

IN THE
SUPREME COURT OF VIRGINIA

WARNER D. CHAPMAN, *et al.*,)
)
 Defendants-Appellants,)
)
 v.)
)
 PSINET INC., *et al.*,)
)
 Plaintiffs-Appellees.)

Case No. 030235

BRIEF OF APPELLEES

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Due to printer error – apparently mechanical “skips” – a number of pages were omitted from documents in the multi-volume Joint Appendix. These omissions were detected during final review of Plaintiffs/Appellees Brief. To avoid delay, and for the Court’s convenience, the Commonwealth has agreed that omitted pages deemed material to Appellees’ Brief may be included in this Appendix. The page number citations in the text of the Brief include an asterisk – e.g. JA-53* -- to indicate inclusion in this Appendix.

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BRIEF OF APPELLEES

Plaintiffs/Appellees PSINet, Inc., et al., submit this brief in opposition to the Commonwealth's "Brief of Appellants."

INTRODUCTION

The Commonwealth urges this Court to make bad law in hopes of saving a bad statute. The bad statute is the 1999 Amendment to Va. Code 18.2-391 (the "Act"), which addressed complex new issues presented by the Internet through the simple expedient of inserting "electronic file or message" into a pre-Internet statute. Predictably, this blunt approach to regulating fully protected adult speech in a medium where geographic and political boundaries do not exist suffers from a host of constitutional defects under the Commerce Clause and the First Amendment.

Equally predictably, the 1999 Amendment offers no practical protection to any Virginia child. That is a sober and undisputed fact. The Commonwealth has argued its legal significance, but never claimed – much less showed – that a single Virginia child would receive meaningful protection if the 1999 Amendment were sustained. At the same time, the Commonwealth does not deny that voluntary user-based means permit parents and other responsible adults to provide highly effective protection to children at little or no cost. But it is difficult to persuade parents that the responsibility is theirs when the Commonwealth is pretending – contrary to fact – that the 1999 Amendment offers meaningful protection.

The law that the Commonwealth asks this Court to make in an effort to save the pointless 1999 Amendment is bad for many reasons. First, just to reach the questions the Commonwealth asked the Fourth Circuit to certify, this Court would have to abandon its judicial role as a decider of cases and, instead, act as a legal adviser, answering abstract questions. In addition to breaking with settled and fundamental doctrine that requires this Court to satisfy itself at all stages that it is acting

within its judicial power, this would violate this Court's Rule 5:42(c)(6), which mandates that a certification order "explain" how the questions are determinative.

Second, the answers that the Commonwealth asks this Court to give would require this Court to draft legislation, rather than construe it. No plausible reading of the Act would allow for-profit businesses to target a "harmful" display to juveniles so long as it promotes some event, service, or product that is not itself harmful. No reading of the Act would allow "harmful" material to be displayed to anyone who has a credit card number. And no reading can confine restriction of all "harmful" "electronic files or messages" to websites, excluding electronic files or messages displayed via email, instant messaging among groups, listservs, and similar Internet modalities that are not website based. Yet this is what the Commonwealth urges.

Third, the narrowing constructions the Commonwealth urges would require this Court to actively frustrate the General Assembly's legislative intent by curtailing the application of the entire Act in all of its applications, including its applications to physical space, in hopes of preserving a pointless sliver of Internet regulation. For example, the Act presently forbids any for-profit business to knowingly display "harmful" material to juveniles for any "commercial purpose." Yet, in an attempt to save some Internet regulation, the Commonwealth would have this Court authorize explicitly "harmful" displays that businesses target directly to juveniles so long as the displays are not in connection with the sale, rental, or loan of material that itself is "harmful." Thus, promotion of rock concerts, raves, beach weekends, bars, reviews, and not-quite-harmful books, movies, videos, video games, magazines, and the like, would be released from restraints that the General Assembly plainly imposed. The tail would wag the dog.

Unquestionably, children need protection from "harmful" Internet material, but they need real protection, not a pointless gesture that violates basic Constitutional restraints. Real protection can be achieved, but only if Virginia makes clear to its parents and other adults who supervise

children that state-imposed restriction of “harmful” Internet content is an illusion and that, instead, existing, highly effective, voluntary user-based methods must be employed.

This Court should preserve its judicial role by refusing to act as a legal adviser and by refusing to re-write the Act in a manner that frustrates plainly expressed legislative intent.

QUESTIONS PRESENTED

This proceeding presents three questions, one established by this Court’s Order of March 6, 2003, and two questions by the United States Court of Appeals for the Fourth Circuit. To avoid confusion over numbering, these questions are designated as follows:

- Threshold Does the Fourth Circuit’s order proposing the questions below establish that this Court’s answers will be determinative of the proceeding before the Fourth Circuit as requested by Va. Sup. Ct. R. 5:42 (c)(6)?
1. Would the use of any of the technological access controls (i.e. credit card numbers and adult-check PINS) identified by the Attorney General of Virginia preclude conviction under Virginia Code § 18.2-391 as amended in 1999?
 2. Does the prohibition against knowingly displaying pornographic materials that are “harmful to juveniles” only apply to displays that are made 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 materials “for commercial purpose”?

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Plaintiffs/Appellees brought this action in the U.S. District Court for the Western District of Virginia. The action challenged the constitutionality of the 1999 Amendment to Virginia Code §18.2-391, which -- by inserting “electronic file or message containing” an “image” or “words” into the description of restricted materials -- purported to extend to all of the Internet the Act’s criminal

provisions making it “unlawful for any person knowingly to sell, rent or loan to a juvenile, or to knowingly display for commercial purpose” material that is “harmful” to juveniles. The pre-1999 provisions of the Act were not challenged.

The complaint alleged that the 1999 Amendment violated both the Commerce Clause of, and the First Amendment to, the United States Constitution. U.S. District Judge Michael granted a fully considered preliminary injunction against the 1999 Amendment, supported by a comprehensive opinion that found violations of both the Commerce Clause and the First Amendment. *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D.Va. 2001). Ultimately he granted summary judgment making the injunction final, again relying both on Commerce Clause and First Amendment violations. 167 F. Supp. 2d 878 (W.D.Va 2001). Pre-1999 provisions of the Act were not affected, but all Internet communications were protected.

The Commonwealth appealed to the Fourth Circuit and asked it to certify questions to this Court. After briefing and argument on January 21, 2003, the Fourth Circuit asked this Court to answer two questions of Virginia law under Rule 5:42. On March 6, 2003, this Court directed the parties to brief both the merits and the question of whether the proposed questions are “determinative of the proceeding” before the Fourth Circuit, as Rule 5:42 requires.

STATEMENT OF FACTS

Introduction

Twelve federal judges in five circuits unanimously have struck down the application to the Internet of state statutes forbidding Internet communications deemed “harmful” to juveniles, relying on Commerce Clause and First Amendment grounds that apply with equal force to the Internet portion of Va. Code § 18.2-391 (“Act”). *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff’d* 4 F. Supp. 2d 1024 (D.N.M. 1998); *ACLU v. Napolitano*, ___ F. Supp. 2d ___, Civ. No. 00-506 (D. Ariz. Feb. 19, 2002); *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich.

2002) (“*Cyberspace II*”) (summary judgment and permanent injunction); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (“*Cyberspace I*”) (preliminary injunction), *aff’d*; 238 F.3d 420 (6th Cir. 2000) (unpublished); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *PSINet Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D.Va. 2001) (“Dist. Ct. Op.”) (granting summary judgment) (JA-912-32); *PSINet v. Chapman*, 108 F. Supp. 2d 611 (W.D.Va. 2000 (granting preliminary injunction) (JA-293-323); *Am. Booksellers Found. For Free Expression v. Dean*, 202 F. Supp. 2d 300 (D.Vt. 2002).

Plaintiffs, which include and represent many of the largest Internet businesses and other content providers in the country, brought this litigation because the Act’s sweeping restrictions and burdens on constitutionally protected communications over the Internet concerning health, literature, arts, and other matters would severely damage the commercial and democratic potential of this revolutionary, interactive global medium. Plaintiffs understand firsthand how, because of the practical inability to choose or restrict information by geography and age of viewers, the Act would chill and disrupt the free flow of information that is so essential to Internet growth and commerce. Plaintiffs also understand that the Act would be completely ineffective and have been actively engaged in making widely available for free or low cost a range of far more effective and flexible tools that enable parents and other responsible adults to control Internet access by minors consistent with their own needs and values. *See infra* at 18.

Far from lacking concern for America’s youth, Judge Michael recognized the compelling nature of the goal of “protecting, and helping parents to protect, minors from sexually explicit materials.” Dist. Ct. Op., JA-920. Plaintiffs agree and do not challenge Virginia or federal laws criminalizing the distribution or display of child pornography or obscenity, or the sexual solicitation or luring of minors over the Internet. Although all of these judges also recognize the state’s interest in protecting children, a striking judicial consensus has found unconstitutional state statutes

imposing a broad and untailed, content-based ban on fully protected adult speech in a medium that is inherently interstate in nature while providing no practical protection to children. The Commerce Clause and First Amendment violations found by these other courts are of primary concern to the Fourth Circuit, but practical points deserve emphasis at the outset.

First, Virginia's Act offers no practical protection to Virginia children. Cyberspace is fundamentally different from physical space. In the physical world, juveniles (and even adults) have much greater access to their own neighborhoods than to more distant areas. Thus, excluding items from a community or state may substantially reduce juvenile exposure and access to "harmful" items. This is the approach of the pre-1999 statute. In cyberspace, by contrast, every place is equally close at hand. A Virginia juvenile has the same access and exposure to Internet websites and speakers in California or Minnesota or Amsterdam as to those next door. No matter how effective the Act might be in suppressing "harmful" speech by those concerned about Virginia's law – and Virginia offers no evidence on this point – the access and exposure of Virginia juveniles to "harmful" material could not be materially reduced. Judge Michael expressly ruled that the 1999 Act is "impotent" to protect children, and that ruling is not attacked on appeal. Dist. Ct. Op., JA-930.

Second, Virginia's parents and other responsible adults can voluntarily guide and protect their children from "harmful" Internet material. Moreover, such voluntary user-based techniques can be tailored to the maturity and needs of each particular child and to the values of each particular family. Some parenting techniques are simple common sense, such as putting the computer in the kitchen, den, or other place where parents readily can observe what is on the screen. Parents also may select from a spectrum of marketplace and technological options, ranging from Internet portals that connect only to affirmatively selected, age-appropriate websites to sophisticated screening technologies that parents can adjust to their own child's needs, and that can be temporarily modified

to accommodate special situations (e.g. to a school report on a sex-related subject). Virginia could enhance the effectiveness of voluntary parenting and user-based methods by educating, encouraging and even assisting parents to purchase appropriate technologies, though many are inexpensive or even free. Although no approach can provide perfect protection, parental and user empowerment can provide a very high level of practical protection while respecting all constitutional constraints and enhancing the core parental role that the Constitution itself protects. *Moore v. City of Cleveland*, 431 U.S. 494, 502-04 (1977). See “Youth, Pornography and the Internet.” (NRC Report, 2002) (“NRC Report”) at 14-7 to 14-10 (discussing parenting techniques) (lodged with the Court).

Third, Judge Michael’s opinion does not foreclose the General Assembly from attempting to craft more narrowly tailored statutes to address the specific examples identified in Virginia’s brief.

For example, the Commonwealth argues that it should be able to regulate true “commercial speech” used to promote an on-line credit card sale of “commercial pornography.” If so, however, any such statute would have to be carefully crafted and would involve a host of legislative judgments that the General Assembly has not yet made. This Court should not attempt to craft such a statute itself by radically rewriting existing law and jettisoning protections the General Assembly clearly intended.¹

In sum, this case does not require a hard choice between compelling practical benefits and compliance with marginal constitutional restraints. Nor does this case shut the door to all further legislation. Instead, this case presents a statute that transgresses core constitutional commands as an ineffective gesture toward “doing something” about a problem.

The Statutory Scheme

Since 1970 Virginia Code §18.2-391 has made it a crime “for any person knowingly to sell,

¹ Plaintiffs in this action oppose mandatory content-based speech restrictions and support voluntary, user-based approaches. That said, Plaintiffs observe that the federal government, which can provide national uniformity, is not constrained by the Commerce Clause, and has international relations authority, has been active in fields such as child pornography. See Commission on Child Online Protection, *Report to Congress* at 43-44 (Oct 20, 2000) (“COPA Report”).

rent or loan to a juvenile . . . [a]ny picture, photography, drawing, sculpture, motion picture film or similar representation or image” or “[a]ny book, pamphlet, magazine, printed matter however reproduced or sound recording . . . which, taken as a whole, is harmful to juveniles.” Section 18.2-390(6) defines “harmful to juveniles” to mean speech that (a) “predominantly appeals to the prurient, shameful, or morbid interest of juveniles,” (b) “is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles,” and (c) “is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.” Because obscenity otherwise is regulated, the Act targets fully protected adult speech that is unsuitable for juveniles.

The plain language of the 1970 statute regulated, any sale, rental, or loan. It applied to all sales of a personal or social nature, as well as to sales made as part of a for-profit business. And, by regulating both rental and loan, it made clear that non-compensated temporary transfers were included. (Otherwise, the reference to “loan” would be redundant.) Thus, this prohibition was not limited to commercial transactions. But it was limited to transfers of “harmful” material.

In 1985 Virginia amended § 18.2-391 to deal with situations in which, without any transfer of possession, a juvenile was knowingly exposed to “harmful” material. The 1985 Amendment added a phrase making it unlawful to “knowingly display [“harmful” material] for commercial purpose in a manner whereby juveniles may examine and peruse”. This plain language encompassed any display for commercial purpose, whether or not a transfer was contemplated. That amendment led to a First Amendment challenge by booksellers. After full decisions by the U.S. District Court and the Fourth Circuit, *Am. Booksellers v. Strobel*, 617 F. Supp. 699 (E.D. Va. 1985); *Am. Booksellers v. Virginia*, 802 F.2d 691 (4th Cir. 1986), the United States Supreme Court certified certain questions to this Court. *Am. Booksellers v. Virginia*, 494 U.S. 1056 (1990).

This Court responded by focusing on the statutory language and respecting its plain meaning.

Commonwealth v. Am. Booksellers Ass'n, Inc., 372 S.E. 2d. 618 (1988) (“Booksellers”). First, it considered the phrase “harmful to juveniles.” It ruled that the phrases referred to juveniles as a group, rather than to particular juveniles. Thus, material is not “harmful to juveniles” if it has “serious value” for any “legitimate minority...of older, normal (not deviant) adolescents.” *Id.* at 623. Put another way, material is regulated only if it is harmful to virtually all juveniles.

The Court then addressed the duty that the statute imposed with respect to “harmful” materials. It observed that, to be liable, a bookstore must “knowingly” display “harmful” “material” in a “manner whereby juveniles may examine and peruse.” *Id.* at 625 (emphasis added). The Court gave “knowingly” its conventional meaning of having reasonable notice. *Id.* at 621. Since bookstores know that juveniles may have access to their general stock, their general stock in general is knowingly displayed to juveniles. *Id.*

However, a display is regulated only if a juvenile “may” actually “peruse” it, in the sense of a detailed examination. *Id.* at 624. By shelving the limited number of “harmful” books in plain view of store personnel, the store reasonably could expect to “prevent” such juvenile perusal at little cost. *Id.* at 624-25. Since, with such an approach, the likelihood of an occasional unanticipated juvenile perusal would not be “reasonably apparent,” a store taking this step could not be said to have “knowingly” displayed to juveniles, and prosecution would fail. Because bookstores would incur no substantial burden in complying with the plain meaning of the statute as construed by this Court, the Fourth Circuit held that the First Amendment was not violated. *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990).

At the time of these rulings, the modern Internet did not exist and the arguments and analysis of the cases focused exclusively on the display and sale of tangible items in traditional

establishments. There also was no occasion for a Commerce Clause challenge.²

In the late 1990's the Internet became an increasingly important means of communication. In 1999 Virginia amended §18.2-391 to make it applicable to the Internet by simply inserting the phrase "electronic file or message" in the specification of "harmful" materials. Of course, all forms of Internet communication, e.g. email, result in the display of images or text transmitted as an electronic file or message. This action challenges only that 1999 Amendment.

Unique Characteristics of the Internet

The basic characteristics of the Internet are not disputed. The Fourth Circuit's certification order summarizes the district court's findings, noting that they are consistent with other courts' conclusions. More detail is provided by the Expert Declaration of Lorrie Faith Cranor and her supplemental declaration. JA-84-105; JA-826-34. Dr. Cranor is Senior Technical Staff Member in the Secure Systems Research Group at AT&T Labs – Research and has been extensively involved in the development of the Internet. The Commonwealth relied upon the Dr. Dan J. Olsen, Jr., and his supplemental declaration. JA-413-55; JA-831-43 n.A. Read carefully and with allowance for his different policy views, the material facts presented by Dr. Olsen do not substantially differ from the facts set forth by Dr. Cranor.

Significantly, the Internet encompasses multiple modes of communication beyond the World Wide Web ("Web"), such as email, instant messaging, mail lists (including mail exploders and listservs), USENET newsgroups, chat rooms, and electronic bulletin boards and newspapers. JA-90. These methods involve the display and transfer of files and messages that contain words or images.

² For purposes of *stare decisis*, a case decides only what it decides. If an issue was not presented or was not decided, or if the outcome turns on a materially different factual record, *stare decisis* does not apply. *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (collecting authority); *Brown v. Gilmore*, 258 F.3d 265, 279-81 (4th Cir. 2001) (same statutory language may be given different meaning in second case where record is different).

Id. All modes of Internet communication are subject to the Act.³ Although the Commonwealth stresses the application of the Act to certain websites, it does not deny that emails or other non-website displays are forbidden by the terms of the Act.

Internet speech is much less intrusive than many other forms of communication. Generally, to observe specific items of Internet content, one must invite and authorize its display, unlike conventional broadcast media. Typically, the nature of the communication will be obvious before its opening, and screening software can prevent most explicit materials from reaching the computer screen. This is particularly true of websites of the type the Commonwealth most seeks to regulate. To access websites, one must either conduct a word-based search and select from a list of responsive materials, activate a link, or enter a known “Universal Resource Locator” (“URL”).

**Geographic Location and Distance
Are Meaningless on the Internet**

In contrast to the physical world, geographic location is nearly meaningless in cyberspace. An Internet connection’s speed allows users to interact so rapidly that the communication barrier of physical distance is virtually eliminated. JA-89-90. Moreover, the Internet uses “logical” rather than geographic addresses, and most Internet communications delineate no geographic location at all. JA-91. Where geographic hints seem to appear, they often are misleading. *Id.* Thus, Internet speech from London is as readily accessible to a Virginia juvenile as is Internet speech from next door. Virginia offers no practical way for Internet speakers reliably to determine whether those accessing or receiving a display or communication are in Virginia.⁴

³ The plain language of the Act refers to “electronic files or messages” which clearly covers all Internet communications. While the Commonwealth seeks to minimize this plain reading, they do not seriously dispute it. Moreover, in COPA, passed prior to the Act, Congress explicitly limited the statute to the Web. Virginia could have done that as well but chose not to.

⁴ The Commonwealth asserts that some proprietary techniques can detect nation of origin with increasing accuracy. They do not claim, however, that the state of origin can reliably be detected or that the cutting edge methods they mention are available for general commercial use. Justices

**Ages of Internet Users Cannot
Be Determined Reliably or Practically**

The Internet allows users to control what they disclose about themselves. Internet passwords or login names typically carry no indication of a user's age or other personal characteristics. JA-91-92. Anonymity is highly valued by many Internet users and it encourages free Internet communication. JA-97-98.

Except for websites, the Commonwealth does not even claim to describe a mechanism that a speaker could use today to prevent juveniles from viewing Internet communications. As to websites, it suggests several methods that essentially require each visitor to provide a valid credit or debit card number, either directly to the website or to a site that will issue an "adult PIN" based on the number. However, the Commonwealth offers no evidence that such a requirement would be effective, given that (i) a large and growing number of juveniles have their own credit or debit cards,⁵ (ii) juveniles are notorious for sharing, and (iii) a number from a parent's restaurant receipt could be used and, if no purchase was made, there would be no resulting record.⁶

The Commonwealth cites extra-record reports of studies conducted several years ago suggesting that "pornographic" sites that imposed credit card based systems were able to reduce the percentage of their customers who were juveniles to, in the best case, about 5%. Of course, that was in a context where juveniles easily could shift to other sites that impose no such requirement. Also,

(Continued . . .)

O'Connor and Rehnquist have stressed that Internet restrictions must be judged in light of the Internet as it now exists. *Reno v. ACLU*, 521 U.S. 844, 890-91 (1997).

⁵ The Commonwealth asserts (at 23) that "the prevalence of credit cards among adults...can hardly be questioned." Nor can the rapidly increasing number of youth who hold such cards. A recent survey showed that 22% of college students had their own card in high school. Sarah Kehaulani Goo, *Age 14 and Paying With Plastic*, Washington Post, Apr. 3, 2001, at A1. Two years earlier, it was reported that 7% of all high school students had a major credit card. American Savings Education Council, *Youth & Money 1999*, at 11, available at <http://www.asec.org/youthsurvey.pdf>.

⁶ Even where a charge is made, the bill often specifies an innocuous service, so that charge records may not raise any parental concern.

the number of juveniles who hold “plastic” has risen substantially in the last few years. The Commonwealth does not claim – much less prove – that all websites could have achieved a 5% level when the study was done, much less today.⁷ Nor does the Commonwealth discuss how its proposed techniques could be used by speakers who only intermittently display “harmful” materials – e.g. an auction site that occasionally handles erotic antiques. And it makes no mention of the burdens on speech and Commerce thus imposed.

But even giving the Commonwealth the full benefit of these figures, users of credit card techniques would know that, of every 100 viewers, about five would be juveniles, who could peruse the site as long as they chose. This is nothing like the near perfect exclusion that an ordinary bookstore readily can achieve by shelving “harmful” inventory in plain view of store personnel. The Commonwealth does not explain how such a retailer can be said to lack notice that juveniles “may examine and peruse” its displays. Certainly, one doubts that a seller of alcohol or tobacco who knew that 5% (or 1%) of their customers were juveniles would be viewed sympathetically by the Commonwealth.

Privacy and Trust Concerns

Visitor identification and disclosure of personal information would substantially burden and deter Internet communication. Although many U.S. adults hold credit cards, many others do not, either because they cannot qualify or choose not to use them. Moreover, many Americans who have credit cards are reluctant to give out their numbers or similar information over the Internet. JA-

⁷ Plaintiffs recognize that, in constitutional litigation, courts sometimes look beyond the strict adjudicatory record. However, the material cited by the Commonwealth has not been rigorously evaluated and should not be taken to guarantee a 5% or similar figure. In fairness, the most that can be said is that, at unstated cost and burden, credit card techniques will predictably allow a substantial percentage of juvenile access.

839*.⁸ And many who may be willing to give out a credit card number to a well-known national retailer are reluctant to entrust their credit to a lesser known entity, particularly where doing so will create an electronic record of having visited an “adult” site.

Many people are reluctant to provide personally identifiable information over the Internet.⁹ JA-98. Some websites have abandoned identification requirements because of lost traffic. *Id.* The Commonwealth’s Dr. Olsen reports that 46% percent of American Internet users have never purchased anything online, much less access to “adult” websites. JA-839*. Moreover, as is discussed below, much Internet speech that has a commercial purpose does not involve direct Internet sales. Such speech, which includes both websites and other modalities, today does not require a credit card. Thus, a requirement that a “harmful” website display require disclosure of a credit card number would impair the effectiveness of constitutionally protected website speech by limiting access solely to those willing to be electronically identified. The burden would fall on willing listeners as well as on speakers.

Speech for Commercial Purposes Over the Internet

Most Internet communications and information remain free of charge, even when displayed or disseminated for commercial purposes. JA-96-97. In one common for-profit business model, many web businesses provide content (e.g. news, sports, weather, traffic information, music, hobby information, and so on) that they hope will attract visitors, and they then sell advertising. JA-96. Another for-profit business model charges content providers a fee to post similar materials on a

⁸ Upon examination, it appears several pages are missing from the Joint Appendix. Hereafter, each citation to a missing page will be followed by an asterisk. The missing pages are appended at the end of this brief.

⁹ Virginia attempts to minimize Americans’ privacy concerns and the potential chilling effect Internet verification schemes may have on adult speech by citing one of Dr. Cranor’s previous articles. Commonwealth Br. at 23. Notably, the following sentence from that report states that in revealing personal information individuals “become vulnerable to other uses of their personal information that they find undesirable.” The potential stigma of being associated with adult speech may be but one undesirable use of the collection of personal information on the Internet.

website to which viewers interested in that type of content will come. Booksellers and music stores often allow anonymous online visitors to browse excerpts or summaries without charge, and they also may sponsor bulletin boards, chat rooms, provide alerts to matters of special interest to patrons, and so on. JA-97. They do this to build customer recognition and goodwill that translate into profit, though the connection to sale of particular product may be hard to show. As the Commonwealth notes, some websites also require users to pay for access with a credit or debit or otherwise require personal identification as a condition of access or use. These websites may allow representative samples of the website contents to be viewed or permit “guest” use without prior payment or identification. Moreover, Internet speech that has a commercial purpose is by no means limited to website displays. Rather, it includes all other Internet modalities. Virginia makes no claim that there is any practical way of limiting non-website communication.

**Examples of Communications Displayed for
Commercial Purposes Threatened by the Act**

The Commonwealth emphasizes one Internet business model that it refers to with the undefined term “commercial pornographers.” The general concept seems to be a website that offers highly explicit material to viewers who are willing to use a credit or debit card to pay for access. Virginia’s statute, however, does not define or limit its application to such websites or even to websites generally. To the contrary, it applies to any “harmful” display by any Internet modality, such as email, listservs, chat rooms, etc. Moreover, its provisions reach many types of non-pornographic but sexually explicit speech relating to health, arts, sex education, and other information that may be deemed to have value for adults, although only prurient interest for minors.

For example, Plaintiff Sexual Health Network (“SHN”) is a for-profit Connecticut corporation. Mitchell Tepper, Ph.D. in Human Sexuality Education at the Pennsylvania Graduate School of Education and who has lectured at the Yale University School of Medicine owns and operates SHN. SHN operates “Sexualhealth.com” a website that provides a wide array of sex

education materials and services for people with disabilities and chronic diseases. JA-74*. For example, in articles written specifically for the Website, and in materials obtained elsewhere, SHN provides information on how a person with quadriplegia or other serious disabilities, or the spouse of such a person, can achieve sexual expression. For a person in need of such information, it would not be prurient, but teenagers might seek out such materials for different reasons. SHN also hosts a “chat room” where individuals with sexually related concerns can communicate freely and anonymously in a supportive environment. JA-75*. The displays often are explicit and graphic. JA-75*; JA-236-44. For example, there might be discussions of how a couple can achieve sexual penetration despite injuries or conditions that prevent a male from achieving an erection.

Although the site has strong educational objectives, it is operated for a profit. JA-75*. It sells advertising to companies and is compensated for referred purchasers by companies as diverse as Amazon.com (a bookstore) and ILTS, Inc. (distributor of vibrators specially designed for men with spinal cord injuries). Dr. Tepper attests that he would lose visitors if he required them to provide personal identifying information to access the site. JA-76*.

The Charlottesville Sexual Health and Wellness Clinic, another plaintiff, presents a somewhat similar situation, pursuing an educational mission but also seeking to realize income. Its website includes a Question and Answer feature that addresses explicit adult topics such as “Could a threesome harm our relationship?” and “My wife has lost her sexual desire. What can we do?” JA-211-20. Viewers can access the archives and the rest of the website without charge, but incur a fee for answers to specific questions. Also, printed literature is offered for sale.

Plaintiff Susie Bright provides a very different business model. Ms. Bright is a prominent writer, editor, and educator with a national reputation as an expert in sexuality. Her works range from social commentary to sex advice to explicitly sexual erotic fiction. JA-52-53*. Ms. Bright maintains a California-based website that offers a wide range of resources to persons who are

seeking to explore their sexuality or to educate themselves and participate in discussion concerning sexual matters. *Id.* Her website includes erotic photography and other art, as well as erotic literature of all types. JA-221-36. Although access is free, the website allows viewers to sample Ms. Bright's work, contributes to her public persona and, via links to Amazon.com and other retailers, permits visitors to purchase her work elsewhere. *Id.* In addition to its educational and aesthetic purposes, the website has a clear commercial purpose. JA-53*. Ms. Bright attests that many people who access websites like hers that deal with sexual matters wish to do so anonymously and would be deterred by a requirement to provide identifying information. JA-53-54*.

Plaintiff A Different Light Bookstores is a chain of gay and lesbian bookstores with locations in three non-Virginia cities. JA-59*. Its website offerings focus on matters of concern to homosexuals; some content is sexually explicit, including sexually explicit stories that can be read on-line. JA-60-61*. It also reports coming events, links to other gay/lesbian sites, and contains other matters of interest. Norman Laurila, the owner, attests that users highly value the ability to visit the site while remaining anonymous. JA-61*.

This list could be extended indefinitely. However, there is no dispute that the Internet supports a wide range of explicit adult communication that is made freely available for commercial purposes and for which anonymity is important.

The Scope of Sexually Explicit Internet Material Available to Juveniles

Although the great majority of Internet communications have nothing to do with sex, a great deal of sexually oriented material is available on the Internet. The Commonwealth's exhibits establish the existence of hundreds of thousands of sources of truly hard-core commercial material. JA-104. Much equally explicit material is published for non-commercial reasons. *Id.* There is no dispute that this material overwhelmingly originates outside Virginia.

**The Undisputed Ability of Voluntary
User-based Methods to Protect Virginia's Children**

Voluntary, user-based methods and tools are widely available for little to no cost, permitting parents and others to manage their children's Internet communication and to tailor protection to the child's level of maturity and to family values. *Id.* Major industry groups have developed a website (www.getnetwise.org) that provides comprehensive information on voluntary parental and user-based techniques and tools. JA-99-100. Although the Commonwealth argues that such techniques are not perfect, it does not dispute that such techniques can be highly effective and far more effective than the Act. JA-99, ¶ 35. NRC Report, *supra*, at 14-7 to 14-10.

Dr. Cranor discusses some of the voluntary techniques available to parents. JA-98-103; JA-831-33. Simple common sense techniques include developing "family contracts" about what to view, placing the computer in an area of the house where parents easily can monitor what is on the screen, and restricting access to when parents are around. JA-101. Other techniques that can enhance these steps include using software tools that: 1) restrict Internet access to prescribed times; 2) keep a log of websites visited; 3) limit access to so-called "white lists" which identify websites that organizations have reviewed and recommend as high quality and age appropriate; 4) limit childrens' email communication to a specific list of friends and family; and 5) block or filter categories of materials.¹⁰ JA-102-103. While each of these solutions may not be foolproof, each or any number in combination are far more effective than the Act. And override mechanisms allow

¹⁰ Different levels of protection can be established for each household member. JA-101. While filtering and screening software may exclude information that a parent is willing for a child to have, e.g. descriptions of the human reproductive system or the risks of breast cancer, parents easily can modify or inactivate the software as needed. JA-833. Dr. Olsen complains that filters may be "overbroad," but since they are privately controlled by parents who have an override code, this concern is limited. He also notes that images, at present, are difficult to filter. But since Internet searches are word based, a website image that lacks associated descriptive text is unlikely to be found and accessed; JA-447. He also does not dispute Dr. Cranor's testimony that filtering technology can block a juvenile's access to the great majority of sexually explicit websites [as well as] explicit pop up ads and emails." JA-832-33.

parents or other supervising adults to assure that a juvenile may access any blocked site on any subject that is deemed appropriate for the particular juvenile.

ARGUMENT

I. THE PROPOSED QUESTIONS ARE NOT DETERMINATIVE OF THE PROCEEDINGS BEFORE THE FOURTH CIRCUIT AND, INSTEAD, PLACE THIS COURT IN AN ADVISORY ROLE.

Courts of Virginia and the United States exercise the judicial power to decide cases, they do not give legal advice. *See Commonwealth v. Harley*, 256 Va. 216, 219-220, 504 S.E.2d 852, 853 (Va. 1998); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Karsten v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 36 F.3d 8, 11-12 (4th Cir. 1994). “They are not constituted...to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.” *Commonwealth v. Harley*, 256 Va. 216 at 219-220, 504 S.E.2d at 854 (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 229-230, 135 S.E.2d 773, 775-776 (Va. 1964).

To protect the integrity of their proceedings, “subject-matter delineations must be policed by courts on their own initiative.” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (Otherwise, the court will “act ultra vires”). It is the “special obligation” of a court to “satisfy itself” of its jurisdiction. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998). ‘Where its jurisdiction is questioned [a court] must decide the question itself.’ *Cox v. Thomas*, 50 Va. 323, 326, 9 Gratt. 323, 326 (1852). “[A]n actual controversy must be extant at all stages.” *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (collecting authority).

This Court’s jurisdiction under Article VI, § 1 of the Virginia Constitution to decide questions certified to it by the federal courts is a judicial power, to be exercised consistently with this Court’s status as a decider of cases. Va. Sup. Ct. R. 5:42 is explicit that this Court will answer a question certified to it only when “a question of Virginia law is determinative in any proceeding pending before the certifying court....” Va. Sup. Ct. R. 5:42(a) (emphasis added). To permit this

Court to fulfill its special obligation to satisfy itself that proposed questions are within its power, subsection (c)(6) requires the certifying court to separately and clearly “explain how the certified question of law is determinative of the proceeding in the certifying court....” Va. Sup. Ct. R. 5:42(c)(6) (emphasis added). Moreover, this Court must clearly understand how the questions interrelate, so that it will not answer a question that has become moot by virtue of an earlier answer.

Of course, form need not senselessly triumph over function. The determinative nature of some questions may be obvious, requiring a very little explanation. But other questions may address parts of a complex matter, as is the case here. On such occasions the certifying court must provide sufficient detail to permit this Court to satisfy itself that other grounds for decision have been resolved, so that the questions posed actually will determine the outcome of the proceeding.

States that share Virginia’s view of the judicial power recognize that whether a certified question is determinative is an issue of subject matter jurisdiction, and the state court “is under a duty to inquire into [its] own jurisdiction.” *Cray v. Deloitte Haskins & Sells*, 925 P.2d 60, 62 (Okla. 1996). Accordingly, if a certification order leaves open the possibility that the final outcome of the case may rest on factual or legal grounds other than the answers to the certified questions, jurisdiction is lacking. *In re Richards*, 223 A.2d 827, 833 (Me. 1996):

If we are to participate and yet not render purely advisory opinions, we think it will be incumbent upon us to respond to questions only when it is apparent from the certification itself that all material facts have been either agreed upon or found by the [certifying] court and that the case is in such posture in all respects that our decision as to the applicable Maine law will in truth and in fact be “determinative of the cause” as the statute conferring jurisdiction requires.

See also Retail Software Servs., Inc. v. Lashlee, 525 N.E.2d 737, (N.Y. 1988) (possibility that personal jurisdiction could be sustained on another theory defeated certification); *Eley v. Pizza Hut of Am., Inc.*, 500 N.W.2d 61, (Iowa 1993) (after quoting ruling that jurisdiction proper only where answers “will be ‘determinative of the cause’” (court’s emphasis), holds that alternative grounds not

clearly foreclosed defeats jurisdiction); *Palmore v. First Unum*, 2002 WL 1398015, *3 (Ala. 2002) (where certification fails to show how outcome would not be controlled by federal rule, no jurisdiction); *Jefferson v. Moran*, 479 A.2d 734 (RI 1984) (where final outcome would depend on post-answer rulings by another court, no jurisdiction); *Morris v. Scaling*, 344 S.W.2d 161 (Texas 1961) (if the certifying order leaves open an issue that might determine the outcome, no jurisdiction); *In re Certified Question*, 549 P.2d 1310, 1311 (Wyo. 1976) (certifying court must resolve all open issues so that it will “clearly appear . . . how the answer would be determinative”); *Grant Creek Water Works, Inc. v. Com. of IR*, 775 P.2d 684, (Mont. 1988) (where issues yet to be resolved could determine outcome, certification declined).¹¹

Moreover, where more than one question is certified, the certification order must make clear how they relate to one. This is so because, if an answer to one question deprives another of determinative force, the second question is moot and should not be answered. *Greene v. Massey*, 384 So.2d 24, 28 (Fla. 1980) (where prior answers are dispositive, remaining question seeks an “academic discussion” that should be declined); *Morris v. Scaling*, 344 S.W.2d 18 at 22 (Texas 1961) (important to understand how answer to first question will affect later questions).

The Commonwealth makes much of the fact that questions were certified to this Court when a previous version of Va. Code § 18.2-391 was challenged. So they were. But that case differed from this one in important respects. First, the statute there was challenged only under the First Amendment. Second, this Court had the benefit of full opinions from the District Court and the Fourth Circuit, together with an explanatory opinion from the U.S. Supreme Court, that explained

¹¹ Because not all states share Virginia’s understanding of the judicial power, and because certification statutes and rules are worded in various ways, precedent from other states must be consulted with caution. Some states allow their Supreme Courts to give advisory opinions and some states will accept any certification that appears likely to be important to the underlying proceeding.

how the referred questions would resolve the case.¹² Third, the propriety of the certification there apparently was not challenged. Fourth, as to constitutional matters the U.S. Supreme Court has a hierarchical position vis-à-vis this Court that other federal courts do not share.

The situation here is very different. The district court held that the current iteration of § 18.2-391 violated *both* the First Amendment *and* the dormant Commerce Clause.¹³ *PSINet v. Chapman*, 167 F. Supp. 2d 878, 890-91 (W.D.Va. 2001) (emphasis added). That ruling was in accord with the unanimous views of more than a dozen federal judges who have considered similar statutes. *Supra* at 880. *See also ACLU v. Ashcroft*, 322 F.3d 240, 271 (3d Cir. 2003) (finding the Child Online Protection Act to be unconstitutional on First Amendment grounds). Those cases identify a host of grounds on which such statutes are unconstitutional. For example, such statutes may violate the dormant Commerce Clause because (i) the Internet is an inherently interstate medium requiring federal regulation; (ii) due to of the nature of the Internet, such statutes invariably export state policies nationwide; (iii) such statutes operate to regulate commerce located entirely in other states; (iv) such statutes discriminate against speakers from other states; and (v) such statutes unduly burden interstate commerce. Similarly, a wide range of First Amendment defects exist.

Against this background, the Fourth Circuit simply summarized the district court's opinion and made the following statement:

[T]he scope of the 1999 Amendment is determinative of whether the statute is constitutional at this time. Ascertaining the scope of the law's coverage and what compliance measures would preclude conviction is necessary for resolution not only of the First Amendment claim, but also for the dormant Commerce Clause claim, should it be necessary for us to reach the latter issue.

¹² *American Bookseller Ass'n v. Strobel*, 617 F. Supp. 699 (E.D. Va. 1985), *aff'd*, 802 F.2d 691 (4th Cir. 1988), *remanded and questions certified*, 488 U.S. 905 (1988).

¹³ Interestingly, and perhaps tellingly, Virginia notes the district court's dormant Commerce Clause ruling in footnote 4 of their statement of facts. (Commonwealth Br. at 8.)

PSINet, Inc. v. Chapman, 317 F.3d 413, 422-423 (4th Cir. 2003). The Fourth Circuit then turned to the two proposed questions. What the Fourth Circuit says may establish that this Court's answers will affect – but will not be determinative of – the First Amendment legal issues that are analogous to those presented in the former *Am. Booksellers* case. But, there is no explanation as to how the questions will affect or determine the outcome of the Commerce Clause issues, nor is there a statement that those issues have been resolved in favor of validity. Hence, no matter how this Court answers the questions, the proceeding may be determined by the Fourth Circuit's eventual ruling on other open issues.

The Commonwealth's Brief (at 35) really concedes as much. It makes no claim that the Fourth Circuit has provided the required explanation. Instead, the Commonwealth (at 35) urges this Court to rely on “signaled” inferences as to what the Fourth Circuit has “implicitly concluded” and “apparently” regards as constitutional. It concocts (at 33-34) a theory as to why the second question possibly might be related to one Commerce Clause challenge, but that explanation is not provided by the Fourth Circuit and, it leaves open other grounds of Commerce Clause invalidity. Thus, the Commonwealth can go no further (at 25) than asserting that it is “almost” clear that answering the questions will determine the outcome of the proceeding.

This will not do. The Fourth Circuit would not delegate the power to determine its subject matter jurisdiction to this Court, nor should it ask this Court to delegate its similar duty to the Fourth Circuit. Instead, the Fourth Circuit should have decided all of the issues it could without this Court's guidance and then explained how this Court's answers would determine the outcome of the remaining issues and hence, the proceeding. Such an explanation would permit this Court to fulfill its independent obligation to assure itself of its jurisdiction generally and as to each question. Because the certification order here fails to comply with Rule 5:42(c)(6), this Court should exercise its discretion under Rule 5:42(f) and decline to answer the questions.

II. ANY NARROWING CONSTRUCTION THAT CONTRAVENES PLAIN STATUTORY LANGUAGE OR FRUSTRATES THE GENERAL ASSEMBLY'S LEGISLATIVE INTENT SHOULD BE REJECTED.

When all is said and done, in an effort to preserve a pointless sliver of an amendment adopted in 1999, the Commonwealth asks this Court to give the Act a strained and narrow meaning contrary to the intent that the General Assembly plainly expressed in 1970 and 1985. The Court, instead, should respect the intent plainly expressed in 1970 and 1985, and refuse to allow the 1999 Amendment to undermine the intended operation of the Act in physical space.

The goal of statutory construction is to “determine, and adhere to, the intent of the legislature.” *Virginia Soc. For Human Life, Inc. v. Caldwell*, 256 Va. 151, 156, 500 S.E.2d 814, 816, (1998). The search for legislative intent begins with the statutory language, and if the language has a plain and rational meaning, that is where it ends. *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001). “[T]he plain, obvious, and rational meaning of a statute always is preferred to any curious, narrow or strained construction.” *Reid v. Controlled Conditions Corp.*, 2002 WL 433623, *2 (Va. App. 2002) (collecting authority). “Thus, when the General Assembly has used words of plain and definite import, courts cannot place on them a construction that amounts to holding that the General Assembly meant something other than which it actually expressed.” *Vaughn*, 262 Va. at 677, 554 S.E.2d at 90 (collecting authority). Thus, as is discussed *supra* at 8-9, this Court’s *Am. Booksellers* decision focused on the plain meaning of the statutory text.

Sometimes, there is a constitutional impediment to giving full effect to the legislature’s intent. In such a situation, to preserve as much as possible of the legislative intent, the Court “will narrowly construe a statute where such a construction is reasonable and avoids a constitutional infirmity.” *Virginia Soc. For Human Life*, 256 Va. at 156, 500 S.E.2d at 816. (emphasis added). But this is a serious step and has stringent limits.

To begin with, courts are not legislatures and cannot take on the role of drafting legislation. *Aptheker v. Sec. of State*, 378 U.S. 500, 515 (1964) (Courts must not ask whether the legislature “might have enacted a valid statute,” but are limited to construing the enacted statute); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996) (Courts are not “back-seat lawmakers”). They “cannot press statutory construction to the point of disingenuous evasion,” even to avoid invalidity. *Public Citizen v. U.S. D.O.J.*, 491 U.S. 440, 467 (1989). The Court simply will not hold that “the General Assembly meant something other than it actually expressed.” *Vaughn*, 262 Va. at 677, 554 S.E.2d at 90. Instead, in the words of the Commonwealth (at 33), a narrowing construction must be a “fairly plausible” reading of the statute. *See Virginia Soc.*, 256 Va. at 156, 500 S.E.2d at 816. Otherwise, this Court must respect the General Assembly’s expressed intent and strike the statute down. *Shulman Co. v. Sawyer*, 167 Va. 386, 392, 189 S.E. 344, 346 (1937); *Martin v. Commonwealth*, 126 Va. 603, 621, 102 S.E. 77, 83 (1920).

But there is an even more fundamental constraint. The Court must not pervert or frustrate the overall legislative intent in an attempt to save one part of statute. *See County of Amherst v. Brockman*, 224 Va. 391, 395, 297 S.E. 2d. 805, 807 (1982). (“frustration of the legislative intent” is impermissible); *Armstrong v. Commonwealth*, 263 Va. 573, 581, 562 S.E. 139, 144 (2002) (same); *CFTC v. Schor*, 478 U.S. 833, 841 (1986) (Narrowing does not allow “perverting the purpose of a statute”); *U.S. v. Albertini*, 472 U.S. 675, 680 (1985) (narrowing must not “trench upon the legislative powers”). In the ordinary case, where the entire statute will fall unless narrowed, half a loaf is better than none. Here, however, the Court is being asked to narrow provisions of the statute that were adopted in 1970 and 1985, and that have broad application throughout the Commonwealth, in order to save an amendment that was added in 1999 for the purpose of further expanding, rather than contracting, the existing and functional statute and that offers no practical benefit. The Commonwealth proposes to let the tail wag the dog.

The Court should preserve the legislative intent as plainly expressed in 1970 and 1985 and should refuse to sacrifice the broad sweep of the Act in physical space to attempt to save a narrowed Internet clause that achieves no benefit.

III. THE PLAIN LANGUAGE OF THE ACT CANNOT BE CONSTRUED TO MEAN THAT REQUIRING VIEWERS TO PROVIDE A VALID CREDIT CARD NUMBER IS A DEFENSE TO LIABILITY.

Since 1985, § 18.2-391 has made it an offense “knowingly” to display “harmful” material “in a manner whereby juveniles may examine and peruse.” In its *Booksellers* opinion, this Court gave those words their plain meaning. *See supra* at 9-10. It ruled that one who has reasonable notice that juveniles may peruse a harmful display acts “knowingly,”¹⁴ one who takes steps reasonably likely to prevent juvenile perusal has not “knowingly” allowed such perusal. The Commonwealth now seeks something very different. It asks this Court to hold that a merchant who has notice that 5% or more (perhaps much more) of those who will peruse a “harmful” display are juveniles does not “knowingly” act in a “manner whereby juveniles may examine and peruse.”¹⁵ At least this is so, the Commonwealth says, if viewers have a valid credit card number. Obviously, what the Commonwealth proposes is judicial re-writing of plain statutory text.

Because the Commonwealth now asks the Court to distort language that the *Booksellers* opinion faithfully followed, *Booksellers* cannot support the Commonwealth here. Moreover, the factual predicates for the earlier ruling were very different. *Booksellers* relied on undisputed matters of general experience. The mechanism approved by the Court – visual perception of furtive or giggling children – was direct and simple. The “technology” of eyeballing customers was unlikely to advance. The solution was universally applicable to all stores. Finally, the proposed solution

¹⁴ In 2001 the General Assembly strongly ratified that ruling, changing “knowingly” to “knowing or having reason to know.” *Commonwealth Br.* at 4, n. 1 (quoting 2001 VA. Acts, ch. 451.

¹⁵ In the language of the 2001 amendment discussed by the Commonwealth (at 4 n.1), the Commonwealth must contend that the merchant lacks “reason to know” that juveniles may peruse.

promised near 100% success – at most an occasional older juvenile might be overlooked for a few minutes during a busy moment.

By contrast, the proposed credit card techniques are technologies in flux, and the technology is evolving rapidly in various directions. Those techniques cannot fairly be said to “prevent” perusal by juveniles. To the contrary, the best result the Commonwealth can find (at 23-24) allowed juveniles to make up at least 5% of the “pornographic” site’s customers. And those juveniles’ Internet sessions were unlimited in duration, rather than a few quick peeks before bookstore staff observes what is occurring.

And, the Commonwealth does not claim that all websites would achieve a 5% level, or that such a level would be maintained. The average might well be higher, with some sites averaging a still higher juvenile rate. Moreover, the reported studies were from several years ago, and the proportion of juveniles having their own credit cards recently has been increasing dramatically. *See supra* at 16 n.3. The Commonwealth tacitly concedes as much, but asserts (at 25 n.8) that “the website operator cannot be reasonably held accountable if parents carelessly equip their children” with credit cards.¹⁶ And, since the Commonwealth does not propose to require a purchase, but only the provision of a valid number, a juvenile may use a borrowed number, or any discarded credit card receipt, with no risk of detection. For all of these reasons, there is no assurance that any credit card based regime would achieve a rate nearly as low as 5% juvenile customers. And websites that juveniles found particularly attractive might have a far higher percentage of juveniles, even though they were using the same credit card techniques as other sites. Could it really be said that a website

¹⁶ It is ironic that the Commonwealth places such stress on parental responsibility in this regard, but discounts the ability of informed parents to protect their children using voluntary user-based techniques. Parents or other adults provide the computers that allow juvenile Internet access. The assertion that parents are “careless” if they provide children with credit cards is perplexing. While giving a child unlimited credit would be careless, a card that has a modest limit, or that operates as a debit or check card, drawing only on money available in the associated account, may make as much sense for children as for adults. Often it avoids carrying cash, which is susceptible to theft and, if lost, generally is irretrievable.

had prevented juvenile access if it knew that 10% or 20% or 50% of its patrons were juveniles? And could it be said that such a website lacked notice that juvenile perusal was likely?

Also, a credit card technique is not universally applicable in the way that the shelving solution was. Virginia's statute applies to all websites, including those like the Sexual Health Clinic who rely on user anonymity to encourage viewers to obtain important health-related information. And Virginia's statute applies to all types of Internet displays, not just displays on the World Wide Web. Are commercially oriented chat rooms, bulletin boards, listservs, mail exploders, and all of the other Internet communication modalities expected to require users to display valid credit card numbers whenever "harmful" subjects arise, and how would that work? Is this true even when "harmful" material is displayed only intermittently?¹⁷

There is no plausible way for a court to "construe" the Act to provide a credit card defense. Instead, any such provision would require General Assembly action.¹⁸ Yet, when the General Assembly amended the Act in 2000 to create a defense for Internet service providers, 2000 Va. Acts ch. 1009, and again in 2001 to change "knowingly" to "knowing or having a reason to know," 2001 Va. Acts. ch. 451, no such affirmative defenses were enacted. The General Assembly was well aware of this case. Thus, the Commonwealth asks this Court to draft a statutory defense that the General Assembly chose not to adopt.

¹⁷ Dr. Cranor testified that credit card or adult verification methods were not possible or feasible for many of the other methods of Internet communication (automated listservs, bulletin boards, newsgroups, etc.). Dr. Olsen did not disagree but hypothesized that all Internet communications could be run through websites where credit card verification would be possible. Dr. Olsen's hypothetical would destroy much of the utility of these various forms of Internet communication that are a vital part of Internet commerce and democracy today. As stated earlier, even Justice O'Connor and Chief Justice Rehnquist in dissent in the CDA case recognized that it was necessary to address constitutional issues in the context of the reality of the medium today.

¹⁸ When Congress intended to authorize affirmative defenses, it did so expressly. *See* Communication Decency Act, 47 U.S.C. § 223(e)(5); Child On-Line Protection Act, 47 U.S.C. § 231(C)(1).

Moreover there is no reason to believe that any response this Court gives actually will be determinative of the Fourth Circuit proceeding. The Commonwealth assumes that without some sort of credit card defense the statute will fall. But the fact is that similar statutes that included explicit credit card defenses crafted with some care by states and Congress also have fallen. *ACLU v. Johnson, supra* (NM); *Am. Libraries Ass'n v. Pataki, supra* (N.Y.); *ACLU v. Reno*, 521 U.S. 844 (1997) (“CDA”); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) (COPA). As these courts have found, requiring adults to possess and provide a credit card number, thus exposing financial and personal information and creating a permanent record of access to an “adult” site imposes a serious burden and chill on fully protected adult speech. And the burden is even greater when “harmful” content is only intermittent or arises in the flow of non-“harmful” communication.¹⁹ For this reason, the Court should decline to answer the first question and certainly should not answer it in the affirmative.

IV. THE ACT CANNOT REASONABLY BE CONSTRUED TO ALLOW THE KNOWING DISPLAY OF “HARMFUL” MATERIAL TO CHILDREN FOR A COMMERCIAL PURPOSE SO LONG AS THAT PURPOSE IS NOT THE SALE, RENTAL, OR LOAN OF OTHER MATERIAL THAT ITSELF IS “HARMFUL”.

The Commonwealth believes that it could defend a statute that narrowly targeted the operators of websites that sell access to “pornography.” However, rather than asking the General Assembly to attempt to draft such a statute, the Commonwealth asks this Court to perform truly radical and transformational surgery on the present statute.²⁰ Ironically, that surgery cannot be

¹⁹ In addition to noting the burdens, inefficiencies, and uncertainties associated with a credit card defense, the Supreme Court held that such defenses “do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid” speech restriction. *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

²⁰ When the CDA was struck down, Congress enacted a replacement statute, COPA, which regulated only websites and not other Internet modalities. *See* COPA, 47 U.S.C. § 231(a). The Commonwealth thus asks this Court to play that legislative role. Significantly, this narrowing and the inclusion of a credit card defense did not save COPA. *ACLU v. Ashcroft*, 322 F.3d 240 *et seq.* (COPA struck down as overbroad and not narrowly tailored.)

performed on the 1999 Amendment, since it simply added a few words expanding the coverage of the statute to “electronic files and messages.” Instead, to save an amendment that was adopted to expand the statute, the Commonwealth attacks the rest of the statute in all of its applications, undoing a great deal of what this Court sustained in its *Am. Booksellers* decision. This usurpation of the General Assembly’s role and frustration of its intent cannot be justified.

A. **The Proposed Construction Would Radically And Implausibly Curtail The Plain Meaning Of The Statute In All Of Its Applications.**

In 1985 the General Assembly § 18.2-391 made it unlawful to “knowingly display” any “harmful” materials to juveniles for “commercial purpose.” Under the plain language of the statute, any commercial purpose triggered the prohibition. However, in its effort to save the 1999 Amendment, the Commonwealth now urges that the 1985 Amendment be radically narrowed to restrict displays only if they are made in connection with the sale, rental, or loan of “harmful” material. Thus, a video store, news stand, bookstore, or similar establishment would become free to post a large, lurid, sexually explicit and clearly “harmful” poster in its front window so long as the video, magazine, book, or other items being promoted were not themselves “harmful.”²¹ Similarly “harmful” displays could be targeted to juveniles to promote rock concerts, raves, nightclubs, and other events or services that are not regulated under the statute. The Commonwealth does not claim that the plain meaning of the term “commercial purpose” supports its new position. Instead, it asserts that maxims of statutory construction limit the “commercial purpose” referred to in the 1985 Amendment to an intent to advance the types of supposedly commercial transactions regulated in 1970. We refute the maxims-based argument below, but we note here that the 1970 language is not limited to commercial transactions.

²¹ Books of all kinds, ranging from romance novels to science fiction describe sexual and violent incidents of various kinds in ways that are not quite “harmful.” Yet, an artist’s visual depiction of the incident for promotional purposes might well provide explicit and lurid detail that would be “harmful.”

The 1970 language regulated any knowing sale, rental, or loan of “harmful” material. Nothing suggested that sales made for personal or sexual or other purposes were not included. To the contrary, the restriction of both rentals and loans made clear that any temporary transfer of possession was covered, whether or not it was compensated. Otherwise, the word “loan” would be redundant, contrary to settled principles.²² Thus, the plain language of the 1970 statute resulted both commercial and non-commercial transactions. To impose a “commercial” gloss so as to draw a link to the “commercial purpose” referred to in 1985 is circular.

The ordinary meaning of “commercial purpose” includes any effort to advance a for-profit business. See *Webster’s Third New Int’l Dict.* 456 (defining “commercial” as “from the point of view of profit: having profit as the primary aim”); H.R. Rep. 98-536, 11 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492 at 504 (equating a “commercial purpose” for pornography with “a profit motive”); *U.S. v. Lowe*, 65 F.3d 1137, 1146 (4th Cir. 1995) (approving jury instruction that a vehicle is used for “commercial purposes” if it is used “directly or indirectly in connection with any business or other undertaking intended for profit”); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (publishing a picture “to draw attention to the for-profit magazine” displayed a “commercial purpose”). Certainly, no one has ever suggested that “commercial purpose” means only the actual sale, rental, or loan of “harmful” material.²³

In this regard, “commercial purpose” is not some new concept that can be manipulated with impunity. A Westlaw search identified more than 60 Virginia cases using the term “commercial

²² A statute is to be construed to give meaning and effect to each word, avoiding redundancy. *Taylor v. Commonwealth*, 28 Va. App. 498, 506, 507 S.E.2d 89, 92 (1998); *Commonwealth v. Hawkins*, 10 Va. App. 41, 44, 390 S.E.2d 3, 4 (1990); *Penn v. Commonwealth*, 13 Va. App. 399, 404, 412 S.E.2d 189, 192 (1991).

²³ Statutory language is to be understood in its ordinary and popular sense unless the General Assembly definitely indicates otherwise. *Commonwealth v. Orange-Madison Coop.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); *Board of Supvrs. v. Marshall*, 215 Va. 756, 761, 214 S.E.2d 146, 149 (1975).

purposes.”²⁴ Similarly, a Westlaw search of the Virginia Code identified more than 20 statutes using the term.²⁵ The term is used as one well understood, typically without further explanation or definition, and the uses are consistent with advancing a for-profit business of some kind. Under the law of unintended consequences, giving “commercial purpose” a distorted reading here would threaten substantial unintended consequences.

Examining the “knowing display for a commercial purpose” provision in the context of a physical bookstore makes clear that the defendants’ proposed limitation of the statute to “commercial pornographers” violates the plain meaning and purpose of the statute. The 1985 “knowing display” provision in its core application was meant to apply to general-purpose bookstores, not merely pornographic bookstores. General-purpose bookstores might carry a limited number of books or magazines that could be deemed “harmful to juveniles.” The purpose was to deter minors from perusing, not buying, these materials. Defendants’ proposed limitation of the statute to sale or other commercial transactions by “commercial pornographers” clearly contravenes this well-accepted purpose of the statute.

²⁴ For example, nudity by bar room dancers is for “commercial purposes” and may be regulated, *Wayside Restaurant, Inc. v. City of Va. Beach*, 215 Va. 231, 237, 208 S.E.2d 51, 56 (1974); defining “a commercial vehicle as one used for commercial purposes provides a simple, straightforward, and common sense test,” *Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 17, 532 S.E.2d 621, 626 (2000); the right to privacy applies only to uses of a name “for commercial purposes,” *Cerick v. Central Fidelity Bank*, 1989 WL 646512 (Va. Cir. 1989); automobile lemon law does not apply to purchase of vehicles “that will be used for commercial purposes,” *Durso v. Chrysler Corp.*, 1996 WL 1065663 (Va. Cir. 1996), and so on.

²⁵ For example, certain types of solicitation “for commercial purposes” forbidden, § 40.1-112(A); information about greyhound racing may not be transmitted “for commercial purposes,” § 59.1-405.1(B); systems of weights and measures are specified “for all commercial purposes,” § 3.1-920; a Board established by Interstate Compact is forbidden to “operate any facility for commercial purposes,” § 2.2-5600, Art. VII; incubated eggs “may be sold for commercial purposes,” § 3.1-767; pine tree harvesting is regulated when done “for commercial purposes,” § 10.1-1164; “Agricultural production” and “Forestral production” are defined in terms of “commercial purposes,” § 15.2-4302; arrest without a warrant is authorized for misdemeanor destruction of property on “premises used for business or commercial purposes,” § 19.2-81; certain school information gathering is not to “result in the sale for commercial purposes,” § 22.1-79.3(B); and so on.

Thus, to now hold that for-profit “harmful” displays are subject to the Act only if they are “in connection with” the sale, rental, or loan of harmful material would be to impose on the statute, in all of its applications, a meaning that is contrary to and much narrower than the plain statutory language. On its face, this is a proposal to frustrate, rather than to advance, legislative intent. Assuming that such a result ever can be justified, it is not justified here.

B. The Proposed Narrowing Construction Would Greatly Complicate Application Of The Statute.

The narrowing construction proposed by the Commonwealth also would frustrate legislative intent by making enforcement of the surviving aspects of the statute far more complex and difficult. To begin with, it no longer would be sufficient to prove that a defendant knowingly displayed “harmful” material to juveniles to advance some for-profit business. Instead, the Commonwealth also would have to prove that the “harmful” display was connected to the intended sale, rental, or loan of materials that themselves were “harmful.”²⁶ Often this could not be done, since the Act applies to limited categories of items, and not at all to events or services. But even where the “harmful” display was in connection with the intended sale or rental of a book or movie, the “harmfulness” of the book or movie, as well as of the display, would have to be proved.

Beyond that, the Commonwealth also would have to prove a “connection” between the “display” and the commercial sale, rental, or loan. The Commonwealth never states exactly what type of “connection” would be required – and in the First Amendment context, precision is essential. *Buckley v. Valeo*, 424 U.S. 1, 39-42 (1976). But assuming a legally adequate standard of “connection” were established, meeting it would be a further burden of proof.

²⁶ On occasion the “harmful” display and the product to be sold might be one and the same – e.g. a t-shirt offered for sale at a boardwalk booth. But often the “display” will be intended to promote something else.

Similarly, enforcement of the “sell, rent or loan” provision would be complicated. The Commonwealth now suggests that phrase should be glossed to apply only to “commercial” transactions. Hence, it would not be sufficient simply to show that a juvenile received “harmful” material in a sale, rental, or loan. Instead, further proof would be required that the transaction was “commercial” – i.e. pursuant to a for-profit business.

These additional enforcement burdens would further frustrate General Assembly intent.

C. The Maxims Of *Noscitur A Sociis* And *Ejusdem Generis* Do Not Apply Here.

The only fig leaf the Commonwealth tenders (at 32-33) to cover its outright re-writing of the statute is its claim that the related maxims of *noscitur a sociis* and *ejusdem generis* limit the “commercial purpose” referred to in the 1985 display provision to actions connected with a sale, rental, or loan of “harmful” material within the meaning of the original 1970 statute. Not so.

The only “legitimate purpose in employing, canons of construction [is] to reconcile confusing language.” *United States v. Espy*, 145 F.3d 1369, 1371 (D.C. Cir. 1998) (collecting authority) (“*Ejusdem generis* only comes into play when the general term in the list is so broad that it creates ambiguity”); *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389, 248 S.E.2d 124, 133 (1978) (*noscitur a sociis* is used to construe “doubtful words”). *Commonwealth v. Werth*, 116 Va. 604, 607-08, 82 S.E. 695, 695-96 (1914); *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 574, 98 S.E. 665, 669 (Va. 1919); see *Reynolds v. Commonwealth*, 30 Va. App. 153, 160, 515 S.E.2d 808, 812 (1999) (where statutory language is unambiguous, rules of statutory construction do not apply). But, the statutory language here is clear.

Nor does the structure of the statute invite either doctrine. As the Commonwealth recognizes (at 32), *noscitur a sociis* expresses the common sense notion that the words within a “phrase” should be read in harmony. Here, the Commonwealth attempts to apply the doctrine to two separate phrases, that phrases concern different subjects (transfers of possession versus display), the second

phrase is subject to a “purpose” restriction that the first is not, and they were adopted at different times. Moreover, each phrase has a plain meaning, and the two meanings easily co-exist.

Similarly, as the Commonwealth recognizes (at 33). *ejusdem generis* suggests that, when a list of specific terms is followed by a more general term, the general term may be understood in “a sense analogous to” the specific terms. For example, a statutory reference to any “shovel, rake, hoe, or other instrument” would include a pitchfork, but not a piano. See *Green Line Terminal Co. v. Martin*, 122 W.Va. 483, 491-92, 10 S.E.2d 901, 906 (1940) (applying maxim to list of money, notes, bonds, bills and “other intangible personal property”). The rationale is that, unless the specific items qualify the more general term that includes them, they are redundant. 17 Va. L. Rev. 511. But the Act does not include a list of specific items followed by a more general term that encompasses, and must be limited by, the specifics. Instead, one phrase forbids certain transfers of possession, regardless of purpose; the second phrase forbids displays for “commercial purpose,” regardless of whether there is any transfer. Each phrase has its own independent (and plain) meaning.

Latin phrases do not justify ignoring the Act’s plain meaning.

D. This Court’s *American Booksellers* Opinion Addressed The Situation Then Before The Court And Is Fully Consistent With The Plain Statutory Language.

The Commonwealth’s claim (at 32) that this Court defined the full scope of the 1985 Amendment in *Booksellers* ignores the context and purpose of this Court’s earlier remarks. As soon as the 1985 Amendment was enacted, a group of booksellers challenged it. *Am. Booksellers Ass’n v. Strobel*, 617 F.Supp. 699 (E.D. Va. 1985). As the case reached this Court, their core contention was that the Amendment unduly interfered with their ability to display their inventory to customers. It was in that context, this Court discussed how the 1985 Amendment was intended to affect inventory display, stating that it restricted “the perusal of harmful materials by juvenile readers in bookstores.” *Booksellers*, 236 Va. at 174, 327 S.E.2d at 624.

Clearly, *Booksellers* was not attempting to provide a comprehensive statement of the 1985 Amendment's effects. For example, the Court spoke only of protecting juveniles "standing in a bookstore," no one can doubt that the 1985 Amendment also restricted a display open to perusal by juveniles outside on the sidewalk. The Court spoke only of "display of wares for sale," *id.*, but even the narrow construction proposed by the Commonwealth covers rental and loan. Similarly, the Court spoke only of effects on "booksellers" and "bookstores," yet the statute clearly is not so confined. For example, a convenience store that adorned its front door with a "harmful" display or sold "harmful" material would be in violation.

In short, this Court's comments merely identified a key way in which the 1985 Amendment affected the parties before it. It did not purport to provide exhaustive and exclusive statement of what the Amendment meant. And it certainly did not suggest that the plain language of the Amendment should be disregarded.

E. The Proposed Narrowing Construction Would Do More To Frustrate Than To Implement The General Assembly's Intent.

Finally, the Commonwealth asserts (at 34) that its proposed narrowing construction is necessary to correct a fatal Commerce Clause flaw in the Internet portion of the statute – it regulates commercial activity "wholly outside the State." Plaintiffs/Appellees agree that the 1999 Amendment is invalid for that reason among many others. But, as is discussed in Section C above, it does not follow that ignoring the Act's plain language and sharply curtailing its application to ordinary physical space to preserve a sliver of pointless Internet regulation respects and implements the General Assembly's legislative intent.

This is particularly so since, the narrowing construction would have to be even narrower than the Commonwealth has proposed. Merely limiting displays to those connected with a sale, rental or loan would not prevent purely extra-territorial regulation. After all, the bookstore in Berkeley to which the Commonwealth refers (at 30-31), used its Internet display in connection with sale of

“harmful” material to its customers in Berkeley, though it did not sell over the Internet. Thus, the display provision would have to be further narrowed to require a connection to sales, rentals, or loans of “harmful” material made in Virginia.

This would introduce enormous complexity. As discussed above, it is virtually impossible to determine the state location of an Internet viewer. If a physical good were being shipped, the address would provide guidance. But the Commonwealth does not focus on sites that sell physical products. A standard that required proof that the operator of such a website knew where the viewer was located when access was granted would be impossible to enforce. But a standard that applied regardless of the defendant’s knowledge would compel every defendant to comply with the most restrictive state’s laws, even in transactions that had no contact with the state. That would raise very serious Commerce Clause issues.

Nor is it clear that viewer location is the key. When an Internet user reaches out across the Internet and enters a website, the place of the transaction may well be the state where the website host is located. And in *Bigelow v. Virginia*, 421 U.S. 809, 818, 824-35 (1975), the U.S. Supreme Court held that (i) the Commonwealth cannot regulate activities that are lawful where provided, (ii) nor may it “bar a citizen of another State from disseminating information about an activity that is legal in that State”, even if (iii) the dissemination in Virginia is “commercial activity.”²⁷

Appellees do not pretend that all of these issues have easy answers. Certainly we do not know how the Fourth Circuit views them. But this merely illustrates the critical problem that is presented by the lack of a clear explanation as to how this Court’s rulings will be determinative of the proceeding before the Fourth Circuit.

²⁷ *Bigelow* reversed a criminal conviction of a Virginia newspaper publisher who had run a paid ad offering “low cost” abortions in New York, where they then were legal, as they were not in Virginia.

This Court need not plunge into these difficulties. Even if the Commerce Clause problems could be solved as simply as the Commonwealth suggests – and they cannot – the proposed narrowing construction should be rejected because (i) it is not a fairly plausible reading of the statute’s plain language, and (ii) preserving a sliver of pointless Internet restriction by a sweeping curtailment of the entire statute as it applies in ordinary physical space does more to frustrate than to implement the General Assembly’s intent.

CONCLUSION

The Court should decline to answer the questions because they have not been shown determinative. Alternatively, the Court should answer both questions in the negative.

May 12, 2003

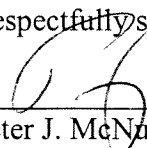
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