No. 08-1449

In the Supreme Court of the United States

CONNECTION DISTRIBUTING CO., ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
THOMAS M. BONDY
ANNE MURPHY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 2257 of Title 18 of the United States Code requires producers of certain sexually explicit images to verify that individuals shown in the images are at least eighteen years old and to maintain records verifying those individuals' ages. The question presented is whether Section 2257 violates the First Amendment, either on its face or as applied to petitioner Connection Distributing Company's "swinger" magazines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Case—Continued: Page

Constitution, statutes and regulations:

Miscellaneous:

In the Supreme Court of the United States

No. 08-1449

CONNECTION DISTRIBUTING CO., ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-103) is reported at 557 F.3d 321. The order of the court of appeals granting en banc review (Pet. App. 106-107) is unreported. The opinion of the court of appeals panel (Pet. App. 108-171) is reported at 505 F.3d 545. The opinion of the district court (Pet. App. 172-196) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. The petition for a writ of certiorari was filed on May 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, the Attorney General's Commission on Pornography found that pornography producers who depict sexually explicit conduct "are looking for models [who] look as young as possible." 1 Attorney General's Commission on Pornography, U.S. Dep't of Justice, *Final Report* 855 (July 1986) (citation omitted). Because the pornography industry's appetite for youth poses a significant risk of child exploitation, the Commission recommended that "Congress should enact a statute requiring the producers, retailers or distributors of sexually explicit visual depictions to maintain records containing * * * proof of performers' ages." *Id.* at 618 (emphasis omitted).

In 1988, Congress adopted the Commission's recommendation, enacting 18 U.S.C. 2257, the provision challenged in this case. Section 2257 establishes a comprehensive recordkeeping system for verifying the age of performers used in the pornography industry. In its current form, the statute provides that all producers of photographs, digital images, videotapes, books and magazines containing visual depictions of "actual sexually explicit conduct * * * shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction." 18 U.S.C. 2257(a)(1) and (b). Those records must contain the names (including aliases) and dates of birth of persons shown in the depictions, and each performer's age must be established "by examination of an identification document containing such information." 18 U.S.C. 2257(b)(1). The required records must be maintained at the producer's business premises or as elsewhere permitted by regulations promulgated by the Attorney General, and must be made available "to the Attorney Gen-

eral for inspection at all reasonable times." 18 U.S.C. 2257(c). Each copy of covered material must display a statement describing where the age records are kept. 18 U.S.C. 2257(e)(1).

Section 2257 covers only actual images of actual human beings engaging in actual sexually explicit conduct. Specifically, the statute requires age verification for performers shown engaging in "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal" sex, "bestiality," "masturbation," "sadistic or masochistic abuse," or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A)(i)-(v); see 18 U.S.C. 2257(h)(1). Producers of such images must create and maintain the records showing proof of age. 18 U.S.C. 2257(h)(2)(A)(i)-(iii).

The Attorney General's implementing regulations, 28 C.F.R. Pt. 75, distinguish between "primary" and "secondary" producers. A primary producer "actually films, videotapes, or photographs the visual depiction of actual sexually explicit conduct," and a secondary producer "produces, assembles, manufactures, publishes, duplicates, reproduces or reissues" the material containing the depictions. 28 C.F.R. 75.1(c). Only primary producers must examine an individual's original identification documents. Secondary producers, who do not themselves create a covered visual depiction, may satisfy their recordkeeping obligations by accepting from the primary producer "copies of the [required] records."

28 C.F.R. 75.2(b).[1] The penalties for violating Section 2257 include fines and imprisonment, with a maximum sentence of five years for a first offense. 18 U.S.C. 2257(i).

2. Petitioner Connection Distributing Company (Connection) publishes and distributes "swinger" magazines. Pet. App. 6-7. Connection's publications allow individuals and couples to arrange sexual encounters by placing and responding to advertisements for sex. *Id.* at 7. Most advertisers submit photographs for publication that "depict the featured individuals in graphic detail" and "exhibit * * * the individuals' preferred sexual practices." *Ibid.* Thus, a "typical photograph * * * portrays either just a featured body part or the full [unclothed] body with the face cropped or blocked out." *Ibid.* Readers respond to advertisements by writing to Connection or using a 900-number service. Connection charges a fee to forward each response to the advertiser. *Id.* at 7-8. Although not at issue here, Connection also runs an online Internet service. *Id.* at 20.

3. Connection filed this action and sought a preliminary injunction in 1995, seeking to prevent enforcement of Section 2257 on the ground that the statute violates the First Amendment both on its face and as applied. The district court denied injunctive relief. Pet. App. 252-264.

---

[1] Petitioner refers (Pet. 2 n.1) to *Sundance Assocs. Inc.* v. *Reno*, 139 F.3d 804 (10th Cir. 1998), which concluded that the regulations defining "producer" were inconsistent in part with an earlier version of Section 2257. *Id.* at 810. Since that decision, however, Congress has amended Section 2257 to address those concerns. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 502(a)(4), 120 Stat. 625.

The court of appeals affirmed. Pet. App. 217-251. It held that Connection had failed to establish a substantial likelihood of success on its First Amendment challenges. *Id.* at 250. The court reasoned that Section 2257's age verification and recordkeeping requirements are content-neutral regulations and thus subject to intermediate scrutiny. *Id.* at 235-237. They survive such scrutiny, the court explained, because they "do not prohibit the sexually explicit speech at issue or unduly burden the opportunity of [petitioner] and its readers to engage in the expression." *Id.* at 240. Finally, the court rejected Connection's claims that Section 2257 constitutes a prior restraint and that it violates the associational rights of Connection's readers. *Id.* at 246-250. This Court denied a writ of certiorari. 526 U.S. 1087 (1999).

4. On remand, the district court granted the government's motion for summary judgment. Pet. App. 200-215. In an unpublished opinion, the court of appeals reversed and remanded to allow the district court to consider the effect, if any, of this Court's recent decisions in *Watchtower Bible & Tract Soc'y of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002); *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002); and *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). Pet. App. 197-199.

5. a. On remand again, the district court permitted additional discovery. Connection amended its complaint to add new "John Doe" plaintiffs, who wish to publish sexually explicit photographs of themselves without pro-

viding the magazine with the records required under Section 2257.[2] Pet. App. 9.

The district court then affirmed its earlier ruling. Pet. App. 172-196. It analyzed not only the four decisions of this Court identified by the court of appeals, but also other intervening decisions of this Court—and concluded that those decisions supported its earlier holding that Section 2257 is constitutional. *Id.* at 181-188. The district court therefore denied petitioners' motion for a preliminary injunction and granted the government's motion for summary judgment. *Id.* at 195.[3]

b. A panel of the court of appeals reversed. Pet. App. 108-171. The panel majority interpreted Section 2257 to apply to all production of sexually explicit images, not simply the production of such images for commercial purposes. *Id.* at 118-123. According to the panel majority, Section 2257 requires age verification records even when a private couple creates images of intimate activity for private use. *Id.* at 118. Thus construed, the panel majority invalidated Section 2257 in its entirety as facially overbroad. *Id.* at 142-147. Judge Moore concurred because she also would have declared Section 2257 unconstitutional as applied to petitioners. *Id.* at 148-159. Judge McKeague concurred in part and dissented in part because he would have severed portions of Section 2257 and thus avoided a finding of overbreadth. *Id.* at 160-171.

c. The court of appeals granted the government's petition for rehearing en banc. Pet. App. 106-107. Over

---

[2] Both the individual plaintiffs and Connection are petitioners before this Court.

[3] The district court also held that petitioner's Internet service is not subject to Section 2257. Pet. App. 193. The government did not appeal that determination, which accordingly is not before this Court.

dissents by six judges, the en banc court held that Section 2257 is consistent with the First Amendment, both as applied and on its face. *Id.* at 1-103.

i. The en banc court first rejected petitioners' as-applied challenge. The court held that Section 2257 is subject to intermediate scrutiny, because it is a content-neutral regulation that "addresses the collateral or 'secondary effects' of the expression," *i.e.*, the "scarring impact on the children exploited in its production." Pet. App. 11. Unlike with content-based restrictions on speech, the court reasoned, "Congress singled out these types of pornography for regulation not because of their effect on audiences but because doing so was the only way to ensure that its existing ban on child pornography could be meaningfully enforced." *Ibid.*

The court held that Section 2257 satisfies intermediate scrutiny, because it advances the government's compelling interest in protecting children in a reasonably tailored way. Pet. App. 13. According to the court, Section 2257 ensures that both primary and secondary producers satisfy themselves that individuals shown in sexually explicit images are at least 18 years old; it prevents children from trying "to pass themselves off as adults," *ibid.*; and it establishes a "compliance system" that allows law enforcement officials to verify the age of persons shown in sexually explicit images without the need for "subjective disputes * * * over whether a model's *apparent* age should have triggered an age verification check," *ibid.*

The court concluded that Section 2257's age-verification requirements do not impose an undue burden on advertisers' interests in engaging in anonymous expression. Petitioner Connection itself requires advertisers in its magazines to provide their names and addresses.

Pet. App. 14. In any event, such information is not made available to the public, and is made available to the government only on request. *Id.* at 14-15. The court rejected Connection's argument that it should not be required to maintain records for older customers, because "it could not do so without injecting an ineffectual subjectivity into the proof-of-age requirement and without effectively delegating enforcement of this critical issue to the industry being regulated—two of the problems Congress permissibly sought to avoid." *Id.* at 16. Moreover, the court stated that "[a] brief glance at one of the issues of the magazine included in the record reveals many images (particularly the frequent depiction of mere body parts) from which no lay observer could readily discern the individuals' ages, * * * as well as a number of images that appear (and in some cases purport) to portray youthful individuals." *Id.* at 17 (internal citations omitted).

ii. The en banc court also rejected petitioners' facial challenge. It held that the record in this case provided no basis for finding Section 2257 overbroad. With respect to petitioners' overbreadth argument that the statute could apply to a magazine for older adult models who are "clearly and visibly not minors," the court held that any overbreadth was not substantial because petitioners had failed to introduce "any evidence that this third-party situation even exists." Pet. App. 27. Moreover, the court reasoned, "[Section 2257] is constitutional as applied to Connection and the individual plaintiffs, and Connection does not dispute, and indeed all but concedes, that the law would be constitutional in most other settings." *Id.* at 28.

With respect to the panel's further overbreadth argument that the statute could apply to private, noncom-

mercial production, the court stated that there is "no record, and therefore no context, for assessing the *substantiality*" of such a concern. Pet. App. 32. The reason for the lack of a record, the court explained, is that "during the twenty years that § 2257 has been in existence, it has never been enforced in this setting." *Id.* at 32-33. Moreover, the government has taken the view—both in this litigation and in the implementing regulations—that Section 2257 applies only to sexually explicit images for sale or trade. *Id.* at 33 (quoting 73 Fed. Reg. 77,456 (2008)). The court concluded that it was "being asked to invalidate a law in its entirety based on a worst-case scenario that, to our knowledge, has never occurred, that may never come to pass and that has not been shown to involve a materially significant number of people." *Id.* at 36.

iii. Judge Kennedy, joined by five other judges, dissented on the ground that Section 2257 is overbroad because it chills the sexual expression of private couples in their own homes. Pet. App. 43-78. She also would have held Section 2257 "unconstitutional as applied to Connection and its advertisers for the simple, uncontroverted fact that the vast majority of swingers, Connection subscribers, and Connection advertisers are over the age of 21." *Id.* at 77-78. Judge Moore, joined by two other judges, dissented on the ground that strict scrutiny should govern petitioners' as-applied challenge, but that under intermediate scrutiny Section 2257 burdens substantially more expression than necessary. *Id.* at 79-91. Judge Clay dissented to explain why his original opinion denying preliminary injunctive relief was no longer controlling in his view. *Id.* at 92-97.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue (at 18-20) that the en banc court's as-applied holding warrants this Court's review. The en banc court, however, correctly held that Section 2257 is constitutional as applied to Connection's magazines. Not only is there no conflict among the courts of appeals on this issue, but as the en banc court recognized, Section 2257 "has withstood every as-applied First Amendment challenge to the law by the real people and businesses to whom it most naturally has been applied over the last twenty years." Pet. App. 36. For instance, in *American Library Ass'n* v. *Reno*, 33 F.3d 78 (1994) (*ALA*), the District of Columbia Circuit rejected a broad pre-enforcement challenge to Section 2257 brought by trade associations including pornography producers, *id.* at 87, and this Court denied a writ of certiorari, 515 U.S. 1158 (1995). See *Free Speech Coal.* v. *Gonzales*, 406 F. Supp. 2d 1196, 1207 (D. Colo. 2005) (upholding Section 2257 as constitutional).

a. Contrary to petitioners' assertion (at 26-27), the en banc court correctly held that Section 2257 is subject to intermediate First Amendment scrutiny. The record-keeping statute is content-neutral because it is "*justified* without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added); see *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); cf. *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 440-441 (2002) (plurality opinion) (declining to revisit "secondary

effects" analysis); *id.* at 448-449 (Kennedy, J., concurring in the judgment). As the en banc court put it, "[s]o long in other words as the law addresses the collateral or 'secondary effects' of the expression, not the effect the expression itself will have on others, it will be treated as content neutral." Pet. App. 10-11.

Measured under that standard, Section 2257 is content-neutral. As petitioners have acknowledged, Congress's "'unanimous concern' in enacting the provision was to deter the production and distribution of child pornography." Pet. App. 11 (quoting Pet. C.A. Br. 6). Thus, Congress did not single out images showing sexually explicit conduct in Section 2257 because of any message the expression conveys; "rather, the [recordkeeping requirements] are designed to deter the exploitation of children and to facilitate the identification of performers depicted in sexually explicit materials." *ALA*, 33 F.3d at 86. In short, the recordkeeping requirements apply to sexually explicit images "not because of any concern over the thoughts [those images] might convey, but because the evil the law was designed to address—the use of underage performers—has its locus in the speech's production." *Id.* at 87.

Moreover, Section 2257 does not ban any sexually explicit images. As long as producers of sexually explicit depictions comply with the statute's recordkeeping and disclosure provisions, they are free to express any message they want. See Pet. App. 10 ("Instead of suppressing these categories of expression, Congress chose to regulate the records of those creating and distributing sexually explicit images."); *id.* at 19. Section 2257 regulates only the manner in which the images are produced, to combat the use of underage performers. Petitioner does not point to any decision, including of this Court or

of any court of appeals, holding that Section 2257's recordkeeping requirements are content-based rather than content-neutral.

b. The en banc court also correctly held that Section 2257 satisfies intermediate scrutiny. Under this Court's decision in *Ward*, Section 2257 satisfies such scrutiny "if it advances a 'substantial' government interest, if [it] does not 'burden substantially more speech than is necessary' and if [it] leaves open 'ample alternative channels for communication.'" Pet. App. 13 (quoting *Ward*, 491 U.S. at 791, 799-800). Like the District of Columbia Circuit in *ALA*, the en banc court in this case concluded that Section 2257 furthers the government's compelling interest in preventing the sexual exploitation of children. See *ibid.*; *ALA,* 33 F.3d at 88-89. Petitioners do not contend otherwise.[4]

Petitioners do argue that Section 2257 burdens substantially more expression than necessary, because "the vast majority of those depicted in Connection's magazines were adults." Pet. 19. That factual question, however, does not merit this Court's attention. Indeed, as the en banc court pointed out, many of the photographs published in Connection's magazines show nothing more than body parts (usually the subject's genitalia), from which it is impossible to determine the age of the person shown. Pet. App. 17. And the court identified "a num-

---

[4] Petitioners likewise do not argue that they lack ample alternative avenues for communicating sexually explicit messages. The government did not appeal the district court's determination that Section 2257 does not apply to Connection's Internet service, see Pet. App. 193, and thus the en banc court correctly recognized that on the facts of this case "Connection's Internet service provides an independent channel of communication," *id.* at 20.

ber of images that appear (and in some cases purport) to portray youthful individuals." *Ibid.*

Those circumstances only highlight that in a forum where age cannot be gauged based upon the images themselves, Congress did not unnecessarily burden expression in requiring age verification for all people shown in Connection's magazines. Pet. App. 17-18. Without universal age verification, "even the most earnest and law-abiding peddler of pornography" would be unable to "verify that its images depict adults rather than minors." *Id.* at 18. As a result, requiring Connection and its subscribers to comply with Section 2257 does not burden more expression than is necessary to advance Congress's pressing aim of ensuring that individuals shown engaging in actual sexually explicit conduct are not minors.

2. Petitioners also contend (at 21-26) that the en banc court's facial overbreadth holding warrants this Court's review. Before that court, the case involved two overbreadth arguments: the first, raised by petitioners, is that the statute is overbroad because it requires age verification for older adults; and the second, raised sua sponte by the panel majority, is that the statute is overbroad because it applies to couples in their own homes. The en banc court correctly held that neither argument has merit.

a. The en banc court first concluded that petitioner had failed to show substantial overbreadth on the ground that Section 2257 applies to sexually explicit pictures showing adults. Pet. App. 27. The court pointed out that "there is little basis for dispute that Section 2257 complies with the First Amendment in most settings" involving actual pornography. *Id.* at 28. Even petitioners did not disagree that Section 2257 could con-

stitutionally be applied to sexually explicit pictures showing young people, and the record contains unrebutted evidence that "when people buy or share pornography, they typically do so with respect to publications or movies involving the young." *Ibid.*

On those facts, the court concluded that even if Section 2257 might be unconstitutional as applied to particular sexually explicit materials depicting only mature adults, any such overbreadth is not substantial in light of the statute's wide range of constitutional applications. Pet. App. 27. The court noted that petitioners had "not pointed [it] to any * * * magazine or book [showing only obviously mature adults] and ha[d] not introduced any evidence showing that this third-party situation even exists." *Ibid.* Absent any evidence that Section 2257's alleged overbreadth is "*substantial* . . . relative to the statute's plainly legitimate sweep," the court properly declined to invalidate the entire statute. *Ibid.* (quoting *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008)).

b. Similarly, the en banc court found no basis for concluding that Section 2257 is substantially overbroad on the ground raised sua sponte by the panel. The panel majority interpreted Section 2257 to require a couple making sexually explicit images for private use to keep age verification records. As the en banc court explained, however, the record is "utterly barren" on the practical impact of such a broad reading, Pet. App. 32, because "during the twenty years that § 2257 has been in existence, it has never been enforced in this setting," *id.* at 32-33. And because the government has taken the position—both in this litigation and in the implementing regulations—that Section 2257 does not apply in such a situation, there is no realistic possibility that the statute

would be enforced against the production of sexually explicit images that are not for sale or trade. The court thus held that petitioners had failed to establish any real and substantial overbreadth on that rationale. *Id.* at 35.

The en banc court's reasoning is correct and does not conflict with any decision of this Court or of any other court of appeals. As this Court recently explained in *Williams*, the overbreadth doctrine "strikes a balance between competing social costs." 128 S. Ct. at 1838. Although overbroad laws that deter constitutionally protected speech may "inhibit[] the free exchange of ideas, * * * invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects" as well. *Ibid.* This Court reaffirmed in *Williams* that overbreadth comes into play only where the statute's overbreadth is "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.*

Accordingly, a plaintiff challenging a statute as facially overbroad must establish "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11 (1988) (quoting *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). A plaintiff establishes a "realistic danger" of First Amendment chill by showing "from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." *Id.* at 14. Thus, in *New York State Club Ass'n*, plaintiffs brought a facial overbreadth challenge to a local antidiscrimination law, but this Court rejected that challenge because "[n]o record was made" showing the actual effect of the law on

the regulated industry. *Ibid.*; see *Taxpayers for Vincent*, 466 U.S.at 802 (concluding from the factual record that plaintiffs had "failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court").

The en banc court of appeals properly applied those principles. As in *New York State Club Ass'n*, it declined to invalidate a federal statute on a record "utterly barren about whether some, many, indeed any, American couples" would be affected by the proffered reading of Section 2257, "and, if so, in what ways." Pet. App. 32. The record before the en banc court contained unrebutted evidence that the "vast majority" of applications of Section 2257 fall within the statute's legitimate sweep, because pornography ordinarily shows young performers. *Id.* at 28. Petitioners "offer[ed] no argument, much less proof, that there are a meaningful number of individuals who would be adversely affected" by that hypothetical application of Section 2257. *Id.* at 34.

Although petitioners provide (at 22) a list of hypothetical images that they argue would be protected expression to which Section 2257 could not constitutionally apply, they neither explain why Section 2257 and its implementing regulations would apply to such materials, nor contend that any such images actually exist. Petitioners also do not address the en banc court's conclusion that, under these circumstances, as-applied challenges to Section 2257—challenges that petitioners themselves recognize are "the basic building blocks of constitutional adjudication," Pet. 20 (quoting *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007), and Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328

(2000))—present the appropriate mechanism for dealing with any possible unconstitutional applications of the statute. See Pet. App. 36-37.

3. Finally, petitioners incorrectly assert that the en banc court's decision is inconsistent with this Court's decisions in *Watchtower Bible & Tract Soc'y of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002) (*Watchtower*), and *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). The statute at issue in *Free Speech Coalition* banned outright the possession of images that *appeared* to show minors. See *id.* at 258. Here, by contrast, Section 2257 bans no expression at all, and regulates the production of sexually explicit images only to ensure that the images do not depict minors. As the en banc court explained, "[t]he proper analogy to this case thus is * * * a law that requires the producers of apparent child pornography to keep their production records to ensure that actual child pornography was not involved." Pet. App. 21. "Nothing in *Free Speech Coalition* suggests that such a law would be invalid." *Ibid.*

Nor does the decision below conflict with *Watchtower*. The ordinance at issue in *Watchtower* required all canvassers, including Jehovah's Witnesses and political candidates, to register with the government before they could go door to door. See 536 U.S. at 154. In contrast, Section 2257 "affects only a narrow category of speech," and only for the limited purpose of preventing the production of child pornography. Pet. App. 21. And while the registration records in *Watchtower* were open to the public, 536 U.S. at 167, the records required under Section 2257 are not publicly available; rather, they are supplied only to Connection, which in turn must make them available to the Attorney General for inspection if necessary. See Pet. App. 21-22. Moreover, Con-

nection's argument in favor of anonymous expression is considerably weakened on the facts of this case, because its subscribers have already taken actions entailing a substantial loss of anonymity. They have provided to Connection "sexually explicit pictures of themselves with identifying names and addresses," to identify themselves to potential sex partners. *Id.* at 14-15. Such public and graphic solicitation is far removed from the sort of anonymous expression that historically has benefited from special First Amendment protection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
THOMAS M. BONDY
ANNE MURPHY
Attorneys

AUGUST 2009