

Testimony of
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STATEMENT OF RICHARD R. WHIDDEN, JR.
HEARING ON "WHY THE GOVERNMENT SHOULD CARE
ABOUT PORNOGRAPHY: THE STATE INTEREST IN
PROTECTING CHILDREN AND FAMILIES"

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS
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Good afternoon. My name is Richard R. Whidden, Jr. and I am the Executive Director and Senior Counsel for the National Law Center for Children and Families headquartered in Fairfax, Virginia. The NLC was founded in 1991 as a non-profit organization dedicated to the protection of children and families across the nation. Today we concentrate on issues related to defending of children and families from sexual exploitation and sexually exploitative materials. I am a member of the Florida Bar and have practiced law for 16 years, primarily in the government sector. I have dealt with a variety of policy issues, including the determination of how government may address the health, safety, and welfare of its citizens. I am honored to be called to testify today.

Today you have heard testimony related to the harms of pornography. This testimony has included peer-reviewed studies and interviews with citizens about the effects of pornography on their lives and relationships. I will not delve further into the harm to individuals and families documented in the studies presented by Ms. Manning and the accounts reported by Ms. Paul. They are, in themselves, sobering reminders of the damage wrought by these materials. I will discuss instead how Congress, and in appropriate cases the states, have a compelling interest in regulating this material in order to protect children.

I should preface my comments by outlining the well-established interest the state has in regulating obscenity. In *Paris Adult Theater I v. Slaton*, the U.S. Supreme Court held that obscene material does not acquire immunity from state regulation simply because it is exhibited to only to "consenting adults." The Court discussed at length the numerous state interests--including the interests of the public in the quality of life, the tone of commerce in the great city centers, and public safety--that justify regulation in addition to the state's interest in protecting children and the "unwilling adult viewer." The Court further held that the obviously prurient nature of the material was a sufficient basis in itself to determine whether the material was obscene (the "material speaks for itself"), so that expert testimony was not required to prove

obscenity. This decision had the effect of allowing the government to regulate obscenity without having to rely upon onerous levels of expert review of each and every investigation or prosecution commenced by the state.

It is thus clear that the government has a compelling interest in protecting children from exposure to sexually oriented materials. This was confirmed in the 1968 case of *Ginsberg v. New York*. In *Ginsberg*, the Court upheld on constitutional grounds a New York law prohibiting the sale of sexually explicit material to those under age 17, whether or not it would be considered obscene for adults. The Court opined that "the well-being of its children is of course a subject within the State's constitutional power to regulate." It also found that the state had an interest both in creating laws supporting parents, teachers, and others who have responsibility for children's well-being, as well as an independent interest in the well-being of youth. According to the *Ginsberg* Court, the quantum of harm required to justify state action was minimal: so long as the government demonstrated that the material was harmful to minors (and therefore not constitutionally protected expression), an easy-to-meet rational basis test applied. In support of its conclusion, the Court cited various studies demonstrating that pornography was harmful to minors.

It appears beyond doubt that the harms from obscenity recognized by the Court decades ago in *Ginsberg* have been greatly amplified in today's hypersexualized environment. When *Ginsberg* was decided in 1968, the Internet was a figment of science fiction writers' imaginations; satellites were something only NASA and the government used; cable TV was rare; and persons who sought obscene materials could obtain it in only a very few places. Today, obscene materials are easily accessible to us--and therefore to our children--as our home computers, classrooms, wireless communications devices such as phones and PDAs, and of course the vast wilderness of television. Obscene materials are no longer limited to the proverbial "plain brown wrapper." The accessibility, affordability, and anonymity of the Internet has had an adverse effect on our children and families.

Congress has taken several steps in the past years to address these harms. For example, the Children Internet Protection Act or CIPA was upheld as a legitimate exercise of federal funding discretion. Specifically, the Court held that Congress could fund library Internet access only on the condition that libraries adopt Internet filtering policies.

On a preliminary injunction in *Ashcroft v. ACLU*, the Court held the Child Online Protection Act unconstitutional because on the record before the Court, COPA was not the least restrictive alternative under a First Amendment analysis. It is also important to note that the Court specifically noted in the *Ashcroft* case that Congress could regulate the Internet to prevent minors from gaining access to harmful materials.

It has also been established that the law may address the methods of distribution of pornography. Justice Sandra Day O'Connor wrote about the regulation of Internet pornography in a way that is analogous to the zoning laws, allowing a segregation of harmful material. Specifically, the government may address the secondary effects of pornography on children and families in the time, place, and manner of the distribution. The Internet that Justice O'Connor referred to was the relatively nascent Internet of 1997, and she lamented the lack of technology available at that time to empower parents to protect their children, suggesting that technology could provide that

ability in the future. Investigating technological capabilities and encouraging the development of new technology that can help parents should be encouraged by Congress and this Committee.

I submit that Congress and the States should consider the following:

? Encouraging research concerning the effects of pornography on children and families.

Additionally, research on the effects of this material on the human brain and its addictive nature should be continued.

? Fostering the development of additional technological answers that allow families to protect their children while they use the Internet.

? Legislation that allows parents to hold illegal pornography distributors responsible for the harm done to their children.

? Legislation that would aid in keeping sexual material away from sexual predators who use that material to groom victims for abuse.

I thank the Committee for the opportunity to testify today on this issue so important to families and to society.