IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al., Plaintiffs, vs. DANIEL S. SULLIVAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA, Defendant.	Case No. 3:10-cv-0193-RRB **ORDER GRANTING PRELIMINARY INJUNCTION**

I. MOTION PRESENTED

Pursuant to Fed. R. Civ. P. 65, Plaintiffs move for a preliminary injunction and other appropriate relief against enforcement of AS 11.61.128, both as amended by Sections 9-12 in Senate Bill No. 222, 26th Leg., 2d Sess., and as prior to amendment, which purports to limit access to materials deemed "harmful to minors." A copy of the statute at issue is found at Docket 7-2. Plaintiffs represent a spectrum of individuals and organizations — including booksellers, a photographer, libraries, and organizations representing booksellers, publishers, and other media interests — that communicate, disseminate, display, and

access a broad range of speech in the physical world as well as through the Internet. This matter has been fully briefed and the Court enters the following order.

II. BACKGROUND

In January of 2010, Alaska passed a bill, SB 222, that amended a variety of statutes with the stated intent of strengthening initiatives relating to sexual assault and domestic violence. The bill included Sections 9-12, which amended and (according to Plaintiffs) expanded an existing censorship law. These sections imposed what Plaintiffs complain are "severe content-based restrictions on the availability, display, and dissemination of constitutionally protected speech on the Internet and physically within the State of Alaska."[1]

Plaintiffs argue that the application of the amended act to the Internet violates the First, Fifth, and Fourteenth Amendments because: it restricts adults from engaging in protected speech on the Internet; it is substantially overbroad; it criminalizes protected speech among and to older minors; it is unconstitutionally vague; and requires that, for the determination of community standards, the relevant community be local, rather than the nation. In addition, Plaintiffs argue the application of

[1] Docket 7 at 8.

the amended act to the Internet violates the Commerce Clause because: it regulates speech that occurs wholly outside the borders of Alaska; it imposes an unjustifiable burden on the interstate commerce over the Internet; and it subjects online speakers to inconsistent state laws.

Plaintiffs do not challenge the Alaska laws criminalizing child pornography, sexual solicitation or luring of minors, or obscenity on the Internet. Plaintiffs also do not challenge the portions of SB 222 that do not amend AS 11.61.128.

III. STANDARD OF REVIEW

In order for the Court to grant a preliminary injunction, the Plaintiffs must demonstrate:

1. a strong likelihood of success on the merits,

2. the possibility of irreparable injury to Plaintiffs if preliminary relief is not granted,

3. a balance of hardships favoring the Plaintiffs, and

4. advancement of the public interest (in certain cases).[2]

A preliminary injunction requires Plaintiffs to show *probable* success on the merits, but only the *possibility* of irreparable harm.[3]

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[2] *Earth Island Inst. v. United States Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003).

[3] *Id.*

IV. DISCUSSION

A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to be successful on the merits because the amended act bans a large amount of speech that adults have a constitutional right to receive, and because the amended act fails strict scrutiny, is overbroad, and violates the Commerce Clause.[4] Plaintiffs argue that 18 federal judges in five circuits have struck down state statutes forbidding Internet communications deemed harmful to minors like the one at issue here.[5] In response, the State argues that because the amended act

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[4] Docket 7 at 15.

[5] *See PSInet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), reh'g. denied. 372 F.3d 671, aff'g 167 F. Supp. 2d 878 (W.D. Va. 2001); *Amer. Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003), aff'g 202 F. Supp. 2d 300 (D.Vt. 2002); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), aff'g 4 F. Supp. 2d 1029 (D.N.M. 1998); *Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005); ACLU v. Napolitano, Civ. No. 00-0505 (D.Ariz. June 14, 2002) (permanent injunction), sub nom. ACLU v. Goddard, 2004 WL 3770439 (D. Ariz. Apr. 23, 2004) (statute as amended in 2003 permanently enjoined); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (summary judgment and permanent injunction), 55 F. Supp. 2d 737 (E.D. Mich. 1999) (preliminary injunction), aff'd, 238 F.3d 420 (6th Cir. 2000) (unpublished); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). The COPA statute, a federal statute similar to the Amended Act, was held unconstitutional. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd sub nom. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009). In addition, the Wisconsin Supreme Court found the Wisconsin statute unconstitutional for lacking an appropriate scienter requirement. *State v. Weidner*, 611 N.W. 2d. 684 (Wis. 2000).

is narrower than the other statutes found unconstitutional, they are unlikely to succeed on the merits.

The State provides little support for its conclusory statement. Even a cursory review of the cases cited by Plaintiffs reveal legitimate concerns regarding AS 11.61.128. In *Reno v. ACLU*,[6] a unanimous Supreme Court struck down a similar federal statute, agreeing with the District Court that the word "indecent" was too vague to provide the basis for a criminal prosecution.[7] Although the Alaska Statute enumerates what is "indecent" and contains a definition of what is considered "harmful to minors" (elements missing in the *Reno* case), the Third Circuit concluded that "harmful to minors" language in the Child Online Protection Act (COPA) did not save that Federal statute. The Third Circuit found that the COPA was not narrowly tailored so as to survive a strict scrutiny analysis.[8]

The Court concludes that there is a strong likelihood of success on the merits in this matter.

B. Likelihood of Irreparable Harm if the Injunction is Denied

Although there are no pending prosecutions under the Amended Act against any of the Plaintiffs, they argue they will suffer

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[6] 521 U.S.844 (1997).

[7] *Id.* at 861.

[8] *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008).

irreparable harm in the absence of an injunction because “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”[9]

The State argues that none of the Plaintiffs or any other entity brought suit under the original 2005 statute complaining that it infringed on their constitutional rights. Further, none of the Plaintiffs have alleged actual harms beyond a “chilling effect.” Such a delay in seeking a preliminary injunction, the State argues, is a factor to be considered in weighing the relief. The State’s brief provides examples of the types of activities that result in charges under this statute and notes that “the statute was designed and is employed in a way to stop predators from sexually grooming children and should be allowed to be used this way while the complaint is pending.”[10] In response, Plaintiffs argue that they fear future prosecution and are chilled by the amended act. It is irrelevant, they argue, that no Plaintiff has been prosecuted thus far.

The Court agrees with Plaintiffs. "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."[11] “[I]f

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[9] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

[10] Docket 33 at 5.

[11] *Virginia v. Amer. Booksellers*, 484 U.S. 383, 392 (1988).

[Plaintiffs'] interpretation of the statute is correct, [they] will have to take significant and costly compliance measures or risk criminal prosecution."[12] While the State argues that it will not, in fact, pursue criminal charges against any of the Plaintiffs, nothing prevents the State from doing so absent an injunction from this Court.

C. Harm to Defendant vs. Harm to Plaintiffs

Plaintiffs argue the only legitimate harm that Defendant could allege is an inability to prosecute persons under the amended act. On the other hand, Plaintiffs are faced with unconstitutional restrictions on their communicative activities with the potential of a criminal charge hanging over them.[13]

The State complains that the amended act is designed to prosecute those predators who use pornography to groom children for sexual abuse, and that without this statute the State would have to wait until a child was actually sexually assaulted before intervening. The State argues this outweighs any chilling effect on the Plaintiffs. However, the State's argument is overstated, given other statutes that are available for prosecution of predators via the internet. Specifically, AS 11.41.452, which has been in place since November of 2005, addresses "online enticement

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[12] *Id.*

[13] Docket 7 at 16.

of a minor." A person commits the crime of online enticement of a minor under this statute if that person, "being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455." AS 11.41.455 addresses "unlawful exploitation of a minor" and prohibits inducing or employing a child under 18 years of age to engage in actual or simulated conduct that mirrors the conduct in the statute at issue in this case.

In short, the State has clear alternative options for prosecuting sexual predators.

D. Public Interest.

Plaintiffs argue a preliminary injunction would serve the public interest by upholding the constitutional rights of the public.[14] The State argues that it is not in the public's interest for the State to have to wait to act until a child has already been molested.[15] For the reasons identified in section C, the State's argument is not persuasive. The State has other mechanisms for prosecution of online predators.

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[14] Docket 7 at 17.

[15] Docket 33 at 6.

V. CONCLUSION

In light of the foregoing, the Preliminary Injunction requested at **Docket 5** is **GRANTED.** Although the Attorney General has argued "the statute was designed and is employed in a way to stop predators from sexually grooming children and should be allowed to be used this way while the complaint is pending,"[16] the State has not provided the Court with a viable alternative that would both protect Plaintiffs during the pendency of this proceeding and allow the State to use the statute as it argues was "intended." Accordingly, the Preliminary Injunction prevents any enforcement of AS 11.61.128 until further Order of this Court, or until the parties enter into a stipulation that would eliminate the need for such an injunction. The oral argument scheduled for November 3, 2011, is **VACATED**.

IT IS SO ORDERED.

ENTERED this 20th day of October, 2010.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

[16] Docket 33 at 5.