1(c)(1). The regulations, in turn, define a "secondary producer" as

> any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, digitally-or-computer-manipulated image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing.

28 C.F.R. § 75.1(c)(2).

The regulations also exclude from the definition of producer those "persons whose activities relating to the visual depiction of actual sexually explicit conduct" are limited to:

> (i) Photo or film processing . . .;
> (ii) Mere distribution;
> (iii) Any activity other than [the activities listed in the definitions of primary and secondary producer] that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers,
> (iv) A provider of web-hosting services who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service; or
> (v) A provider of an electronic communication service who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service.

28 C.F.R. § 75.1(c)(4)(i)-(v).

STANDARD OF REVIEW

It is well-established that a temporary restraining order is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Southern Utah Wilderness Alliance v. Babbitt*, No. 2:99CV852K, 2000 WL 33347721, *1 (D. Utah July 20, 2000); *see also SCFC ILC, Inc. v. Visa USA*, *Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) (applying the same standard to a motion for preliminary injunction). To obtain a temporary restraining order, plaintiffs must first establish (1) a substantial likelihood

of success on the merits and (2) a threat of irreparable injury to them; further, plaintiffs must show (3) that the threatened harm to the plaintiffs outweighs the harm to the government and (4) that the restraining order would not be contrary to the public interest. *See Valley Community Preservation Commission v. Mineta*, 373 F.3d 1078, 1083 (10th Cir. 2004). Because a temporary restraining order is an extraordinary remedy, "the right to relief must be clear and unequivocal." *Id*. at 1084.

If a temporary restraining order would not alter the status quo, and if "a plaintiff establishes that the latter three factors 'tip strongly' in his or her favor, the likelihood of success inquiry is modified somewhat, and the plaintiff may establish a likelihood of success by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id*. at 1083-84 (internal quotation marks and citation omitted). If the movant seeks an injunction that would alter the status quo, however, this modified likelihood of success standard does not apply, and the movant must meet an even higher burden with respect to all four factors. *O Centro Espirita Beneficiente v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991) (to obtain an injunction that disturbs the status quo, the movant must show that "the four factors, on balance, weigh heavily and compellingly in [the movant's] favor").

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH A LIKELIHOOD OF SUCCESS

With this motion, plaintiffs seek a temporary restraining order enjoining both 18 U.S.C. § 2257 and the administrative regulations implementing that statute *in toto*, "with respect to themselves and to the members of the Free Speech Coalition. . . ." TRO Motion at 1. Because plaintiffs seek to enjoin a statute whose basic requirements have been in effect for more than a decade, as well as many aspects of the regulations that have been in effect for a similar period, they are seeking to upset rather than to preserve the status quo. As a result the modified likelihood of success standard does not apply. *O Centro Espirita Beneficiente*, 389 F.3d at 975-76. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1101 (10th Cir. 1991) (movant must establish a "*substantial* likelihood that it will succeed on the merits") (emphasis in original). Regardless of the applicable standard, however, plaintiffs have not satisfied this element, and their motion must therefore be denied.[1]

A. SECTION 2257 AND THE IMPLEMENTING REGULATIONS SATISFY THE FIRST AMENDMENT

Plaintiffs fail to demonstrate a likelihood of success on their claim that section 2257 and the implementing regulations violate the First Amendment. Indeed, plaintiffs fail to address the applicable test for evaluating the statute and regulations, and ignore the decisions of two courts of appeals, which, in one case, upheld section 2257 and prior regulations against a First

[1] Defendant addresses plaintiffs' claim of purported "*ex post facto*" problems with the regulations in the section addressing plaintiffs' claim of irreparable harm.

Amendment challenge and, in the other case, denied a motion for preliminary injunction raising such a challenge. *ALA v. Reno*, 33 F.3d 78, 88 (D.C. Cir. 1994); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 293 (6th Cir. 1998).

The applicable standard is whether the challenged requirements are "'narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, plaintiffs concede that the "public interest in protecting actual children from participation in pornography is substantial and compelling." Supplemental Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order ("Supp. Mem.") at 6; *see also Connection Distributing Co. v. Reno*, 154 F.3d at 290 ("The goal of preventing the sexual exploitation of children undoubtedly is a compelling and important one, which the government not only is permitted but perhaps obliged to pursue."); *ALA v. Reno*, 33 F.3d at 88 ("Appellees concede, as they must, that the Government has a significant–indeed compelling– interest in the prevention of child pornography.").

The only inquiry, then, on plaintiffs' First Amendment claim "is whether the Act's record keeping requirements are narrowly tailored to the prevention of child pornography." *Id*. To "satisfy the narrow tailoring requirement of the intermediate scrutiny test, a regulation need not be the least speech-restrictive means of achieving the government's interests." *Connection Distributing Co. v. Reno*, 154 F.3d at 292 (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)). Instead, the regulation must promote "'a substantial government interest that would be achieved less effectively absent the regulation.'" *Id*. at 293 (quoting *Ward v. Rock*

Against Racism, 491 U.S. 781, 799 (1989)). "All that is required for narrow tailoring is that the regulation does not burden substantially more speech than necessary to further the government's legitimate interest." *Id*. at 292.

Two different courts of appeals have already concluded that the requirements of section 2257 and the 1992 regulations satisfy this standard by "advanc[ing] the abatement of child pornography in fundamental ways." *ALA v. Reno*, 33 F.3d at 88; *see also Connection Distributing Co. v. Reno*, 154 F.3d at 292. Section 2257 "ensures that primary producers actually confirm that a prospective performer is of age" and "deters children from attempting to pass as adults." *ALA v. Reno*, 154 F.3d.at 88-89. Moreover, "it creates the only mechanism by which secondary producers (who by definition have no contact with performers) can be required to verify the ages of the individuals pictured in the materials they will be producing." *Id*. at 89. Indeed, as the D.C. Circuit Court of Appeals stated, the record-keeping requirements "are critical to ensuring that secondary producers deny child pornographers access to their markets." *Id*.

Plaintiffs do not address the intermediate scrutiny standard or these cases, and instead unsuccessfully attempt to liken section 2257 to cases involving prohibitions or content-based restrictions on protected speech. *See* Pls' Supp. Mem. at 5-6 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239-40 (2003) (prohibition on virtual child pornography)); *Simon & Schuster v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 121, 122 (1991) (statute requiring escrow of payments received by a convicted criminal for a work related to his crime)). The D.C. Circuit and Sixth Circuit have already rejected precisely this argument, however, because "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 . . . . The Act's record-keeping and disclosure requirements do not impinge on the content of the materials . . ." *ALA v. Reno*, 33 F.3d at 86; *see also id*. at 90 (rejecting the plaintiffs' reliance on the *Simon & Schuster* decision); *Connection Distributing Co.*, 154 F.3d at 292 ("The provisions are a reasonable attempt to prevent the use of minors in pornographic materials.").

As for plaintiffs' unconvincing assertion that the statute and regulations "amount to, and must be analyzed as, an outright ban," Pls' Supp. Mem. at 5, the basic record-keeping and disclosure requirements have been in effect for over a decade, without any discernible drop-off in the amount of hard-core pornography available. The statute, moreover, applies only to actual (as opposed to simulated) depictions of sexual conduct and thus applies to a category of speech that overlaps with and is, in many ways, narrower than obscenity – which may be prohibited entirely. *See Connection Distributing Co.*, 154 F.3d at 291 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("although sexually explicit expression is protected by the First Amendment, 'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude' than the societal interest in other forms of expression, such as political debate.").

Finally, the purported burden on an individual producer is directly proportional to the scale of the producer's operation and the government's concomitant interest in preventing the dissemination of child pornography. *See* Declaration of David Conners in Support of Plaintiffs' Motion for a Temporary Restraining Order ("Conners Dec.") at ¶ 19 (describing his ownership of

600 websites with "tens of thousands of digital images of actual humans engaging in actual sexually explicit conduct"). In other words, the larger the producer, the more chances there are for the generation and proliferation of child pornography, and the more records that must be kept. And even assuming that certain Internet producers will make their own decision that the record-keeping requirements make production less worthwhile – something that plaintiffs have not yet come close to establishing – such a state of affairs would not even resemble a "ban" on such material.

B. THE REGULATIONS DO NOT VIOLATE THE RIGHT TO PRIVACY

Plaintiffs argue that the requirement that secondary producers verify and retain copies of information regarding performers' ages violates the performers' right to privacy. Supp. Mem. at 6-7. Plaintiffs provide no authority for this assertion, and there is none. Indeed, the only case cited by plaintiffs in support of a purported constitutional right that "extends to the dissemination of private information closely connected to the concept of personhood" is not a constitutional case. *See* Pls' Supp. Mem. at 7 (citing *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (applying exemption 7(C) of the Freedom of Information Act without suggesting that the result was constitutionally mandated, and noting that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution").

There is also a world of difference between anonymous political speech and participation in hard-core pornography, which in virtually all respects is the opposite of anonymous. Plaintiffs are engaged in a public business, the entire goal of which is to maximize the audience for the performers' sexually explicit activities. The regulations, moreover, do not require public

disclosure of identification information, but only disclosure to secondary producers (and to primary producers, but plaintiffs do not claim it is a violation of their privacy rights to require disclosure to primary producers). To the extent they have seriously held privacy concerns, performers can choose to deal only with primary producers who will disseminate information to only a limited number of reliable secondary producers. And plaintiffs do not identify any examples of stalking that have resulted from providing identification information under section 2257.

C. SECTION 2257 APPLIES TO SECONDARY PRODUCERS

Plaintiffs assert that DOJ lacks the statutory authority to require secondary producers to comply with the record-keeping requirements in section 2257. Plaintiffs are mistaken. As set forth below, the new regulations' definition of "secondary producer" is consistent with the text, structure, purpose, and history of section 2257, including Congress' recent modification of the definition of "produce" against the background of DOJ's longstanding regulation of "secondary producers." DOJ's definition similarly relies on the PROTECT Act's "detailed legislative findings," which evinced Congress' goal of stemming the proliferation of Internet child pornography, together with DOJ's general knowledge of the industry, and intervening judicial decisions.

1. Plaintiffs Must Show That the Statute Unambiguously Precludes DOJ's Definition of "Secondary Producer"

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Supreme Court held that reviewing courts must "give effect to the unambiguously

expressed intent of Congress," but that where the statute is ambiguous, the issue is whether the agency has adopted a "permissible construction of the statute." Thus, under *Chevron*, an agency's interpretation of a statute Congress has entrusted it to administer is entitled to deference as long as it is a reasonable construction and not precluded by an unambiguous statutory command to the contrary. *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000); *see generally National Railroad Passengers Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law"); *Central Arizona Water Conservation District v. U.S. Environmental Protection Agency*, 990 F.2d 1531, 1541 (9th Cir. 1993) ("We defer to the agency's reasonable interpretation of its own regulations and statutory mandate.").[2]

To find DOJ's interpretation permissible, this Court "need not conclude that the agency construction was the only one it permissibly could have adopted," *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (*quoting Chevron*, 467 U.S. at 843 n. 11), or that it is "the best interpretation of the statute," *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (*quoting Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue*, 523 U.S. 382, 389 (1998)), or that it is "the best or most natural one by grammatical or other standards." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991). In addition, "'particular deference'" should be accorded

[2] Plaintiffs do not dispute that *Chevron* analysis applies to DOJ's regulation, and both the district court and the court of appeals in the *Sundance* case applied *Chevron*. *Sundance Assocs. v. Reno*, 139 F.3d 804, 807 (10th Cir. 1998).

to "'an agency interpretation of longstanding duration,'" *Alaska Dep't of Envtl. Conservation v. EPA*, 124 S. Ct. 983, 1001 (2004) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)).

Plaintiffs, by contrast, must show that their reading of the statute is the "inevitable one," *Regions Hospital v. Shalala*, 522 U.S. 448, 460 (1998). It is not enough for Plaintiffs to argue that the words of the statute "support" Plaintiffs' view, *Auer v. Robbins*, 519 U.S. 452, 457 (1997), or that Plaintiffs' interpretation is a "plausible" one, *Reno v. Koray*, 515 U.S. 50, 62 (1995), or that Plaintiffs' view is "consistent with accepted canons of construction." *Pauley v. Beth Energy Mines*, 501 U.S. at 702. Thus, for Plaintiffs to prevail their view of the statute must be "the only possible interpretation." *Regions Hospital v. Shalala*, 522 U.S. at 460; *Sullivan v. Everhart*, 494 U.S. at 89.

2. The New Regulations' Definition of "Secondary Producer" Reflects a Reasonable Interpretation of the Statute

DOJ's determination that the record-keeping requirements of section 2257 apply to secondary producers is a reasonable interpretation of the text and structure of section 2257 when read as a whole and understood in light of the statute's purpose. The current regulations reflect the judgment that, in general, the only "producers, publishers, and manufacturers" who do not in some sense "arrange for" the participation of performers are those whose activities are limited to the exceptions listed in the regulations – namely, "photo or film processing . . . with no other commercial interest," "[m]ere distribution," or providing "web-hosting" or "electronic communication service[s]" without the ability to "manage the sexually explicit content of the computer site or service." 28 C.F.R. § 75.1(c)(4)(i)-(v). DOJ also reasonably interpreted the

statutory exclusion as modifying only the words "and includes the duplication, reproduction, or reissuing of any such matter," which otherwise could have expanded the words "produce, manufacture, or publish" beyond their commonly understood meaning.[3] Because DOJ relies in this case on an interpretation of section 2257 that is distinct from the one that it advanced in *Sundance* – and because it bases that interpretation on the implications of the PROTECT Act, *see* Section I(C)(2), *infra*, which was enacted five years after *Sundance* against the background of regulations that applied the Act to secondary producers – the *Sundance* decision, while relevant, is of limited value in evaluating the new regulations.

In addition to its consistency with the statutory language, this interpretation gives effect to every word in section 2257. The words "produce, publish, or manufacture," as the main verbs in the definition, should, at a minimum, help to inform the meaning of the words "otherwise arrange," lest they be reduced to surplusage. At the same time, DOJ's interpretation gives meaning to the exclusionary language by reading it to reflect that Congress did not intend to include mere distributors, photo or film processors, and certain web-hosts and providers of electronic communication services, within the ambit of the regulations.

In contrast, under plaintiffs' view, section 2257 would not apply to publishers of Internet pornography if they obtain their pictures or videos from third parties, no matter how many thousands of pictures that publisher might publish. Such publishers, however, "arrange for" the

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[3] For ease of reference, the statutory definition of the word "produce" is "to produce, manufacture or publish . . . and includes the duplication, reproduction, or resissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted." 18 U.S.C. § 2257(h)(3).

participation of depicted performers simply by actively soliciting and/or making it known that they will provide consideration for, "visual depictions of actual sexual conduct." Interpreting the phrase to be limited to those who plan specific performances is an excessively narrow reading that would allow Internet pornographers to avoid the statute by avoiding direct knowledge of particular performances.

Far from being the "inevitable" interpretation, *see Regions Hospital v. Shalala*, 522 U.S. at 460 (1998), plaintiffs' view would leave section 2257(h) a poorly phrased muddle replete with redundancy. If plaintiffs' interpretation were correct, then the only words in the statutory definition that would do any work are the last ones: "hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted." As a result, the entirety of the earlier clauses in the definition – "produce, manufacture, or publish and includes the duplication, reproduction, or reissuing of any such matter . . ." – would become virtually redundant. Such an interpretation, of course, would violate the well-established canon of statutory construction that a "statute ought, upon the whole, to be construed" in a way that would avoid rendering any provision "superfluous, void, or insignificant." *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (a).[4] Plaintiffs' interpretation would also reduce the introductory verbs "produce, manufacture or publish and includes duplication, production, or reissuing" to a small

[4] Under plaintiffs' interpretation, the presence of those words could serve only to carve out an exemption from the statute from the group of people who hire or otherwise arrange for the participation of the performers for members of that group who do not produce, publish, or manufacture. In other words, to credit plaintiffs' interpretation, one needs to accept that Congress used the verbs "to produce, publish, or manufacture" to *contract* the ambit of the statute.

subset of their commonly understood meaning. Such an interpretation would render the statute the stylistic equivalent of the clause "shall mean the colors of the rainbow, and includes green, orange, and purple but does not include yellow or anything but blue." At a minimum, the statute certainly does not unambiguously compel plaintiffs' interpretation.

DOJ's interpretation of the statute is also consistent with the two cases to have addressed DOJ's interpretation of the statutory term "produces." In *American Library Assoc. v. Reno*, 33 F.3d 78 (D.C. Cir. 1995), the Court upheld DOJ's application of section 2257 against a First Amendment challenge, holding that the restrictions served a substantial government interest and "can hardly be considered onerous." *Id*. at 91. Furthermore, the Court specifically recognized that one of the "congressional purposes" in enacting section 2257 was "to deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers' proof that the photographs depicted were adults at the time they were photographed or videotaped." *Id*. at 86.

Moreover, the Court in *Sundance Assocs*., *Inc. v. Reno*, 139 F.3d 804, 810 (10th Cir. 1998), while rejecting DOJ's position in that case that the "does not includes" exclusion was intended to *broaden the scope of the statute*, *id*. at 808-809 (emphasis added), also stated that "'[A]rranging for the participation of the performers depicted,' *may well encompass* a broad range of activities. . . ." *Id*. at 810 n.8 (emphasis added). The Court's decision in *Sundance* thus also supports DOJ's present view that the words "arrange for" may be read broadly.

3. Plaintiffs' Interpretation Would Thwart the Effectiveness of Section 2257

Not only does the statute not compel plaintiff' interpretation, but plaintiffs' interpretation

would also eviscerate the effectiveness of section 2257, including the modifications made by section 511 of the PROTECT Act. *See Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983) (statutes must be interpreted "in light of the purposes Congress sought to serve"); *Complete Finance Corp. v. Commissioner of Internal Revenue*, 766 F.2d 436, 439 (10th Cir. 1985) (rejecting an interpretation that would "undermine the intent of Congress"). As stated by the Court in *American Library Association v. Reno*, 33 F.3d 78, 85 (D.C. Cir. 1995):

> the congressional purposes in enacting the challenged legislation are threefold: (a) to prevent the exploitation of children by requiring those responsible for photographing or videotaping sexually explicit acts (those defined in the regulations as 'primary producers') to secure proof of the performer's age and to keep a record of the same as evidence of their compliance, (b) to deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers' proof that the persons depicted were adults at the time they were photographed or videotaped, and (c) to establish a system by which a law enforcement officer in possession of materials containing depictions of sexually explicit acts will be able to identify the performers and verify compliance with the Act.

Under plaintiffs' interpretation, secondary producers would no longer be required to verify that performers were above 18, leading to greater distribution of child pornography, greater access to the commercial markets that Congress intended to close to such pornography, and a reduced incentive for primary producers to comply with the Act. Plaintiffs' interpretation would also greatly hamper the ability of law enforcement officials to ensure that performers in pornographic films are not minors. As explained by the Court in *ALA v. Reno*, the secondary producer requirements "provide what is likely to be a more reliable depository of the information identifying and establishing the ages of the persons depicted. Further, because a given issue of a

magazine or book may contain pictures of performers taken by several photographers, it serves the interests of law enforcement efficiency to be able to verify their ages at a single location." 33 F.3d at 91.

The Internet enormously compounds the problems with plaintiffs' interpretation. Plaintiffs' affidavits powerfully demonstrate the already well-known distribution power of the Internet. If plaintiffs' interpretation of the statute were adopted, virtually no Internet publishers of pornography will be required to verify and maintain records of the ages of the participants. Such a scheme would be entirely inconsistent with what Congress was trying to accomplish in enacting section 2257 and, as discussed in the next section, the PROTECT Act.

4. The PROTECT Act's Findings and Its Modification of the Definition of "Produces" Ratified DOJ's Interpretation

In 2003, Congress resolved any doubt about the meaning of section 2257 by modifying the definition of "produces" in section 2257(h) against the backdrop of DOJ's longstanding interpretation of that provision as set forth in the regulations. It is well-established that "an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . ." *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983).[5] In this case, Congress ratified the

[5] *Haig v. Agee*, 453 U.S. 280, 300 (1981) ("[C]ongressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy."); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (same; in addition, where Congress adopts new law incorporating sections of prior law, Congress is presumed to have knowledge of interpretation given to incorporated law); *Beth Rochel Seminary v. Bennett*, 624 F. Supp. 911, 917 (D.D.C. 1985) ("It is hornbook law that reenactment of a statute by Congress without change approves and adopts the prior administrative construction."), *aff'd*, 825 F.2d 478 (D.C. Cir. 1987). As courts have long recognized, "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not

Department's well-known interpretation of "produces" by specifically clarifying the definition of "produces" in section 511 of the PROTECT Act to include the words "computer generated image, digital image, or picture" without in any way contradicting or questioning DOJ's longstanding regulatory interpretation. P.L. 108-21, 117 Stat. 650, 685.

Moreover, Congress must be presumed to have been aware of *ALA v. Reno*, 33 F.3d 78, 86, 91 (D.C. Cir. 1994), which in upholding the statutes and regulations against various challenges concluded, *inter alia*, that one of the "congressional purposes" in enacting section 2257 was "to deprive child pornographers of access to commercial markets by requiring secondary producers" to verify the ages of the persons depicted," that the "record-keeping required of producers can hardly be considered onerous," and that application of the provisions to secondary producers provided what was "likely to be a more reliable depository of the information identifying and establishing the ages of the persons depicted."[6]

To be sure, the *Sundance* decision was issued before the PROTECT Act, but the

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changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay v. Federal Communications Comm'n*, 443 F.2d 638, 646-47 (D.C. Cir. 1970). *See also CBS, Inc. v. FCC*, 453 U.S. 367, 384-85 (1981); *Canada Packers, Ltd v. Atchison Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 184 (1966); *Young v. TVA*, 606 F.2d 143, 147 (6th Cir. 1979) (appropriation of funds for agency in face of agency construction of statute has effect of ratifying agency action). The principle is particularly applicable in a situation such as this where Congress was aware of the agency's interpretation, had occasion to legislate in the area (*i.e.*, the enactment of BIPA in December of 2000) and yet made no change in the statute. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (failure of Congress to act on legislation offered to reverse agency interpretation is evidence of the reasonableness of the agency construction); *Palmore v. Superior Court of the District of Columbia*, 515 F.2d 1294, 1308 (D.C. Cir. 1975), *judgment vacated on other ground*, 429 U.S. 915 (1976).

[6] The ALA Court further explained that the "photographer who sells a picture to a magazine may disappear three months later, and his records with him. The magazine, on the other hand, is apt to remain in business." *Id.*

Sundance case involved a narrow set of facts and noted that the phrase "arranging for the participation of the performers depicted, may well encompass a broad range of activities." *Sundance*, 139 F.3d at 810 n.8. More importantly, following the *Sundance* decision, DOJ did nothing that would have suggested to Congress that DOJ had abandoned its interpretation that section 2257 applies to secondary producers. To the contrary, as of the date of enactment of the PROTECT Act (five years after the *Sundance* decision), DOJ's previously enacted regulations remained in effect. Indeed, even lead counsel for the plaintiffs was quoted in a Free Speech coalition article (attached as Exhibit A, see page 4) as saying, "All along I have advised my clients not to rely on *Sundance*; that any image they had in any book, magazine, video, or whatever, whether it's amateurs or swingers or any of that stuff, that they should have the appropriate records."

Further, Congress had one clear purpose in enacting the relevant provisions of the PROTECT Act: to strengthen protections against the production and dissemination of child pornography. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of [a] statute, [courts] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"). Congress' findings emphasized the Supreme Court's conclusion in *New York v. Ferber*, 458 U.S. 747, 757 (1982), that "[t]he 'prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance' and that this interest extends to stamping out the vice of child pornography *at all levels in the distribution chain*." P.L. 108-21, Sec. 501(2), 117 Stat 650, 676 (emphasis added). Congress also concluded that the "Government thus has a compelling interest

in ensuring that the criminal prohibitions against child pornography remain enforceable and effective."

In passing the PROTECT Act, Congress emphasized its concern over the potential use of the Internet as a tool to disseminate child pornography and its desire to take every possible constitutional step to reduce its proliferation, and thus specifically clarified that the definition of "produces" includes electronic images. Indeed, the Findings section of "Subtitle A – Obscenity and Pornography Prevention" states that the "vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media," and that "Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." *Id*., Section 501(6), (15), 117 Stat. at 677-78. Senator Leahy, one of the two principal sponsors of the bill, summarized Congress' intent when he stated in 2002 that the PROTECT Act "reflect[ed] a good faith attempt to protect children to the greatest extent possible without crossing [the constitutional] line." 148 Cong. Rec. S4391-01, S4394 (Statement of Sen. Leahy).

In light of these findings and express purposes for the PROTECT Act, it is simply implausible that Congress intended to exclude from section 2257's coverage, for example, Internet-based secondary producers simply because they do not take the pictures or film the movies themselves. Nor is it conceivable that Congress intended to preserve a protection for purveyors of hard-core pornography that is not required by the Constitution and that would throughly undermine the purposes of section 2257.

D. THERE IS NO BASIS FOR THE FREE SPEECH COALITION'S FACIAL CHALLENGE ON BEHALF OF ITS MEMBERS

This case has been brought by two individual plaintiffs and by the Free Speech Coalition on behalf of hundreds of members. While it is unclear whether the individual plaintiffs also are seeking to bring an as-applied challenge as well, the Coalition may only obtain relief on behalf of its members by establishing the facial unconstitutionality of the statute and regulations.[7]

"Facial challenges are strong medicine. Article III of the Constitution ensures that federal courts are not roving commissions assigned to pass judgment on the validity of the nation's laws, but instead address only specific cases and controversies. . . . Because facial challenges push the judiciary towards the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims." *Ward v. Utah*, 398 F.3d 1239, 1246-47 (10th Cir. 2005). "Furthermore, when the statute in question is aimed at regulating conduct–as opposed to pure speech," the court's "inquiry must also account for the state's legitimate interest in enforcing its otherwise valid criminal laws." *Id*. at 1247. "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id*. at 1247.

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[7] Defendant does not understand plaintiffs to claim to the contrary, but any such contention would be unavailing because an as-applied challenge would require the individual participation of its members in the lawsuit. *Friends for American Free Enterprise Assoc. v. Wal-Mart Stores, Inc*., 284 F.3d 575, 576-77 (5th Cir. 2002) (association lacked standing to seek injunctive relief for tortious interference with contractual relations on behalf of its members because lawsuit would require the participation of members); *Rent Stabilization Assoc. of City of New York v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993) (association lacked standing to mount an as-applied challenge to a rent stabilization law seeking injunctive relief on behalf of members); *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, 365 F. Supp. 2d 1146, 1162 (association lacked standing to seek injunctive relief on behalf of its members for an as-applied takings challenge).

As discussed above, neither the individual plaintiffs nor the Coalition have established any unconstitutional applications of the statute and regulation, let alone made the kind of showing that would suggest a likelihood of success in mounting a facial challenge. However, even if the Coalition were able to identify specific circumstances where the statute would be unconstitutional as applied, such an application would be insufficient to justify a facial challenge.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A THREAT OF IRREPARABLE HARM

A. THE HARM THAT PLAINTIFFS ALLEGE DOES NOT PROVIDE A BASIS FOR A TEMPORARY RESTRAINING ORDER AGAINST ENFORCEMENT OF THE REGULATIONS

1. The Regulations Present No *Ex Post Facto* Problem

The regulations do not violate the *Ex Post Facto* Clause. As plaintiffs note, that Clause "makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such act." Pls' Mot. at 10 (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)). But neither the statute nor the regulations do anything of the sort. Plaintiffs identify no situation in which the regulations might punish someone for a legal act committed prior to their effective date.

Plaintiffs instead present two examples where the application of the new regulations to future actions will, it is claimed, have implications for previously produced pornographic works. The first example relates to the types of identification cards that could previously be used to verify compliance with the regulations and statute. Plaintiffs are asserting that the old regulations in effect permitted certain foreign-issued identification cards to be used to verify the

ages of performers that may no longer be used, Pls' Mot. at 11, but they are incorrect that "producers who fully complied with the law at the time that the material was produced" are presented with the choice of either "self-censorship " or to go back and procure American-issued identification for all actors in earlier-produced sexually explicit works. *Id*. Defendant does not interpret the regulations in this fashion, and has no intention of applying them in this fashion. Instead, all producers who fully complied with the old regulations regarding the proper forms of identification will not be precluded from distributing those works merely because such forms of identification will be insufficient going forward. The leading example used by plaintiffs, in other words, is not an issue and thus does not reflect a threat of irreparable harm.

The other example used by plaintiffs, however, is quite different. Here, plaintiffs point to certain unnamed "secondary producers" who did not collect and maintain *any* records establishing the age of the performers engaged in sexually explicit visual depictions. Pls' Motion at 12. In other words, such producers ignored both the old regulations and the decisions in *ALA* and *Connection*, relying instead on the Tenth Circuit Court of Appeals' decision in *Sundance* (even, apparently, outside this Circuit).[8]

Such reliance was by no means justifiable. As stated *supra*, lead counsel for plaintiffs has stated publicly that he advised clients all along "not to rely on *Sundance*," and "that they should have the appropriate records." Moreover, following *Sundance*, DOJ never repealed the

[8] A movant may not rely on irreparable harm that is self-inflicted to support a motion for temporary restraining order. *See Salt Lake City Publishing Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable . . . .").

regulations, which remained in effect in every jurisdiction in the country, with the exception of a modification to the definition of secondary producer in the Tenth Circuit. *Sundance*, 139 F.3d at 811. At the same time, the D.C. Circuit had specifically held that one of Congress' purposes in enacting the Act was to "deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers' proof that the persons depicted were adults at the time . . ." *ALA v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1995). And, in 2003, as set forth above, Congress ratified the Department's current understanding of the regulations by enacting the PROTECT Act against the background of the Department's settled administrative interpretation. Thus, the only citizens for whom the *Sundance* decision even arguably supports a justifiable reliance argument are those who (1) reside or have their principal place of business in the Tenth Circuit Court of Appeals and (2) fall within the new regulations' definition of "secondary producer" but not the definition as modified by the *Sundance* court.

This lawsuit, however, was brought not by those who have a close connection to this Circuit, but instead by those who seek to make opportunistic use of its precedent. *See* Connors Aff. at ¶ 2 (plaintiff David Connors is a resident of California); Declaration of Leonard Friedlander in Support of Plaintiffs' Motion for a Temporary Restraining Order at ¶ 1 (describing New Beginnings as a California corporation); Affidavit of Jeffrey Douglas ¶ 8 (stating that only 12 of plaintiff Free Speech Coalition's over 750 members reside in Colorado and failing to identify them or describe the nature of their businesses). Even if individuals residing or working in the Tenth Circuit were plaintiffs, however, any justifiable reliance argument would, at best, support an irreparable harm claim by such plaintiffs who also would not fall within the *Sundance*

Court's modified definition of secondary producer and who cannot now realistically obtain the records of the performers in works created prior to the PROTECT Act of 2003. Plaintiffs have identified no such person, and in any event, the existence of such a plaintiff would certainly not justify the plaintiffs' overbroad attempt to enjoin the entire regulatory framework as applied to all of them.

In addition, the facts in *Sundance* were quite narrow, involving a single plaintiff who did not pay for or solicit visual depictions of sexually explicit material; instead, individuals advertised in Sundance's magazines, and their advertisements frequently included pictures of themselves engaging sexually explicit activity. *Sundance Assocs*, 139 F.3d at 806. As discussed *supra*, the Court's rejection of the interpretation offered by the government in that case did not mean that the statute exempted all or even most secondary producers. For example, a web-site that acquires and publishes thousands of sexually explicit photographs without verifying the ages of the performers or maintaining evidence of that verification would have had no right to rely upon the Court's conclusion that the statute did not apply to Sundance's significantly different business. *See*, *e.g.*, Conners Dec. at ¶¶ 18-19 (describing declarant's ownership of 600 Websites containing tens of thousands of digital images of actual humans engaged in actual sexually explicit conduct). *See also Sundance Assocs.*, 139 F.3d at 810 n.8 (noting that "'[A]rranging for the participation of the performers depicted,' may well encompass a broad range of activities. . . .").

B. PLAINTIFFS IDENTIFY NO IRREPARABLE HARM THAT WILL RESULT FROM PROSPECTIVE APPLICATION OF THE REGULATIONS

Plaintiffs' opening TRO Motion, filed on June 16, 2005, did not attempt to identify any irreparable harm that plaintiffs would suffer as a result of the prospective application of the regulations to material not yet created. Plaintiffs' second filing, filed the next day, attempts to identify such harm but fails.

By seeking a temporary restraining order, plaintiffs must identify some irreparable harm that will occur prior to the Court's opportunity to consider a motion for preliminary injunction (which the government assumes is inevitable). In several instances, however, plaintiffs' actual complaints relate to restrictions that have been in place for over ten years. Plaintiff New Beginnings, for example, discusses the manpower hours required to ensure that magazines, DVDs and VHS tapes are properly labeled. Such labeling requirements and the regulations regarding them, however, have applied to all sellers of such materials since 1992, *see* 57 Fed. Reg. 15017, 15022, and the general obligation has existed since the original enactment of the statute in 1988. P.L. 100-690, 102 Stat. 4487. New Beginnings, however, has managed to stay in business during that entire period, which forecloses its claim of irreparable harm. Friedlander Dec. ¶ 3.[9]

Plaintiffs also speculate as to other potential harms but provide no basis for believing that

[9] New Beginnings' manpower estimates are also patently exaggerated. The Court may take judicial notice of the fact that it does not take 30 minutes to fast forward to the end of a DVD to examine a label. Friedlander Dec. ¶ 43. Even more to the point, New Beginnings only would need to examine the labels on its DVDs and tapes as it sold them. It would not need to examine all of its purported inventory at once.

those harms are sufficiently imminent to justify the extraordinary relief of a temporary restraining order before the Court can address the propriety of preliminary injunctive relief. For example, plaintiffs express a concern that requiring performer records to be provided to secondary producers poses privacy concerns. Such information sharing, however, "is already required by the current Part 75 regulations," and "none of the commenters [on the proposed rules] presented any evidence that a hypothetically possible crime, such as the stalking of a performer, was in any way tied to the dissemination of the information about a performer provided to a producer in compliance with Part 75." 70 Fed. Reg. 29607, 29615. Plaintiffs likewise identify no instances of stalking that have resulted from the requirement and only a single instance of purported identity theft. There is accordingly no basis for the conclusion that irreparable harm of this kind is likely to result prior to the Court's opportunity to consider plaintiffs' motion for preliminary injunction.

In other instances, plaintiffs identify potential longer-term costs but provide no reason to believe that they are irreparable or will occur in the near future. For example, plaintiffs address the amount of storage that will be required for web-sites in the long term, but do not even address the amount of space that will be required pending consideration of a preliminary injunction motion. Moreover, plaintiffs' claims of burden are highly dubious. One can only be skeptical of the claim of someone with the technological savvy to store, upload, and publish tens of thousands of pornographic images on 600 web-sites, but who also claims no ability to store electronically the records verifying the performers' ages. *See Conners Dec.* at ¶ 24 (claiming that he is "not very familiar with computer programming" and explaining that he lacks employees to

do the work for him (but not why he cannot hire one)).

As a final note, plaintiffs have only themselves to blame for the purported "emergency" nature of these proceedings. DOJ issued the notice of proposed rulemaking for the regulations at issue on June 25, 2004, 69 Fed. Reg. 35547, and issued the final rule, which contained no additional requirements that were not in the initial rule, on May 24, 2005, one month prior to the effective date of the regulations. 70 Fed. Reg. 29607. Plaintiff Free Speech Coalition announced the next day that it intended to file suit to enjoin the regulations, but then waited three weeks to file, less than one week prior the effective date of the regulations. Even after they filed the lawsuit, plaintiffs failed to file their brief in support of their motion for temporary restraining order and the supporting declarations until the next day.[10]

III. THE HARM TO THE GOVERNMENT FAR OUTWEIGHS THE POTENTIAL HARM TO PLAINTIFFS, AND THE PUBLIC INTEREST FAVORS DENIAL OF PLAINTIFFS' MOTION

The harms to the government that will result from the temporary restraining order that plaintiffs seek far outweigh any potential harm to the plaintiffs. Moreover, the public interest, which is the fourth element of the test for determining the propriety of preliminary equitable relief, strongly favors the government's position.

As explained *supra*, the purpose of section 2257 is to ensure that primary producers verify the ages of the participants in their pornography, to deny primary producers of child

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[10] Moreover, in the days leading up to the lawsuit, undersigned counsel repeatedly requested that counsel for plaintiffs inform him as to where the lawsuit would be filed. The decision was made to hold back this information, however, even after the decision had been made, for no apparent reason other than strategic gamesmanship.

pornography access to commercial markets, and to ensure that inspectors are able to verify compliance. By eliminating these checks, a temporary restraining order will greatly increase the likelihood of the distribution of child pornography during this period, an effect that will be most serious in the Internet context where, as plaintiffs themselves make clear, the potential for expeditious distribution is so massive. *See* Conners Dec. at ¶ 19.

Plaintiffs argue that a temporary restraining order will cause no harm because "by its very terms, the § 2257 record-keeping requirement applies to material that depicts adults, not children." Pls' Motion at 10. Such a point is unconvincing wordplay that two appellate courts have already rejected. By requiring secondary producers to verify the ages of participants in pornographic depictions, the checks at issue "are critical to ensuring that secondary producers deny child pornographers access to their markets." *ALA. v. Reno*, 33 F.3d at 89.

It is also not at all clear why it matters if, as plaintiffs assert, "the vast majority of the speech impacted by the regulations is already in existence." Pls' Motion at 11. The creation and distribution of child pornography and the further distribution of material already in existence are irreparable harms that must be prevented. Plaintiffs argue that the government would "remain[] free to use its most effective tools" – laws prohibiting child pornography – during the pendency of a restraining order. But this is a false choice. The various "tools" available to the government each have their own purpose and attack the problem from different perspectives. Whichever tools are "most effective," the government should be free to use *all* tools to combat what all responsible citizens agree is an unmitigated evil.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2005, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail address:

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