No. 98-1156

In the Supreme Court of the United States

OCTOBER TERM, 1998

CONNECTION DISTRIBUTING CO., PETITIONER

v.

JANET RENO, 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

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QUESTION PRESENTED

Whether Congress has the power to combat child pornography by requiring the publishers of magazines containing pictures of people engaged in sexual acts to create and maintain records of the name and date of birth of each performer depicted in such pictures.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 154 F.3d 281. The opinions of the district court (Pet. App. 31-41, 43-46, 48-50) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 13, 1998. A petition for rehearing was denied on October 22, 1998. Pet. App. 52. The petition for a writ of certiorari was filed on January 19, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The statute at issue in this case, 18 U.S.C. 2257, requires all producers of matter containing visual depictions of "actual sexually explicit conduct" to create

and maintain records of the names and dates of birth of the performers portrayed in the depictions. 18 U.S.C. 2257(a) and (b). The statute requires that the records be maintained at the producer's business premises or elsewhere as permitted by regulations, and that the records be made available "to the Attorney General for inspection at all reasonable times." 18 U.S.C. 2257(c). The statute also requires producers to affix to each copy of material covered by its provisions a statement describing where the required age verification records may be located. 18 U.S.C. 2257(e)(1).

The statute's requirements apply to those directly involved in the production of the most "hard-core" sexually explicit images. Thus, the term "produces" is defined to mean "produce, manufacture or publish"; it includes "duplication, reproduction or reissuing," 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). In addition, the statute applies only to depictions of "actual sexually explicit conduct," which are limited to four specific types of actual (not simulated) sexual conduct: (1) "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal" sex; (2) "bestiality"; (3) "masturbation"; and (4) "sadistic or masochistic abuse." 18 U.S.C. 2257(h)(1) (incorporating definitions contained in 18 U.S.C. 2256(2)(A)-(D)).

The statute generally provides that no information or evidence obtained from the records shall be used "directly or indirectly" as evidence against any person with respect to any violation of law. 18 U.S.C. 2257(d)(1). The records may be used as evidence only in a prosecution for a violation of Section 2257 itself, "or for a violation of any applicable provision of law with

respect to the furnishing of false information." 18 U.S.C. 2257(d)(2). Persons violating Section 2257 are subject to fines and imprisonment of up to two years for the first offense, and up to five years (but not less than two) for succeeding convictions. 18 U.S.C. 2257(i).

Pursuant to the express authorization contained in 18 U.S.C. 2257(g), the Attorney General has issued regulations that further define the scope and operation of the statute. See 28 C.F.R. Pt. 75. The regulations make clear that only "primary producers"—that is, producers who actually film, videotape, or photograph a covered visual depiction—are required to examine a performer's original identification documents. 28 C.F.R. 75.1(c)(1), 75.2(b). Secondary producers may satisfy their recordkeeping obligations by accepting "copies of the [required] records" from the primary producer. 28 C.F.R. 75.2(b). The regulations also clarify that producers covered by the statute do not include persons whose activities are limited to distribution or photo processing. 28 C.F.R. 75.1(c)(4).

2. Petitioner Connection Distributing Co. publishes and distributes "personal contact" magazines and pamphlets. Pet. App. 3. Petitioner's publications allow individuals and couples to arrange sexual encounters with one another by placing and responding to advertisements for sex. *Ibid.* Those advertisements include detailed descriptions of subscribers' bodies, their sexual tastes, and the types of sexual encounters they seek. *Ibid.* Most of the advertisements include photographs of the people who place them, and in some of those photographs the subscribers are shown engaging in sexual activity. *Ibid.*

In at least one of petitioner's sexually explicit magazines, individuals' addresses are printed underneath their advertisements so that persons interested in

pursuing a sexual encounter can respond to the advertiser directly. See Pet. App. 3. For the most part, however, people seeking sexual partners by advertising in petitioner's magazines identify themselves through a code that appears at the beginning of the text of each message. *Ibid.* Readers respond to advertisements by writing to petitioner, which charges a fee to forward each response to the advertiser. *Ibid.*

3. In September 1995, petitioner filed suit in the United States District Court for the Northern District of Ohio, seeking a temporary restraining order and a preliminary injunction against application of the recordkeeping requirements to its publications. The district court denied the motion for a temporary restraining order the following month, holding that petitioner had failed to establish a substantial likelihood of success on the merits. Pet. App. 48-50. The court subsequently denied petitioner's motion for a preliminary injunction. *Id.* at 31-41. The court observed (*id.* at 39) that the recordkeeping provisions had been upheld against a similar constitutional attack in *American Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 515 U.S. 1158 (1995) (*American Library*), and it concluded that "[n]othing in the evidence leads this Court to conclude that this decision should be distinguished" from the situation presented in *American Library*. Pet. App. 39.[1]

4. The court of appeals affirmed. Pet. App. 1-30. The court first observed that "[t]he government's goal of preventing child pornography through the recordkeeping provisions of the Act clearly is not an attempt to regulate the speech of [petitioner] and its advertisers

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[1] The district court did, however, grant petitioner's motion for an injunction pending appeal. Pet. App. 43-46.

because of disagreement with the messages they convey." Pet. App. 17. Rather, the court stated, "because [the Act] is directed at curbing the secondary effects of the speech and not the speech itself, it is proper to deem it content-neutral for First Amendment purposes." *Id.* at 17-18. Petitioner contended that "the vast majority of its advertisers are well over the age of majority," and that application of the recordkeeping requirements to its publications therefore would not further the governmental interest in preventing sexual exploitation of minors. *Id.* at 19. The court of appeals rejected that argument, noting that any exception to the recordkeeping requirements based on the "obvious" maturity of the persons depicted "would attach an ineffectual subjectivity to the age determination." *Ibid.* The court further observed that "to satisfy the narrow tailoring requirement of the intermediate scrutiny test" – the standard applicable to content-neutral regulations having an incidental impact on speech—"a regulation need not be the least speech-restrictive means of achieving the government's interests." *Id.* at 20. The court also determined that the recordkeeping requirements have no impermissible chilling effect on speech because the requirements do not contemplate any disclosure of advertisers' identifying information to the public, and therefore do not create any genuine risk that individual advertisers will become known through petitioner's compliance with the statute. *Id.* at 21-22.

The court of appeals also rejected petitioner's argument that the recordkeeping statute left it with inadequate alternative avenues for communication. Pet. App. 23-26. The court pointed out that individuals remain free to submit photographs to petitioner and have them published anonymously, provided that they also submit evidence of their age. *Id.* at 24. The court

explained that "[t]his condition of entry to this forum for anonymous, sexually explicit speech does not destroy the forum." *Ibid.* To the extent that subscribers will "be less likely to engage in this form of expression because of the fear of disclosure," the court observed, "this unsubstantiated fear, and not the [statute], is what is diminishing the forum." *Id.* at 25. The court also noted that numerous avenues of communication for sexually explicit messages remain open to subscribers who do not wish to submit evidence of age, including photographs of simulated sex or nudity, text-only messages, voice mail, and the Internet. *Id.* at 25-26.

The court also held that the recordkeeping provisions do not operate as a prior restraint because "[petitioner] and its subscribers are not being forbidden from engaging in expressive activity in the future, but rather they potentially are being subjected to sanctions *following* their expressive activity." Pet. App. 26. Finally, the court rejected petitioner's claim that Section 2257 violated its subscribers' rights to freedom of association. *Id.* at 27-28. The court held that the recordkeeping provisions did not significantly hinder association rights because "readers still may associate freely and anonymously by submitting numerous types of messages and pictures for publication without providing documentation of name or age." *Id.* at 29. Because the court of appeals concluded that petitioner had failed to establish a likelihood of success on the merits of its case, it affirmed the district court's denial of the preliminary injunction. *Id.* at 29-30.

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 not warranted.

1. As the court of appeals recognized (Pet. App. 23-25), the recordkeeping requirements at issue in this case do not interfere with the right of petitioner or its subscribers to engage in anonymous communication. Recordkeeping and disclosure requirements are a traditional and accepted means of government regulation. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 68 (1976) (per curiam) (upholding federal statutory provisions requiring the disclosure of certain campaign-related expenditures because the disclosure "directly serve[d] substantial governmental interests"). And unlike the state law at issue in *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 338 n.3 (1995), Section 2257 does not contemplate any disclosure of information to the public. Pet. App. 24; compare *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 79-81 (1976) (upholding the constitutionality of mandatory abortion records that were accessible only to public health officers).

Petitioner's reliance on *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), is misplaced. The statute at issue in *Lamont* required the addressees of mail deemed to be "communist political propaganda" to identify themselves to the Post Office and to request delivery of such mail. *Id.* at 302. The requirements imposed by the statute were thus triggered by the content of unpopular political speech. Section 2257, by contrast, regulates sexually explicit speech not because of its content, but because "the evil the law was designed to address—the use of underage performers—

has its locus in the speech's production." *American Library Ass'n* v. *Reno*, 33 F.3d 78, 87 (D.C. Cir. 1994), cert. denied, 515 U.S. 1158 (1995). As the court of appeals correctly held, the recordkeeping statute must therefore be sustained if it is "narrowly tailored to serve a significant governmental interest, and * * * leave[s] open ample alternative channels for communication of the information." Pet. App. 18 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)).

2. The court of appeals held that Section 2257's recordkeeping requirements are narrowly tailored to serve the government's substantial interest in reducing the sexual exploitation of minors. Pet. App. 21-23. That holding is correct and is consistent with the only other appellate decision to address the question. See *American Library*, 33 F.3d at 94. The court of appeals was also correct in sustaining Congress's decision to apply the recordkeeping requirements to *all* visual depictions of the covered sexual activities, rather than only those in which the participants appear to be under the age of majority. Pet. App. 19-20. Section 2257 was adopted largely to overcome the difficulty of ascertaining a person's age through visual examination of sexually explicit photographs. As the D.C. Circuit recognized, "the entire point of the Act is to prevent subjective determinations of age by implementing a uniform procedure that applies to all performers." *American Library*, 33 F.3d at 90.

3. Section 2257 also leaves open ample alternative channels through which petitioner's advertisers may communicate their sexual messages. Pet. App. 23-26. As the court of appeals observed, petitioner's subscribers may provide their age verification information to petitioner and publish any pictures they choose, or they may use other avenues of communication—such as

pictures displaying simulated sex or mere nudity, voice mail, Internet services, or text-only messages—that do not require advertisers to verify their ages. *Id.* at 25-26.

Petitioner maintains that the application of the recordkeeping requirements to its business has "completely suppress[ed] an entire genre of constitutionally protected sexually explicit expression." Pet. 22. The court of appeals recognized, however, that public disclosure of the subscribers' identities "is neither required nor suggested by the terms of the Act." Pet. App. 24. Insofar as potential advertisers are deterred from submitting photographs due to an "unsubstantiated fear" of public disclosure, that "self-censorship" provides no basis for holding the Act unconstitutional. *Id.* at 25. The impact of Section 2257 on petitioner's subscribers is further attenuated because the advertisers voluntarily incurred the risk of disclosure by "submitting sexually explicit photographs of themselves to be published and distributed" for the express purpose of generating responses from unknown third parties, and because the advertisers freely disclosed their identities to petitioner. *Ibid.*

Petitioner also contends that the recordkeeping requirements violate the First Amendment because a constitutionally acceptable regulation of speech necessarily "allows the precise message to be communicated at some other time and place." Pet. 23. Contrary to petitioner's argument, however, this Court has sustained content-neutral regulations that affect the way in which individuals express themselves, "for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (sustaining park

regulation banning sleeping in parks, although overnight sleeping in connection with a demonstration amounted to expressive conduct); *United States* v. *O'Brien*, 391 U.S. 367 (1968) (sustaining statute that prohibited the destruction of draft cards).[2] In any event, Section 2257 does not foreclose petitioner or its subscribers from publishing any non-obscene visual depiction of sexual activity, so long as the required documentation is provided.

4. Contrary to petitioner's contention (Pet. 26-28), Section 2257 does not operate as a prior restraint on speech. As the court of appeals observed, "a prior restraint usually is alleged where a public official has been given discretionary power to deny use of a forum in advance of actual expression." Pet. App. 26. In this case, by contrast, "[petitioner] and its subscribers are not being forbidden from engaging in expressive activity in the future, but rather they potentially are being subjected to sanctions *following* their expressive activity—but only if they subsequently are found guilty of violating the record-keeping provisions." *Ibid.*

The court of appeals' analysis is correct. Section 2257 does not prohibit any type of speech: "the Act, by its terms, bans no form of expression." *American Library*, 33 F.3d at 88. If advertisers submit age verification records to petitioner, then they are free to use photographs of actual sexually explicit conduct to convey any message they choose. The statute therefore cannot be characterized as a prior restraint. See *Alexander* v.

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[2] This Court has observed that the standard for the regulation of expressive conduct set forth in *O'Brien* "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Community for Creative Non-Violence*, 468 U.S. at 298.

United States, 509 U.S. 544, 550 (1993) (declining to "obliterate the distinction * * * between prior restraints and subsequent punishments"); *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866, 877-878 (9th Cir. 1991) (requirement that adults request access to "dial-a-porn" services did not operate as a prior restraint because "[t]o trigger operation of the [prior restraint] doctrine, there must be some suppression, prohibition, inhibition, hindrance or constraint of speech"); *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991) (holding that a similar request for access placed "no restraint of any kind on adults who seek access to dial-a-porn"), cert. denied, 502 U.S. 1072 (1992).

5. The recordkeeping provisions do not violate the right of petitioner's advertisers to freedom of association. As the court of appeals observed, "readers still may associate freely and anonymously" by communicating in ways that do not require compliance with the age verification requirements. Pet. App. 29. The court correctly concluded that under the factual circumstances presented here, "the right of the readers to freely associate with like-minded persons is not infringed by the presence of a record-keeping provision that applies only to a highly specific form of expression and requires potential disclosure only to the government." *Ibid.*[3]

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[3] The associational right primarily protected under the First Amendment is the right of political association. See, *e.g.*, *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (membership in the Socialist Workers Party); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (membership in the NAACP). Petitioner's advertisers seek to associate with strangers for the purpose of having sex. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 236-237 (1990), motel owners challenged a city ordinance under which motels that rented rooms for fewer than 10 hours

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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would be deemed "sexually oriented businesses" subject to extensive regulation. They argued, *inter alia*, that "the 10-hour limitation on the rental of motel rooms places an unconstitutional burden on the right to freedom of association." *Id.* at 237. This Court rejected their claim, stating that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *Ibid.*