

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 02-7785

AMERICAN BOOKSELLERS FOUNDATION FOR  
FREE EXPRESSION; *et al.*;

Plaintiffs-Appellees,

- *against* -

HOWARD DEAN, in his official capacity as Governor  
of the State of Vermont; *et al.*,

Defendants-Appellants.

**APPELLEES' PETITION FOR REHEARING  
BY THE PANEL AND  
MEMORANDUM IN SUPPORT THEREOF**

Appellees Sexual Health Network (“SHN”) and the American Civil Liberties Union of Vermont (“ACLU-VT”) (collectively “Appellees”), pursuant to Federal Rules of Appellate Procedure, FRAP 40, and Second Circuit Local Rule 40, hereby petition the Court for rehearing, in the nature of a clarification of this Court’s opinion of August 27, 2003 (the “Opinion”). A copy of the Opinion is attached hereto as Exhibit A. In particular, Appellees respectfully request clarification with regard to the Court’s modification of the scope of the injunction ordered against enforcement of 13 V.S.A. § 2802a (“Section 2802a”).

In the Opinion, the Court correctly affirmed the district court’s decision and correctly ruled that Section 2802a violated both the First Amendment right of free expression and the dormant Commerce Clause,

and that Appellees had standing to challenge the law. However, the Court modified the District Court's injunction "to enjoin only . . . [Section 2802a's] applications to the [Appellees'] . . . Internet-related activity." Opinion at 3, lines 1-3. Later in the Opinion the Court states that the injunction is modified "to enjoin defendants from enforcing Section 2802a only as applied to the kind of Internet speech presented by plaintiffs." Id. at 19, lines 18-20. And even later in the Opinion, the Court states that it "enjoins enforcement of Section 2802a only as applied to the Internet speech upon which plaintiffs based their suit[.]" Id. at 20, lines 4-6.

The three formulations of this Court's ruling would appear to allow for differing interpretations. On the one hand, the Court in the second and third of these statements appears to intend to enjoin the State from enforcing Section 2802a against the Appellees and anyone else who may engage in Internet communications similar to the ones engaged in by the Appellees, which are detailed in the Opinion and the opinion of the district court below, such as placing the material on a website or sharing with an e-mail or Internet discussion group. Opinion at 8, lines 7-9. Such an injunction on the application of Section 2802a to any Internet communication is, we contend, the correct result. If this is the Court's intent, we need go no further.

However, one could conceivably argue based on a literal reading of certain phrases of the Opinion that the injunction is narrower and applies

only to the Internet-related activities of Appellees, *i.e.*, that only the Appellees would gain the benefit of the injunction<sup>1</sup>, thereby allowing the State to enforce Section 2802a against other speakers who may engage in the same or similar speech and Internet-related activities as the Appellees. This action is a challenge to the constitutionality of Section 2802a, based both on the First Amendment and the Commerce Clause. It is a challenge to the application of the statute generally to such speech, and not merely as applied to plaintiffs. We believe that such a limiting interpretation in a case such as this would be incorrect and contrary to established principles under the First Amendment and the Commerce Clause, which we will discuss below.

**I. The Precedents Support Enjoining The Application of Section 2802a To Any Internet Speech or Communication**

In order to establish their standing, Appellees SHN and ACLU-VT put in extensive evidence as to the nature of their speech and the speech of their users and members, respectively, and how the statute would affect such speech . Similarly, evidence was put in through Dr. Lori Cranor as to the nature of the Internet and how its unique characteristics would cause Section 2802a to impact generally on all those who communicate via the

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<sup>1</sup> See, *e.g.*, **New York Law Journal**, September 2, 2003, p.1, col. 1. (“The district court’s ruling was modified to apply only to the Internet activity of the plaintiff merchants.”)

Internet. (A-\_\_\_) Contrary to this Court's statement (Opinion at 17 line 16), plaintiffs did not "challenge the statute based on their own speech."

Given this posture, it would be inappropriate for this Court, having found the statute to violate the First Amendment as to the broad range of speech of Appellees', their users and members, to limit the scope of the injunction to suits against such persons.<sup>2</sup> The manner in which Section 2802a is applied to Internet speech of Appellees is not what is unique in this case; rather, what is unique here are the attributes of the Internet, irrespective of the speaker. This is evidenced by the broad range of original plaintiffs and their concerns.

The chilling effect of Section 2802a falls equally on Appellees and all other Internet speakers. No speaker on the Internet can determine with certainty whether a minor is receiving its communication or whether such minor is in the state of Vermont. The reasons why Section 2802a is unconstitutional as applied to Appellees' speech apply equally to all other Internet speakers. It is for this reason that, in each of the challenges to the six other statutes similar to Section 2802a, the Court did not limit injunctive relief to plaintiffs, but rather applied it to all Internet communications.

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<sup>2</sup> Even if there were such a limitation, since the ACLU-VT sued on behalf of its members as well as itself, the only way the rights of such members to receive First Amendment protected material could be adequately protected is to bar the application of Section 2802a to all Internet communications.

ACLU v. Johnson, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999); Cyberspace Communications, Inc. v. Engler, 142 F. Supp.2d 827 (E.D. Mich. 2002); ACLU v. Napolitano, CIV 00-505 TUC ACM (D. Ariz. June 14, 2002); Bookfriends, Inc. v. Taft, 223 F. Supp.2d 932 (S.D. Ohio 2002); PSINet Inc. v. Chapman, 167 F. Supp.2d 878 (W.D. Va. 2001), app. pending while awaiting response to cert. questions to Va. Supreme Court 317 F.3d 413 (4<sup>th</sup> Cir. 2002); American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

The cases cited on page 18 and 19 of the Opinion as supporting a more limited scope of relief are inapposite. Board of Trustees v. Fox, 492 U.S. 469 (1989) was a case involving a First Amendment challenge by students at SUNY Cortland against a regulation that prohibited commercial enterprises in the dormitory. The students desired to put on Tupperware parties. The case had been remanded by this Court to the district court for a determination whether the statute was valid as applied. The students also contended that the statute was overbroad in terms of applying to certain categories of non-commercial speech. The Supreme Court held that it was inappropriate to proceed to an overbreadth issue before determination of the validity of the “as applied” challenge regarding commercial speech, both a jurisprudential matter and because the students had not filed a cross-petition for certiorari. The Supreme Court did not state a rule of generally staying away from overbreadth

determination if possible. Rather, it stated that when there was an “as applied” challenge, that should be determined first. Nor did the Supreme Court state that the overbreadth issue should not be considered after the “as applied” determination had been made. As we have pointed out above, the present case is not an “as applied” challenge, and therefore the Fox discussion does not apply.

Similarly, the language in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) does not support limiting the injunction here. The sentence quoted in the Court’s Opinion on page 18, lines 19 through 23, deals with whether a court must strike the entire statute, or may limit the invalidation to that portion which is unconstitutional. See, Reno v. ACLU, 521 U.S. 882, 884 (1997). Appellees concede that rather than striking Section 2802a in its entirety, in accordance with Brockett the injunction on its enforceability should be limited to Internet communications.

Finally, the reference to Reno v. ACLU, is also inapposite. Reno, like this case, was not an “as applied” challenge. In the portion of the decision quoted by this Court, the Supreme Court is saying that even if it were an “as applied” challenge, “. . . given the vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute,” it would not “be practicable to limit our holding to a judicially defined set of specific applications.” 521 U.S. at 83. When, in the challenge to the Child Online Protection Act — a federal statute also regulating harmful to minors

material on the Internet — the United States government argued that relief should be limited to the plaintiffs in the case, the court denied the request, stating,

The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. See ACLU v. Reno, 929 F. Supp. 824, 883 (1996); Virginia v. American Booksellers Association, 484 U.S. 383, 392 (1988) (noting that in the First Amendment context, “litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression”) (internal quotations omitted).

ACLU v. Reno, 31 F. Supp.2d 473, 499 fn.7 (E.D. Pa. 1999), aff’d 217 F.3d 162 (3d Cir. 2000), reversed and remanded on other grounds sub nom. Ashcroft v. ACLU, 122 Sup. Ct 1700 (2002).

Similarly, we note that both the Supreme Court and this Court have repeatedly, in situations such as this, authorized injunctions not limited to the plaintiffs. See, e.g., U.S. v. Playboy Ent. Group, Inc., 529 U.S. 803 (2000) (challenge by single cable company; enforcement generally enjoined); Ashcroft v. Free Speech Coalition, 122 Sup. Ct. 1389 (2002); Velazquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999), aff’d 531 U.S. 533 (2001).

It is thus clear that the precedents do not support, in a pre-enforcement challenge such as this, limiting the relief to the plaintiffs.

Nor would it make any sense. The chilling effect of the unconstitutional impact of Section 2802a applies to all Internet speakers. To require others to relitigate the issue is both an unconstitutional burden on those speakers, and inefficient and burdensome on the courts. To leave them in limbo is equally chilling and abhorrent to the protection granted by the First Amendment.

**II. Even If First Amendment Jurisprudence Supported Limiting The Scope Of The Injunction To Protect Only Appellees, Their Users and Members, Were Appropriate When, As Here, A Statute Violates The Dormant Commerce Clause, It Must Be Stricken Without Any Such Limitation**

This Court found that Section 2802a is “a per se violation of the dormant Commerce Clause.” Opinion, p. 16, lines 13-14. Having so found, it is inappropriate to limit the relief from that unconstitutionality “to plaintiffs internet speech.” Id., line 18. As the Court states, “in practical effect, Vermont ‘has projected its legislation into other States, and directly regulated commerce therein,’ in violation of the dormant Commerce Clause.” Id., p. 16, lines 14-16. Appellees have not found any concept of an “as applied” challenge to a statute based on violation of the dormant Commerce Clause; and, in any event, that was not the basis of plaintiffs’ claim in this case. In each of the dormant Commerce Clause cases cited by the Court, relief was general — applying to all those in interstate

commerce — rather than specifically to those making the challenge.

[CITATIONS OF OTHER CASES.]

## CONCLUSION

By reason of the foregoing, Appellees respectfully urge this Court to confirm and rule that the scope of the injunction granted below should only be limited to the extent that it is limited to the application of Section 2802a to Internet communications.

Dated: New York, New York  
September 10, 2003

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on \_\_\_\_\_, 2003, two copies of the foregoing Appellees' Petition for Rehearing by the Panel and Memorandum in Support Thereof were deposited in the U.S. Mail, postage prepaid, addressed to opposing counsel of record:

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