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VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on* Friday *the* 12th *day of* September, 2003.

PSINet Inc., et al.,

Plaintiffs-Appellees,

against Record No. 030235

Warner D. Chapman, etc., et al.,

Defendants-Appellants.

Upon questions of law  
certified by the United States  
Court of Appeals for the Fourth  
Circuit.

On January 21, 2003, pursuant to Rule 5:42, the United States Court of Appeals for the Fourth Circuit certified to this Court the following questions of law:

A. Would the use of any of the technological access controls identified by the Attorney General of Virginia preclude conviction under Virginia Code § 18.2-391 as amended in 1999?

B. Does the prohibition against knowingly displaying pornographic materials that are "harmful to juveniles" apply to displays made only in connection with the sale, rental, or loan of such materials? If not, what must the government establish to prove that a defendant has knowingly displayed such material "for commercial purpose"?

PSINet, Inc. v. Chapman, 317 F.3d 413, 419 (4th Cir. 2003).

This Court accepted the questions in an order entered March 6, 2003. However, under Rule 5:42, the Court may furnish answers to certified questions only if the questions are determinative in any proceeding pending before the certifying court. In this case, the order of March 6, 2003, directed counsel to brief and argue the

additional question whether the answers to the certified questions would be determinative of the outcome of the proceeding pending in the Fourth Circuit. Upon consideration of the written and oral arguments, this Court finds that the answers to the certified questions would not be outcome determinative.

Prior to 1999, Code § 18.2-391 made it a Class 1 misdemeanor for any person knowingly to sell, rent, or loan to a juvenile or to display for commercial purpose certain pornographic materials in a manner whereby juveniles may examine and peruse them. A 1999 amendment added an "electronic file or message containing an image" and "words" to the list of proscribed materials, 1999 Va. Acts ch. 936, thus extending the provisions of the Code section to include the Internet.

On December 15, 1999, PSINet, Inc. and numerous other plaintiffs brought an action in the United States District Court for the Western District of Virginia seeking a declaration that the 1999 amendment was unconstitutional because violative of the First Amendment to and the Commerce Clause of the United States Constitution. The district court declared the amendment unconstitutional on both First Amendment and Commerce Clause grounds and granted an injunction against enforcement of the 1999 amendment insofar as it related to Internet communications. PSINet, Inc. v. Chapman, 167 F. Supp. 2d 878 (W.D. Va. 2001). On appeal, the Fourth Circuit certified to this Court the two questions quoted above.

Rule 5:42(a) provides that a certification order shall set forth a brief statement explaining how a certified question of law is determinative of the proceeding in the certifying court. The

explanation provided in the certification order entered in this case states that "[a]scertaining the scope of the [1999 amendment's] coverage and what compliance measures would preclude conviction is necessary for resolution not only of the First Amendment claim, but also for resolution of the dormant Commerce Clause claim, should it be necessary for [the Fourth Circuit] to reach the latter issue." 317 F.3d at 422.

During oral argument, the parties discussed the question whether the answers to the certified questions would be determinative of the proceeding pending in the Fourth Circuit. Much of the discussion focused upon whether the certified questions implicate both the First Amendment and the Commerce Clause.

We find that neither question implicates the Commerce Clause. It can hardly be argued that the Fourth Circuit intended Question A to implicate the Commerce Clause issue. Framed in terms of conviction for a criminal offense, Question A bears no relation to an inquiry into the 1999 amendment's validity under the Commerce Clause. Therefore, any response this Court might make to Question A would not be determinative of the Commerce Clause issue.

The sole issue presented by Question B is whether the 1999 amendment applies only to displays made in connection with the sale, rental, or loan of materials "harmful to juveniles." The Commerce Clause is not mentioned, nor is there any reference, directly or indirectly, to interstate commerce, the predicate for application of the Commerce Clause. Hence, Question B presents to this Court no issue concerning the effect of the 1999 amendment vis-à-vis the Commerce Clause. If this Court were to express its views on that subject, it would be rendering an advisory opinion,

which it is not free to do. See City of Fairfax v. Shanklin, 205 Va. 227, 229, 135 S.E.2d 773, 775-76 (1964). Thus, even if this Court answered Question B by agreeing with the Attorney General that the 1999 amendment applies only to displays made in connection with the sale, rental, or loan of materials harmful to juveniles, the answer would not be determinative of the proceeding because there would remain outstanding the question concerning the effect of the amendment with relation to the Commerce Clause.

Furthermore, because this Court's answers to the certified questions would not be determinative of the Commerce Clause issue, it would be futile for the Court to respond to the First Amendment issue. If the Fourth Circuit finds it necessary to reach the issue concerning the Commerce Clause, its action on that issue could render this Court's answer to the First Amendment question without effect, and, therefore, not determinative of the proceeding pending in the Fourth Circuit.

For the foregoing reasons, this Court respectfully declines to answer the certified questions.

This order shall be certified to the United States Court of appeals for the Fourth Circuit.

A Copy,

Teste:

*Bert A. Honey*

Clerk