IN THE SUPREME COURT OF OHIO

No. 2009-0609

OHIO ATTORNEY GENERAL RICHARD CORDRAY AND FRANKLIN COUNTY, OHIO, PROSECUTING ATTORNEY RON O'BRIEN, etc. et. al.,

Petitioners,

v.

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION et al.,

Respondents.

On Review of Certified Questions from
the United States Court of Appeals for the Sixth Circuit (Docket No. 07-4375 / 4376)

MERIT BRIEF OF RESPONDENTS
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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INTRODUCTION

In attempting to make Internet communications subject to Ohio's "harmful to juveniles" criminal law, R.C. § 2907.31—which prohibits providing material and performances with certain sexual content to juveniles—the General Assembly exempted material and performances disseminated to a juvenile by a "method of mass distribution [which] does not provide the [sender] the ability to prevent a particular recipient from receiving the information." R.C. § 2907.31(D)(2)(b). However, the General Assembly provided no guidance as to what that exemption meant:

- Could a Website publisher be prosecuted for posting, or permitting the posting, of "harmful to minors" matter on a Website accessible to the general public? Are Websites treated differently, depending upon whether they are generally-accessible without registration or fee, require registration, require a fee, or are operated as "internal sites" available only to, for example, employees of a corporation or members of an association?
- Could a person be prosecuted for using a "listserv", USENET group, or other form of mailing list to send an e-mail to a single address, knowing that it would be automatically forwarded to subscribers, some of whom might be minors?
- Could a participant in a chat room be prosecuted if others in the chat room included minors? Does that depend on the nature of the chat room?

Through its overbreadth and vagueness, the statute criminalized non-obscene, constitutionally-protected speech among adults, as well as to or among older minors, not only within the State of Ohio, but also across and outside its borders.

American Booksellers Foundation for Free Expression, Association of American Publishers, Ohio Newspaper Association, Video Software Dealers Association, and other

Respondents, including a broad group of mainstream publishers, distributors, retailers, and Website publishers (the "Booksellers / Website Publishers"),[1] brought this action in the United States District Court for the Southern District of Ohio, seeking to have the statute, as it applied to Internet communications, held unconstitutional, because it violates both the First Amendment and the Commerce Clause of the United States Constitution. The Booksellers / Website Publishers named as defendants the Attorney General of Ohio and all of the Prosecuting Attorneys throughout the State ("Attorney General / Prosecutors").

On September 4, 2007, the district court held the statute, which had been amended during the course of the litigation (the "Amended Act"), unconstitutional as applied to Internet communication, because it is overbroad and violates the First Amendment. *American Booksellers Foundation for Free Expression v. Strickland* (S.D. Ohio 2007), 512 F.Supp.2d 1082, 1106. The district court enjoined the enforcement of the Amended Act.

The injunction had no effect whatsoever on Ohio's "importuning" criminal statute, R.C. § 2907.07, which makes it a felony for sexual predators to use the Internet or other means to lure minors into sexual activity. The Booksellers / Website Publishers have never challenged the "importuning" statute, which Ohio's prosecuting attorneys vigorously and effectively enforce. Detective Darren Barlow testified that his work under the "importuning" statute, specifically focused on the abhorrent use of the Internet by sexual predators, yielded 51 arrests and 51 convictions. S 708.[2] Nor have the Booksellers / Website Publishers ever challenged Ohio criminal laws which prohibit obscenity, child pornography, and speech constituting harassment

[1] The Booksellers / Website Publishers are 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.

[2] The Joint Appendix in the United States Court of Appeals for the Sixth Circuit has been filed in this Court as a Supplement to the Merit Brief of Petitioners, and is cited as "S __."

over the Internet**.**

On appeal, in an effort to narrow the breadth and eliminate the vagueness of the Amended Act, the Attorney General / Prosecutors changed their position on its scope. In the district court, the Attorney General / Prosecutors had argued that some Websites, chat rooms, discussion groups, and listservs could make participants subject to criminal prosecution under the Amended Act. S 749-50. In the Sixth Circuit, the Attorney General / Prosecutors argued (albeit not consistently) that the Amended Act "does not regulate Web communications, other than such personally directed devices as instant messaging ('IM') or person-to-person e-mail."[3]

The United States Court of Appeals for the Sixth Circuit, *sua sponte*, certified these questions to this Court:

> (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 (C.A. 6 2009), 560 F.3d 443, 447. While the Sixth Circuit framed its certified questions in terms of whether or not the Attorney General's reading of the Amended Act was correct, the certified questions were different from the Attorney General's position in three critical respects.

- The Attorney General / Prosecutors' brief in the Sixth Circuit appeared to take the position that all Websites were exempt from the Amended Act. The certified

[3] *American Booksellers Foundation for Free Expression v. Strickland* (C.A. 6 2009), 560 F.3d 443, 447, quoting Final Third Brief of Attorney General / Prosecutors, *American Booksellers Foundation for Free Expression v. Strickland* (C.A. 6), Nos. 07-4375, 4376 ("AG 6th Cir. Third Br."), p. 3.

questions asked whether "generally-accessible Websites" were exempt from the Amended Act. The certified questions did not define that term, and did not state whether Websites that require registration, or internal websites operated by, for example, a corporation, university, governmental office, or association are "generally-accessible."

- The Attorney General / Prosecutors' brief in the Sixth Circuit appeared to take the position that all listservs and other forms of mailings lists were exempt from the Amended Act. The certified questions do not address the issue of listservs.
- The Attorney General / Prosecutors' brief in the Sixth Circuit was unclear as to whether it drew any distinction between different types of chat rooms. The certified questions made a distinction between "public chat rooms" and "private chat rooms."

In certifying these questions, the Sixth Circuit noted that the "the statute provides no guidance" on the meaning of the statutory language that gives rise to the questions, and that that Court should not "speculate" on the meaning of the Amended Act. 560 F.3d at 447.

This Court accepted the certified questions. Order, June 3, 2009.

The Attorney General / Prosecutors now ask this Court to answer each question "yes" based upon the Amended Act's "plain terms," (Attorney General / Prosecutors' Merit Brief, p. 12). But if the Amended Act had "plain terms," then the Attorney General / Prosecutors would not have struggled with the meaning of the Amended Act, advancing different, conflicting positions on what was covered by the Amended Act as the case progressed. If the Amended Act had "plain terms," the Sixth Circuit would not have stated that it could not discern the meaning of the Amended Act without "speculat[ing]." And, given the critical differences between the position taken by the Attorney General / Prosecutors on the construction of the Amended Act in

the Sixth Circuit and the position attributed to the Attorney General / Prosecutors by the certified questions, how can the Attorney General / Prosecutors now, without explanation, propose answering the questions, "yes"?

The Attorney General / Prosecutors compound, rather than solve, this problem by arguing that, if this Court finds that it cannot answer the questions through the Amended Act's "plain terms," this Court should nevertheless answer both questions, "yes," in the hope that so limiting the Amended Act would render it constitutional. But the limitation suggested by the Attorney General simply demonstrates how hazardous it is when a party, by asking a court to "limit" legislation, in fact asks a court to draft legislation. What does it mean for a Website to be "generally-accessible"? Does the Amended Act cover Websites that are not "generally-accessible"? What is the difference between a "public chat room" and a "private chat room" which, according to the Attorney General / Prosecutors, makes the use of one, but not the other, subject to criminal sanction? Are listservs (and other mailing lists) covered by the statute, as a form of e-mail? Or are listservs beyond the statute's reach, and treated in the same manner as "generally-accessible" Websites, or all Websites? Thus, even if this Court were to answer both of the certified questions, "yes," the Amended Act would remain vague.

The task of drafting a statute that is constitutional should rest with the General Assembly, not with this Court. This Court should answer the certified questions by stating, "The Amended Act is too vague to permit the Supreme Court of Ohio to answer the certified questions."

If this Court undertakes to limit the Amended Act in an effort to render it constitutional, this Court should hold that the Amended Act exempts from liability not only generally-accessible Websites and public chat rooms but also (a) all Websites, (b) all chat rooms (because the line between public and private chat rooms, at least in the absence of a legislative definition, is unconstitutionally vague) and (c) all listservs (and other mailing lists), so that the Amended

Act is limited to "person-to-person" instant messaging and "person-to-person" e-mails, for which the person sending the message individually selects the recipient of the message, and knows that recipient to be a juvenile.

STATEMENT OF THE CASE AND FACTS

The Booksellers / Web Publishers

Respondents Booksellers / Web Publishers are a broad range of organizations, including the American Booksellers Foundation For Free Expression, a non-profit foundation founded by American booksellers to protect free speech; the Association of American Publishers, a national association of the United States book publishing industry, whose members include most of the major commercial publishers as well as non-profit publishers, small publishers, and university presses; the Ohio Newspaper Association, the trade association for more than 250 Ohio daily and weekly newspapers and more than 150 Websites;[4] and the Video Software Dealers Association (now known as the Entertainment Merchants Association), the trade association for the home video industry. S 119; 235-238; 439; 470-471.

Respondents represent a broad spectrum of persons—including online businesses and organizations representing booksellers, Ohio newspapers and Websites, book publishers, video stores, and record shops. They use the Internet to communicate, disseminate, display, and access a broad range of speech.

Although the Booksellers / Web Publishers do not speak with a single voice, they all engage in speech which may at times involve sexually explicit matters. Their direct and online speech may be considered by some to be "harmful to juveniles" under the Amended Act, even

[4] A list of Ohio Newspaper Association members as of 2002 appears in the Supplement at S 235-238. A current list of the newspapers and Website members of the Ohio Newspaper Association appears at http://www.ohionews.org/about/member-roster/ (visited August 5, 2009).

though it is constitutionally protected for adults and often for older juveniles as well.

"Importuning" and "Luring" Statutes.

The use of the Internet by sexual predators to "importune" or "lure" children into sexual relations is abhorrent. Ohio and other states have directly addressed this problem through the enactment of "importuning" or "luring" statutes, which make it a felony for sexual predators to use the Internet or other means to lure minors into sexual activity. The district court found:

> law enforcement officers in Ohio have been eminently successful in prosecuting pedophiles who are on the internet, under Ohio's importuning statute.

S 200.

The Booksellers / Website Publishers do not challenge, and have never challenged, the constitutionality of Ohio's "importuning" statute, R.C. § 2907.07. As the district court noted in its decision in this case, "importuning" and "luring" statutes are constitutional because they are properly drawn to address the evil conduct—rather than mere speech—at issue:

> For instance, in *People v. Foley*, 94 N.Y.2d 668, 731 N.E.2d 123, 709 N.Y.S.2d 467 (N.Y. 2000), the Court of Appeals of New York upheld a New York Statute which prohibited a person from:
>
> > intentionally us[ing] any computer communication system…to initiate or engage in such communication with a person who is a minor; *and*…By means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.
>
> Id. 94 at 676, 731 N.E.2d at 127, 709 N.Y.S.2d at 471 [emphasis added]. The New York court focused on two factors when it ruled that the statute passed strict scrutiny. First, a person was not criminally liable under the statute unless the speech fell within the bounds set forth in the *Miller-Ginsberg*[5] standard, and, secondly, the statute limited application to those who intended to induce minors into sexual activity. Id. at 682-683, 731 N.E.2d 131-132, 709 N.Y.S.2d at 475-476. The statute survived scrutiny, because it attempted to regulate conduct by restricting speech that was part of the "evil" sought to be prevented, and was

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

> narrowly tailored to achieve the state's objective of preventing predators from using the internet to victimize children.
>
> In addition, in *People v. Hsu*, 82 Cal. App. 4th 976, 988-989, 99 Cal. Rptr. 2d 184, 194 (Cal. Ct. App. 2000), a California appellate court similarly held that a statute which required a double intent, first, an intent to display harmful material to children, and, second, with the intent of seducing them was not overbroad for purposes of First Amendment analysis. It targeted only those who intended to prey on minors and therefore left protected adult-to-adult communication unregulated. Id. at 988, 99 Cal. Rptr. 2d 194.

S 177-178.

The Amended Act

Contrary to the Attorney General / Prosecutors' repeated suggestions, the Amended Act at issue in this litigation is not an "importuning" or "luring" statute. Instead, the Amended Act sought to extend, to the use of the Internet, an existing Ohio criminal statute, R.C. 2907.31, which imposes criminal sanctions for providing to juveniles "harmful to juveniles"[6] material and performances.[7] It is not an element of the offense that the person providing such material or

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[6] R.C. 2907.01(E) provides this definition:

"(E) 'Harmful to juveniles' 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) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.

(2) 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."

[7] The statute applies to furnishing either "material" or "performances" to juveniles. R.C. 2907.01 (J), (K), provides these definitions:

"(J) 'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.

(K) 'Performance' means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience."

(cont'd)

performances to juveniles have an intent to lure or importune the juveniles into sexual activity, or have any other malevolent intent. Instead, 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

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(cont'd)

In its formulation of the certified questions, the Sixth Circuit referred to "***material*** posted on generally accessible Websites and in public chat rooms." (emphasis added). The Booksellers / Website Publishers believe it unlikely that the Sixth Circuit intended to make a distinction between "material" and "performances", as defined in the statute, and submit that—however this Court answers the certified questions—both "material" and "performances" should be treated in the same manner.

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. A violation of the Amended Act is punishable by imprisonment of up to eighteen months, or a fine of up to $5,000, or both, depending on the nature of the offense. R.C. §§ 2929.14(A)(4) and (5), 2929.18(A)(3)(d) and (e).

The Internet

The basic structure and operation of the Internet is at the core of the Booksellers / Website Publishers' challenge to the constitutionality of the Amended Act.

A. "As Diverse as Human Thought"

"The Internet is a 'unique and wholly new medium of worldwide human communication' … [where] the content … is as diverse as human thought." *ACLU v. Reno* (1997), 521 U.S. 844, 850-52 (internal citations omitted). The Internet is a decentralized, international network of interconnected computers that links people, institutions, corporations, and governments around the world and allows them to communicate in a variety of ways. *Reno*, 521 U.S. at 849-58; *PSINet, Inc. v. Chapman* (W.D. Va. 2000), 108 F. Supp. 2d 611, 614, *aff'd*, 362 F.3d 227 (C.A. 4 2004); *Cyberspace Commc'ns, Inc. v. Engler* (E.D. Mich. 1999), 55 F. Supp. 2d 737, 741, aff'd (C.A. 6 2000), 238 F.3d 420. "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web." *Reno*, 521 U.S. at 853; *PSINet*, 108 F. Supp. 2d at 615; S-259. Over 40% of the content on the Internet originates outside the United States, and all of the content on the Internet is available to Internet users worldwide. *ACLU v. Gonzales*, (E.D. Pa. 2007), 478 F. Supp. 2d 775, 789, *aff'd sub nom. ACLU v. Mukasey*, (C.A. 3 2008), 53 F.3d 181; *Reno*, 521 U.S. at 850.

B. How Individuals Access the Internet

Individuals access the Internet through computers in their homes and workplaces, "Internet cafés" which provide access for an hourly fee, libraries, and schools. *Reno,* 521 U.S. at 850; *PSINet,* 108 F. Supp. 2d at 615; *Engler,* 55 F. Supp. 2d at 742. Individuals increasingly access the Internet through PDAs—personal digital assistants—such as a BlackBerry or an iPhone.

"[T]he receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial [and a] child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." *Reno,* 521 U.S. at 854; *PSINet,* 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 741.

Most Internet users have a user name, password, and e-mail address that allow them to sign on to the Internet and to communicate with others. *Engler,* 55 F.Supp.2d at 742 (citing *American Libraries Ass'n v. Pataki* (S.D.N.Y. 1997), 969 F. Supp. 160, 165). Persons communicating with other users—absent a prior in-person relationship—often know them only by their usernames and e-mail addresses. *Id.*; S 261.

C. Ways of Communicating Over the Internet

Once an individual accesses the Internet, there are a wide variety of methods for communicating and exchanging information with other users. These methods include the following:

1. Websites

Websites allow users worldwide to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. *Reno,* 521 U.S. at 852; *Gonzales,* 478 F. Supp. 2d at 782. Websites can include written text, still or video visual images, and sound. *Reno,* 521 U.S. at 851; *Engler*, 55 F. Supp. 2d at 743. Websites have

varying levels of accessibility.

Some Websites are generally-accessible—anyone "surfing" the Web can enter the Website, without fee and without registration. S 588-589.

Some Websites require registration and a password, sometimes imposing a fee for access to the site, but are accessible to anyone who chooses to register and, if required, pay a fee. S 589.

Some "internal" Websites are maintained for the specific use of a particular group—such as employees of a corporation or governmental entity, alumni of a college, or members of an association (such as a trade association). Those Websites are limited to persons who qualify under the rules of the site—employees, alumni, association members, or the like. S 589.

Some Websites are a hybrid of the foregoing types of Websites—for example, a generally-accessible Website, open without fee and without registration, but for which a section of the Website requires registration, or is open to "members only." S 589.

2. E-mail and IMs (Instant Messages)

E-mail "enables an individual to send an electronic message — generally akin to a note or letter — to another individual or to a group of addressees." *Reno,* 521 U.S. at 851; see *PSINet*, 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 742; *Pataki*, 969 F. Supp. at 165. S 261.

Instant messages ("IMs") are similar to e-mail when used to communicate with one individual or a group of addressees, individually selected by the sender.

3. Listservs, Mail Exploders, USENET Groups, and Other Mailing Lists

Listservs, also called Mail Exploders, are a special form of e-mail that allows persons to send messages to a common e-mail address, which then forwards the message to the group's subscribers. S-262; *Reno,* 521 U.S. at 851.

Some listservs permit anyone to subscribe; others limit subscriptions. Some, but not all,

listservs allow non-subscribers to read (but not send) messages that have been sent through the listserv. S 262-263.

USENET newsgroups are similar to listservs, but postings on USENET newsgroups can be read by persons other than subscribers. "There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic." *Reno,* 521 U.S. at 851. S 263.

A person who sends a message using a listserv, or mail exploder, or USENET newsgroup, or other mailing list has no ability to select, on an individual basis, who will receive the message (just as a person who posts material on a Website cannot select who will view the material).

4. Chat Rooms

Chat rooms allow two or more individuals to engage in real time "dialogue," through written messages, with other users. *Reno,* 521 U.S. at 851; *Engler,* 55 F. Supp. 2d at 743; S 263-264.

There are both "public" and "private" chat rooms, and the certified questions drew a distinction between the two. Dr. Lorrie Faith Cranor, then Principal Technical Staff Member in the Secure Systems Research Group at AT&T Labs-Research, and now Associate Professor of Computer Science and of Engineering and Public Policy at Carnegie Mellon University, where she is also director of the CyLab Usable Privacy and Security Laboratory, submitted an Expert Declaration and testified as an expert witness in the district court on this issue. Dr. Cranor stated:

> For public chat rooms, most of which are free, there is no reasonable way to ascertain with any certainty whether some of the participants presently in the chat room are minors, or to restrict or prevent minors from receiving the information. Some Internet service providers permit users to set up a private chat room where it is possible to designate specific people, for example a few specified friends, to

> be in a chat room. In such a situation, the user would have a degree of control over that room. However, since participants register on the Internet only with their Internet addresses, even in this situation a user would have no reasonable way to verify whether an adult had given his e-mail address or log-in to a minor in his family, for example, or whether a minor had obtained the log-in information so to receive or participate in the chat room.

S 263-264. Thus, while it might appear that "private chat rooms" offer their participants the ability to ascertain whether the other participants are minors, and the ability to exclude minors from a private chat room, that is not the case, for two reasons. First, only the person who established the private chat room—not the other persons invited to join—has any control over who may be in the chat room. Second, neither the person who established the private chat room nor the invited participants has any way or knowing the age of the public chat room participants who were invited into the private chat room—unless those persons truthfully self-identified.

D. The Inability of Speakers on the Internet to Prevent Their Speech From Reaching Minors

For the vast majority of communications over the Internet, including communications over the Web, or by e-mail, newsgroups, listservs, and in chat rooms, it is not technologically possible for a speaker to determine the age of a recipient who is accessing such communications. *Reno,* 521 U.S. at 855 ("[T]here 'is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms.'"); *PSINet,* 108 F. Supp. 2d at 616; *Engler,* 55 F. Supp. 2d at 743; S-257-258, 272, 572, 574-577. Thus, in order for online users to make their information available on the Internet, they must do so to all Internet users, including users who may be minors, or not make it available at all. *Engler,* 55 F. Supp. 2d at 744. Even Websites that require registration and a password cannot be certain of a user's age (absent a prior relationship established in person, such as between a bank and its customer).

E. The Availability of User-Based "Parental Controls" To Shield Minors From Material That Is "Harmful To Minors"

Although there is no way for speakers to prevent minors from accessing their speech on the Internet, there are many effective user-based "parental controls" available to restrict access to online communications that parents, teachers, or others consider unsuitable for minors under their supervision. S 267-272.

Through the Internet Education Foundation, the computer industry supports an online resource, "GetNetWise: You're One Click Away," that is designed to ensure that parents are "one click away" from their children, wherever they are on the Internet. S 268. The program maintains a website, www.getnetwise.org , with readily-accessible information on protecting children who use the Internet. "The GetNetWise site is designed to assist families with finding the type of tools that best suit their needs." S 270.

Many computers—straight out of the box—include a "parental controls" feature.[8] If a computer does not already have such a feature, it is easy to download one, for free, from many online services, such as AOL.[9] These features enable parents to block access to sexually explicit materials on the Web, to prevent minors from giving personal information to strangers by e-mail or in chat rooms, and to maintain a log of all online activity on a home computer. *Reno*, 521

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[8] See, e.g., http://docs.info.apple.com/article.html?path=Mac/10.4/en/mh2258.html (visited August 5, 2009) ("You can use parental controls to create an account for a user with safe limits on the applications they can run, what files they can access, and how they use the internet. With parental controls you can: Create settings for Internet applications. For example, you can establish a list of email addresses with which the user can exchange email, specify websites the user can view, and approve of individuals the user can chat with.");

http://www.microsoft.com/windows/windows-vista/features/parental-controls.aspx (visited August 5, 2009) ("The parental controls built into Windows Vista are designed to help parents manage what their children can do on the computer. These controls help parents determine which games their children can play, which programs they can use, and which websites they can visit—and when.").

[9] See, e.g., https://parentalcontrols.aol.com (visited August 5, 2009).

U.S. at 855; *Engler,* 55 F. Supp. 2d at 744. Parents can also use screening software that blocks messages containing certain words, as well as tracking and monitoring software. *Engler,* 55 F. Supp. 2d at 744.

Perhaps most effectively, a parent can restrict and observe a child's use of the Internet by placing the computer in a family room.

Proceedings in the United States District Court

The Booksellers / Website Publishers filed this action in 2002, challenging a prior version of the Amended Act. The district court issued a preliminary injunction. S 499-532. In response, the General Assembly amended the statute to address some, but not all, of the issues raised. On September 24, 2007, the district court held the Amended Act unconstitutional:

> 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.

512 F.Supp.2d at 1094. The district court issued an injunction, "permanently enjoining Ohio Revised Code § 2907.31(D)(1), as applied to internet communications." 512 F.Supp.2d at 1106.

The district court held that the Amended Act was not unconstitutionally vague, and did not violate the Commerce Clause. 512 F. Supp. 2d at 1098-1105.

The Appeal and Cross-Appeal to the United States Court of Appeals for the Sixth Circuit, and the Questions Certified to this Court by the Sixth Circuit

The Attorney General / Prosecutors appealed, and the Booksellers / Website Publishers cross-appealed, to the Sixth Circuit.

The Attorney General / Prosecutors argued that the Amended Act is constitutional because it only covers "direct communications … with juveniles,"[10] 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.

AG 6th Cir. Third Br., p. 3. Based on that statement, the Attorney General concluded:

> [C]ontrary to Plaintiffs' repeated suggestions, the statute does not regulate Web communications, other than such personally directed devices as instant messaging ("IM") or person-to-person e-mail.

Id. After taking note of the Attorney General's argument, the Sixth Circuit pointed out:

> Notably, as Plaintiffs point out, the statute provides no guidance about when a person has "inadequate information" to "have reason to believe that a particular recipient of the information ... is a juvenile,"§ 2907.31(D)(2)(a), or has the "ability to prevent a particular recipient from receiving the [harmful to juveniles] information,"§ 2907.31(D)(2)(b).

560 F.3d at 447. The Sixth Circuit concluded that it should not "speculate" on the meaning of the Amended Act, and "the better course … is to provide the Supreme Court of Ohio with the opportunity to interpret the scope of § 2907.31(D)(2)'s exemptions and the statute's coverage."

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

560 F.3d at 447. The Sixth Circuit therefore certified the questions quoted above.

This Court's Acceptance of the Certified Questions

On June 3, 2009, this Court entered an Order accepting the certified questions.

ARGUMENT

RESPONDENTS' PROPOSITION OF LAW 1: THE AMENDED ACT IS TOO VAGUE TO ENABLE THIS COURT TO ANSWER THE CERTIFIED QUESTIONS.

Would that the General Assembly had enacted a narrow, well-defined statute, which would remove the threat of unconstitutional criminal prosecutions, while giving prosecutors an additional tool to protect juveniles. But that is not the statute that the General Assembly enacted. Instead, the General Assembly enacted a convoluted statute, the overbreadth and vagueness of which is demonstrated by the varying interpretations proffered in the federal proceedings, by the Attorney General / Prosecutors and the courts, as they have endeavored to ascertain what the Amended Act means.

The Attorney General / Prosecutors took the position in the district court that:

> 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.

S 749 (emphasis added). But the Attorney General / Prosecutors' use of the phrase ***"for the most part"*** 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 IMs, the Attorney General / Prosecutors took the position in the district 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).

S-750 (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 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.

The district court's opinion used a "chat room" as an example of a communication that came within the scope of the statute, without stating whether all chat rooms, or only some, could subject a user to criminal prosecution. 512 F. Supp. 2d at 1094.

In the Sixth Circuit, the Attorney General / Prosecutors appeared to change their position, and argued that

> the statute does not regulate Web communications, other than such personally directed devices as instant messaging ("IM") or person-to-person e-mail.

AG 6th Cir. Third Br., p. 3. The Attorney General / Prosecutors explicitly stated that Websites, listservs, and chat rooms were not covered by the Amended Act, by stating,

> 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.

AG 6th Cir. Third Br., p. 3. The Attorney General / Prosecutors also appeared to state that there could be no successful prosecution for any Website or any chat room, because

> a person who posts materials to a Web site or in a chat room would lack sufficient information to suspect that any *particular* viewer or the transmission would be a

> minor, so that the prosecution could not prove the statute's hardy scienter requirements.

Final First Brief of Attorney General / Prosecutors, *American Booksellers Foundation for Free Expression v. Strickland* (C.A. 6), Nos. 07-4375, 4376 ("AG 6th Cir. First Br."), p. 14. However, that statement makes it unclear whether the Attorney General / Prosecutors believe that no Website and no chat room is subject to the statute, or simply that prosecutions could not be successful.

In other portions of their briefing in the Sixth Circuit, the Attorney General / Prosecutors appeared to suggest that some "chat rooms" were within the scope of the Amended Act. The Attorney General / Prosecutors thus stated,

> [A]n adult who wishes to post explicit messages or images to a chat room cannot be prosecuted unless he both (a) has reason to believe that a minor is present in the chat room *and* (b) lacks the technological capacity—in that particular chat room—to exclude individual participants.

AG 6th Cir. First Br., p. 37. The Attorney General / Prosecutors thus suggest that the Amended Act can apply to the person who established a "private chat room" if he or she had reason to believe that a minor was present (because the person establishing the private chat room, by selecting the participants, had the "technological capacity" to exclude participants).[11]

The certified question about what was exempt from the Amended Act used the phrase "generally-accessible Websites"—without stating what made a Website generally-accessible (Is a Website that requires registration, but allows anyone to register, generally-accessible?) and without stating whether Websites that are not generally-accessible (such as a corporation or association's internal Website, or a "registration required" or "members only" section of a

[11] The Attorney General / Prosecutors' statement could also be read as suggesting that an adult, in a public chat room which offered each participant the "technological capacity" to create a "private chat room," could be prosecuted if he or she transmitted "harmful to minors" material in the public chat room, rather than establishing a private chat room.

Website) would be exempt from, or covered by, the Amended Act.

The certified questions used the terms "private chat rooms" and "public chat rooms" without attempting to define "private chat rooms."

The certified questions make no reference to the use of listservs, USENET groups and other forms of mailing lists. Thus, the Sixth Circuit did not make clear whether it was embracing the Attorney General's position (taken in that Court) that all listservs and other forms of mailings lists were exempt from the Amended Act.

While this range of positions would be appropriate as part of a legislative debate while a statute was being drafted, the very fact that these varying positions have been taken by the Attorney General, by the Prosecutors, and by judges—all struggling to figure out the meaning of the Amended Act—compels but one conclusion: The Attorney General / Prosecutors' argument that the Amended Act "conveys a clear, unequivocal, and definite meaning" (Attorney General / Prosecutors' Merit Brief, p. 12) is untenable.[12]

The Amended Act is vague, and does not "convey an understandable standard capable of enforcement in the courts." *Norwood v. Horney* (2006), 110 Ohio St.3d 353, 378-79, 853 N.E.2d 1115, 1142, 2006-Ohio-3799. As this Court held in *Norwood:*

> Due process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached. See, generally, *Kolender v. Lawson (*1983), 461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.Ed.2d 903; *Colten v. Kentucky* (1972), 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584. Implicitly, the law must also convey an understandable standard capable of enforcement in the courts, *Giaccio v. Pennsylvania* (1966), 382 U.S. 399, 403, 86 S.Ct. 518, 15

[12] The Attorney General / Prosecutors' quotation from *Columbia Gas Transm. Corp. v. Levin* (2008), 117 Ohio St.3d 122, 882 N.E.2d 400, 2008-Ohio-511 (Attorney General / Prosecutors' Merit Brief, p. 12) fails to note that, in the *Columbia Gas* case, this Court articulated the less stringent "vagueness" standard that applied to a "civil statute that does not implicate the First Amendment." 117 Ohio St.3d at 131, 882 N.E.2d at 411. Here, the Amended Act is a criminal statute that directly implicates the First Amendment.

> L.Ed.2d 447, for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct.

Id. In certifying questions to this Court, the Sixth Circuit frankly stated that, because "the statute provides no guidance" on the certified questions, if the Sixth Circuit attempted to answer those questions, it could only "speculate."

In construing a statute, this Court's task is, of course, "to give effect to the words used, not to delete words used or to insert words not used." *State v. Maxwell* (2002), 95 Ohio St.3d 254, 256, 767 N.E.2d 242, 245, 2002-Ohio-2121, quoting *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 254 N.E.2d 8. See also *Lesnau v. Andate Enterprises, Inc.* (2001), 93 Ohio St.3d 467, 471, 756 N.E.2d 97, 101, 2001-Ohio-1591. Because the words used in the statute provide inadequate guidance to answer the certified questions, this Court, too, could only "speculate" as to the scope of the Amended Act. This Court should not do so. Whether a question as to the construction of a statute reaches this Court through the Ohio judicial system (as it did in *Norwood*), or by a certified question from a federal court (as it does here), if the correct answer is that a statute is vague, that is the answer that this Court should give. *State of Nevada v. Richard* (Nev. 1992), 108 Nev. 626, 836 P.2d 622 (on certified question from federal court, Supreme Court of Nevada held statute was vague). As this Court held in *Norwood*,

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

110 Ohio St.3d 353, 377, 853 N.E.2d 1115, 1142, quoting *Grayned v. Rockford* (1972), 408 U.S.

104, 108-109. See also *City of Alliance v. Carbone* (Ohio App. 5 Dist. 2009), 909 N.E.2d 688, 2009-Ohio-1197.

Not only does the Amended Act provide no answers to the certified questions, but the certified questions themselves beget other questions:

- Are all Websites exempt from the Amended Act, or only generally-accessible Websites? What makes a Website generally-accessible? Are Websites that require registration—but allow any person to register—generally-accessible? What about websites that require a fee, but will accept payment from anyone? How are "internal" Websites—such as a website maintained by a trade association for its members—treated under the Amended Act? What about "members only" sections of otherwise generally-accessible Websites? Can a person be prosecuted for posting "harmful to minors" material on an internal Website, or a "members only" section of a Website which would be exempt if it were posted on a generally-accessible Website? (For sites such as a trade association site or a college alumni site, it would be ***less likely*** that a juvenile would have access to the internal Website or the "members only" section of the Website than a generally-accessible Website.)
- Does the use of a listserv (or another forms of mailing list) subject the speaker to criminal prosecution? Are all listservs exempt from the Amended Act, or only some? If so, how does a speaker know whether a particular listserv is on one or the other side of the line?
- Do communications in chat rooms subject the speaker to criminal prosecution or not? Does that depend on the size of the chat room, or whether it is public or private? What is the difference between a "public chat room" and a "private chat room"?

> Does criminal liability depend on whether the sender, or the juvenile recipient, of the message (or a third person) established the "private chat room" and determined who would be permitted access to it? What if a person in a public chat room seeks to establish a private chat room with the intended purpose of excluding whatever minors might be in the public chat room, but does so ineffectively, so that minors end up in the private chat room?

No reading of the Amended Act provides answers to these questions—unless this Court were to "insert words" into the Amended Act, something which this Court has consistently stated that it will not do in construing a statute. *State v. Maxwell*; *Lesnau v. Andate Enterprises, Inc.*

Because it does not provide answers to any of these questions, the Amended Act neither "provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence," nor "is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood,* 110 Ohio St.3d 353, 379, 853 N.E.2d 1115, 1142, citing *Kolender v. Lawson* (1983), 461 U.S. 352, 357.

In *Norwood,* this Court declined to provide a definition for the vague statute at issue—an eminent domain statute that used "deteriorating area" as a standard for appropriation—but instead held the statute void for vagueness. Similarly, here, it would be an act of legislation—not statutory interpretation—for this Court to answer the certified questions "yes" or "no" and thus engraft definitions onto this vague statute.

RESPONDENTS' PROPOSITION OF LAW 2: IF THIS COURT UNDERTAKES TO ELIMINATE THE VAGUENESS AND OVERBREADTH OF THE AMENDED ACT, THIS COURT SHOULD LIMIT THE AMENDED ACT TO PERSON-TO-PERSON E-MAILS AND PERSON-TO-PERSON INSTANT MESSAGES, FOR WHICH THE SENDER SELECTS THE INDIVIDUAL RECIPIENT, KNOWING THE RECIPIENT TO BE A JUVENILE

Courts have held that a state may constitutionally prohibit one-on-one communications,

by e-mail or IM, to a specific juvenile known to be a juvenile by the sender, where the communication falls within a *Miller/Ginsberg* definition of "harmful to juveniles." The Ohio General Assembly could have drafted such a statute, free from ambiguity or overbreadth, as other state legislatures have done. For example, Florida has a narrowly-drawn, constitutional statute that addresses this specific issue. The Florida statute provides:

> **847.0138 Transmission of material harmful to minors to a minor by electronic device or equipment prohibited; penalties.--**
>
> (1) For purposes of this section:
>
> (a) "Known by the defendant to be a minor" means that the defendant had actual knowledge or believed that the recipient of the communication was a minor.
>
> (b) "Transmit" means to send to a specific individual known by the defendant to be a minor via electronic mail.
>
> (2) Notwithstanding ss. 847.012 and 847.0133, any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, as defined in s. 847.001, to a specific individual known by the defendant to be a minor commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) Notwithstanding ss. 847.012 and 847.0133, any person in any jurisdiction other than this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, as defined in s. 847.001, to a specific individual known by the defendant to be a minor commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> The provisions of this section do not apply to subscription-based transmissions such as list servers.

Florida Statutes, Title 46, Sec. 847.0138

The Attorney General / Prosecutors suggest that, if this Court cannot answer the questions posed based on the terms of the Amended Act, this Court should adopt a limiting construction of the Amended Act by answering each certified question, "yes." (Attorney General / Prosecutors' Merit Brief, p. 16, citing *State v. Beckley* (1983), 5 Ohio St.3d 4, 8).

But where, as here, a statute is not fairly susceptible to a limiting instruction, this Court should construe the statute as it was written—even if the consequence is a finding of unconstitutionality—and leave it to the legislature to enact a constitutional statute. *City of*

Oakwood v. Gummer (1974), 38 Ohio St.2d 164, 172-173, 311 N.E.2d 517 (ordinance on issuance of parade permit held unconstitutional because it improperly "allow[s] denial of a permit upon the city manager's estimation as to the reasonable likelihood that the parade for which a permit is sought will provoke disorderly conduct or create a disturbance"; dissenting opinion suggested that "all that need be done to save this ordinance and affirm the judgment below is to judicially interpret the enactment in a fashion which eliminates the above-stated objectionable feature").

Moreover, limiting the Amended Act by answering the certified questions "yes," as the Attorney General / Prosecutors suggest, would neither eliminate the vagueness and overbreadth of the Amended Act, nor remedy its constitutional infirmity. That is because the certified questions (a) fail to address the treatment of Websites which are not generally-accessible, (b) fail to make clear whether the use of listservs and other mailing lists is exempt from the Amended Act, and (c) fail to define sufficiently the characteristics of a "private" chat room which would render it subject to the Amended Act.

If this Court were to accept the Attorney General / Prosecutors' suggestion that it should limit the Amended Act (even if such limitation cannot be found in the Amended Act's terms), then this Court should answer the certified questions with narrative answers, rather than "yes" or "no", to address these three issues.

Websites. Whether Websites are "generally-accessible" without fee or registration, are "generally-accessible" but require a fee or registration, have a "members only" section of a site, or are "internal" sites, limited to employees, or members of an association, or the like, they cannot constitutionally be subject to the Amended Act, because persons who post material and performances on Websites have no way of knowing whether minors will view the Website, and have no way of limiting their communications to adults. Therefore, if the Amended Act is to be

limited in an effort to render it constitutional, this Court should hold that all Websites—not just generally-accessible Websites—are outside the scope of the Amended Act.

Listservs, USENET Groups, and Other Mailing Lists. While one-on-one e-mails (or IMs) directed to a specific juvenile known to be a juvenile by the sender may be subject to the Amended Act, unless the Amended Act is limited to exclude the use of listservs, USENET groups, or any other form of mailing list, the Amended Act will remain unconstitutional. (Of course, if the sender selects several specific individuals, known by the sender to be juveniles, and sends an e-mail to them, that is not the use of a "mailing list.") The Attorney General / Prosecutors appear to agree, but the certified questions do not address this issue. If this Court undertakes to limit the Amended Act, this Court should make clear that such communications are not covered by the Amended Act, because such communications cannot constitutionally be subject to the Amended Act.

Chat rooms. If "private chat rooms" are not defined narrowly and with specificity, then the limitation proposed by the Attorney General / Prosecutors—that "public chat rooms" are not within the scope of the Amended Act, but "private chat rooms" are—will leave the Amended Act vague and overbroad.[13] The task of attempting to draw a constitutional line between public chat rooms and private chat rooms is inherently legislative, and fraught with difficulty. If this Court nevertheless undertakes that task, this Court should, at a minimum, ensure that the Amended Act is limited to private chat rooms (a) which afford the participants an "effective way to determine the identity or the age" of the others in the "private chat room," and (b) which afford the sender of the communication in the private chat room the ability to exclude others from that

[13] In *Reno,* without distinguishing between "private chat rooms" and "public chat rooms," the United States Supreme Court noted that, "there 'is no effective way to determine the identity or the age of a user who is accessing material through … chat rooms.'" 521 U.S. at 855.

communication. Alternatively, this Court could limit the Amended Act by excluding chat rooms in their entirety, and thus leave it to the General Assembly to endeavor to draft a constitutional provision applicable to "private chat rooms" if it deemed it advisable.

CONCLUSION

For the foregoing reasons, the Booksellers / Website Publishers respectfully request that this Court answer the certified questions as follows:

> **Certified Question 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?
>
> **Certified Question 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?
>
> ***Answer:*** *The Amended Act is too vague to permit the Supreme Court of Ohio to answer the certified questions.*

Alternatively, if this Court elects to use the certified questions as an occasion to limit the Amended Act, in an effort to render the Amended Act constitutional,[14] the Booksellers / Website Publishers respectfully request that this Court answer those questions as follows:

> **Certified Question 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?
>
> ***Answer:*** *In an effort to render the Amended Act constitutional, the Supreme Court of Ohio limits the applicability of the Amended Act to "person-to-person" e-mails and "person-to-person" instant messages, in*

[14] In addition to challenging the Amended Act on First Amendment grounds, the Booksellers / Website Publishers challenged the Amended Act as violative of the Commerce Clause, because of its substantial impact on interstate commerce. That issue is before the Sixth Circuit, and need not be addressed by this Court. However, the Booksellers / Website Publishers note that a construction of the Amended Act which limits the Amended Act to person-to-person e-mails and IMs makes it far more likely that the Amended Act would survive scrutiny under the Commerce Clause.

which the person sending the e-mail or instant message selects each individual recipient thereof, knowing that individual recipient to be a juvenile (or believing that individual recipient to be a juvenile, where the individual is a law enforcement officer posing as a juvenile).

Certified Question 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?

Answer. *In an effort to render the Amended Act constitutional, the Supreme Court of Ohio limits the Amended Act so that the Amended Act exempts from liability material and performances[15] posted on all Websites, material and performances transmitted in all chatrooms, and material and performances transmitted by all forms of listservs, USENET groups, and mailing lists.*

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[15] As noted above, the Amended Act separately defines "material" and "performances" and the exemption thus should cover both.

CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 2009, I served a copy of the foregoing Merit Brief of Respondents American Booksellers Foundation for Free Expression et al., by first class mail, postage prepaid, upon:

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