No. 06-694

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION; AND PMA, THE INDEPENDENT BOOK PUBLISHERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation and PMA, the Independent Book Publishers Association submit this joint amicus brief in support of respondent, urging that this Court affirm the decision of the court below.[1] This brief is submitted upon the consents of counsel to the Government and respondent, filed with the Court herewith.

INTEREST OF THE *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute and sell books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers.

As such, *amici* have a significant interest in preventing the imposition of unconstitutional Governmental limitations on the manner and substance of their advertising and promotion of their First Amendment-protected communicative materials, both textual and visual.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g.*,

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[1] A description of the amici is attached as Appendix A.

Pursuant to Rule 37.6 of the Rules of the Court, counsel for the amici curiae discloses that they authored the brief in whole. No person or entity, other than Media Coalition, Inc., a trade association of which amici curiae are members or with which they are affiliated, and of which the parties in this action are not members, made a monetary contribution to the preparation or submission of the brief.

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *PSInet Inc. v Chapman*, 342 F.3d 227 (4th Cir. 2004), *aff'g* 167 F. Supp. 2d 878 (W.D. Va. 2001); *American Booksellers Fdn. v. Dean*, 342 F.3d 86 (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); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

They also have filed amicus briefs in this Court to advise it as to the impact of its decisions with respect to regulation of sexually frank speech on mainstream creators, producers, distributors, and retailers. *See, e.g.*, *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996); *United States v. X-Citement Video*, 513 U.S. 64 (1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue in this case, 18 U.S.C. § 2252A(a)(3)(B) (the "Marketing Provision"), criminalizes the marketing of First Amendment-protected material if the marketing "reflects the belief" or "is *intended* to cause another to believe" that the material marketed or promoted is child pornography.[2] On its face, as the court of appeals found, the statute allows for the imposition of liability based on speech that falls outside any heretofore recognized category of unprotected speech even in the absence of a finding that the material being marketed actually is child pornography. This overbreadth presents a serious threat to *amici*'s legitimate, everyday marketing and promotional activities.

Amici do not produce, market or promote child pornography. Indeed, they support criminalizing the advertising and promotion of child pornography, which is and should be illegal. But they are deeply concerned that the Marketing Provision criminalizes the truthful marketing and promotion of legal, protected communicative materials. By targeting marketing speech based on an assessment of its subjective intent without regard to the legality of the speech being marketed, the Government seeks to criminalize otherwise lawful speech in order to control the dissemination of unlawful speech (child pornography). This Court, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002), already has held that it is unconstitutional to "suppress lawful speech as the means to suppress unlawful speech" – a proscription violated even more clearly here, where criminal sanction can be imposed even when the marketed material is

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[2] *Amici* adopt the discussion of the unconstitutional vagueness of this language in the amicus brief of the National Coalition Against Censorship ("NCAC").

not, in fact, child pornography. Through the Marketing Provision, the Government seeks, by targeting marketing, to circumvent constitutional protections of speech which it does not like and wishes to ban.

The First Amendment protects not only the right to create and publish protected speech, but also the right to distribute and sell such speech. *Amici's* ability to market the mainstream books, periodicals, and DVDs they produce and sell is integral to the full exercise of their First Amendment rights. Like the sound of the proverbial tall tree that falls to the ground in an uninhabited forest, the truths, beauty and entertainment contained in unread books, magazines and comic books or in unseen motion pictures and photographs are in some sense nonexistent. Marketing is an essential aspect of *amici's* exercise of their First Amendment rights.

In 2006, over 150,000 new books were published in the United States, and multiples of that number are in print; over 19,000 magazine titles were published weekly, monthly and quarterly in the United States and Canada; and over 74,000 DVD titles were in release. Advertising and promotion, including print ads, press releases, packaging, descriptions on the book cover and point-of-sale materials are the primary means by which these items are distinguished in the marketplace.

As common experience demonstrates, the sale of books, periodicals and DVDs in brick-and-mortar retail establishments is heavily dependent on browsing and perusing the marketing and promotional matter on the packaging of or adjacent to the work,[3] as well as advertisements, press releases and other promotional activity. Even more importantly, as the Internet grows as a sales

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[3] DVDs are shrink-wrapped and generally do not permit review of their content; in some retail establishments books and periodicals are also shrink-wrapped.

medium, when considering whether to purchase books, periodicals or videos online, customers generally make their selection based on marketing material.

The Government seeks to allay the concerns of those who produce and market mainstream materials by referring to the Marketing Provision as a "pandering" provision despite the fact that the word "pander" or "pandering" does not appear in the statute. The dictionary definition of "pander" is "to cater to the lower tastes and desires of others or exploit their weaknesses." *Webster's New Collegiate Dictionary* 850 (9th ed. 1984). The example given by the dictionary is from the author Herman Wouk: "the audience is vulgar and stupid; you've got to pander to them." Describing marketing as pandering reflects a view that it (or that which is being marketed) is tasteless, vulgar or catering to "lower tastes." It is the marketing of that of which one disapproves. The Government states (without any supporting citation) that "there is no per se protection for pandering." (U.S. Brief at 37.) But marketing or other speech that "caters to the lower tastes and desires of others or exploits their weaknesses" is presumptively protected unless it falls within one of the narrow categories of unprotected speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

The concerns expressed by *amici* extend beyond this case. The various theories by which the Government seeks to establish the constitutionality of the Marketing Provision in the child pornography context would be equally applicable to support a statute criminalizing marketing which someone might consider "reflects the belief" or "is intended to cause another to believe" that the product marketed is obscene or harmful to minors. The world of communications and ideas, like life itself, is inextricably entwined with human passion and sexuality. Many serious works of fiction appearing in book, periodical, or DVD form contain sexually forthright material that is not obscene but may offend some adults who

personally equate sexual forthrightness with obscenity. If the Marketing Provision is upheld in this case, a similar provision could be added to laws banning obscenity. A publisher or DVD movie producer would, at the risk of a long sentence of incarceration, have to carefully choose the marketing language it uses so that third parties -- and particularly prosecutors -- could not suggest that the marketing or description "reflects the belief" or "is intended to cause another to believe" that the material is obscene. This would be true even if that is not the marketer's intent and even if the work is not obscene. The substantial chilling effect of this subjective test is not mitigated by the Government's suggestion that the marketing will be judged in the context of the other facts — yet another level of subjectivity.

Ginzburg v. United States, 383 U.S. 463 (1966), provides no support for criminalizing the truthful marketing of protected materials. Nor, as noted, can protected speech be criminalized as a vehicle to discourage unprotected speech. In addition, the Marketing Provision is a content-based regulation of protected speech. The governmental interest supporting such regulation has previously been found by the Court not to be compelling, *Free Speech Coalition*, 535 U.S. at 254, nor is it substantial. Thus the regulation fails under both strict and intermediate scrutiny.

ARGUMENT

I.

GINZBURG AND ITS PROGENY PROHIBIT THE CRIMINALIZATION OF NON-OBSCENE, TRUTHFUL MARKETING

The First Amendment protects both non-commercial and commercial speech that constitutes truthful marketing of

lawful activity. The Marketing Provision is an improper criminalization of speech that the government concedes may, in and of itself, be truthful and non-obscene in order to combat the dissemination of child pornography. (*See, e.g.*, U.S. Brief at 28-29.)

As the Eleventh Circuit properly found, the Marketing Provision unconstitutionally criminalizes speech that is protected by First Amendment. *See United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006). Under the statute, it is a felony punishable by up to twenty years in prison to "advertise" or "promote" "any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains [child pornography]." 18 U.S.C. § 2252A(a)(3)(B). These severe penalties are imposed without regard to the actual nature, or even the existence, of the underlying material. *See Williams*, 444 F.3d at 1298-99. There can be no reasonable basis for imposing a twenty-year sentence for marketing lawful materials.

The statute is not narrowly drawn to sanction only commercial speech that is false or that proposes an illegal transaction. Instead, it extends to commercial and non-commercial speech even if such speech constitutes non-obscene, truthful marketing of lawful activity.[4] The

[4] In addition, despite the Government's attempt to rewrite the statute to require specific intent, (*see* U.S. Brief at 32), as the Eleventh Circuit aptly noted: "[T]he law does not require the pandered material to contain any particular content nor, in fact, that any 'purported' material need actually exist. Since the 'reflects the belief' portion of the statute has no intent requirement, the government establishes a violation with proof of a communication that it deems, with virtually unbounded discretion, to be reflective of perverse thought." *Williams*, 444 F.3d at 1306 (emphasis added); *see also id.* at 1298 ("[T]hat pandered child pornography need only be 'purported' to fall under the prohibition … means that promotional or[sic] speech is criminalized even when the touted materials are clean or non-existent.").

Marketing Provision also punishes marketing that while not false may be viewed by some as puffery,[5] exaggeration, sarcasm, in poor taste or a mistaken belief. If upheld, the same framework readily could be applied to marketing of other unpopular protected speech that could not otherwise be subject to regulation or sanction.

As retailers, publishers, distributors, and users of mainstream, non-obscene material, *amici* have a direct interest in ensuring that the Court does not uphold the vague and overbroad statutory scheme at issue here. While the Marketing Provision before the Court has been added to a child pornography law, the rationale behind it could equally apply to support the addition of similar marketing crimes to laws restricting obscenity and material harmful to minors.

The Marketing Provision represents, in effect, an unwarranted and unconstitutional extension of *Ginzburg*. In that case, the Court narrowly held that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test." 383 U.S. at 474. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 239 n.1 (1990):

> In *Ginzburg*, this Court held merely that in determining whether a given publication was obscene, a court could consider as relevant evidence not only the material itself but also evidence showing the circumstances of its production, sale and advertising. … [T]here is no "obscenity vel non" question in this case.

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[5] The Court has quoted the FTC as stating, in the context of civil regulation, "mere puffing deceives no one and has never been subject to regulation." *California Dental Ass'n* v. *F.T.C.*, 526 U.S. 756, 778 n.14 (1999).

Since *Ginzburg*, the Court has extended First Amendment protection to commercial speech and has made it clear that truthful, non-obscene material cannot be deemed obscene simply based on the manner by which it is advertised or marketed. *See e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 829 (2000) (Stevens, J., concurring) ("The very fact that the programs marketed by Playboy are offensive to many viewers provides a justification for protecting, not penalizing, truthful statements about their content.").[6] Thus, truthful and non-obscene marketing of protected material may not be criminalized on the ground that it is done in a "manner that reflects the belief, or that is intended to cause another to believe" that the material is child pornography, obscene, or "harmful to minors."

The Government's attempt to broaden the Court's holding in *Ginzburg* in a manner that would threaten to impose such severe penalties on persons engaging in First Amendment-protected speech, thereby chilling such speech, should be rejected.

A. Truthful Non-Obscene Statements Concerning Lawful Activity Are Fully Protected By The First Amendment

Section 2252A(a)(3)(B) directly criminalizes First Amendment-protected advertising and promotion. In so

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[6] The Eleventh Circuit also recognized that "although *Ginzburg* has not been overturned its precedential value is questionable," noting Justice Stevens' dissent, joined by four justices, in *Splawn v. California*, 431 U.S. 595, 603 n.2 (1977), and his concurrence in *Playboy Entm't Group, Inc.*, 529 U.S. at 829 ("since *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, a proposal that otherwise legal material be deemed obscene on the basis of its titillating marketing, is 'anachronistic.'"). *Williams*, 444 F.3d at 1301.

doing, it also indirectly restricts the protected books, periodicals and DVDs whose marketing is chilled by the possibility of a lengthy jail term. The Government claims that "[t]here is no per se protection for pandering," (*id.* at 37), but this is not true. First, the statute criminalizes speech that "advertises" and "promotes" — not that which "panders" (a term that does not appear in the statute). Truthful marketing of lawful activity — whether for commercial or non-commercial purposes — is fully protected under the First Amendment. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976). Second, even if the statute can be interpreted to criminalize only pandering, as that term has been interpreted by the Court, the Court has never held "pandering" to be unconstitutional. *See Pinkus v. United States*, 436 U.S. 293, 303 (1978) ("Pandering is 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'") (quoting *Ginzburg*, 383 U.S. at 467). Under *Ginzburg* and its progeny, all the Court has found is that in "close cases," evidence of pandering may be probative in determining whether the underlying material in question is constitutional. *See Ginzburg*, 383 U.S. at 474; *FW/PBS*, 493 U.S. at 239, n.1 (1990) ("What *Ginzburg* did not do, and what this Court has never done … is to abrogate First Amendment protection for an entire category of speech-related businesses.").

If such a regulation of marketing were held to be constitutional, publishers and retailers, including *amici*, would have to review all marketing materials, including advertisements and promotional information typically provided on the covers of books or DVDs, and attempt to determine whether the material might appeal to the "salaciously disposed," *Ginzburg*, 383 U.S. at 472, even when the underlying work clearly is not child pornography. For example, consider the promotional speech on the packaging of the DVD of "Hustle & Flow," a film that

received the 2005 Sundance Film Festival Award and was nominated for multiple Academy Awards. The advertisement talks of the "unforgettable tale of DJay (Terrance Howard), a pimp whose gritty hustle selling sexy Nola … and supporting pregnant Shug … leaves him wondering if this is it for him." Consider further the promotional speech on the DVD cover of the film "Cruel Intentions" that talks of the "ultimate challenge to … deflower the headmaster's beautiful, virgin daughter," played by Academy Award winner Reese Witherspoon.[7] Could some read these promotional descriptions as reflecting a belief that the motion pictures are obscene or involve adolescents engaging in sexual activity? Possibly. Does that make the movies or the promotional language unprotected? Certainly not.

The Government states that the Marketing Provision "could not ensnare" marketing of mainstream literature or movies because the Government knows that the publishers and producers of such mainstream materials "do not intend" their materials to violate federal law. (U.S. Brief at 41.) Although that statement is correct as *amici's* products are neither obscene nor child pornography, a prosecutor or complainant nevertheless may conclude that in his or her subjective view the marketing reflects a belief that they are, which the Marketing Provision makes a felony. Nor is it much solace to mainstream media entities that run afoul of such a misguided prosecutor or complainant that "[t]o the extent that … [the Marketing Provision] sweeps within its ambit protected speech, any such application can be avoided by case-by-case adjudication." (*Id.* at 42.) The fear of having to confront such charges can itself give rise to a chilling effect.

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[7] The movie is the most recent film interpretation of the well known de Laclos novel "Les Liaisons Dangereuses."

If the Marketing Provision is upheld, a similar statutory scheme undoubtedly could be used to regulate and chill the marketing and distribution of First Amendment-protected sexually frank and other governmentally-disfavored material. First Amendment rights should not be limited by a prosecutor's surmise as to the intent of a publisher or retailer, particularly when the underlying material is lawful. The protected speech of *amici* and others similarly situated should not be chilled by the fear of criminal prosecution for the sexually frank or titillating marketing of mainstream publications and films.

B. Regulation Of Protected Speech May Not Be Used As A Vehicle To Discourage Unprotected Speech

As the Court stated in *Free Speech Coalition*:

> The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . .' [citation omitted] The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

535 U.S. at 255.

While *amici* strongly support combating the distribution of child pornography, this cannot be done by

criminalizing First Amendment-protected communication. The Marketing Provision impermissibly criminalizes not only false, but also fully protected truthful marketing of lawful activity. Criminalizing marketing that describes sexually frank or racy, but not unlawful, material may not be used as a means of combating the dissemination of other material that is, in fact, unlawful. As the Court held in *Free Speech Coalition* with respect to a similar statutory provision:

> Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

535 U.S. at 257.

The Marketing Provision is, in effect, an attempt to circumvent that ruling by taking protected promotional language, combining it with protected material, and somehow ending up with unprotected marketing. That result is insupportable.

As the Court has found, "[t]he First Amendment assumes that, as a general matter, 'information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.'" *Playboy Entm't Group, Inc.*, 529 U.S.

at 829 (Stevens, J., concurring) (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

II.

THE MARKETING PROVISION IS A CONTENT-BASED REGULATION OF PROTECTED SPEECH WHICH DOES NOT PROMOTE EITHER A COMPELLING OR SUBSTANTIAL GOVERNMENT INTEREST

Because the Marketing Provision applies to First Amendment-protected sexually frank speech, the Marketing Provision plainly is content-based. To the extent that the communicative product marketed is not child pornography, it is content-based regulation of protected speech. As a content-based speech restriction applying to non-commercial as well as commercial speech, the Marketing Provision is "presumptively invalid," *R.A.V.*, 505 U.S. at 382, and "can stand only if it satisfies strict scrutiny." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). "If a statute regulates [non-commercial] speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't Group, Inc.*, 529 U.S. at 813. *See also Williams*, 444 F.3d at 1298. Even if the Marketing Provision were limited to commercial speech, under the *Central Hudson* test it is unconstitutional unless the government assert[s] a substantial interest in support of the regulation," "demonstrates that the restriction on commercial speech directly and materially advances the interest" and draws the regulation narrowly. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995).

As the Eleventh Circuit noted, "[i]f all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were, the

Government need not show that it has narrowly tailored its restriction because neither of these scenarios involve protected speech." *Williams*, 444 F.3d at 1297. However, as set forth above, the statute is not so limited. The Marketing Provision applies to both commercial and non-commercial speech — to persons and non-profit entities as well as business. *Cf. Ashcroft v. ACLU*, 535 U.S. 564, 568 (2000).

While *amici* do not dispute that marketing which is false can be regulated, there already are numerous federal and state laws, both civil and criminal, aimed at protecting consumers from such fraud.[8] *See also Williams*, 444 F.3d at 1297. Those which are criminal, however, are almost exclusively misdemeanors or less, and counsel has found none that are based on the protected communicative content of the item which is being marketed. Further, counsel has been unable to find any statute where the penalties for illegal advertising or promotion are even close to the lengthy jail sentences imposed for violation of the Marketing Provision. *See also Williams*, 444 F.3d at 1297 ("[W]e note that a mere false commercial advertiser is punished on par with an actual child pornographer, without regard to the actual content or even existence of underlying material."); Tribe, A*merican Constitutional Law* 814 (2d ed. 1988) ("If the first amendment requires an extraordinary justification of government action which is aimed at ideas or information that government doesn't like, the constitutional guarantee should not be avoidable by governmental action which seeks to attain that unconstitutional objective under some other guise.").

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[8] *See, e.g.*, 18 U.S.C. § 709 (falsely advertising to imply federal government relationship; misdemeanor); Fla. Stat. Ann. §§ 817.06, 817.44 (general application; misdemeanor); N.Y. Gen. Bus. L. §§ 350, 350-d (general application; civil penalty up to $5,000).

In the case before the Court, the Government puts forward as the governmental interest justifying the Marketing Provision the "drying up the market for child pornography and thus removing an incentive to create it." (U.S. Brief at 12.) That is the very same compelling interest that was offered by the Government in *Free Speech Coalition* where it was described by the Court as the "market deterrence theory" and rejected as insufficient to permit restriction of protected speech on the ground that there was "no underlying crime at all." 535 U.S. at 254. That analysis applies equally here and requires the rejection of the advanced Government interest. Because the Marketing Provision promotes no compelling governmental interest, the content-based Marketing Provision fails strict scrutiny and is unconstitutional to the extent it purports to apply to the non-commercial promotion of legal, protected materials. Even if the Marketing Provision were limited to commercial speech, it then would not directly and materially advance that proposed Government interest and therefore would fail intermediate scrutiny. The Government has failed to demonstrate that the restriction will "in fact alleviate … [the harm that underlies the government's interest] to a material degree." "This burden is not satisfied by mere speculation or conjecture." *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993).

As the Court has often stated:

> [I]t bears repeating, as we did in *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. 499 U.S., at 448-449, 111 S.Ct., at 1444-1445. The First Amendment presumptively places this sort of discrimination beyond the power of the government. As we reiterated in

> *Leathers*: " 'The constitutional right of free expression is … intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us … in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'"

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991).

As the Court pointed out in *Simon & Schuster* with respect to New York's "Son of Sam" law, "[i]t singles out income derived from expressive activity for a burden the state places on no other income, and is directed only at works with a specified content." *Id.* The same is true of the Marketing Provision. It singles out marketing of expressive activity for a burden that the Government places on no other product and is directed only at speech on the basis of specified content. While *Simon & Schuster* related to financial regulation, the chilling effect of the possibility of many years in a federal penitentiary is even more likely to drive disfavored ideas or viewpoints from the marketplace than monetary burdens.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to affirm the decision of the Eleventh Circuit Court of Appeals that the Marketing Provision is unconstitutional.

Dated: August 14, 2007

Respectfully submitted,

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APPENDIX A: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has it principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to

establish legal precedent for the freedom to read of all citizens.

PMA, the Independent Book Publishers Association ("PMA") is a nonprofit trade association representing more than 3,700 publishers across the United States and Canada. PMA members publish and distribute mainstream books on a variety of topics including marriage, sex education, family and relationships, self help, art photography, glamour photography, photo techniques, as well as erotic fiction and romance novels.

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