

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CENTER FOR DEMOCRACY & TECHNOLOGY, *et al.*,

Plaintiffs,

v.

No. 03-5051

GERALD J. PAPPERT, Acting Attorney General of the  
Commonwealth of Pennsylvania,

Defendant.

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION  
FOR DECLARATORY RELIEF AND FOR  
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

John B. Morris, Jr., Esq.  
Lara M. Flint, Esq.  
Center for Democracy & Technology  
1634 I Street, NW, Suite 1100  
Washington, D.C. 20006  
(202) 637-9800

Stefan Presser, Esq.  
Bar No. 43067  
Legal Director  
American Civil Liberties Union  
of Pennsylvania  
125 South Ninth Street  
Suite 701  
Philadelphia, PA 19107  
(215) 592-1513 ext. 116

Seth Kreimer, Esq.  
Bar No. 26102  
3400 Chestnut Street  
Philadelphia, PA 19104  
(215) 898-7447

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Plaintiffs respectfully submit this reply memorandum supporting their motion for declaratory relief and for preliminary and permanent injunctive relief.

**SUMMARY OF ARGUMENT**

The Defendant's arguments in this case can be distilled down to three points: (1) don't worry, this is only about child pornography; (2) but if it is about protected speech, don't worry because we will be careful; and (3) but if you are still worried, don't blame us because the ISPs did it. Each of these themes recurs throughout the Defendant's brief, but as detailed below, none of these (nor the Defendant's other) arguments can withstand scrutiny. What is relevant is not the label of the law (child pornography), but the law's impact on protected expression (over one million blocked web sites). The Defendant's professed good intentions do not insulate the Statute from judicial review, and in any event there are 67 other prosecutors authorized in Pennsylvania to use the law today, and prosecutors come and go (as we have recently seen). Finally, the Supreme Court has directly and squarely held that when a statute leads a third party

to make a choice (based on its own technical and economic considerations) that overly restrains speech, the statute must fail. That is the precise situation that is before this Court today.

### FACTS

The Court has received, and is about to receive, voluminous factual submissions and testimony, and Plaintiffs will not take the Court's time here to debate the factual points raised by the Defendant's brief. But one assertion made in that brief is so misleading that Plaintiffs must respond. On pages 6-7 of his Memorandum (hereafter "Defendant's Mem."), the Defendant implies that three ISPs (AOL, Comcast and WorldCom) chose "IP filtering" and two ISPs (Verizon and Epix) chose "DNS filtering" to comply with the Statute and Informal Notices. In fact, Verizon (through a third party network provider) and Epix initially utilized *both* IP filtering *and* DNS filtering, and Verizon at least is continuing to using IP filtering today.<sup>1</sup> So the scorecard shows (as far as Plaintiffs are aware and can determine):

Initial Implementation: <sup>2</sup>	IP filtering only:	5 ISPs
	Both IP & DNS:	3 ISPs
	DNS filtering only:	1 ISPs
Current Implementation: <sup>3</sup>	IP filtering only:	5 ISPs
	Both IP & DNS:	2 ISPs
	DNS filtering only:	2 ISPs

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<sup>1</sup> Verizon/LeBredo Deposition, at 36-37, 111-12; Epix/Basham Deposition, at 18-19.

<sup>2</sup> The figure for IP filtering includes AOL, Comcast, Innet.net, Pennsylvania Online, and WorldCom. CompuServe is a distinct ISP that also uses IP filtering only, but it is a subsidiary of AOL and is not separately counted above. Using both IP and DNS filtering were initially Epix, RCN Corporation, and Verizon, and using only DNS filtering was Earthlink.

<sup>3</sup> The change is that Epix moved from the "both IP and DNS" to the "DNS only" category after the IP filtering method blocked thousands of innocent web sites.

## ARGUMENT

### **I. THE ATTORNEY GENERAL CANNOT HIDE BEHIND THE ISPs TO DENY RESPONSIBILITY FOR THE BLOCKING OF MORE THAN ONE MILLION INNOCENT WEB SITES.**

The Attorney General cannot disavow responsibility for the blocking of more than one million entirely innocent web sites by pointing fingers at the ISPs. He seeks to blame the ISPs' decisions to use IP and DNS filtering as the cause of the massive overblocking of web sites, not any action of the state. But the blocking of those sites is a direct result of ISPs' attempts to comply with the statutory scheme enacted by the Pennsylvania legislature and the Informal Notice scheme developed by the Attorney General. As discussed below, the Supreme Court has made clear that responsibility for the suppression of speech lies squarely with the Statute and the Attorney General, and cannot be laid on the doorsteps of ISPs making rational decisions to protect themselves and their shareholders from criminal liability and non-mandatory expense.

#### **A. The Supreme Court's Decision in *Playboy Entertainment Group* Directly Controls This Case.**

In a strikingly similar case, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the U.S. Supreme Court found a clear First Amendment violation where – due to technical and economic feasibility concerns of third parties – the practical effect of the statute at issue was to over-restrict speech. That case is dispositive here.

In *Playboy Entertainment*, a challenge was mounted to Section 505 of the Telecommunications Act of 1996, which required that cable television operators who provide channels “primarily dedicated” to sexually oriented programming ensure that children not accidentally view their programming either by: (1) “fully scrambl[ing] or otherwise fully block[ing]” their channels, or (2) limiting the transmission of such channels to certain hours of the day (between 10 p.m. and 6 a.m.) when children would be unlikely to see it (known as “time

channeling”). *Id.* at 806. Section 505 was supposed to address the problem of “signal bleed,” where imprecise scrambling technology led to audio or visual portions of scrambled programs being heard or seen by viewers who were not supposed to receive the signal (because they had not paid for the channel). *Id.*

Due to technical and economic feasibility issues, the majority of operators – somewhere around 69 percent – chose to time channel in order to avoid liability under Section 505. *Id.* at 809. Much of the scrambling technology in use presented a risk of signal bleed, and although more effective scrambling technology was available, the Court explained that generally speaking “at present it appears not to be economical [for cable operators] to convert” to it on a systemwide scale. *Id.* at 808. Moreover, even some of the best scrambling technology available might still result in occasional signal bleed. Given the existing state of technology, the Court explained that “[a] rational cable operator, faced with the possibility of sanctions for intermittent bleeding, could well choose to time channel even if the bleeding is too momentary to pose any concern to most households.” *Id.* at 821.

Thus, the Court determined “that the only reasonable way for a substantial number of cable operators to comply with the letter of §505 is to time channel.” *Id.* at 812. As a result of that technical and economic reality, the practical effect of the statute was “a significant restriction of communication between speakers and willing adult listeners” during the day, even though the statute itself did “not impose a complete prohibition” on sexually oriented programming during the day. *Id.* at 812, 821. As the Supreme Court explained, “[t]he Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” *Id.* at 812; *see also Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (the First Amendment protects against government “inhibition as well as prohibition”). Given the law’s

significant impact on speech and the less restrictive alternatives available, the Court held that the statute violated the First Amendment.

This case's direct parallel to *Playboy Entertainment* powerfully demonstrates why the Attorney General's attempt to blame the ISPs must fail. First, the ISPs are in precisely the same position as the cable operators in *Playboy Entertainment*. Here, the Statute requires ISPs to block access to certain child pornography content, as identified by URL. Just like the cable operators in *Playboy Entertainment*, who were conduits for sexually oriented programming (not the publishers of it), the ISPs are intermediaries providing access to Internet content (not publishers of it). Nonetheless, there was no question that the publisher of the content – Playboy Entertainment – had standing to sue, even though it was not the subject of direct federal regulation. Similarly here, as discussed more fully in Section II below, CDT and the ACLU have standing even though not the direct object of the Statute and Informal Notices. *See also* Plaintiffs' Mem. at 21-22 (citing cases).

Second, the Statute and Informal Notices allow the ISPs to decide how to block web sites, just as the law at issue in *Playboy Entertainment* allowed cable operators to choose how to comply. But the ISPs' discretion is limited by cost and existing technology. Just like the majority of the cable operators in *Playboy Entertainment*, when choosing among different methods of compliance, the ISPs have acted "rational[ly]." *Playboy Entertainment*, 529 U.S. at 821. Given their financial bottom lines and the fact that they were "faced with the possibility of sanctions," *id.*, all of the ISPs chose blocking methods that would minimize their liability, without causing significant expenditures and redesign of their systems (and the vast majority have chosen the method – IP filtering – that is most self-protective, but also most speech-restrictive). Indeed, the Attorney General himself fully acknowledges that implementing

blocking methods other than IP address blocking and DNS filtering “would, today, be an additional cost and operational challenge for many ISPs.” Defendant’s Mem. at 56. That the ISPs’ decisions were clearly “rational” (if not absolutely unavoidable) is discussed in more detail in Subsection B below.

Third, the practical effect of the ISPs’ decisions has been, just as in *Playboy Entertainment*, the suppression of a significant amount of protected speech. Given the substantial *effect* on speech caused by the implementation of Section 505 in *Playboy Entertainment*, it was irrelevant to the Supreme Court that the law did “not impose a complete prohibition” on sexually oriented programming during the day. *Id.* at 821. Likewise here, even though the Statute and Informal Notices themselves do not direct the ISPs to use a particular blocking method or to block protected speech, we now know that has, in fact, been the effect of its implementation. It is that *effect* that must be evaluated under the First Amendment. Just as the Supreme Court in *Playboy Entertainment* did not allow the federal government to avoid responsibility because the cable operators (rationally) chose the more speech-restrictive compliance option, so too this Court must not allow the Attorney General to hide behind the ISPs’ similarly rational decisions. Under *Playboy Entertainment*, there can be no dispute that as a constitutional matter, it is *the Statute and the Informal Notices* that have caused millions of innocent web sites to be blocked.<sup>4</sup>

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<sup>4</sup> So, too, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court gave no weight to the fact that the threats under the Rhode Island scheme were delivered to book distributors, who in turn decided not to risk prosecution, but rather to pull the plaintiffs’ books from circulation. The Court observed, 372 U.S. at 64 n.6:

Pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied.

Furthermore, courts consistently evaluate government suppression of speech in the context of existing technical and economic feasibility. Just this year the Third Circuit struck down the Child Online Protection Act in *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir.), *cert. granted*, 124 S. Ct. 399 (2003), because the law’s prohibition on World Wide Web content that is “harmful to minors” was overbroad. The Third Circuit rejected the argument that the law’s two “safe harbors” sufficiently narrowed the overbroad effect. *Id.* at 257-61. The first affirmative defense – that the web site owner restricted access to minors by requiring a credit card or other adult identification number for individuals to access their site – overly burdened speech. And the second affirmative defense – that the web site owner restricted access to minors by accepting digital certificates that verified age – was neither “effective [n]or feasible.” *Id.* at 258 n.19. While technologically possible, no authority actually issued such digital certificates, and no other reasonable, technologically feasible alternatives were available. *Id.* Likewise here, the Statute and Informal Notices must be evaluated based on existing technology and marketplace realities. ISPs cannot be expected to rely on technology that is neither “effective [n]or feasible,” and if the only other options are overly burdensome on speech, then the Statute is unconstitutional.

Similarly, the court in *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), evaluated a state statute prohibiting the communication to juveniles over the Internet of information “harmful to minors.” The Court struck it down, explaining:

Technological advancements may, in the not-too-distant future, permit statutes similar to the one now before this court to regulate constitutionally content on the Internet. However, *given the present state of Internet technology*, it is patent that the bare application of the statute in question to the Internet would unconstitutionally interfere with the dissemination of protected speech to adults.

*Id.* at 881 (emphasis added).<sup>5</sup> Despite the fact that the statute’s burden on protected adult speech was “unintentional[□]” it violated the First Amendment. *Id.* at 884. *See also Reno v. ACLU*, 521 U.S. 844, 876 (1997) (striking down Communications Decency Act because “existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying [legal] access to adults”); *Fabulous Assocs., Inc. v. Pennsylvania Public Util. Comm’n*, 896 F.2d 780 (3d Cir. 1990) (striking down law requiring “dial-a-porn” operators to use identification access codes because, *inter alia*, as a practical matter it would cost so much to implement that the companies providing the service would simply go out of business).

In sum, the Attorney General’s finger-pointing has no basis in First Amendment jurisprudence. Under *Playboy Entertainment* and a myriad of other cases, the appropriate First Amendment analysis begins with an examination of the practical *effect* of the Statute and Informal Notices given technical and economic feasibility, and is not limited to their express directives. Here, it is undisputed that they have resulted and will continue to result in massive overblocking of innocent Internet content. As will be explained in detail below, *see* Section V, they cannot survive the First Amendment.

**B. The Actions and Choices of the ISPs are Clearly Rational.**

Under *Playboy Entertainment*, the only relevant issue is *what did the third parties do*. The third parties were confronted with a legal obligation under a statute, they complied, speech was harmed as a result, and thus if the government could have regulated with less restrictive

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<sup>5</sup> To be clear (although the Court need not resolve this question), Plaintiffs believe that the Statute would require such a fundamental redesign of the Internet – and the entire “end-to-end” model on which it is based – that it is unlikely that ISPs merely providing access to the Internet will ever be the appropriate vehicle for governments to attempt to control content on the Internet. Thus, Plaintiffs do not anticipate any near-term technical change to the Internet that would make the appropriate result in this case different in the future.

alternatives the statute must fail. The actual effect of the law at issue is what matters, and if its operation has suppressed or chilled a significant amount of protected speech, it should not survive. There is no need for the Court to second guess the third parties' decisions, nor should it attempt to divine how the third parties might have acted under a different statute or a different legal theory.

But to complete the picture, the ISPs' actions in this case were unquestionably rational. The Court need look no further than the report of the *Defendant's* expert, supplemented by a single point on which both Plaintiffs' and Defendant's experts agree. On page 13, the Expert Report of Benjamin Stern presents a table comparing the methods of compliance (IP and DNS filtering as used by the ISPs, and the new URL filtering suggested by Mr. Stern). In the table set out below, Plaintiffs summarize the table offered by the Defendant's expert,<sup>6</sup> and have added the last line of italicized material. The final italicized line of the chart reflects ¶¶ 63-67 of the Expert Report and Testimony of [Plaintiffs' expert] Mitchell Marcus (filed with the Court in early December as Exhibit 1 of the Supplemental TRO papers); in deposition, Defendant's expert Mr. Stern specifically agreed with the information reflected in the italicized line of the chart.<sup>7</sup>

The chart below reflects a simplified overview of the key factors that would confront an ISP's legal, financial, and technical corporate decision makers as they consider how to comply with an order under the Statute, and analyze the IP and DNS filtering methods (and, for completeness, the newly suggested URL filtering method, although no ISPs in fact ever seriously considered that method, for reasons that almost leap out from the chart below). (Defendant's

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<sup>6</sup> Plaintiffs have changed the table in three ways: (1) the row and columns of the table have been transposed for easier understanding; (2) two different hypothetical models of "URL filtering" have been combined into one; and (3) one hypothetical and wholly unused model of IP filtering ("using Policy Maps") has been omitted.

<sup>7</sup> Deposition of Benjamin A. Stern, Dec. 16, 2003, at 252-53.

"Contact the Host" "method" is discussed a few paragraphs below.) Those key factors are, in Plaintiffs' view: cost, ease of implementation, harmful impact on network performance, and the degree of initial effectiveness in terms of limiting potential criminal exposure under the Statute. (What is not included as a key factor is the potential liability for overblocking of protected expression. Under a federal statute, 47 U.S.C. § 230(c)(2)(A), ISPs have immunity from liability for overblocking if it is acting in good faith to restrict "objectionable" content. Thus, ISPs faces no legal risk for any method of compliance for blocking protected speech.)

<b>Filtering Technique:</b>	IP Filtering	DNS Filtering	URL Filtering
Financial Cost	Low	Low to Medium	Medium to High
Implementation Difficulty	Low	Low <sup>8</sup>	Medium to High
Performance Impact	Low	Low	Low to High
<i>Initial Effectiveness for Non-evading Customers</i>	<i>High</i>	<i>Moderate</i>	<i>High</i>

Plaintiffs' expert has and will offer his opinion that if asked by an ISP, he would recommend IP filtering as the way the ISP should minimize legal risk without undue expense. Plaintiffs suggest, however, that the Court does not need any expert to look at the chart and conclude that the decision by the great majority of ISPs to implement IP filtering was a rational one.

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<sup>8</sup> Indeed, for some ISPs, specifically including the largest ISP in the world, AOL, implementation of DNS filtering is actually impossible. See AOL Dep. at 118-19 (DNS option not available to AOL; null routing only feasible option for AOL).

And this conclusion does not change if one adds the possibility that the ISPs might have chosen to comply with blocking orders by simply "ask[ing] the host [of the content] to remove the item" *E.g.* Defendant's Mem. at 19. To be clear, as discussed in Section V, *infra*, Plaintiffs strongly believe that the "Contact the Host" method is an effective and appropriate *less restrictive alternative* that *the government* can utilize to achieve its goals far more effectively than the Statute, with virtually no risk to speech.

As detailed below, however, it is not a "method" of compliance with the Statute and cannot be used to save it. For the following reasons, it is unlikely that corporate counsel advising national and global Fortune 500 companies would conclude that "Contacting the Host" would constitute sufficient compliance with 18 Pa. Ann. Stat. §§ 7621-7630 to protect them from liability:

First, from the outset, the Defendant plainly believed that the Statute required a *technological* response. According to Joint Stipulation 32, one of the two topics of discussion at the initial meetings (in April 2002) about the ISPs' compliance with the Statute (and ultimately, the Informal Notices) was "technical methods of blocking or disabling access to sites accessible through, but not resident on, an ISP's services." The Defendant and the ISPs had extensive, repeated debates over many months about how *technologically* the ISPs were to comply. And the Defendant's belief that technological responses were required could not be more plain from the numerous internal communications making very clear that the Defendant expected the ISPs to invest significant amounts of money to "upgrade their systems."<sup>9</sup>

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<sup>9</sup> See, e.g., J. Burfette to D. Guzy, Mar. 19, 2002 ("merely an excuse not to spend the necessary money to upgrade their systems"); D. Guzy to J. Burfete, Mar. 19, 2002 ("The technology is there. The issue is that they do not want to use it."); D. Guzy to J. Burfete, Mar. 21, 2002 ("How is it that one ISP says it can be done but at a expense to the ISP and others tell us it is impossible to do?").

Second, if actually applied in hundreds of cases over more than a year, ISPs would be placed in untenable positions, in part because under both the Informal Notices and the one order under the Statute, the ISPs *never* received copies of the actual content challenged by the Defendant, and so the ISPs would have no way to discuss the request with the hosting companies (and could not respond, for example, to a question like "the content was changed this morning, and is the new content problematic?"). Moreover, because many state child pornography laws (including, for example, Virginia's, where some of the largest ISPs are based) do *not* appear to have a "judicial purpose" exception, it would be illegal for the ISP to visit the site to respond to the question.

Finally, the Statute if so construed to allow the "Contact the Host" method would border on the irrational. Drawing on the whole of discovery in this case – most importantly the actual dates and sequence of the application of the actual Statute to WorldCom – an action under such a Statute would proceed roughly as follows (measured from the point where the Office of Attorney General ("OAG") confirms the existence of child pornography):

<b>Date</b>	<b>Step</b>
7/25/02	Senior Agent Dennis Guzy confirms child pornography OAG retains Dr. Earl Greenwald to review content
9/3/02	Dr. Greenwald submits his report
9/12/02	Agent Harry Marnie signs 11 page affidavit
9/17/02	OAG files application for order Court of Common Pleas Judge enters order
9/18/02	ISP receives service of notice ISP identifies web host to contact (5 to 10 minutes) ISP contacts web host (1 to 24 hours, depending on location) Host removes child pornography

*Total approximate duration:* almost two months

This contrasts with the approach that Plaintiffs propose as a less restrictive alternative to the actual Statute:

<b>Date</b>	<b>Step</b>
Day 1	OAG confirms child pornography OAG identifies web host to contact (5 to 10 minutes) OAG contacts web host (1 to 24 hours, depending on location) Host removes child pornography

*Total approximate duration:* two hours to two days

This contrast suggests – at least to Plaintiffs – that this is highly unlikely to be what the State Legislature had in mind when it passed 18 Pa. Stat. Ann. §§ 7621-7630, and the fact that the Attorney General could place a call to a web host easily itself would suggest to a rational counsel at a major corporation that making a phone call was probably not enough.

And all of this takes place in the context of an issue – child pornography – that can be very politically effective. While Plaintiffs emphasize that child pornography has great societal harms and is a serious problem, the reality is that it also is the perfect issue for politicians – there is universal condemnation of the content, and absolutely no constituency to raise a claim. With no disrespect intended towards any of the 67 district attorneys in Pennsylvania, any corporate counsel would have to be concerned that one of those prosecutors might decide to make an example of one of those big technology companies out on the West Coast or down in Northern Virginia. And in the face of a criminal charge, the General Counsel would have to explain to the Board of Directors that after receiving a court order under a child pornography law, one of his legal staff had responded by placing a single phone call to a small web hosting company in Melbourne, Australia, with no further action taken.

Plaintiffs submit that the likely result of 18 Pa. Ann. Stat. §§ 7621-7630 and the Informal Notice system is exactly what happened: cautious corporations protecting themselves while expending as little money as possible (while incurring no civil liability). Under *Playboy*

*Enterprises*, the Court should look at the effect of those decisions on speech, apply traditional First Amendment analysis, and strike down both the Statute and the Informal Notices.

## **II. PLAINTIFFS CLEARLY HAVE STANDING TO ASSERT EACH OF THEIR CLAIMS.**

By accident or design, the Attorney General's practices and his interpretation of the law would combine to give his office censorial authority that would be completely unchecked. On the Attorney General's view, ISPs who have not received orders to remove websites would have no standing to challenge his practice, while those who have already received orders are subject to public accusations of abetting child pornography if they object. Surfers whose access to web sites is blocked might have standing in the Attorney General's world to challenge the blocking of some web sites, but in the ordinary course of events they will not be able to discover the blockage because orders are issued in secret and there is no way for potential listeners to determine which websites have been blocked. And should Pennsylvania surfers determine the identity of the blocked web sites, they would be unable to raise the interests of the owners of blocked web sites, who are unlikely to come before the court. Happily, the Attorney General's interpretation is not the law.

All three plaintiffs plainly have standing in this case. Indeed, the Attorney General concedes that the Center for Democracy and Technology (CDT) and the American Civil Liberties Union of Pennsylvania (ACLU) have standing as receivers of speech, and contests only their ability to raise the correlative rights of the speakers they want to hear – the web site owners whose content is being blocked by the Statute and Informal Notices. But it is clear that CDT and ACLU *can* assert those rights, and that the Attorney General's argument that Plantagenet, Inc., does not have standing because "it is hardly an ISP" (Defendant's Mem. at 10) is both factually and legally wrong.

**A. CDT and the ACLU Have Standing.**

As the Attorney General concedes, CDT and the ACLU have standing to assert their (and in the case of the ACLU, its members') substantive and procedural rights as Internet users whose access is restricted by the Statute and Informal Notices. *See* Plaintiffs' Mem. at 20-22 & n.12; Defendant's Mem. at 9. However, the Attorney General argues that they only have standing to challenge the blocking of web sites expressly identified in blocking orders. Under the Attorney General's theory, they do not have standing to challenge the suppression of hundreds of thousands of innocent sites caused by those orders because it was not *expressly* ordered by the state. That argument is simply wrong.

Countless cases have emphasized that individuals have standing to challenge statutes that affect their free speech rights even if the statute does not *directly* censor their speech. *See, e.g., Board of Educ. v. PICO*, 457 U.S. at 867 (students have standing to challenge removal of books from school library); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (permitting prescription drug consumers to challenge ban on advertising by pharmacists); *see also* Plaintiffs' Mem. at 21-22 (citing cases). And as explained in *Playboy Entertainment*, a court cannot put on blinders and look only at the express directive of the law at issue, but must also examine its practical effects on speech. *See* Section I, *supra*. Here, the Statute and the Informal Notices, by requiring ISPs to block access to certain web sites, have caused the suppression of hundreds of thousands of additional innocent web sites, and Plaintiffs' inability to access those sites is an injury that would clearly be redressed by striking down the Statute and declaring the Informal Notices invalid. If Playboy had standing to challenge Section 505 of the Telecommunications Act based on its burdensome effects, CDT and the ACLU *must* have standing to challenge both the express "prohibition[s]" of the Statute and Informal Notices

and the effective “inhibition[s]” that resulted from them. *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965).<sup>10</sup>

The Defendant also argues that CDT, the ACLU, and members of the ACLU do not have standing because it is very unlikely that their ISPs will receive any blocking orders under the Statute or the Informal Notice system. But the ISPs used by CDT and a great number of the ACLU’s members have *already* received scores of blocking orders under either the Statute or the Informal Notice scheme, meaning that CDT and members of the ACLU have *already* been injured. *See* Plaintiffs’ Mem. at 19-20 & n.12. Indeed, although the Attorney General attempts to ignore it, Plaintiffs at this very moment are being denied access to more than 600,000 entirely legal web sites. They plainly have standing to seek redress for that injury.

CDT and the ACLU also have standing to assert the rights of the web site owners – the speakers whose content is being blocked as a result of the Statute and Informal Notices.<sup>11</sup> Plaintiffs can assert the rights of third party web site owners under the prudential standing doctrine of “*jus tertii*,” or third party standing, and under the First Amendment overbreadth doctrine.

Once a party has established its own Article III standing in a lawsuit, as Plaintiffs have here, they can seek to raise the rights of third parties to the lawsuit. *See, e.g., Pitt News v.*

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<sup>10</sup> For these reasons, CDT and the ACLU easily satisfy any heightened causation and redressability requirements for indirect regulations set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), although it is unclear if they even apply in the First Amendment context. It is difficult to conceive of a First Amendment case brought by a listener to challenge government censorship of speakers that would not satisfy *Lujan*. The interests of listeners and speakers are so intertwined that the fact that the censorship of a speaker caused the listener’s constitutional injury would always be a certainty. *See Virginia Pharmacy Bd.*, 425 U.S. at 756 (“where a speaker exists, . . . the protection afforded is to the communication, *to its source and to its recipients both*”) (emphasis added).

<sup>11</sup> However, even without asserting the rights of web site owners, Plaintiffs’ allegations of procedural and substantive constitutional violations can be adjudicated based solely on the injuries to Plaintiffs themselves.

*Fisher*, 215 F.3d 354, 361-62 (3d Cir. 2000). Although third party standing is generally disfavored, that rule is far from “ironclad.” *Amato v. Wilentz*, 952 F.2d 742, 749 (3d Cir. 1991). To assert third party standing, plaintiffs must show that: (1) plaintiffs have suffered an actual injury giving them a sufficiently concrete interest in the outcome; (2) there is an “identify of interests” with the absent third party such that the plaintiffs can effectively advocate for the third party; and (3) “some obstacle impedes the [third party]’s own suit.” *Amato*, 952 F.2d at 748, 749, 751-52; *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Pitt News*, 215 F.3d at 362. The Supreme Court has found such third party standing in a variety of circumstances. *See, e.g., Powers*, 499 U.S. 400; *Craig v. Boren*, 429 U.S. 190 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *McGowan v. Maryland*, 366 U.S. 420 (1961). Furthermore, in First Amendment cases “the prudential standards governing the assertion of third party rights may be relaxed” in light of the potential dangers to free expression. *Pitt News*, 215 F.3d at 364 (citing *Secretary of State of Md. v. J.H. Munson Co.*, 467 U.S. 947 (1984)); *see also Amato*, 952 F.2d at 749.

Here, Plaintiffs easily meet these criteria. First, as already detailed above, Plaintiffs have suffered and continue to suffer injury to their First Amendment right to receive information. Second, Plaintiffs’ right to receive information from web site owners is entirely consistent with web site owners’ right to provide them with that information. A closer commonality of interests is hard to imagine; indeed, the Third Circuit has noted that “it can be difficult to draw a distinction between . . . the First Amendment rights of [ ] speakers and listeners” *Pitt News*, 215 F.3d at 361 n.5. There is no question that Plaintiffs can be effective advocates for the First Amendment rights of web site owners. Third, substantial “obstacles” and “practical disincentive[s]” impede web site owners from bringing their own constitutional challenges.

*Amato*, 952 F.2d at 750; *see also Pennsylvania Psychiatric Soc’y v. Green Spring Health Servs.*, 280 F.3d 278, 290 (3d Cir. 2002 ) (allowing third party standing because “patients’ fear of stigmatization, coupled with their potential incapacity to pursue legal remedies, operates as a powerful deterrent to bringing suit”). Most notably, under both the Statute and Informal Notices the blocking orders are issued entirely in secret, and no web site owner is ever given notice that an order has been issued. Thus, both the owners of the sites targeted by the blocking orders and the owners of the indisputably legal sites blocked as a result of the blocking orders do not even necessarily know that their rights have been infringed. Surely that is obstacle enough, but they also face a practical disincentive to bringing a constitutional challenge. If a web site owner discovers that her site has been blocked and realizes that it was mistakenly caused by the Statute or an Informal Notice, the cheapest and easiest way to deal with the problem is to move to a new web hosting company so that the web site is hosted on a different (non-blocked) IP address. Litigation, on the other hand, is burdensome and expensive. Thus, if the rights of the web site owners are not raised by Plaintiffs, those rights will most likely go unvindicated.

Add to this the vital First Amendment rights at stake here and the massive overbreadth of the Statute and Informal Notices, and Plaintiffs’ standing to assert the rights of web site owners becomes even clearer. In First Amendment cases, “[g]iven a case or controversy,” a plaintiff may “challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.” *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). *See also* Plaintiffs’ Mem. at 22-24 & nn.13-14 (citing cases). The standing rules are relaxed where statutes have such overbroad effects, in order to protect against an “intolerable, inhibitory effect on freedom of speech.” *J.H. Munson*, 467 U.S. at 957 n.5. Here, the Statute and Informal Notices substantially impinge on the “[f]reedom to distribute

information to every citizen whenever he desires to receive it,” a right “so clearly vital to the preservation of a free society that . . . it must be fully preserved.” *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943). Thus, Plaintiffs should be permitted to raise the rights of web site owners whose right to speak has been violated.

The Attorney General argues that overbreadth standing does not apply where a law has overly broad effects rather than overly broad language. But a law “is unconstitutional on its face if it prohibits a substantial amount of protected expression.” *Free Speech Coalition*, 535 U.S. at 244. And “[a]n overbreadth challenge is based on a statute’s possible *direct and indirect* burdens on speech.” *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002) (emphasis added). Where the overly restrictive effects of a law are as far-ranging and definite as they are in this case, *see* Plaintiffs’ Mem. at 31-32. It cannot be that the overbreadth doctrine does not apply because the language of the statute does not expressly direct the over-suppression of speech. Plaintiffs plainly have standing based on their overbreadth claim, and should succeed substantively on that claim as well.<sup>12</sup>

#### **B. Plantagenet Has Standing.**

Defendant asserts that Plaintiff Plantagenet, Inc., lacks standing based on a series of remarkable assertions. Before responding to the assertions below, Plaintiffs suggest that the starting point is the statutory definition of “Internet service provider”:

“Internet service provider.” A person who provides a service that enables users to access content, information, electronic mail or other services offered over the Internet.

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<sup>12</sup> In any event, Plaintiffs easily satisfy the requirements of third party standing and therefore need not rely on overbreadth to assert the rights of web site owners.

18 Pa. Ann. Stat. §7621. As the Defendant's Chief Information Officer (CIO) wrote on March 21, 2002, to then First Deputy Gerald Pappert with regard to the Statute:<sup>13</sup>

The law targets "Internet Service Providers" but relies on a definition that even I could argue covers just about ALL businesses on the Internet.

As the CIO correctly points out, the Statute likely covers any entity that provides Internet access to anyone (including employees and possibly even within a home). It is likely that Plaintiff Center for Democracy & Technology is the only party to this case that is *not* directly covered by the Statute (because CDT is not located in Pennsylvania). Thus, Plaintiff Plantagenet without question falls within the statutory definition of ISP. (To keep this case as focused as possible, Plaintiffs have not to date pursued this particular defect in the Statute, and the very significant overbreadth issues it raises.)

Moreover, Plantagenet is, without any possible question, an Internet Service Provider.

From its web site ([www.pil.net](http://www.pil.net)), Plantagenet's offerings include (among other services):

#### Dial-Up PPP Accounts

- \* Full access to the internet: www, E-mail, Newsgroups, FTP, etc.
- \* Telnet access to Unix Shell account included
- \* Unlimited Interactive Use flat monthly rate\*
- \* All PlantagaNet incoming lines are connected to 56k V.90 modems
- \* POPs throughout Southeastern PA, parts of NJ and all of Delaware
- \* 64k (1 B channel) and 128k (2 B channels) ISDN available in all our dialup POPs. . . .
- \* Tech support available from 9:00am to 8:00pm Monday through Friday, and 11am to 4pm Saturdays.

#### Dedicated Dial-Up PPP Account:

- \* Similar to an End-User Dedicated Except that one of our lines is dedicated to your account, providing uninterrupted non-interactive connections.
- \* Economically priced.
- \* Available anywhere dialup is.
- \* 33.6k, K56Flex or ISDN speeds.
- \* Up to 30 IP addresses, assigned to YOUR subnet.

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<sup>13</sup> E-mail from Peter Sand to Gerald Pappert, Mar. 21, 2003.

- \* 5 email accounts, plus aliases.
- \* Ideal for running a small company's email server.
- \* Can be assigned a domain name.

Dedicated Frac T1 or Full T1 Connections:

- \* Provides the lowest latency of any local connection.
- \* Excellent solution for large company/corporate connections.
- \* IP addresses assigned as needed.
- \* Normal TelCo 'Local Loop' and Common Equipment, not included.

Because Plaintiffs cannot frankly fathom how Plantagenet is *not* an ISP, Plaintiffs will await the hearing before determine what additional evidence will be needed on this point. Plaintiffs will address Defendant's additional points below (including Plantagenet's lack of ownership of certain equipment):

- *Plantagenet "is such an insignificant operation that it is hardly an ISP."* (Defendant's Mem. at 10)

In a 2001 report entitled "The Internet's Coming of Age," the National Research Council of the National Academy of Sciences directly addressed the broad range in size of Internet Service Providers (hereafter "Coming of Age")<sup>14</sup>:

Below tier 1 [ISPs] sit a number of so-called tier 2 and tier 3 service providers, which connect corporate and individual clients (which, in turn, connect users) to the Internet backbone and offer them varying types of service according to the needs of the target marketplaces. This group spans a wide range of sizes and types of providers, including both a small set of very large providers aimed at individual/household customers (e.g., America Online) and a large number of smaller providers. These include providers of national or regional scale as well as many small providers offering dial-up service in only a limited set of area codes.

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<sup>14</sup> The full report is available at [http://bob.nap.edu/html/coming\\_of\\_age/](http://bob.nap.edu/html/coming_of_age/). As the Third Circuit recently did in the [COPA decision footnote 29] (relating to a different study by the National Research Council), this Court can take judicial notice of the Coming of Age report. *See also, e.g., Tempel v. United States*, 248 U.S. 121, 130 (1918) (taking judicial notice of government reports); *Dispatch, Inc. v. City of Erie*, 364 F.2d 539, 541 (3d Cir. 1966) (taking judicial notice of government agency report).

Coming of Age, p.111 (citation omitted).<sup>15</sup> The relative size of Plantagenet to other ISPs does not alter its function as an ISP, nor its susceptibility to statutory or informal orders (as discussed below).

- *Plantagenet's "tiny customer base means that Defendant would never proactively subscribe to its services. . . . [N]o citizen will likely complain to Defendant about child pornography accessed through Plantagenet because so few citizens use Plantagenet's services. . . . Defendant will not likely consider an entity that does not even own ISP equipment to be an ISP. Defendant will go to the ISP that does own the equipment and can disable access."* (Defendant's Mem. at 10)

As the National Research Council continued in discussing ISPs:

Some of these providers have not invested significantly in building their own facilities; instead they act as resellers of both access facilities (e.g., dial-up modem banks) and connectivity to the Internet backbone.

*Id.* But critically, and directly contrary to the Defendant's reassurances to the Court, this factor does *not* protect an ISP from the Statute. On July 19, 2002, Defendant transmitted Informal Notice 2879 to the ISP Pennsylvania Online, instructing that it deny access to a certain URL. Five days later, the President of Pennsylvania Online responded by saying:<sup>16</sup>

I engaged a subcontractor to block access to [the URL] on behalf of Pennsylvania Online Ltd. at 11:03 AM on Friday, July 19. . . . The subcontractor notified me via telephone on 08:40 AM on Tuesday July 23 that their [work] ticket had been completed and closed on Monday July 22.

This indicates that Pennsylvania Online is almost certainly in the *exact* same position as Plantagenet – a small ISP that does not control or operate its modem banks, etc., and could not internally comply with the Informal Notice. That Pennsylvania Online and as many as ten other small local ISPs received Informal Notices demonstrates that neither size nor configuration provide any protection to Plantagenet.

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<sup>15</sup> Available at [http://bob.nap.edu/html/coming\\_of\\_age/ch3.html](http://bob.nap.edu/html/coming_of_age/ch3.html).

<sup>16</sup> Letter from George Peace to L.Ceh, July 24, 2002.

- *Plantagenet* "does not own or operate the equipment that a real ISP would own and operate, e.g. access lines, modems, routers or other equipment customers of an ISP use to access the Internet." (Defendant's Mem. at 10)

The perplexing thing about this assertion is that the Defendant himself rejected *this precise argument* when made by an ISP – indeed, when made by one of the largest retail ISPs in the world, the Microsoft Network ("MSN"). In an internal memo dated July 9, 2002, John Burfete of the Attorney General's staff described the situation in detail:

Microsoft was served with an informal notification requesting that it deny access to the sites. After 5 days, the sites were still accessible through MSN. Conversation between Agent Guzy and Microsoft over their failure to comply resulted in a number of excuses. The primary excuse is that while Microsoft is an ISP, it contractually out sources its service through approximately 10 independent businesses. In effect, when a client logs on to MSN to access the Internet, they are randomly re-routed to one of the 10 independents.

Microsoft initially complained that since they used out sourcing, OAG were not actually "accessing" through MSN. They eventually conceded that aspect one we advi[s]ed them that OAG subscribed to MSN and used it to get to the [child pornography] web sites. . . .

Microsoft, not the independents, is the ISP in these cases and it is up to it to have its independents comply . . . [If after an extension] if Microsoft has not complied, we will proceed with the formal process under Act 5.

Memorandum from John Burfete to William Ryan, July 9, 2002. Thus, the Defendant considered and *rejected* the precise argument that it is now advancing before this Court.

Microsoft's structure – which is essentially identical to both AOL *and* Plantagenet – did not protect Microsoft from either the Informal Notices or the threat of a statutory order.

Based on the documents produced in discovery in this case, it appears that Microsoft had only limited success in getting its "independents" to comply, and Microsoft had to significantly restructure its network to avoid violating the Attorney General's orders. If Microsoft is unable to

get independent suppliers of access service to comply, it is far from clear that Plantagenet, a one person operation, would be able to get its supplier to comply. As Plaintiffs stated in ¶ 94 of its complaint, "[b]ecause of the structure of its operations, PLANTAGENET has no direct ability to comply with any such Order, and would thus be at risk of criminal liability if it becomes subject to an Order." That risk remains as great today as it was on September 9, 2003.

The threat to Plantagenet, however, is now greater. If Defendant carries through on its threat to "go to the ISP that does own the equipment and can disable access," as quoted above, Defendant would gravely damage or destroy Plantagenet's business relationship with its supplier. Thus, in addition to the standing that Plantagenet has because it is an ISP subject to the Statute, it also has standing to defend its business relationships against interference by Defendant.

### **III. BLOCKING URLs IS A VIOLATION OF THE FIRST AMENDMENT UNDER NEAR AND VANCE.**

The Attorney General next argues that the Statute and Informal Notices do not seek to permanently block all speech at certain URL addresses and therefore cannot violate the prior restraint cases of *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), but even if they did, they would not violate the First Amendment.<sup>17</sup> He fails on both counts.

Defendant points to the precise wording of Section 7622 of the Statute, which states that an ISP "shall remove or disable access to child pornography items residing on or accessible through its service," and argues that the Statute itself directs not that the ISP block a particular URL but rather particular "items," or content. Thus, says the Attorney General, it cannot be a prior restraint of all speech at that URL but only of particular illegal content. If that is true, then the Statute is technically impossible to comply with. As will be established at trial, it is literally

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<sup>17</sup> For a full discussion of *Near* and *Vance*, see Plaintiffs' Mem. at 24-30.

impossible for an ISP to block access to a particular *image* on the Internet. If that is what the Statute really means, then it is unconstitutional on its face because it is irrational and arbitrary for the Pennsylvania legislature to enact a law that cannot be complied with. *See Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002). Furthermore, based on existing procedures no ISP would even know what images it is supposed to be blocking. The Informal Notices identified *only* URL addresses to be blocked (not specific images), and the one court order that has been issued under the Statute also directed that the ISP block particular URLs. In fact, the Attorney General gave the ISP only a redacted version of the court order, omitting the exhibit showing the actual images to be blocked.<sup>18</sup> Even if it were technically possible for an ISP to block access to an image on the Internet – and it is not – the ISPs cannot block images if they do not know what they are.

In any event, it is far more likely that the Statute, construed to be constitutional, can only mean that ISPs must block URLs, not specific content. That is how the Attorney General implemented the Informal Notices, and that is how the state court judge interpreted it in the one court order issued under the Statute. The language of the Statute supports that reading. The application for an order under the Statute must include “[t]he Uniform Resource Locator providing access to the items,” 18 Pa. Stat. Ann. §626(4), and the judge is permitted to include in the order any information “relevant and necessary” to implementation, *id.* §627. It is true that particular URLs are chosen because of the content that the Attorney General’s Office found residing on them at a particular point in time, but nonetheless as a technical matter it is the *URLs*, not the images, that can be blocked.

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<sup>18</sup> The materials sent to that ISP will be submitted as Joint Exhibits 4, 5 and 6.

The Defendant also argues that the Statute does not result in permanent blocking of URL addresses because an ISP is permitted to “unblock” a URL once the child pornography content no longer resides there. Defendant’s Mem. at 20. Of course, the Statute itself says nothing about “unblocking.” And any ISP seeking to minimize its liability is unlikely to take extra-statutory action to “unblock” a URL that the Pennsylvania Attorney General has identified as containing child pornography, nor is it likely to devote staff time to surfing web sites designated as child pornography (which is in itself a crime) to determine whether the content still appears to be illegal. Furthermore, under the Statute and the Informal Notices, the offending images themselves are never disclosed to the ISPs, who have only been told to disable access to particular URLs. Thus, this “unblocking” theory gets the Defendant nowhere. He cannot deny that the Statute and Informal Notices result in a prior restraint of the URL locations themselves.

Faced with that inevitable conclusion, the Attorney General suggests that the state can disable URLs perpetually because they are not speech, and because they are limitless and fungible. But as Plaintiffs explained in their opening brief, under current case law URLs, standing alone, may in fact be protected speech. *See* Plaintiffs’ Mem. at 30 n.19. And they are certainly not fungible. Users of the Internet often access web sites by “bookmarking” their URLs or remembering them. The fact that Amazon.com could provide access to its site through the substitute address “www.creamcheese.com” would hardly make the blockage of “www.amazon.com” *de minimis* for either the site owner or users. URLs often constitute valuable intellectual property that parties fight hard over in trademark litigation. *See, e.g., Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir 2003); *Schmidheiny v. Weber*, 319 F.3d 581 (3d Cir 2003). Nor are URLs unlimited. While as a theoretical matter it may seem that way, as a practical matter useful URLs are scarce. Indeed, the lack of useful URLs has directly led to

pressure over the past few years to add a new “top level domain” (TLD) such as “.biz” to supplement “.com” and “.net.”<sup>19</sup>

In any event, Plaintiffs’ claim under *Near* and *Vance* does not turn on whether URLs are speech, are fungible, or are in short supply. Under those cases, the state simply cannot prevent speech from ever occurring at a particular *location* on the Internet because at one time it displayed illegal materials. See Plaintiffs’ Mem. at 25-30. The two cases cited by Defendant to dispute that conclusion, Defendant’s Mem. at 22, are inapposite. In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the Supreme Court upheld the closure of a bookstore that had been used for prostitution because “the closure sanction was directed at unlawful *conduct* having nothing to do with books or other expressive activity.” *Id.* at 707 (emphasis added). The Court found not only that the closure order was not a prior restraint of speech, but also that it did not even have an incidental burden on speech. *Id.* at 702, 705 n.2. In *Alexander v. United States*, 509 U.S. 444 (1993), the Court upheld the forfeiture of a criminal defendant’s adult entertainment business as part of his punishment for RICO violations. The forfeiture did not involve a prior restraint of speech because it was punishment for past conduct (after a criminal trial in which the obscenity question was fully litigated), not the preclusion of future speech. In contrast to both those cases, here the purpose and effect of the government action was to *restrain speech*, not prevent or punish conduct, without sufficient advance safeguards to protect against censorship of legal speech. That the government cannot do.

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<sup>19</sup> Furthermore, the Attorney General does not even address the fact that some Informal Notices have explicitly directed that access to an *IP address* be disabled. IP addresses are valuable and are currently in short supply (especially in certain parts of the world).

**IV. THE STATUTE AND INFORMAL NOTICES ARE ENTIRELY PROCEDURALLY INADEQUATE UNDER THE FIRST AND FOURTEENTH AMENDMENTS.**

The Attorney General concedes that general First and Fourteenth Amendment principles impose procedural requirements of notice, hearing and burden of proof that are not met by either the Informal Notice scheme or the Statute as written. Defendant's Mem. at 24. Nonetheless the Attorney General attempts to piece together a patchwork of arguments to justify these deficiencies. The attempt fails. The Attorney General is not entitled to ignore First and Fourteenth Amendment procedural requirements simply by labeling the Statute a child pornography law. The Statute and the Informal Notice system lack the basic requirements of notice and an opportunity to be heard, as well as the requirement that there be a determination that the targeted content *is* child pornography, not just that it probably is. And the fact that an ISP could be subject to criminal prosecution if it refuses to comply with an order issued pursuant to the Statute is hardly a substitute for a prior adversary hearing. But regardless of how this Court views any of these inadequacies, the Attorney General does not and cannot deny the fundamental failure of the Statute and the Informal Notice scheme to provide *any* notice or *any* hearing, before or after web sites are blocked, to the owners of those web sites.

**A. The Fact That The Statute And Informal Notices Are Aimed At Child Pornography Does Not Justify Lower Procedural Standards.**

A state cannot avoid the First Amendment simply by passing a statute whose laudable goal is to combat child pornography. The procedural safeguards required whenever illegal speech is targeted apply equally here, where there is just as much risk that innocent speech will be censored as in obscenity cases. Indeed, Plaintiffs have already proven that implementation of the Statute and the Informal Notices has resulted, and will continue to result, in the blocking of hundreds of thousands, even millions, of innocent web sites.

### 1. This Court Should Not Rely On *Camfield* and *Moore*.

The Defendant argues that constitutionally required procedures for determining whether speech is protected do not apply to child pornography because it is easy to identify, while determining whether materials fall into another category of unprotected speech, obscenity, is factually complex. Thus, according to the Defendant, there is little risk that protected speech will be censored in the child pornography context, while that risk is much greater in the obscenity context. The Defendant principally relies on two cases from other Courts of Appeals, *Camfield v. City of Oklahoma City* and *United States v. Moore*, neither of which actually holds that lesser procedures are constitutionally adequate for child pornography determinations.<sup>20</sup>

This Court should reject the Defendant's arguments. As an initial matter, the Attorney General's argument misconstrues the basis of the procedural requirements imposed by the Supreme Court on government actions of the sort at issue here. The hostility to prior restraints and the necessity of sensitive procedures does not arise from the subtlety of obscenity doctrine, but from the dangers of censorship on any account. As the Court observed long ago, in overturning constraints on public demonstrations by a white supremacist organization, "[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter that the circumstances permit. As the Court

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<sup>20</sup> In *Camfield*, the court held that there was a constitutional right to a hearing *before* seizure of items suspected to be child pornography under the relevant state statute, but that it was not a clearly established constitutional right for purposes of the qualified immunity analysis. 248 F.3d at 1228. In *Moore*, the court addressed only whether a pre-arrest judicial determination of child pornography was required, so no prior restraint of speech was at issue. 215 F.3d at 685; *see also* Plaintiffs' Mem. at 45-46.

said in *Freedman v. Maryland*, 380 U.S. at 58, a noncriminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *See also Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1969). The possibility of censoring innocent speech, particularly where there is a possibility of collateral damage of the magnitude that has been demonstrated in this case and the "danger in relying exclusively on the version of events and dangers presented by prosecuting officials, because of their special interest," *Carroll*, 393 U.S. at 183 n.10, is not lessened by any alleged clarity of the doctrine of child pornography. As the Court observed in *Bantam Books*, "[o]ur insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." 372 U.S. at 66 (internal citations omitted).

Both the analysis in *Camfield* and *Moore* were premised on the assumption that where a child pornography definition relies solely on age, it is relatively simple to discern child pornography from non-child pornography. Even were that a relevant inquiry, the Supreme Court, ruling one year after *Camfield* and two years after *Moore*, has explained that it is not that simple to determine whether images depict actual children (and are therefore unprotected) or contain computer-generated images or images of young adults who appear child-like (and are

therefore protected unless they are obscene). *Free Speech Coalition*, 535 U.S. at 241.<sup>21</sup> The continuing validity of *Camfield* and *Moore* in the wake of *Free Speech Coalition* is uncertain.<sup>22</sup>

Second, the concern underlying *Camfield* and *Moore* was the risk that protected non-child pornography might be impacted. Both cases involved a government official reviewing a single static item – a magazine in *Moore* and a video in *Camfield* – so there was little risk that speech other than that believed to be child pornography would be affected. The seizure of a hard copy of a magazine or video in those cases had no effect on – and, critically, were very unlikely to affect – the distribution of any other unrelated (and protected) books, magazines or videos. But in the Internet context, content is not physically discrete in the same way. Blocking access to a single URL can have – and has had – a dramatic impact on unrelated (and protected) content. The technical architecture of the Internet results in an interdependency of unrelated content that creates a significant risk of over-blocking material that *no one* contends is unprotected. That risk of over-censorship is *precisely* the reason the Supreme Court has imposed certain procedural requirements on prior restraints of speech, including an adversary hearing prior to implementation of the censorship. *See Freedman*, 380 U.S. at 58-59; *Southeastern Promotions*, 420 U.S. at 560. Given the special risks inherent in blocking access to Internet content, it is imperative that these same requirements apply here. *See ACLU v. Reno*, 929 F. Supp. at 872-73 (“the Supreme Court’s First Amendment jurisprudence compels us to consider

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<sup>21</sup> Furthermore, substantive evaluations of materials addressing teenage sexuality can be complex, as the Supreme Court predicted in *Ferber* when it indicated that a “case-by-case analysis” would sometimes be necessary. *Ferber*, 458 U.S. at 774 (recognizing that protected expression such as “medical textbooks [and] pictorials in the National Geographic” might technically be covered by some child pornography laws).

<sup>22</sup> To the degree that *Camfield*, and now the Attorney General, rely on cases that involved the issuance of search warrants to seize child pornography materials, they are irrelevant. Where materials are seized as evidence for a criminal proceeding (without the goal or effect of blocking the public’s access to the materials), a prior hearing is not necessary even for obscenity materials. *See Heller*, 413 U.S. at 492 & n.8; Plaintiffs’ Mem. at 43-44.

the special qualities of this new [Internet] medium”) (opinion of Dalzell, J.), *aff’d*, 521 U.S. 844, 868-70 (1997).

Even if the Court were to consider lower procedural standards for child pornography – and it should not – *Camfield* and *Moore* only suggest that it would be permissible to hold the required hearing *after* the web sites were blocked, rather than *before*. Those cases do not support the wholesale denial of procedural rights that the Attorney General advocates. *Camfield* and *Moore* suggest only that because it is sometimes easier to identify child pornography than obscenity, a hearing *prior* to an arrest or seizure of child pornography materials may not always be necessary because the initial, non-adversarial determination is less likely to be wrong. Thus, there is less likely to be a risk that protected speech is censored prior to a full adversarial hearing. Although that suggestion should not be followed here for the reasons set forth above, the Statute and Informal Notices must fail even under *Camfield* and *Moore* because they provide for no hearing whatsoever, before or after the web sites are blocked. And they provide for notice only to the ISP, not to the web site owners whose sites are being blocked.

## **2. The Fourteenth Amendment Requires A Hearing In Every Case.**

Faced with the fact that *Camfield* and *Moore* address at most the proper timing of a hearing, the Defendant was forced to try to develop another argument to justify that the Statute and the Informal Notices provide for no hearing whatsoever. His effort is unsuccessful.

The Attorney General is unable to overcome decades of Fourteenth Amendment cases decreeing that notice and an opportunity to be heard are baseline due process requirements. The only argument that the Defendant makes to uphold the utter lack of procedures in the Statute and Informal Notices is that an adversary hearing is not required in child pornography cases because a determination that materials are child pornography can categorically never be “in dispute.”

Defendant’s Mem. at 33-34. Apparently, according to this argument, an adversary hearing would add so little value to a child pornography determination that it is unneeded. That theory strains credulity, both legally and factually.

First of all, “[i]t is axiomatic that, *at a minimum*, procedural due process requires that the deprivation of a protected interest be accompanied by notice and an opportunity to be heard at a meaningful time, and in a meaningful manner.” *United States v. Antar*, 38 F.3d 1348, 1362 (3d Cir. 1994) (emphasis added); *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975) (“[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950)); *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 72 (3d Cir. 1993). Thus, notice and a hearing are required in *every case* where liberty or property deprivations occur; “[b]eyond this the exact procedural protections guaranteed by due process vary according to the specific factual context presented.” *United States v. Raffoul*, 827 F.2d 218, 222 (3d Cir. 1987); *see also Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting forth three-part test for evaluating when the hearing must occur and what additional procedures are required). The Pennsylvania Statute operates to deprive web site owners of their free speech rights with *no* notice and *no* hearing, and (as discussed further below) gives ISPs notice but no hearing. It is therefore a blatant violation of the Fourteenth Amendment.<sup>23</sup>

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<sup>23</sup> For this reason, there is no need to evaluate the three-part *Mathews v. Eldridge* procedural due process test, which deals with what *additional* procedures are required. Neither of the cases cited by the Attorney General, Defendant’s Mem. at 34, suggest anything different. In those cases, the Supreme Court found no procedural due process violations only because the requested hearings would not have had any bearing on the deprivations alleged. *See Connecticut Dep’t of Public Safety v. Doe*, 123 S. Ct. 1160 (2003) (denying right to a hearing as to “current dangerousness” because that was not a criteria for whether an individual was to be listed on state’s sex offender registry); *Codd v. Velger*, 429 U.S. 624 (1977) (per curiam) (denying right to a hearing as to inclusion of defamatory information in personnel file where employee

Second, as amply demonstrated by *Camfield* itself, where the Oklahoma state judge’s *ex parte* determination that the 1959 critically acclaimed, award winning movie “The Tin Drum” constituted unprotected child pornography was overturned by a federal district court, whether materials constitute child pornography can most certainly be factually disputed.<sup>24</sup> See *Camfield*, 248 F.3d at 1220; see also *Ferber*, 458 U.S. at 774 (determinations of child pornography sometimes require a “case-by-case analysis”). Indeed, a 1989 Third Circuit panel took up eight pages of the Federal Reporter analyzing whether particular materials constituted child pornography – and the dissenting judge took another three pages to explain why she disagreed. See *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989). Plainly, whether particular materials constitute child pornography can generate a factual dispute in need of resolution in an adversary proceeding.<sup>25</sup>

**B. The ISPs’ Potential Criminal Liability Does Not Save the Statute.**

The Statute and the Informal Notices require that access to certain web sites be blocked, with no opportunity for an adversary hearing on that issue for anyone involved. Instead, either the Attorney General alone or a judge in an *ex parte* hearing determines whether particular web sites contain child pornography, and then orders that they be blocked. Notice is given only to the ISP when it is told it must block access to designated URLs within five days. The fact that an

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had not challenged the accuracy of the information and there was no other factual determination to be examined in a hearing). In contrast, here whether the blocked speech is protected by the First Amendment is the heart of the deprivation Plaintiffs have alleged.

<sup>24</sup> The Tenth Circuit in *Camfield* did not disturb the district court’s decision on that point.

<sup>25</sup> This very case provides yet another example. One of the web sites identified by the Attorney General in an Informal Notice as child pornography contains a front page that asserts that the owner of the web site cares about child pornography laws, and has had all of its content screened by attorneys to ensure that it is legal. Surely the owners of that web site, who are based in the United States, would dispute the Attorney General’s determination.

ISP could refuse to comply and be subject to criminal prosecution does not provide an adequate hearing for purposes of the First or Fourteenth Amendments.

First, that ISPs hypothetically can refuse to comply with a blocking order and be criminally prosecuted misses the point. That hypothetical is irrelevant to the due process rights of *web site owners* – the individuals whose speech is being directly censored. Even in the highly unlikely event that an ISP failed to comply and was prosecuted, there remains no adversary proceeding for web site owners whose sites would be affected by the order (either as a direct target or a byproduct of IP or DNS filtering). As the Supreme Court stated in the very case relied on by the Defendant, “it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others,” such as web site publishers who “may assess quite differently the strength of their constitutional claims.” *McKinney v. Alabama*, 424 U.S. 669, 676 (1969). A web site owner whose web site is being blocked – and whose free speech rights are potentially being infringed – must be given the opportunity to contest that decision. *See id.* at 676 (“We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose.”).

This case shows precisely how the interests of ISPs and web site owners conflict, and demonstrates why notice and an adversary hearing for all interested parties are so important. ISPs’ primary interest is in avoiding liability and negative publicity for failure to comply with a child pornography law.<sup>26</sup> They have absolutely no countervailing incentive to challenge a blocking order under the Statute. Thus, there is virtually no chance that an ISP would refuse to

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<sup>26</sup> This is why ISPs have typically used IP filtering to comply with the Informal Notices – that method is most effective, even though it results in overblocking, and thereby minimizes ISPs’ liability. *See* Section I, *supra*.

comply with an order and make itself vulnerable to criminal prosecution.<sup>27</sup> Web site publishers, on the other hand, want to ensure that their content remains accessible on the Internet, and are far more likely to fight a blocking order. The owners of web sites believed by the Attorney General to contain child pornography must be given notice and an opportunity to contest any such determination. And if an ISP uses IP filtering to comply with a blocking order, there should be notice to the holder of that IP address, who can contact the owners of the innocent web sites likely to be blocked to notify them of the impending problem.<sup>28</sup>

Second, even aside from web site owners, the fact that an ISP can be criminally prosecuted if it fails to comply with a blocking order does not satisfy the constitutional requirement of an adversary hearing for that ISP either. Surely an ISP does not have to go so far as to possibly commit a crime – punishable by up to seven years in prison, *see* 18 Pa. Stat. Ann. §624 – in order to get the process it is due. *Cf. Virginia v. American Booksellers Ass’n*, 484 U.S. at 392 (entity does not have to risk prosecution to get standing to bring constitutional challenge). As in *Bantam Books* and other prior restraint cases, the government must grant the ISP a pre-censorship hearing; the ISP cannot be required to refuse to comply with a government order and then wait to be hauled into court. Furthermore, the core First Amendment issue of whether the web sites contain child pornography would not even be determined in a trial of an ISP under the Statute. The Statute as written makes it a crime simply for an ISP not to comply

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<sup>27</sup> This is all the more true after WorldCom was subjected to aggressive public intimidation by the Attorney General after asking him to issue a court order under the Statute rather than an Informal Notice. *See* Section IV.D, *infra*.

<sup>28</sup> While there is certainly no affirmative obligation on the government to notify all Internet users of proposed blocking orders, nonetheless those determinations cannot be conducted in a secret, *ex parte* process, as they are now. At a minimum, individual members of the public (and the press) should be have access to the proceedings in which URLs and IP addresses are blocked. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (public access to criminal trials protects integrity and fairness of the proceedings). They should at least be able to find out that they are receiving only censored access to the Internet.

within five days with court orders issued under the Statute. *See* 18 Pa. Stat. Ann. §§7622, 7624.

It is not at all clear that the issue of whether the web site specified in an order is truly illegal child pornography would be adjudicated at trial. Indeed, based on that reading of the Statute, *McKinney v. Alabama*, 424 U.S. 669 (1976), supports yet another constitutional deficiency here. *McKinney* holds that a criminal defendant cannot be bound by a finding of unprotected speech in a proceeding to which it was not a party, where its interests might not have been represented, yet that is precisely what might occur under the Statute if an ISP were ever prosecuted.

**C. A Probable Cause Determination Is Not The Same As A Full Finding.**

The Attorney General summarily asserts that under the Statute, a probable cause determination of child pornography is somehow the same as a full finding. This unsupported claim is simply false. The Supreme Court has consistently held that “mere probable cause to believe a legal violation has transpired is not adequate to remove [First Amendment materials] from circulation” precisely *because* probable cause is a much lower standard. *Fort Wayne Books*, 489 U.S. at 65-66; *see also* Plaintiffs’ Mem. at 44-45.

**D. The Informal Notices Were Coercive And Violated *Bantam Books*.**

Defendant presents two arguments in support of the Informal Notice process: First, Defendant asserts that the *Bantam Books* procedures are not required because it is easy for the employees of the Attorney General’s office to identify child pornography. This has already been addressed above – the state court judge in *Camfield* got that very determination wrong, and the Supreme Court in *Free Speech Coalition* has explained that it is not that simple to correctly determine whether something is child pornography or not. In light of this, the Defendant’s mere assertion that “he knows it when he sees it” cannot, without more, support the Court’s rejection of the Supreme Court’s *Bantam Books* decision.

Second, Defendant asserts that the Informal Notice process is not coercive, asserting – for the first time ever – that the Informal Notices had no force of law and, ultimately, no significance. This argument reflects a remarkable revision of history, including very recent history. On December 2, 2003, Plaintiffs asked this Court for declaration that the Informal Notices had no force of law, and at the time the Defendant vigorously opposed our request. Now, three weeks later (albeit with a change of Attorney General), the Defendant has declared to this Court exactly the conclusion Plaintiffs were seeking in early December: that the Informal Notices have no force of law. This late attempt to take the teeth out of seventeen months of Informal Notices belies the impact that the Informal Notices both had, and were intended to have.

Under *Bantam Books*, informal government action that nonetheless coerces the suppression of potentially protected speech without adequate procedural safeguards constitutes a prior restraint in violation of the First Amendment. *See Bantam Books*, 372 U.S. at 71. This is because a government actor can “chill or silence a person of ordinary firmness from future First Amendment activities” through informal action, resulting in a prior restraint. *See Plaintiffs’ Mem.* at 53-54.

Here, the state legislature passed the Statute, and to implement the Statute the Attorney General devised the Informal Notice process and began sending them out. The very first line of the Informal Notices issued in the first few months read: “This notice is provided to you under the provision of Section 7330 of the Pennsylvania Criminal Code, 18 PACs 7330, Internet Child Pornography.” Joint Stipulation 35. The Notices demand compliance and set a very specific timetable – five days – which is the exact timetable defined in the Statute. Indeed, the Informal

Notices often had at the top of the page the boldface title: **“Legal Compliance.”**<sup>29</sup>

It is abundantly clear that the ISPs understood that the Attorney General’s Informal Notices were not mere voluntary requests for compliance that the ISPs could choose to ignore. AOL was explicitly “told by [the Attorney General’s Office] that the informal notice from the Attorney General had the same force and effect as a court order and that [ISPs] were obliged to comply with it as if it were a court order.” AOL Dep. at 101.<sup>30</sup> Verizon specifically testified that it understood the first Informal Notice it received to be issued pursuant to the Statute.<sup>31</sup> When an Epix customer complained about the fact that Epix was blocking innocent content (due to an Informal Notice), Epix would take no action until the Attorney General’s office approved of the action, and even then a key concern of Epix was “whether or not we would still be in compliance with the [Informal] Notification and the statute should we remove the block on the IP address.” In responding to an Informal Notice, RCN Corporation asked the Attorney General’s office to provide confirmation “that RCN’s action has satisfied its obligation of compliance under the informal notice.”<sup>32</sup> In a later communication, RCN stated “please find screen shots demonstrating RCN’s compliance with the above referenced Informal Notices that your office served [on RCN]. Please send me an e-mail advising RCN whether your office expects further action from us at this time.”<sup>33</sup> Pennsylvania Online responded to an Informal Notice stating that “Pennsylvania Online has complied with informal notice # 2879 dated July 19, 2002.”<sup>34</sup>

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<sup>29</sup> TRO Exh. 1.

<sup>30</sup> The Defendant now denies that this statement was true, which ultimately, however, is irrelevant. What is relevant is whether the ISPs felt under an obligation to comply with the Notices, and they plainly did.

<sup>31</sup> Verizon/LeBredo Deposition, at 14 (“basically what had been deemed as an informal notice, that they were enacting the law that they had passed”).

<sup>32</sup> D. Kortrey (RCN Corporation) e-mail to L. Ceh (Attorney General’s Office), Feb. 25, 2003.

<sup>33</sup> D. Kortrey Letter to L. Ceh, June 13, 2003.

<sup>34</sup> G. Peace Letter to L. Ceh, July 24, 2002.

PenTeleData responded to an Informal Notice by e-mail stating “please find attachment of screenshot of Internet Explorer after compling [sic] with this notification.”<sup>35</sup>

It may be that the Defendant never meant anyone to take the Informal Notices seriously, but it is crystal clear that the ISPs did, and that is what matters. When the chief law enforcement officer in the state writes your company a “Legal Compliance” letter identifying specific criminal laws and stating that your company has five days to comply or suffer further consequences, few companies are likely to ignore that communication.

The coercive nature of the Notices themselves was compounded by the fact that the Attorney General engaged in aggressive public intimidation of those who challenged his secret censorship scheme. One ISP – WorldCom – was uncomfortable with the informal process and wrote to the Attorney General’s Office to suggest that it should use the statutory procedures instead of the Informal Notices. In its letter (Joint Exhibit 2), WorldCom specifically stated:

- “WorldCom will promptly comply with any court order (or other applicable legal process) related to your fight against child pornography.”
- “If the Pennsylvania Attorney General’s office decides to seek a court order for WorldCom to block access to sites not on our network, we will be happy to work with you to draft an order that involves a technically-feasible solution that achieves the goals of all parties involved.”

In response to that letter, WorldCom heard nothing until the Attorney General obtained a court order and issued a press release (Joint Exhibit 7) accusing WorldCom of refusing to block child pornography. It was not merely a “routine announcement” of court proceedings, as Defendant argues. The press release expressly blamed WorldCom for providing access to child pornography:

- “[W]e will use this court order to ensure that WorldCom complies with the law in Pennsylvania,” which is “designed to protect children from sexual exploitation.”

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<sup>35</sup> R. Kunkle e-mail to L. Ceh, Oct. 23, 2002.

- “In the vast majority of cases, the ISPs have agreed to disable access to the child pornography site. . . . However, WorldCom informed the Attorney General’s Office that it would not deny access to the child porn sites.”
- “As the investigation continued, additional sites that were accessible through the WorldCom Internet Services were discovered by investigators of Fisher’s Office.”

WorldCom was, to put it mildly, "surprised."<sup>36</sup> Since the issuance of that sharply worded press release, no ISP has refused to follow any of the secret Informal Notices.

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<sup>36</sup> WorldCom’s testimony was diplomatic:

12 Q. All right. Following the July 25th letter  
 13 that we just were discussing and the conversations  
 14 with Mr. Burfete in that same general time frame,  
 15 what’s the next interaction you had with the  
 16 Pennsylvania Attorney General?

17 A. I didn’t have any other interactions at  
 18 all until we were served with the court order in  
 19 mid-September of 2002.

20 Q. That’s fine. Just a moment, please.

21 Did you have any expectation as to what  
 22 was going to happen?

23 A. No. No, absolutely not. We were quite  
 24 surprised, because, as I had left the final  
 25 discussion with Mr. Burfete, indicating our  
 1 willingness to work with him -- and, as I said,  
 2 certainly, Mr. Burfete -- I don’t want to, in any  
 3 way, imply that Mr. Burfete went back on a promise.  
 4 I don’t know that he explicitly said he would let us  
 5 know if they wanted to seek an order, but that  
 6 certainly was my understanding.

7 I saw no reason they wouldn’t, because,  
 8 again, we were not hosting the content. We were an  
 9 intermediary, and we had expressed a willingness to  
 10 work with them on the technical feasibility issues  
 11 and other things, so we were surprised.

12 Q. Do you believe that you made clear, in  
 13 July of 2002, that you were willing to cooperate  
 14 with the Attorney General to address the Attorney  
 15 General’s concerns about these child pornography  
 16 sites or these alleged child pornography sites?

17 A. I certainly thought I had been clear . . . .

WorldCom/Silliman Dep. 65-66.

Taken together, the Informal Notices, the ISP's reaction to and compliance with the Notices, and the Attorney General's public intimidation of the one ISP to question the Informal Notice process clearly constituted the "means of coercion, persuasion, and intimidation" that violates the First Amendment. *Bantam Books*. 372 U.S. at 67.<sup>37</sup>

**V. THE STATUTE AND INFORMAL NOTICES VIOLATE THE SUBSTANTIVE REQUIREMENTS OF THE FIRST AMENDMENT.**

As should be clear by now, the Statute and the Informal Notices have created blatant substantive violations of the First Amendment, both on overbreadth grounds and traditional strict scrutiny analysis.

The Defendant does not even address Plaintiffs' substantial overbreadth claim as a matter of First Amendment doctrine, but rather raises it only as a standing issue. Thus, Plaintiffs addressed overbreadth in Section II.B, *supra*. For the reasons set forth there and in Plaintiffs' Mem. at 31-32, the Statute and Informal Notices are unconstitutionally overbroad and must be struck down on that basis alone.

Defendant does argue that intermediate scrutiny, rather than strict scrutiny, should apply to Plaintiffs' as-applied challenge because a child pornography law cannot be content-based. But in *New York v. Ferber*, the Supreme Court's seminal case addressing a child pornography law, it stated that prohibitions and other regulations of child pornography and obscenity are "unabashedly content-based laws." *Ferber*, 458 U.S. at 756; *see also id.* at 763. Although child pornography itself is unprotected speech, that does not make the distinction any less based on the

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<sup>37</sup> Defendant cites *McLaughlin v. Watson*, 271 F.3d 566 (3d Cir. 2001), *see* Defendant's Mem. at 43, but that case is inapposite. First, it addresses a First Amendment employment retaliation claim, where the plaintiffs believed the Defendant encouraged their employer to take adverse action against them, not a prior restraint of speech subject to analysis under *Bantam Books*. Second, even were *McLaughlin* relevant, here, the presence of the Statute, the wording of the Notices, and the public intimidation of WorldCom, provide ample evidence of coercion sufficient to distinguish *McLaughlin*.

content of the materials. *Cf. Free Speech Coalition*, 535 U.S. at 255 (federal child pornography law is “a measure suppressing speech”). Accordingly, strict scrutiny must apply. *See Playboy Entertainment*, 529 U.S. at 813.

Furthermore, the intermediate scrutiny cases cited by the Attorney General (Defendant’s Mem. at 47-48) address, without exception, regulations based on the time, place or manner of speech, not the content. It cannot be disputed that the regulation at issue here is a direct prohibition of speech based solely on its content. Under no possible interpretation is it a regulation governing when, where or how an individual may speak, in either its intended or unintended effects.

In any event, regardless of whether strict or intermediate scrutiny apply, the Statute and Informal Notices must fall. Plaintiffs have explained at length in Section I, *supra*, that the Statute and the Attorney General have dramatically over-restricted innocent speech without adequate justification, and that the Attorney General cannot hide behind the ISPs to avoid a First Amendment violation. Although the state certainly has a substantial and compelling government interest in combating child pornography, the burden imposed on speech here is so severe in relation to the marginal gains achieved by the law that it must be struck down. The Attorney General attempts to downplay the dramatic effect of the Statute and Informal Notices, but it is truly remarkable – potentially unprecedented – how much innocent speech has been suppressed.

Moreover, the government cannot demonstrate that the law directly advances its interest in the least restrictive way. The Attorney General could take a variety of actions to fight child pornography that would not result in widespread Internet censorship. As explained in Plaintiffs’ opening memorandum (at 36-40), it can prosecute child pornographers directly; it can work with local, federal and overseas authorities to go after producers and distributors outside

Pennsylvania; and it can itself contact entities that are hosting any child pornography that it finds and ask them to remove it. Defendant argues about the effectiveness of these options, but an adequate less restrictive alternative need only be plausible, not perfectly effective, *see Playboy*, 529 U.S. at 824, and there can be no question these alternatives would serve Defendant's interest in fighting child pornography. None of these options have the far-reaching effects on protected speech that the Statute and Informal Notices do.<sup>38</sup> Even under intermediate scrutiny, the law restricts far more speech than is necessary to further the government's valid interest when these other alternatives are available. As the Supreme Court stated in a case striking down a child pornography law, "the possible harm to society in permitting some unprotected speech to go unpunished" – even where that speech is child pornography – "is outweighed by the possibility that protected speech of others may be muted." *Free Speech Coalition*, 535 U.S. at 255.

## **VI. DEFENDANT HAS NOT REBUTTED PLAINTIFFS' COMMERCE CLAUSE ARGUMENT.**

Without question, if this Statute only affected child pornography, Plaintiffs would have no significant Commerce Clause claims – and Plaintiffs have never suggested otherwise. But if that were true, Plaintiffs would not have brought this case in the first place.

Where Plaintiffs and Defendant part company on the Commerce Clause is Plaintiffs' believe that a direct and unavoidable impact on interstate (and indeed global) speech involving more than 1 million blocked web sites – hundreds of thousands of which were in the United States – amounts to an affect on something other than child pornography. Moreover, this impact

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<sup>38</sup> The Defendant's assertion that "the statutory and informal notices asking ISPs to disable access to objectionable material cannot be considered more restrictive than taking down the producer" (Defendant's Mem. at 60) makes no sense. Forcing ISPs to disable access has resulted in the censorship of more than one million concededly innocent web sites; taking down a child pornography producer would result only in the suppression of unprotected speech.

was completely predictable.<sup>39</sup> The harm here was clear and undeniable (but, until discovery, impossible to clearly document). Under *Healy* and other cases cited by Plaintiffs, that practical effect establishes a Commerce Clause violation.

Plaintiff believes that Defendant misreads *Ford Motor Co. v. Insurance Commissioner*, 874 F.2d 926 (3d Cir. 1989). Under *Ford* and similar cases, certain of Plaintiffs' Commerce Clause claims are "governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relationship to the putative local benefit." *Id.* at 941. In this case, Plaintiffs respectfully submit that the blockage of over 1 million lawful web sites in a only mildly effective effort to interfere with 500 child pornography sites does indeed, under *Ford* and other cases, constitute more than an "incidental" burden on Interstate commerce.

## **VII. SEVERING THE STATUTE CANNOT REMEDY CORE PROCEDURAL DEFECTS THAT RENDER IT UNCONSTITUTIONAL.**

Defendant suggests that the Statute can be saved by striking the language that requires non-hosting ISPs to "disable access" to URLs "accessible through its service," but leaving the Statute intact insofar as it allows the Attorney General to issue orders to ISPs to "remove" items "residing on" their services. 18 Pa. Stat. Ann. §622. The Attorney General notes that it is only the requirement that *non*-hosting ISPs block access to sites "accessible though" their services that has caused the massive overblocking that Plaintiffs are concerned about – and he is exactly right on that point. Defendant's Mem. at 16. If the Statute had only permitted orders issued to

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<sup>39</sup> Indeed, when in February 2003 Plaintiff CDT issued its first report attacking the Statute, it did not have any benefit of discovery, and no knowledge of any blocked web sites. Yet based on the limited amount of information known largely from papers relating to the WorldCom case in 2002, Plaintiff was able to describe *precisely* how the interstate (and global) harm would flow from Defendant's actions – and that was that a well intended statute had the *practical effect* of directly regulating protected speech entirely outside of Pennsylvania.

web hosts to remove content on their own servers, Plaintiffs would not have felt it necessary to bring this lawsuit.<sup>40</sup>

Nonetheless, severability will not save the Statute. Even were the “accessible through” language removed, the Statute could never be constitutionally applied because of its fundamental procedural defects. The Statute provides for no hearing whatsoever to any interested parties – a stark due process violation. A federal court should not strain to leave intact such an obviously and unquestionably unconstitutional law.

### **CONCLUSION**

For all the reasons set forth above and in Plaintiff’s opening memorandum, this Court should declare both the Statute and the Informal Notices to be unconstitutional and without legal force or effect, and should enjoin their enforcement.

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<sup>40</sup> Indeed, had the Defendant suggested that it would be willing to ask the legislature to excise the “accessible through” language in the spring of 2003 when Center for Democracy & Technology was making strong overtures to work this out peacefully, this lawsuit might never have happened.

Respectfully Submitted,

John B. Morris, Jr., Esq.  
Lara M. Flint, Esq.  
Center for Democracy & Technology  
1634 I Street, NW, Suite 1100  
Washington, D.C. 20006  
(202) 637-9800

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Stefan Presser, Esq.  
Bar No. 43067  
Legal Director  
American Civil Liberties Union  
of Pennsylvania  
125 South Ninth Street  
Suite 701  
Philadelphia, PA 19107  
(215) 592-1513 ext. 116

Seth Kreimer, Esq.  
Bar No. 26102  
3400 Chestnut Street  
Philadelphia, PA 19104  
(215) 898-7447

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