IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES Plaintiff,	)	Appeal No. 03-2183 District Ct. 01CR 724-1
TERRY JOHNSON, Defendant.	)	

Appeal from the United States District Court for the Northern District of Illinois No. 01-CR-724-1, Honorable Judge Hibbler

OPENING BRIEF FOR APPELLANT

ATTORNEY FOR PLAINTIFF
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CERTIFICATE OF INTEREST

The undersigned, counsel of record for Defendant, Jason R. Epstein, furnishes the following information in compliance with Circuit Rule 12(d).:

(1) The full name of every party or amicus the attorney represents in this matter: Terry Johnson

(2) If such amicus or party is a corporation: Not applicable. Party is an individual.

(3) The names of all law firms, partners or associates who have appeared for the party in the District Court or are expected to appear for the party in this Court:

District Court:

Jason R. Epstein
Law Offices of Jason R. Epstein
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134 N. LaSalle Suite 2222
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Appellate Court:

Same

Certified this___ day of September, 2003

_____
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JURISDICTIONAL STATEMENT

This is an appeal from a conditional plea pursuant to Fed.R.Crim.P.. 11(a)(2) entered by the United States District Court, Northern District of Illinois on February 13, 2003 (Rec. 43). Plaintiff-Appellant's Notice of Appeal was timely filed on May 1, 2003. (Rec 48).

Jurisdiction of the Court is pursuant to 28 U.S.C. § 1343(a)(4). The matter was brought in the trial court under an Act of Congress, namely, 18 U.S.C. § 2251.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

WHETHER 18 USC §2251 IS UNCONSTITUTIONAL AS AN AFFRONT TO FREE SPEECH

II

WHETHER THE US ATTORNEY MAY ADD ELEMENTS INTO A JURY INSTRUCTION WHICH ARE NOT CONTAINED IN THE STATUTE

STATEMENT OF THE CASE

Terry Johnson is charged with enticing or inducing a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction. 18 U.S.C. § 2251. The alleged crime occurred in a chat room on the internet. The alleged child was a person not under the age of 18. Thus, Terry Johnson allegedly enticed or induced an adult, who, according to the State, he believed was under 18.

STATEMENT OF FACTS

In July of 2001 a detective from the Cook County Sheriff's office was on the internet acting as "Dena" a fourteen year old girl. (Rec. 36). While there he began to chat with an individual from Bronson, Florida. (Rec. 36). Ultimately, the defendant was alleged to have solicited "Dena" via the internet to engage in sexual acts. (Rec 36) According to the Government defendant also brought a RCA camcorder, a net camera and a digital camera amongst various other items. (Rec. 36 p2). Additionally, the Government asserts that the defendant wanted to take pictures of "Dena" (Rec36 p2). After arrest, defendant, as asserted in the Governments brief stated "At first I didn't think I was talking with a true 14 year old girl.." (Rec. 36 p3).

Case History Facts

Defendant was charged pursuant to 18 U.S.C. § 2251"Sexual Exploitation of Children". (Rec 1). A motion to dismiss was filed on September, 5, 2002 alleging a violation of the First Amendment. (Rec. 29). On October 22, 2002, after oral argument, such motion was denied. (Rec. 31). On February 5, 2003, a motion to bar a jury instruction was filed. (Rec 37). On

February 12, 2003, same said motion was denied. (Rec 39). On February 13, 2003, due the denial of his motion defendant entered a conditional plea. (Rec 43).

SUMMARY OF ARGUMENT

I

18 U. S. C. §2251 is unconstitutional as written as there is no element of scienter and said statute violates the First Amendment and is void for vagueness and over breadth.

II

The US attorney is without authority to include an element of scienter in a statute when one is not included by Congress. Basing a jury instruction on such a legislation of law by the Executive violates Due Process and Separation of Powers.

ARGUMENT

18 U. S. C. §2251
is unconstitutional as written as there is no element of scienter

18 U. S. C. § 2251 reads as follows:

> "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed. "

§ 2251 is facially unconstitutional as it contains no element of scienter. The seminal case regarding statutes requiring guilty knowledge or intent legally known as scienter, is *Morissette v. United States*, 342 U.S. 246, 250 (1952). In Morissette, a piece of property was used by the government for bombing practice. Planes would drop canisters filled with black powder to simulate and mark the "explosion". The canisters were not removed and were allowed to accumulate. The defendant entered the property, loaded the canisters onto his truck, crushed them and sold them as scrap for $81.00. The statute contained no element of scienter. The court succinctly stated:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and

> persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil". *Morissette*

In *United States v. X-citement Video* (1994), 18 U.S.C. 2252 was challenged as unconstitutional for a lack of scienter. The court found it unconstitutional facially and read into such statute an element of scienter. Judge Scalia in his dissent, took the majority to task for rewriting the statute. He indicated that such rewriting of the statute was inappropriate as the court was legislating.

Examining the analysis and facts of X-citement with § 2251 in mind it becomes clear that there is little, if any, difference between the statutes and analysis in the two cases. With respect to the necessity of scienter in *X-Citement Video* the Court found that the First Amendment required that the defendant possess knowledge that the performer had not reached the age of majority. *Morissette* citing *Smith v. California*, 361 U.S. 147 (1959); *New York v. Ferber*, 458 U.S. 747 (1982); *Hamling v. United States*, 418 U.S. 87 (1974). Scienter is generally to be implied in a criminal statute even if not expressed. *Morissette*.

There is an exception to the requirement of scienter. Public welfare offenses are exempt from the scienter requirement. In *Harold E. Staples, III, V. United States* 511 U.S. 600 (1994), the Court concluded that the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics. The statute in Staples required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics". Public welfare offenses have been created by Congress, and recognized by the Supreme Court, in "limited circumstances." *United States Gypsum*, 438 U.S., at 437. Usually public welfare offenses regulate potentially harmful or

injurious items. *Staples* at 605. The Supreme Court has essentially relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements. *Harold E. Staples, Iii, V. United States* 511 U.S. 600 (1994).

Common law offenses against the "state, person, property, or public morals" presume a scienter requirement in the absence of express contrary intent.[1] In X-Citement Video the Court found that the age of minority in § 2252 unquestionably maintains the same status as an elemental fact because non-obscene, sexually explicit materials involving persons over age 17 is constitutionally protected via the First Amendment. *United States v. X-Citement Video* 513 U.S. 64 (1994). The Court found that the statute in *X-citement* fell outside of public welfare offenses and more appropriately to the type which the common law directed against the person. Thus, § 2251, the near identical statute, would likewise fall into the gambit of offenses not within the range of public welfare offenses and would thus require an element of scienter to be Constitutional. Enticing an adult to engage in sexual conduct is protected just as non-obscene explicit materials of persons over 17 is protected.

There is a second instance where scienter is not a necessary element of a criminal statute. Where age is at issue in a criminal statute, scienter is not a necessary element, when there is person to person meeting between the defendant and the minor. *United States v. X-Citement Video* 513 U.S. 64 (1994). Ultimately this is due to the ability of the defendant to ascertain the age of the victim first hand. *Id.*

In the case at bar all the interaction and "enticement or persuasion" took place over the internet. Internet contact does not constitute personal contact. *Weidner*. Personal meeting is necessary to ascertain the age of the victim. The internet provides no effective means to gauge

[1] Congressional intent is addressed below.

the identity and age of the persons who access material through use of this continuous evolving technology. *Reno*[2] *v. ACLU*, 521 U.S. 844 (1997). Participants in chat rooms often assume pseudonyms and do not divulge truthful personal data. The lack of face-to face interaction, which impairs the ability to ascertain reliably the age of the recipients, effectively serves to chill speech. *Weidner*. Not only must the defendant prove the reasonableness of his or her belief but in essence the defendant must also prove the fraud of another in displaying false documentation of age. The incentive resulting from such uncertainty is self censorship. *Mishkin v. New York,*383 U.S. 502 (1966). Self-censorship exacts too great a cost and renders freedom of expression the loser. *Weidner*.

Due Process becomes an issue, as belief of an unprovable fact becomes the basis for incarceration. Because age represents the critical element separating illegal conduct from that which remains protected, to avert significant constitutional dilemmas some form of scienter in X-citement must be implied in a statute imposing criminal liability based on age. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). However, the scienter in this case is impossible to

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[2] A substantially identical statute was struck down in *Reno v. ACLU*, 521 U.S. 844 (1997). The statute there read:

"(a) Whoever-
(1) in interstate or foreign communications-
(B) by means of a telecommunication device knowingly-
(i) makes, creates or *solicits* and
(ii) initiates the transmission of,...any comment, *request, suggestion, proposal*, image or other communication which is obscene or *indecent*, *knowing that the recipient of the communication is under 18 years of age*... shall be fined ..or imprisoned not more than two years or both.

In sum and substance -Whoever by means of a telecommunication device knowingly solicits and initiates the transmission of any request suggestion or proposal which is indecent, knowing that the recipient of the communications under 18 years of age shall be ...imprisoned.

prove or disprove by the defendant as there is no effective method to ascertain age while on the internet including chat rooms. There is an absence of both face-to-face contact and a satisfactory degree of reliability. *Wisconsin v. Weidner*, 611 N.W.2d 684 (2000). Thus, the exception regarding no scienter does not apply because of lack of face to face contact.

X-Citement discussed, at length, the construction of § 2252 as the term knowing was present within the statute and could logically be extended to whether the actor knew the age of the minor. The court in "saving" the statute read knowing to include whether the actor knew the age of the minor. Such discussion as to the construction of § 2251 is not relevant here because while the term knowing does appear in the statute it is structurally not positioned such that it could conceivably be argued that knowing modifies the age of the minor addressed. However, the court in *X-Citement Video*, did address the fact that the court should not impute to Congress an intent to pass unconstitutional legislation and for that fact knowingly was intended to modify elements in the statute such that the statute would be constitutional.

The point which is not to be missed however in the analysis of what knowing modified is that § 2252 was unconstitutional as written and required a strained interpretation to save it from being struck down. In *X-Citement*, both the dissent and the majority agreed that the statute was unconstitutional without scienter. The Justices disagreed as to how such a statute was to be handled. This Court nor the Government can contravene Congress by rewriting the statute at issue.

Not knowing the age of the "minor" chills speech because a person will refrain from speaking if they are not sure. Persons on the internet can't know because people lie and its impossible to ascertain age without face to face contact.

"Believes to be"
This Court, in an attempt to save the subject statute, should not interpret the statute to include scienter nor should it allow the government to modify the statute as written.

Scienter may not be read into a statute where Congress specifically excludes it. § 2251

differs from § 2252 (the statute discussed in *X-Citement*) in one key aspect. Congress in discussing § 2251, specifically opted to exclude scienter from the statute:

> "Unless knowingly is deleted here, the bill might be subject to an interpretation requiring the government to prove the defendant's knowledge of everything that follows "knowingly", including the age of the child. We assume that it is not the intention of the drafters to require the government to prove that the defendant knew the child was under [the age of majority] but *merely to prove that the child was, in fact, less than [the age of majority]*". S.Rep. No. 438, 95th Cong., 1st Sess. 29 1977) reprintedin1978 U.S. Code cong. & Admin. News 40, 64. [Emphasis added]

The House expressly adopted this view and struck knowingly from its bill.[3] In a strange twist of occurrences the Government now inserts a standard which for all intents and purposes is an element of scienter. Instead of including that the defendant knew that the person induced or enticed was a minor the government includes in their indictment that the defendant believed the person to be a minor. (Rec 16). This is in direct contravention to the stated intent of congress and the common law. No federal crime can exist except by force of statute, *Morissette V. United States*, 342 U.S. 246, 72 S. Ct. 240, This fundamental precept of the law stems from well known law school *Erie* doctrine. Thus, the law forbids a common law construction of a federal crime but not interpretation. The Government has written an indictment based on no federal statute and in direct contravention to the stated intent of congress. Congress specifically excluded any form of scienter. To include scienter is to contravene a statute with no authority to do so. Overtly in violation of Due Process the Government inserts an element which is unauthorized by

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[3] This specific exclusion is due in part to the fact that the statute is aimed at producers of films who are in a better position to ascertain the age of the performer and therefore a more appropriate person to shoulder the risk of error. *United States v. X-Citement Video* 513 U.S. 64 fn 5 (1994). This however wholly misses the situation sub judice. The crime is complete prior to any face to face meeting as contemplated by Congress due to the nature of the internet which could not have been foreseen at the time of the congressional debates.

Congress, and one which may not be inserted by the defendant when it benefits the defendant. The rule of leniency requires that any vagueness in a statute be interpreted in favor of the defendant. *Bifulco v. Untied States,* 447 U.S. 381, 387 (1980). If there is no vagueness to this statute, the government has no basis to include language and elements not found in the actual statute.

Courts nor the Government may rewrite a statute but only interpret it. The bounds of interpretation are limited by every reasonable construction in order to save the statute from unconstitutionality. *United States v. X-Citement Video* 513 U.S. 64 (1994) Dissent Justice Scalia. P13. Courts may strain to save a statute from being struck for unconstitutionality but this shall not extend to the point of judicially rewriting it or perverting its purpose[4]. *Id.* Of course, only the legislature may write a statute lest the doctrine of separation of powers be confronted. If the government is allowed to rewrite or add in elements which Congress has specifically sought to eliminate, the Government then becomes both executive and legislator in clear contravention of Separation of Powers.

If this Court chooses not to legislate nor to allow the Government to legislate the statute is unconstitutional for its lack of a requirement of scienter. Even Justice Scalia and Justice Thomas agree that without a requirement of "knowing" a person may not be convicted of an act

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[4] It is important to note that the apparent purpose of § 2251 is directed to the producer and performer of sexually explicit videos. In fact this is the very distinction made between § 2256 and § 2251. The fact that producers may come into face to face contact and be able to ascertain the age of the "performer" affected the framers intent. The difference between the two statutes reflects the fact that producers are able to ascertain the age of the performers and it therefore is just in imposing the risk on producers. *United States v. X-Citement Video* 513 U.S. 64 (1994) fn 5. However, this belies the very real and apparent fact that 1) the internet now makes such face to face ascertainment of age a very real impossibility and 2) the fact that the mere transportation of the materials used or attempted to be used in any film may be transported in interstate commerce without any possibility or necessity that the defendant either intended to "produce" such films or that there any actual contact between the two.

which he does not know the nature of for fear of self censorship and evident lack of narrow tailoring. *United States v. X-Citement Video* 513 U.S. 64 (1994) Justice Scalia dissent p 13. Both the majority and the dissent agreed that a statute could not be constitutional where it failed to include an element of scienter where the First Amendment is at risk of affront. The dissent disagreed on how the issue was to be remedied. The dissent rightfully recognized that it is for the legislature to write statutes, not the court nor the Government. Though it was Congress intent to exclude the element of knowing the statute remains unconstitutional for the lack of mens rea, guilty mind, scienter, all the same and all cornerstones of criminal law - punishing those without innocent minds.

The intent of Congress and § 2251

If this Court chooses to find the statute unconstitutional and save the statute by interpretation, the intent of Congress must be followed in interpreting said statute.

> "Unless knowingly is deleted here, the bill might be subject to an interpretation requiring the government to prove the defendant's knowledge of everything that follows "knowingly", including the age of the child. We assume that it is not the intention of the drafters to require the government to prove that the defendant knew the child was under [the age of majority] but *merely to prove that the child was, in fact, less than [the age of majority]*". S.Rep. No. 438, 95th Cong., 1st Sess. 29 1977) reprintedin1978 U.S. Code cong. & Admin. News 40, 64. [Emphasis added]

"But merely to prove that the child was in fact, less than the age of majority" can be no clearer expression of the legislative intent of the drafters. Congress presumptively recognized the pitfalls of the First Amendment by excluding scienter. The only way to save such a statute is to require that the only speech which may be punished is the narrowly tailored factual situation

where the person attempted to be induced or enticed is "in fact, less than the age of majority". To allow the law to punish those who believed the person to be a minor runs completely afoul of the First Amendment and more importantly is not what congress intended in drafting this statute. Otherwise what the court is left with is the issue of the legislature expressly exposing a statute to constitutional infirmity. This is against statutory interpretation that a statute is presumed to be Constitutional and that Congress has acted Constitutionally. To go against the clear and unambiguous intent of Congress and allow a person to be prosecuted where the victim is not a minor opens the door for the attack below and the attack leveled against this same act in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 152 L.Ed.2d 403 (U.S. 04/16/2002). It is a fair and necessary assumption, of statutory construction, that "believed to be" was left out for a reason. Only the inducement of an actual minor may be punished where there is no face to face contact.

18 U.S.C. § 2251 IS VOID FOR VAGUENESS AND OVER BREADTH AND SUCH OVERBREADTH TRAMPLES OF THE FIRST AMENDMENT

If this Court chooses to interpret the statute to include "believes to be" as an element of scienter in modifying the age of the minor the statute would still be unconstitutional as applied as such an interpretation would fly in the face of the First Amendment for its vagueness and over breadth.

THE INTERNET, INCLUDING CHAT ROOMS, ARE ENTITLED TO THE HIGHEST FIRST AMENDMENT PROTECTION

The internet is as diverse as human thought. *Reno v. ACLU*, 521 U.S. 844 (1997). The web is comparable to a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. *Reno v. ACLU*, 521 U.S. 844 (1997). It is a vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers, and buyers. *Reno v. ACLU*, 521 U.S. 844 (1997). The First Amendment denies Congress the power to regulate the content of the protected speech on the internet. *Reno v. ACLU*, 521 U.S. 844 (1997) The internet is the most participatory form of mass speech yet developed and is entitled the highest protection from governmental intrusion. *Reno v. ACLU*, 521 U.S. 844 (1997).

This dynamic multifaceted category of communication includes not only traditional print and news services but also audio, video, and still images, as well as interactive-real time dialogue. *Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox*. *Reno v. ACLU*, 521 U.S. 844 (1997). (Emphasis added). The internet receives full First Amendment Protection. *Reno v. ACLU*, 521 U.S. 844. (1997

ADULT SPEECH IS PROTECTED BY THE FIRST AMENDMENT

Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech. *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 152 L.Ed.2d 403 (U.S. 04/16/2002). P 11. (Hereinafter *Free Speech Coalition*) It is well established that speech may not be prohibited because it concerns subjects offending our sensibilities. *Id.* The fact that society may find speech offensive is not a sufficient reason for suppressing it. *Id.* p 11. In evaluating the free speech rights of

adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment. *Free Speech Coalition* p11 citing *Sable Communications of Cal, Inc v. FCC*, 492 U.S. 115 (1989). The fact that protected speech may be offensive to some does not justify its suppression. *Free Speech Coalition*, p11. The First Amendment bars the government from dictating what we see or read or speak or hear. *Free Speech Coalition*, p11

Adults have a First Amendment right and a Due Process right to solicit one another, even indecently. In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997) Where obscenity is not involved we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. *Reno v. ACLU*, 521 U.S. 844 (1997). The governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults. *Reno v. ACLU*, 521 U.S. 844 (1997). The government may not reduce speech amongst the adult population to only what is fit for children. *Reno v. ACLU*, 521 U.S. 844 (1997). Regardless of the strength of the government interest in protecting children, the level of discourse reaching a mailbox cannot be limited to that which is suitable for a sandbox. *Reno v. ACLU*, 521 U.S. 844 (1997) citing *Bolger v. Youngs Drug Products Corp*, 463 U.S. 60 at 74 (1983).

Depictions of pornographic activity including sexually explicit conduct would seemingly be entitled to less protection than depictions of Shakespearean theater. As well, conversations and human discourse regarding sexually explicit conduct would also seem to be entitled to less protection than political debate. However, pornography and political debate receive the same full First Amendment Protection. *United States v. United States Dist. Ct. for the Central Dist. of*

Ca., 858 F.2d 534, 99ALR Fed 619, 627 (9th Cir. 1988). Varied degrees of protection for protected speech is a concept wholly alien to the First Amendment. *Id.*

The Supreme Court in *New York v. Ferber*, 458 U.S. 761, the seminal case regarding child pornography, reaffirmed that speech which is neither obscene nor the product of sexual abuse falls within the protection of the First Amendment. *Free Speech Coalition at 7.* Speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. *Free Speech Coalition* at 7, citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115. When a statute infringes on rights afforded by the First Amendment the government shoulders the burden of proving the statute constitutional beyond a reasonable doubt. *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1252 (7th Cir. 1985). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 658 (1981).

Participants in chat rooms often assume pseudonyms and do not divulge truthful personal data. *Wisconsin v. Weidner*, 611 N.W.2d 684 (2000). Persons on dating services, chat rooms and instant messaging often say that they are tall when they are short, thin when they are fat, old when they are young and young when they are old. In the course of courtship and human discourse in sexuality, some adults pretend that they are police, nurses, ups delivery persons, infants, stuffed animals (furries), strangers, when they are not. Some adults where diapers, some men pretend to be women, some women pretend to be men. The purpose of the statute at hand is to prohibit adults from inducing or enticing minors to engage in sexually explicit conduct for the purpose of creating a visual depiction.

The statute is not narrowly drawn. The breadth of the statute encompasses speech which is

protected. An adult soliciting an adult who is pretending to be something other than what he or she is, is within the statute *and* within protected speech. The statute must give way to protected speech. This "fantasy" interaction is protected speech between adults. The basic human fact that adults engage in role playing in their "courting" rituals is speech carried on between adults. We know that offensive speech is protected and we know that speech need not be suitable for children. Because it is impossible to ascertain the age of persons on the internet. *Wisconsin v. Weidner*, 611 N.W.2d 684 (2000), it is impossible to regulate the solicitation of what a person believes to be an adult or a minor.

In *Reno*, the government argued that the knowledge requirement saves the statute from over breadth. That persons need only refrain from sending materials to person they know to be under 18. The court responded that this assertion ignores the fact that "most internet fora-including chat rooms, newsgroup, mail exploders, and the web are open to all comers". *Reno v. ACLU*, 521 U.S. 844 (1997). Thus, such argument is untenable. *Reno v. ACLU*, 521 U.S. 844 (1997). The Court stated that a hecklers veto to any opponent of indecent speech who need simply log on and broadcast that a minor is present. *Reno v. ACLU*, 521 U.S. 844 (1997). Likewise, a heckler could log on to a fantasy chat room where adults pose as minors and broadcast that one of the participants is an actual minor. This would supply the necessary element of the defendant "believing" that he was speaking to a minor or enticing a minor to pose for sexually explicit pictures not to mention the imposition on those seeking work in sexually explicit films or modeling. The whole of the chat rom would be ostensibly shut down. Any reasonable person knowing the potential for severe criminal punishment would end their lawful discussions with the person they thought was, a woman, a man, a rabbit, a minor.

In *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 152 L.Ed.2d 403 (U.S. 04/16/2002), a sister statute to the statute challenged herein, was challenged. The statute prohibited pictures of "what appeared to be" minors. The statute was struck down. This necessarily included pictures of youthful looking adults who appeared to be minors. Examples given were the academy award winning film American Beauty where what appeared to be a minor female engaged in sexual conduct with an adult. Additionally, there was depicted what appeared to be a young man engaging in sexual conduct with an adult. None of the actors in the film were minors, though they appeared to be. This academy award winning film would be banned via the statute struck down in *Free Speech Coalition.*

The viewing of pictures is "figurative speech" as opposed to literal speech which is the spoken word or actual speech. What is occurring in chat rooms is actual speech. The court in *Reno* refers to such speech as the most participatory form of mass speech yet developed and entitled to the highest protection from governmental intrusion. *Reno v. ACLU*, 521 U.S. 844 (1997).

The statute in *Free Speech Coalition*, falling under what was termed the, CPPA (Child Pornography Protection Act), was substantially overbroad because it banned materials that were neither obscene nor produced by the exploitation of real children. *Free Speech Coalition*, p10. Likewise, an adult enticing, inducing or persuading a person he believes to be a minor, which is not a minor, is not obscene nor does it exploit any real children. Thus, for these same reasons Section § 2251 regarding the "enticement" or "persuasion" of person one believes to be a child is overly broad. Merely because actions may cause or lead to crime is not a basis for the prohibition of protected speech. The prospect of crime does not justify laws suppressing

protected speech. *Free Speech Coalition*, p11. *Ferber* reaffirms the notion that where the speech is neither obscene nor the product of sexual abuse such speech falls within the protection of the First Amendment.

In *Free Speech Coalition*, the court addressed images wherein the person depicted appeared to be a minor but in fact was not. The Court considered this a viable alternative to using actual minors where the protected speech or literary work called for the depiction of minors. "A person over the statutory age who perhaps looked younger could be utilized." *Free Speech Coalition*, p14. When a person "appears to be a minor" the viewer "believes" the person to be a minor. "Appears to be" focuses on the characteristics of the picture, "believes to be" focuses on the effect those characteristics have on the viewer. By and large "believes to be" and "appears to be" are the same concept, just different sides to the same coin.

Assuming arguendo that "believes to be" is read into 18 U.S.C. § 2251, the statute then becomes just as the now unconstitutional 18 U.S.C. § 2256 struck down in *Free Speech Coalition.* The "appeared to be" language in *Free Speech Coalition* mirrors the "believes to be" language read into § 2251.

In *Free Speech Coalition*, 18 U.S.C. § 2256 was overly broad due to the language "appeared to be". If a person "appeared to be" a minor engaging in sexually explicit conduct, the film, video or picture would violate § 2256 (8)(B). The court found this untenable as the "prohibited speech recorded no crime and created no victims by its production". *Free Speech Coalition* 2002 WL 552476 (U.S.). This lack of direct harm added to the First Amendment concerns of self censorship due to fear of criminal liability which ultimately rendered the statute unconstitutional.

The rule thus borne, albeit stated differently - First Amendment protection extends to a film, video or picture of an adult, who appears to be a minor, engaging in sexually explicit conduct. The protection of this speech is due to the weak nexus between films, video and pictures using adults who appear as minors and the harms involved, namely the victimized child in the making of the film and that the victimization forever recorded.

Likewise, the enticement or persuasion of an adult, who the solicitor believes is a minor, creates no victims nor records any abuse of children or effects children at all in the making of the statement. The enticement or persuasion of an adult who appears to be a minor is conversation between adults. Additionally, the fear of criminal prosecution creates prodigious concerns of self-censorship.

"Simulation outside of the prohibition of the statute could provide an alternative". *Free Speech Coalition* p14 citing *Ferber*, at 763, 102 S.Ct. 3348. In *Free Speech Coalition*, the court recognized that an alternative to sexually explicit conduct involving minors is sexually explicit conduct involving adults who appear to be minors. Here, an alternative to enticing or inducing a minor to engage in sexually explicit conduct is enticing or inducing an adult pretending to be a minor, to engage in sexually explicit conduct just as the court suggested in *Ferber* which *Free Speech Coalition* reiterated.

Furthermore, chat rooms involve actual speech as opposed to figurative speech as in the case of a picture and are thus closer to the heartland of the First Amendment. Closer, not because of the content or the message but because of the method. Literal speech, the spoken word, speech in it purest form as opposed to pictures which are figurative.

Part of the justification in *Ferber* wherein the use of actual children was struck down

notwithstanding the First Amendment claims was that virtual children was an alternative. *Free Speech Coalition.* P14. The objective of the statute at hand is to shield children from harm. See notes in § 2251. The objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative. *Free Speech Coalition*, at 14, Citing *Reno v. ACLU*, 521 U.S. at 875. Protecting children does not include protecting adults who appear to be or whom one believes to be a minor.

It is imperative to note that the defendant may be speaking with an adult. Whether he believed it to be a minor or not is beyond this Courts reach as such beliefs, expressed via speech are protected. The government cannot constitutionally premise legislation on the desirability of controlling a *person's private thoughts.* *Free Speech Coalition*, at 14. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. Had the person been a minor than his First Amendment protection would have been lost and his beliefs would then be an appropriate matter for judicial interpretation. Simply stated indecent speech between adults is protected from criminal sanction or judicial interpretation via the First Amendment. The governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults. *Free Speech Coalition*, at 14 Citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115. (Striking down a ban on "dial-a-porn" messages that had the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear.)

In *Free Speech Coalition*, the government wanted to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle remains the same: The government cannot ban speech fit for adults simply because it

may fall into the hands of children. *Free Speech Coalition*, at 14. The evil in question depends upon the actors unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but the restriction goes well beyond that interest by restricting speech available to law-abiding adults. *Free Speech Coalition*, at 14. Restrictions on adults who appear to be minors engaged in explicit conduct and adults who a person believes to be a minor being induced to engage in explicit conduct are unconstitutional as the illegal conduct is not at hand but a possibility. In fact, a person inducing or enticing an adult, whom he believes to be a minor, to engage in sexually explicit conduct is conduct further from illegal conduct and morally less reprehensible than adults, who appear to minors, engaged in sexually explicit conduct. Due to the fact that in the former the adult, who the person believes is a minor, has engaged in no sexually explicit conduct, in the latter the adult who appears to be a minor has engaged in sexually explicit conduct. In other words, in the first instance, sexually explicit conduct of a person whom the actor believes is a minor has not occurred and in the second instance sexually explicit conduct of a person who appears to be a minor has occurred. The only thing which has occurred in the latter is an invitation to engage in such conduct. Thus, the justifications for restricting speech are less the further one gets from the criminal act sought to prevented.

MENA SUVARI CAN ACT BUT SHE CANT BE ASKED

As a necessary counterpart to the holding in *Free Speech Coalition*, a person who appears to be a minor (§ 2256) could not be enticed to engage in sexually explicit conduct for fear that the person enticing them could be charged under § 2251. In other words under *Free Speech Coalition* a person who appears to be a minor has a constitutional right to appear in sexual

explicit films which the public has a right to view. This necessarily requires or contemplates that a person must ask them to engage in such a film. The producer must ask that person, over the net, who appears to be minor to engage in that sexually explicit film. If the person appears to be a minor, the Government could present such evidence, that the person appears to be a minor, and charge the producer asking said person with enticing what he believes to be a minor to engage in sexually explicit films. To hold that a person may not entice or induce a person, whom based on his/her appearance he believes to be a minor, to engage in sexually explicit films is to effectively overrule *Free Speech Coalition*. To be allowed to do something but be disallowed from asking or being asked to do it turns the opinion in *Free Speech Coalition* upside down and effectively accomplishes what the unconstitutional statute in *Free Speech Coalition* sought to, stop young looking adults from appearing in films with literary value.

For instance, Mena Suvari was the actress in American Beauty who portrayed a teenage cheerleader in high school. She is the example used in *Free Speech Coalition* though not mentioned by name. If the producer can constitutionally use her to engage in sexually explicit conduct but may not ask her to be in the film for fear of prosecution under § 2251 the holding in *Free Speech Coalition* is a farce. In fact, § 2251 punishes the very conduct which the statute abrogated in Free Speech Coalition punished. If the producer of American Beauty "employs" or "entices" Mena Suvari, which he has, to engage in any sexually conduct on film which may be shown outside of Hollywood he has violated § 2251.

> "Any person who employs, [or] entices,... any minor [or person he believes to be a minor] to engage in... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished...if such person knows or has reason to know that such visual depiction will be transported in interstate

commerce..." 18 U.S.C. 2251.

Thus, the producer who offers a young looking actress money to appear in his film violates the law as he has enticed a person whom he arguably believes to be a minor to engage in sexually explicit conduct knowing that it will be become a visual depiction transported in interstate commerce. It makes no difference that after the enticement or inducement he verifies that she is an adult as the crime is complete prior to verification. Add the vagaries of the internet and a heavy burden on speech has been uncovered.

To preserve these freedoms and to protect speech for its own sake the Courts First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. The government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time. *Free Speech Coalition*, at 15. The normal method of deterring conduct is to impose an appropriate punishment on the person who engages in it. *Free Speech Coalition*, at 15. Here, the state punishes one who believes he is speaking to a minor in the hopes of stopping an unlawful act at some indefinite future time with some indefinite person.

The over breadth doctrine has been defined as holding that if a statue is so broadly written that it deters free expression, than it can be struck down on its face because of its chilling effect even if it also prohibits acts that may legitimately be forbidden. Blacks Law Dictionary 1129 (7th Ed. 1999). The legitimate prohibition is the solicitation of minors, the deterrence of free expression is the prohibition of inducement, persuasion and enticement between adults, regardless of what they believe. Justice Rehnquist, the conservative jurist on the Supreme Court, agrees that a prohibition against what "appears to be" a minor is unconstitutional and should be struck down. *Free Speech Coalition*, at 18. As indicated earlier, appears to be and believes to be are the same

coin albeit different sides. The dissent in *Free Speech Coalition* agrees that the causal connection between pornographic images that "appear" to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech. *Free Speech Coalition,* Rehnquist dissent p19. Likewise, the conversation between adults wherein one person willingly believes an untruth is not causally connected to actual enticement or inducement of a child. Such potential is insufficient to warrant the striking of protected speech. You cant suppress lawful speech in an effort to suppress unlawful speech. *Reno v. ACLU*, 521 U.S. 844 (1997).

The government in *Reno v. ACLU*, 521 U.S. 844 (1997) argued that anytime a sender knew [or believed] that a minor was present the prohibition of sending an indecent message would not burden adult speech. The Court found this argument "untenable". Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender would be charged with knowing that one or more minors will likely view it. Knowledge that in a 100 person chat group a minor or two is present and therefore it would be a crime to send the group an indecent message would surely burden communication among adults. *Reno v. ACLU*, 521 U.S. 844 (1997). There is no effective way to determine the identity or the age of a user who is accessing material through email, mail exploders, newsgroups or chat rooms. *Reno v. ACLU*, 521 U.S. 844 (1997). Because there is no effective method of determining the age of a particular user, a person who wishes to solicit another is stifled for fear that the thought police would swoop down and charge him with believing that a person was a minor where it would be impossible to prove that the person either is or is not a minor. Thus, the message "teens of Texas can become a star by modeling for my sexually explicit website, all you have to do is

come to Illinois for a modeling session" transmitted in a chat room frequented by minors would subject the author to criminal prosecution where there was any basis to argue that he believed minors would be present.

It is noteworthy that the statute subjudice goes beyond that in *Reno*. Section 2251 does not require knowledge or belief unless we assume that Congress meant to include "or believes to be" in said statute. Even then, "believes to be" is a lesser standard than actual knowledge as in *Reno*.

On an average night in Middletown. Stephanie is chatting on the net with Jake who is 29 years old. Stephanie tells Jake that she is in high school, lives with her parents, is a virgin, watches cartoons, plays video games and believes that sex is icky, loves Britney Spears and would like some teaching in how to have sex. Jake asks what she is wearing and she conveys that she is wearing shorts from Old Navy, has no makeup, has her hair in pigtails, has on large white underwear and is willing to wear thongs if given the chance and she is just learning to paint her nails. Jake then says lets have sex tonight, you will like it, cmon don't be scared. Alternatively or in addition he says you sound really cute lets have sex, I will bring my camera, which I bought in Japan, and we will video tape it. The crime under 18 U.S.C. §2251 is complete. Jake has solicited a person whom, the Government could prove, he believed was a minor. Of course, Stephanie is 18 years old. Presented to a jury, protected speech, speech between two persons 18 or over is punished as long as it can be shown that the defendant believed he or she was under 18.

This presents a Fourteenth Amendment issue for the 18 year old who is in high school, lives with her parents, is a virgin, watches cartoons, plays video games and believes that sex is icky

but would like some teaching. Such persons freedom to procreate and freedom of speech is interfered with based on the fact that persons speaking with her could be charged with believing he or she is a minor. Furthermore, the apparent minor's commercial interest in obtaining employment in sexually explicit films or modeling and his or her First Amendment interest in conversing with those who are "enticing" or "persuading" is infringed upon. The governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults. *Reno v. ACLU*, 521 U.S. 844 (1997). Regardless of the strength of the government interest in protecting children, the level of discourse reaching a mailbox cannot be limited to that which is suitable for a sandbox. *Reno v. ACLU*, 521 U.S. 844 (1997) citing *Bolger v. Youngs Drug Products Corp*, 463 U.S. 60 at 74 (1983).

Thus, any adult, with the above stated characteristics, who wishes to exercise their free speech rights in the commercial arena and the social intercourse arena is limited if one may mistakenly believe that he or she is a minor. He or she may not participate in chat rooms where illicit speech is occurring for they foist liability on those they wish to converse. Once the fact that he or she lives with their parents, is in high school, likes cartoons, likes playing video games and feels that sex is icky is revealed, any person who converses with that individual either to commence a consensual relationship or to enter into a commercial agreement runs the risk of being charged with "enticing" what he or she believes to be a minor into sexually explicit conduct.

Even if he or she says she is 18 years old, it is well known that people lie and the totality of the facts conveyed may lead a reasonable jury to believe that the solicitor or enticeor believed she was a minor based on her living with her parents, liking cartoons, not liking sex and so forth.

Not to mention that the mere charge of such an offense is devastating to the person charged. Families are destroyed, employment lost and general shunning by the community can be expected when one is charged with such an emotionally charged crime.

In *Free Speech Coalition*, the Government argued that the need to eliminate the market for pornography using real children requires a prohibition on virtual images. The Court responded that such argument was implausible because few pornographers would risk prosecution for abusing real children, if fictional, computerized images would suffice. *Free Speech Coalition* at 7. Likewise, if chat with adults pretending to be minors would suffice, no rational person would risk such chat with an actual minor.

The government will also argue that such a restriction would make it more difficult to enforce § 2251. The First Amendment is turned upside down by the argument that because it is difficult to distinguish between images made using real children and those produced by computer imaging, both kinds must be prohibited. The over breadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. *Free Speech Coalition*, p8. Similarly, protected speech between adults would be banned in an effort to apprehend those who would solicit an actual minor, turning the First Amendment on its head. 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. *Free Speech Coalition*, at 15. The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that unprotected speech of others may be muted. *Free Speech Coalition*, at 15. Even where there is an underlying crime the Court has not allowed the suppression of speech in all cases. *Free Speech Coalition*, at

15. Here, in an effort to catch or prohibit the inducement or enticement of an actual minor, inducement or enticement of an adult is punished. Inducement and enticement of an adult is protected speech, which necessarily means that the punishment on the whole must cease.

CRIMINAL SANCTIONS CHILL SPEECH

A violation of 18 U.S.C. § 2251 brings with it severe penalties. A first offense is ten to twenty years and a fine. A second offense under this section or any section relating to the sexual exploitation of children carries with it imprisonment of fifteen to thirty years. Two prior convictions results in imprisonment of thirty years to life.

The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words ideas and images. The increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations poses greater First Amendment concerns than those implicated by civil regulation. *Reno v. ACLU*, 521 U.S. 844 (1997). Those intending to take advantage of the internet will refrain from doing so for fear of prosecution under the statute. See *Wisconsin v. Weidner*, 611 N.W.2d 684 (2000)

The First Amendment does not permit the imposition of criminal sanctions when doing so would substantially chill protected speech. *Smith v. California*, 361 U.S. 147 (1959). A rule that would impose strict liability on a publisher for unprotected speech would have an undoubted chilling effect on speech that has Constitutional value. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). By requiring an internet user to prove lack of knowledge regarding the age of the person exposed to material deemed harmful to a child, the statute effectively chills protected internet communication to adults. The vast democratic forum of the internet would be rendered a nullity if persons refrained from sharing a wide range of ideas and images for fear of criminal sanctions.

Reno, 521 U.S. at 868.

The penalties *sub judice* are more severe than that in *Free Speech Coalition.* Under the sections struck down by *Free Speech Coalition* a first offender can be sentenced up to 15 years. Repeat offenders face a prison sentence of not less than 5 years and not more than 30 years. *Free Speech Coalition*, p11. Even minor punishment can chill protected speech. *Free Speech Coalition* citing *Wooley v. Maynard* 430 U.S. 705 (1977). The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. *Free Speech Coalition* at 11. A statute is unconstitutional on its face if it prohibits a substantial amount of protected expression. *Free Speech Coalition,* P 11.

The statute at issue burdens protected speech and the criminal penalties chill speech and cause self censorship. Such a result is not countenanced by the First Amendment. For these reasons the defendant respectfully moves this Court to strike the statute in question as unconstitutional or in the alternative interpret the statute to require that the person "enticed or persuaded" actually be a minor as a method of saving the unconstitutional statute.

II

THE US ATTORNEY IS WITHOUT AUTHORITY TO INCLUDE AN ELEMENT OF SCIENTER WHEN ONE IS NOT INCLUDED BY CONGRESS AND IS THEREFORE PROHIBITED FROM INCLUDING SAME IN A JURY INSTRUCTION

Terry Johnson was charged in a three count indictment. A true bill on Count three was issued by the grand jury pursuant to 18 U.S.C. §2251 cited above. The relevant portions of Count 3 of the indictment reads as follows:

On or about August 18, 2001, in the Northern District of Illinois Eastern Division, and

> elsewhere Tery L. Johnson defendant herein, *attempted to* employ use, persuade, induce and entices a person *he believed to be* a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, knowing and having reason to know that such visual depiction would be transported in interstate commerce, and knowing and having reason to know that the visual depiction would be produced using materials that had been transported in interstate and foreign commerce; (Emphasis added) (Rec 16).

"Believes to be"

Defendant in preparing for trial moved to bar a jury instruction which included any reference to "believe to be" as included in the Governments indictment. (Rec. 37). The motion was denied (Rec. 39). Based on such denial defendant moved to enter a conditional plea preserving the issues raised herein. (Rec 42, 43).

Scienter may not be read into a statute where Congress specifically excludes it. Congress in discussing § 2251, specifically opted to exclude scienter from the statute:

> "Unless knowingly is deleted here, the bill might be subject to an interpretation requiring the government to prove the defendant's knowledge of everything that follows "knowingly", including the age of the child. We assume that it is not the intention of the drafters to require the government to prove that the defendant knew the child was under [the age of majority] but *merely to prove that the child was, in fact, less than [the age of majority]*". S.Rep. No. 438, 95th Cong., 1st Sess. 29 1977) reprintedin1978 U.S. Code cong. & Admin. News 40, 64. [Emphasis added]

The House expressly adopted this view and struck knowingly from its bill. In a strange twist of occurrences the Government now inserts a standard which for all intents and purposes is an element of scienter. Instead of including that the defendant knew that the person induced or enticed was a minor the government includes in their indictment that the defendant believed the person to be a minor. This is in direct contravention to the stated intent of congress and the common law. No federal crime can exist except by force of statute, *Morissette V. United States*,

342 U.S. 246, 72 S. Ct. 240, This fundamental precept of the law stems from well known law school *Erie* doctrine. Thus, the law forbids a common law construction of a federal crime but not interpretation. The Government has written an indictment based on no federal statute and in direct contravention to the stated intent of congress. Congress specifically excluded any form of scienter. To include scienter is to contravene a statute with no authority to do so. Overtly in violation of Due Process the Government inserts an element which is unauthorized by Congress, and one which may not be inserted by the defendant when it benefits the defendant. The rule of leniency requires that any vagueness in a statute be interpreted in favor of the defendant. If there is no vagueness to this statute, the government has no basis to include language and elements not found in the actual statute.

Courts nor the Government may rewrite a statute but only interpret it. The bounds of interpretation are limited by every reasonable construction in order to save the statute from unconstitutionality. *United States v. X-Citement Video* 513 U.S. 64 (1994) Dissent Justice Scalia. P13. Courts may strain to save a statute from being struck for unconstitutionality but this shall not extend to the point of judicially rewriting it or perverting its purpose. *Id.* Of course, only the legislature may write a statute lest the doctrine of separation of powers be confronted. If the government is allowed to rewrite or add in elements which Congress has specifically sought to eliminate, the Government then becomes both executive and legislator in clear contravention of Separation of Powers.

The District Court cited *United States v. Bailey*, 227 F.3d 792, 797 (7th Cir. 2000) for the proposition that factual impossibility is a bar to arguing that an undercover officer is not actually a fourteen year old and therefore the act is impossible. (Rec. 39 p3). Defendant in no way shape

or form raises such defense as factual impossibility. *Bailey* and other similar cases have put that argument to rest as the District Court accurately points out. Defendant relies on the encroachment of the First Amendment and not on such legal theory. This matter is different from luring a young looking undercover on a street corner into a van by "enticing" a minor to engage in prohibited sexual conduct. This matter is different from an undercover DEA agent offering to sell cocaine which he does not have nor can he produce. This matter is different from an undercover officer parading as a common street prostitute to lure those soliciting sex for money. This matter is intimately intertwined with actual speech. This matter is inseparable from a forum never before seen in the world as we know it. The internet is afforded the highest protection. *Reno* and *Free Speech Coalition*, *Supra.*

The Ninth Circuit recognizes such issues and entanglement with the First Amendment as demonstrated by their instruction. (Rec 37. Ex 1). In their instruction no scienter as to age is included in accordance with Congress' explicit directions. *Supra*. It is a fair and necessary assumption, of statutory construction, that "believed to be" was left out for a reason. It is presumed that Congress acts with intent. The Ninth Circuit has addressed the issue and supplied their courts with an appropriate instruction reflecting the current status of the law as written. Defendant's motion to bar any reference to scienter in a jury instruction should have been granted.

CONCLUSION

Generally, scienter must be included in every criminal statute. No element of scienter has been included in 18 U.S.C. §2251. The Government may not act as a legislator and supplant whatever element it sees fit to include. If "believes to be" is allowed to be included, as courts

have been allowing, the statute runs afoul of the First Amendment and should be deemed unconstitutional.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Shamiran Askharia, secretary of: Jason R. Epstein, an attorney, herein certifies that she has served an OPENING BRIEF FOR APPELLANT upon:

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by delivering in person to the address referred to above on September 25, 2003.

_____

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CERTIFICATE OF COMPLIANCE

Jason R. Epstein certifies pursuant to rule 30 that all materials required by parts (a) and (b) of Rule 30 are included in Short Appendix.

Jason R. Epstein certifies that pursuant to Circuit Rule , that this brief contains 10,803 words, 42 pages, and 54,427 characters pursuant to the character-count algorithm Word Perfect 9.0 for Windows, with which this Brief was prepared. Counsel also certifies that a copy of this brief and all of the appendix items are available in non-scanned PDF format was filed with the Clerk of the Seventh Circuit pursuant to Circuit Rule 31 (e).

_____

Jason R. Epstein

Counsel for Terry Johnson

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES Plaintiff,	)	
v.	)	Appeal No 03-2183 District Ct. No. 01 CR 724-1
TERRY JOHNSON Defendants.	)	

Appeal from the United States District Court for the Northern District of Illinois

No. 01 C9400, Honorable Judge Hibbler

SHORT APPENDIX TO THE BRIEF FOR APPELLANT

TERRY JOHNSON

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