Case Nos. 07-4375 & 07-4376

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

SECOND PROOF BRIEF OF PLAINTIFFS - APPELLEES/CROSS - APPELLANTS AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ET AL.

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DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Plaintiffs-Appellees/Cross-Appellants certify that (1) none of plaintiffs have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in any Plaintiffs-Appellees/Cross-Appellants.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees/Cross-Appellants American Booksellers Foundation for Free Expression ("ABFFE"), et al., respectfully request oral argument, which they believe will aid this Court's consideration of the varied issues that this case presents.

JURISDICTIONAL STATEMENT

The district court had federal-question jurisdiction over plaintiffs' First Amendment and Commerce Clause challenges under 28 U.S.C. § 1331. On October 22, 2007, defendants appealed and on October 30, 2008, plaintiffs appealed the district court's final judgment entered on September 24, 2007. Accordingly, 28 U.S.C. § 1291 provides this Court with jurisdiction over both appeals from the district court's final judgment.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Ohio Revised Code § 2907.31(D), a criminal statute, violates the Fifth Amendment because it is so vague and ambiguous that the average person does not know what is prohibited.

2. Whether Ohio Revised Code § 2907.31(D), which prohibits the transmission to minors by the Internet of material which is harmful to juveniles, violates the First Amendment because it criminalizes and restricts the dissemination of constitutionally-protected speech to adults and older minors and is overbroad.

3. Whether Ohio Revised Code § 2907.31(D) violates the Commerce Clause because it (a) regulates commerce entirely outside of Ohio (b) imposes burdens on interstate commerce which exceed any local benefit and (c) subjects interstate Internet users to inconsistent regulations.

STATEMENT OF THE CASE

This case is a challenge under the First, Fifth, and Fourteenth Amendments to the U.S. Constitution and the Commerce Clause to an Ohio statute which extended Ohio's "harmful to juveniles" criminal statute to Internet communications. Sections 2907.01, 2907.31 and 2907.35 of the Ohio Revised Code (collectively the "Revised Internet Provision"), to the extent they apply to Internet communications, are unconstitutional. After careful consideration of the oral hearing testimony and submitted affidavits, the district court correctly held that the Revised Internet Provision, as amended, was overbroad and failed strict scrutiny, and therefore permanently enjoined its enforcement. The district court also found that it was not unconstitutionally vague and rejected plaintiffs' Commerce Clause claims on the basis that the Salerno doctrine (see U.S. v. Salerno, 481 U.S. 739 (1987) discussed infra at pp. 49-51) applied and that plaintiffs had failed to demonstrate that there were no set of circumstances under which the Act could be constitutionally applied.

Plaintiffs, a broad group of mainstream publishers, distributors, retailers, and Web sites distributing First Amendment-protected material available to persons in Ohio directly or through the Internet, commenced this action in May 2002, challenging the then recently enacted amendments to Sections 2907.01 and 2907.35 (the "Act"). The Act contained two components — the "harmful to juveniles" definition and the "Internet Provision" — each of which was

unconstitutional. The first, the definition of "harmful to juveniles" in § 2907.01 (the "Harmful to Juveniles Definition") was preliminarily enjoined by the District Court on August 30, 2002. See Bookfriends, Inc. v. Taft, 223 F. Supp. 2d 932 (S.D. Ohio 2002).

The District Court did not have to deal with the second component — the Internet Provision — at that time, because the preliminary injunction with respect to the Harmful to Juveniles Definition prevented enforcement of the Internet Provision as well. Defendants appealed the District Court's order to this Court. After the notice of appeal had been filed, but before the appeal itself had taken a significant step towards being heard, the Ohio General Assembly again amended its harmful to juveniles statutes (the "Amended Act") as defendants state, "to fix this flaw." (Proof Brief of Defendants-Appellants ("Defs. Br.") p. 2.; Ohio Amended Substitute H.B. 490.)

On remand, the District Court reached the issue it did not have to reach previously, and correctly found, as have 13 other courts faced with this issue,[1] that

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[1] ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999), aff'g 4 F. Supp. 2d 1029 (D.N.M. 1998) (finding New Mexico Internet "harmful to minors" statute unconstitutional); American Booksellers Found. for Free Expression v. Dean, 342 F.3d 96 (2d Cir. 2003), aff'g 202 F. Supp. 2d 300 (D. Vt. 2002) (finding Vermont "harmful to minors" statute unconstitutional); PSINet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004), reh'g denied 372 F.3d 671 (4th Cir. 2004), aff'g 108 F. Supp. 2d 611 (W.D. Va. 2000) (granting preliminary injunction against enforcement of Virginia "harmful to juveniles" statute on basis of unconstitutionality), and 167 F. Supp. 2d 878 (W.D. Va. 2001) (granting summary judgment on identical grounds); Southeast Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773 (D.S.C. 2005) (finding South Carolina Internet "harmful to minors" statute unconstitutional);

the application of the harmful to juveniles statute to the Internet violated the First Amendment. American Booksellers Found. for Free Expression v. Strickland, 512 F. Supp. 2d 1082 (S.D. Ohio 2007).

STATEMENT OF FACTS

In support of its motion for summary judgment and a permanent injunction, plaintiffs tendered the declarations previously filed on June 24, 2002, of:

> Dr. Mitchell S. Tepper, founder and president of plaintiff Sexual Health Network, Inc;
>
> James Latham, co-owner of then-plaintiff Bookfriends, Inc;
>
> Allan R. Adler, Vice-President for Governmental and Legal Affairs of plaintiff Association of American Publishers;
>
> Michael Neff, Editor of plaintiff Web del Sol;
>
> Pamela J. Horovitz, President of plaintiff National Association of Recording Merchandisers;

ACLU v. Napolitano, Civ. No. 00-506 (D. Ariz. June 10, 2002) (finding Arizona "harmful to minors" statute unconstitutional); Cyberspace Commc'ns, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (granting a preliminary injunction against enforcement of Michigan Internet "harmful to minors" statute on the basis of unconstitutionality), aff'd, 238 F.3d 420 (6th Cir. 2000), 142 F. Supp. 2d 827 (E.D. Mich. 2001) (granting summary judgment and permanent injunction on identical grounds); American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y 1997) (finding New York Internet "harmful to minors" statute unconstitutional). See also ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007) (invalidating COPA, the successor to the CDA), remanded by Ashcroft v. ACLU, 542 U.S. 656 (2004).

Christopher Finan, President of plaintiff American Booksellers Foundation for Free Expression;

Frank Deaner, Executive Director of plaintiff Ohio Newspaper Association;

Dr. Lorrie Faith Cranor, an expert witness on the Internet then employed at AT&T Labs-Research and now Associate Research Professor in the School of Computer Science and in the Engineering and Public Policy of the School of Engineering of Carnegie-Mellon University; and

Marty Klein, a plaintiff and the editor, publisher and writer for the website Ask Me Anything,

as well as the oral testimony of Dr. Cranor, Dr. Tepper and Mr. Latham at the July 31, 2002 hearing before the district court. (R. 27, Plaintiffs' Motion for Preliminary Injunction with all Exhibits, Joint Appendix ("JA")___; R. 48, July 31, 2002 Hearing Transcript, JA_____.)

I. PLAINTIFFS AND THEIR SPEECH

Plaintiffs represent a broad spectrum of persons — including online businesses, and organizations representing booksellers, newspaper publishers, book publishers, video stores, and record shops. Some use the Internet to communicate, disseminate, display, and access a broad range of speech; others communicate, disseminate, and display a broad range of speech in Ohio through newspapers, books, magazines, sound recordings, and video recordings. Although plaintiffs do not speak with a single voice or on a single issue, they all engage in speech regulated by the Act, whether it at times involves sexually explicit matters, violence, death, or foul language. Thus, they justifiably fear that their direct and

online speech may be considered by some to be "harmful to juveniles" under the Act, even though it is constitutionally protected for adults and often for older juveniles as well.

Plaintiffs include speakers and content providers who communicate online both within and outside of the state of Ohio. Like all speech on the Internet, all of plaintiffs' Internet speech is accessible both within and outside of the state of Ohio.

II. THE AMENDED ACT

The Amended Act is set forth in full the an addendum to this brief. A violation of the Amended Act is punishable by imprisonment of not more than six to eighteen months, or a fine of not more than $2,500 to not more than $5,000, or both, depending on the nature of the offense. Ohio Rev. Code §§ 2929.14(a)(4) and (5), 2929.18(A)(3)(d) and (e).

By extending the realm of material which may be deemed harmful to juveniles to include material on the Internet accessed by computer, the Amended Act dangerously targets communication and expression exchanged amongst adults via the World Wide Web (The "Web").[2] Speech on the Web is generally available to anyone with access to the Internet, whether at home, at work, in school, or in the

[2] This case is not about, and defendants here do not challenge, the regulation of obscenity, child pornography, speech intended to lure minors into illegal sexual activity, or speech constituting harassment over the Internet. In this respect, this case is similar to Ashcroft v. Free Speech Coalition, where the Court recognized that the statute at issue was not directed toward obscene speech, as Congress had proscribed obscene materials through a separate statute. See 535 U.S. 234, 240 (2002).

library. Anyone who posts content to the Web, chat rooms, mailing lists, and discussion groups makes it automatically available to all users worldwide, including minors. Given the availability of these forums to minors, any communication in these forums is subject to the Act, because placing content on the Internet arguably constitutes "dissemination" of material.

In addition to exposing all communications placed on or carried out through the Internet to prosecution under the Amended Act, the Revised Internet Provision is also remarkably convoluted and, as set forth below at pages 26-31, unconstitutionally vague. Section 2907.01(J), which defines "material" for the purposes of crimes relating to obscenity and harmful to minors material, generically includes an image or text appearing on a computer monitor or similar device, or recorded on a computer hard disk or similar storage device, which definition is incorporated in § 2907.31, defining the crime. But § 2907.35(D)(1) and (3), which limits the scope of § 2907.31, uses the phrase "electronic method of remotely transferring information," while § 2907.35(F), another limitation, refers directly to the Internet.

The Revised Internet Provision criminalizes the delivery, furnishing, dissemination, exhibition or presentation of harmful to juveniles matter to minors on or via the Internet. Ohio Rev. Code § 2907.31(A). Presumably in an attempt to mitigate the unconstitutionality of the Act, the Amended Act provides that if the harmful to juveniles material is remotely transmitted "by means of a method of

mass distribution," then, in some circumstances, it is not a violation of § 2907.31(A). Ohio Rev. Code § 2907.31(D)(2).

Putting aside, for the moment, the meaning of "remotely" in this context, the expression "method of mass distribution" is puzzling. It appears nowhere else in Ohio statutes or court decisions. If the expression includes the Internet, then the Revised Internet Provision is meaningless, since, subject to the meaning of the phrase, the Internet "does not provide the person [transmitting information] the ability to prevent a particular recipient from receiving the information." Ohio Rev. Code § 2907.31(D)(2)(b). However, it is difficult to conjure up what else it might mean.

III. THE INTERNET

The basic structure and operation of the Internet is at the core of the unconstitutionality of the Amended Act and the other attempts to extend the applicability of restrictions on harmful to minors material to the Internet. It has been examined and described in the context of statutes similar to the Amended Act by numerous courts, including the Supreme Court, three Courts of Appeal, and various federal district courts.[3] In addition, it is described in Dr. Cranor's declaration and her testimony before the court below. (R. 48, July 31, 2002 Hearing Transcript ("Cranor Testimony") pp. 29-72, JA____.) At this point, the

[3] See cases cited in footnote 1, supra.

basic facts regarding communication on the Internet are well-established. Three basis points are crucial:

(a) It would be impossible from a technical, economic and/or practical perspective for Internet speakers to prevent their speech from reaching minors in Ohio without also preventing it from reaching adults.[4]

(b) Internet speakers cannot prevent their speech from reaching persons in Ohio without also preventing it from reaching persons in other states.

(c) The Revised Internet Provision will not substantially diminish the access of minors in Ohio to harmful to juveniles matter.

As the court below stated, "the nature of the internet makes it virtually impossible to identify the age and geographic location of the sender or the recipient of communications over the internet." American Booksellers v. Strickland, 512 F. Supp. 2d at 1087.

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[4] The National Research Council, the working arm of the National Academy of Sciences and the National Academy of Engineering, issued a comprehensive study on protecting children on the Internet. The report, which had been commissioned by Congress, supports the district court's ruling. Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, Youth, Pornography, and the Internet, (Dick Thornburgh and Herbert S. Lin, eds., National Academy Press 2002) ("NRC Report"), available at http://www.nap.edu, pp. 11-13 (summarizing alternatives); p. 373 ("in an online environment in which it is very difficult to differentiate between adults and minors, it is not clear whether denying access based on age can be achieved in a way that does not unduly constrain the viewing rights of adults").

A. The Nature of the Online Medium

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. (R. 27, Declaration of Dr. Lorrie Cranor ("Cranor Decl.") ¶¶ 13, 15, JA _____.) See also Reno v. ACLU, 521 U.S. 844, 849-58 (1997); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 614 (W.D. Va. 2000); Cyberspace Commc'ns, Inc. v. Engler, 55 F. Supp. 2d 737, 741 (E.D. Mich. 1999); ACLU v. Johnson, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998); American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 164 (S.D.N.Y. 1997). As the United States Supreme Court has noted, "[t]he Internet is a unique and wholly new medium of worldwide human communication ... [where] the content ... is as diverse as human thought." Reno, 521 U.S. at 850, 852 (internal citations omitted).

The United States Supreme Court also has recognized that the Internet is distinguishable in important ways from traditional media. 521 U.S. at 862-63, 868-69; see also PSINet, 108 F. Supp. 2d at 615; Engler, 55 F. Supp. 2d at 741. For instance, "[n]o 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 (quoting ACLU v. Reno, 929 F. Supp. 824, 838 (E.D. Pa. 1996)); see PSINet, 108 F. Supp. 2d at 615; Engler, 55 F. Supp. 2d at 741. (See also R. 27, Cranor Decl. ¶ 14, JA__.) In addition, the Internet is a truly global medium. Over 40% of the content on the Internet originates abroad, and all of the content on the Internet is equally available to all

Internet users worldwide. See ACLU v. Gonzales, 478 F. Supp. 2d 775, 789 (E.D. Pa. 2007); Reno, 521 U.S. at 850; Engler, 55 F. Supp. 2d at 741.

The Internet also differs from traditional media because it provides users with an unprecedented ability to interact with other users and with content. Unlike radio or television, the Internet does not " 'invade' an individual's home or appear on one's computer screen unbidden." PSINet, 108 F. Supp. 2d at 615; see also Reno, 521 U.S. at 854; Engler, 55 F. Supp. 2d at 741. Rather, "the 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; see also PSINet, 108 F. Supp. 2d at 615; Engler, 55 F. Supp. 2d at 741.

Since the Internet presents extremely low entry barriers, it "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers," and provides any person or organization with the capability to "publish" information." Reno v. ACLU, 521 U.S. at 853; see also Engler, 55 F. Supp. 2d at 741; ACLU v. Reno, 31 F. Supp. 2d 473, 482 (E.D. Pa. 1999). Unlike radio, television, newspapers and books, the Internet "is not exclusively, or even primarily, a means of commercial communication." Engler, 55 F. Supp. 2d at 741-42; see also ACLU v. Reno, 929 F. Supp. at 842. In addition, unlike the newspaper, broadcast station, or cable system,

Internet technology gives a speaker a potential worldwide audience. (R. 27, Cranor Decl. ¶ 13, JA ___.)

B. How Individuals Access the Internet

Individuals can easily obtain access to the Internet through computers maintained by many educational institutions, libraries, their business and/or employer, commercial outfits that provide access for an hourly fee, or through the computer in their own home provided the computer is linked to the Internet. Reno v. ACLU, 521 U.S. at 850; PSINet, 108 F. Supp. 2d at 615; Engler, 55 F. Supp. 2d at 742; Pataki, 969 F. Supp. at 164-65. "Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods." Reno, 521 U.S. at 851.

Most Internet users are provided a user name, password, and electronic mail ("e-mail") address that allow them to sign on to the Internet and to communicate with other users. Engler, 55 F. Supp. 2d at 742 (citing Pataki, 969 F. Supp. at 165). Many user names are pseudonyms or pen names that often provide users with a distinct online identity and help to preserve their anonymity. Id. Generally, persons communicating with the user will know them only by their username and e-mail address, unless the user reveals other information about herself through her messages. Id. (See also R. 27, Cranor Decl. ¶ 21, JA ___.)

C. Ways of Communicating and Exchanging Information on the Internet

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

1) E-mail, which "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 v. ACLU, 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. (See also R. 27, Cranor Decl. ¶ 21, JA _____.);

2) Online discussion groups, which have been established by individuals, institutions, and organizations on many different computer networks and cover virtually every topic imaginable — creating a new, global version of the village green. There are three common forms for online discussion communication methods:

   a) Mail explorers, also called listserves, are a sort of e-mail that allows subscribers to send messages to a common e-mail address, which then forwards the message to the group's other subscribers. (R. 27, Cranor Decl. ¶¶ 22-23, JA ___.) See also Reno, 521 U.S. at 851;

   b) USENET newsgroups also serve groups of regular participants by automatically disseminating information to users, but these postings can be read by others as well. "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. (See also R. 27, Cranor Decl. ¶ 24, JA ____.);

c) Chat rooms allow two or more individuals to engage in real time dialogue with one or many other users. "[I]n other words, by typing messages to one another that appear almost immediately on the others' computer screens." Reno v. ACLU, 521 U.S. at 851; see Engler, 55 F. Supp. 2d at 742; Pataki, 969 F. Supp. at 165-66. (See also R. 27, Cranor Decl. ¶ 25, JA _____.); and

3) The Web allows 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 v. ACLU, 521 U.S. at 852; see also Gonzales, 478 F. Supp. 2d at 782. Some of these documents are simply files containing information, while others are more elaborate "Web pages" which can include any variety of written text, still or video visual images, and music or other sound recordings. See generally Reno v. ACLU, 521 U.S. at 851; Engler, 55 F. Supp. 2d at 743; Pataki, 969 F. Supp. at 166. Any Internet user worldwide with the proper software can create his own Web page or view Web pages posted by others. (R. 27, Cranor Decl. ¶ 27, JA ___.) See also Engler, 55 F. Supp. 2d at 743; Pataki, 969 F. Supp. at 166. For example,

defendant Marc Dann has his own Internet Web site, at http://www.ag.state.oh.us.

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

"Once a provider posts content on the Internet, it is available to all other Internet users worldwide." ACLU v. Reno, 929 F. Supp. at 844; see Pataki, 969 F. Supp. at 167; PSINet, 108 F. Supp. 2d at 616; Engler, 55 F. Supp. 2d at 743. (See also R. 27, Cranor Decl. ¶ 26, JA ____.) For the vast majority of communications over the Internet, including all communications over the Web, or by e-mail, newsgroups, mail exploders, and in chat rooms, it is not technologically possible for a speaker to determine the age of a recipient who is accessing such communications. See Reno v. ACLU, 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. (See also R. 27, Cranor Decl. ¶¶ 11, 44, JA ____; R. 48, Cranor Testimony pp. 40, 42-45, JA _____.) 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.

E. The Availability of User-Based Filtering Programs

Although there is no way for the vast majority of speakers to prevent minors in general and any individual minor in particular from accessing their speech, there

are a variety of options available to parents and other users who wish to restrict access to online communications that they might consider unsuitable for minors. (See R. 48, Cranor Testimony pp. 48-51, JA _____; R. 27, Cranor Decl. ¶¶ 33-42, JA ___.) See also Reno, 521 U.S. at 854-55; Engler, 55 F. Supp. 2d at 744. For example, there are a variety of user-based software products that allow users 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 log of all online activity that occurs on a home computer. See Reno, 521 U.S. at 855; Engler, 55 F. Supp. 2d at 744.

Commercial online services such as AOL provide features to prevent minors from accessing chat rooms and to block access to certain newsgroups based on keywords, subject matter, or specific newsgroups. See Reno, 521 U.S. at 854-55; Engler, 55 F. Supp. 2d at 744. They also offer screening software that automatically blocks messages containing certain words, as well as tracking and monitoring software to allow parents to determine which resources their child has accessed online and children-only discussion groups that are closely monitored by adults. See Engler, 55 F. Supp. 2d at 744; Johnson, 4 F. Supp. 2d at 1033; Reno, 929 F. Supp. at 842.

In fact, a Congressional-commissioned study of the National Research Council, the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering, found that:

> Filters are capable of blocking inappropriate sexually explicit material at a high level of effectiveness—if a

> high rate of overblocking is also acceptable. Thus, filters are a reasonable choice for risk-averse parents or custodians (e.g., teachers) who place a very high priority on preventing exposure to such material and who are willing to accept the consequences of such overblocking. (For example, these individuals may be more inclined to take such a stance if the children in question are young).

NRC Report at 303.

In addition, there are "family" ISP's that parents can select that provide access only to Web sites, discussion groups, and the like that have been pre-approved as containing material that is suitable for minors.

Finally, and perhaps most effectively, a parent can restrict a child's use of the Internet by placing the computer in a family room or other public room and monitoring the child's use of the Internet.

F. The Interstate Nature of Online Communication

"The Internet is by nature an instrument of Interstate Commerce." Engler, 55 F. Supp. 2d at 744; see also Johnson, 4 F. Supp. 2d at 1032; Pataki, 969 F. Supp. at 171-73. As the United States Supreme Court has noted, the Internet is a decentralized series of linked computers that is wholly insensitive to geographic distinctions. Reno v. ACLU, 521 U.S. at 850-51; see also PSINet, 108 F. Supp. 2d at 616; Engler, 55 F. Supp. 2d at 744; Johnson, 4 F. Supp. 2d at 1032; Pataki, 969 F. Supp. at 170. While computers on the network do have "addresses," they are digital addresses on the network rather than geographic addresses in real space. See PSINet, 108 F. Supp. 2d at 616; Engler, 55 F. Supp. 2d at 744; Johnson, 4 F. Supp. 2d at 1032; Pataki, 969 F. Supp. at 170.

Those geographic indicators that do exist do not necessarily indicate the geographic location of the user because users can gain access to their e-mail accounts and other information from any location without indication that the user may be accessing the Internet from a place other than their home access point. For example, a person who obtained an e-mail address from a New Mexico ISP may, in fact, be accessing the Internet while in Ohio while using the New Mexico account. This makes it impossible for someone who sends or receives an e-mail to know with certainty where the message actually originated or actually was received. See NRC Report at 67.

As the foregoing suggests, information bows freely across state borders on the Internet, a characteristic that has earned the Internet the nickname, "the information superhighway." See Engler, 55 F. Supp. 2d at 744, Pataki, 969 F. Supp. at 161. To that end, no aspect of the Internet can feasibly be closed off to users from another state. ACLU v. Reno, 217 F.3d 162, 169 (3d Cir. 2000); PSINet, 108 F. Supp. 2d at 616; Engler, 55 F. Supp. 2d at 744-45; Johnson, 4 F. Supp. 2d at 1032; Pataki, 969 F. Supp. at 171. An Internet user who posts a Web page or participates in a chat room or discussion group cannot prevent Ohioans or New Mexicans or New Yorkers from accessing that page and, indeed, will not even know the state of residency of any visitors to that site, unless the information is voluntarily (and accurately) given by the visitor. See, e.g., ACLU v. Reno, 217 F.3d 162, 169 (3d Cir. 2000); PSINet, 108 F. Supp. 2d at 616; Engler, 55 F. Supp. 2d at 745; Johnson, 4 F. Supp. 2d at 1032; Pataki, 969 F. Supp. at 171. (See also

R. 27, Declaration of Mitchell S. Tepper ("Tepper Decl.") ¶¶ 24-26, JA ____ _____; R. 27, Cranor Decl. ¶ 11(2), JA ____.)

In addition, since the Internet is a redundant series of linked computers over which information often travels randomly, a message from an Internet user sitting at a computer in New York may travel via one or more other states — including Ohio — before reaching a recipient who is also sitting at a computer in New York. See, e.g., Engler, 55 F. Supp. 2d at 745; Johnson, 4 F. Supp. 2d at 1032. For these reasons, it is impossible for an Internet user to prevent his or her message from reaching residents of any particular state. See PSINet, 108 F. Supp. 2d at 616; Engler, 55 F. Supp. 2d at 745; Johnson, 4 F. Supp. 2d at 1032; Pataki, 969 F. Supp. at 171.

SUMMARY OF ARGUMENT

As set forth herein, plaintiffs have demonstrated that:

- Under well-established precedents applicable to First Amendment challenges, plaintiffs have standing;

- The challenged provisions of Ohio Revised Code § 2907.31(D), a criminal statute, include language so vague and ambiguous as to violate the Fifth Amendment;

- The challenged provisions of Ohio Revised Code § 2907.31(D) violate the First Amendment; and

- The challenged provisions of Ohio Revised Code § 2907.31(D) violate the dormant Commerce Clause and plaintiffs can raise such violations.

The Revised Internet Provision violates the First and Fourteenth Amendments because: 1) it restricts adults from engaging in protected speech on the Internet; 2) it is substantially overbroad; and 3) it criminalizes protected speech among and to older minors. Every comparable state statute attempting to regulate Internet communications in this manner has been struck down by the federal courts.

In addition, the Revised Internet Provision violates the Commerce Clause by restricting the free flow of information via the Internet across state lines. It regulates speech that occurs wholly outside the borders of Ohio and imposes an unjustifiable burden on the interstate commerce of the Internet. The Revised Internet Provision also subjects online speakers to inconsistent state laws and as such, is unconstitutional. Finally, the Revised Internet Provision is woefully vague and indefinite.

The Amended Act was passed despite the similarity of the effect of the Revised Internet Provision to those portions of the federal Communications Decency Act ("CDA") that were invalidated by the United States Supreme Court in Reno v. ACLU, 521 U.S. 844 (1997). Since Reno, the Second, Fourth and Tenth Circuit Courts of Appeals and numerous federal district courts have enjoined and struck down comparable federal and state statutes under the First Amendment

based upon reasoning similar to that employed by the Supreme Court, as well as because the relevant state statutes violate the Commerce Clause.

Despite defendants' attempts to distinguish them[5], the Revised Internet Provision is similar to these recently stricken laws in that it attempts to restrict minors from accessing speech that is constitutionally-protected among adults. It also is substantially overbroad because it criminalizes a wide range of speech that is valuable and constitutionally protected for minors, especially older minors, including information about safe sex and resources for gay and lesbian youth. These constitutional defects are amplified because of their impact upon online communication. The Internet has no parallel in the history of human communication. It provides millions of people around the globe with a low-cost method of conversing, publishing, and exchanging information on a vast array of subjects with a virtually limitless worldwide audience. It also provides a foundation for new forms of community, based not on any accident of geographic proximity, but rather on bonds of common interest, belief, and culture. Had the Act not been found unconstitutional, it would have forced the plaintiffs, and millions of other online speakers around the country, to cease engaging in constitutionally protected speech or risk criminal prosecution in Ohio. Unless the judgment below is affirmed, the Act will greatly impair the tremendous speech-

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[5] Discussed infra at pages 31-34, 46-49.

enhancing qualities of the Internet by reducing all of its content to a level deemed suitable for children.

Thus, the judgment of the district court should be affirmed by this Court, on the grounds that the Revised Internet Provision violates the First Amendment, that the Revised Internet Provision is unconstitutionally vague and that the Revised Internet Provision violates the dormant Commerce Clause.

STANDARD OF REVIEW

Defendants contend that this Court should review de novo the district court's order granting summary judgment. While the Court's precedents so provide as to review of ordinary summary judgment orders, this case involves a summary judgment for a permanent injunction (including a hearing with live testimony and cross-examination). The 6th Circuit cases provide that, on review of a decision to grant or deny a permanent injunction,

> we employ several different standards of review. Factual findings are reviewed under the clearly erroneous standards, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of discretion.

Sec'y of Labor v. 3Re.com, Inc., 317 F.3d 534, 537 (6th Cir. 2003) (quoting South Cent. Power Co. v. Int'l Bhd. of Elec. Workers, 186 F.3d 733 (6th Cir. 1999)). This is the appropriate standard of review.

ARGUMENT

I. PLAINTIFFS HAVE STANDING

Defendants did not appeal from the district court's finding that plaintiffs have standing to assert the claims they raise; nor do they designate standing as one of the "Issues Presented for Review" (Def. Br. 1). Since, nevertheless, defendants apparently contend that plaintiffs do not have standing (Def. Br. 25-31) and to reassure the Court, we will respond.

Defendants contend that no plaintiff has established the necessary "injury-in-fact" to support standing. Applying the unreasonably narrow reading of the Amended Act proposed by defendants (which was not accepted by the court below), they claim that the activity pled by certain of the plaintiffs would not be covered by the statute. As we demonstrate below, this reading of the Amended Act is not reasonable or appropriate. Nor is it supported in law. In a challenge as here, only one plaintiff need demonstrate standing. See, e.g., Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981). See also American Booksellers Found. for Free Expression v. Strickland, 512 F. Supp. 2d at 1091.

Defendants also seem to suggest that plaintiffs' fear of enforcement against them of the Amended Act is unreasonable. However, as in Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988), "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." (See R. 5, First Amended Complaint ¶¶ 92-120, JA ___.) Further, as in that case, "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." 484 U.S. at 393. For example,

plaintiff Sexual Health Network ("SHN") responds both on-line and directly to inquiries from persons throughout the country with respect to issues of sexuality – both as to persons with disabilities and others. (R. 27, Declaration of Dr. Mitchell Tepper ("Tepper Decl.") ¶ 3, JA ___; R. 48, July 31, 2002 Hearing Testimony pp. 98-99, JA ___.) The inquiries may appropriately come from minors. Dr. Mitchell Tepper, the founder of Sexual Health Network, expressed reasonable concerns that SHN's responses could well be considered "harmful to juveniles" under Ohio law (R. 48, Tepper Testimony pp. 96-98, JA ___), and therefore could well fall within the purview of the Amended Act. Similarly,

> Plaintiffs, with members who sell products online, including the National Association of Recording Merchandisers ("NARM"), American Booksellers Foundation for Free Expression ("ABFFE") and the Association of American Publishers, Inc. ("AAP"), have standing in this case. Plaintiffs' second amended complaint states that NARM's members sell sound recordings on the internet. ABFFE and AAP represent members who sell books and other materials online. Plaintiffs' Second Amended Complaint at 31-33. As discussed below, the direct sale of merchandise on the internet falls within the type of communication proscribed in § 2907.31(D)(1), and all three Plaintiffs engage in conduct which falls within the scope of that prohibited by § 2907.31. Therefore, NARM, AAP and ABFFE all engage in "a course of conduct arguably affected with a constitutional interest, but proscribed by a statute."

American Booksellers v. Strickland, 512 F. Supp. 2d at 1091.

In 1999, a challenge like that in this case was made to a Michigan law which, as here, applied its harmful to minors statute to Internet communications. The district court stated:

> "All the Plaintiffs justifiably fear prosecution. They have stated that they disseminate on the Internet sexually explicit material which arguably could be deemed 'harmful to minors'. Absent an injunction they must self-censor their speech on the Internet or else risk prosecution under the Act. These allegations of harm are sufficient to confer standing in this action for declaratory and injunctive relief. 'In the context of threats to the right of free expression,' it is not necessary 'that an individual first be exposed to prosecution in order to have a standing to challenge a statute which is claimed to deter the exercise of constitutional rights.' "

Cyberspace Commc'ns, Inc. v. Engler, 55 F. Supp. 2d 737, 746-47 (E.D. Mich. 1999), aff'd, 238 F.3d 420 (6th Cir. 2000) (quoting Briggs v. Ohio Elections Comm'n, 61 F.3d 487 (6th Cir. 1995)). The same is true here. The preliminary injunction order based on that finding of standing was affirmed by this Court. The preliminary relief was thereafter made permanent. Cyberspace Commc'ns, Inc. v. Engler, 142 F. Supp. 2d 827 (E.D. Mich. 2001).

Curiously, defendants also take the position that the fact that ABFFE, AAP and ONA "assert that their members' materials have significant redeeming social, literary or artistic value" (Def. Br., fn. 3) means it is "extremely unlikely that these materials could be considered harmful to minors' [sic] under Ohio's statute." (Id.) To the contrary, a core First Amendment fact in this lawsuit is that, by definition, harmful to juveniles material is constitutionally protected as to adults. Thus, much

of it – particularly as to mainstream entities such as plaintiffs herein – will have serious value. It is precisely for this reason that a law which in effect restricts access to Internet material by adults is socially harmful and constitutionally defective.

II. THE AMENDED ACT IS UNCONSTITUTIONALLY VAGUE

The void-for-vagueness doctrine provides that a statute — particularly one which imposes criminal sanctions for its violation — is unconstitutional on its face if its provisions are so vague and imprecise that persons of ordinary intelligence must either guess at its meaning or differ as to its application. See Grayned v. Rockford, 408 U.S. 104, 108-09 (1972); Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); see also Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Lanzetta v. New Jersey, 306 U.S. 451 (1939). By requiring statutes to be drafted in precise and understandable language, the void-for-vagueness doctrine ensures that the government provides the average person "a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108.

In addition to requiring that citizens be notified as to what conduct is prohibited, the void-for-vagueness doctrine demands that precise standards be enacted for all police, prosecutors, judges, and juries in applying the law so as to prevent arbitrary and erratic enforcement. See Chicago v. Morales, 527 U.S. 41, 60 (1999); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972); see also Kolender v. Lawson, 461 U.S. 352, 357 (1983); Colautti v. Franklin, 439 U.S. 379,

390 (1979); Giaccio, 382 U.S. at 402-03. Indeed, it has been recognized that the "principal element" of the void-for-vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). Without such minimal guidelines, those in charge of enforcing the law are impermissibly granted complete discretion in determining what conduct does or does not violate the law at issue. Id. As the United States Supreme Court recognized in Grayned:

> [I]f 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 policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. at 108-09 (footnotes omitted). It is therefore well-recognized that vague laws violate "the first essential of due process of law," Connally, 269 U.S. at 391, both for the failure to warn citizens of what conduct will expose them to liability and for the failure to provide objective guidelines for those applying the law.

The Supreme Court has consistently held that even stricter vagueness standards apply to laws which potentially inhibit the exercise of First Amendment rights. See Reno v. ACLU, 521 U.S. 844, 871-72 (1997) (noting special danger of chilling effect raised by vaguely drafted content-based regulations on speech). Thus, greater precision is constitutionally required with respect to such laws. See Colautti, 439 U.S. 379; Goguen, 415 U.S. 566; Grayned, 408 U.S. 104; Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967); Smith v. California, 361 U.S.

147, 152 (1959). In this regard, it bears emphasis that the standard of permissible vagueness is no less strict when the law in question is designed to prohibit the exposure of harmful material to juveniles. Indeed, the Supreme Court expressly rejected a contrary contention in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968):

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. ... It is ... essential that legislation aimed at protecting children from allegedly harmful expression - no less than legislation enacted with respect to adults - be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Id., at 688-89 (internal quotation marks omitted) (second omission in original).

Pursuant to these principles, the Amended Act as a whole is unconstitutionally vague in the following ways:

1. The meaning of § 2907.31(D)(2) is difficult, if not impossible, to discern. The concept of "a method of mass distribution" is the basis of this provision, which provides a total and complete exemption from the Revised Internet Provision if the "method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information." Ohio Rev. Code § 2907.31(D)(2)(b). This is concededly true of the method of mass

distribution known as the Internet. But then, the Revised Internet Provision would not apply to the Internet and this case would be over. It is unclear what else it could mean, particularly since there are other references to the Internet in the Amended Act. Defendants appear to suggest that this means parts of the Internet, such as the Web, but that is not apparent from the statute.

The phrase "method of mass distribution" appears in no other Ohio statute, nor in any reported case retrievable on Westlaw. In fact, the expression "mass distribution" appears in no other Ohio statute. Finally, since "distribute" is not one of the verbs in the operative criminal provision, it is unclear whether "methods of mass distribution" apply to each of sales, deliveries, furnishing, dissemination, provision, exhibition and rental.

2. Section 2907.31(D)(2)(b) exempts from the Revised Internet Provision persons sending harmful to juveniles material by a method of mass distribution if the method "does not provide the person [transmitting] the ability to prevent a particular recipient from receiving the information." Is the statute referring to financial ability, technological ability or physical ability? If one reads "a method of mass distribution" by its plain meaning to be coterminous with the Internet, then even an email from A to B containing sexually explicit maternal would not violate the Revised Internet Provision, since there is no way of knowing whether C, a minor, has been given the right to open B's email or whether C happens to be with B when B receives the e-mail. (Obviously, a sender could avoid "a particular recipient" from receiving information by sending it subject to a

password-protected security system, but such a requirement would also prevent all adults not privy to the security system from receiving the information, in itself a First Amendment violation.)

3. Section 2907.31(D)(1) refers to a person transmitting speech "by means of an electronic method of remotely transmitting information," while § 2907.31(D)(2) refers to "'remotely transmitting information by means of a method of mass distribution." Ohio Rev. Code §§ 2907.31(D)(1), (D)(2); see also §§ 2907.35(D)(1) and (3), and (F) (which also relate to the electronic transmission). It is unclear what 'remotely" means, since it would seem that an electronic transmission is "remote." It also is unclear whether "an electronic method of remotely transmitting information" is coterminous with an electronic "method of mass distribution" or, if not, which definition is of broader scope.

4. Under § 2907.01(E), in order to be harmful to juveniles, the material in question must be "offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles." This phrase fails to provide any ascertainable standard for determining whether a particular literary, cinematic, musical, artistic, or educational work qualifies as "harmful to juveniles," and thereby invites erratic and arbitrary enforcement by prosecutors, police, and juries. As applied here, in determining whether the material they distribute qualifies as "harmful to juveniles" under § 2907.01, the plaintiffs are given no guidance whatsoever by this provision. Indeed, in Reno v. ACLU, the Supreme Court noted that a similar provision — forbidding communications to minors that are "patently

offensive as measured by contemporary community standards" — raises serious vagueness concerns. 521 U.S. at 860, 871-73.

As demonstrated by these examples, the Amended Act is unconstitutionally vague with respect to significant core provisions. Therefore, the judgment of the court below should be affirmed.

If the Court finds that the Internet is a "method of mass distribution" and that therefore, under § 2907.31(D)(2), Ohio "harmful to juveniles" provisions no longer apply to the Internet, the Court need not concern itself with Points III and IV below. If, on the other hand, as defendants contend, § 2907.31(D)(2) excludes only a subset of Internet communications, not only has unconstitutional vagueness been demonstrated, but Points III and IV set forth two additional substantial bases for unconstitutionality.

III. THE REVISED INTERNET PROVISION IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

A. The Revised Internet Provision Bans Constitutionally Protected Speech In Violation Of The First Amendment and Is Overbroad[6]

The Revised Internet Provision violates the First and Fourteenth Amendments by criminalizing speech that adults have a constitutional right to send

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[6] The Amended Act should not be reviewed under the test of Connection Distrib. Co. v. Keisler, 505 F.3d 545 (6th Cir. 2007), which does not appear to have applied strict scrutiny as is required for a content-based regulation as here. But even if that test were applicable, the Amended Act would be unconstitutional. As demonstrated herein, the Amended Act reaches only protected speech, it reaches beyond its "plainly legitimate sweep," and it substantially burdens protected speech. See id., 505 F.3d at 555, 558-59.

and receive.[7] The Supreme Court has specifically condemned such a result both in the context of the Internet and other traditional modes of communication. See Reno v. ACLU, 521 U.S. at 874 ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.' ") (quoting Sable Commc'ns of California v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989); see also Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

In Reno, the Court held as unconstitutional certain provisions of the CDA on the basis of overbreadth and a lack of narrow tailoring. 521 U.S. 844. In so doing, the Court relied on extensive evidentiary hearings regarding the nature of the Internet, including in-court online demonstrations, which established that the technology of the Internet makes it impossible for the vast majority of online users to distinguish between adults and minors in their audience. Most recently the successor to the CDA (the Child Online Protection Act or "COPA") was held unconstitutional by the district court on remand from the United States Supreme Court. See ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007) (remanded by Ashcroft v. ACLU, 542 U.S. 656 (2004)).

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[7] Defendants state that the Amended Act bans only "unprotected speech." (Def. Br. 20.) That is incorrect. The Amended Act regulates speech fully protected for adults and older children, the vast majority of the population of Ohio.

1) Internet Regulations Which Flatly Ban Constitutionally-Protected Speech For Adults Are Per Se Unconstitutional

It is well-settled and not disputed by defendant (see Def. Br. 34) that restrictions which criminalize the exchange of constitutionally protected speech between adults over the Internet are unconstitutional under the First Amendment. See Reno v. ACLU, 521 U.S. at 875-76; ACLU v. Johnson, 194 F.3d 1149, 1159 (10th Cir. 1999); PSINet, Inc. v. Chapman, 167 F. Supp. 2d 878 (W.D. Va. 2001); Engler, 55 F. Supp. 2d 737; American Booksellers Found. v. Dean, 202 F. Supp. 2d. 300 (D. Vt. 2002); ACLU v. Napolitano, Civ. No. 00-506 (D. Ariz. June 10, 2002). For example, in Gonzales, the court invalidated language in COPA which criminalized the knowing communication for commercial purposes by means of the Web of harmful to minors material if it is available to a minor. Gonzales, 478 F. Supp. 2d 775; 47 U.S.C. § 231(a)(2) and (3); see also Reno v. ACLU, 521 U.S. 844.

To the extent the language of the Amended Act does not exclude all Internet communications from the scope of the Amended Act, it is dangerously similar to the offending portions of the CDA and the somewhat narrower COPA. Because the Internet does not permit the vast majority of Internet speakers to distinguish between minors and adults in their audience, well-meaning adults cannot comply with the Amended Act unless they speak only in language suitable for children. Thus, like the portions of the CDA found unconstitutional in Reno, the Act operates as a criminal ban on constitutionally protected speech among adults on the Internet. See Reno v. ACLU, 521 U.S. at 874.

Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech in this manner because to do so would "burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957); see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996) (holding that the government may not "reduc[e] the adult population ... to ... only what is fit for children") (internal quotations omitted). While the Supreme Court has "repeatedly recognized the governmental interest in protecting children from harmful materials," it has also unwaveringly determined that "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." Reno v. ACLU, 521 U.S. at 875. Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Supreme Court has never upheld a criminal ban on non-obscene sexually explicit communications between adults. Id.

Defendants argue that the Amended Act is necessary in order to find those who are in early stages of luring a minor via the Internet for sexual purposes, a stage described by defendants as "grooming." (Def. Br. 45.) That argument also was made – and rejected – in other of the cases invalidating Internet application of the harmful to minors laws. See, e.g., American Booksellers Found. v. Dean, 342 F.3d 96, 102 (2d Cir. 2003).

As the United States Supreme Court held in a case which also involved the protection of minors, although there in the context of child pornography:

> The Government may not suppress lawful speech as the means to suppress unlawful speech.

Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002). It should also be noted that Ohio has a statute which criminalizes solicitation by Internet of a minor to engage in sexual activity with the solicitor (Ohio Rev. Code § 2907.07) and which is not challenged by plaintiffs. And, in fact, Detective Darren Barlow, who testified for defendants as to how those lurking on the Internet are apprehended, stated that, of the 51 cases arising out of his activities, the state of Ohio obtained 51 convictions (i.e., every defendant was convicted). (R. 62, Excerpted Testimony of D. Barlow (filed under seal), JA __.) If, however, the state of Ohio believes that § 2907.07 is insufficiently broad, the legislature can amend it. Such an amendment, if correctly drafted, would be constitutional as long as the crime includes the requisite intent to lure.[8]

2) Internet Restrictions Which Criminalize A Substantial Amount of Constitutionally Protected Speech among or to Older Minors Are Unconstitutionally Overbroad

Where "a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech," it is considered facially overbroad. Sec'y of State v. Munson, 467 U.S. 947, 967-68 (1984) (citing Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)) (emphasis

[8] Such luring statutes, which contain the additional intent to induce children into sexual activity, have consistently been held constitutional. See, e.g., People v. Foley, 94 N.Y.2d 668 (2000). There is no such additional intent component in the Amended Act.

added). An overbroad law must be struck down as facially invalid if it penalizes a substantial amount of speech that is constitutionally protected, even if some applications would be "constitutionally unobjectionable." Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 129-30 (1992). In determining whether the criminalized speech at issue is constitutionally protected, the Supreme Court has counseled that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Reno, 521 U.S. at 874.

The Supreme Court has ruled in this regard that the First Amendment protects minors as well as adults, and that minors have the constitutional right to speak and to receive the information and ideas necessary for intellectual development and participation as citizens in a democracy, including information about reproduction and sexuality. See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 864 (1982). In so doing, the Court has implicitly distinguished between expression intended to educate older juveniles on topics of sexuality and sexual speech that is inappropriate for younger children. Examples of such expression that would be protected as to teenagers but not to children include information and resources on safe sex and descriptions of explicit sex in fiction and motion pictures. See, e.g., Carey, 431 U.S. at 693 (holding that state cannot ban distribution of contraceptives to minors) (plurality opinion); Erznoznick v. Jacksonville, 422 U.S. 205, 213-14 (1975); Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 511-13 (1969).

Applying these principles, it is clear that, to the extent that the Revised Internet Provision applies to Internet communications, it is fatally overbroad because it prohibits the dissemination of information to young adults under the age of 18 that they have a constitutional right to receive. Specifically, the Revised Internet Provision impermissibly burdens the right of older minors to obtain ideas and information about sexuality, reproduction, and the human body — subjects that are of special interest to maturing adolescents. As a practical matter, given the inability of senders to distinguish between older and younger juveniles using the Internet, the Revised Internet Provision can make no distinction between communications concerning ''nudity'' and "sexual activity" that maybe inappropriate for younger minors and communications concerning "nudity" and "sexual activity," such as explicit safe sex information, that may be valuable when communicated to teenagers.

Recognizing this problem, courts in other states have upheld statutes regulating the dissemination of material deemed "harmful to minors" only after construing them to prohibit only that material that would lack serious value for older minors. See American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th Cir. 1990) (concluding that "if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors' " for purposes of the statute); American Booksellers Ass'n v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989) (concluding that "if a work is found to have a serious literary, artistic,

political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles").

3) Internet Restrictions Which Prohibit Speech Outside Of The Geographic Boundaries For Which They Were Intended Are Unconstitutional

The Revised Internet Provision also is overbroad and facially invalid because it chills constitutional speech wholly outside of Ohio. As applied to Internet communications, the Act defines "harmful to juveniles" according to the "prevailing standards in the adult community" of the state of Ohio. As discussed above, however, online speakers cannot restrict their messages to persons in a particular geographic area. See, e.g., PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 616 (W.D. Va. 2000); Engler, 55 F. Supp. 2d at 745; ACLU v. Johnson, 4 F. Supp. 2d 1029, 1032 (D.N.M. 1998); American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 171 (S.D.N.Y. 1997). Since all Internet communications can be received in Ohio, to comply with the Act, every Internet speaker in the United States must censor his or her message to meet the community standards of each county in Ohio, even if the message is constitutionally protected in the speaker's community. This is are untenable and unconstitutional result.

B. The Revised Internet Provision Fails Strict Scrutiny Because it is Not Narrowly Tailored to Achieve a Compelling State Interest

Regulations which target a particular type of speech based on the content of the message it contains are presumptively invalid. See R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992); see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641

(1994). Known as content-based restrictions, these regulations will be upheld only when they are justified by a compelling governmental interest and are "narrowly tailored" to effectuate that interest. See Reno v. ACLU, 521 U.S. at 879; ACLU v. Reno, 217 F.3d 162, 173 (3d Cir. 2000). In analyzing the constitutional propriety of content-based restrictions in this manner, courts are to apply the strictest of scrutiny. See Reno v. ACLU, 521 U.S. at 868, 870 (requiring content-based restrictions on speech to be reviewed under strict scrutiny analysis).

1) As A Flat Ban On Constitutionally Protected Speech, The Revised Internet Provision Is Not Narrowly Tailored

As discussed above, and as the Supreme Court and other federal courts have held, Internet censorship statutes such as the Amended Act effectively prevent Internet users from engaging in constitutionally protected speech and are therefore unconstitutional. See § III (A)(1), supra. To that end, neither the Amended Act's requirement that Internet users act with "knowledge," nor its affirmative defenses sufficiently narrow the Act to a constitutionally acceptable content-based restriction. Similarly, for the same reasons described above that cause the Amended Act to be overbroad, it is not narrowly tailored to focus on the government's interest in protecting youth.

2) The Available Affirmative Defenses Do Not Sufficiently Narrow the Internet Provision

Although four affirmative defenses are provided in §§ 2907.31(B) and (C), those defenses fail to narrow the Act sufficiently to render it constitutional. Like

the defenses considered in Johnson, they are "illusory" and "ineffective." ACLU v. Johnson, 194 F.3d at 1160.

The first affirmative defense is limited to dissemination to the juvenile from his or her parent, guardian, or spouse. Ohio Rev. Code § 2907.31(B)(1). Closely related, the second affirmative defense allows individuals to avoid liability if the minor is accompanied by a parent or legal guardian. Ohio Rev. Code § 2907.31(B)(2). These defenses, however, are insufficient to protect adults who disseminate legitimate, constitutionally protected expression on the Internet because they are unworkable in the context of cyberspace. As discussed supra, it is impossible for online speakers to determine the age of the individuals who access their Web sites, chat rooms, and e-mail. Even if, however, content providers could assess the age of their audience, and determined there to be minors amongst it, it is impossible to detect whether those minors are accompanied by a parent or guardian. Therefore, given the current status of Internet technology, the first two affirmative defenses provide no real protection to adult Internet users whose speech falls innocently into the hands of minors.

The third affirmative defense is equally unworkable in an online environment. Pursuant to this defense, an accused may avoid criminal liability where the minor in question exhibits some form of false identification to establish that he or she is 18 years of age or older. Online speakers, however, have no ability to review age-verifying documents of persons who access the Internet. While technology does exist to condition Web site access on the verification of

requested information, such as a credit card number or an adult password, that technology is imperfect. See Reno v. ACLU, 521 U.S. at 856. As the Supreme Court has noted, "[c]redit card verification is only feasible ... either in connection with a commercial transaction in which the card is used, or by payment to a verification agency." Id. In addition, the verification technology is expensive; mandating its usage would impose exorbitant costs on non-commercial Web sites, which, as the Supreme Court observed, "would require many of them to shut down." Id. Requiring age verification would also "completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material" Id. (internal quotation omitted). More importantly, however, even if online speakers do obtain the ability to verify a recipient's age, there is no guarantee that the user is actually a minor who has surreptitiously obtained the password or credit card information from an adult. Id.

In addition, to the extent the Revised Internet Provision effectively requires Internet users to register themselves to participate online, such a requirement violates the Constitution. See Denver Area, 518 U.S. at 754 (striking statutory requirement that cable television subscribers provide written notice to cable operators to access certain sexually oriented programs because the requirement "restrict[s] viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the ... channel"); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) (holding

unconstitutional a requirement that recipients of Communist literature notify the postal service that they wish to receive it).

Such a requirement also violates the Constitution by preventing Internet users from communicating anonymously. As the Supreme Court stated in McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995), anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression—at the hand of an intolerant society." See also Talley v. California, 362 U.S. 60, 64-65 (1960) (declaring unconstitutional a California ordinance that prohibited the distribution of anonymous handbills); Vermont Right to Life Comm. v. Sorrell, 221 F.3d 376, 387 (2d Cir. 2000) (declaring part of campaign finance law invalid and describing defects as "particularly serious because of their impact on anonymous communications"); ACLU of Georgia v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down Georgia statute that would have made it a crime for Internet users to "falsely identify" themselves online). Given these considerations, the third affirmative defense provides little, if no, protection to online speakers engaged in the exchange of constitutionally protected information and expression.

Neither does the fourth affirmative defense sufficiently prohibit conviction for the dissemination of constitutionally protected speech. The fourth defense allows individuals to escape liability under the Act where the material in question was provided for "a bona fide medical, scientific, educational, governmental,

judicial or other proper purpose by a physician, psychologist, scientist, teacher, librarian, clergyman, prosecutor, judge or other proper person." Ohio Rev. Code § 2907.31(C)(1). Obviously, this defense is available only to a limited number of Internet users and, even then, raises the issue of what the prosecutor considers a "proper purpose" or a "proper person." The Revised Internet Provision thus subjects the vast majority of online speakers to the threat of criminal prosecutions against which they have no affirmative defense.

3) The Revised Internet Provision Is An Ineffective Method For Achieving The Government's Interest

Under strict scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980). As Justice Scalia wrote in Florida Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring), "a law cannot be regarded as ... justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." The government bears the burden of showing that its scheme will in fact alleviate the alleged "harms in a direct and material way." Turner Broad. Sys., 512 U.S. at 664.

In this case, the Defendants cannot meet this burden. Assuming, *arguendo*, that the Internet Provision can be constitutionally enforced, the restrictions fail to absolutely protect minors from exposure to objectionable material. Due to the nature of the online medium, even a total content-based ban in the United States fails to eliminate "harmful to juveniles" material available online. The Internet is a

global medium, and material posted on a computer overseas is just as available as information posted next door. To that end, "a large percentage, perhaps 40% or more, of content on the Internet originates outside of the United States." ACLU v. Reno, 929 F. Supp. 824, 848 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997). Thus, the Act will not prevent minors from gaining access to the large percentage of "harmful" material that originates abroad. See PSINet, 108 F. Supp. 2d at 625; ACLU v. Reno, 31 F. Supp. 2d 493, 497 (E.D. Pa. 1999). This reality prompted Judge Dalzell of the Federal District Court for the Eastern District of Pennsylvania to conclude in the lower court ruling in Reno:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

929 F. Supp. at 882-83; see also PSINet, 167 F. Supp. 2d at 890. In addition, adult-oriented content providers in the United States could circumvent the Act simply by moving their content to sites located outside of the country. ACLU v. Reno, 929 F. Supp. at 883, n.22. Thus, the Revised Internet Provision is not narrowly tailored, and is therefore unconstitutional, because it fails to alleviate the alleged "harm in a direct and material way." Turner Broad. Sys., 512 U.S. at 664.

4) The Amended Act Is Not The Least Restrictive Means Of Achieving The Government's Interest In Protecting Children From Harmful Speech And Expression

The Amended Act also fails strict scrutiny because it is not the least restrictive means of achieving the government's asserted interest. See Sable Commc'ns of California v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989) (holding that, in order to survive strict scrutiny, means chosen to regulate speech must be carefully tailored to achieve legislative purpose). Several less restrictive alternatives exist to allow parents and other users to control the Internet content that may be accessed from a particular computer while not simultaneously requiring other users to limit their message. See Reno v. ACLU, 521 U.S. at 877 (noting that user based software can provide a "reasonably effective method by which parents can prevent their children from accessing sexually explicit material and other material which parents may believe is inappropriate for their children...") (emphasis eliminated); Denver Area, 518 U.S. at 758-59 (finding that informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material).

For example, many commercial online service providers, such as AOL and Yahoo!, provide Internet access while offering parental control options to their members. In particular, AOL maintains a parental control feature that allows parents to establish a separate account for their children and choose predefined limits for e-mail, chat room capabilities, and Web access that are based on the age

range of the child. See Engler, 55 F. Supp. 2d at 744; ACLU v. Reno, 929 F. Supp. at 842.

In addition, user-based filtering programs such as CyberPatrol, Surf Watch, and NetNanny maintain lists of Web sites known to contain sexually explicit material. When installed, this software blocks access to sites containing sexually explicit material, as well as Internet searches including words such as "sex" or character patterns such as "xxx." PSINet, 108 F. Supp. 2d at 625; Reno, 929 F. Supp. at 839-42. Concerned parents can also choose to obtain Internet access through "family" ISP's which allow their users to access only a limited number of child-appropriate sites. These methods can screen material from minors without infringing on the rights of adults.

Given the availability of less restrictive means to effectuate the government's interest in protecting children from obtaining and reviewing material that may be harmful to them, the Amended Act's content-based restriction upon constitutionally protected speech and expression cannot be justified. The Amended Act is therefore unconstitutional and its enforcement should be enjoined by this Court.

C. The Revised Internet Provision Is Not Distinguishable From The Seven Other Internet/Harmful To Minors Statutes, All Of Which Were Found Unconstitutional Under The First Amendment

By misapprehending the meaning of the Revised Internet Provision and misstating the provisions of several of the seven state Internet/harmful to minors

statutes uniformly found unconstitutional[9], defendants contend that the prior cases are not relevant. To the contrary, they are.

Firstly, defendants contend that the Revised Internet Provision applies only "when the speaker targets juveniles" (Def. Br. 21), or when the material is "directed at juveniles," "where the speaker had control over whether a particular recipient received the information," and thus distinguish the Virginia, New Mexico, Michigan and Arizona statutes found unconstitutional in PSINet, Johnson, Engler and Napolitano[10] (Def. Br. 49). The Revised Internet Provision does not require the sender to "target" a juvenile. In fact the word "target" does not appear in the Revised Internet Provision. Nor does the statute require that a communication be "directed to a juvenile" any more than the similar statutes which were held unconstitutional. Every Internet communication is in a real sense "directed" to the entire Internet community, adults and children. Nor does the Revised Internet Provision state that it must be "directed to a juvenile." Rather it simply requires that the communication go "directly," rather than indirectly. In addition, if the reference to "control" in defendants' brief stems from the applicability of § 2907.31 (D)(2)(b), defendants must be taking the position that the Internet is a "method of mass distribution;" if so, the Revised Internet Provision does not apply at all to the Internet. (See pp. 28 - 31, supra.)

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[9] See fn. 1, supra.

[10] Defendants do not attempt to distinguish Dean (Vermont statute) and Southeast Booksellers (South Carolina statute).

Even if defendant's unreasonable reading of the Revised Internet Provision, that it excludes communications on the Web, were correct, as found by the court below, the provision's application to chat rooms and similar capabilities causes it to be unconstitutional:

> 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.

American Booksellers Found. v. Strickland, 512 F. Supp. 2d at 1094.

Defendants also try to distinguish PSINet and Johnson on the ground that the Virginia and New Mexico harmful to minors statutes "lacked the third value" prong of the Miller-Ginsberg analysis." (Def. Br. 48, 49.) That simply is incorrect.

Virginia Code § 18.2-390(6) is Virginia's definition of "harmful to Juveniles." Subsection (c) of that provision sets forth in full the value prong of Miller/Ginsberg.[11] NMSA § 30-37-1(f) sets forth New Mexico's definition of "harmful to minors." Subsection (iii) of that provision sets forth the earlier, less

[11] Subsection (c) states: "is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles."

restrictive value prong — "utterly without redeeming value for minors." This is not only a "value" prong, but one less restrictive than Ohio's.

IV. THE AMENDED ACT VIOLATES THE COMMERCE CLAUSE

Due to the borderless nature of the online medium, the Amended Act violates the Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, in three ways: 1) the Amended Act imposes restrictions on communications occurring *wholly* outside the State of Ohio; 2) the Amended Act effects an impermissible burden on interstate commerce; and 3) the Amended Act subjects online speakers to inconsistent state obligations.

A. U.S. v. Salerno Does Not Apply To Challenges Of State Statutes Under Dormant Commerce Clause

The District Court found the "Salerno doctrine" – that a facial challenge fails unless every application of the challenged statute is unconstitutional – was applicable to plaintiffs' dormant Commerce Clause claim and caused it to fail. For this proposition, the court below cited 6 cases, only one of which involved the dormant Commerce Clause. Three were challenges to federal statutes,[12] one was a dicta-like reference in a non-commerce clause,[13] and one was a holding in a non-

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[12] U.S. v. Lopez, 215 Fed. Appx. 863 (11th Cir. 2007) (challenge to federal child pornography law); Nebraska v. EPA, 331 F.3d 995 (D.C. Cir. 2003) (challenge to federal EPA regulation); Rancho Viejo v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (challenge to federal ESA regulation).

[13] Anderson v. Edwards, 514 U.S. 143 (1995) (challenge to California AFDC regulation).

Commerce Clause case.[14] The only case in which a dormant Commerce Clause challenge was subject to Salerno is S.D. Myers, Inc. v. San Francisco, 253 F.3d 461 (9th Cir. 2001) and this appears to be unique to the Ninth Circuit. While the Ninth Circuit panel recognized that the continued viability of Salerno was problematic given the statement of disavowal by the plurality opinion in Chicago v. Morales, 527 U.S. 41, 55, fn. 22 (1999) (Justice Stevens, with two justices concurring, three justices in the judgment, and three justices dissenting on this issue),[15] it has determined to apply it to all cases other than First Amendment and abortion cases. No other circuit has gone that far. Plaintiffs submit that this Court should not follow the Ninth Circuit position in this action because:

a) It makes little sense in dormant Commerce Clause challenges; and

b) Dormant Commerce Clause challenges, particularly when by persons outside the state whose statute is challenged (such as all the remaining plaintiffs in this action other than ONU and the associational members resident in Ohio), are actually more in the nature of as-applied challenges.

Dormant Commerce Clause challenges are of four sorts claiming invalidity of a statute because (1) it applies disproportionately to out-of-state persons; (2) it regulates commerce entirely outside of the enacting state; (3) the burden imposed upon interstate commerce exceeds any local benefit; or (4) because it subjects

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[14] Reno v. Flores, 507 U.S. 292 (1993) (challenge to INS regulation).

[15] See also Wash. State Grange v. Washington State Republican Party, U.S. Sup. Ct., March 18, 2008, slip op. p.6 (recognizing split in the Court as to "Salerno formulation").

interstate commerce to inconsistent regulations.[16] A statute violative of each of the four types of challenges will always have a constitutional application, namely its application to intrastate persons and transactions. Thus, were this court to extend the scope of the Salerno doctrine to dormant Commerce Clause challenges, the extension would basically eliminate facial challenges under that clause.

Yet another analysis is to recognize that dormant Commerce Clause challenges are, in effect, comparable to as-applied challenges.[17] Cf. Pharmaceutical Research and Mfg. of America v. District of Columbia, 406 F. Supp. 2d 56, 67 (D.D.C. 2005), aff'd 496 F.3d 1362 (D.C. Cir. 2007). The out-of-state plaintiffs (all the remaining plaintiffs in this action other than ONU and the members of plaintiff associations resident in Ohio) clearly can, and did, complain of the unconstitutional application of the Amended Act to their commerce outside of Ohio as it affects each of them. All plaintiffs clearly can, and did, complain of the likelihood of inconsistent regulations unconstitutionally applied to their interstate commerce. All plaintiffs clearly can, and did, complain of the of the excessive burden imposed by the Amended Act on their interstate commerce in excess of the local benefit. Thus, the Salerno doctrine does not apply to the facts herein. As such plaintiffs respectfully maintains that the court below was incorrect

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[16] The first of the four does not apply to the Amended Act.

[17] It should be noted that plaintiffs did not style their Commerce Clause Challenge as facial, and in fact entered evidence as to plaintiffs' business practices and the applicability of the Amended Act to plaintiffs.

in finding the Amended Act did not violate the dormant Commerce Clause, as more specifically discussed below.

B. The Amended Act is Per Se Invalid Because It Regulates Commerce Entirely Outside Of The State Of Ohio

The "Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside the state's borders." Healy v. Beer Institute, 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)). Because the Internet is essentially a global medium, there are few ways to engage in purely intrastate communications over the Internet and no way for users to reliably restrict their communications in order to prevent information from flowing into and out of Ohio. See Pataki, 969 F. Supp. at 171; see generally Dan L. Burk, Federalism in Cyberspace, 28 Conn. L. Rev. 1095 (1996). As the Pataki court held:

> The nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York.... Thus, conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy — perhaps favoring freedom of expression over a more protective stance — to New York's local concerns.... New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net.... This encroachment upon the authority which the Constitution specifically confers upon the federal government and upon the sovereignty of New York's sister states is per se violative of the Commerce Clause.

Pataki, 969 F. Supp. at 177 (internal citations omitted). Or, as described more colorfully by the Fourth Circuit, "[t]he content of the Internet is analogous to the content of the night sky. One state simply cannot block a constellation from the view of its own citizens without blocking or affecting the view of the citizens of other states." PSINet, Inc. v. Chapman, 362 F.3d 227, 240 (4th Cir. 2004). See also Dean, 342 F.3d at 103; Johnson, 194 F.3d at 1161; Engler, 55 F. Supp. 2d at 751-52. As the Supreme Court has noted, such a *per se* violation of the Commerce Clause should be "struck down-without further inquiry." Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); see also Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 521 (1935).

By its own terms, the Amended Act applies to a variety of materials which are disseminated "by means of an electronic method of remotely transmitting information," regardless of whether the materials originate in Ohio. In this regard, the Amended Act contains no requirement that the criminal communication take place entirely within the state of Ohio. As such, the Amended Act's prohibition effectively applies to all Internet users, regardless of their geographic location or the location of their intended recipient. For example, Dr. Mitchell Tepper, President of plaintiff The Sexual Health Network, can post information to the Internet at his computer in Connecticut and can answers questions from an Internet user in California in the chat room of his Sexualhealth.com Web site. These messages can then be accessed by Internet users in Ohio even though Dr. Tepper may have had no specific desire to send the messages to Ohio. More importantly,

however, if Dr. Tepper's communication is considered "harmful to juveniles," he could be subject to prosecution in Ohio under the Amended Act, even though he had no intention to conduct communication in the State. This result is not acceptable under the Commerce Clause. See Johnson, 194 F.3d at 1161; PSINet, 108 F. Supp. 2d at 626-27; Engler, 55 F. Supp. 2d at 751-52; Pataki, 969 F. Supp. at 173-76.

C. The Amended Act Is Invalid Because The Burdens It Imposes Upon Interstate Commerce Exceed Any Local Benefit

As the Pataki court noted in analyzing the New York statute, "[e]ven if the Act were not a per se violation of the Commerce Clause by virtue of its extraterritorial effects, the Act would nonetheless be an invalid indirect regulation on commerce, because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers." Pataki, 969 F. Supp. at 177; see also Johnson, 194 F.3d at 1162 (same conclusion with respect to New Mexico statute); PSINet, 362 F.3d at 239-40 (same conclusion with respect to Virginia statute); Dean, 342 F.3d at 104 (same conclusion with Vermont statute); Engler, 55 F. Supp. 2d at 751-52 (same conclusion with respect to Michigan statute). This is consistent with a long line of Supreme Court jurisprudence. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (invalidating fruit-packing statute because the burden it imposed on interstate commerce was "clearly excessive in relation to the putative local benefits"); Edgar, 457 U.S. at 643-44 (1982) (holding state interests in protecting shareholders and regulating state corporations were

insufficient to outweigh burdens imposed by allowing state official to block tender offers).

The Amended Act similarly violates the Commerce Clause because the burdens imposed on interstate commerce outweigh the benefits of the restrictions it contains. First, as set forth above, the Amended Act prohibits a wide range of entirely out-of-state communications which the State of Ohio has no legitimate interest in regulating. Second, as previously discussed, the Amended Act is not an effective means of effectuating the State's interest in protecting minors; nearly half of all Internet communications originate overseas and will not be affected by a state Internet censorship statute. See Johnson, 194 F.3d at 1162; Pataki, 969 F. Supp. at 177-79. Further, in light of the provisions of § 2907.31(D)(2) — whatever they may mean — the effectiveness of the Amended Act is even narrower. Finally, the Amended Act, like the other state statutes found unconstitutional, "casts its net worldwide" and produces "[a] chilling effect that ... is bound to exceed the actual cases that are likely to be prosecuted, as Internet users will steer clear of the Act by significant margin." Pataki, 969 F. Supp. at 179. Therefore, when balanced against the limited local benefits, the Act "is an extreme burden on interstate commerce" which cannot be justified. Johnson, 194 F.3d at 1162.

D. The Amended Act Violates The Commerce Clause Because It Subjects Interstate Users Of The Internet To Inconsistent Regulations

The Supreme Court has long held that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. Thus, for example, the Supreme Court has forbidden states from imposing burdensome regulations on the nation's railroads and highways. See, e.g., Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1994) (finding that Arizona train length regulation impeded the flow of interstate commerce); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (finding that Illinois statute requiring the use of contour mudguards violated the Commerce Clause); Wabash St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886) (holding railroad rates exempt from state regulation).

Just like the nation's railroads, interstate and international computer communications networks constitute a national economic segment that particularly demands uniform rules and regulations. Pataki, 969 F. Supp. at 182. Because Internet communications are accessible to Internet users throughout the nation and the world, it is clear that "[t]he Internet is an instrument of interstate commerce." Johnson, 4 F. Supp. 2d at 1032. Indeed, "the Internet is one of those areas of commerce that rust be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether." Pataki, 969 F. Supp. at 169; see also Johnson, 194 F.3d at 1162.

If each state implements its own regulations regarding what information can be legally distributed on the Internet, as Ohio has done, interstate commerce will be disrupted. Speakers around the country would be faced with inconsistent state regulations, each of which purport to have a nationwide effect. Given the nature of the Internet, online users who post to Web sites, discussion groups, and chat rooms would simply have no way to send different versions of their speech to different regions in order to comply with differing state laws. See Pataki, 969 F. Supp. at 183 ("an Internet user cannot foreclose access to her work from certain states or send differing versions of her communication to different jurisdictions."). In fact, as the Pataki Court noted:

> An Internet user is in a worse position than the truck driver or train engineer who can steer around Illinois or Arizona, or change the mudguard or train configuration at the state line; the Internet user has no ability to bypass any particular state. The user must thus comply with the regulation imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution.

Id.; see also Johnson, 194 F.3d at 1162; PSINet, 362 F.3d at 240; Engler, 55 F. Supp. 2d at 752. Thus, the practical effect of the combination of fifty conflicting state laws regulating content on the Internet would be to "create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." Healy, 491 U.S. at 337. For this reason, the Amended Act is unconstitutional and its enforcement should be enjoined.

CONCLUSION

For the above reasons, plaintiffs respectfully request that the Court affirm the permanent injunction on the enforcement of the Amended Act as applied to communications and speech on the Internet because:

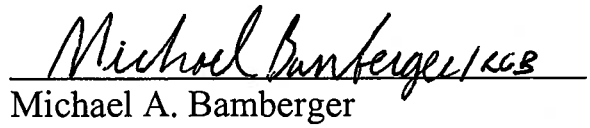
(a) it violates the First and Fourteenth Amendments to the U.S. Constitution;

(b) it is unconstitutionally vague in violation of the Fifth Amendment to the U.S. Constitution; and

(c) it violates the dormant Commerce Clause.

March 31, 2008

Respectfully submitted,



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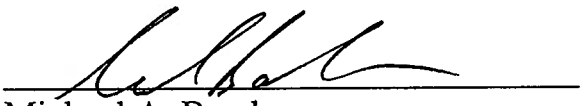
CERTIFICATE OF COMPLIANCE

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

1. the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.



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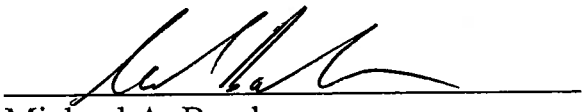

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ADDENDUM

The Amended Act

Sec. 2907.01. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without lineation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(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 in sex of juveniles;
>
> (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, kicks serious literary, artistic, political, and scientific value for juveniles.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, hinge, 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.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

> (1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;
>
> (2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;
>
> (3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.

(M) "Minor" means a person under the age of eighteen.

* * *

Sec. 2907.31. (A) 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;

(3) While in the physical proximity of the juvenile or law enforcement officer posing as a juvenile, allow any juvenile or law enforcement officer posing as a juvenile to review or peruse any material or view any live performance that is harmful to juveniles.

(B) The following are affirmative defenses to a charge under this section that involves material or a performance that is harmful to juveniles but not obscene:

(1) The defendant is the parent, guardian, or spouse of the juvenile involved.

(2) The juvenile involved, at the time of the conduct in question, was accompanied by the juvenile's parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

(3) The juvenile exhibited to the defendant or to the defendant's agent or employee a draft card, driver's license, birth record, marriage license, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or over or married,

and the person to whom that document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under the age of eighteen and unmarried.

(C) (1) It is an affirmative defense to a charge under this section, involving material or a performance that is obscene or harmful to juveniles, that the material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person.

(2) Except as provided in division (B)(3) of this section, mistake of age is not a defense to a charge under this section.

(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.

(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.

(E) If any provision of this section, or the application of any provision of this section to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of this section or related sections that can be given effect without the invalid provision or application. To this end, the provisions are severable.

(F) Whoever violates this section is guilty of disseminating matter harmful to juveniles. If the material or performance involved is harmful to juveniles, except as otherwise provided in this division, a violation of this section is a misdemeanor of the first degree. If the material or performance involved is obscene, except as otherwise provided in this division, a violation of this section is a felony of the fifth degree. If the material or performance involved is obscene and the juvenile to whom it is sold, delivered, furnished, disseminated, provided, exhibited, rented, or presented, the juvenile to whom the offer is made or who is the subject of the agreement, or the juvenile who is allowed to review, peruse, or view it is under thirteen years of age, violation of this section is a felony of the fourth degree.

Sec. 2907.35. (A) An owner or manager, or agent or employee of an owner or manager, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances, who, in the course of business:

> (1) Possesses five or more identical or substantially similar obscene articles, having knowledge of their character, is presumed to possess them in violation of division (A)(5) of section 2907.32 of the Revised Code;
>
> (2) Does any of the acts prohibited by section 2907.31 or 2907.32 of the Revised Code, is presumed to have knowledge of the character of the material or performance involved, if the owner, manager, or agent or employee of the owner or manager has actual notice of the nature of such material or performance, whether or not the owner, manager, or agent or employee of the owner or manager has precise knowledge of its contents.

(B) Without limitation on the manner in which such notice may be given, actual notice of the character of material or a performance maybe given in writing by the chief legal officer of the jurisdiction in which the person to whom the notice is directed does business. Such notice, regardless of the manner in which it is given,

shall identify the sender, identify the material or performance involved, state whether it is obscene or harmful to juveniles, and bear the date of such notice.

* * *

(D) (1) Sections 2907.31, 2907.311, 2907.32, 2907.321, 2907.322, 2907.323, and 2907.34 and division (A) of section 2907.33 of the Revised Code do not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information not under that person's control, including having provided transmission, downloading, intimidate storage, access software, or other related capabilities that are incidental to providing access or connection to or from a computer facility, system, or network, and that do not include the creation of the content of the material that is the subject of the access or connection.

(2) Division (D)(1) of this section does not apply to a person who conspires with an entity actively involved in the creation or knowing distribution of material in violation of section 2907.31, 2907.311, 2907.32, 2907.321, 2907.322, 2907.323, 2907.33, or 2907.34 of the Revised Code or who knowingly advertises the availability of material of that nature.

(3) Division (D)(1) of this section does not apply to a person who provides access or connection to an electronic method of remotely transferring information that is engaged in the violation of section 2907.31, 2907.311, 2907.32, 2907.321, 2907.322, 2907.323, 2907.33, or 2907.34 of the Revised Code and that contains content that person has selected and introduced into the electronic method of remotely transferring information or content over which that person exercises editorial control.

(E) An employer is not guilty of a violation of section 2907.31, 2907.311, 2907.32, 2907.321, 2907.322, 2907.323, 2907.33, or 2907.34 of the Revised Code based on the actions of an employee or agent of the employer unless the employee's or

agent's conduct is within the scope of employee's or agent's employment or agency, and the employer does either of the following:

(1) With knowledge of the employee's or agent's conduct, the employer authorizes or ratifies the conduct.

(2) The employer recklessly disregards the employee's or agent's conduct.

(F) It is an affirmative defense to a charge under section 2907.31 or 2907.311 of the Revised Code as the section applies to an image transmitted through the internet or another electronic method of remotely transmitting information that the person charged with violating the section has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by juveniles to material that is harmful to juveniles, including any method that is feasible under available technology.

DESIGNATION OF APPENDIX CONTENTS

Case Nos. 07-4375 & 07-4376

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

PLAINTIFFS - APPELLEES/CROSS - APPELLANTS AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ET AL. DESIGNATION OF JOINT APPENDIX PURSUANT TO SIXTH CIRCUIT RULE 30(b)

Pursuant to Rule 30(b) of the Sixth Circuit Rules, Plaintiffs-Appellees/Cross - Appellants American Booksellers Foundation For Free Expression, et al. hereby designate the following filings in the district court's record as items to be included in the joint appendix:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Complaint	05/06/02	1
First Amended Complaint	05/30/02	5
Plaintiffs' Motion for Preliminary Injunction and Memorandum of Law in Support with all Exhibits	06/25/02	27
Memorandum/Declaration by Crossan R. Anderson in Support of Motion for Preliminary Injunction	07/01/02	30
Plaintiffs' Memorandum in Opposition to Motion to Certify and Reply to Response to Motion for Preliminary Injunction	07/30/02	46
Oral and Evidentiary Hearing on Plaintiffs' Motion for Preliminary Injunction	07/31/02	48
Order issuing Temporary Restraining Order	08/02/02	49
Order grating Motion for Preliminary Injunction	08/30/02	51
Transcript of Proceedings	11/25/02	61
Transcript of Proceedings Excerpt of Testimony of D. Barlow (filed under seal)	11/25/02	62
Second Amended Complaint	08/07/03	69
Plaintiffs' Motion for Summary Judgment	10/11/03	86

Plaintiffs' Response Memorandum in Support of Motion for Summary Judgment	10/11/03	87
Plaintiffs' Reply to Response to Motion for Summary Judgment	12/05/03	100
Opinion on Plaintiffs' Motion for Summary Judgment	09/27/04	104
Decision and entry on Plaintiffs' Motion for Summary Judgment	09/24/07	105
Judgment on Plaintiffs' Motion for Summary Judgment	09/24/07	106
Defendants First Motion to Amend/Correct the 09/24/07 Judgment	10/20/07	110
Defendants' Notice of Appeal	10/22/07	112
Plaintiffs Motion to Correct Clerical Error	10/29/07	114
Plaintiffs' Notice of Appeal	10/30/07	116
Notation Order substituting references to Section 2907.07(E) with Section 2907.01(E)	02/19/08	No Docket Number
Notation Order Sustaining Defendants First Motion to Amend the 09/24/07 Judgment	02/19/08	No Docket Number