UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PSINet, Inc. et al., *Plaintiffs/Appellees*	)	
	)	
v.	)	No. 01-2352
	)	
Chapman, et al, *Defendants/Appellants.*	)	

PLAINTIFFS/APPELLEES' OPPOSITION TO
THE PETITION FOR REHEARING EN BANC

Defendants/Appellants' Petition for Rehearing En Banc should be denied. Contrary to the Petition's claims, the March 25 Opinion does not conflict with *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1988). Without mentioning the Internet, the 1988 *American Booksellers* ruling sustained 1985 legislation restricting "harmful" books, magazines, and similar items because compliance would impose no significant burden on the normal operation of ordinary physical bookstores. *Id.* at 128. By contrast, the March 25 Opinion affirms an injunction against Internet speech provisions adopted in 1999. *See PSINet, Inc. v. Chapman,* 167 F. Supp. 2d 878, 892 (W.D. Va. 2001). It was well after 1988 that the modern Internet became a "unique and wholly new medium of worldwide human communication." *Reno v. ACLU,* 521 U.S. 844, 850 (1997). The Opinion turns on the impact of 1999 legislation new and unique characteristics of the modern Internet that did not yet exist in either 1985 or 1988.

Nor does the Opinion present any exceptionally important issue for *en banc* consideration. Certainly there is no important legal issue. Nine other federal courts and their 14 federal judges unanimously have ruled that similar state legislation violates the First

Amendment, the Commerce Clause, or both.[1] The Petition makes no claim this unanimous precedent is distinguishable: it is not even mentioned.

Nor do the invalidated 1999 provisions have practical importance. The Petition wisely does not dispute the Opinion's findings (at 16-17, 19) that the Internet provisions, as construed by the Commonwealth, offered no protection to any Virginia youth. In a tangible context, youths mostly are exposed to their own neighborhoods so that statutes that reduce harmful neighborhood exposures are able to offer some protection. But on the Internet, everywhere is right next door to everywhere else. A Virginia juvenile has easy, instant, and equal access to hundreds of thousands of "harmful" displays from across the country and around the world. Thus, giving maximum effect to the 1999 Internet provisions, Virginia juveniles would remain exposed to far more "harmful" materials than they could observe in a dozen lifetimes.[2]

The Petition asserts that First Amendment and Commerce Clause analysis make irrelevant the failure of the Internet provisions to achieve the benefits that supposedly justified them. That claim is contrary to extensive and explicit Supreme Court precedent, as we show below. Moreover, the notion that fundamental constitutional rights may be impaired to accomplish nothing defies common sense.

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[1] *Am. Booksellers Found. v. Dean,* 342 F. 3d 96 (2d Cir. 2003), *aff'g* 202 F. Supp. 2d 300 (D.Vt. 2002); *ACLU v. Johnson,* 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *ACLU v. Napolitano,* __ F. Supp. 2d __, Civ. No. 00-505 (D. Ariz. Feb. 19, 2002); *Cyberspace Communications, Inc. v. Engler,* 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd,* 238 F.3d 420 (6th Cir. 2000) (unpublished), 142 F. Supp. 2d 827 (E.D. Mich 2001); *ACLU v. Goddard,* __ F. Supp. 2d __, Civ. No. 00-505 (D. Ariz. April 23, 2004); *Am. Lib. 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.

[2] Because the target of the Internet provisions is fully protected adult speech – not obscenity, Defendants cannot, have not, and do not claim that deterring such speech is a benefit, much less a compelling benefit. The only "compelling interest" they have identified is protecting youth from such speech. The Internet Provisions simply do not achieve that interest.

Equally unfounded are the Petition's assertions that the Opinion will thwart future efforts to protect Virginia's children. To begin with, the Opinion does not restrict the many user-based voluntary techniques that, as Defendants themselves recognized, are highly effective and do not implicate the First Amendment.[3] Such techniques range from simply moving the family computer into a kitchen, den, or other space where parents frequently pass by to an array of technical measures (e.g., filters, site logs, approved web-sites, etc.), many of which cost nothing and can be adjusted to particular children and circumstances. JA-101-02, 832-33. Virginia remains free to educate parents and other responsible adults about the need, instruct them in how to use the measures, and even provide financial assistance or incentives if that is deemed necessary.[4] Moreover, the Opinion (at 16-17, 19) rests its holdings on the narrow ground that the Internet provisions offer no actual benefit. If a speculative future statute actually achieved significant protection, Virginia would be free to argue for a different result.

There is considerable irony in the effort by Virginia's Solicitor General to persuade this Court to take the exceptional step of *en banc* review. At the Solicitor General's urging, the panel certified questions to Virginia's Supreme Court. The Solicitor General then forcefully urged the Virginia Supreme Court to use its broad powers to radically revise the statute and provide some

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[3] Virginia's Brief conceded (at 26) that filtering "technology widely available today...blocks substantially all materials harmful to juveniles." Its expert made a similar concession, JA-447, and he did not dispute the discussion of effectiveness by Plaintiffs' expert. JA 101-02, 832-33. Virginia argued that filtering technology also blocks certain non-harmful speech (e.g., a discussion of breast cancer), but parents are free to adjust the protection as a child matures or as specific needs arise. Voluntary parental decisions typically do not violate the First Amendment.

[4] Because the obvious ineffectiveness of these Internet provisions precluded satisfying strict scrutiny, the Opinion did not have to address whether Defendants had negated plausible less restrictive alternatives. However, *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 820-26 (2000), is emphatic that "voluntary blocking" of indecent material by parents is a plausible alternative and that the Defendants bear the burden of proving that the "relative efficacy of voluntary blocking" is sufficiently less than mandatory restrictions to justify those restrictions. Defendants here have offered no such evidence. *See also Dean,* 342 F.3d at 102.

arguable basis for constitutionality. However, after full briefing and argument the Virginia Supreme Court declined to use heroic measures to save these ill-considered provisions. Opinion at 7. Similarly, the *en banc* Court should husband its resources for another day.

I. THE OPINION DOES NOT CONFLICT WITH THE LAW OF THE CIRCUIT.

The Petition's primary claim is that the Opinion conflicts with *American Booksellers'* 1988 ruling that the 1985 statute regulation of physical bookstores (§ 18.2-391) was not facially invalid under the First Amendment. The 1985 statute applied to any "picture, photography, drawing, sculpture, motion picture film or similar visual representation or image" deemed "harmful" to a juvenile. Two retail booksellers, three associations of retailers selling books and periodicals, the book publishers' association (collectively called the "Booksellers" by the Court), challenged the statute under the First Amendment. *Am. Booksellers v. Virginia,* 802 F.2d at 691, (4th Cir. 1986). No plaintiff mentioned the Internet. The case was argued exclusively as one involving physical stores and books.[5]

This Court initially held that the 1985 statute violated the First Amendment. *Id.* The U.S. Supreme Court then asked the Virginia Supreme Court to construe the statute. 494 U.S. 1056 (1990). The Virginia Supreme Court read it very narrowly. *Commonwealth v. Am. Booksellers Ass'n, Inc.,* 372 S.E.2d 618 (1988). This Court upheld the narrowed statute, finding that, because Virginia Supreme Court ruling allowed a store to simply place its few "harmful" books and magazines on a single visible shelf enabling its employees to easily notice and shoo away "perusing" juveniles, there was no significant First Amendment burden. *American*

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[5] For purposes of *stare decisis,* a case decides only what it decides. *Gately v. Mass.,* 2 F.3d 1221, 1226 (1st Cir. 1993); *Brown v. Gilmore,* 258 F.3d 265, 279-81 (4th Cir. 2001).

Booksellers, 882 F.2d at 127-28, *citing* 372 S.E.2d at 623, 625.[6] In so ruling, the Court spoke only in terms of physical books and bookstores. Regulation of the "unique and wholly new medium" known as the Internet, *see Reno,* 521 US. at 850, simply was not at issue.

The modern Internet began to emerge in the late 1980's and grew exponentially during the 1990s.[7] In 1999 Virginia's General Assembly amended the 1985 categories of "harmful" materials to include Internet displays. The General Assembly made no effort to tailor its prohibitions to the unique circumstances of the Internet. It did not, for example, adopt the credit card defense that Defendants now seek to write into the amendments. Plaintiffs filed suit

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[6] Contrary to the dissent (at 34), the *American Booksellers* opinion did not require booksellers "(1) to conceal harmful books from the public at large, and (2) to reveal them only to adults." (emphasis added). Instead, booksellers were allowed to shelve the books in full public view, subject only to preventing extended "perusal" by juveniles. 372 S.E.2d. at 178-79. Thus, this Court explained that "the 1985 amendment was not aimed at mere browsing but at 'the opportunity [a bookseller] may afford to juveniles to take off the shelves books which they are unable to buy, and read them in the store.'" 822 F.2d at 127 (emphasis added). Defendants suggest no means by which websites could keep contents visible to the public while merely preventing extended examination by juvenile.

[7] Although the Internet has deep roots, it only emerged as a medium of popular and commercial communication in the 1990's. Indeed, the World-Wide Web program that permits the websites that Defendants focus upon was first released in 1991. The Internet depends on participating host computers. At present, over 300 million computers connect to it. Worldwide numbers for earlier years are: 1984 – 1,000; 1986 – 5,000; 1989 – 100,000; 1992 – 1 million; 2002 – 200 million. *See generally* <http://www.isoc.org/internet/history/index.shtml>, at W. Slater, Internet History and Growth. Only a few thousand domain names were registered by 1994; by 1997 there were 1.6 million; and by 2001 there were over 31 million. *Id.* Historic reference materials also place public awareness of the Internet in the mid-1990s. The 1991 editions of the Encyclopedia Americana and the Merriam-Webster's Ninth New Collegiate Dictionary had no entries for "Internet," nor did the encyclopedia articles on computers and communications mention the term. In the Americana Annual for 1994, the word "Internet" first appears in a brief report (at 197) "On June 1, 1993, the White House announced it could now receive letters [via] the information highway called the Internet." The first Americana index entries for "Internet" appeared in the 1996 Annual. The word "Internet" appeared in the Tenth New Collegiate Dictionary. Prior to the Internet there was some public concern over pornographic computer programs, but they generally were sold in physical form in physical stores.

claiming that the new Internet provisions violated the First Amendment and the Commerce Clause.

Because First Amendment principles did not radically change between 1988 and 1999, the legal principles Plaintiffs relied upon were similar to those underlying *American Booksellers*. But Plaintiffs used those legal principles to analyze the new Internet provisions in light of unique characteristics of the modern Internet. Plaintiffs showed that the special circumstances of the Internet meant that the Internet provisions offered no practical benefit to justify its unique speech burdens. Opinion at 15-16 & 19. Plaintiffs also demonstrated that, in contrast to a physical bookstore, there is no practical way on the Internet to detect juveniles and shoo them away from "harmful" material. *Id.* *See also* n.6, supra Defendants did not dispute the point as to most forms of Internet communication, such as chat rooms, bulletin boards, list-servs, mail exploders, and email. Opinion at 15 nn. 7-8. However, Defendants argued that websites selling access to pornography could exclude some juveniles by removing all "harmful" material from any public view requiring each user to disclose a valid credit card number. Evaluating unique Internet considerations, not involved in the 1988 case, the Opinion held that the 1999 Internet provisions failed strict scrutiny.

Nothing daunted, the Petition argues that (1) isolated phrases in the 1985 statute could be read broadly enough to describe future Internet displays[8]; and (2) the Internet provisions added in 1999 might have been intended only to clarify the original language; so that (3) this Court's 1988 ruling might have implicitly and prospectively held that the First Amendment permitted application of § 18.2-391 to the Internet. But such speculation runs afoul of *Altman v. City of*

[8] The dissent acknowledges (at 31) that the 1985 language lists "very specific examples" of physical media, but argues that "[s]tripped of the examples provided" the concluding phrases can be read to reach the Internet. But one does not construe a statute by stripping out its heart, particularly when the state supreme court has mandated a narrow approach.

High Point, 330 F.3d 194, 210 (4th Cir. 2003), where Judge Luttig's opinion rejected claims that supposed "hidden reasoning and implicit holdings" of an earlier ruling may bind a later panel. *See also United States v. Brower,* 336 F.3d 274, 276 n.1 (4th Cir. 2003) (express *en banc* language that appears to go beyond the Court's explained intent is not binding).

In any event, the Petition's core premise -- that the 1985 statute had inchoate application to the future Internet -- cannot withstand analysis. The Petition offers no legislative history or other reason to believe that the 1999 provisions were intended merely to clarify rather than to expand the 1985 language. But even if the 1985 statute was unclear as to whether it reached the Internet, the *American Booksellers* opinions, which commands narrow construction, require those doubts to be resolved against such a reach.[9] This is the only conclusion that would avoid serious constitutional issues. In any event, a statute cannot be struck down to avoid speculative future effects. Thus, the constitutionality of restricting the future Internet was not and could not have been adjudicated in 1988 as the Defendants argue. The Petition's primary ground for *en banc* review thus fails.

II. THERE IS NO IMPORTANT REASON FOR THE EN BANC COURT TO REVIEW THE PANEL DECISION.

No questions of exceptional importance exist to warrant *en banc* review. There is no important practical reason to attempt to save them. The Petition tacitly concedes that the Internet provisions offered no real world benefit. And the Opinion does not foreclose future effective regulation. To the contrary, by resting its holdings (at 15-16, 19) on the Internet provision's utter impotence and lack of benefit, the Opinion left the fate of truly protective provisions to be

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[9] The Petition does not and cannot deny that, in this respect, the 1985 language is readily susceptible to being construed to apply to physical items of the type listed. *See* Opinion at 7-9. This contracts with the Petitions impermissible attempt to read into the Internet provisions defenses that are not there and that, with knowledge of this lawsuit, the General Assembly and the Virginia Supreme court declined to add. *See Opinion* at 13-14

decided when and if they are developed. In the meantime, it left highly effective user-end technologies freely available. Nor does the Opinion introduce intolerable legal error that must be reviewed and corrected immediately. The Opinion's holdings closely track those of every other federal court and judge to consider similar state laws. *See* supra at n.1. If ever a case clearly did not merit *en banc* review, this is it.[10]

A. The Opinion Faithfully Applied First Amendment Strict Scrutiny And Properly Invalidated The Internet Provisions.

Virginia's Internet provisions are not directed toward obscenity (forbidden by other laws), but to fully protected adult speech that is not appropriate for juveniles. For example, clinics provide graphic instructions on how persons with quadriplegia or other profound disabilities can achieve sexual relations. They also host chat rooms and encourage other explicit Internet discussion of the subject. Bookstores make available excerpts from sexually oriented adult books; display related emailed reader comments and reviews; host chat room discussions of adult works and themes; and send email notices to interest-defined mailing lists. Although the provisions deal only with speech that has some "commercial purpose," they reach far beyond "commercial speech" in the First Amendment sense. Thus, the Petition concedes (at 8-10) that the Internet provisions are subject to First Amendment strict scrutiny.

The Petition argues (1) that the Opinion erred in holding that a statute that does not materially achieve its purpose is invalid, so long as the purpose is compelling in the abstract; and (2) that the Opinion erred because one type of Internet speech -- pornographic commercial websites -- could continue to operate under the Internet provisions. However, neither argument

[10] The Petition opens by not-so-subtly stressing that the panel majority was two district court judges sitting by designation, while the dissenter was a full time circuit judge. It would be unthinkable, however, for this Court to relegate to second-class status district judges who have volunteered to assist this Court and who have been duly appointed to a case. Moreover, it would be fundamentally unfair to disadvantage litigants whose appeals happen to be heard by panels including designated district judges.

establishes error, much less provides the type of exceptionally important question necessary for *en banc* review.

1. The failure of a content-based speech restriction to materially advance its claimed purpose is highly relevant to First Amendment strict scrutiny.

The Petition asserts (at 9-10) that the Opinion committed fundamental legal error by holding (at 16-17) that First Amendment strict scrutiny required the Internet provisions to actually and materially achieve the proffered compelling interest of protecting Virginia youth. That argument is emphatically and explicitly refuted by a long line of Supreme Court cases that the Opinion cited (at 16) and that the Petition simply ignored.

Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 664 (1994), held that the First Amendment is not satisfied by identifying a metaphorical "disease" unless the challenged speech restriction will alleviate it "in a direct and material way." *Edenfield v. Fane,* 507 U.S. 761, 770-71 (1993), held that a statute will not survive strict scrutiny unless the government proves that the speech restriction "will in fact alleviate [compelling harms] in a direct and material way." *Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 496 (1986) (emphasis added), required proof that a challenged restriction will "advance the state interest sufficiently to justify its abridgement of expressive activity."[11] Indeed, even under the lesser standards that protect commercial speech, a statute that "provides only ineffective or remote support for the

[11] There is abundant other authority to the same point. *Sable Communications v. FCC,* 492 U.S. 115, 130-31 (1989), held that, although the government has a compelling interest in protecting youth, the government could not justify a nationwide speech ban that was necessary only to incrementally protect "a few of the most enterprising and disobedient young people." As Justice Scalia's concurrence discussed, the opinion mandated a "balancing process" that he approved. *Id.* at 132. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), approached the issue from the other end, holding that if a statute leaves "appreciable damage" to the asserted interest unremedied, it fails strict scrutiny. This standard obviously requires an assessment of the actual benefits the statute achieves, compared to those it does not achieve. This is not a free-form balancing. The benefit achieved must be compelling, and some deference may be owed legislative findings. But here there no findings and the compelling interest was not materially advanced

government's purpose" cannot be sustained. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,* 447 U.S. 557, 564 (1980) (emphasis added).

The Petition argues (at 13) that a legislature "is free to solve only part of a problem." In fact, where the means chosen is a content-based restriction on speech that is only partially true. As *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), holds, if a statute leaves unremedied "appreciable damage" to its claimed compelling interest, it typically will fail strict scrutiny. In any event, to survive strict scrutiny a statute must actually "solve" at least some of the problem – enough to justify the constitutional burden imposed.[12] Here, Defendants' own admissions showed that the Internet provisions solved nothing.

2. The Opinion properly joined every other federal court and judge to consider a similar state statute to find a clear First Amendment violation.

Because the Internet provisions provide no material benefits, they fail strict scrutiny even if Defendants' other arguments were correct. But they are not. The Internet provisions restrict all forms of Internet speech, not just websites. As the Opinion found (at 15 & nn. 7-8), Defendants did not even attempt to suggest any way that users of chat rooms, bulletin boards, mail-exploders, and the like could comply with Virginia's Internet provisions except by reducing all adult speech to a level suitable for juveniles. Defendants' argument that sponsors of bulletin boards and chat rooms may not themselves be responsible for the postings by users simply does not address the applicability of the statute to users. Opinion at 16. Nor does it address the liability of sponsors who edit and maintain displays of material from chat rooms or bulletin boards or otherwise add content. The Opinion properly held (at 15-16) that reducing all these

[12] The Petition's argument that First Amendment scrutiny does not require Virginia to "protect its children from *all* harmful materials" (original emphasis) is disingenuous. The problem here is not that Virginia's statute falls somewhat short of perfection. Instead, it is that the statute provides no material benefit. As the Opinion observed (at 17), and as the Petition does not dispute, "there is no benefit to a law which merely reduces the number of pornographic responses to an Internet search by a juvenile from 186,000 responses to 183,000 responses."

forms of adult speech to the level of the playground would violate the First Amendment, *Dean,* 342 F.3d at 101, and the Petition does not show otherwise.

The Petition argues that websites of commercial pornographers could feasibly comply if the Internet provisions were construed to provide an absolute defense for any displays to a user who provided a valid credit card number. The Petition asserts that the Virginia Supreme Court's narrow construction of the 1985 statute suggests that the Court would write such a "credit card defense" into the 1999 Internet provisions. However, the text of the Internet provisions does not readily suggest legislative intent to create such a defense, the General Assembly failed to codify such a defense when it amended the statute to create other defenses after this suit was filed, and the Virginia Supreme Court refused the Solicitor General's invitation to create such a defense. Defendants' argument is wishful thinking.

But even if an explicit "credit card defense" existed, it would not satisfy the First Amendment, even as to websites. Simply stated, limiting website communication to those Internet users who (i) have a credit card (many adults choose not to have credit cards or cannot qualify), and (ii) are willing to share their credit card information over the Internet (especially with a site that is forced to identify itself as an "adult" site), imposes very substantial burdens on speech to adults.[13] These burdens are far greater than the "minimal burden" of shooing away obvious juveniles from an open shelf.[14] Moreover, since many juveniles have access to credit

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[13] Common estimates are that about 12% of adults have no credit card. Moreover, many adults are unwilling to give out financial information over the Internet. JA-98. Defendants' expert admitted that 46% of all adults have never purchased anything on the Internet. JA-839.

[14] The Petition argues that at least some websites manage to operate with a credit card requirement. But those are sites whose business model consists of selling access over the Internet, for whom credit cards are the only practical means of obtaining real-time payment. They lose little by excluding users who will not or cannot pay in the way their business model requires. These examples simply do not address the wide range of other commercial speech for which such immediate payment is not required.

card numbers, little is accomplished. Hence, federal courts that have considered similar statutes that have express credit card defenses uniformly have struck them down.[15]

B. The Opinion's Commerce Clause Balancing Correctly Gives No Weight To Non-Existent Local Benefits And Would Not Foreclose Future State Legislation That Actually Achieves Meaningful Local Benefits.

The Petition does not deny that the Internet provisions would impose substantial burdens on interstate commerce. Instead, it attacks the Opinion's Commerce Clause ruling because (1) it refused to give weight to non-existent local benefits, and (2) it makes it impossible for Virginia to ever regulate "harmful" speech on the Internet. The Petition is mistaken on both points.

1. The Opinion correctly refused to give weight to non-existent local benefits.

The most lenient Commerce Clause standard, the balancing test, asks "whether the burden on interstate commerce clearly exceeds the local benefits." *Star Scientific, Inc. v. Beales,* 278 F.3d 339, 355 (4th Cir. 2002) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986)); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). As one would expect, abundant precedent looks to the actual local benefits achieved by the challenged statute, though with appropriate deference to legislative judgments that the statute may reflect.

For example, *Edgar v. MITE Corp.,* 457 U.S. 624, 645 (1982) (emphasis added), struck down an Illinois statute because, although its purpose was important, the Court was

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[15] *E.g. Johnson*, 194 F.3d at 1160; *ACLU v. Reno*, 929 F. Supp. 824, 846 (E.D. Pa. 1996), *aff'd other grounds*, 521 U.S. 844, 877-81 (1997). The Opinion noted (at 12 n.2) that Defendants "assumed only adults will have credit cards because only adults are contractually obligated to pay back credit card charges." In fact, a large and growing number of juveniles have credit cards of their own. A recent survey of college student showed that 22% had credit cards in high school. *S. Kehaulani, Age 14 and Paying With Plastic,* Wash. Post., Apr. 3, 2001, at A1. And that number grows rapidly. Many others have access to credit card numbers, e.g., from friends, siblings or parents. Because the use of numbers as a screening device to restrict access does not generate a charge, a minor would incur no cost from allowing friends to use a credit card number for access. Nor would a minor who used a parent's card number impose any cost on the parent or generate any bill to the parent. As the Opinion noted (at 14), the government does not regard requiring a credit card as an effective way to screen out underage persons in any other context (e.g., purchasing tobacco or alcohol).

"unconvinced that the Illinois Act substantially enhances the shareholder's position." Similarly, the Eighth Circuit struck down a Missouri statute because, although the statute's objective was important, "the local benefit actually derived from the statute is minimal or nonexistent." *R & M Oil & Supply Co. v. Saunders,* 307 F.3d 731, (8th Cir. 2002) (emphasis added). Indeed, in a case that foreshadowed the Opinion here, the Tenth Circuit recently struck down New Mexico's analog to Virginia's Internet provisions because, though their purpose was compelling, "the local benefits the statute actually confers," as demonstrated by defendants' own arguments, were insufficient to justify the burdens on commerce. *Johnson,* 194 F.3d at 162-63. Surprisingly, the Petition did not mention the *Johnson* decision.

The Petition emphasizes that *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), spoke of balancing the "putative" local benefits. Noting that one possible dictionary meaning of "putative" is "supposed," and ignoring abundant precedent, the Petition argues that *Pike* forbids any consideration of actual benefits. But "putative" has other common meanings, e.g., "accepted," and post-*Pike* authority (such as that just discussed) regularly looks to actual benefits.

Moreover, *Pike* itself demands consideration of how well the justifying benefits actually are achieved. Immediately after its reference to balancing "putative benefits," *Pike* explains that a challenged statute will fail if "the local interest involved ... could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142 (emphasis added), *quoted* in *Star Scientific*, 278 F.3d at 357. Because Virginia's Internet provisions have no local benefit, those putative benefits can be achieved just "as well," and with less burden on commerce, by striking

the provisions down.[16] Thus, the Opinion is squarely supported by *Pike* itself, as well as the plethora of post-*Pike* authority looking to the actual benefits achieved.

2. The Opinion's narrow holding – which rests on the absence of any local benefit – would not foreclose a statute that achieved material protection.

The Supreme Court has recognized that, by their natures, some means of interstate commerce inherently require that regulation be nationally uniform. Several federal courts so view that the Internet, at least where the regulated activity is purely internal to the Internet, as opposed to being integrated with local activity, such as the sale of goods to an in-state address. *E.g.*, *Dean,* 342 F.3d at 104, *Pataki,* 969 F. Supp. at 172-75.

There is much to be said for that view, but the Opinion (at 17-20) stakes out much narrower ground. It notes the broader views of other cases, but its holding (at 19-20) is that, because Defendants' own position establishes that the Internet provisions "will have no local benefit," the statute "still fails under the Dormant Commerce Clause analysis of *Pike*." Thus, the Opinion does not foreclose approaches that actually provide local benefits.

CONCLUSION

Virginia's General Assembly simply subjected the Internet to restrictions developed for physical outlets, making no attempt to tailor the provisions to accommodate the unique and very different characteristics of the Internet. The Virginia Supreme Court declined to supply the tailoring that the General Assembly omitted. Not surprisingly, the Internet provisions were struck down, sharing the fate of all similar state legislation to be review by a federal court. The Opinion is consistent with Circuit law and presents no important legal or factual issue for *en banc* review. The Petition should be denied.

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[16] Indeed, the user-based solution discussed above (at 3) would offer far greater benefits without burdening commerce.

April 29, 2004

Respectfully submitted,

Of counsel:

Thomas W. Kirby
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas, 24th Floor
New York, NY 10020

Garrett M. Smith (VA Bar #34162)
Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C.
500 Court Square, Suite 300
P.O. Box 298
Charlottesville, VA 22902
(434) 951-7222

Elliot M. Mincberg
People For The American Way Foundation
2000 M Street, NW, Suite 400
Washington, DC 20036

Robert M. O'Neil
J. Joshua Wheeler
The Thomas Jefferson Center For The Protection Of Free Expression
400 Peter Jefferson Place
Charlottesville, VA 22911

Counsel for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2004, three (3) true copies of the Opposition was sent by first-class mail, postage paid to:

William H. Hurd
Solicitor General's Office
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Thomas W. Kirby
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000