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## INTRODUCTION

This Court has accepted the United States Court of Appeals for the Sixth Circuit's request to confirm the scope of R.C. 2907.31(D), which prohibits knowingly or recklessly transmitting obscene material directly to juveniles over the Internet. The questions arose from Plaintiffs-Respondents' (collectively, "American Booksellers") federal suit against Ohio's Governor, Attorney General, and 88 county prosecutors (collectively, "State"). American Booksellers allege that R.C. 2907.31 is unconstitutional on its face, raising vagueness and overbreadth challenges under the First Amendment, as well as a dormant Commerce Clause challenge. At the Sixth Circuit, the Ohio Attorney General—as a party and as counsel for the State—presented a reading of the statute that both called American Booksellers' standing into question (because none of their conduct fell within the statute's scope) and alleviated concerns about the statute's alleged unconstitutionality.

This Court has agreed to answer whether the Attorney General's construction of the statute is correct in two respects: (1) that the statute's prohibition on transmitting harmful materials directly to juveniles criminalizes only direct communications over "personally directed devices" (such as e-mail); and (2) that the exemption for transmissions that occur over a "method of mass distribution" when that particular technology "does not provide the person the ability to prevent a particular recipient from receiving the information" exempts from criminal liability people that post harmful material "on generally accessible websites and in public chat rooms." *Am. Booksellers Found. for Free Expression v. Strickland* (6th Cir., Mar. 19, 2009), Nos. 07-4375/4376, slip op. at 6-7 ("Sixth Cir. Op.").

The plain language of the statute answers both questions with an unequivocal "yes." The statute criminalizes only *direct* transmission of harmful materials to recipients that the sender knows or has reason to know are minors. The only electronic devices that can trigger criminal



liability, then, are those like e-mail, instant messaging, or private chat rooms, which allow senders to choose who will receive their messages. See R.C. 2907.31(D)(2)(a).

Further confirming the statute's narrow scope, R.C. 2907.31(D)(2)(b) exempts from criminal liability people who distribute harmful materials over a "method of mass distribution," when the particular technology does not allow people to "prevent a particular recipient from receiving the information." R.C. 2907.31(D)(2)(b). This exemption protects adults that use websites and public chat rooms to post material that is harmful to juveniles. After all, unlike transmissions that occur over personally directed devices, any Internet user can access material posted on generally accessible websites or in public chat rooms, and neither forum allows users to prevent particular individuals from seeing what they post. In light of this exemption, adults may use these forums to distribute harmful-to-juveniles material to mass audiences on the Internet without fear of criminal liability.

Even if the plain text did not definitively resolve the Sixth Circuit's questions, this Court should still answer both questions in the affirmative. American Booksellers are challenging the constitutionality of R.C. 2907.31(D) on its face, asserting that the statute is unconstitutional in all of its applications. When considering a facial challenge, both this Court and the federal courts construe the challenged statute narrowly to avoid finding it unconstitutional. At a minimum, the reading offered by the Attorney General is a reasonable limiting construction that avoids potential constitutional problems. Consistent with both the canon of constitutional avoidance and this Court's disfavor of facial challenges, the Court should answer "yes" to both questions.

#### **STATEMENT OF THE CASE AND FACTS**

##### **A. Electronic communication has become child abusers' chief method of predation.**

The Internet has changed the nature of sex crimes against children. Janis Wolak, Kimberly Mitchell & David Finkelhoff, *Internet Sex Crimes Against Minors: The Response of Law*

*Enforcement*, National Center for Missing & Exploited Children (2003), available at <http://www.unh.edu/ccrc/pdf/CV70.pdf>. The challenged statute is aimed not only at shielding children from pornographic materials, but also at protecting them from sexual predation. The certified questions ask this Court to consider whether R.C. 2907.31(D) applies to a number of Internet technologies, ranging from “personally directed devices” (which facilitate private, one-to-one communication) to “mass distribution devices” (which make material available to anyone with an Internet connection). To provide context, a description of each device is provided below, with an explanation of how predators use the personally directed devices to exploit children.

**1. Individuals accessing the Internet have at their disposal a variety of devices for communicating, transmitting, and receiving information.**

“The Internet is an international network of interconnected computers.” *Reno v. ACLU* (1997), 521 U.S. 844, 849. Any “user,” or individual who accesses the Internet, Buxton Test., Hr’g. Tr. 113, Supplement (“Supp.”) 647-48, can employ a wide variety of Internet-based devices to communicate, transmit, and receive information. *Reno*, 521 U.S. at 851. The certified questions ask this Court to consider the following devices:

**a. Generally Accessible Websites**

“The best known category of communication over the Internet is the World Wide Web.” *Id.* at 852. The Web consists of millions of separate websites. Cranor Exp. Decl., Supp. 264. Most websites are “generally accessible,” in that anyone who chooses to access the website may visit it and view all its contents. *Reno*, 521 U.S. at 852-53. Users who post material to generally accessible websites, then, “make their material available to the entire pool of Internet users.” *Id.* at 853; see also Cranor Exp. Decl., Supp. 264-65. Some web publishers restrict access to their websites only to “a selected group, such as those willing to pay for the privilege.” 521 U.S. at 853. But restricting a website’s accessibility in that manner requires an affirmative action by the

publisher of that particular website; there is no “centralized point from which individual Web sites or services can be blocked from the Web.” *Id.* (citation omitted). By and large, websites—and all of their content—can be viewed by anyone with an Internet connection. *Id.*

**b. Public Chat Rooms**

A public chat room is an online forum where an Internet user can type messages that appear almost instantaneously on the screen of all other users who are in the chat room at the same time. Cranor Exp. Decl., Supp. 263. Public chat rooms allow users to engage in real-time communication “similar to a party line on a phone conversation,” in that everyone in the chat room can read everything that each user posts. Buxton Test., Hr’g Tr. 132, Supp. 664-65. At any one time, “thousands of different” public chat rooms are available, “in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects.” See *ACLU v. Reno* (E.D. Pa. 1996), 929 F. Supp. 824, 835. Public chat rooms are often given names to attract people of common interests to the rooms. For example, there might be chat rooms named “Miley Cyrus Fans” or “Disney Princesses,” where children congregate to meet and converse with others that share the same interests. See *Internet Safety*, [http://kidshealth.org/parent/positive/family/net\\_safety.html#](http://kidshealth.org/parent/positive/family/net_safety.html#) (last visited July 1, 2009).

To enter a public chat room, a user typically does not have to reveal his identity or age. Cranor Test., Hr’g Tr. 42, Supp. 574. Some chat rooms require users to register before entering. *Id.* For other rooms, users simply create a pseudonym (or “screen name”), type it in, and press an “enter” button to gain entry. *Id.* Once inside, the user can type messages that instantly appear on all the other participants’ screens. *Id.* Chat rooms often allow users to post images, sounds, and links to other websites. See *United States v. Williams* (2008), 128 S. Ct. 1830, 1837-38.

When posting a message to the chat room, the user’s pseudonym appears in front of the message he sends, identifying him as the speaker. See Sealed Portion of Tr., on file with the

United States Court of Appeals for the Sixth Circuit. In most chat rooms, the pseudonyms are the only information that users initially have about each other. See Cranor Test., Hr'g Tr. 42, Supp. 574. Unless an individual user chooses to disclose her real name, age, or residence, that information would not be known to any of the room's participants. *Id.* Because of the anonymity typically associated with public chat rooms, "there is no reasonable way to ascertain with any certainty whether some of the participants presently in the chat rooms are minors, or to restrict or prevent minors from receiving the information." Cranor Exp. Decl., Supp. 263. Even in public chat rooms that require users to register, no means exist to verify whether the information provided at registration is accurate. See *id.*, Cranor Test., Hr'g Tr. 59-60, Supp. 591-92. And public chat rooms do not allow users to send a message only to adults in the room, while excluding all juveniles. Cranor Test., Hr'g Tr. 42-43, Supp. 574-75.

**c. Private Chat Rooms**

Private chat rooms operate like public chat rooms, with a key difference: only selected participants can communicate and view the information exchanged in them. Buxton Test. 133, Supp. 665. A common way that private chat rooms operate is best demonstrated by example: Suppose, for instance, that 50 individuals are in a public chat room. The website hosting the chat room offers the ability to break off into a secondary, private chat room. *Id.* At some point, one user decides he wants to communicate with only a select individual or group of individuals. To prevent the rest of the public chat room from seeing the conversation, the user invites individuals he chooses to join him in a separate, private chat room. Buxton Test. 133, Supp. 665. Once inside the private chat room, the user and the invited individuals can communicate in real time with each other—much like an "instant messaging" conversation, described below. *Id.* The uninvited individuals remaining in the public chat room do not see and cannot access the private-room conversation. *Id.* To analogize to in-person communication, if a public chat room is like a

conversation amongst five or ten people, a private chat room is like “lean[ing] over and whisper[ing] in your ear.” *Id.*

**d. Person-to-Person E-mail**

E-mail is an electronic message similar to a note or a letter that a user sends “to another individual or to a group of addresses.” *Reno*, 521 U.S. at 851. Once a user sends an e-mail, the message is stored electronically in the designated recipient’s “mailbox.” *Id.* at 851. When the recipient opens the online mailbox, the message is there for her to read. *Id.* Unless the recipient gives access to her mailbox to someone else (by, for example, disclosing her password), the message can be read only by the designated recipient.

**e. Instant Messaging**

Instant messaging, commonly referred to as “IM,” is similar to a private chat room. With an instant messaging program, the user writes a message and sends it to a specific recipient. *Cranor Exp. Decl.*, Supp. 261. The message appears almost immediately on the recipient’s computer screen. *Buxton Test.*, Tr. 133-34, Supp. 665-66. No one except the individuals engaged in the instant messaging conversation can see the messages; they are not available for general perusal by any other Internet user. *Cranor Test.*, Hr’g Tr. 60, Supp. 592-93. In essence, instant messaging is an electronic version of a telephone call. See *id.*

**2. Sexual predators employ personally directed devices to target children on the Internet.**

Personally directed devices such as e-mail, instant messaging, and private chat rooms make it easier than ever for a predator to sexually exploit a child. Before the advent of these devices, a sexual predator trying to seduce children not otherwise known to him had to approach the child in person. *Barlow Test.*, Hr’g Tr. 164, Supp. 696-97. He did not have much time to get the child comfortable both with him and with the idea of having sex. *Id.* For instance, a predator might

go to a playground to try and talk to a child. But if he could not get the child to trust him or go with him the first day, he usually could not try again with the same child the next day because the child would recognize him. *Id.*

On the Internet, predators do not have the same limitations. Using e-mail, instant messaging, or a private chat room, a predator can target a particular child. At first, he makes the child feel comfortable by discussing issues that interest the child. He communicates with the child often, sometimes daily. The child feels safe because the conversations are anonymous, innocuous, and friendly. By repeatedly contacting the child over a long period of time, the predator lulls the child into a sense that the predator is no longer a stranger but a friend. The predator can then “groom” the child, or condition the child to the idea of sex with an adult, sometimes with words, other times by transmitting sexually explicit images. Over time, the child begins to trust the predator, may travel to meet him, and may even be coaxed into a sexual encounter. See Barlow Decl. ¶10, Supp. 782, see also Janis Wolak, David Finkelhor & Kimberly Mitchell, *Internet Sex Crimes Against Minors: The Implications for Prevention Based on Findings from a National Study* (2004), 35 J. of Adolescent Health 242.e15.

The nature of e-mail, instant messaging, and private chat rooms make them particularly useful tools for predators looking to exploit children. See Sealed Portion of Tr., on file with the United States Court of Appeals for the Sixth Circuit. Each of these devices permits direct transmission of sexually explicit materials, whether words or images, to a particular child in order to “groom” her for sexual activity. See Barlow Decl. ¶10, Supp. 782. By communicating over instant messaging or private chat, the predator faces little threat of discovery, because the conversations occur under pseudonyms and can be read only by the real-time participants. See Cranor Test., Supp. 591-92. E-mail is similarly low-risk. Because a variety of websites permit

users to register for a free e-mail account, and there is generally no way to verify whether the name on the account is the registrant's actual identity, predators can send private e-mails under pseudonyms. See Buxton Test., Hr'g Tr. 143, Supp. 675. And on the receiving end, there is only so much that parents can do to monitor their children's e-mail. *Id.* Any child with access to the Internet can set up an e-mail account without the knowledge or control of a parent. *Id.* Once a predator knows a child's personal e-mail address, he can converse with the child wholly undetected by parents. And with the Internet's nearly universal availability, even a child who is well-monitored at home can hide involvement with the predator from her parents by using computers at the library, a friend's house, or at school. See *id.*

During the district court proceedings in this case, police detectives demonstrated just how easily predators can draw minors into dangerous situations through personally directed devices. Posing as a young girl, a police detective logged onto a public chat room with a pseudonym he used for undercover online investigations. Moments later, another online user—apparently believing that the detective was a child—messed the police detective privately and began a sexually related discussion. The detective testified that the primary method of enforcing R.C. 2907.31(D) would be through similar undercover operations: A predator's initial contact with a detective posing as a child might occur in a public chat room, but predators would only be susceptible to prosecution upon taking the next step—using a personally directed device to send the detective a private message containing material harmful to juveniles. See Sealed Portion of Tr., on file with the United States Court of Appeals for the Sixth Circuit.

**B. R.C. 2907.31 responds to problems of online child predation by prohibiting knowing or reckless dissemination of harmful material directly to juveniles.**

In light of the problem of predators using technology to “groom” children for abuse via sexually explicit materials, Ohio passed a law criminalizing the transmission of such materials

directly to juveniles. R.C. 2907.31(A), (D). As amended in House Bill 490, the statute's general provisions state:

No person, with knowledge of its character or content, shall recklessly do any of the following:

(1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present 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 any material or performance that is obscene or harmful to juveniles;

(2) Directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent or present 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 any material or performance that is obscene or harmful to juveniles.

R.C. 2907.31(A). The amended statute defines "harmful to juveniles" in a manner that mimics the test for juvenile obscenity as articulated in *Miller v. California* (1973), 413 U.S. 15, and *Ginsberg v. New York* (1968), 390 U.S. 629. See R.C. 2907.01(E).

R.C. 2907.31(D) describes how the statute's general provisions operate in cyberspace, delineating what constitutes a violation of R.C. 2907.31(A) when "direct[]" transmission of harmful material occurs over a method of electronic communication:

(1) A person [violates 2907.31(A)(1) or (2)] 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).

R.C. 2907.31(D)(2) places two key limits on the scope of criminal liability under R.C. 2907.31(D)(1). First, the section clarifies that a person who does not "know or have reason to believe that a particular recipient of the information or offer is a juvenile" does not violate the statute upon transmitting harmful-to-juveniles material, even if a minor receives it. R.C. 2907.31(D)(2)(a). Second, the section exempts from prosecution people who transmit material harmful to juveniles "by means of a method of mass distribution" when 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)(b).

**C. American Booksellers challenged the constitutionality of a former Ohio statute that prohibited dissemination of materials harmful to juveniles.**

American Booksellers filed a federal suit in 2002 challenging the constitutionality of a predecessor statute to R.C. 2907.31, which made it a crime to “disseminate” or “display” to a minor any “materials harmful to juveniles.” R.C. 2907.01(E) & (J), 2907.31 (LexisNexis 2002); see *Am. Booksellers Found. for Free Expression v. Strickland* (S.D. Ohio, 2007), Case No. 3:02cv210, Supp. 155. After a hearing, the district court granted a preliminary injunction, finding the statutory definition of “materials harmful to juveniles” overbroad because it was not consistent with the three-part test for juvenile obscenity defined in *Miller v. California* (1973), 413 U.S. 15, and *Ginsberg v. New York* (1968), 390 U.S. 629. Supp. 156. Because the district court resolved the case on this ground, it did not reach any other aspect of American Booksellers’ claim.

**D. The General Assembly amended the statute, and American Booksellers amended their complaint to challenge R.C. 2907.31 as it presently stands.**

The State appealed the preliminary injunction ruling to the Sixth Circuit, but before the court heard the case, the General Assembly amended the underlying law. Supp. 156. First, the General Assembly revised the definition of “material harmful to juveniles,” adding language virtually identical to the *Miller-Ginsberg* standard. R.C. 2907.01(E)(1)-(3). Next, the General Assembly revised 2907.31(A) to criminalize not mere transmission of harmful material to juveniles, but *direct* transmission of such material. R.C. 2907.31(A); see Am. Sub. H.B. No. 490. Finally, the General Assembly added an entirely new section, R.C. 2907.31(D), which specifically addresses transmission of harmful materials over electronic means, such as the

Internet. Because of the General Assembly's substantial revisions to the statute, the Sixth Circuit remanded the case to the district court. Supp. 156.

**E. The district court granted in part and denied in part American Booksellers' motion for summary judgment.**

On remand, American Booksellers amended their complaint to challenge the statute as revised. *Id.* Both parties filed motions for summary judgment. *Id.* at 156-57. The district court granted both parties' motions in part and denied them part in 2004, but did not file its decision and entry until 2007. See Sixth Cir. Op. at 4.

The district court concluded that the statute's new definition of "harmful to juveniles" corrected the prior version's constitutional defect by mimicking the *Miller-Ginsberg* standard for juvenile obscenity. Supp. 168. But the court found that the new prohibitions on electronic transmission were unconstitutionally overbroad. The court permanently enjoined enforcement of R.C. 2907.31(D) as applied to Internet communications. Supp. 200. The State appealed, and American Booksellers cross-appealed.

**F. The Sixth Circuit *sua sponte* certified to this Court two questions regarding the scope of R.C. 2907.31(D).**

After briefing and oral argument concluded, the Sixth Circuit *sua sponte* certified to this Court two questions regarding the language of R.C. 2907.31(D). Sixth Cir. Op. at 2. Specifically, the Sixth Circuit asked whether, as asserted by the Attorney General, (1) the statute limits criminal liability to direct transmissions that occur via "personally directed devices such as instant messaging, person-to-person emails, and private chat rooms"; and (2) the statute "exempt[s] from liability material posted on generally accessible websites and in public chat rooms." *Id.* at 6-7. This Court accepted certification.

## ARGUMENT

### Petitioner Ohio Attorney General's Proposition of Law:

*R.C. 2907.31(D) criminalizes only the knowing or reckless transfer of harmful material directly to juveniles over personally directed devices, not the use of generally accessible forums to disseminate harmful material.*

R.C. 2907.31(D) makes explicit that the only Internet communications it criminalizes are those directed at a particular juvenile or group of juveniles. The statute's plain terms, then, settle both of the Sixth Circuit's questions. Knowingly or recklessly transmitting harmful material to juveniles over devices such as e-mail, instant messaging, or private chat rooms is a form of "direct" transmission "to a juvenile," and is thus within the scope of criminal liability. R.C. 2907.31(D)(1). On the other hand, posting harmful material to generally accessible websites and public chat rooms is not criminal conduct, because neither forum provides "the person the ability to prevent a particular recipient from receiving the information." R.C. 2907.31(D)(2)(b). Even if the plain text did not resolve the Sixth Circuit's questions, reading the statute to criminalize only transmission of materials over personally directed devices and not over generally accessible electronic forums is, at the very least, a reasonable interpretation of the statute. Because this Court presumes that statutes are constitutional and construes statutes narrowly to avoid constitutional concerns, this Court should approve the Attorney General's reading of the statute—and answer "yes" to both questions—even if the text itself does not rule out a potentially broader construction.

- A. By its plain terms, R.C. 2907.31(D) criminalizes only knowingly or recklessly transmitting harmful material to juveniles over personally directed devices, not posting such material to generally accessible electronic forums.**

R.C. 2907.31(D) "conveys a clear, unequivocal, and definite meaning" that this Court can apply "according to its terms." *Columbia Gas Transmission Corp v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, ¶19. Contrary to American Booksellers' insistence that answering the Sixth

Circuit's questions "would be an act of legislation—not statutory interpretation," Prelim. Mem. 15, the questions require only that this Court "appl[y] the law as written" to particular types of Internet technologies. See *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706, ¶12. That task is easily accomplished by reading the plain text of the statute.

The only Internet communications the statute criminalizes are those "*directly*" transmitted "to a juvenile, a group of juveniles," or law enforcement officers posing as juveniles. R.C. 2907.31(D) (emphasis added). A person cannot violate the statute's general prohibitions "by means of an electronic method of remotely transmitting information," such as the Internet, unless that person "knows or has reason to believe" that a juvenile is on the receiving end of that transmission. R.C. 2907.31(D)(1). To further clarify this scienter requirement, the statute exempts from prosecution people who lack "[i]adequate information to know or have reason to believe that a *particular* recipient of the [communication] is a juvenile." R.C. 2907.31(D)(2)(a) (emphasis added). And the statute expressly does not apply to methods of mass distribution that deny speakers the ability to exclude particular recipients. R.C. 2907.31(D)(2)(b).

As to the first question, the statute provides that a person can incur criminal liability only when he uses personally directed devices to send harmful material to known juveniles. E-mail, instant messaging, and private chat rooms are paradigmatic examples of this type of device.

First, all three devices transmit material "directly," in that users must designate a particular person or group to receive the communication. See R.C. 2907.31(D)(1). American Booksellers' own descriptions make this clear. E-mail allows senders "to address and transmit via computer a message to a *specific* individual or group of individuals who have e-mail addresses." Second Amended Complaint, ¶41, Supp. 122 (emphasis added). In the same vein, instant messaging—which is "similar to e-mail but allows messages to be sent and received almost

instantaneously”—requires users to choose who will receive their messages. See Cranor Exp. Decl., Supp. 261. And *private* chat rooms (as distinguished from public chat rooms) give “the user . . . a degree of control,” because “it is possible to designate specific people, for example a few specified friends, to be in a chat room.” Cranor Exp. Decl., Supp. 263-64. Because sending material through devices like e-mail, instant messaging, or private chat rooms requires senders to direct their messages to particular recipients, it follows that—unless a sender does not “know or have reason to believe” that his chosen recipient is a minor—transmitting harmful material to juveniles through these devices is criminal conduct. See R.C. 2907.31(D)(2)(a).

This conclusion is amplified by the fact that devices like e-mail, instant messaging, and private chat rooms do not fall within R.C. 2907.31(D)(2)(b)’s “mass distribution” exemption: All three devices provide senders “the ability to prevent a particular recipient from receiving the information.” A user can send an e-mail to a particular e-mail address and not to others, can instant-message a specific person and not others, or can invite selected individuals into a private chat room and exclude all others. See, e.g., *United States v. Chriswell* (6th Cir. 2005), 401 F.3d 459, 460 n.2 (instant messages are “private conversations, only accessible to the . . . participants”).

In short, the statute expressly criminalizes illicit transmissions to juveniles that occur over personally directed devices like e-mail, instant messaging, and private chat rooms. But because the statute requires that the harmful communication (1) be knowingly or recklessly directed to particular juveniles, R.C. 2907.31(D)(2)(a); and (2) take place over a device that allows senders to exclude particular recipients, R.C. 2907.31(D)(2)(b), the statute necessarily *does not* criminalize communications over devices *unlike* e-mail, instant messaging, or private chat

rooms, which neither permit the speaker to direct his message to particular recipients nor allow the speaker to restrict who views it.

The plain text also provides a ready “yes” to the second question—whether the statute exempts from liability material posted on generally accessible websites and in public chat rooms. The R.C. 2907.31(D)(2)(b) “mass distribution” exemption covers both of these forums, because neither device gives speakers the ability to exclude particular recipients.

Again, American Booksellers’ own admissions confirm as much. As for generally accessible websites, “[a]ny Internet user anywhere in the world” can “view Web pages posted by others, and then read text, look at images and video, and listen to sounds posted at these sites.” Second Amended Complaint, ¶47, Supp. 124. Speakers on the World Wide Web “lack the ability to prevent minors from gaining access to the information on the sites.” Cranor Exp. Decl., Supp. 264. And without the capacity to keep minors out, an adult who posts harmful material on generally accessible websites cannot be convicted under the statute—even if he suspects that a minor might stumble across his website.

The same goes for public chat rooms. In “public chat rooms . . . there is no reasonable way to ascertain with any certainty whether some of the participants presently in the chat rooms are minors, or to restrict or prevent minors from receiving the information.” Cranor Exp. Decl., Supp. 263-64. Because public chat rooms do not allow users to control who reads their messages, the “mass distribution” exemption protects adults that post harmful material in these chat rooms. R.C. 2907.31(D)(2)(b).

To summarize: the statute specifically defines what does and does not constitute criminal conduct. When a person knows or has reason to believe that a juvenile is on the receiving end of communication, transmitting harmful-to-juveniles material directly to that recipient—through a

device like e-mail, instant messaging or private chat room—is criminal conduct within the scope of the statute. Conversely, posting harmful material to forums that do not allow the speaker to exclude particular recipients—such as websites or public chat rooms—is not criminal conduct, even if the poster knows or suspects that juveniles will see the material.

**B. Even if the statute’s text did not definitively answer both questions, this Court should adopt the Attorney General’s reading of the text as a reasonable limiting construction.**

Even if the statute were unclear (and it is not), this Court should still answer both questions in the affirmative. American Booksellers brought this case in federal district court as a facial challenge, attempting to establish “that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party* (2008), 128 S. Ct. 1184, 1190. Resolving both questions using the construction detailed above will—in accord with this Court’s strong disfavor of facial challenges, *State v. Beckley* (1983), 5 Ohio St. 3d 4, 8—provide the guidance the Sixth Circuit needs either to dismiss the action for lack of standing (because American Booksellers have not alleged that they use personally directed devices to transmit harmful materials), or to adopt a construction that avoids potential constitutional problems.

Neither this Court nor the federal courts will deem a statute overbroad “when a limiting construction has been or could be placed on the challenged statute.” *Beckley*, 5 Ohio St. 3d at 8 (citation omitted); see also *Virginia v. Am. Booksellers Ass’n* (1988), 484 U.S. 383, 397. To be sure, interpreting the statute as unreasonably restricting all Internet communications directed at a mass audience could raise concerns that the statute interfered with constitutionally protected speech. But even if the statute’s language permitted such a broad reading (and it does not), this Court should read the statute narrowly to avoid potential constitutional concerns. See *Wash. State Grange*, 128 S. Ct. at 1190 (reaffirming the avoidance canon and emphasizing that courts

considering facial challenges “must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases”).

In addition, as both a party to this case and as counsel for Ohio’s 88 county prosecutors, the Attorney General has “indicate[d] that the [State] takes, and will enforce, a limited view” of the statute. See *Frisby v. Schultz* (1988), 487 U.S. 474, 483. And when, as here, a reasonable limiting construction has been offered “by the agency responsible for enforcement,” this Court gives weight to that construction. See *In re Complaint Against Judge Harper* (1996), 77 Ohio St. 3d 211, 224; see also *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 495 n.5 (citing *Grayned v. City of Rockford* (1972), 408 U.S. 104, 110) (“In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.”). During federal court proceedings, the Attorney General confirmed that state law enforcement will enforce R.C. 2907.31(D) *only* when a person transmits material directly to juveniles (or law enforcement officers posing as such) over a device that permits the speaker to exclude particular recipients. See Sealed Tr., on file with the United States Court of Appeals for the Sixth Circuit. Therefore, answering “yes” to both questions is not only a reasonable limiting construction of the statute, but is also consistent with the enforcement plans of state law enforcement.

At bottom, the certified questions ask this Court to endorse the Attorney General’s construction of the statute. Even assuming that the Attorney General’s construction of R.C. 2907.31(D) is not simply a plain reading, but a “limiting construction” necessary to preserve the statute’s constitutionality, this Court should—consistent with its disfavor of facial challenges and its preference for adopting reasonable limiting constructions—adopt the State’s reading of the statute and answer “yes” to both questions.



**C. R.C. 2907.31(D) is a carefully drawn statute free of the defects that rendered other “harmful to minors” statutes unconstitutional.**

The Attorney General’s reading of the statute also ensures that R.C. 2907.31(D) does not suffer from the First Amendment defects that rendered other “harmful to minors” statutes unconstitutional. See *Reno*, 521 U.S. 844 (invalidating the federal Communications Decency Act); *Ashcroft v. ACLU* (2004), 542 U.S. 656 (“*Ashcroft II*”) (invalidating the federal Child Online Protection Act).

Reading R.C. 2907.31(D) to criminalize only personally directed illicit transmissions distinguishes it from the constitutionally defective federal Communications Decency Act (CDA). The CDA forbade the display of juvenile obscenity, not just in one-to-one communications with minors, but in any “manner available to a person under 18 years of age.” See *Reno*, 521 U.S. at 860. This broad sweep (which included devices such as generally accessible websites and public chat rooms) was constitutionally problematic because “existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults.” *Id.* at 876. Given the inability to keep juveniles from receiving most illicit material displayed on the Internet, the CDA “effectively suppress[ed] a large amount of speech that adults have a constitutional right to receive and to address to one another,” placing a “burden on adult speech” that was “unacceptable.” *Id.* at 874. R.C. 2907.31(D)(2)(b)’s exemption for mass communications avoids the CDA’s misstep. Read to apply *only* where the speaker has the technological capacity to prevent a juvenile from receiving the speech (such as through e-mail, instant messaging, or private chat room), the statute does not cover materials broadcast to the public generally and, accordingly, does not suppress speech that adults have a constitutional right to display and receive.

The statute's "mass distribution" exemption also avoids the constitutional problems that inhered in the federal Child Online Protection Act ("COPA"). COPA imposed criminal penalties for knowingly posting harmful-to-juveniles material on the World Wide Web for commercial purposes. See *Ashcroft II*, 542 U.S. at 661. The United States Supreme Court held COPA unconstitutional because it was not the least restrictive means of preventing minors from accessing sexually explicit content on the Web. *Id.* According to the Court, using commercially available filtering software was less restrictive and comparably effective at blocking juveniles from viewing harmful-to-juveniles material on generally accessible websites. See *id.* at 666-70.

*Ashcroft II*'s analysis is immaterial to the conduct barred under R.C. 2907.31(D). Because of the exemption for mass distribution under R.C. 2907.31(D)(2), the statute does not bar individuals from posting material on generally accessible websites. Accordingly, the availability of filtering software, crucial to the *Ashcroft II* Court's decision to strike down a wholesale ban on juvenile obscenity on the World Wide Web, is irrelevant to constitutional analysis of the Ohio statute. R.C. 2907.31(D) targets one-to-one communications because child predators frequently use such communications as part of the "grooming" process to prime future victims for abuse. Filtering software is incapable of filtering harmful materials sent to juveniles through e-mail, instant messaging, or private chat, especially when those materials contain video and/or audio. Buxton Exp. Decl., Supp. 485-88. It follows, then, that because filtering software cannot prevent predators from using personally directed devices to transmit harmful material directly to juveniles, such software is not a less restrictive means of advancing the government's interest in protecting children from predation. *Ashcroft II* does not call R.C. 2907.31(D)'s constitutionality into question.

As argued to the Sixth Circuit, the Attorney General's reading of the statute both avoids potential constitutional problems and distinguishes R.C. 2907.31 from constitutionally defective statutes. Given both this Court's doctrine of constitutional avoidance and its strong presumption that statutes are constitutional, the Court should endorse the Attorney General's reading of the statute, even if the construction is not commanded by the text itself.

**D. Affirmative answers from this Court will endorse the statutory construction the Attorney General presented to the Sixth Circuit, equipping that court to dispose of American Booksellers' challenge in its entirety.**

The certified questions ask this Court to endorse the Attorney General's reading of the statute, not to adjudicate American Booksellers' constitutional claims. Yet affirmative answers from this Court will lay the groundwork for the Sixth Circuit to hold R.C. 2907.31(D) constitutional.

First, the Attorney General's reading of the statute affirms that the plaintiffs lack standing to pursue their First Amendment claim. If this Court reads the statute to criminalize only illicit, personally directed communications that occur over e-mail, instant messaging, or private chat room—activities in which plaintiffs do not presently engage or intend to engage—plaintiffs face no likelihood that the statute will cause them any injury. Without actual or imminent injury, the plaintiffs cannot establish standing.

Second, even if plaintiffs have standing, affirmative answers from this Court will unravel American Booksellers' facial overbreadth challenge. If this Court determines that the statute bans juvenile obscenity only when the speaker knowingly or recklessly directs such speech toward a particular juvenile (through e-mail, instant messaging, or private chat room), then the statute does not apply to any constitutionally protected speech and, accordingly, is not unconstitutionally overbroad. And if, as the Attorney General suggests, the statute's exemptions protect adults who use methods of mass communication (such as websites and public chat

rooms) to transmit harmful materials, then chances are slim that R.C. 2907.31(D)'s prohibition of juvenile obscenity will trench on constitutionally protected sexually explicit adult-to-adult speech.

Third, this Court's endorsement of the Attorney General's reading will dispatch American Booksellers' vagueness challenge. When a "statute does not proscribe a substantial amount of constitutionally protected conduct, a party may raise a . . . vagueness challenge only if the enactment is impermissibly vague in all of its applications." *Rendon v. Transp. Sec. Admin.* (6th Cir. 2005), 424 F.3d 475, 480 (internal quotation marks and citation omitted). Read in the way the Attorney General presents, the statute proscribes *no* protected speech, let alone a substantial amount. Nor is it vague in all applications: For example, the law plainly applies if a little-league coach e-mails a sexually explicit video clip to a ten-year-old player.

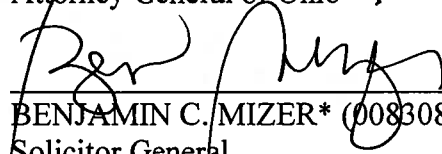
Finally, affirmative answers from this Court may also inform the Sixth Circuit's resolution of American Booksellers' dormant Commerce Clause challenge. If the statute applies only to personally directed, one-to-one electronic communications, it is difficult to see how the statute's modest prohibitions have any effect on interstate commerce.

**CONCLUSION**

For these reasons, the State asks this Court to answer "yes" to both questions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Petitioners Ohio Attorney General Richard Cordray and 88 County Prosecutors was served by U.S. mail this 10th day of July, 2009, upon the following counsel:

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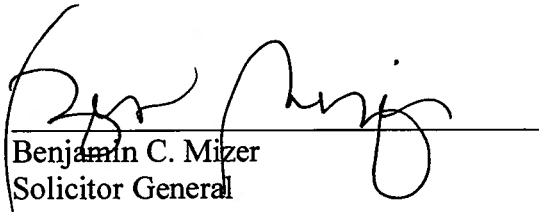
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