

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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| |) | |
| Southeast Booksellers Association, |) | |
| et al., |) | |
| |) | |
| Plaintiffs, |) | |
| v. |) | C.A. No. 2:02-3747-23 |
| |) | |
| |) | <u>ORDER</u> |
| Henry D. McMaster, Attorney |) | |
| General of South Carolina, et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

In this action, Plaintiffs have brought a pre-enforcement constitutional challenge to permanently enjoin the operation of S.C. Code § 16-15-375, which provides criminal sanctions for “disseminating harmful material to minors.” *See* S.C. Code Ann. § 16-15-375; S.C. Code Ann. § 16-15-385 (collectively hereinafter “the Act”). The parties are now before the court upon cross motions for summary judgment. Having thoroughly considered the parties’ submissions, the oral arguments, the applicable law, and the entire documented record, the court grants Plaintiffs’ motion for summary judgment, and denies Defendants’ motion.

BACKGROUND

Plaintiffs, with the exception of Families Against Internet Censorship (“FAIC”),¹ are organizations that represent artists, writers, booksellers, and publishers who use the Internet to engage in expression, including graphic arts, literature, and health-related information. Most

¹ FAIC is an organization that represents families with Internet access and at least one child. These families are advocates of the right to “acquire educational and artistic material” via the Internet. (Compl. ¶ 10.) FAIC fights against government regulation and censorship of Internet content, arguing that parents should have ultimate authority over the content to which their children are exposed on the Internet.

of these organizations maintain their own websites which contain resources on obstetrics, gynecology, and sexual health; visual art and poetry; and other speech which could be considered “harmful to minors” in some communities under the Act, despite the fact that their speech is constitutionally protected as to adults.

The Act provides criminal sanctions for “disseminating harmful material to minors.” The term “harmful to minors” is defined by S.C. Code Ann. § 16-15-375(1), which provides:

“Harmful to minors” means that quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:

- (a) the average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and
- (b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and
- (c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

S.C. Code Ann. § 16-15-375. A violation of § 16-15-375 is a felony, punishable by up to five years in prison, a fine of \$5,000, or both. *See* S.C. Code Ann. § 16-15-385.

The controversy in this case centers primarily around an amendment to the Act, signed by former Governor Jim Hodges on July 20, 2001, which added the following definition of “material”:

“Material” means pictures, drawings, video recordings, films, *digital electronic files, or other visual depictions or representations* but not material consisting entirely of written words.”

S.C. Code § 16-15-375 (2) (emphasis added). Pursuant to this amendment, the Act proscribes the dissemination to minors of obscene “digital electronic files.”

Plaintiffs allege that this proscription violates the First Amendment and the Commerce

Clause because it prohibits adults, and even older minors, from viewing and sending constitutionally-protected images over the Internet and has the effect of prohibiting constitutionally-protected communications nationwide. (Compl. ¶¶ 1; 78-81; 84-86). With respect to their First Amendment claim, Plaintiffs argue that the Act, as a content-based restriction on speech, cannot survive strict scrutiny and is unconstitutionally overbroad because it substantially infringes on protected speech of adults. As for their Commerce Clause arguments, Plaintiffs contend that the proscription constitutes an unreasonable and undue burden on interstate and foreign commerce and subjects interstate use of the Internet to inconsistent state regulation. (Compl. ¶¶ 84-86)

PROCEDURAL HISTORY

On February 6, 2003, Defendants moved to dismiss the action, arguing that Plaintiffs lacked standing to pursue their First Amendment and Commerce Clause challenges. Defendants also argued that the Complaint was subject to dismissal for failure to state a claim upon which relief could be granted because the statute, properly construed, did not violate either the First Amendment or the Commerce Clause. Following a hearing, the court considered and rejected each of Defendants' arguments. *See Southeast Booksellers v. McMaster*, 282 F.Supp.2d 389 (D.S.C. 2003).

Shortly thereafter, both sides moved for summary judgment. This court held the cross-motions for summary judgment in abeyance pending the United States Supreme Court's decision in *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004), due to the similarities between the relevant provisions of the Child Online Protection Act ("COPA"), which were under review in *Ashcroft*, and those at issue in the present action. On June 29, 2004, the Supreme Court issued its opinion