DEVICE FILTER LEGISLATION PASSES CONSTITUTIONAL MUSTER

I. The First Amendment

In discussing efforts to restrict pornography websites on the Internet, **the Supreme Court has found that filters on devices in the hands of the user pass constitutional muster.** Most notably, the Child Online Protection Act, which prohibited any person from posting content on the Internet that was harmful to minors, was struck down by the Supreme Court because it was not the most effective and least restrictive way to protect minors from harmful online content. *Ashcroft, ACLU*, 542 U.S. 656, 673 (2004). By contrast, the Supreme Court found that filters on devices at the receiving end met the requirements of the First Amendment. The Court:

> Blocking and filtering software . . . is less restrictive and . . . more effective as a means of restricting children's access to materials harmful to them . . . .
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> Filters are less restrictive [because they] impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. *Id*. at 670.

It was the tech industry that promoted filters over Internet bans in *Ashcroft. Id*. at 669-70. Unlike bans at the point of transmission, filters on user devices permit adult access. *Id*. And see *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (the state may not restrict adult access to material on grounds that it is unsuitable for minors).

So long as adults are permitted access, Supreme Court has repeatedly recognized that the State may restrict children's access to harmful material. *Ginsberg v. State of N.Y.*, 390 U.S. 629, 636-638 (1968). The Court has also found that the State has a compelling interest in protecting children from pornographic material. *Id.* at 638-640. Furthermore, the Court has recognized that parents are entitled to laws which support their ability to safeguard their children from harm. *Id.* at 639

Under the filtering law, adults can easily access sexually explicit material if they choose to, as noted. During activation, adults can deactivate the filters entirely. This imposes little or no burden on adults' access to speech while effectively protecting children.

Following the Court's cue in *Ashcroft*, other efforts to protect children online through filtering software have been upheld by the Supreme Court. For instance, the Children's Internet Protection Act requires libraries to use software that prevents Internet users from accessing obscenity or child pornography online as a condition of receiving federal funds. *20 U.S.C.* § 9134(f)(1)(A)(i) (2005). See also *47 U.S.C*. § 254(h) (2005). The Supreme Court held that requiring filters on library computers passed constitutional muster. *U.S. v. Am. Library Ass'n,* 539 U.S. 194, 211-12 (2003). The Court determined such filters met constitutional requirements since the filter could be easily disabled by library staff at the request of an adult patron. *Id at 209-210.*

Compared to the Children's Internet Protection Act in *Am. Library Ass'n*, the present filter legislation is far less restrictive and burdensome for adult users since adult users have the ability to change filter settings or deactivate filters themselves. If it is a small burden for an adult to ask a librarian to turn off a filter at a library, then requiring an adult to turn off a filter on their own device, using a passcode provided at activation, poses little or no burden.

Nor is the material to be filtered unconstitutionally vague or overbroad as the definition of material that is "harmful to minors" has been found fully constitutional by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968). It "gives…adequate notice of what is prohibited.'" *Id.* at 643 (1968), quoting *Roth v. United States*, 354 U.S. 476, 492 (1957). Additionally, community standards regarding what is harmful to minors has also passed constitutional muster as it is not likely to vary so much as to cause uncertainty among those working to comply with the legislation. *Ashcroft v. ACLU*, 535 U.S 564, 583-85 (2002).

II. The Federal Dormant Commerce Clause

The filter bill complies with the Dormant Commerce Clause. The purpose of the clause is to prevent economic protectionism, that is, laws which are designed to burden out of state businesses in favor of in state businesses. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994). As long as all producers are treated the same, it does not matter "when only out-of-state businesses are burdened because there are no comparable in-state businesses." *de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013)

A two-tiered analysis is used. First, is the state acting discriminatorily to out of state producers or regulating wholly out of state activities. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986). The answer is no. Second, is any burden imposed on interstate commerce greater than the benefit to the State. Id. The answer again is no. This filter bill does not discriminate based on the origin of the product; it does not directly regulate interstate commerce; and it does not create nor impose a substantial burden on interstate commerce, and thus, *a fortiori*, it cannot outweigh the State's compelling interest in protecting children.

Even if the "practical effect" of the law is to regulate something made out of state, this bill is only seeking to activate the filter in its own state for its own citizens. *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014) (where the California law requiring captions on CNN videos accessible by Californians was upheld, even though the videos were made outside of the state.); *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) (upholding the California Shark Fin law which barred the sale or possession of shark fins within the state but did not fix prices or impose the ban outside the state).

As discussed above, **it is well recognized that the state has a compelling interest in protecting children from exposure to pornography**. *Ginsberg v. New York*, 390 U.S. 638-40. Any assertion that the law would place a substantial burden on interstate commerce cannot be taken seriously given the minimal obligation of simply turning an existing filter to ON rather than OFF when activated in the state. And no serious argument has been raised to date that the *faux* ON/OFF burden could conceivably outweigh the compelling State interest in protecting children from harm.

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