IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ET AL., Plaintiffs, -VS.- TED STRICKLAND, ET AL., Defendants.	Case No. 3:02cv210 Judge Walter Herbert Rice

MOTION, PURSUANT TO FED. R. CIV. P. 59(e), TO ALTER OR AMEND JUDGMENT ENTERED MAY 26, 2010

Plaintiffs American Booksellers for Free Expression, et al., hereby move this Court, pursuant to FED. R. CIV. P. 59(e) to alter and amend the "Decision and Entry Carrying Out Order of Remand from Sixth Circuit Court of Appeals; Permanent Injunction Vacated; Judgment To Enter in Favor of Defendants and Against Plaintiffs Herein; Motion for Attorneys Fees and Costs(Docs. #66 and #107) Overruled as Moot; Termination Entry"(Doc. #124) and the Judgment (Doc. #125) (collectively, the "Judgment") entered herein on May 26, 2010:

(1) To delete the second and third paragraphs of the Judgment (Doc. #124), which provided:

> As the result of this Court's ruling above, the initial Motion of Plaintiffs, seeking attorneys fees and costs (Doc. # 66) (sustained by this Court, without quantification, at Doc. # 103) and second Motion for Attorneys Fees and Costs (Doc. #107), are, each in their entirety, overruled as moot. To the extent necessary, this Court's decision sustaining the initial Motion for Attorneys Fees (Doc. # 103), while deferring quantification of same, is vacated.
>
> The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

(2) To amend the Judgment (Doc. #124), by adding the following paragraphs, in these words or substance:

> This Court's decision (Doc. # 103) sustaining, without quantification, the initial Motion of Plaintiffs for attorneys' fees and costs (Doc. # 66), shall remain in effect. This Court issued a preliminary injunction (Doc. #30) based on its finding that Plaintiffs were likely to succeed on their claims that the challenged statute's definition of "harmful to juveniles" was unconstitutional. In response, the Ohio General Assembly enacted House Bill No. 490, 124th Gen. Assembly ("House Bill No. 490"), which remedied the deficiencies identified by this Court. The preliminary injunction which led to the enactment of House Bill No. 490 was a judicial sanction which altered the legal relationship between the parties in a manner that remains in effect today. Plaintiffs therefore were and are the "prevailing parties," pursuant to 42 U.S.C. § 1988, with respect to all proceedings in this litigation which preceded the enactment of House Bill No. 490.
>
> Following the enactment of House Bill No. 490, Plaintiffs continued to challenge the statute, as it applied to electronic communications, upon the grounds that it was not limited to personally-directed electronic communications directed to a minor, such as emails and instant messages. The Attorney General of Ohio maintained in this Court that the statute was not so limited. Based upon that breadth of the statute, as argued by the Attorney General, this Court held the statute unconstitutional. (Docs. #106). On appeal, the Attorney General changed his position on the scope of the statute, and argued to the United States Court of Appeals to the Sixth Circuit, and after certification of questions to the Supreme Court of Ohio, that the statute should be limited to personally-directed electronic communications. The Supreme Court of Ohio adopted that narrow construction of the Amended Act and, based on that construction, the United States Court of Appeals for the Sixth Circuit upheld the constitutionality of the Amended Act. This Court's issuance of a permanent injunction, and the Supreme Court of Ohio's answer to the certified questions limiting the scope of the Amended Act, are judicial sanctions which altered the legal relationship between the parties in a manner that remains in effect today. Plaintiffs therefore are the "prevailing parties," pursuant to 42 U.S.C. § 1988, with respect to all proceedings in this litigation which followed the enactment of House Bill No. 490.
>
> As noted above, this Court's decision (Doc. # 103) sustaining, without quantification, the initial Motion of Plaintiffs for attorneys' fees and costs (Doc. # 66), shall remain in effect. This Court hereby grants Plaintiffs' second Motion for Attorneys Fees and Costs (Doc. #107), without quantification. As provided in this Court's decision (Doc. # 103), Plaintiffs may their Motions for attorneys fees to cover the time period not covered by Plaintiffs' initial Motion or second Motion. Defendants may file a response thereto, and Plaintiffs may file a reply.

(3) To amend the Judgment (Doc. #125) in a manner corresponding to the changes in Doc. #124.

(4) To amend the Judgment (Docs. #124, 125) in such other respects as to this Court seems just and proper.

This motion is supported by the accompanying Memorandum of Law.

Dated: June 21, 2010

/s/ Michael A. Bamberger
Michael A. Bamberger
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax: (212) 768-6800
mbamberger@sonnenschein.com

Of Counsel:
CARRIE L. DAVIS (0077041)
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax: (216) 472-2210
cdavis@acluohio.org

H. Louis Sirkin (Bar No. 0024573)
Jennifer M. Kinsley (Bar No. 0071629)
SIRKIN, KINSLEY & NAZZARINE
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax: (513) 721-0876
lsirkin@skn-law.com
jkinsley@skn-law.com

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via this Court's electronic filing system upon all attorneys registered therewith, including Elise W. Porter, Office of the Ohio Attorney General, and Nick A Soulas, Jr., Franklin County Prosecutor's Office, on June 21, 2010.

/s/ Michael A. Bamberger
Michael A. Bamberger

Attorney for Plaintiffs American Booksellers Foundation for Free Expression et al

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AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ET AL., Plaintiffs, -vs- TED STRICKLAND, ET AL., Defendants.	Case No. 3:02cv210 Judge Walter Herbert Rice

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION PURSUANT TO FED. R. CIV. P. 59(e) TO ALTER OR AMEND THE JUDGMENT ENTERED MAY 26, 2010

Michael A. Bamberger
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax: (212) 768-6800
mbamberger@sonnenschein.com

Of Counsel:
CARRIE L. DAVIS (0077041)
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax: (216) 472-2210
cdavis@acluohio.org

H. Louis Sirkin (Bar No. 0024573)
Jennifer M. Kinsley (Bar No. 0071629)
SIRKIN, KINSLEY & NAZZARINE
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax: (513) 721-0876
lsirkin@skn-law.com
jkinsley@skn-law.com

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein

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Plaintiffs American Booksellers for Free Expression, et al. ("Plaintiffs") respectfully submit this Memorandum of Law in support of their motion, pursuant to FED. R. CIV. P. 59(e), to alter and amend the Judgment (Docs. #124, 125) entered herein on May 26, 2010 (the "Judgment").[1] Plaintiffs' motion asks that this Court amend the Judgment to reinstate this Court's prior decision (Doc. #103) sustaining Plaintiffs' initial motion for attorneys' fees (Doc. #66), to sustain Plaintiffs' second motion for attorneys' fees (Doc. #107), to permit Plaintiffs to supplement that motion, and to provide for further briefing with respect thereto.

PRELIMINARY STATEMENT

As the direct result of Plaintiffs' efforts in this litigation, an unconstitutional Ohio "harmful to juveniles" criminal statute was dramatically narrowed to render it constitutional—first by the preliminary injunction issued by this Court which caused the Ohio General Assembly to amend the statute, and second by the permanent injunction issued by this Court, which caused the Attorney General / Prosecutors to repudiate their earlier position asking that the statute be construed broadly, and led to the Supreme Court of Ohio's adopting a narrow construction of the statute. Plaintiffs are thus the prevailing parties, entitled to attorneys' fees.

In the first phase of this litigation, this Court entered an order (Doc. #51) granting Plaintiffs' motion for a preliminary injunction enjoining enforcement of the statute, as enacted by the Ohio General Assembly in 2002 (the "Act"). This Court held that Plaintiffs were likely to succeed on their claim that the Act was unconstitutional because the Act did not include *Miller/Ginsberg* standards (which are required for such statutes under decisions of the United

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[1] On May 26, 2010, this Court entered "Decision and Entry Carrying Out Order of Remand from Sixth Circuit Court of Appeals; Permanent Injunction Vacated; Judgment To Enter in Favor of Defendants and Against Plaintiffs Herein; Motion for Attorneys Fees and Costs (Docs. #66 and #107) Overruled as Moot; Termination Entry" dated May 25, 2010 (Doc. #124). Also on May 26, 2010, the Clerk entered a Judgment (Doc. #125).

States Supreme Court[2]), and because the statute criminalized not only sexually-explicit material (such prohibitions can be constitutional under *Miller/Ginsberg*), but also criminalized communications that included nudity, "foul language," violence and other First Amendment-protected subjects (such prohibitions are unconstitutional under *Miller/Ginsberg*).

In direct response to this Court's granting Plaintiff's motion for a preliminary injunction, the Ohio General Assembly enacted and the Governor signed House Bill No. 490, 124th Gen. Assembly ("House Bill No. 490") in early 2003, amending the Act (as amended, the "Amended Act"). House Bill No. 490 remedied the unconstitutional aspects of the Act that were the subject of this Court's order granting the preliminary injunction. House Bill No. 490 thus incorporated the *Miller/Ginsberg* standards into the statute's definition of "harmful to juveniles," and eliminated provisions of the Act relating to "foul language," violence, and other subjects, so that the Amended Act related only to sexually-explicit material. Upon enactment of the Bill, the Attorney General / Prosecutors withdrew their appeal from the preliminary injunction.

Plaintiffs thus prevailed in the first phase of this litigation, because it was Plaintiffs' efforts, in this litigation, and this Court's grant of the preliminary injunction, which brought about the enactment of House Bill No. 490 in early 2003. House Bill No. 490 brought about a permanent change in the law, which remains in effect today.

In the second phase of this litigation, this Court addressed the Amended Act. This Court granted Plaintiffs' motion for a permanent injunction, because the Amended Act—under the broad reading urged upon this Court by defendants Attorney General and prosecuting attorneys ("Attorney General / Prosecutors")—was not limited to personally-directed electronic communications directed to a minor, such as emails and instant messages. In response to this

[2] *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York,* 390 U.S. 629 (1968).

Court's granting Plaintiffs' motion for a permanent injunction, the Attorney General / Prosecutors changed their position on the scope of the Amended Act. Upon appeal to the United States Court of Appeals to the Sixth Circuit, and upon certified questions to the Supreme Court of Ohio, the Attorney General / Prosecutors argued that the Amended Act should be limited to personally-directed electronic communications. The Supreme Court of Ohio adopted that narrow construction, and based on that construction, the Sixth Circuit upheld the constitutionality of the Amended Act. Plaintiffs thus prevailed in the second phase of this litigation, because it was in response to this Court's granting of a permanent injunction that the State retreated from its expansive, unconstitutionally-broad reading of the Amended Act, and agreed that the statute should be limited to personally-directed electronic communications, such as emails and instant messages. That narrow construction—now embodied in a decision of the Supreme Court of Ohio—represents a change in the legal relationship of the parties which remains in effect today.

Of course, because of the amendment of the Act, and the Attorney General / Prosecutors's narrow reading of the Amended Act, the mandate of the Sixth Circuit directed that judgment be entered for the Defendants. But that entry of Judgment does not, and cannot, negate the fact that (a) the General Assembly amended the Act (remedying the unconstitutional definition of "harmful to juveniles") in response to this Court's grant of a preliminary injunction, and (b) the State adopted a narrow reading of the Amended Act (remedying its unconstitutional application to a broad range of Internet communications) in response to this Court's grant of a permanent injunction, and that narrow reading is now the law of the State of Ohio, by reason of the decision of the Supreme Court of Ohio. Plaintiffs are thus the prevailing parties in both the first phase and second phase of this litigation, and are entitled to attorneys' fees.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. The First Phase of This Action

A. House Bill No. 8

On May 6, 2002, the Governor signed into law House Bill No. 8, 124th Gen. Assembly ("House Bill No. 8" or the "Act"), which revised provisions of the Ohio Revised Code which criminalize the distribution of material that is deemed "harmful to juveniles."

B. Plaintiffs' Complaint

Plaintiffs, including a local Ohio bookseller, the Ohio Newspaper Association, and a broad group of mainstream publishers, distributors, retailers, and Website operators, brought this action. Plaintiffs alleged that House Bill No. 8 was unconstitutional in three principal respects. ***First,*** Plaintiffs argued that the Act's definition of material that is "harmful to juveniles" was unconstitutional because it did not incorporate the Supreme Court's *Miller/Ginsberg* standards. ***Second,*** Plaintiffs argued that the Act's definition of material that is "harmful to juveniles" violated the First Amendment because it included material that involved "foul language," descriptions of "human bodily functions," displays or descriptions of "bizarre violence," mere "nudity," and other matters—and was not limited to sexually-explicit material. ***Third,*** Plaintiffs argued that the Act, in extending the prohibition on distribution of harmful to minors materials to the Internet, violated the First Amendment because it swept within its scope a broad range of Internet communications among adults that were not directed to a particular minor. (Complaint, Doc. #1; Motion for Preliminary Injunction, Doc. #27).

C. This Court's Orders Granting a Temporary Restraining Order and a Preliminary Injunction

On August 2, 2002, before the effective date of House Bill No. 8, this Court issued a Temporary Restraining Order. (Doc. #49). On August 30, 2002, this Court issued a preliminary

injunction. *Bookfriends, Inc. v. Taft,* 223 F.Supp.2d 932, (S.D. Ohio 2002) (Doc. #51). This Court grounded its finding that Plaintiffs were likely to succeed on their claim that the Act was unconstitutional in two respects—both related to the Act's definition of "harmful to juveniles."

First, this Court noted that the Act did not include the Supreme Court's *Miller/Ginsberg* standards:

> As an initial matter, reenacted § 2907.01(E) does not define "harmful to juveniles" in accordance with the three-part test as adopted in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), as modified for juveniles in *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), the Supreme Court reiterated the three-part test for *Miller:*
>
> > (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> *Id.* at 872, 117 S.Ct. 2329 (quoting *Miller,* 413 U.S. at 24, 93 S.Ct. 2607). The test is modified in accordance with *Ginsberg,* so that the second prong of the test focuses upon whether the material is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." 390 U.S. at 633, 88 S.Ct. 1274. As indicated, reenacted § 2907.01(E) does not contain all three parts of that test. In particular, that legislation does not require the factfinder to decide whether the material in question, taken as a whole, lacks serious literary, artistic, political or scientific value, the third factor in the *Miller* test. *See Reno,* 521 U.S. at 873, 117 S.Ct. 2329 (noting that the third prong of the *Miller* test "critically limits the uncertain sweep of obscenity definition"). In addition, although § 2907.01(E)(1) contains language similar to the first prong of *Miller,* the second and third prongs of that test need not be met in order to demonstrate that the material in question is deemed to be "harmful to juveniles." It bears emphasis that the three prongs of the *Miller* test are conjunctive, rather than being disjunctive; therefore, a book or movie is not obscene, unless all three prongs have been established. *Reno,* 521 U.S. at 873, 117 S.Ct. 2329. Moreover, even though § 2907.01(E)(2) contains language which is somewhat analogous to the second prong of the *Miller* test, as modified by *Ginsberg*, that statutory language does not require that the specified sexual conduct be depicted in a patently offensive manner (the key to the second prong), nor does it require that the first and third prongs of that test be established, before the material in question is deemed to be "harmful to juveniles."

223 F.Supp.2d at 945-46.

Second, this Court held that the Act included materials in the definition of "harmful to juveniles" that are fully protected by the First Amendment—including descriptions and representations of "nudity," "extreme violence," representation of "human bodily functions," "repeated use of foul language," violence, and representations of "criminal activity":

> In addition, the various subsections of reenacted § 2907.01(E) include materials in the definition of "harmful to juveniles" which are fully protected by the First Amendment, thus rendering the dissemination of those materials to juveniles a criminal offense. For instance, reenacted § 2907.01(E)(2) includes nudity as something within the definition of "harmful to juveniles." In *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Supreme Court held that a sweeping restriction which criminalized showing any nudity to a juvenile was unconstitutionally overbroad. . . .
>
> In addition, reenacted § 2907.01(E)(3) includes depictions of extreme violence within the definition of "harmful to juveniles." Courts have held that the First Amendment forbids governments from preventing juveniles from being exposed to depictions of violence. *See e.g., American Amusement Machine Ass'n v. Kendrick,* 244 F.3d 572 (7th Cir.), *cert. denied,* 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001). ...
>
> Reenacted § 2907.01(E)(4) includes a display, description or representation of the human bodily functions of elimination within the definition of "harmful to juveniles." In *Reno*, the Supreme Court noted that the Miller definition of obscenity is limited to "sexual conduct" (anything short of that is constitutionally protected); therefore, the statute in question was unconstitutional because it included within its sweep "excretory activities" and "organs of both a sexual and excretory nature." 521 U.S. at 873, 117 S.Ct. 2329. Accordingly, the Court concludes that § 2907.01(E)(4) criminalizes expression which is fully protected by the First Amendment and that the definition of "harmful to juveniles" is substantially overbroad, because displays, descriptions or representations of the human bodily functions of elimination are included within that definition.
>
> Reenacted § 2907.01(E)(5) includes repeated use of foul language within the definition of "harmful to juveniles." It should go without saying that foul language and profanity enjoy protection under the First Amendment. ...
>
> Under reenacted § 2907.01(E)(6), the definition of "harmful to juveniles" includes "a display, description or representation in lurid detail of the violent physical torture, dismemberment, destruction or death of a human being." This statutory provision extends far beyond "sexual conduct," the type of speech which may be

> outlawed in accordance with the *Miller* test, as modified for juveniles in *Ginsberg. Reno,* 521 U.S. at 873, 117 S.Ct. 2329. ...
>
> Reenacted § 2907.01(E)(7) defines "harmful to juveniles" to include "a display, description or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt." In *Eclipse Enterprises, Inc. v. Gulotta,* 134 F.3d 63 (2nd Cir. 1997), the Second Circuit concluded that a local ordinance which prohibited the distribution to juveniles of trading cards depicting crimes and criminals violated the First Amendment. ...
>
> In sum, the statute criminalizes conduct and expression otherwise lawful, as protected by the First Amendment to the United States Constitution. Moreover, the statute as written, because of the overbreadth of reenacted § 2907.01(E), will sweep within its ambit, under the definition of "harmful to juveniles," not only predators, the avowed targets of the legislation, but also publishers, booksellers and others who disseminate materials to juveniles which are fully protected by the First Amendment. Accordingly, the definition of "harmful to juveniles," contained in reenacted § 2907.01(E), is substantially overbroad, in violation of the First Amendment.

223 F.Supp.2d at 946 – 950. This Court concluded:

> In sum, the Court concludes that three of the relevant factors (substantial likelihood of success on the merits, irreparable injury to the Plaintiffs if a preliminary injunction is not issued and the public interest) favor the entry of a preliminary injunction. Moreover, given that it is unlikely that anyone will suffer an injury if such an injunction is issued, that factor does not warrant denial of the requested relief. Balancing the four factors, the Court concludes that the Plaintiffs have demonstrated that they are entitled to preliminary injunctive relief. Accordingly, the Court sustains Plaintiffs' Motion for Preliminary Injunction (Doc. # 27). Therefore, the Defendants (other than Governor Taft), their agents, employees and persons acting in concert with them are hereby restrained from prosecuting anyone for violating § 2907.31 and 2907.311, to the extent that such a prosecution arises out of materials which are allegedly "harmful to juveniles."

223 F.Supp.2d at 952-953. This Court found it unnecessary to reach the issue of whether or not the statute's application to electronic communications over the Internet was also unconstitutional. 223 F.Supp.2d at 945. Defendants appealed.

D. House Bill No. 490

The Ohio General Assembly accepted this Court's conclusion—embodied in the preliminary injunction—that Plaintiffs were likely to succeed on their claim that the Act was

unconstitutional. The General Assembly therefore promptly amended the law to respond to the specific issues addressed by this Court. On January 2, 2003, the Governor signed into law House Bill No. 490.

House Bill No. 490 amended the "harmful to juveniles" definition by (a) adding the *Miller/Ginsberg* requirements, and (b) removing from the definition violence, nudity, foul language, and the other subjects that had been reviewed in this Court's order granting the preliminary injunction. House Bill No. 490 thus provided, in pertinent part (deletions are indicated by ~~strike-throughs~~; additions by underscores):

> (E) ~~Any material or performance is "harmful~~ "Harmful to juveniles~~," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any~~ means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:
>
> (1) ~~It tends to appeal~~ The material or performance, when considered as a whole, appeals to the prurient interest in sex of juveniles~~;~~.
>
> ~~(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;~~
>
> ~~(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;~~
>
> ~~(4) It contains a display, description, or representation of human bodily functions of elimination;~~
>
> ~~(5) It makes repeated use of foul language;~~
>
> ~~(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;~~
>
> ~~(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt~~ The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.
>
> (3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

Put simply, the Ohio General Assembly enacted House Bill No. 490 to eliminate the constitutional infirmities of House Bill No. 8 that had been reviewed in this Court's order granting a preliminary injunction, and upon which this Court found Plaintiffs were likely to succeed. This Court's order granting a preliminary injunction thus led directly to a permanent change in the Ohio statute.

Plaintiffs thus prevailed in the first phase of this action, obtaining by the issuance of the preliminary injunction and the enactment of House Bill No. 490 all of the relief that they could have obtained had those issues been litigated to final judgment in this Court.

E. The Appeal and Remand

Defendants had appealed this Court's order granting a preliminary injunction. On January 30, 2003, promptly after the Governor signed House Bill No. 490 into law, Defendants made a motion in the Sixth Circuit[3] to remand the case, stating:

> This is an appeal from an Order of the United States District Court for the Southern District of Ohio, Western Division (Rice, C.J.), which held unconstitutional the definition of "harmful to juveniles" in § 2907.01(E) of the Ohio Revised Code. After the filing of the Notice of Appeal in this action, the Ohio General Assembly adopted House Bill 490, which, among other things, substantially amended § 2901.01(E). Governor Taft recently signed H.B. 490. In light of the amendment, it is inappropriate for this appeal to be heard; instead it would be more appropriate for the District Court to consider the constitutionality of § 2907.01(E), as amended. In addition, there are other issues presented to the District Court but not previously decided. House Bill 490 also substantially affects these issues.

The Sixth Circuit granted the motion for remand (Doc #63), directing that the preliminary injunction remain in effect.

[3] *Bookfriends, Inc. v. Taft,* No. 02-4091 (6th Cir.), Appellant Motion filed to remand to district court (Jan. 30, 2003).

F. Plaintiffs' Initial Motion for Attorneys' Fees, and This Court's Order Granting That Motion

Having prevailed in the first phase of this action, Plaintiffs filed their initial motion for attorneys' fees in the amount of $82,100.02 on July 14, 2003. (Doc. #66). On March 10, 2004, this Court entered a decision and order (Doc. #103) granting the motion, with the amount of attorneys' fees to be quantified at a later date.

2. The Second Phase of this Action

A. Plaintiffs' Second Amended Complaint

On August 7, 2003, Plaintiffs filed a Second Amended Complaint (Doc. #69), to address the issue which this Court found it unnecessary to reach when it granted the preliminary injunction—the application of Ohio's "harmful to juveniles" statute to electronic communications over the Internet. That provision had been amended as part of House Bill No. 490.

Under the Amended Act, the act of furnishing the "harmful to juveniles" matter to a juvenile, independent of the actor's intent, is a crime. The Amended Act thus defines the criminal conduct as follows:

> (D) (1) A person directly sells, delivers, furnishes, disseminates, provides, exhibits, rents, or presents or directly offers or agrees to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present material or a performance to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section ***by means of an electronic method of remotely transmitting information*** if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

R.C. § 2907.31 (D)(1) (emphasis added). The Amended Act includes this exemption:

> (2) A person remotely transmitting information by means of a method of mass distribution does not directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present or directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present the material or performance in question to a juvenile, a group of juveniles, a law enforcement officer posing as a

juvenile, or a group of law enforcement officers posing as juveniles in violation of this section if either of the following applies:

(a) ***The person has inadequate information to know or have reason to believe that a particular recipient of the information or offer is a juvenile.***

(b) ***The method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information.***

R.C. § 2907.31 (D)(2) (emphasis added).

The Amended Act contains no definition of what is meant by "remotely transmitting information," or by "a method of mass distribution," or by "the ability to prevent a particular recipient from receiving the information," or by many of the other phrases in this provision.

The focus during the second phase of the litigation was the scope of the application of the Amended Act to electronic communications. Did that provision apply to all electronic communications—including, for example, the posting of materials on Websites, or the transmission of materials through listservs or mailing lists, or the transmission of materials in chat rooms? If so, the Amended Act would criminalize a broad range of adult-to-adult communications protected by the First Amendment. Or was the Amended Act's application to electronic communications limited to person-to-person emails and instant messages, directed to a specific person known by the sender to be a minor? If so, the provision would be constitutional—just as it is constitutional to prohibit a person from handing "harmful to minors" material, in person, to a person known to be a minor.

B. The Attorney General / Prosecutors' Position in This Court

In defending the Amended Act in this Court, the Attorney General / Prosecutors took the position that criminal prosecutions could be brought under the Amended Act based on some communications made through Websites, chat rooms, discussion groups, and mailing lists (or

listservs). In the State's memorandum in opposition to Plaintiffs' motion for summary judgment (Doc. #97), the Attorney General / Prosecutors thus stated:

> Web sites, chat rooms, discussion groups, etc., ***for the most part*** are also methods of communication that do 'not provide the person [transmitting the information] the ability to prevent a particular recipient from receiving the information. R.C. 2907.31(D)(2)(b). These generalized broadcasts of information are therefore specifically excepted from the operation of R.C. 2907.31.

(Doc. #97, p. 18) (emphasis added). The Attorney General / Prosecutors' use of the phrase ***"for the most part"*** thus implied that, ***in some instances,*** Websites, chat rooms, and discussion groups do provide the speaker with the ability to prevent a particular recipient from receiving the information, and that ***in those instances,*** the use of Websites, chat rooms, and discussion groups would be subject to this criminal statute.

With respect to e-mails and instant messages ("IMs"), the Attorney General / Prosecutors took the position in this Court that:

> These methods of Internet communication ***might fall within*** the reach of the statute if a person uses IM or e-mail to send material harmful to juveniles directly to a person (or persons) he has reason to believe is a juvenile (or are juveniles).

(Doc. #97, p. 19) (emphasis added). The Attorney General / Prosecutors did not state what would determine whether such communications ***"would fall within"*** the scope of the statute, but added a footnote that "Listservs or mail exploders fall between the two extremes," so that listservs "open to subscribers from the public or a large subset of the public" would be exempt from the statute while "a listserv with a smaller address list of e-mail recipients, open or of interest only to particular people" might fall within the purview of the statute. *Id.* The Attorney General / Prosecutors did not state where the statute drew the line between those listservs whose use could result in prosecution and those that could be used without such fear.

C. This Court's Order Granting a Permanent Injunction

Based on the Attorney General / Prosecutors' broad construction of the Amended Act, this Court held the Amended Act unconstitutional (Opinion, Doc. #104; Order and Entry, Doc. #105). This Court held:

> Although § 2907.31(D)(2) may act to limit the scope of this statute, § 2907.31(D)(1) is still overbroad and infringes on constitutionally protected adult-adult speech. The limiting provisions do not extend to one-to-one methods of communication in places such as chat rooms. According to the Court in *Reno,* every user of the internet has reason to know that some participants in chat rooms are minors. An adult would have no way of ensuring that her communications in a chat room would be between and among other adults alone. There is simply no means, under existing technology, to restrict conversations in a chat room to adults, only. Consequently, an adult sending a one-to-one message which is unprotected as to minors under the *Miller-Ginsberg* standard, but protected as to adults under the standard in *Miller,* will be liable under § 2907.31(D)(1). Therefore, the provision is overbroad. ...
>
> No matter the subjective intent of a chat room participant and regardless of whether he or she meant to communicate with juveniles, if a minor is in the chat room, the participant could be prosecuted under the statute in question, even though the conversation was intended only for adults and was protected vis a vis adults. Since the limiting provision of the statute would not prevent such a result and that result would violate the First Amendment, as interpreted by the Supreme Court in *Reno,* this Court concludes that § 2907.31(D)(2) does not sufficiently narrow subsection (D)(1) to save it from a challenge under the overbreadth doctrine.

American Booksellers Foundation for Free Expression v. Strickland, 512 F.Supp.2d 1082, 1094 (S.D. Ohio 2007). This Court issued an injunction, "permanently enjoining Ohio Revised Code § 2907.31(D)(1), as applied to internet communications." 512 F.Supp.2d at 1106.

D. Plaintiffs' Second Motion for Attorneys' Fees

On October 1, 2007, Plaintiffs filed a Second Motion for Attorneys' Fees (Doc. #107), seeking additional fees in the amount of $38,948.49. That motion covered fees and costs incurred after Plaintiffs' initial motion for attorneys' fees, and through the issuance of the permanent injunction. Taken together, the fees and costs sought on the initial motion

($82,100.02) and the fees and costs sought on the second motion ($38,948.49) come to $121,048.51.

E. The Attorney General / Prosecutors' Change of Position in the Sixth Circuit

After entry of the permanent injunction, the Attorney General / Prosecutors appealed to the Sixth Circuit. Because House Bill No. 490 had remedied the constitutional infirmities in the Act's definition of "harmful to juveniles," the issues on the appeal were limited to those raised in the second phase of this action.

On appeal to the Sixth Circuit from this Court's decision granting a permanent injunction, the Attorney General / Prosecutors dramatically changed the State's position on the scope of the Amended Act's application to electronic communications. Abandoning the position that the State had taken in this Court—that the Amended Act applied to some Websites, chat rooms, discussion groups, and mailing lists (listservs)—the Attorney General / Prosecutors argued in the Sixth Circuit that the Amended Act is constitutional because it only covers "direct communications ... with juveniles,"[4] and thus would not apply either to Websites or chatrooms. To support this narrowing construction of the statute, the Attorney General / Prosecutors stated, "most Internet technologies—including the Web, USENET discussion groups, chat rooms, and mailing lists—do not allow senders to prevent particular recipients from receiving the transmissions."[5] Based on that statement, the Attorney General / Prosecutors concluded, "[C]ontrary to Plaintiffs' repeated suggestions, the statute does not regulate Web

[4] Final First Brief of Attorney General, *American Booksellers Foundation for Free Expression v. Strickland* (6th Cir.), Nos. 07-4375, 4376 ("AG 6th Cir. First Br.), p. 28.

[5] Final Third Brief of Attorney General, *American Booksellers Foundation for Free Expression v. Strickland* (6th Cir.), Nos. 07-4375, 4376 ("AG 6th Cir. Third Br."), p. 3.

communications, other than such personally directed devices as instant messaging ("IM") or person-to-person e-mail."[6]

After the Attorney General / Prosecutors took this changed position, the Sixth Circuit, *sua sponte,* certified these questions to the Supreme Court of Ohio:

> (1) Is the Attorney General correct in construing R.C. § 2907.31(D) to limit the scope of § 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?
>
> (2) Is the Attorney General correct in construing R.C. § 2907.31(D) to exempt from liability material posted on generally accessible websites and in public chat rooms?

American Booksellers Foundation for Free Expression v. Strickland, 560 F.3d 443, 447 (6th Cir. 2009).

F. Proceedings in the Supreme Court of Ohio, and the Supreme Court of Ohio's Answer to the Sixth Circuit's Certified Questions

In the Supreme Court of Ohio, the Attorney General / Prosecutors continued to repudiate the position that they had taken in this Court, and explicitly argued that "posting harmful material on generally accessible websites and public chat rooms is not criminal conduct."[7]

Accepting the Attorney General / Prosecutors' narrow construction of the Amended Act, the Supreme Court of Ohio answered each certified question, "yes." *American Booksellers Foundation for Free Expression v. Cordray,* 124 Ohio St.3d 329, 922 N.E.2d 192 (Ohio 2010).

That decision by the Supreme Court of Ohio means that, contrary to the position taken by the Attorney General / Prosecutors in this Court, no prosecution can be brought under the

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[6] *Id.*

[7] Merit Brief of Petitioners Ohio Attorney General et al., *Cordray v. American Booksellers Foundation for Free Expression,* Docket No. 2009-0609 (Supreme Court of Ohio), p. 12.

Amended Act for posting "harmful to minors" material on Websites, or transmitting such material through public chat rooms and mailing lists (listservs).

G. The Decision of the Sixth Circuit

After receiving the Supreme Court of Ohio's answers to the certified questions, the Sixth Circuit issued its opinion addressing the scope of the Amended Act. The Sixth Circuit made clear that the issue had been framed by the Attorney General's construction of the Amended Act, and that it was relying both on the Attorney General's narrow construction of the Amended Act and the Supreme Court of Ohio's endorsement of that narrow construction.

> Upon our request, the Ohio Supreme Court expressly confirmed the defendants' interpretation of the statute, first concluding that the statute "can be violated only when matter harmful to juveniles is transmitted to someone who the sender knows is a juvenile or has reason to believe is a juvenile." *Am. Booksellers*, 922 N.E.2d at 195. "The statute does not require that the sender know the recipient by name, but that the sender know or have reason to believe that the recipient is a juvenile." *Id.* The court accordingly held "that the scope of [section] 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." *Id.*
>
> The Ohio Supreme Court also concluded that the statute "is not violated when matter harmful to juveniles is disseminated by a method of mass distribution that does not allow the sender to prevent the distribution to particular recipients." Id. The court explained that, "[b]ased on [its] understanding of generally accessible websites and public chat rooms," these fora "are open to all, including juveniles, and current usage and technology do not allow a person who posts thereon to prevent particular recipients, including juveniles, from accessing the information posted." *Id.* The court therefore held "that a person who posts matter harmful to juveniles on generally accessible websites and in public chat rooms does not violate [section] 2907.31(D), because such a posting does not enable that person to 'prevent a particular recipient from receiving the information.' " *Id.*

American Booksellers Foundation for Free Expression v. Strickland, 601 F.3d 622, 626 (6th Cir. 2010). The Sixth Circuit concluded:

> we find that the statute, as interpreted by the Ohio Supreme Court, is constitutional under both the First Amendment and the Commerce Clause.

601 F.3d at 628. The Sixth Circuit's opinion concluded:

> We therefore REVERSE the district court's entry of judgment for the plaintiffs and REMAND the case to the district court with instructions to vacate the permanent injunction and to enter judgment for defendants.

601 F.3d at 628.

As noted above, no issue with respect to the first phase of this litigation was before the Sixth Circuit. The Sixth Circuit therefore did not address the constitutional infirmity of the original Act's definition of "harmful to juveniles"—as found by this Court in its order granting the preliminary injunction, and as remedied by the General Assembly when it enacted House Bill No. 490. The Sixth Circuit did not address whether Plaintiffs were the "prevailing parties" for the first phase of the litigation.

Similarly, while Plaintiffs pointed out, in their briefs in the Sixth Circuit, that the Attorney General / Prosecutors had changed the State's position on the scope of the Amended Act, as it applied to electronic communications, the Sixth Circuit did not address that change of position. Instead, the Sixth Circuit based its certified questions to the Supreme Court of Ohio, and its decision after receiving the answers, on the Attorney General / Prosecutors' new position. Thus, the Sixth Circuit did not address whether Plaintiffs—having procured a permanent injunction based on the Attorney General / Prosecutors' broad construction of the Amended Act, which caused the Attorney General / Prosecutors to adopt a narrow construction on appeal—were the "prevailing parties" for the second phase of this litigation.

3. This Court's May 26, 2010 Judgment

On May 26, 2010, this Court entered its Judgment. (Docs. #124, 125).

The first paragraph of the Judgment followed the mandate of the Sixth Circuit:

> Pursuant to the April 15, 2010 Order of Remand of the United States Court of Appeals for the Sixth Circuit, the permanent injunction previously issued by this Court is vacated and final judgment is entered in favor of Defendants and against Plaintiffs herein.

(Doc. #124).

The second and third paragraphs of the Judgment addressed the issue of attorneys' fees—an issue that had not been addressed by the Sixth Circuit:

> As the result of this Court's ruling above, the initial Motion of Plaintiffs, seeking attorneys fees and costs (Doc. # 66) (sustained by this Court, without quantification, at Doc. # 103) and second Motion for Attorneys Fees and Costs (Doc. #107), are, each in their entirety, overruled as moot. To the extent necessary, this Court's decision sustaining the initial Motion for Attorneys Fees (Doc. # 103), while deferring quantification of same, is vacated.
>
> The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

(Doc. #124).

4. This Rule 59(e) Motion

Plaintiffs are hereby moving to alter and amend the Judgment, to reinstate this Court's prior decision (Doc. #103) sustaining Plaintiffs' initial motion for attorneys' fees (Doc. #66), to sustain Plaintiffs' second motion for attorneys' fees (Doc. #107), to permit Plaintiffs to supplement that motion for fees and expenses for the period of time after Plaintiffs' second motion, and to provide for further briefing with respect thereto.

ARGUMENT

—

THE JUDGMENT SHOULD BE AMENDED TO PROVIDE FOR THE AWARD OF ATTORNEYS' FEES TO PLAINTIFFS, WHO PREVAILED IN BOTH THE FIRST AND SECOND PHASES OF THIS LITIGATION

Plaintiffs are the prevailing parties, entitled to attorneys' fees for both the first phase and second phase of this action, because this Court's Order granting the preliminary injunction, this Court's Order granting the permanent injunction, and the Supreme Court of Ohio's answers to the certified questions brought about a "judicially sanctioned" change in the legal relationship of the parties, *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and*

Human Resources, 532 U.S. 598, 605 (2001) ("*Buckhannon*"); 42 U.S.C. § 1988. Those judicial sanctions materially altered the parties' relationship "in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989); *Bronco's Entertainment, Ltd. v. Charter Township of Van Buren*, 214 Fed. Appx. 572 (6th Cir. 2007); *DiLaura v. Township of Ann Arbor*, 471 F.3d 666 (6th Cir. 2006).

1. Plaintiffs Prevailed in the First Phase of this Action, Because This Court's Issuance of a Preliminary Injunction Led the Ohio General Assembly To Enact House Bill No. 490, Amending the Act, and That Relief Was Not "Undone" By the Further Proceedings in this Action

In *Gamble v. Ohio Dept. of Job and Family Services*, 2007 WL 3046492 (S.D. Ohio, Oct. 16, 2007), this Court determined that the plaintiffs were the "prevailing parties" under 42 U.S.C. § 1988, after a course of events that directly parallel this case: In *Gamble*, the Court granted plaintiffs' motion for a preliminary injunction enjoining the enforcement of an administrative regulation, and the State amended the administrative regulation to remedy the infirmities identified by the Court, but final judgment was ultimately entered for defendants, on a different basis. Because that is precisely what happened here (except that here a statute, rather than an administrative regulation, was amended), the Court's analysis in *Gamble* is particularly instructive.

In *Gamble*, plaintiffs sought, and were granted, a preliminary injunction to enjoin the Ohio Department of Job and Family Services ("ODJFS") from following an administrative regulation which provided for "recouping erroneous overpayments [of child support payment made to custodial parents] from Plaintiffs' subsequent child support payments without Plaintiffs' explicit consent, or, barring that, without a court procedure awarding the overpayments to Defendants." 2007 WL 3046492, at *1. In response to the preliminary injunction, ODJFS

> implement[ed] a policy change, amending an existing administrative regulation on January 4, 2005 "on an emergency basis to comply with [this Court's] preliminary injunction of September 28, 2004." (Doc. 63 at 2.) On April 3, 2005, the ODJFS codified the new regulation at Ohio Admin. Code § 5101:12-80-05.6(F) as a "permanent rule to implement the provisions of the September 28, 2004" injunction. (*Id.*)

2007 WL 3046492, at *2. The change in the administrative regulation left one surviving claim, and the *Gamble* action continued on that separate issue—whether ODJFS had violated plaintiffs' due process rights in its calculation and distribution of child support payments. *Id.* The District Court later dismissed that surviving claim, granting defendants' motion for judgment on the pleadings. *Gamble v. Ohio Dept. of Job and Family Services,* 2007 WL 2417402 (S.D. Ohio Aug 21, 2007).

Applying "prevailing party" standards to this course of events, this Court held in *Gamble:*

> As applied to this case, these rules require the Court to determine whether the permanent amendment to the Ohio Administrative Code, made to comply with this Court's order enjoining Defendants from "recouping erroneous overpayments from Plaintiffs' subsequent child support payments without Plaintiffs' explicit consent, or, barring that, without a court procedure awarding the overpayments to Defendants," was a judicially sanctioned, material alteration of the legal relationship of the parties that was not ultimately undone by the Court's final decision that the Plaintiffs did not state a cause of action under § 1983 for violation of 42 U.S.C. § 657(a) or a due process violation stemming from the Defendants' alleged inability to perform accurate audits. The Court finds that the Ohio Administrative Rule change, permanently in effect as of April 3, 2005, altered the legal relationship of the parties, was not done voluntarily by the Defendants but was judicially sanctioned, and was not undone by the Court's final ruling.
>
> The Court did not issue its September 28, 2004 injunction hastily. The matter was fully briefed by both parties in late summer 2003 (docs. 6, 8, 12, and 13), and the Court held a conference on July 27, 2004 during which counsel for all parties represented that the motion did not require a hearing. Thus, the Court had deliberately considered the merits of Plaintiffs' claim when, in an eleven-page order, it concluded that Plaintiffs had a property interest in child support payments protected by the Due Process Clause and that the recoupment notice being used by the Defendants was likely insufficient to satisfy the requirements of due process. (Doc. 26 at 8-9.) To comply with the Court's order, the ODJFS Director amended the Administrative Rule to address the due process concern with respect to recoupment. This was not a voluntary change in conduct. *Contra*

> *Buckhannon*, 532 U.S. at 605 (finding that a state's voluntary revision of the challenged statute, while accomplishing the plaintiffs' objectives, was not a "judicially sanctioned change in the legal relationship of the parties."). Thus, because the Court ordered the Defendants to change the procedure with respect to the withholding of erroneous overpayments, the ODJFS' Director did so, and the legal relationship of the parties was altered (because Defendants could no longer withhold erroneous overpayments without consent or a court order), Plaintiffs are prevailing parties with respect to the injunction.

2007 WL 3046492, at *3.

In *Gamble,* in concluding that the entry of judgment on the pleadings for defendants did not undermine plaintiffs' claim for attorneys' fees relating to the issuance of the preliminary injunction which led to the change in the administrative regulation, this Court specifically addressed the Supreme Court's decision in *Sole v. Wyner,* 551 U.S. 74, 82 (2007). In *Sole v. Wyner,* the Supreme Court held that a plaintiff cannot recover fees as a "prevailing party" based on a preliminary injunction where plaintiff's "temporary success rested on a premise the District Court ultimately rejected" and "the preliminary injunction .... is reversed, dissolved, or otherwise undone by the final decision in the same case." That principle did not negate the plaintiffs' entitlement to attorneys' fees in *Gamble,* because the change in the administrative regulation, made in response to the preliminary injunction, was not undone by the ultimate entry of judgment on the pleadings in favor of defendants. *Gamble v. Ohio Dept. of Job and Family Services,* 2007 WL 3046492, at *3.

The course of events in this case parallels those in *Gamble:* Here, this Court issued a preliminary injunction, based on a thorough consideration of the legal issues, enjoining the enforcement of the Act. Here, in response to this Court's order granting a preliminary injunction, the General Assembly enacted House Bill No. 490, amending the Act to address the precise concerns that were the subject of the preliminary injunction. Here, the case proceeded to address other issues—the application of the Amended Act to electronic communications. Here,

the change in the parties' legal relationship brought about by the preliminary injunction and the enactment of the Amended Act "was not undone" by the ultimate resolution of those other issues. The Amended Act, with the inclusion of the *Miller/Ginsberg* standards, and the restriction of the Amended Act to sexually-explicit communications (repealing those provisions of the original Act which covered nudity, violence, foul language, etc.), remains in place, as a permanent change in the parties' legal relationship.

As in *Gamble,* Plaintiffs here are the "prevailing parties" with respect to the first phase of this action.

2. Plaintiffs Prevailed in the Second Phase of this Action, Because This Court's Issuance of a Permanent Injunction Led the Ohio Attorney General To Abandon the State's Argument for a Broad, Unconstitutional Construction of the Act, and To Argue, Instead, for a Narrow, Constitutional Construction of the Act, Which Was Adopted by the Supreme Court of Ohio

To evaluate whether Plaintiffs were also the "prevailing parties" in the second phase of this action, which addressed the application of the Amended Act to electronic communications, and particularly communications over the Internet, this Court must again answer the question under *Buckhannon:* Was there a "judicially sanctioned" change in the legal relationship of the parties which was not "undone" by the ultimate disposition of the action? The answer is "yes."

Throughout the proceedings in this Court, the Attorney General / Prosecutors took the position the persons could lawfully be prosecuted under the Amended Act, at least under some circumstances, for posting "harmful to juveniles" materials on Websites, or communicating such materials in chat rooms, or through mailing lists (listservs). That was the state of the legal relationship between Plaintiffs and defendant Prosecutors when this litigation began.

When this Court issued its permanent injunction, it "judicially sanctioned" a change in the parties' legal relationship: The Prosecutors were no longer free to prosecute the Plaintiffs (or anyone else) based on the electronic communication of "harmful to juveniles" materials.

The Attorney General / Prosecutors then made a strategic decision not to defend the full breadth of the Amended Act, and instead to seek to have the Amended Act held constitutional by arguing that it was limited to emails and IMs. In response to the Attorney General / Prosecutors' change in position, the Sixth Circuit certified questions to the Supreme Court of Ohio, which explicitly answered that the Amended Act "exempt[s] from liability material posted on generally accessible websites and in public chat rooms." The Supreme Court of Ohio's answer to the certified questions was also a judicial sanction, confirming the change in the parties' legal relationship, and precluding prosecutions based on Websites, public chat rooms, and mailing lists.

That change is permanent; it was not undone by the entry of judgment for Defendants. Defendant Attorney General / Prosecutors can no longer take the position that they are free to bring criminal prosecutions against Plaintiffs (and others) for posting or communicating "harmful to juveniles" materials on Websites, in chat rooms, and otherwise. If any prosecutor within the State were to bring such a prosecution, it would promptly be dismissed based on the definitive construction of the Amended Act by the Supreme Court of Ohio.

In *Exeter-West Greenwich Regional School Dist. v. Pontarelli,* 788 F.2d 47 (1st Cir. 1986), the First Circuit addressed whether plaintiffs were the "prevailing parties" under 42 U.S.C. § 1988 in a litigation which followed a procedural course comparable to this case. In *Exeter-West*, a local school district and taxpayer brought suit in federal district court against the Rhode Island Commissioner of Education, challenging, on First Amendment grounds, the Commissioner's directive that the school district pay tuition for a student to attend a religious

school. Plaintiffs secured a temporary restraining order in the federal district court, which then certified, to the Rhode Island Supreme Court, the question of whether state law required the school district to pay the religious school tuition. The Rhode Island Supreme Court held that state law did not so require and, on that basis, the federal district court dismissed plaintiffs' complaint as moot. The First Circuit held that the plaintiffs school district and taxpayer were the "prevailing parties" because, by obtaining the temporary restraining order in federal district court, and by then obtaining a definitive construction of state law from the Rhode Island Supreme Court, plaintiffs "achieved ... the benefit they sought from their § 1983 claim" and prevailed on "the merits." 788 F.2d at 51.[8] The fact that the federal action was dismissed as moot did not undermine plaintiffs having attained—through the temporary restraining order, and the state supreme court's answer to the certified question—exactly the relief that they sought.

Similarly, here, this Court's entry of judgment for Defendants, in accordance with the Sixth Circuit's mandate, does not undermine Plaintiffs having attained—through the permanent injunction, the Attorney General's change of position on the appeal, and the Supreme Court of Ohio's answers to the certified questions—substantially the relief that they sought.

The only difference between this case and *Exeter-West* is that here, after losing in the federal district court, the state defendants changed their position on the appeal. But the Attorney General / Prosecutors cannot deprive Plaintiffs of their status as a "prevailing party" by changing their position, after the issuance of a permanent injunction, on the scope of the Amended Act. In

[8] In *Exeter-West*, the First Circuit found that plaintiffs were prevailing parties under two separate and distinct tests. First, the court found that plaintiffs had prevailed on "the merits." 788 F.2d at 50-52. Second the court found that plaintiffs' federal claim was the "catalyst" for the change in the Rhode Island Commissioner's position. 788 F.2d at 52-53. While *Buckhannon* rejected the "catalyst" test, it cast no doubt on the validity of that portion of the First Circuit's decision which found that plaintiffs had prevailed "on the merits" because of the Rhode Island Supreme Court's answer to the certified question.

Bronco's Entertainment, Ltd. v. Charter Township of Van Buren, 214 Fed. Appx. at 576, the Sixth Circuit held that the district court should have awarded attorneys' fees to plaintiffs, as "prevailing parties", who succeeded in narrowing the grounds under which defendant township could deny a license for a sexually oriented business, stating:

> the law with which the Plaintiffs must comply is not the law which the Plaintiffs challenged because the ordinance no longer includes two provisions that this court found to be unconstitutional. ... Plaintiffs obtained an enforceable alteration in their legal relationship with the Township without obtaining all of the changes that they sought.

Here, too, "the law with which the Plaintiffs must comply is not the law which the Plaintiffs challenged." Plaintiffs are the "prevailing parties" with respect to the second phase of this action.

CONCLUSION

Plaintiffs respectfully request that this Court alter and amend the Judgment to reinstate this Court's prior decision (Doc. #103) sustaining Plaintiffs' initial motion for attorneys' fees (Doc. #66), to sustain Plaintiffs' second motion for attorneys' fees (Doc. #107), to permit Plaintiffs to supplement that motion with respect to fees and costs incurred after the issuance of the permanent injunction, and to provide for further briefing with respect thereto.

Dated: June 21, 2010

/s/ Michael A. Bamberger
Michael A. Bamberger
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax: (212) 768-6800
mbamberger@sonnenschein.com

Of Counsel:
CARRIE L. DAVIS (0077041)
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax: (216) 472-2210
cdavis@acluohio.org

H. Louis Sirkin (Bar No. 0024573)
Jennifer M. Kinsley (Bar No. 0071629)
SIRKIN, KINSLEY & NAZZARINE
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax: (513) 721-0876
lsirkin@skn-law.com
jkinsley@skn-law.com

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via this Court's electronic filing system upon all attorneys registered therewith, including Elise W. Porter, Office of the Ohio Attorney General, and Nick A Soulas, Jr., Franklin County Prosecutor's Office, on June 21, 2010.

/s/ Michael A. Bamberger
Michael A. Bamberger

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ET AL., Plaintiffs, -vs.- TED STRICKLAND, ET AL., Defendants.	Case No. 3:02cv210 Judge Walter Herbert Rice

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION PURSUANT TO FED. R. CIV. P. 59(e) TO ALTER OR AMEND THE JUDGMENT ENTERED MAY 26, 2010

Michael A. Bamberger
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax: (212) 768-6800
mbamberger@sonnenschein.com

H. Louis Sirkin (Bar No. 0024573)
Jennifer M. Kinsley (Bar No. 0071629)
SIRKIN, KINSLEY & NAZZARINE
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax: (513) 721-0876
lsirkin@skn-law.com
jkinsley@skn-law.com

Of Counsel:
CARRIE L. DAVIS (0077041)
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax: (216) 472-2210
cdavis@acluohio.org

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein

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RULES

Plaintiffs American Booksellers for Free Expression, et al. ("Plaintiffs") respectfully submit this Memorandum of Law in support of their motion, pursuant to FED. R. CIV. P. 59(e), to alter and amend the Judgment (Docs. #124, 125) entered herein on May 26, 2010 (the "Judgment").[1] Plaintiffs' motion asks that this Court amend the Judgment to reinstate this Court's prior decision (Doc. #103) sustaining Plaintiffs' initial motion for attorneys' fees (Doc. #66), to sustain Plaintiffs' second motion for attorneys' fees (Doc. #107), to permit Plaintiffs to supplement that motion, and to provide for further briefing with respect thereto.

PRELIMINARY STATEMENT

As the direct result of Plaintiffs' efforts in this litigation, an unconstitutional Ohio "harmful to juveniles" criminal statute was dramatically narrowed to render it constitutional—first by the preliminary injunction issued by this Court which caused the Ohio General Assembly to amend the statute, and second by the permanent injunction issued by this Court, which caused the Attorney General / Prosecutors to repudiate their earlier position asking that the statute be construed broadly, and led to the Supreme Court of Ohio's adopting a narrow construction of the statute. Plaintiffs are thus the prevailing parties, entitled to attorneys' fees.

In the first phase of this litigation, this Court entered an order (Doc. #51) granting Plaintiffs' motion for a preliminary injunction enjoining enforcement of the statute, as enacted by the Ohio General Assembly in 2002 (the "Act"). This Court held that Plaintiffs were likely to succeed on their claim that the Act was unconstitutional because the Act did not include *Miller/Ginsberg* standards (which are required for such statutes under decisions of the United

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[1] On May 26, 2010, this Court entered "Decision and Entry Carrying Out Order of Remand from Sixth Circuit Court of Appeals; Permanent Injunction Vacated; Judgment To Enter in Favor of Defendants and Against Plaintiffs Herein; Motion for Attorneys Fees and Costs (Docs. #66 and #107) Overruled as Moot; Termination Entry" dated May 25, 2010 (Doc. #124). Also on May 26, 2010, the Clerk entered a Judgment (Doc. #125).

States Supreme Court[2]), and because the statute criminalized not only sexually-explicit material (such prohibitions can be constitutional under *Miller/Ginsberg*), but also criminalized communications that included nudity, "foul language," violence and other First Amendment-protected subjects (such prohibitions are unconstitutional under *Miller/Ginsberg*).

In direct response to this Court's granting Plaintiff's motion for a preliminary injunction, the Ohio General Assembly enacted and the Governor signed House Bill No. 490, 124th Gen. Assembly ("House Bill No. 490") in early 2003, amending the Act (as amended, the "Amended Act"). House Bill No. 490 remedied the unconstitutional aspects of the Act that were the subject of this Court's order granting the preliminary injunction. House Bill No. 490 thus incorporated the *Miller/Ginsberg* standards into the statute's definition of "harmful to juveniles," and eliminated provisions of the Act relating to "foul language," violence, and other subjects, so that the Amended Act related only to sexually-explicit material. Upon enactment of the Bill, the Attorney General / Prosecutors withdrew their appeal from the preliminary injunction.

Plaintiffs thus prevailed in the first phase of this litigation, because it was Plaintiffs' efforts, in this litigation, and this Court's grant of the preliminary injunction, which brought about the enactment of House Bill No. 490 in early 2003. House Bill No. 490 brought about a permanent change in the law, which remains in effect today.

In the second phase of this litigation, this Court addressed the Amended Act. This Court granted Plaintiffs' motion for a permanent injunction, because the Amended Act—under the broad reading urged upon this Court by defendants Attorney General and prosecuting attorneys ("Attorney General / Prosecutors")—was not limited to personally-directed electronic communications directed to a minor, such as emails and instant messages. In response to this

[2] *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York,* 390 U.S. 629 (1968).

Court's granting Plaintiffs' motion for a permanent injunction, the Attorney General / Prosecutors changed their position on the scope of the Amended Act. Upon appeal to the United States Court of Appeals to the Sixth Circuit, and upon certified questions to the Supreme Court of Ohio, the Attorney General / Prosecutors argued that the Amended Act should be limited to personally-directed electronic communications. The Supreme Court of Ohio adopted that narrow construction, and based on that construction, the Sixth Circuit upheld the constitutionality of the Amended Act. Plaintiffs thus prevailed in the second phase of this litigation, because it was in response to this Court's granting of a permanent injunction that the State retreated from its expansive, unconstitutionally-broad reading of the Amended Act, and agreed that the statute should be limited to personally-directed electronic communications, such as emails and instant messages. That narrow construction—now embodied in a decision of the Supreme Court of Ohio—represents a change in the legal relationship of the parties which remains in effect today.

Of course, because of the amendment of the Act, and the Attorney General / Prosecutors's narrow reading of the Amended Act, the mandate of the Sixth Circuit directed that judgment be entered for the Defendants. But that entry of Judgment does not, and cannot, negate the fact that (a) the General Assembly amended the Act (remedying the unconstitutional definition of "harmful to juveniles") in response to this Court's grant of a preliminary injunction, and (b) the State adopted a narrow reading of the Amended Act (remedying its unconstitutional application to a broad range of Internet communications) in response to this Court's grant of a permanent injunction, and that narrow reading is now the law of the State of Ohio, by reason of the decision of the Supreme Court of Ohio. Plaintiffs are thus the prevailing parties in both the first phase and second phase of this litigation, and are entitled to attorneys' fees.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. The First Phase of This Action

A. House Bill No. 8

On May 6, 2002, the Governor signed into law House Bill No. 8, 124th Gen. Assembly ("House Bill No. 8" or the "Act"), which revised provisions of the Ohio Revised Code which criminalize the distribution of material that is deemed "harmful to juveniles."

B. Plaintiffs' Complaint

Plaintiffs, including a local Ohio bookseller, the Ohio Newspaper Association, and a broad group of mainstream publishers, distributors, retailers, and Website operators, brought this action. Plaintiffs alleged that House Bill No. 8 was unconstitutional in three principal respects. ***First,*** Plaintiffs argued that the Act's definition of material that is "harmful to juveniles" was unconstitutional because it did not incorporate the Supreme Court's *Miller/Ginsberg* standards. ***Second,*** Plaintiffs argued that the Act's definition of material that is "harmful to juveniles" violated the First Amendment because it included material that involved "foul language," descriptions of "human bodily functions," displays or descriptions of "bizarre violence," mere "nudity," and other matters—and was not limited to sexually-explicit material. ***Third,*** Plaintiffs argued that the Act, in extending the prohibition on distribution of harmful to minors materials to the Internet, violated the First Amendment because it swept within its scope a broad range of Internet communications among adults that were not directed to a particular minor. (Complaint, Doc. #1; Motion for Preliminary Injunction, Doc. #27).

C. This Court's Orders Granting a Temporary Restraining Order and a Preliminary Injunction

On August 2, 2002, before the effective date of House Bill No. 8, this Court issued a Temporary Restraining Order. (Doc. #49). On August 30, 2002, this Court issued a preliminary

injunction. *Bookfriends, Inc. v. Taft,* 223 F.Supp.2d 932, (S.D. Ohio 2002) (Doc. #51). This Court grounded its finding that Plaintiffs were likely to succeed on their claim that the Act was unconstitutional in two respects—both related to the Act's definition of "harmful to juveniles."

First, this Court noted that the Act did not include the Supreme Court's *Miller/Ginsberg* standards:

> As an initial matter, reenacted § 2907.01(E) does not define "harmful to juveniles" in accordance with the three-part test as adopted in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), as modified for juveniles in *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), the Supreme Court reiterated the three-part test for *Miller:*
>
> > (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> *Id.* at 872, 117 S.Ct. 2329 (quoting *Miller,* 413 U.S. at 24, 93 S.Ct. 2607). The test is modified in accordance with *Ginsberg,* so that the second prong of the test focuses upon whether the material is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." 390 U.S. at 633, 88 S.Ct. 1274. As indicated, reenacted § 2907.01(E) does not contain all three parts of that test. In particular, that legislation does not require the factfinder to decide whether the material in question, taken as a whole, lacks serious literary, artistic, political or scientific value, the third factor in the *Miller* test. *See Reno,* 521 U.S. at 873, 117 S.Ct. 2329 (noting that the third prong of the *Miller* test "critically limits the uncertain sweep of obscenity definition"). In addition, although § 2907.01(E)(1) contains language similar to the first prong of *Miller,* the second and third prongs of that test need not be met in order to demonstrate that the material in question is deemed to be "harmful to juveniles." It bears emphasis that the three prongs of the *Miller* test are conjunctive, rather than being disjunctive; therefore, a book or movie is not obscene, unless all three prongs have been established. *Reno,* 521 U.S. at 873, 117 S.Ct. 2329. Moreover, even though § 2907.01(E)(2) contains language which is somewhat analogous to the second prong of the *Miller* test, as modified by *Ginsberg*, that statutory language does not require that the specified sexual conduct be depicted in a patently offensive manner (the key to the second prong), nor does it require that the first and third prongs of that test be established, before the material in question is deemed to be "harmful to juveniles."

223 F.Supp.2d at 945-46.

Second, this Court held that the Act included materials in the definition of "harmful to juveniles" that are fully protected by the First Amendment—including descriptions and representations of "nudity," "extreme violence," representation of "human bodily functions," "repeated use of foul language," violence, and representations of "criminal activity":

> In addition, the various subsections of reenacted § 2907.01(E) include materials in the definition of "harmful to juveniles" which are fully protected by the First Amendment, thus rendering the dissemination of those materials to juveniles a criminal offense. For instance, reenacted § 2907.01(E)(2) includes nudity as something within the definition of "harmful to juveniles." In *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Supreme Court held that a sweeping restriction which criminalized showing any nudity to a juvenile was unconstitutionally overbroad. . . .
>
> In addition, reenacted § 2907.01(E)(3) includes depictions of extreme violence within the definition of "harmful to juveniles." Courts have held that the First Amendment forbids governments from preventing juveniles from being exposed to depictions of violence. *See e.g., American Amusement Machine Ass'n v. Kendrick,* 244 F.3d 572 (7th Cir.), *cert. denied,* 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001). ...
>
> Reenacted § 2907.01(E)(4) includes a display, description or representation of the human bodily functions of elimination within the definition of "harmful to juveniles." In *Reno*, the Supreme Court noted that the Miller definition of obscenity is limited to "sexual conduct" (anything short of that is constitutionally protected); therefore, the statute in question was unconstitutional because it included within its sweep "excretory activities" and "organs of both a sexual and excretory nature." 521 U.S. at 873, 117 S.Ct. 2329. Accordingly, the Court concludes that § 2907.01(E)(4) criminalizes expression which is fully protected by the First Amendment and that the definition of "harmful to juveniles" is substantially overbroad, because displays, descriptions or representations of the human bodily functions of elimination are included within that definition.
>
> Reenacted § 2907.01(E)(5) includes repeated use of foul language within the definition of "harmful to juveniles." It should go without saying that foul language and profanity enjoy protection under the First Amendment. ...
>
> Under reenacted § 2907.01(E)(6), the definition of "harmful to juveniles" includes "a display, description or representation in lurid detail of the violent physical torture, dismemberment, destruction or death of a human being." This statutory provision extends far beyond "sexual conduct," the type of speech which may be

> outlawed in accordance with the *Miller* test, as modified for juveniles in *Ginsberg. Reno,* 521 U.S. at 873, 117 S.Ct. 2329. ...
>
> Reenacted § 2907.01(E)(7) defines "harmful to juveniles" to include "a display, description or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt." In *Eclipse Enterprises, Inc. v. Gulotta,* 134 F.3d 63 (2nd Cir. 1997), the Second Circuit concluded that a local ordinance which prohibited the distribution to juveniles of trading cards depicting crimes and criminals violated the First Amendment. ...
>
> In sum, the statute criminalizes conduct and expression otherwise lawful, as protected by the First Amendment to the United States Constitution. Moreover, the statute as written, because of the overbreadth of reenacted § 2907.01(E), will sweep within its ambit, under the definition of "harmful to juveniles," not only predators, the avowed targets of the legislation, but also publishers, booksellers and others who disseminate materials to juveniles which are fully protected by the First Amendment. Accordingly, the definition of "harmful to juveniles," contained in reenacted § 2907.01(E), is substantially overbroad, in violation of the First Amendment.

223 F.Supp.2d at 946 – 950. This Court concluded:

> In sum, the Court concludes that three of the relevant factors (substantial likelihood of success on the merits, irreparable injury to the Plaintiffs if a preliminary injunction is not issued and the public interest) favor the entry of a preliminary injunction. Moreover, given that it is unlikely that anyone will suffer an injury if such an injunction is issued, that factor does not warrant denial of the requested relief. Balancing the four factors, the Court concludes that the Plaintiffs have demonstrated that they are entitled to preliminary injunctive relief. Accordingly, the Court sustains Plaintiffs' Motion for Preliminary Injunction (Doc. # 27). Therefore, the Defendants (other than Governor Taft), their agents, employees and persons acting in concert with them are hereby restrained from prosecuting anyone for violating § 2907.31 and 2907.311, to the extent that such a prosecution arises out of materials which are allegedly "harmful to juveniles."

223 F.Supp.2d at 952-953. This Court found it unnecessary to reach the issue of whether or not the statute's application to electronic communications over the Internet was also unconstitutional. 223 F.Supp.2d at 945. Defendants appealed.

D. House Bill No. 490

The Ohio General Assembly accepted this Court's conclusion—embodied in the preliminary injunction—that Plaintiffs were likely to succeed on their claim that the Act was

unconstitutional. The General Assembly therefore promptly amended the law to respond to the specific issues addressed by this Court. On January 2, 2003, the Governor signed into law House Bill No. 490.

House Bill No. 490 amended the "harmful to juveniles" definition by (a) adding the *Miller/Ginsberg* requirements, and (b) removing from the definition violence, nudity, foul language, and the other subjects that had been reviewed in this Court's order granting the preliminary injunction. House Bill No. 490 thus provided, in pertinent part (deletions are indicated by ~~strike-throughs~~; additions by underscores):

> (E) ~~Any material or performance is "harmful~~ "Harmful to juveniles~~," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any~~ means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:
>
> (1) ~~It tends to appeal~~ The material or performance, when considered as a whole, appeals to the prurient interest in sex of juveniles~~;~~.
>
> (2) ~~It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;~~
>
> ~~(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;~~
>
> ~~(4) It contains a display, description, or representation of human bodily functions of elimination;~~
>
> ~~(5) It makes repeated use of foul language;~~
>
> ~~(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;~~
>
> ~~(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt~~ The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.
>
> (3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

Put simply, the Ohio General Assembly enacted House Bill No. 490 to eliminate the constitutional infirmities of House Bill No. 8 that had been reviewed in this Court's order granting a preliminary injunction, and upon which this Court found Plaintiffs were likely to succeed. This Court's order granting a preliminary injunction thus led directly to a permanent change in the Ohio statute.

Plaintiffs thus prevailed in the first phase of this action, obtaining by the issuance of the preliminary injunction and the enactment of House Bill No. 490 all of the relief that they could have obtained had those issues been litigated to final judgment in this Court.

E. The Appeal and Remand

Defendants had appealed this Court's order granting a preliminary injunction. On January 30, 2003, promptly after the Governor signed House Bill No. 490 into law, Defendants made a motion in the Sixth Circuit[3] to remand the case, stating:

> This is an appeal from an Order of the United States District Court for the Southern District of Ohio, Western Division (Rice, C.J.), which held unconstitutional the definition of "harmful to juveniles" in § 2907.01(E) of the Ohio Revised Code. After the filing of the Notice of Appeal in this action, the Ohio General Assembly adopted House Bill 490, which, among other things, substantially amended § 2901.01(E). Governor Taft recently signed H.B. 490. In light of the amendment, it is inappropriate for this appeal to be heard; instead it would be more appropriate for the District Court to consider the constitutionality of § 2907.01(E), as amended. In addition, there are other issues presented to the District Court but not previously decided. House Bill 490 also substantially affects these issues.

The Sixth Circuit granted the motion for remand (Doc #63), directing that the preliminary injunction remain in effect.

[3] *Bookfriends, Inc. v. Taft,* No. 02-4091 (6th Cir.), Appellant Motion filed to remand to district court (Jan. 30, 2003).

F. Plaintiffs' Initial Motion for Attorneys' Fees, and This Court's Order Granting That Motion

Having prevailed in the first phase of this action, Plaintiffs filed their initial motion for attorneys' fees in the amount of $82,100.02 on July 14, 2003. (Doc. #66). On March 10, 2004, this Court entered a decision and order (Doc. #103) granting the motion, with the amount of attorneys' fees to be quantified at a later date.

2. The Second Phase of this Action

A. Plaintiffs' Second Amended Complaint

On August 7, 2003, Plaintiffs filed a Second Amended Complaint (Doc. #69), to address the issue which this Court found it unnecessary to reach when it granted the preliminary injunction—the application of Ohio's "harmful to juveniles" statute to electronic communications over the Internet. That provision had been amended as part of House Bill No. 490.

Under the Amended Act, the act of furnishing the "harmful to juveniles" matter to a juvenile, independent of the actor's intent, is a crime. The Amended Act thus defines the criminal conduct as follows:

> (D) (1) A person directly sells, delivers, furnishes, disseminates, provides, exhibits, rents, or presents or directly offers or agrees to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present material or a performance to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section ***by means of an electronic method of remotely transmitting information*** if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

R.C. § 2907.31 (D)(1) (emphasis added). The Amended Act includes this exemption:

> (2) A person remotely transmitting information by means of a method of mass distribution does not directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present or directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present the material or performance in question to a juvenile, a group of juveniles, a law enforcement officer posing as a

juvenile, or a group of law enforcement officers posing as juveniles in violation of this section if either of the following applies:

(a) ***The person has inadequate information to know or have reason to believe that a particular recipient of the information or offer is a juvenile.***

(b) ***The method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information.***

R.C. § 2907.31 (D)(2) (emphasis added).

The Amended Act contains no definition of what is meant by "remotely transmitting information," or by "a method of mass distribution," or by "the ability to prevent a particular recipient from receiving the information," or by many of the other phrases in this provision.

The focus during the second phase of the litigation was the scope of the application of the Amended Act to electronic communications. Did that provision apply to all electronic communications—including, for example, the posting of materials on Websites, or the transmission of materials through listservs or mailing lists, or the transmission of materials in chat rooms? If so, the Amended Act would criminalize a broad range of adult-to-adult communications protected by the First Amendment. Or was the Amended Act's application to electronic communications limited to person-to-person emails and instant messages, directed to a specific person known by the sender to be a minor? If so, the provision would be constitutional—just as it is constitutional to prohibit a person from handing "harmful to minors" material, in person, to a person known to be a minor.

B. The Attorney General / Prosecutors' Position in This Court

In defending the Amended Act in this Court, the Attorney General / Prosecutors took the position that criminal prosecutions could be brought under the Amended Act based on some communications made through Websites, chat rooms, discussion groups, and mailing lists (or

listservs). In the State's memorandum in opposition to Plaintiffs' motion for summary judgment (Doc. #97), the Attorney General / Prosecutors thus stated:

> Web sites, chat rooms, discussion groups, etc., ***for the most part*** are also methods of communication that do 'not provide the person [transmitting the information] the ability to prevent a particular recipient from receiving the information. R.C. 2907.31(D)(2)(b). These generalized broadcasts of information are therefore specifically excepted from the operation of R.C. 2907.31.

(Doc. #97, p. 18) (emphasis added). The Attorney General / Prosecutors' use of the phrase ***"for the most part"*** thus implied that, ***in some instances,*** Websites, chat rooms, and discussion groups do provide the speaker with the ability to prevent a particular recipient from receiving the information, and that ***in those instances,*** the use of Websites, chat rooms, and discussion groups would be subject to this criminal statute.

With respect to e-mails and instant messages ("IMs"), the Attorney General / Prosecutors took the position in this Court that:

> These methods of Internet communication ***might fall within*** the reach of the statute if a person uses IM or e-mail to send material harmful to juveniles directly to a person (or persons) he has reason to believe is a juvenile (or are juveniles).

(Doc. #97, p. 19) (emphasis added). The Attorney General / Prosecutors did not state what would determine whether such communications ***"would fall within"*** the scope of the statute, but added a footnote that "Listservs or mail exploders fall between the two extremes," so that listservs "open to subscribers from the public or a large subset of the public" would be exempt from the statute while "a listserv with a smaller address list of e-mail recipients, open or of interest only to particular people" might fall within the purview of the statute. *Id.* The Attorney General / Prosecutors did not state where the statute drew the line between those listservs whose use could result in prosecution and those that could be used without such fear.

C. This Court's Order Granting a Permanent Injunction

Based on the Attorney General / Prosecutors' broad construction of the Amended Act, this Court held the Amended Act unconstitutional (Opinion, Doc. #104; Order and Entry, Doc. #105). This Court held:

> Although § 2907.31(D)(2) may act to limit the scope of this statute, § 2907.31(D)(1) is still overbroad and infringes on constitutionally protected adult-adult speech. The limiting provisions do not extend to one-to-one methods of communication in places such as chat rooms. According to the Court in *Reno,* every user of the internet has reason to know that some participants in chat rooms are minors. An adult would have no way of ensuring that her communications in a chat room would be between and among other adults alone. There is simply no means, under existing technology, to restrict conversations in a chat room to adults, only. Consequently, an adult sending a one-to-one message which is unprotected as to minors under the *Miller-Ginsberg* standard, but protected as to adults under the standard in *Miller,* will be liable under § 2907.31(D)(1). Therefore, the provision is overbroad. ...
>
> No matter the subjective intent of a chat room participant and regardless of whether he or she meant to communicate with juveniles, if a minor is in the chat room, the participant could be prosecuted under the statute in question, even though the conversation was intended only for adults and was protected vis a vis adults. Since the limiting provision of the statute would not prevent such a result and that result would violate the First Amendment, as interpreted by the Supreme Court in *Reno,* this Court concludes that § 2907.31(D)(2) does not sufficiently narrow subsection (D)(1) to save it from a challenge under the overbreadth doctrine.

American Booksellers Foundation for Free Expression v. Strickland, 512 F.Supp.2d 1082, 1094 (S.D. Ohio 2007). This Court issued an injunction, "permanently enjoining Ohio Revised Code § 2907.31(D)(1), as applied to internet communications." 512 F.Supp.2d at 1106.

D. Plaintiffs' Second Motion for Attorneys' Fees

On October 1, 2007, Plaintiffs filed a Second Motion for Attorneys' Fees (Doc. #107), seeking additional fees in the amount of $38,948.49. That motion covered fees and costs incurred after Plaintiffs' initial motion for attorneys' fees, and through the issuance of the permanent injunction. Taken together, the fees and costs sought on the initial motion

($82,100.02) and the fees and costs sought on the second motion ($38,948.49) come to $121,048.51.

E. The Attorney General / Prosecutors' Change of Position in the Sixth Circuit

After entry of the permanent injunction, the Attorney General / Prosecutors appealed to the Sixth Circuit. Because House Bill No. 490 had remedied the constitutional infirmities in the Act's definition of "harmful to juveniles," the issues on the appeal were limited to those raised in the second phase of this action.

On appeal to the Sixth Circuit from this Court's decision granting a permanent injunction, the Attorney General / Prosecutors dramatically changed the State's position on the scope of the Amended Act's application to electronic communications. Abandoning the position that the State had taken in this Court—that the Amended Act applied to some Websites, chat rooms, discussion groups, and mailing lists (listservs)—the Attorney General / Prosecutors argued in the Sixth Circuit that the Amended Act is constitutional because it only covers "direct communications ... with juveniles,"[4] and thus would not apply either to Websites or chatrooms. To support this narrowing construction of the statute, the Attorney General / Prosecutors stated, "most Internet technologies—including the Web, USENET discussion groups, chat rooms, and mailing lists—do not allow senders to prevent particular recipients from receiving the transmissions."[5] Based on that statement, the Attorney General / Prosecutors concluded, "[C]ontrary to Plaintiffs' repeated suggestions, the statute does not regulate Web

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[4] Final First Brief of Attorney General, *American Booksellers Foundation for Free Expression v. Strickland* (6th Cir.), Nos. 07-4375, 4376 ("AG 6th Cir. First Br.), p. 28.

[5] Final Third Brief of Attorney General, *American Booksellers Foundation for Free Expression v. Strickland* (6th Cir.), Nos. 07-4375, 4376 ("AG 6th Cir. Third Br."), p. 3.

communications, other than such personally directed devices as instant messaging ("IM") or person-to-person e-mail."[6]

After the Attorney General / Prosecutors took this changed position, the Sixth Circuit, *sua sponte,* certified these questions to the Supreme Court of Ohio:

> (1) Is the Attorney General correct in construing R.C. § 2907.31(D) to limit the scope of § 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?
>
> (2) Is the Attorney General correct in construing R.C. § 2907.31(D) to exempt from liability material posted on generally accessible websites and in public chat rooms?

American Booksellers Foundation for Free Expression v. Strickland, 560 F.3d 443, 447 (6th Cir. 2009).

F. Proceedings in the Supreme Court of Ohio, and the Supreme Court of Ohio's Answer to the Sixth Circuit's Certified Questions

In the Supreme Court of Ohio, the Attorney General / Prosecutors continued to repudiate the position that they had taken in this Court, and explicitly argued that "posting harmful material on generally accessible websites and public chat rooms is not criminal conduct."[7]

Accepting the Attorney General / Prosecutors' narrow construction of the Amended Act, the Supreme Court of Ohio answered each certified question, "yes." *American Booksellers Foundation for Free Expression v. Cordray,* 124 Ohio St.3d 329, 922 N.E.2d 192 (Ohio 2010).

That decision by the Supreme Court of Ohio means that, contrary to the position taken by the Attorney General / Prosecutors in this Court, no prosecution can be brought under the

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[6] *Id.*

[7] Merit Brief of Petitioners Ohio Attorney General et al., *Cordray v. American Booksellers Foundation for Free Expression,* Docket No. 2009-0609 (Supreme Court of Ohio), p. 12.

Amended Act for posting "harmful to minors" material on Websites, or transmitting such material through public chat rooms and mailing lists (listservs).

G. The Decision of the Sixth Circuit

After receiving the Supreme Court of Ohio's answers to the certified questions, the Sixth Circuit issued its opinion addressing the scope of the Amended Act. The Sixth Circuit made clear that the issue had been framed by the Attorney General's construction of the Amended Act, and that it was relying both on the Attorney General's narrow construction of the Amended Act and the Supreme Court of Ohio's endorsement of that narrow construction.

> Upon our request, the Ohio Supreme Court expressly confirmed the defendants' interpretation of the statute, first concluding that the statute "can be violated only when matter harmful to juveniles is transmitted to someone who the sender knows is a juvenile or has reason to believe is a juvenile." *Am. Booksellers*, 922 N.E.2d at 195. "The statute does not require that the sender know the recipient by name, but that the sender know or have reason to believe that the recipient is a juvenile." *Id.* The court accordingly held "that the scope of [section] 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." *Id.*
>
> The Ohio Supreme Court also concluded that the statute "is not violated when matter harmful to juveniles is disseminated by a method of mass distribution that does not allow the sender to prevent the distribution to particular recipients." Id. The court explained that, "[b]ased on [its] understanding of generally accessible websites and public chat rooms," these fora "are open to all, including juveniles, and current usage and technology do not allow a person who posts thereon to prevent particular recipients, including juveniles, from accessing the information posted." *Id.* The court therefore held "that a person who posts matter harmful to juveniles on generally accessible websites and in public chat rooms does not violate [section] 2907.31(D), because such a posting does not enable that person to 'prevent a particular recipient from receiving the information.' " *Id.*

American Booksellers Foundation for Free Expression v. Strickland, 601 F.3d 622, 626 (6th Cir. 2010). The Sixth Circuit concluded:

> we find that the statute, as interpreted by the Ohio Supreme Court, is constitutional under both the First Amendment and the Commerce Clause.

601 F.3d at 628. The Sixth Circuit's opinion concluded:

> We therefore REVERSE the district court's entry of judgment for the plaintiffs and REMAND the case to the district court with instructions to vacate the permanent injunction and to enter judgment for defendants.

601 F.3d at 628.

As noted above, no issue with respect to the first phase of this litigation was before the Sixth Circuit. The Sixth Circuit therefore did not address the constitutional infirmity of the original Act's definition of "harmful to juveniles"—as found by this Court in its order granting the preliminary injunction, and as remedied by the General Assembly when it enacted House Bill No. 490. The Sixth Circuit did not address whether Plaintiffs were the "prevailing parties" for the first phase of the litigation.

Similarly, while Plaintiffs pointed out, in their briefs in the Sixth Circuit, that the Attorney General / Prosecutors had changed the State's position on the scope of the Amended Act, as it applied to electronic communications, the Sixth Circuit did not address that change of position. Instead, the Sixth Circuit based its certified questions to the Supreme Court of Ohio, and its decision after receiving the answers, on the Attorney General / Prosecutors' new position. Thus, the Sixth Circuit did not address whether Plaintiffs—having procured a permanent injunction based on the Attorney General / Prosecutors' broad construction of the Amended Act, which caused the Attorney General / Prosecutors to adopt a narrow construction on appeal—were the "prevailing parties" for the second phase of this litigation.

3. This Court's May 26, 2010 Judgment

On May 26, 2010, this Court entered its Judgment. (Docs. #124, 125).

The first paragraph of the Judgment followed the mandate of the Sixth Circuit:

> Pursuant to the April 15, 2010 Order of Remand of the United States Court of Appeals for the Sixth Circuit, the permanent injunction previously issued by this Court is vacated and final judgment is entered in favor of Defendants and against Plaintiffs herein.

(Doc. #124).

The second and third paragraphs of the Judgment addressed the issue of attorneys' fees—an issue that had not been addressed by the Sixth Circuit:

> As the result of this Court's ruling above, the initial Motion of Plaintiffs, seeking attorneys fees and costs (Doc. # 66) (sustained by this Court, without quantification, at Doc. # 103) and second Motion for Attorneys Fees and Costs (Doc. #107), are, each in their entirety, overruled as moot. To the extent necessary, this Court's decision sustaining the initial Motion for Attorneys Fees (Doc. # 103), while deferring quantification of same, is vacated.
>
> The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

(Doc. #124).

4. This Rule 59(e) Motion

Plaintiffs are hereby moving to alter and amend the Judgment, to reinstate this Court's prior decision (Doc. #103) sustaining Plaintiffs' initial motion for attorneys' fees (Doc. #66), to sustain Plaintiffs' second motion for attorneys' fees (Doc. #107), to permit Plaintiffs to supplement that motion for fees and expenses for the period of time after Plaintiffs' second motion, and to provide for further briefing with respect thereto.

ARGUMENT

THE JUDGMENT SHOULD BE AMENDED TO PROVIDE FOR THE AWARD OF ATTORNEYS' FEES TO PLAINTIFFS, WHO PREVAILED IN BOTH THE FIRST AND SECOND PHASES OF THIS LITIGATION

Plaintiffs are the prevailing parties, entitled to attorneys' fees for both the first phase and second phase of this action, because this Court's Order granting the preliminary injunction, this Court's Order granting the permanent injunction, and the Supreme Court of Ohio's answers to the certified questions brought about a "judicially sanctioned" change in the legal relationship of the parties, *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and*

Human Resources, 532 U.S. 598, 605 (2001) ("*Buckhannon*"); 42 U.S.C. § 1988. Those judicial sanctions materially altered the parties' relationship "in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989); *Bronco's Entertainment, Ltd. v. Charter Township of Van Buren*, 214 Fed. Appx. 572 (6th Cir. 2007); *DiLaura v. Township of Ann Arbor*, 471 F.3d 666 (6th Cir. 2006).

1. Plaintiffs Prevailed in the First Phase of this Action, Because This Court's Issuance of a Preliminary Injunction Led the Ohio General Assembly To Enact House Bill No. 490, Amending the Act, and That Relief Was Not "Undone" By the Further Proceedings in this Action

In *Gamble v. Ohio Dept. of Job and Family Services*, 2007 WL 3046492 (S.D. Ohio, Oct. 16, 2007), this Court determined that the plaintiffs were the "prevailing parties" under 42 U.S.C. § 1988, after a course of events that directly parallel this case: In *Gamble*, the Court granted plaintiffs' motion for a preliminary injunction enjoining the enforcement of an administrative regulation, and the State amended the administrative regulation to remedy the infirmities identified by the Court, but final judgment was ultimately entered for defendants, on a different basis. Because that is precisely what happened here (except that here a statute, rather than an administrative regulation, was amended), the Court's analysis in *Gamble* is particularly instructive.

In *Gamble*, plaintiffs sought, and were granted, a preliminary injunction to enjoin the Ohio Department of Job and Family Services ("ODJFS") from following an administrative regulation which provided for "recouping erroneous overpayments [of child support payment made to custodial parents] from Plaintiffs' subsequent child support payments without Plaintiffs' explicit consent, or, barring that, without a court procedure awarding the overpayments to Defendants." 2007 WL 3046492, at *1. In response to the preliminary injunction, ODJFS

> implement[ed] a policy change, amending an existing administrative regulation on January 4, 2005 "on an emergency basis to comply with [this Court's] preliminary injunction of September 28, 2004." (Doc. 63 at 2.) On April 3, 2005, the ODJFS codified the new regulation at Ohio Admin. Code § 5101:12-80-05.6(F) as a "permanent rule to implement the provisions of the September 28, 2004" injunction. (*Id.*)

2007 WL 3046492, at *2. The change in the administrative regulation left one surviving claim, and the *Gamble* action continued on that separate issue—whether ODJFS had violated plaintiffs' due process rights in its calculation and distribution of child support payments. *Id.* The District Court later dismissed that surviving claim, granting defendants' motion for judgment on the pleadings. *Gamble v. Ohio Dept. of Job and Family Services,* 2007 WL 2417402 (S.D. Ohio Aug 21, 2007).

Applying "prevailing party" standards to this course of events, this Court held in *Gamble:*

> As applied to this case, these rules require the Court to determine whether the permanent amendment to the Ohio Administrative Code, made to comply with this Court's order enjoining Defendants from "recouping erroneous overpayments from Plaintiffs' subsequent child support payments without Plaintiffs' explicit consent, or, barring that, without a court procedure awarding the overpayments to Defendants," was a judicially sanctioned, material alteration of the legal relationship of the parties that was not ultimately undone by the Court's final decision that the Plaintiffs did not state a cause of action under § 1983 for violation of 42 U.S.C. § 657(a) or a due process violation stemming from the Defendants' alleged inability to perform accurate audits. The Court finds that the Ohio Administrative Rule change, permanently in effect as of April 3, 2005, altered the legal relationship of the parties, was not done voluntarily by the Defendants but was judicially sanctioned, and was not undone by the Court's final ruling.
>
> The Court did not issue its September 28, 2004 injunction hastily. The matter was fully briefed by both parties in late summer 2003 (docs. 6, 8, 12, and 13), and the Court held a conference on July 27, 2004 during which counsel for all parties represented that the motion did not require a hearing. Thus, the Court had deliberately considered the merits of Plaintiffs' claim when, in an eleven-page order, it concluded that Plaintiffs had a property interest in child support payments protected by the Due Process Clause and that the recoupment notice being used by the Defendants was likely insufficient to satisfy the requirements of due process. (Doc. 26 at 8-9.) To comply with the Court's order, the ODJFS Director amended the Administrative Rule to address the due process concern with respect to recoupment. This was not a voluntary change in conduct. *Contra*

> *Buckhannon*, 532 U.S. at 605 (finding that a state's voluntary revision of the challenged statute, while accomplishing the plaintiffs' objectives, was not a "judicially sanctioned change in the legal relationship of the parties."). Thus, because the Court ordered the Defendants to change the procedure with respect to the withholding of erroneous overpayments, the ODJFS' Director did so, and the legal relationship of the parties was altered (because Defendants could no longer withhold erroneous overpayments without consent or a court order), Plaintiffs are prevailing parties with respect to the injunction.

2007 WL 3046492, at *3.

In *Gamble,* in concluding that the entry of judgment on the pleadings for defendants did not undermine plaintiffs' claim for attorneys' fees relating to the issuance of the preliminary injunction which led to the change in the administrative regulation, this Court specifically addressed the Supreme Court's decision in *Sole v. Wyner,* 551 U.S. 74, 82 (2007). In *Sole v. Wyner,* the Supreme Court held that a plaintiff cannot recover fees as a "prevailing party" based on a preliminary injunction where plaintiff's "temporary success rested on a premise the District Court ultimately rejected" and "the preliminary injunction .... is reversed, dissolved, or otherwise undone by the final decision in the same case." That principle did not negate the plaintiffs' entitlement to attorneys' fees in *Gamble,* because the change in the administrative regulation, made in response to the preliminary injunction, was not undone by the ultimate entry of judgment on the pleadings in favor of defendants. *Gamble v. Ohio Dept. of Job and Family Services,* 2007 WL 3046492, at *3.

The course of events in this case parallels those in *Gamble:* Here, this Court issued a preliminary injunction, based on a thorough consideration of the legal issues, enjoining the enforcement of the Act. Here, in response to this Court's order granting a preliminary injunction, the General Assembly enacted House Bill No. 490, amending the Act to address the precise concerns that were the subject of the preliminary injunction. Here, the case proceeded to address other issues—the application of the Amended Act to electronic communications. Here,

the change in the parties' legal relationship brought about by the preliminary injunction and the enactment of the Amended Act "was not undone" by the ultimate resolution of those other issues. The Amended Act, with the inclusion of the *Miller/Ginsberg* standards, and the restriction of the Amended Act to sexually-explicit communications (repealing those provisions of the original Act which covered nudity, violence, foul language, etc.), remains in place, as a permanent change in the parties' legal relationship.

As in *Gamble,* Plaintiffs here are the "prevailing parties" with respect to the first phase of this action.

2. Plaintiffs Prevailed in the Second Phase of this Action, Because This Court's Issuance of a Permanent Injunction Led the Ohio Attorney General To Abandon the State's Argument for a Broad, Unconstitutional Construction of the Act, and To Argue, Instead, for a Narrow, Constitutional Construction of the Act, Which Was Adopted by the Supreme Court of Ohio

To evaluate whether Plaintiffs were also the "prevailing parties" in the second phase of this action, which addressed the application of the Amended Act to electronic communications, and particularly communications over the Internet, this Court must again answer the question under *Buckhannon:* Was there a "judicially sanctioned" change in the legal relationship of the parties which was not "undone" by the ultimate disposition of the action? The answer is "yes."

Throughout the proceedings in this Court, the Attorney General / Prosecutors took the position the persons could lawfully be prosecuted under the Amended Act, at least under some circumstances, for posting "harmful to juveniles" materials on Websites, or communicating such materials in chat rooms, or through mailing lists (listservs). That was the state of the legal relationship between Plaintiffs and defendant Prosecutors when this litigation began.

When this Court issued its permanent injunction, it "judicially sanctioned" a change in the parties' legal relationship: The Prosecutors were no longer free to prosecute the Plaintiffs (or anyone else) based on the electronic communication of "harmful to juveniles" materials.

The Attorney General / Prosecutors then made a strategic decision not to defend the full breadth of the Amended Act, and instead to seek to have the Amended Act held constitutional by arguing that it was limited to emails and IMs. In response to the Attorney General / Prosecutors' change in position, the Sixth Circuit certified questions to the Supreme Court of Ohio, which explicitly answered that the Amended Act "exempt[s] from liability material posted on generally accessible websites and in public chat rooms." The Supreme Court of Ohio's answer to the certified questions was also a judicial sanction, confirming the change in the parties' legal relationship, and precluding prosecutions based on Websites, public chat rooms, and mailing lists.

That change is permanent; it was not undone by the entry of judgment for Defendants. Defendant Attorney General / Prosecutors can no longer take the position that they are free to bring criminal prosecutions against Plaintiffs (and others) for posting or communicating "harmful to juveniles" materials on Websites, in chat rooms, and otherwise. If any prosecutor within the State were to bring such a prosecution, it would promptly be dismissed based on the definitive construction of the Amended Act by the Supreme Court of Ohio.

In *Exeter-West Greenwich Regional School Dist. v. Pontarelli,* 788 F.2d 47 (1st Cir. 1986), the First Circuit addressed whether plaintiffs were the "prevailing parties" under 42 U.S.C. § 1988 in a litigation which followed a procedural course comparable to this case. In *Exeter-West*, a local school district and taxpayer brought suit in federal district court against the Rhode Island Commissioner of Education, challenging, on First Amendment grounds, the Commissioner's directive that the school district pay tuition for a student to attend a religious

school. Plaintiffs secured a temporary restraining order in the federal district court, which then certified, to the Rhode Island Supreme Court, the question of whether state law required the school district to pay the religious school tuition. The Rhode Island Supreme Court held that state law did not so require and, on that basis, the federal district court dismissed plaintiffs' complaint as moot. The First Circuit held that the plaintiffs school district and taxpayer were the "prevailing parties" because, by obtaining the temporary restraining order in federal district court, and by then obtaining a definitive construction of state law from the Rhode Island Supreme Court, plaintiffs "achieved ... the benefit they sought from their § 1983 claim" and prevailed on "the merits." 788 F.2d at 51.[8] The fact that the federal action was dismissed as moot did not undermine plaintiffs having attained—through the temporary restraining order, and the state supreme court's answer to the certified question—exactly the relief that they sought.

Similarly, here, this Court's entry of judgment for Defendants, in accordance with the Sixth Circuit's mandate, does not undermine Plaintiffs having attained—through the permanent injunction, the Attorney General's change of position on the appeal, and the Supreme Court of Ohio's answers to the certified questions—substantially the relief that they sought.

The only difference between this case and *Exeter-West* is that here, after losing in the federal district court, the state defendants changed their position on the appeal. But the Attorney General / Prosecutors cannot deprive Plaintiffs of their status as a "prevailing party" by changing their position, after the issuance of a permanent injunction, on the scope of the Amended Act. In

[8] In *Exeter-West*, the First Circuit found that plaintiffs were prevailing parties under two separate and distinct tests. First, the court found that plaintiffs had prevailed on "the merits." 788 F.2d at 50-52. Second the court found that plaintiffs' federal claim was the "catalyst" for the change in the Rhode Island Commissioner's position. 788 F.2d at 52-53. While *Buckhannon* rejected the "catalyst" test, it cast no doubt on the validity of that portion of the First Circuit's decision which found that plaintiffs had prevailed "on the merits" because of the Rhode Island Supreme Court's answer to the certified question.

Bronco's Entertainment, Ltd. v. Charter Township of Van Buren, 214 Fed. Appx. at 576, the Sixth Circuit held that the district court should have awarded attorneys' fees to plaintiffs, as "prevailing parties", who succeeded in narrowing the grounds under which defendant township could deny a license for a sexually oriented business, stating:

> the law with which the Plaintiffs must comply is not the law which the Plaintiffs challenged because the ordinance no longer includes two provisions that this court found to be unconstitutional. ... Plaintiffs obtained an enforceable alteration in their legal relationship with the Township without obtaining all of the changes that they sought.

Here, too, "the law with which the Plaintiffs must comply is not the law which the Plaintiffs challenged." Plaintiffs are the "prevailing parties" with respect to the second phase of this action.

CONCLUSION

Plaintiffs respectfully request that this Court alter and amend the Judgment to reinstate this Court's prior decision (Doc. #103) sustaining Plaintiffs' initial motion for attorneys' fees (Doc. #66), to sustain Plaintiffs' second motion for attorneys' fees (Doc. #107), to permit Plaintiffs to supplement that motion with respect to fees and costs incurred after the issuance of the permanent injunction, and to provide for further briefing with respect thereto.

Dated: June 21, 2010

/s/ Michael A. Bamberger
Michael A. Bamberger
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020-1089
(212) 768-6756; Fax: (212) 768-6800
mbamberger@sonnenschein.com

H. Louis Sirkin (Bar No. 0024573)
Jennifer M. Kinsley (Bar No. 0071629)
SIRKIN, KINSLEY & NAZZARINE
810 Sycamore Street, 2nd Floor
Cincinnati, OH 45202
(513) 721-4876; Fax: (513) 721-0876
lsirkin@skn-law.com
jkinsley@skn-law.com

Of Counsel:
CARRIE L. DAVIS (0077041)
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200; Fax: (216) 472-2210
cdavis@acluohio.org

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via this Court's electronic filing system upon all attorneys registered therewith, including Elise W. Porter, Office of the Ohio Attorney General, and Nick A Soulas, Jr., Franklin County Prosecutor's Office, on June 21, 2010.

/s/ Michael A. Bamberger
Michael A. Bamberger

Attorneys for Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspaper Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein