

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4 August Term 2002

5 (Argued February 6, 2003 Decided: August 27, 2003)

6 Docket No. 02-7785

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8 AMERICAN BOOKSELLERS FOUNDATION; AMERICAN CIVIL LIBERTIES UNION  
9 OF VERMONT, INC.; ASSOCIATION OF AMERICAN PUBLISHERS, INC.;  
10 FREEDOM TO READ FOUNDATION; NATIONAL ASSOCIATION OF RECORDING  
11 MERCHANDISERS; NORTHSHIRE INFORMATION, INC.; PSINET, INC.;  
12 RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.; SEXUAL HEALTH  
13 NETWORK, INC.,

14  
15 Plaintiffs-Appellees,

16  
17 -- v. --

18  
19 HOWARD DEAN, in his official capacity as Governor of the State of  
20 Vermont; WILLIAM H. SORRELL, in his official capacity as Attorney  
21 General of the State of Vermont, ROBERT SIMPSON, DAN DAVIS, KEITH  
22 W. FLYNN, DALE O. GRAY, JAMES A. HUGHES, VINCENT ILLUZZI, JAMES  
23 D. MCKNIGHT, JAMES P. MONGEON, JOEL W. PAGE, JOHN H. QUINN,  
24 GEORGE E. RICE, ROBERT L. SAND, TERRY J. TRONO, and WILLIAM  
25 FINLEY WRIGHT, in their official capacities as Vermont State's  
26 Attorneys,

27  
28 Defendants-Appellants.

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32 B e f o r e : WALKER, Chief Judge, POOLER, Circuit Judge, and  
33 GLEESON, District Judge.\*

34 Appeal from the judgment and order of the United States

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\* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

1 District Court for the District of Vermont (J. Garvan Murtha,  
2 District Judge) permanently enjoining defendants from enforcing  
3 13 V.S.A. § 2802a on the basis that the statute violates the  
4 First Amendment and dormant Commerce Clause.

5 Affirmed in part and modified in part.

6 MICHAEL A. BAMBERGER, Sonnenschein  
7 Nath & Rosenthal (Nolan Burkhouse,  
8 Sarah Shelburne North, Law Offices  
9 of Charles Platto, Norwich, VT,  
10 David Putter, Montpelier, VT,  
11 Markus Brakhan, Burlington, VT, on  
12 the brief), New York, NY, for  
13 Plaintiffs-Appellees.

14  
15 JOSEPH LEON WINN, Assistant  
16 Attorney General, Vermont Office of  
17 Attorney General, Montpelier, VT,  
18 for Defendants-Appellants.

19  
20  
21 JOHN M. WALKER, JR., Chief Judge:

22 Plaintiffs Sexual Health Network, Inc. and American Civil  
23 Liberties Union of Vermont brought suit against Vermont's  
24 Governor, Attorney General and various State's Attorneys ("State  
25 Defendants" or "Appellants") to enjoin enforcement of 13 V.S.A. §  
26 2802a on the basis that it violated the First Amendment right of  
27 free expression and the dormant Commerce Clause. The United  
28 States District Court for the District of Vermont (J. Garvan  
29 Murtha, District Judge) found that the statute violated both the  
30 First Amendment and the dormant Commerce Clause and enjoined  
31 defendants from enforcing the statute. We affirm the district  
32 court's finding that the statute would violate the First

1 Amendment and the dormant Commerce Clause if applied to the  
2 plaintiffs but modify the injunction to enjoin only its  
3 applications to the plaintiffs' internet-related activity.

4 BACKGROUND

5 The facts of this case are set forth in detail in American  
6 Booksellers Foundation for Free Expression v. Dean, 202 F. Supp.  
7 2d 300 (D.Vt. 2002), familiarity with which is presumed. We  
8 summarize the relevant facts below.

9 Plaintiff Sexual Health Network, Inc. ("SHN") is a Delaware  
10 for-profit corporation whose principal place of business is in  
11 Connecticut. SHN's purpose is to provide access to sexuality-  
12 related information, especially for persons with disabilities,  
13 illnesses, and changes in their lifestyle. SHN's website is the  
14 primary vehicle by which SHN provides such information. The SHN  
15 website contains information on a range of sex-related topics  
16 including: sexual addiction, advice for making safe sex practices  
17 more erotic, guidelines on the safe practice of bondage  
18 sadomasochistic activities, and information on how those with  
19 disabilities can experience sexual pleasure. Approximately  
20 25,000 different viewers visit the SHN website each month. SHN's  
21 website also coordinates interactive question and answer forums.

22 The American Civil Liberties Union of Vermont ("ACLU-VT") is  
23 an affiliate of the national ACLU. ACLU-VT maintains a website  
24 that links to the website of the national ACLU. Although ACLU-VT

1 does not include sex-related materials on its own website, the  
2 national ACLU includes materials on topics such as birth control,  
3 safe sex practices, gay and lesbian rights, abortion, and sex  
4 education.

5 In 2000, Vermont Governor Howard Dean signed into law Act  
6 No. 124, "An Act Relating to Internet Crimes," which extended to  
7 internet communications 13 V.S.A. § 2802's prohibition against  
8 distributing to minors sexually explicit materials that are  
9 "harmful to minors." 2000 Vt. Acts & Resolves 124 § 7; 13 V.S.A.  
10 § 2802 (1998). On February 7, 2001, plaintiffs sought  
11 declaratory and injunctive relief from enforcement of the amended  
12 statute on the basis that it violated the First Amendment and the  
13 dormant Commerce Clause. In response, the Vermont General  
14 Assembly passed Act No. 41, which limited 13 V.S.A. § 2802 to  
15 dissemination of indecent material to a minor "in the presence of  
16 a minor" and created a new provision, 13 V.S.A. § 2802a, which  
17 prohibited dissemination to minors of indecent material that is  
18 "harmful to minors" when the dissemination occurs "outside the  
19 presence of the minor" but the disseminator has "actual  
20 knowledge" that the recipient is a minor. 2001 Vt. Acts &  
21 Resolves 41. Plaintiffs amended their complaint to allege First  
22 Amendment and dormant Commerce Clause violations with the  
23 enactment of amended § 2802 and the new § 2802a.

24 The district court found that the technology of the Internet

1 has not changed substantially since the Supreme Court's decision  
2 in Reno v. American Civil Liberties Union, 521 U.S. 844, 849-53  
3 (1997). In particular, it remains difficult for "publishers" who  
4 post information on the internet to limit website access to adult  
5 viewers or to viewers from certain states. Although technology  
6 exists that allows publishers to restrict website access by  
7 requiring credit card verification or registration with a  
8 commercial age-verification service, a significant number of  
9 adult web-users are unwilling or unable to use such verification  
10 systems. Such systems are not only an additional hassle, they  
11 also require that website visitors forgo the anonymity otherwise  
12 available on the internet. Additionally, adults who do not have  
13 a credit card are unable to access those sites that require  
14 credit card verification. Neither SHN nor ACLU-VT screen viewers  
15 through either a credit card system or an age-verification  
16 screening service. According to SHN, such age-verification  
17 systems would significantly decrease the number and frequency of  
18 visitors to its website.

19 The district court held that (1) SHN and ACLU-VT had  
20 standing to bring suit against Section 2802a because they faced a  
21 sufficiently credible fear of prosecution but lacked standing to  
22 challenge Section 2802; (2) Section 2802a violates the First  
23 Amendment because it burdens adult speech and is not narrowly  
24 tailored; and (3) Section 2802a violates the dormant Commerce

1 Clause because it projects Vermont's regulation onto the rest of  
2 the nation and because the local benefits do not outweigh the  
3 burden on interstate commerce. Am. Booksellers, 202 F. Supp. 2d  
4 at 302-03, 310-22. Finally, the district court found that the  
5 statute could not be severed and permanently enjoined defendants  
6 from enforcing it.

#### 7 DISCUSSION

8 The State Defendants challenge the district court's  
9 determination that plaintiffs have standing and that the statute  
10 violates the First Amendment and dormant Commerce Clause.

11 Defendants also challenge the scope of the injunction.

12 Appellants' argument with respect to the first three points rests  
13 on a narrow construction of Section 2802a. We therefore turn  
14 first to the proper construction of Section 2802a. We review the  
15 district court's factual findings for clear error and its legal  
16 determinations de novo. See Zervos v. Verizon New York, Inc.,  
17 252 F.3d 163, 168 (2d Cir. 2001).

#### 18 I. Scope of Section 2802a

19 The core prohibition of Section 2802a reads in pertinent  
20 part as follows:

21 No person may, with knowledge of its character and content,  
22 and with actual knowledge that the recipient is a minor,  
23 sell, lend, distribute or give away [pornographic material]  
24 which is harmful to minors.<sup>2</sup>

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<sup>2</sup> The entirety of 13 V.S.A. § 2802a reads as follows:  
Disseminating indecent material to a minor outside the

presence of the minor

(a) No person may, with knowledge of its character and content, and with actual knowledge that the recipient is a minor, sell, lend, distribute or give away:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image, including any such representation or image which is communicated, transmitted, or stored electronically, of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(2) any book pamphlet, magazine, printed matter, however reproduced, or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

(b) No person may, with actual knowledge that the recipient or viewer is a minor, and with knowledge of the character and content of a motion picture, show or other presentation, including any such motion picture, show or presentation which is communicated, transmitted, or stored electronically, which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors:

(1) exhibit such a motion picture, show or other presentation to a minor; or

(2) sell or give away to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such a motion picture, show or other presentation.

(c) This section shall apply to acts occurring outside the presence of the minor.

"Harmful to minors" is defined by 13 V.S.A. § 2801(6) as material that:

(A) Predominantly appeals to the prurient, shameful or morbid interest of minors; and

(B) Is patently offensive to prevailing standards in the adult community in the state of Vermont as a whole with respect to what is suitable material for minors; and

(C) [] [T]aken as a whole, lacks serious literary, artistic, political, or scientific value, for minors.

1 posted on websites and to internet or email discussion groups.  
2 The State Defendants argue that this interpretation is incorrect  
3 and that Section 2802a only applies to "person-to-person"  
4 communication because it is only in these circumstances that the  
5 sender will have "actual knowledge" that the recipient is a  
6 minor. We disagree.

7 The terms of Section 2802a can be easily read to apply to  
8 material placed on a website or shared with an email or internet  
9 discussion group. When people post information onto a website  
10 available to the public, they "distribute" or "give away" the  
11 information. "Actual knowledge" that a recipient is a minor is  
12 possible not only in cases of two-person email but also when the  
13 disseminator of the material knows that there will be minors  
14 among the many people who visit the website or participate in the  
15 discussion group. Moreover, as the Supreme Court pointed out in  
16 Reno, a "heckler" might provide "knowledge" by announcing that a  
17 minor would be looking at the website or participating in the  
18 discussion group. 521 U.S. at 880. Appellants point to no  
19 decisions of the Vermont Supreme Court that suggest to us that  
20 that court would construe the statute differently.

## 21 II. Standing

22 Appellants argue that plaintiffs lack standing because the  
23 statute does not reach material posted on plaintiffs' websites.  
24 As we have discussed, we reject this narrow reading of the



1 statute. Because there are no feasible means of preventing  
2 minors from accessing their websites or internet discussion  
3 groups without also significantly limiting communication to  
4 adults, see Reno, 521 U.S. at 855-57, Section 2802a presents  
5 plaintiffs with the choice of risking prosecution or censoring  
6 the content of their sites. Plaintiffs have therefore met the  
7 threshold for establishing standing for a First Amendment claim  
8 by demonstrating “an actual and well-founded fear that the law  
9 will be enforced against [them].” Vt. Right to Life Comm. v.  
10 Sorrell, 221 F.3d 376, 382 (2d Cir. 2000) (quoting Virginia v.  
11 Am. Booksellers Ass’n, 484 U.S. 383, 393 (1988)). The district  
12 court did not address whether plaintiffs also have standing to  
13 bring their Commerce Clause claims. The standard for non-First  
14 Amendment claims is slightly higher: A plaintiff must  
15 demonstrate “a realistic danger of sustaining a direct injury as  
16 a result of the statute’s operation or enforcement.” Babbitt v.  
17 United Farm Workers Nat’l Union, 442 U.S. 289, 298 (1979). In  
18 this case, the choice that the statute presents to plaintiffs -  
19 censor their communications or risk prosecution - plainly  
20 presents a “realistic danger” of “direct injury.”

### 21 III. First Amendment Right to Free Expression

22 The Constitution permits a state to impose restrictions on a  
23 minor’s access to material considered harmful to minors even if  
24 the material is not obscene with respect to adults, see Ginsberg

1 v. New York, 390 U.S. 629, 636-37 (1968); but such restrictions  
2 aimed at minors may not limit non-obscene expression among  
3 adults. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252  
4 (2002) (“[S]peech within the rights of adults to hear may not be  
5 silenced completely in an attempt to shield children from it.”);  
6 Reno, 521 U.S. at 874 (applying heightened scrutiny to  
7 Communications Decency Act which aimed to protect children from  
8 indecent material).

9 Vermont’s primary argument, again, is that the statute only  
10 applies to transmissions such as email sent directly to a minor  
11 when the sender has “actual knowledge” that the recipient is a  
12 minor. If that were the case, it is possible that regulation of  
13 such two-person email correspondence would be constitutional.  
14 However, as we have discussed, Vermont did not pass such a narrow  
15 statute. Section 2802a, like the statute struck down by the  
16 Supreme Court in Reno, regulates websites and internet discussion  
17 groups. See 521 U.S. at 859-60. Appellants have not challenged  
18 the district court’s finding that the technology available to  
19 prevent minors from accessing websites and discussion groups has  
20 not developed significantly since the Supreme Court decided  
21 Reno and that the present technologies would deter many adults  
22 from visiting those sites. See Am. Booksellers, 202 F. Supp. 2d  
23 at 307-08, 318; see also Reno, 521 U.S. at 855-57.

24 We also agree with the district court that the legislative

1 remedy is not narrowly tailored and that Vermont's goals could be  
2 substantially achieved through alternative means that would not  
3 burden adult expression. As the Reno Court found, the general  
4 interest in preventing minors from viewing pornographic material  
5 on the internet can be achieved through a variety of user-based  
6 internet filtering technologies that allow parents and teachers  
7 to oversee a minor's use of the internet. See Reno, 521 U.S. at  
8 877. In addition, Vermont's interest in preventing pedophiles  
9 from "grooming" minors for future sexual encounters can be  
10 effectively addressed through enforcement of Section 2828, which  
11 regulates electronic "luring." 13 V.S.A. § 2828. We therefore  
12 find that, as applied to plaintiffs' internet speech, Section  
13 2802a burdens protected speech and is not narrowly tailored, and,  
14 like the Communications Decency Act struck down in Reno, violates  
15 the First Amendment. See id. at 879.

#### 16 IV. Dormant Commerce Clause

17 The district court also held that Section 2802a violated the  
18 dormant Commerce Clause. We discuss this issue briefly.

19 The "dormant" Commerce Clause protects against state  
20 regulations that "erect barriers against interstate trade."  
21 Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980). Dormant  
22 Commerce Clause doctrine distinguishes between state regulations  
23 that "affirmatively discriminate" against interstate commerce and  
24 evenhanded regulations that "burden interstate transactions only

1 incidentally." Maine v. Taylor, 477 U.S. 131, 138 (1986).  
2 Regulations that "clearly discriminate against interstate  
3 commerce [are] virtually invalid per se," Nat'l Elec. Mfr. Ass'n  
4 v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001), while those that  
5 incidentally burden interstate commerce will be struck down only  
6 if "the burden imposed on such commerce is clearly excessive in  
7 relation to the putative local benefits," Pike v. Bruce Church,  
8 Inc., 397 U.S. 137, 142 (1970). The Supreme Court has  
9 acknowledged, however, that "there is no clear line separating  
10 the category of state regulation that is virtually per se invalid  
11 under the Commerce Clause, and the category subject to the Pike  
12 v. Bruce Church balancing approach." Brown-Forman Distillers  
13 Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); see  
14 also Healy v. Beer Inst., 491 U.S. 324, 337 n.14 (1989). In  
15 order to determine whether Section 2802a should be analyzed under  
16 the Pike balancing test or as a per se violation, we examine the  
17 nature of the burden on interstate commerce. Under either  
18 analysis, "the critical consideration is the overall effect of  
19 the statute on both local and interstate activity." Brown-  
20 Forman, 476 U.S. at 579.

21 State regulations may burden interstate commerce "when a  
22 statute (i) shifts the costs of regulation onto other states,  
23 permitting in-state lawmakers to avoid the costs of their  
24 political decisions, (ii) has the practical effect of requiring

1 out-of-state commerce to be conducted at the regulating state's  
2 direction, or (iii) alters the interstate flow of the goods in  
3 question, as distinct from the impact on companies trading in  
4 those goods." Brown & Williamson Tobacco Corp. v. Pataki, 320  
5 F.3d 200, 208-09 (2d Cir. 2003) (citations omitted); see also  
6 Pac. Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1015  
7 (9th Cir. 1994) (reviewing types of burdens such as "disruption  
8 of travel and shipping due to lack of uniformity of state laws,"  
9 "impacts on commerce beyond the borders of the defendant state,"  
10 and "impacts that fall more heavily on out-of-state interests").

11 The district court considered separately whether, because of  
12 its extraterritorial effects, Section 2802a violates the dormant  
13 Commerce Clause and whether it fails the Pike balancing test  
14 because of the general burden it placed on interstate commerce.  
15 Am. Booksellers, 202 F. Supp. 2d at 320-21. The district court  
16 found that because Section 2802a "regulates Internet commerce  
17 occurring wholly outside Vermont's borders," it violates the  
18 dormant Commerce Clause per se and, because the putative local  
19 benefits were relatively insignificant, it also fails the  
20 Pike balancing test. Id.

21 We start by considering the statute's extraterritorial  
22 effects. In Healy, the Court held that "a state law that has the  
23 'practical effect' of regulating commerce occurring wholly  
24 outside that State's borders is invalid under the Commerce

1 Clause.” 491 U.S. at 332. Because the internet does not  
2 recognize geographic boundaries, it is difficult, if not  
3 impossible, for a state to regulate internet activities without  
4 “project[ing] its legislation into other States.” Id. at 334.

5 A person outside Vermont who posts information on a website  
6 or on an electronic discussion group cannot prevent people in  
7 Vermont from accessing the material. If someone in Connecticut  
8 posts material for the intended benefit of other people in  
9 Connecticut, that person must assume that someone from Vermont  
10 may also view the material. This means that those outside  
11 Vermont must comply with Section 2802a or risk prosecution by  
12 Vermont. Vermont has “project[ed]” section 2802a onto the rest  
13 of the nation.

14 Once again appellants defend Section 2802a by arguing that,  
15 under their narrow interpretation of the statute, it only  
16 regulates material sent directly to a minor in Vermont and does  
17 not regulate out-of-state internet activities or websites that  
18 are visited by Vermont minors. With our rejection of this narrow  
19 interpretation of Section 2802a, this argument fails. Although  
20 Vermont aims to protect only Vermont minors, the rest of the  
21 nation is forced to comply with its regulation or risk  
22 prosecution.

23 We do note, however, that the extraterritorial effects of  
24 internet regulations differ from extraterritorial-regulation

1 cases like Healy and Brown-Forman. In Healy, for example,  
2 Connecticut sought to prevent distributors from selling beer in-  
3 state for more than the price at which they sold it in  
4 neighboring states. Healy, 491 U.S. at 326. Connecticut  
5 accomplished this by setting the maximum price for which beer  
6 could be sold during the next month by reference to the minimum  
7 price in neighboring states. Once the maximum in-state price was  
8 set, the regulations had the effect of also fixing the minimum  
9 price at which beer or liquor could be sold in the neighboring  
10 states because the distributor would face penalties if it sold  
11 beer or liquor for less in the neighboring states. Id. at 338.  
12 Thus, Connecticut's regulation was projected onto purely  
13 intrastate beer sales in the neighboring state. See also Brown-  
14 Forman, 476 U.S. at 575, 584 (striking down a similar New York  
15 State regulation of liquor prices).

16 In contrast, the internet's boundary-less nature means that  
17 internet commerce does not quite "occur[] wholly outside  
18 [Vermont's] borders." Healy, 491 U.S. at 332. Even if a website  
19 is never visited by people in Vermont, it is available to them in  
20 a way that a beer purchase in New York or Massachusetts is  
21 plainly not. Vermont's interest in out-of-state internet  
22 activity is thus more significant than a state's interest in the  
23 price of out-of-state beer sales. However, internet regulation  
24 of the sort at issue here still runs afoul of the dormant

1 Commerce Clause because the Clause “protects against inconsistent  
2 legislation arising from the projection of one state regulatory  
3 regime into the jurisdiction of another State.” Id. at 337.

4 Thus, at the same time that the internet’s geographic reach  
5 increases Vermont’s interest in regulating out-of-state conduct,  
6 it makes state regulation impracticable. We think it likely that  
7 the internet will soon be seen as falling within the class of  
8 subjects that are protected from State regulation because they  
9 “imperatively demand[] a single uniform rule.” Cooley v. Bd. of  
10 Wardens, 53 U.S. 299, 319 (1852).

11 Although Section 2802a does not discriminate against  
12 interstate commerce on its face, we agree with the district court  
13 that it presents a per se violation of the dormant Commerce  
14 Clause. In practical effect, Vermont “has ‘projected its  
15 legislation’ into other States, and directly regulated commerce  
16 therein,” in violation of the dormant Commerce Clause. Brown-  
17 Forman, 476 U.S. at 584 (emphasis added). Because we find that,  
18 as applied to plaintiffs’ internet speech, the statute violates  
19 the dormant Commerce Clause as a matter of law, we have no need  
20 to apply the Pike balancing test to the statute’s  
21 extraterritoriality and decline to consider, as the district  
22 court did, whether the statute would also fail the Pike test  
23 based on the general burden it places on interstate commerce.

24 In finding that Section 2802a violates the First Amendment



1 and the dormant Commerce Clause, we join the Tenth Circuit which  
2 concluded in American Civil Liberties Union v. Johnson that a  
3 similar New Mexico law violated both constitutional provisions.  
4 See Johnson, 194 F.3d 1149, 1158, 1162-63 (10th Cir. 1999); see  
5 also Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 179, 183-84  
6 (S.D.N.Y. 1997) (holding that a New York law prohibiting  
7 dissemination via computer of "harmful to minors" material to a  
8 minor violated the dormant Commerce Clause).

#### 9 V. Scope of the Injunction

10 Appellants request that the panel modify the injunction,  
11 which permanently enjoins them from enforcing Section 2802a, to  
12 apply only to internet communications. We agree with the  
13 district court that the terms of the statute do not permit us  
14 either to construe the statute narrowly or to sever the  
15 unconstitutional portion. However, we believe that because  
16 plaintiffs challenged the statute based on their own speech, it  
17 is preferable to determine the validity of the statute only as  
18 applied to that speech. As such, we agree with appellants that  
19 the injunction should be modified to enjoin them from enforcing  
20 the statute against the internet speech upon which plaintiffs  
21 base their suit.

22 In the context of the First Amendment, a party whose speech  
23 could be constitutionally regulated is permitted to challenge a  
24 statute based on its overbreadth, the fact that the statute

1 regulates not only their unprotected speech but also a  
2 substantial amount of protected speech. See Broadrick v.  
3 Oklahoma, 413 U.S. 601, 612 (1973). When a court finds that a  
4 statute suffers from such substantial overbreadth, all  
5 enforcement of the statute is generally precluded. Although the  
6 district court did not directly analyze whether the statute was  
7 “substantially overbroad,” the broad terms of the injunction  
8 suggest that the district court thought that it was substantially  
9 overbroad and thus invalid in all applications.

10 In this case, we do not need to determine whether the  
11 statute is substantially overbroad; we can simply determine  
12 whether the statute can be constitutionally applied to the  
13 internet speech upon which plaintiffs base their suit. As the  
14 Supreme Court held in Board of Trustees v. Fox, it is “generally  
15 [not] desirable [] to proceed to an overbreadth issue  
16 unnecessarily.” 492 U.S. 469, 484-85 (1989). Thus, “the  
17 lawfulness of the particular application of the law should  
18 ordinarily be decided first.” Id. at 485; see also Brockett v.  
19 Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (“[W]here the  
20 parties challenging the statute are those who desire to engage in  
21 protected speech that the overbroad statute purports to punish .  
22 . . [t]he statute may forthwith be declared invalid to the extent  
23 that it reaches too far, but otherwise left intact.”). We  
24 therefore follow “the normal rule that partial, rather than

1 facial, invalidation is the required course" and leave for  
2 another day an overbreadth challenge to the statute. Brockett,  
3 472 U.S. at 504.

4 We think the Supreme Court's decision in Reno is not  
5 inconsistent with this result. In Reno, the Court enjoined the  
6 Communications Decency Act completely, despite the fact that the  
7 plaintiffs in Reno based their suit on their own protected  
8 speech. However, the Reno Court explained that the statute which  
9 granted expedited review prevented the Court from converting the  
10 case into an as-applied challenge and also noted that the "vast  
11 array of plaintiffs, the range of their expressive activities,  
12 and the vagueness of the statute" made it impractical to consider  
13 an as-applied challenge. Reno, 521 U.S. at 883-84. In the  
14 instant case, our jurisdiction is not similarly constrained and  
15 because the speech at issue is discrete, it is feasible to  
16 consider only the internet speech upon which plaintiffs based  
17 their suit.

18 We therefore order that the injunction be modified to enjoin  
19 defendants from enforcing Section 2802a only as applied to the  
20 kind of internet speech presented by plaintiffs.

21 To recap, we agree with the district court that plaintiffs  
22 SHN and ACLU-VT have standing to challenge Section 2802a.  
23 Considering the statute as applied to plaintiffs' internet  
24 speech, we find that Section 2802a violates the First Amendment

1 because it burdens protected communications and is not narrowly  
2 tailored, and violates the dormant Commerce Clause as a matter of  
3 law because it projects Vermont's regulatory regime onto the rest  
4 of the nation. Finally, we enjoin enforcement of Section 2802a  
5 only as applied to the internet speech upon which plaintiffs  
6 based their suit and direct the district court to modify the  
7 injunction accordingly.

8 CONCLUSION

9 Affirmed in part and Modified in part.