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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al. **Plaintiffs,** **v.** **DANIEL S. SULLIVAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA,** **Defendant**.	**Civil No. 3:10-cv-00193-RRB**

REPLY MEMORANDUM
IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiffs respectfully submit this reply memorandum in further support of their motion for a preliminary injunction.[1]

INTRODUCTION

Defendant's response to the demonstration in Plaintiffs' opening papers of the over-breadth and unconstitutionality of the Amended Act is to assert often and without authority that the statute does not mean what it plainly says or somehow would not be construed to cover the conduct it says it does. Defendant also contends that finding the statute to be unconstitutional means that "the state would have to wait until a child was actually sexually assaulted before intervening," (D. Br. 6), ignoring other applicable statutes such as AS 11.41.452 (Online Enticement of a Minor) and 18 U.S.C. § 1470 (knowing transfer of obscene material to a minor using facility of interstate commence).

Defendant's arguments are, however, insufficient to overcome the manifest constitutional deficiencies in the statute. For the reasons set out below, this Court should grant Plaintiffs' request for a preliminary injunction.

ARGUMENT

1. The State Ignores the Applicable Precedents

The Courts of Appeals of the Second, Third, Fourth, Sixth and Tenth Circuits, as well as U.S. District Courts in Arizona and South Carolina have all held statutes similar to the Amended Act to be unconstitutional under the First Amendment (Pl. Br. 2, fn. 1). Other than a bland statement that the Amended Act "is narrower than the other statutes found unconstitutional described by Plaintiffs" (D. Br. 4), the State fails to distinguish these cases or explain why in the

[1] Capitalized terms herein have the same meaning as in Plaintiff's moving brief.

State's view the statutes struck down in these cases differ from the Amended Act.[2] In fact, those statutes are undistinguishable from the Amended Act in any relevant respect.

2. Defendant's Attempts to Narrow the Amended Act's Scope to Render it Constitutional are Unavailing

Defendant argues that the Amended Act is constitutional because it is limited in a variety of ways. But Defendant does not explain how such supposed limitations can be derived from the language of the statute or applicable case law, or demonstrate how such a limited statute could be constitutional under existing case law.

For example, the State argues that the Amended Act is constitutional because it prohibits dissemination of only some categories of "harmful to minors" material – those that involve explicit sexual material.[3] (D. Br. 2). (In fact, *Ginsberg v. New York*, 390 U.S. 629 (1968), which established the "harmful to minors" concept in constitutional law, explicitly limited it to "sex material." (*Id*. at 636-37.) However, as is clear from Plaintiffs' moving brief and the declarations attached thereto, these broad categories still encompass a great deal of constitutionally-protected material that the State has no legitimate interest in limiting access to, including serious works of art and educational books such as "*Changing Bodies, Changing Lives* by Ruth Bell, *The Joy of Sex* by Alex Comfort . . . *Beauty and Art: 1750-2000* by Elizabeth Prettejohn and *Frida Kahlo: The Paintings* by Hayden Herrera." (Decl. of Allan R. Adler ¶ 10). Despite the State's unsupported claims to the contrary (*see* D. Br. 8), the Amended Act in no way prevents Plaintiffs or others from "be[ing] prosecuted for simply displaying or selling such books in [their] store[s], or for posting to [their] website[s] excerpts or images from material that [they] carry." (Decl. of Julie Drake ¶ 9).

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[2] The State does distinguish *Powell's Books v. Kroger*, 2010 WL 3619949 (9th Cir. Sept. 20, 2010), which Plaintiffs do not rely on and which does not involve Internet communications.

[3] Defendant is correct that nudity is not within the restricted category. Plaintiffs withdraw that claim.

Defendant additionally argues that the Amended Act is constitutional because of its scienter requirements: "[s]ome scienter is required when the government regulates obscene material, but the [Supreme] Court has not specified the required level." (D. Br. 15). First, it is unclear from Defendant's arguments whether he contends that a bookseller, for example, must have knowledge of each element of the Act other than the age of the recipient to violate the Amended Act or if the other possible scienter standard that could be applied under Alaskan law, reckless, should be applied to some elements. (Compare D. Br. 15 with D. Br. 16)[4]. But even if the higher standard of knowing were to apply, the statute would still fail to pass constitutional tests because of its broad scope. The Act must require actual knowledge by the distributor of the age of the recipient and of the offending material's content and character in order to be constitutional. *See Hamling v. U.S.*, 418 U.S. 87, 123 (1974). ("It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials."). In fact, the State concedes that the Amended Act does not require that the transmitter/retailer know that the recipient is a minor. (Answer, ¶¶ 2, 12)

Defendant argues that under Alaskan law, *Western Star Trucks, Inc. v. Big Iron Equip. Service, Inc.*, 101 P.3d 1047 (Alaska 2004), statutes should be construed to conform to the legislature's intent in passing them. Defendant then concludes that, because the Amended Act was intended to prevent grooming of minors, that should narrow the scope of the Act. (D. Br. 7),

[4] The State argues that the Amended Act's scienter requirement may in fact be knowledge rather than recklessness, if the Act is interpreted in a manner similar to the way in which another statute was interpreted in *Strane v. State*, 61 P.3d 1284 (Alaska 2003). But even assuming that there exists enough similarity between the statute at issue in *Strane* and the Act so that a court might interpret the Act's scienter requirement to be one of knowledge rather than recklessness, it is mere conjecture to assume that a court would so interpret the Act. Plaintiffs in the meantime would be forced to assume that the Act's standard was one of mere recklessness, requiring them to familiarize themselves with all of the material contained in the stores and on their websites. Indeed, the "chilling" effect would be the same.

without saying how it should be narrowed. But such a doctrine cannot alter what it is that the legislature actually passed. The plain language of the Amended Act criminalizes activities in which Plaintiffs engage in the course of their work, as is their constitutional right. They therefore could be prosecuted under the Act regardless of the legislature's putative intent. In fact, the court in *Western Star* rejected defendants' argument that the legislature's intent changed the plain meaning of the statute at issue in that case. *See Western Star*, 101 P.3d at 1048, 1050 ("the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be"). The plain meaning of the Act criminalizes dissemination of a wide range of constitutionally-protected material that the State need not criminalize in order to achieve its purpose. And in fact, the legislature was repeatedly informed that the Amended Act far exceeded the supposed purpose, and did not cure this constitutional error. (See Decl. of David Horowitz submitted herewith)

3. The Amended Act Cannot Survive Strict Scrutiny

Although Defendant does not contest that the Amended Act must pass strict scrutiny to be constitutional (D. Op. Br. 7), he fails to meet the heavy burden that test imposes. Strict scrutiny requires Defendant to show that the Amended Act will actually and materially "achieve its goal" of furthering a compelling state interest and that no less-restrictive alternatives exist. *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). Defendant states that the Act is necessary to "prevent[] predators from using pornography to groom children for sexual abuse by adults." (D. Op. Br. 8) No one could or does argue that that is anything less than a very compelling state interest. However, the Amended Act's broad prohibitions are not directed at that state interest and the State has ignored other much narrower means available to achieve that goal, both in statutes already on the books and in statutes that could be enacted.

That the Amended Act is not limited to activities that could constitute "grooming" is evident by looking at statutes, such as AS 11.41.452, that do just that. If the State's concern with AS 11.41.452 is that it does not encompass activity in the physical world and not on the Internet, then it could be expanded to do so. The Amended Act is not a constitutional way to fill this hole in the law. An example is Vermont statute 13 V.S.A. § 2828, which makes it a crime to lure a child to engage in a sexual act, whether online or off-line. The statute provides:

> (a) No person shall knowingly solicit, lure, or entice, or to attempt to solicit, lure, or entice, a child under the age of 16 or another person believed by the person to be a child under the age of 16, to engage in a sexual act as defined in section 3251 of this title or engage in lewd and lascivious conduct as defined in section 2602 of this title.
>
> (b) This section applies to solicitation, luring, or enticement by any means, including in person, through written or telephonic correspondence or electronic communication.
>
> . . .

In invalidating Vermont's "harmful to minors" law, which was similar to the Amended Act, the Court of Appeals for the Second Circuit found, "Vermont's interest in preventing pedophiles from "grooming" minors for future sexual encounters can be effectively addressed through enforcement of Section 2828, which regulates electronic luring." *Amer. Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003).

The State dismisses such statutes out of hand and rejects filters which have been praised as narrower alternative by courts. Defendant also rejects the possibility of passing a narrower statute that "prohibited only direct distribution to a specific minor known to the distributor." (P.

Br. 16)[5]. Nor does Defendant present evidence that the State did any of its own analysis or testing of less restrictive means before enacting the Amended Act.

Most importantly, although Plaintiffs have suggested several less-restrictive alternatives to the Amended Act, the burden is not on the Plaintiffs to evaluate less restrictive alternatives, it is on the Defendant. As Defendant has not even attempted to meet this burden, Defendant has not shown that the Amended Act passes the strict scrutiny test. *See Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126-29 (1989) (holding government must prove that less restrictive alternatives have been tested and failed). Defendant argues, without citing any authority, that "[n]o statute that is as narrowly tailored as AS 11.61.128 has been struck down by a court as unconstitutional." (D. Br. 9). This is plainly incorrect. The Amended Act is similar to the statutes in at least 12 recent cases in which the statutes were struck down on the identical grounds that Plaintiffs have submitted to this Court. (*See* P. Br. n. 1). Of those cases, Defendant mentions only *Reno v. ACLU*, 521 U.S. 844 (1997), and does so only to make the uncontested observation that the statute in *Reno* was a federal statute that was struck down in part due to concerns over its vagueness.[6] (D. Br. 9). *Reno*, however, unambiguously stands for the proposition that a statute will not survive constitutional scrutiny if "[i]n order to deny minors access to potentially harmful speech, [the statute] effectively suppresses a large amount of speech that adults have a constitutional right to receive." *Id.* at 874.

[5] Such a narrower statute was recommended to the legislature by a trade association to which some Plaintiffs are members prior to passage of the Amended Act. (See Declaration of David Horowitz submitted herewith).

[6] As discussed in Section 4 below, the Act suffers from many of the same vagueness problems as the statute invalidated in *Reno*.

4. Defendant Fails to Address the Unconstitutional Vagueness of the Amended Act

Defendant does not address Plaintiffs' contention that the Act's terms "taken as a whole" and "depict" are vague, effectively conceding their vagueness. The vagueness of these two terms alone is enough to render the Act unconstitutional.

As to the vagueness of the phrase "harmful to minors," the State relies on *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989) and *Am. Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), arguing that the phrase "harmful to minors" must be construed to mean harmful to all ages of minors. (D. Br. 11). But the more recent decision of *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), held that the phrase "harmful to minors" is vague and open to multiple constructions. 534 F.3d at 205. It is by no means settled that "harmful to minors" will be construed as it was in *Virginia*. The very fact that courts have varying opinions of the meaning of "harmful to minors" renders it vague and places Plaintiffs at the mercy of future court decisions interpreting that language.

5. The Amended Act Violates the Commerce Clause

There is broad consensus among the courts that have decided the issue that statutes such as the Amended Act violate the commerce clause in several ways. *E.g., Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) ("harmful to minors" statute unconstitutionally sought to regulate conduct outside state's borders, unduly burdened interstate commerce, and subjected interstate use of the Internet to inconsistent regulation); *PSInet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), *reh'g. denied* 372 F.3d 671 (same); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), (same); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (same). Once again Defendant simply ignores most of the precedent cited by

Plaintiffs. Referring to no federal case law on the major issues, Defendant places heavy reliance on *People v Hsu*, 82 Cal. App. 4th 976 (Cal. App. 1 Dist. 2000), and a law journal article.[7]

The State claims that the Amended Act cannot be used to prosecute out-of-state individuals who post material to the Internet that could be considered "harmful to minors" because "AS 12.05.010 restricts the court's jurisdiction to crimes that are consummated in-state." (D. Br. 13) However, there is no such restriction in AS 12.05.010. Rather, AS 12.05.010 allows an individual to be prosecuted for the consummation of a crime in-state "if the defendant consummated the crime through the intervention of an innocent or guilty agent, or by other means proceeding directly from the defendant." (AS 12.05.010). There is nothing on the face of this statute, nor does the State cite any other authority, that would prevent prosecution of an out-of-state speaker on the Internet under the theory that access of his or her Internet communication by a minor in Alaska constituted consummation of a crime "by other means proceeding directly from the defendant." Prosecuting such out-of-state posting of material to the Internet would be an impermissible attempt to regulate activity occurring entirely outside of Alaska. *Pataki*, 969 F. Supp. at 173-77; *PSInet*, 362 F.3d at 239-40; *Johnson*, 194 F.3d at 1161; *Cyberspace* , 142 F. Supp. 2d at 831.

Although *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), held that a similar statute violated the "rule barring the states from regulating those phases of the national commerce which . . . demand that their regulation. . . be prescribed by a single authority," Defendant takes issue with its holding and argues that this Court should disregard it. In doing so, Defendant disregards the broad range of other federal cases adopting the holding in *Pataki*. (Pl. Br. 2) In fact, Defendant fails to discuss these cases at all. In their stead, Defendant urges to this

[7] But *People v. Hsu* involved a statute that required a distribution of material plus the intent to seduce the recipient. It thus correctly upheld a statute like AS 11.41.452, not like the Amended Act.

Court that "[t]he *Pataki* approach has been persuasively and roundly criticized," citing a single case from a Washington state intermediate appellate court[8] and a law journal article[9] in support of their argument that the State's regulation of commerce over the Internet is merely the inevitable byproduct of a constitutionally-sound statute. The well-founded decision of the *Pataki* court and others following it that local regulation of the Internet "will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities" is persuasive. *Pataki*, 969 F. Supp. at 182.

Defendant next makes the conclusory statement that "Even though the internet is affected by his statute, the effect on interstate commerce is minimal. Further, this minimal intrusion is necessary for the State to promote its compelling interest." (D. Br. 17). Defendant, however, provides no evidence and refers to no authority that the effect on interstate commerce is minimal, or that the Amended Act is necessary to promote the State's interest. Indeed, the effect on interstate commerce is great. The Amended Act as written reaches all speakers on the Internet and criminalizes posting of "harmful to minors" material regardless of the location of the speaker. Indeed, the Amended Act has the potential to dramatically alter the way that Plaintiffs both in-state and out-of-state do business. (*See, e.g.* Decl. of David Cheezem ¶ 7).

6. First Amendment Protections Cannot be Left to Depend Upon Prosecutorial Restraint

The State's two examples of what prosecutions have, in fact, been brought under the predecessor during an undisclosed period may well demonstrate that the Attorney General is responsible—but it has no bearing upon the constitutionality of the Amended Act. On this issue, the State's argument is akin to the argument made by the government, and rejected by the

[8] *Rousso v. State*, 204 P.3d 243, 251 (Wash. App. Div. 1. 2009).

[9] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001).

Supreme Court, in *United States v. Stevens*, __ U.S. ___, 130 S.Ct. 1577 (2010). In *Stevens*, the Court held unconstitutional a federal statute that established a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. 18 U.S.C. § 48(a). Chief Justice Roberts, writing for the Court, held:

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6-7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.*, at 6-7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

130 S.Ct. at 1591.

7. Plaintiffs Have More Than Met the Applicable Standards for a Preliminary Injunction

Plaintiffs and the State agree that in order to prevail on a preliminary injunction motion, Plaintiffs must show "(a) a likelihood of success on the merits; (b) a likelihood of irreparable harm if the injunction is denied; (c) that the harm to the defendant from granting preliminary relief will not exceed the harm to the plaintiff from denying it; and (d) the effect of the court's ruling on the public interest. " (P. Br. 7; D. Br. 3). They further agree that under *Alliance for Wild Rockies v. Cottrell*, 2010 WL 3665149 (9th Cir. Sept. 22, 2010), if "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff" are shown, that showing "can support issuance of an injunction, assuming the other two elements of the *Winter*

test [irreparable harm and the public interest] are also met."[10] *Id.* By this standard, Plaintiffs are clearly entitled to a preliminary injunction.

The State contends that Plaintiffs cannot now claim to be "chilled" in the exercise of their First Amendment rights when the prior version of the Act has been in effect since 2005. *Id.* Plaintiffs simply did not know of the Prior Act's existence until passage of the Amended Act.[11] However, Plaintiffs still fear future prosecution under the Amended Act now and are chilled by it. Defendant thus fears prosecution for a far broader set of acts than they would have under the Prior Act. And the very recent passage of the Amended Act reflects the renewed focus of state government on this area and increases both the likelihood of prosecutorial activity and the fear of it. Under the case law, it is irrelevant that no Plaintiff has been prosecuted thus far. Fear of

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[10] Defendant's reliance on *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959 974 (9th Cir. 2002) for the proposition that "any public interest in protecting First Amendment privileges may be 'overcome by a strong showing of other competing interests'" is misplaced. (D. Br. 4) The court in *Sammartano* merely stated in passing that "The public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests," (i*d.)* citing a case that involved only a time, place and manner restriction. *Hale v. Dep't of Energy*, 806 F.2d 910 (9th Cir 1986). This is far from a statement than any public interest can be so overcome. In fact, the statement was dictum since the *Summartano* court held the statute there at issue to be unconstitutional and remanded the case with instructions to the lower court to issue a preliminary injunction against it. *Id.* at 975.

[11] (Decl. of David Ongley 10; Decl. of Barbara M. Jones 10; Decl. of John Weddleton 9; Decl. of David Cheezem 10; Decl. of Julie Drake 6; Decl. of Crossan R. Andersen 10; Decl. of Donald R. Douglas 7; Decl. of Allan R. Adler 13; Decl. of Christopher Finan 18; Decl. of Charles Brownstein 11).

Contrast this case with *Lydo Enterprise, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984), cited by the defendant. In *Lydo Enterprise*, an adult bookstore filed a motion for a temporary restraining order, ten days before a zoning ordinance would go into effect, to halt the enforcement of the ordinance passed five years earlier. The bookstore has been given written notice that the ordinance would affect the bookstore the November prior to the April date for enforcement. Even considering the delay by the plaintiffs in the face of explicit notice, the court still stated "delay is not the principal basis of our decision." 745 F.2d at 1216. Instead, the court noted that the plaintiffs had not made a substantial showing that relocation to a location properly zoned for the bookstore was difficult or impossible, nor had they shown that enforcement of the zoning ordinance would "have the effect of restricting access to constitutionally protected speech." Id. In the present case, the Plaintiffs have successfully argued that their speech is currently chilled by the Amended Act, and relocation is not a means of avoiding its reach.

future prosecution is legally sufficient. "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." *Virginia v. Amer. Booksellers*, 484 U.S. 383, 392 (1988).

In addition, while the Prior Act criminalized only electronic dissemination of certain material, the recently passed Amended Act is broader, allowing prosecution for any sort of distribution, whether in a store or library, or via the Internet.

Fear of such prosecution is chilling Plaintiffs now and has been since they learned of the Act's existence. For example, John Weddleton, owner of plaintiff Bosco's, Inc., stated in his declaration in support of Plaintiffs' motion:

> For many years we have bagged and taped shut with packaging tape titles that we think are adult, and we have put stickers with the word "Mature" on them. This hurts sales. My staff has become very nervous and is bagging far more titles now. This limits sales on great stories, frustrates customers who want to look at a comic before buying it, and costs a great deal of staff time to process these titles.

(Decl. of John Weddleton ¶ 7).

Finally, Defendant fails to rebut Plaintiffs' argument that, "'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' . . . Likewise, deprivation of Plaintiffs' constitutional rights under the Commerce Clause constitutes irreparable injury." (P. Br. 9) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It is therefore indisputable that Plaintiffs are suffering immediate and irreparable injury and that a preliminary injunction is appropriate.

CONCLUSION

For the above reasons, plaintiffs respectfully request that the Court enjoin enforcement of the Act.

Dated: October 8, 2010

Respectfully submitted,

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The undersigned certifies that a true and correct copy of the foregoing Reply Memorandum in Further Support of Plaintiffs' Motion For a Preliminary Injunction was served via electronic filing this 8th day of October, 2010, upon counsel for Defendant.

s/ Michael A. Bamberger
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