Case Nos. 07-4375 & 07-4376

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al., Plaintiffs-Appellees/ Cross-Appellants v. RICHARD CORDRAY, Attorney General of Ohio, et al., Defendants-Appellants/ Cross-Appellees.	:	On Appeal from the United States District Court for the Southern District of Ohio, Case No. 3:02cv210

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ET AL. PURSUANT TO REQUEST OF THE COURT

Michael A. Bamberger
Richard M. Zuckerman
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax (212)768-6800

Of Counsel:

Carrie L. Davis
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax (216) 472-2210

H. Louis Sirkin
Jennifer M. Kinsley
Sirkin, Kinsley, & Nazzarine
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax (513) 7210846

Attorneys for Plaintiffs-Appellees/Cross-Appellants

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Pursuant to the request of the Court, Plaintiffs-Appellees/Cross-Appellants American Booksellers Foundation for Free Expression *et al.* ("plaintiffs" or "ABFFE") respectfully submit this Supplemental Brief to address the decision of the Supreme Court of Ohio[1] answering certified questions posed by this Court.[2]

ARGUMENT

I. WHETHER THE SUPREME COURT OF OHIO'S NARROWING CONSTRUCTION OF THE AMENDED ACT ELIMINATES THE OVERBREADTH AND VAGUENESS THAT RENDERED THE AMENDED ACT UNCONSTITUTIONAL

There is an ambiguity in the decision of the Supreme Court of Ohio upon which turns the question of whether that decision has eliminated the unconstitutional vagueness and overbreadth of Sections 2907.01, 2907.31 and 2907.35 of the Ohio Revised Code (the "Amended Act").

Certified Question No. 1 asked:

> 1. Is the Attorney General correct in construing O.R.C. 2907.31(D) ***to limit the scope*** of O.R.C. 2907.31(A), as applied to electronic communications, to personally directed devices such as instant messaging, person-to-person e-mails, and private chat rooms?

ABFFE v. Strickland, 560 F.3d 443, 447 (6th Cir. 2009) (emphasis added).

The Supreme Court of Ohio answered, "yes," thus "***limit[ing] the scope*** of O.R.C. 2907.31(A), as applied to electronic communications, to personally

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[1] *American Booksellers Foundation for Free Expression v. Cordray*, Slip Op. 2010-Ohio-149, 124 Ohio St.3d 329, 922 N.E.2d 192 (Supreme Court of Ohio, January 27, 2010).("*ABFFE v. Cordray*").

[2] Order of Certification to the Supreme Court of Ohio, *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443 (6th Cir. 2009). ("*ABFFE v. Strickland*").

directed devices such as instant messaging, person-to-person e-mails, and private chat rooms." The Supreme Court of Ohio explained:

> We conclude that the scope of R.C. 2907.31(D) ***is limited to electronic communications that can be personally directed***, because otherwise the sender of matter harmful to juveniles cannot know or have reason to believe that a particular recipient is a juvenile.

Slip Op. at ¶ 24, 124 Ohio St.3d at 332, 922 N.E.2d at 195 (emphasis added). Both its "yes" answer to Certified Question No. 1, and its explanation that the Amended Act is ***"limited to"*** electronic communications that are[3] personally directed by the sender to the recipient indicate that ***the statute applies only to those electronic communications***. The Supreme Court of Ohio thus indicated that the statute cannot be applied to any other forms of electronic communication—such as Websites of any nature, listservs, mailing lists, and so on. If the statute is so construed, it is neither unconstitutionally vague nor substantially overbroad.

Certified Question No. 2 asked:

> 2. Is the Attorney General correct in construing O.R.C. 2907.31(D) to exempt from liability material posted on generally accessible Websites and in public chat rooms?

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[3] The Supreme Court of Ohio used the phrase "limited to electronic communications that ***can be*** personally directed"(emphasis added). Read in context, it is clear that the Court meant that specific communications of "harmful to minors" material cannot be the subject of a criminal prosecution unless such specific communications ***were*** personally directed. Thus, the statute can be applied to a person-to-person e-mail that was sent to an individual but cannot be applied to an e-mail sent to a group (even though such e-mail ***can be,*** and thus ***could have been,*** personally directed to an individual).

560 F.3d at 447. The Supreme Court of Ohio answered, "yes." That answer necessarily followed from that Court's answer to Certified Question No. 1; because the Amended Act is "limited to" electronic communications that are personally directed, *a fortiori*, the Amended Act cannot apply to generally-accessible Websites and public chat rooms.[4]

However, having clearly answered the Certified Questions posed by this Court, the Supreme Court of Ohio concluded its decision with a statement that could be read to undermine its holding that "the scope of R.C. 2907.31(D) is limited to electronic communications that can be personally directed." Slip Op. at ¶ 24, 124 Ohio St.3d at 332, 922 N.E.2d at 195. The last two sentences of the decision of the Supreme Court of Ohio stated:

> The certified questions and the parties focus on particular types of electronic communications, namely, e-mail, instant messaging, private chat rooms, public chat rooms, and generally accessible websites. Our answer is accordingly constrained by that focus and should not be construed as necessarily governing other types of electronic transmissions, whether currently in use or developed in the future.

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[4] Because Certified Question No. 1 was answered "yes," Certified Question No. 2 was redundant.

Had Certified Question No. 1 been answered "no"—that is, had the Supreme Court of Ohio held that the Amended Act was not limited to "personally directed" electronic communications—then Certified Question No. 2 could have been answered either "yes" (communications in generally-accessible Websites and public chat rooms are excluded from the Amended Act) or "no" (communications in generally-accessible Websites and public chat rooms can form the basis for prosecutions under the Amended Act).

Slip Op. at ¶ 26, 124 Ohio St.3d at 333, 922 N.E.2d at 195. Three aspects of this statement are troubling.

First, it is not accurate for the Supreme Court of Ohio to state, as it does in the penultimate sentence, "The certified questions and the parties focus on particular types of electronic communications, namely, e-mail, instant messaging, private chat rooms, public chat rooms, and generally accessible websites." Slip Op. at ¶ 26, 124 Ohio St.3d at 333, 922 N.E.2d at 195. In fact, plaintiffs devoted a substantial portion of both their Preliminary Memorandum in the Supreme Court of Ohio (which urged that Court to accept the Certified Questions)[5] and their Merit Brief in that Court to discussing other forms of electronic communications, including listservs, mailing lists, and all forms of Websites (including Websites that might not be considered "generally-accessible").[6] For example, plaintiffs' Merit Brief presented these issues to the Supreme Court of Ohio:

> Are all Websites exempt from the Amended Act, or only generally-accessible Websites? What makes a Website generally-accessible? Are Websites that require registration—but allow any person to register—generally-accessible? What about Websites that require a fee, but will accept payment from anyone? How are "internal" Websites—such as a Website maintained by a trade association for its

[5] Defendants Attorney General and prosecutors urged the Supreme Court of Ohio to decline to answer the Certified Questions. Preliminary Memorandum of Petitioners Ohio Attorney General Richard Cordray, et al., *ABFFE v. Cordray*, No. 2009-0609, April 22, 2009 (Supreme Court of Ohio).

[6] All briefs filed in the Supreme Court of Ohio are accessible on the Website of that Court, under Case No. 2009-0609. http://www.supremecourt.ohio.gov/Clerk/ecms (last visited April 7, 2010). If this Court so requests, plaintiffs will provide copies of those briefs to this Court.

> members—treated under the Amended Act? What about "members only" sections of otherwise generally-accessible Websites? Can a person be prosecuted for posting "harmful to minors" material on an internal Website, or a "members only" section of a Website which would be exempt if it were posted on a generally-accessible Website? (For sites such as a trade association site or a college alumni site, it would be ***less likely*** that a juvenile would have access to the internal Website or the "members only" section of the Website than a generally-accessible Website.)
>
> Does the use of a listserv (or another form of mailing list) subject the speaker to criminal prosecution? Are all listservs exempt from the Amended Act, or only some? If so, how does a speaker know whether a particular listserv is on one or the other side of the line?

Merit Brief of Respondents AFFFE et al., *ABFFE v. Cordray*, No. 2009-0609, August 7, 2009, p. 23 (Supreme Court of Ohio). Thus, plaintiffs squarely presented to the Supreme Court of Ohio the issue of whether or not persons could be prosecuted under the Amended Act for electronic communications other than those specifically enumerated in the two Certified Questions.

Second, this is a challenge, on the grounds of overbreadth and vagueness, to a criminal statute that subjects persons to fines and imprisonment. If the last sentence of the Supreme Court of Ohio's decision is read to state that the Amended Act ***might not be limited to*** personally directed electronic communications, and ***might apply*** to other forms of electronic communication (such as listservs, mailing lists, and Websites that might not be considered "generally-accessible"), then the Amended Act is unconstitutional. If the Supreme Court of Ohio's decision does not give a ready answer to the question of whether or not the Amended Act applies

to other forms of electronic communication, then the Amended Act does not "convey an understandable standard capable of enforcement in the courts." *Norwood v. Horney*, 2006-Ohio-3799, 110 Ohio St.3d 353, 378-79, 853 N.E.2d 1115, 1142 (2006); *Kolender v. Lawson*, 461 U.S. 352, 357-358, (1983); and the Amended Act may well apply to other forms of electronic communication (such as listservs) in violation of the First Amendment.

Third, by concluding its decision with the statement that the decision does not "necessarily govern[] other types of electronic transmissions, whether currently in use ***or developed in the future,***" Slip Op. at ¶ 26, 124 Ohio St.3d at 333, 922 N.E.2d at 195 (emphasis added), the Supreme Court of Ohio ignores this critical fact: Each of the forms of electronic communication discussed by plaintiffs in their briefs in that Court—including listservs, mailing lists, and Websites that might not be considered "generally accessible"—were in use prior to the passage of the Amended Act in 2004. Plaintiffs recognize that it is not an easy task for legislatures to draft clear statutes applicable to electronic communications, the forms of which proliferate at a pace far more rapid that legislatures can act. But the issue here is not that the Ohio General Assembly did not anticipate forms of electronic communication developed after the passage of the Amended Act, or not yet developed as of today. The issue is whether the Amended Act is sufficiently

clear so that one can determine whether it applies to forms of electronic communication that were already in use when the Amended Act was passed.

Where does this leave this Court? Plaintiffs have prosecuted this action because the Amended Act, on its face, is unconstitutionally vague and overbroad, and restricts a broad range of adult-to-adult communications that are protected by the First Amendment. As this case proceeded from the District Court, to this Court, to the Supreme Court of Ohio, defendants Attorney General and prosecutors changed their position, arguing for an ever-narrower scope of the Amended Act in the hope of saving it from a finding of unconstitutionality. In adopting the Attorney General's latest construction of the Amended Act, the Supreme Court of Ohio substantially narrowed the scope of the Amended Act. That was entirely proper, as an exercise of the Supreme Court of Ohio's authority to adopt a limiting construction of an Ohio statute to render it constitutional, *State v. Beckley*, 5 Ohio St.3d 4, 8, 448 N.E.2d 1147, 1150 (1983).

Does that limiting construction save the Amended Act from a finding of unconstitutionality? That turns on how this Court resolves the ambiguity described above.

Plaintiffs ask this Court to hold that this language in the decision of the Supreme Court of Ohio is dispositive:

> We conclude that the scope of R.C. 2907.31(D) ***is limited to electronic communications that can be personally directed***, because

> otherwise the sender of matter harmful to juveniles cannot know or have reason to believe that a particular recipient is a juvenile.

Slip Op. at ¶ 24, 124 Ohio St.3d at 332, 922 N.E.2d at 195 (emphasis added). If this Court so holds—and thus holds that only electronic communications that are personally directed are subject to criminal prosecution under the Amended Act—then the Amended Act is not unconstitutionally vague or overbroad.

However, if this Court concludes that the Supreme Court of Ohio's limiting language was negated by the concluding sentences of that Court's decision—leaving in doubt whether or not the Amended Act applies to a broad range of electronic communication, including listservs, mailing lists, and Websites that might not be considered "generally-accessible"—then this Court should hold the Amended Act unconstitutional.

II. WHETHER THE SUPREME COURT OF OHIO'S NARROWING CONSTRUCTION OF THE AMENDED ACT AVOIDS VIOLATION OF THE COMMERCE CLAUSE

In their earlier briefing to the Court,[7] plaintiffs spelled out how the Amended Act was unconstitutional under the Commerce Clause in three respects:

1. It regulates commerce entirely outside of Ohio;
2. The burden imposed on interstate commerce exceeds any local benefit; and

[7] Principal and Response Brief of Plaintiffs-Appellees/CrossAppellants American Booksellers Foundation for Free Expression, *et. al.* pp. 49-57; Reply Brief of Plaintiffs-Appellees/Cross Appellants American Booksellers Foundation for Free Expression, *et. al.* pp. 8-10.

3. Its existence subjects interstate users of the Internet to inconsistent regulations.

Whether these exist after the decision of the Supreme Court of Ohio as they did before depends on how this Court resolves the ambiguity described in Point I above. If this Court holds that only electronic communications that are personally directed are subject to criminal prosecution under the Amended Act, then the Amended Act does not violate the Commerce Clause.

However, if this Court concludes that the Supreme Court of Ohio's limiting language was negated by the concluding sentences of that Court's decision—potentially applying the Amended Act to a broad range of electronic communications, including listservs, mailing lists, and Websites that might not be considered "generally-accessible"—then this Court should hold the Amended Act unconstitutional under the Commerce Clause as well, because the reasoning set forth in our prior briefing in this Court continues to be valid.

CONCLUSION

Plaintiffs-Appellees/Cross-Appellants respectfully request that this Court hold that the Amended Act is limited to electronic communications that are personally directed—so that no other electronic communications can be the subject of prosecutions under the Amended Act—and hold that, so limited, the Amended Act is constitutional, and thus modify the judgment of the District Court.

However, if this Court concludes that the Amended Act is not so limited, then Plaintiffs-Appellees/Cross-Appellants respectfully request that this Court hold that the Amended Act is unconstitutionally vague and overbroad, and violates the First Amendment and the Commerce Clause, and thus affirm the judgment of the District Court as to the First Amendment and reverse the judgment of the District Court as to the Commerce Clause.

April 7, 2010

Respectfully submitted,

/s/ Michael A. Bamberger
Michael A. Bamberger
Richard M. Zuckerman
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax (212) 768-6800

H. Louis Sirkin
Jennifer M. Kinsley
Sirkin, Kinsley, & Nazzarine
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax (513) 721-0876

Attorneys for Plaintiffs-Appellees/Cross-Appellants

Of Counsel:

Carrie L. Davis
American Civil Liberties Union of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax (216) 472-2210

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with:

1. the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,362 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

April 7, 2010

/s/ Michael A. Bamberger

Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
Telephone: (212) 768-6756
Facsimile: (212) 768-6800

Attorneys for Plaintiffs-Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Brief has been served by this Court's ECF system, and also by Federal Express for overnight delivery on April 7, 2010 on the following counsel:

RICHARD CORDRAY
Attorney General of Ohio
BENJAMIN C. MIZER
Solicitor General
ELISE W. PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

NICK A. SOULAS, JR.
Franklin County Prosecuting Attorney
373 South High Street - 13th Floor
Columbus, Ohio 43215

/s/ Michael A. Bamberger
Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
Telephone: (212) 768-6756
Facsimile: (212) 768-6800

Attorneys for Plaintiffs-Appellees/Cross-Appellants