

**IN THE  
SUPREME COURT OF VIRGINIA**

<b>PSINET INC., <i>et al.</i>,</b>	)	
	)	
<b>Plaintiffs-Appellees,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 030235</b>
	)	
<b>WARNER D. CHAPMAN, <i>et al.</i>,</b>	)	
	)	
<b>Defendants-Appellants.</b>	)	

- A.**
- B.**
- C. REPLY BRIEF OF APPELLANTS**
- D.**

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## **REPLY BRIEF OF APPELLANTS**

This reply brief is filed by the Attorney General of Virginia on behalf of the two Commonwealth's Attorneys named as Defendants, Warner D. Chapman and James L. Camblos, III (collectively, "the Commonwealth").

### **I. PLAINTIFFS' CONSTITUTIONAL ARGUMENTS ARE MISPLACED.**

Plaintiffs devote most of their brief to repeating the same constitutional arguments they made – unconvincingly – to the Fourth Circuit. These arguments are misplaced. This Court is not confronted with constitutional issues; it is asked to interpret the challenged state statute. Had plaintiffs brought their case in state court, the constitutional questions might now be before this tribunal on appeal. It is a mystery to the Commonwealth why plaintiffs so often by-pass state courts with their free speech claims –especially in Virginia where First Amendment principles first found their written expression and this Court has shown itself to be equally sensitive to free speech concerns as federal courts. Even so, Plaintiffs have made their bed and now must lie in it. They may disagree with the constitutional decisions that undergird the Fourth Circuit's certification, but those issues simply are not before this Court.

### **II. PLAINTIFFS' DESCRIPTION OF THE CASE REQUIRES CORRECTION.**

The alleged effectiveness of filtering technology may bear upon the constitutional issues, but it is not relevant to the interpretation of the Virginia statute. Even so, it should be noted that Plaintiffs are mistaken when they attribute to the Commonwealth the view that "voluntary user-based means permit parents and other responsible adults to provide highly effective protection to children at little or no cost." Pls.' Br. at 1. The Commonwealth's views on filtering are found in its opening brief on pages 17-19. *See* Olsen Dec. and Supp. Dec., JA 427-430, 447, 842-30.

Moreover, at least two of Plaintiffs – the Safer Sex Institute and Freedom to Read Foundation – have previously made – and prevailed – on an argument directly contrary to the one they make now, disparaging the filtering technologies they now claim to be so effective. *See American Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D.PA. 2002) (“[W]e find that it is currently impossible... to develop a filter that neither underblocks nor overblocks a substantial amount of speech.”). Plaintiffs are likewise mistaken when they say the Commonwealth does not contest Judge Michael’s view that the 1999 Act is “impotent to protect children.” *See Pls.’ Br.* at 6. For example, the Commonwealth argued to the Fourth Circuit that “The Benefits Of The Virginia Law Outweigh Any Burden.” *Com. Fourth Cir. Br.* at 54; *Com. Fourth Cir. reply Br.* at 26.

**III. USE OF EITHER OF THE TECHNOLOGICAL ACCESS CONTROLS IDENTIFIED BY THE ATTORNEY GENERAL PRECLUDES CONVICTION UNDER THE STATUTE.**

Plaintiffs argue that, even where a credit card or adult-check PIN is required, some percentage of those persons accessing a pornographic website will be juveniles; that the website operator should be aware of this fact; and that, therefore, requiring use of such access controls does not constitute a defense under the statute. Thus, they say, the first certified question should be answered in the negative.<sup>1</sup> In support of this theory, they focus on the statute’s use of the word, “may,” noting that the statute makes it unlawful “knowingly” to display harmful material “in a manner whereby juveniles *may* examine or peruse.” *Pls.’ Br.* at 26 (quoting Va. Code

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<sup>1</sup> The first certified questions reads:

Would the use of any of the *technological access controls* identified by the Attorney General of Virginia preclude conviction under Virginia Code § 18.2-391 as amended in 1999?

§ 18.2-391) (emphasis added by Plaintiffs). Given the likelihood that some enterprising juveniles will gain access to the site even if a credit card or adult-check PIN is required, Plaintiffs contend that liability cannot be avoided by requiring use of such devices.<sup>2</sup>

The flaw in Plaintiffs' argument is that it ignores the holding of *American Booksellers*, which said:

Because it is criminal in nature, the statute is not to be given the broad interpretation the booksellers apprehend. The word "may" in the amendment is not to be converted into "might." A scenario may always be envisioned wherein a juvenile, by stealth, secretes a book and manages to peruse it in a store despite the efforts of the most vigilant clerk. The absence of scienter precludes conviction of any bookseller under those circumstances. *Reasonable efforts to prevent perusal of harmful materials by juveniles are all that the statute requires of a bookseller*

*Commonwealth v. American Booksellers*, 236 Va. 168, 179, 372 S.E.2d 618, 625 (1988)

(emphasis added). In keeping with this focus on "reasonable efforts," this Court went on to explain that liability under the statute does not turn on whether or not *actual perusal* of harmful materials by a minor has occurred:

If a bookseller were to display materials harmful to juveniles, provide an area in which they could be perused without observation by the bookseller or his employees, and take no reasonable steps to inhibit such perusal by juveniles, a jury properly instructed under the foregoing principles might convict even in the absence of proof that juveniles had actually taken advantage of the opportunity thus afforded to them.

*Id.* at 179, 372 S.E.2d at 625. In other words, a bookseller who disdains reasonable precautions

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<sup>2</sup> Plaintiffs' citation of *Reno v. ACLU*, 521 U.S. 844, 882 (1997) is misleading. See Pls.' Br. at 29 n. 18. The invalidation of the statute at issue there was the result of the fact that it applied not only to commercial speakers, but also to non-commercial speakers. As the Court explained, "use of a verified credit card or adult identification... is not only technologically available but actually is used by commercial providers of sexually explicit material... however, it is not economically feasible for most noncommercial speakers to employ such verification." *Id.* The challenged provisions of the Virginia statute do not suffer from this defect, being limited to "displays for commercial purposes." Va. Code § 18.2-391.

can be held liable under the statute even though no actual perusal by minors occurs. This case is the other side of the same coin. A website operator who *takes* reasonable precautions will *avoid* liability, even though perusal by some small group of determined minors may well occur.

Although ignored by Plaintiffs, the holding that “reasonable efforts” are all the statute requires is now settled law. When the precedent of *American Booksellers* is applied to cyberspace, it must also be the law that “reasonable efforts to prevent perusal of harmful materials by minors are that the statute requires of a [website operator].” 236 Va. at 179, 372 S.E.2d at 625. Thus, the question to be answered here is a simple one: *Does it constitute “reasonable efforts” to require the production of a credit card number or adult-check PIN before allowing the website visitor to peruse materials harmful to minors?*

The Commonwealth has given four reasons why this question must be answered in the affirmative: (1) In cyberspace, credit card numbers and adult-check PINs are analogous to the measures approved by this court for use in the physical world; (2) Credit cards and adult-check PINs are reasonably effective in depriving minors of access to harmful materials; (3) Federal law reinforces the conclusion that credit cards and adult-check PINs are a reasonable and effective means of protecting minors from harmful materials; and (4) As a practical matter, there is nothing more a website operator can do. Com. Br. at 21-29.

**1. In Cyberspace, Credit Card Numbers and Adult-Check Pins Are Analogous to the Measures Approved by This Court for Use in the Physical World.**

As the Commonwealth has explained, under *American Booksellers*, a merchant in the physical world will comply with the statute if he so arranges his premises so that a customer cannot obtain access to harmful materials without allowing the clerk to ascertain whether he is an adult. In the physical world, this verification is done by visual inspection. By analogy, a

merchant in cyberspace will also comply if he so arranges his website a customer cannot obtain access to harmful materials without allowing the computer to ascertain whether he is an adult. In cyberspace, this verification is done by electronic inspection of a proffered credit card number or adult-check PIN. *See* Com. Br. at 22.

In response, Plaintiffs raise several objections, none of them valid. First, Plaintiffs say that the defense approved in *American Booksellers* “relied on undisputed matter of general experience.” Pls.’ Br. at 26. This is true, but it is also an undisputed matter of general experience that minors generally do not have credit cards.<sup>3</sup> Moreover, those who do have credit cards are likely to be older minors – on the verge of adulthood – where concerns about access to pornographic sites may be less urgent than for young children.

Second, they say that the mechanism approved by the Court was “direct and simple.” Pls.’ Br. at 26.<sup>4</sup> The mechanism for use in cyberspace is also “direct and simple.” It involves nothing more complicated than submitting a credit card or adult-check PIN, something that already occurs on websites as a matter of everyday routine.

Third, they say that “[t]he technology of ‘eyeballing’ customers was unlikely to advance.” Pls.’ Br. at 26. While internet technology will undoubtedly advance in various ways,

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<sup>3</sup> Plaintiffs cite newspaper articles showing that some high school students have their own credit card. Pls.’ Br. at 12, n.5. Their argument is flawed for several reasons. The articles are not good evidence and do not purport to reflect the situation in Virginia. Moreover, a significant percentage of students celebrate their eighteenth birthday while still in high school. It is understandable that many of this group would then obtain some form of credit card – if only from a department store or oil company – as part of their rite of passage into adulthood. None of this changes the observation that children generally do not have credit cards.

<sup>4</sup> Plaintiffs are mistaken, however, when they characterize that mechanism as “visual perception of giggling or furtive children.” Pls.’ Br. at 26. The point in *American Booksellers* was not that the store clerk was to look for immature *behavior*. The point is that the clerk – as the person regulating access to the harmful materials – was not to permit such access unless he saw that the customer was an adult.

Plaintiffs have not suggested that such advances will bring better means of identifying adults. Any such suggestion would, of course, be sheer speculation. Moreover, absent a change in the statute, such new means – if they were to occur – would simply take their place alongside credit cards and adult-check PINS.

Fourth, they say that the solution of eyeballing customers was “universally applicable to all stores.” Pls.’ Br. at 26. So, too, the technological access controls identified by the Commonwealth are equally applicable to all websites.<sup>5</sup>

Finally, they say that, in *American Booksellers*, “the proposed solution promised near 100% success – at most an occasional older juvenile might be overlooked for a few minutes during a busy moment.” Pls. Br. at 26. But the decision of this Court contained no such naïve overstatement about the success rates in deterring juveniles. Besides, once it is recognized that *no* steps will be foolproof – and that they need *not* be foolproof in order to furnish a defense – then the reasonableness of any steps taken can only be measured in light of available options. There is nothing more a website operator can do, a point Plaintiffs do not contest. *See infra* at 7.

## **2. Credit Cards and Adult-Check Pins Are Reasonably Effective in Depriving Minors of Access to Harmful Materials.**

Plaintiffs repeatedly state that, even with the use of technology access controls, minors will comprise 5 percent of the audience visiting pornographic websites. The studies discussed by

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<sup>5</sup> Plaintiffs’ arguments regarding non-web-based modalities are red herrings. If harmful pornography is displayed on a bulletin board or through an e-mail service, the services hosting such messages receive the same immunity under state and federal law as other internet service providers. To the extent that plaintiffs refer to *content providers*, not service providers, there is no evidence in the record suggesting that messages sent or posted through non-web based modalities are sent or posted with a commercial purpose. Plaintiffs have not identified any chat room, bulletin board or e-mail message that any of them wish to send or receive that would contain harmful pornography displayed for a commercial purpose. In any event, these are

the Commonwealth actually showed a *range* of 2 to 5 percent. *See* Com. Br. at 24. Moreover, Plaintiffs ignore the other side of these studies, which show that *without* access controls, minors will compose 20 to 30 percent of the audience visiting these websites. Taken together, these studies show a dramatic reduction in the number of minors is exposed to harmful materials. Plaintiffs do not deny that such a reduction occurs, nor do they address the conclusion by the Commission on Child Online Protection that an age verification system “is generally effective in preventing access by children.” Commission on Child Online Protection, *Report to Congress* 27 (2000); JA Vol. V. *See* Com. Br. at 24.

**3. Federal Law Reinforces the Conclusion That Credit Cards and Adult-Check PINs Are a Reasonable and Effective Means of Protecting Minors from Harmful Materials.**

As the Commonwealth has pointed out, both Congress and the United States Supreme Court have concluded that credit cards and adult-check PINs are an effective means by which to restrict electronic access by minors to harmful materials. *See* Com. Br. at 26-28. Plaintiffs may disagree with Congress and the Court, but they do not deny that these institutions have reached these conclusions, nor have they explained why this Court should disregard such persuasive opinions and reach the opposite conclusion.

**4. As a Practical Matter, There Is Nothing More a Website Operator Can Do.**

Plaintiffs’ disparagement of credit cards and adult-check PINs might be more convincing if they could suggest something else that a website operator could do to prevent perusal of harmful material by minors. But they have suggested nothing. They evidently agree that there is nothing more a website operator can do. Given such agreement, it should be evident that these

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matters for the Fourth Circuit to address in connection with its constitutional analysis and are not apart of the certified questions.

technological access controls constitute reasonable measures to prevent perusal of harmful materials by juveniles. Under the precedent of *American Booksellers*, use of such measures precludes conviction under the statute.

Finally, Plaintiffs say nothing about the cardinal rule of statutory construction, as laid down by this Court and cited by the Commonwealth. “[A] statute will be construed to avoid a constitutional question whenever this is possible.” *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002); *see* Com. Br. at 29. Thus, in disputes over statutory construction, the question to be decided is not which of two competing constructions is *more* plausible – or which construction this Court might prefer in the absence of constitutional considerations. The question is whether the construction proffered by the Commonwealth is one to which the statute is amenable. Here the construction proffered by the Commonwealth flows readily from this Court’s precedent in *American Booksellers*. It is a construction to which the statute is clearly amenable and which avoid a constitutional question. It is the construction that must be preferred.

In sum, use of either of the technological access controls identified by the Attorney General precludes conviction under the statute. The first certified question should be answered in the affirmative.

**IV. THE TERM “DISPLAY FOR COMMERCIAL PURPOSE” APPLIES ONLY TO DISPLAYS MADE IN CONNECTION WITH THE SALE, RENTAL, OR LOAN OF HARMFUL MATERIALS.**

As shown by the phrasing of its second question,<sup>6</sup> the Fourth Circuit implicitly suggests a narrow construction of the phrase “display for commercial purpose,” which the 1985 amendment

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<sup>6</sup> The second certified question reads:

added to the list of acts prohibited by the statute. Under this narrow construction – which the Commonwealth believes is correct – the term “display for commercial purpose” applies only to displays made in connection with the “sale, rental, or loan” of harmful materials. As previously explained, this narrow interpretation stands in sharp contrast to the virtually unbound definition of commercial purpose advocated by Plaintiffs throughout this litigation. *See* Com. Br. at 30. None of the arguments advanced by Plaintiffs require the Court to construe the term “commercial purpose” in the boundless fashion they prefer.

First, Plaintiffs say that, under the construction offered by the Commonwealth, it would not be unlawful to use a “lurid” – *i.e.* “harmful” – poster to advertise products that are not harmful in themselves. This is true. However, using pornography to sell toothpaste or concert tickets to juveniles has not been a problem in our society. More importantly, it was not the problem the General Assembly sought to address when it passed the 1985 amendment adding “display for commercial purposes” to the list of prohibited acts. As this Court explained in *American Booksellers*, “[i]ts legislative purpose is plain: to preclude the perusal, by juveniles standing in a bookstore, of harmful materials they are unable to buy.” 236 Va. at 178, 372 S.E.2d at 624. In the event that merchants were to begin using lurid posters to sell innocent products, the General Assembly could certainly respond by enacting a new statute. On the other hand, access by minors to pornography on the Internet is a problem *now*. And, contrary to Plaintiffs’ suggestion, the need to guard against problems that are not yet upon us ought not

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Does the prohibition against knowingly displaying pornographic materials that are “harmful to juveniles” apply to displays made only in connection with the sale rental, or loan of such materials? If not, what must the government establish to prove that a defendant has knowingly displayed such materials “for commercial purpose”?

trump the need to deal with problems that are already here – nor is there any reason to believe the General Assembly would favor the upside-down priorities that their position implies.

Second, Plaintiffs say that, under the limiting construction offered by the Commonwealth, “enforcement of the ‘sell, rent or loan’ provision would be complicated.” Pls., Br. at 34. This would be so, they say, because it would be necessary to show that any such transaction was “pursuant to a for-profit business.” Plaintiffs are confused. The point here is to limit the meaning of “display for a commercial purpose” by reference to the words “sell, rent or loan” – not the other way around.

Third, Plaintiffs contend that two maxims of statutory construction – *noscitur a sociis* and *ejusdem generis* – do not apply here. Pls.’ Br. at 34. They are mistaken. They say there is no role here for maxims of construction because there is nothing doubtful or ambiguous about the phrase at issue: “display for commercial purpose.” This is obviously not the view of the Fourth Circuit. Otherwise, it would not have certified the question for an explanation of its meaning. Moreover, the term “commercial” must taken its meaning from its context. In *United States v. Public Service Co.*, 143 F.2d 79, 81 (10th Cir. 1944), the Tenth Circuit construed a federal statute using the phrase “commercial consumption.” Noting that “commercial” could be broadly construed to mean *all* businesses, the court nevertheless used a narrow definition, applying the phrase only to consumption by enterprises engaged in the buying and selling of goods. *Id.* at 81. Similarly, the phrase “commercial purpose” could be broadly construed to mean *all* business purposes (as Plaintiffs content), or it may be narrowly construed to mean purposes directly connected with the sale, rental or loan or harmful materials (as the Commonwealth maintains). Finally, assuming *arguendo* that the *ordinary* meaning of the word is the broad meaning proposed by Plaintiffs, there is *always* doubt about whether a word was intended in its ordinary

sense when such a construction would lead to constitutional doubts. The presence of such doubts warrants use of rules of construction, including the rules invoked here by the Commonwealth.

Plaintiffs also say that “the structure of the statute” does not “invite either doctrine.” Pls.’ Br. at 34. Here, too, they are mistaken. The sentences in question contains four verbs naming the prohibited acts in parallel: “sell, rent... loan” and “display.” It is, however, not every act of “displaying” that is prohibited. It only a subset of such acts that are affected – those done “for commercial purpose.” Grammatically, the phrase “for commercial purpose” modifies “display.” In determining what constitutes a “commercial purpose,” it is perfectly logical – and consistent with these two maxims of constructions – to look back at the three verbs, “sell, rent... loan,” that are in parallel with the verb being modified and to use those three verbs to place a limiting construction on the modifier at issue.

Fourth, Plaintiffs contend that, even under the narrowing construction proposed by the Commonwealth, its hypothetical Berkeley bookstore would still be covered by the statute because the chat room containing harmful chatter is maintained by the bookstore “in connection with” its sale of harmful materials in Berkeley. There are two problems with this argument. To begin, where the display does not hold out for examination and perusal harmful wares being offered for sale, rental or loan – and does not otherwise propose any such transaction – then any “connection” between the display and any eventual commercial transaction is too remote and indirect to fall under the statute. Thus, the Berkeley bookstore is not covered by the statute.

Moreover, there must be a connection to Virginia *other* than the fact that the out-of-state website is accessible here, just as it is everywhere else in the world. Like most statutes, § 18.2-391 says nothing that directly addresses its territorial scope; however, “it will be presumed ... that a legislative body... did not intend to give its enactments an impermissible extraterritorial

operation.” 82 C.J.S. *Statutes* § 310 (1999). Enacting a statute with an impermissible extra-territorial effect would violate due process. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Unless the statutory language compels a different result, it must be read *not* to have such an impermissible effect, but to apply only where the exercise of legislative jurisdiction is legitimate. For this reason too, the statute is inapplicable to the Berkeley bookstore in Plaintiffs’ hypothetical.<sup>7</sup>

**V. THE FOURTH CIRCUIT’S QUESTIONS ARE DETERMINATIVE OF THIS LITIGATION AND SHOULD BE ANSWERED.**

When a federal court is faced with an unsettled question of state law, it does not *answer* the question so much as it *predicts* how the state’s highest court would answer it. Even so, such predictions can be fatal to a state statute subject to a federal constitutional challenge, leaving little or no practical mechanism by which the state can then obtain an authoritative construction of its law from the state’s highest tribunal. The process invites what the United States Supreme Court has described as “friction-generating error.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Under our federal system, such friction should be – and can be – readily avoided. “Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication or history of application is particularly gratuitous when... the state courts stand willing to address the questions of state law on certification from a federal court.”

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<sup>7</sup> Given the concept of legislative jurisdiction, the *location* of the customer paying the money furnishes an important alternative limiting principle that precludes Plaintiffs’ expansive interpretation *whether or not* “display for commercial purpose” requires a connection with the sale, rental or loan of harmful materials. In other words, because the *Berkeley* bookstore does not sell in Virginia and has no other significant contact here – there is nothing to give Virginia legislative jurisdiction over it. The term “display for commercial purpose” is not met where the person making the display does not have the purpose of soliciting business from Virginia.

*Id.* Virginia is one of 49 states with a certification procedure in place.<sup>8</sup> It is a procedure calculated to provide a definitive ruling on the meaning of state law and thereby determine the result of a pending lawsuit. In keeping with this procedure, the Fourth Circuit has certified two questions, which this Court – and only this Court – can authoritatively answer. Yet, Plaintiffs insist this Court must now spurn the certification, refuse to construe the state statute at issue, and tell the Fourth Circuit the explanation that accompanied the certification is not good enough. They are mistaken. There is no basis for the extreme action they request.

Plaintiffs claim that the certified questions are not “determinative” as required by Rule 5:42(a). Their claim rests largely on their dogmatic insistence that the statute would be unconstitutional regardless of how the Court might answer the questions. While such inflexibility may be required by their litigation strategy, it is hardly a basis for this Court to reject the certification. Moreover, as explained above, the constitutional issues are not before this Court.

The power of this Court to decide questions certified to it arises from Virginia Constitution, Art. VI, § 1, which provides that this Court shall have “original jurisdiction... to answer questions of state law certified by a court of United States or by the highest appellate court of another state....” In exercising this authority, this Court has adopted Rule 5:42, which provides, in part, that “[s]uch answer may be furnished when requested by the certifying court if a question of Virginia law is *determinative* in any proceeding pending before the certifying court

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<sup>8</sup> See Schneider, “But Answer Came There None”: The Michigan Supreme Court and The Certified Question of State Law, 41 Wayne L. Rev. 273, 275-277 n.1., (1995) (listing forty-three states with certification procedures as of 1995); Cal. Rules of Ct. Div. I R 29-5 (1999); 477.004 R.S.Mo (1999); N.J.Ct.R. 2:12 A (1999) In Re: Certification of Questions of Law (Order) (S. Ct. of Pa. Jan 12, 2000); Arkansas Court of Appeals Rule 6-8 (2003); 12 V.S.A. § 2386 (2003)(Vermont).

and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia.” *Id.* at (a) (emphasis added). This Court has not construed the meaning of “determinative.” However, the Fourth Circuit has explained the restraint that it exercises in determining whether to certify a question of state law:

Considerations of comity lead us to conclude that we ought not to request [a state court] to answer a question of law unless and until it appears that the answer is dispositive of the federal litigation or is a necessary and inescapable ruling in the course of the litigation.

\* \* \* \* \*

The highest courts in some other jurisdictions having certification procedures have taken the position that they will not respond to a certified question where the answer may be nothing more than an advisory opinion. ... [F]ederal courts should take care not to burden their state counterparts with unnecessary certification requests.

*Boyster v. Commissioner*, 668 F.2d 1382, 1385 and 1385 n.5 (4th Cir. 1981)(declining certification request). Given this cautious approach, there is no reason to believe that the Fourth Circuit would certify a question that it believed was not determinative.

Rule 5:42 also calls for the certifying court to make “a *brief* statement explaining how the certified question is determinative of the proceeding in the certifying court.” *Id.* at (b)(6) (emphasis added). The Fourth Circuit has provided such a statement. Plaintiffs want something more. Essentially, they want the Fourth Circuit to explain itself in the same degree of fulsomeness that might be expected of a lower court writing an opinion to be reviewed by a higher tribunal. This Court has never demanded such a statement, nor should it do so now.

The Commonwealth's is unaware of any case where this Court has accepted certification of a question of state law and its answer was not dispositive. To the contrary, in more than a dozen cases, the outcome of the case in the Fourth Circuit has been determined by this Court's

answer to the certified questions.<sup>9</sup> Plaintiffs offer no basis for rejecting the representation of the Fourth Circuit that this Court's interpretation of the scope of the 1999 Amendment "is determinative of whether the statute is constitutional at this time ... [and] is necessary for resolution not only of the First Amendment claim, but also for the dormant Commerce Clause claim.". *PSINet, Inc. v. Chapman*, 317 F.3d 413, 422-23 (4<sup>th</sup> Cir. 2003). For this Court to do so would disregard the Fourth Circuit's clear respect for the limited circumstances in which certification of questions is appropriate. *See e.g. Bettius & Sanderson v. National Union Fire Ins. Co.*, 839 F.2d 1009 (4<sup>th</sup> Cir. 1988) (declining certification). Moreover, it would ignore entirely the important concerns that underlie the certification rule and cede to a federal court a question of state law that it is the proper province of this Court to determine.

### **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in Brief of Appellants, both questions certified by the Fourth Circuit should be answered in the affirmative.

**Respectfully submitted,**

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**By: \_\_\_\_\_  
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<sup>9</sup> *C.F. Trust, Inc. v. First Flight Ltd. P'Ship*, 306 F.3d 126 (2002); *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584 (2002); *Beard Plumbing & Heating v. Thompson Plastics*, 152 F.3d 313 (1998); *Shaw v. Titan Corp.*, 1998 U.S. App. LEXIS 23059 (1998); *Bradick v. Grumman Data Sys. Corp.*, 116 F.3d 1473 (1997); *Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188 (1997); *Vaughan v. Murray*, 1995 U.S. App. LEXIS 31288 (1995); *Allianz Ins. Co. v. Garrett*, 47 F.3d 665 (1995); *Potomac Greens Assocs. P'ship v. City Council of Alexandria*, 6 F.3d 173 (1993); *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 1991 U.S. App. LEXIS 25387 (1991); *American Booksellers Assoc. v. Virginia*, 882 F.2d 125 (1989); *Beach Robo, Inc. v. Crown Cent. Petroleum, Inc.*, 860 F.2d 606 (1988); *Dodson v. Aetna Casualty & Surety Co.*, 851 F.2d 736 (1988).

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Brief of Appellants was mailed on this 27th day of May, 2003, to Garrett M. Smith, Michie Hamlett Lowry Rasmussen & Tweel, 500 Court Square, Suite 300, P. O. Box 298, Charlottesville, Virginia 22902, and Thomas W. Kirby, Wiley, Rein & Fielding, 1776 K Street N.W., Washington, D.C. 20006.

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