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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**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs respectfully submit this memorandum in support of their motion for summary judgment.

INTRODUCTION

On October 20, 2010, this Court issued a preliminary injunction against enforcement of Alaska's recently enacted "Distribution of indecent material to minors" statute.[1] (Order Granting Preliminary Injunction, Docket 47 at 7-8). In doing so, this Court agreed with the Plaintiffs that the Amended Act bans a large amount of speech that adults have a constitutional right to receive. The Court also noted that its decision was in harmony with those of eighteen other judges in five circuits who struck down very similar laws. (*Id.* at 5). This Court concluded that "the State has clear alternative options for prosecuting sexual predators" (i*d.* at 8), and that "there is a strong likelihood of [Plaintiffs'] success on the merits in this matter." (*Id.* at 5)

Defendant has neither contested nor sought to contest any of the facts upon which this Court found the statute likely to be unconstitutional. There is thus no genuine dispute as to a material fact, and the ample case law invalidating similar statutes makes clear that Plaintiffs are entitled to judgment as a matter of law. Therefore, Plaintiffs now seek summary judgment, (1) declaring the Amended Act unconstitutional, and (2) permanently enjoining enforcement of the Amended Act.

In issuing the preliminary injunction, this Court reached some, but not all, of the grounds upon which Plaintiffs had argued that the statute was invalid as a matter of federal constitutional law. Accordingly, in this memorandum, Plaintiffs will summarize each of the constitutional deficiencies of the Amended Act, but rather than repeat the entire argument presented before, will refer the Court back to the longer discussion of such issues in the earlier papers filed in

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[1] AS 11.61.128. The Court included the statute both as it was amended by Senate Bill No. 222, 26th Leg., 2d Sess. (2010) ("SB 222") (the "Amended Act"), and as it existed prior to amendment (the "Prior Act").

support of the Motion for a Preliminary Injunction. Although it seems incontrovertible that the statute violates several distinct constitutional provisions, this Court need find only one constitutional violation to grant the Plaintiffs the relief requested.

SUMMARY OF ARGUMENT

The Amended Act violates the First, Fifth and Fourteenth Amendments by imposing severe content-based restrictions on the availability, display, and dissemination of any material that is "harmful to minors," either on the Internet or physically within the State of Alaska. In doing so, it restricts adults from engaging in protected speech on the Internet and criminalizes protected speech among and to older minors. Given the State's stated purpose for the law, to "prevent[] predators from using pornography to groom children for sexual abuse by adults," (D. Br. in Op. to P.I. at 8), it is substantially overbroad and is not narrowly tailored to achieve its purpose. The Amended Act is also unconstitutionally vague and does not meet the constitutionally mandated level of scienter. Application of the Amended Act to the Internet would also violate the Commerce Clause because it seeks to regulate speech that occurs wholly outside the borders of Alaska, imposes an unjustifiable burden on interstate commerce over the Internet and subjects online speakers to inconsistent state laws.

As noted by the Court, seventeen federal judges in five circuits have struck down state statutes forbidding Internet communications deemed harmful to minors like the one at issue

here.[2] In doing so, these courts invoked the same constitutional provisions as the Plaintiffs have presented to this Court--the Commerce Clause and the First Amendment.

STATEMENT OF UNCONTESTED FACTS

Plaintiffs filed this action on August 31, 2010, challenging the Amended Act. On the same date, Plaintiffs filed a motion seeking a preliminary injunction against enforcement of the Amended Act and the Prior Act. Defendant filed his Answer (Docket 43) on September 29, 2010, denying some aspects of Plaintiffs' interpretation of the Amended Act, but not denying any material facts alleged in the Complaint. Based on Defendant's Answer, the uncontested factual record before this Court, and the Court's order, Plaintiffs submit that the following facts are not in dispute:

I. THE STATUTE

On May 14, 2010, Governor Sean Parnell signed into law Senate Bill No. 222, 26th Leg., 2d Sess. (2010) ("SB 222"), Sections 9-12 of which amended AS 11.61.128, Alaska's

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[2] *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); *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. Oct. 26, 2010). As to the First Amendment issues, all of these cases relied heavily on *Reno v. ACLU*, 521 U.S. 844 (1997) ("*Reno*"), in which a unanimous Supreme Court struck down a similar federal statute. 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).

"Distribution of indecent material to minors" statute. (Comp. ¶ 1,5; Ans. ¶ 1,5). The Amended Act took effect on July 1, 2010. (Comp. ¶ 7; Ans. ¶ 7).

The Amended Act makes it a crime to distribute to a person under 16 years of age, whether over the Internet or in person, any depictions of "(A) sexual penetration; (B) the lewd touching of a person's genitals, anus, or female breast; (C) masturbation; (D) bestiality; (E) the lewd exhibition of a person's genitals, anus, or female breast; or (F) sexual masochism or sadism" that are "harmful to minors." (AS 11.61.128(a)(1); Comp. ¶ 1, 2; Ans. ¶ 1, 2). It criminalizes the distribution of such material even when the person distributing the material does not know the age of the recipients. (Comp. ¶ 2; Ans. ¶ 2).

The Amended Act does not distinguish between material that is "harmful" for older as opposed to younger minors. (Comp. ¶ 84; Ans. ¶ 84). The Amended Act also does not define the term "as a whole" in the definition of matter that is "harmful to minors," (Comp. ¶ 85; Ans. ¶ 85); and although it appears that the Alaska Legislature intended the Amended Act to apply only to visual depictions of nudity or sexual conduct, the Amended Act itself does not specify that the depictions be visual as opposed to textual. (Comp. ¶ 14; Ans. ¶ 14).[3]

A violation of the Amended Act is a Class C felony, punishable by a term of imprisonment of up to two years for a defendant with no prior felony convictions, from two to four years for a defendant with one prior felony conviction, and from three to five years for a defendant with two prior felony convictions. (Comp. ¶ 79; Ans. ¶ 79). Conviction under the Amended Act may result in forfeiture of a defendant's website, bookstore or any other property

[3] Before being amended by SB 222, AS 11.61.128 prohibited distribution to minors by computer of certain sexually explicit material. The recent amendments deleted the word "electronic" before "distribute" so that all forms of distribution whether electronic or physical are covered. In addition, the amendments added sections requiring the application of community standards and requiring that the material be harmful to minors as that term is defined in the Amended Act. (Comp. ¶ 8; Ans. ¶ 8).

used in aid of the violation, and requires the violator to register for 15 years as a sex offender. (Comp. ¶¶ 23, 79; Ans. ¶¶ 23, 79).

II. THE PLAINTIFFS

Plaintiffs include a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. (Comp. ¶ 24; Ans. ¶ 24). Plaintiffs post and discuss content including visual and verbal depictions of nudity and sexual conduct, visual art and images, resources on AIDS prevention, and books and resources for sex education for youth. *Id.*

Plaintiffs also include a broad range of individuals and entities who sell and buy books, magazines, other printed material, as well as DVDs and other forms of audio-visual content within the State of Alaska. (Comp. ¶ 25; Ans. ¶ 25). This material includes visual and verbal depictions of nudity and sexual conduct, visual art and images, resources on AIDS prevention, and books and resources for sex education for youth. *Id.*

III. THE INTERNET

All speech on the Internet is accessible in Alaska, regardless of the geographical location of the person who posted it. (Comp. ¶ 17; Ans. ¶ 17). Online users outside of Alaska, including those Plaintiffs located outside of the State, cannot know whether someone in Alaska might download their content posted on the Internet. (Comp. ¶ 26; Ans. ¶ 26). Users who communicate on mailing lists and content providers on the Web, including Plaintiffs both inside and outside Alaska, have no reasonable way to verify the age of persons who access their mailing lists or websites. (Comp. ¶ 87; Ans. ¶ 87).

IV. ALTERNATIVES TO THE AMENDED ACT

In his opposition to Plaintiffs' Motion for Preliminary Injunction, Defendant stated that the Act is necessary to "prevent[] predators from using pornography to groom children for sexual

abuse by adults." (D. Br. in Op. to P.I. at 8). Plaintiffs maintained that while this is a legitimate government interest, "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." (P. Rep. Br. in Support of P.I. at 4).

In entering the preliminary injunction, this Court agreed with Plaintiffs, and held that the Amended Act is not the only tool the State and its citizens have to protect minors against predators:

> [O]ther statutes [] 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 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.

(Order Granting Preliminary Injunction at 7-8).

Additionally, Defendant does not deny that many computers and almost all browsers include "parental control" features pre-installed and such features are readily available that permit parents to control and block email and Internet activities of their children. (Comp. ¶ 100; Ans. ¶ 100).

ARGUMENT:
PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

I. PLAINTIFFS MEET THE STANDARD FOR SUMMARY JUDGMENT.

In order to prevail on a motion for summary judgment, Plaintiffs must show that two elements are met: (1) "there is no genuine dispute as to material facts," and (2)" the moving party is entitled to judgment as a matter of law." *Bloom v. Teamster Affiliates Pension Plan*, 2008 WL 3200763 at *2 (D. Alaska Aug. 5, 2008) (Beistline, J.) (citing Fed. R. Civ. P. Rule 56).

> The moving party has the burden of showing that there is no genuine dispute as to material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. *Id.* at 323-325. Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant. *Id.* at 255. However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. *Id.* at 248-49.

Plaintiffs clearly meet their burden of proof, and are entitled to judgment as a matter of law.

II. THERE IS NO GENUINE DISPUTE AS TO MATERIAL FACTS

There is no factual dispute in this case. The record in this case includes all material facts necessary for a ruling as to the constitutionality of the Amended Act, as detailed in the Statement of Uncontested Facts above:

- The Amended Act does not require that a person prosecuted under it have had actual knowledge of the age of the minor to whom "harmful to minors" material was distributed. (Comp. ¶ 2; Ans. ¶ 2);
- The Amended Act does not distinguish between material that is "harmful" for older as opposed to younger minors. (Comp. ¶ 84; Ans. ¶ 84);
- The Amended Act also does not define the term "as a whole" in the definition of matter that is "harmful to minors." (Comp. ¶ 85; Ans. ¶ 85);
- The Amended Act does not specify whether the "depictions" are visual as opposed to textual. (Comp. ¶ 14; Ans. ¶ 14);
- All speech on the Internet is accessible in Alaska, regardless of the geographical location of the person who posted it. (Comp. ¶ 17; Ans. ¶ 17);
- Internet users have no reasonable way to verify the age of persons who access their communications. (Comp. ¶ 87; Ans. ¶ 87);
- AS 11.41.455 provides a more narrowly focused alternative to the Amended Act under which to prosecute online predators. (Order Granting Preliminary Injunction at 7-8);

- "Parental controls" features allow parents to control their minor children's online activity. (Comp. ¶ 100; Ans. ¶ 100).

Defendant does not deny any of these facts. The material denials contained in Defendant's Answer are denials of questions of law rather than of fact.

Given that Plaintiffs are able to "point out the lack of any genuine dispute as to material fact," *Bloom*, 2008 WL 3200763 at *2, Plaintiffs have met the first element necessary for Summary Judgment. As discussed further below, Plaintiffs have also met the second element, entitlement to judgment as a matter of law, and Summary Judgment is therefore appropriate.

III. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. The Admitted Absence of a Scienter Requirement for the Recipient's Age and for the Nature of the Contents of the Material Renders the Entire Statute Unconstitutional Under the First Amendment

The Supreme Court has consistently held that laws restricting sexually explicit communicative material must contain a scienter requirement for all the major elements of the crime to avoid suppression of constitutionally protected speech by speakers self-censoring in order to steer well clear of any criminal liability. This was held true even in the case of obscenity — which, unlike the material subject to the Amended Act, falls entirely outside the protection of the First Amendment. *See Smith v. California*, 361 U.S. 147, 152-53 (1960); *see also 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."); *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 at *4 ("All parties agree that without such a [knowledge] requirement, the statute does not pass constitutional muster.").

The State concedes that the Amended Act does not require knowledge by the distributor of the age of the recipient. (Ans. ¶¶ 2, 15). The statute also fails to even refer to knowledge of

the offending material's "content and character," as do the obscenity and harmful to minors laws of many, if not most, states.[4] Either of these failures alone is dispositive.

B. The Amended Act's Restrictions on Electronic/Internet Distribution Violate The First Amendment.

Both the United States Supreme Court and every federal court reviewing similar state Internet "harmful to minors" laws has held that such laws violate the First Amendment.[5] Although Defendant "denies that AS 11.61.128 was similar to those statutes," (Ans. ¶ 4), this argument was unavailing when Defendant argued it in opposition to Plaintiffs' Motion for a Preliminary Injunction (the "Preliminary Injunction Motion"), and it is unavailing now. In granting the Preliminary Injunction Motion, this Court noted:

> Even a cursory review of the cases cited by Plaintiffs reveal legitimate concerns regarding AS 11.61.128. In *Reno v. ACLU*, 521 U.S. 844 (1997), 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. *Id.* at 861. 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.

(Order Granting Preliminary Injunction at 5).

Six days after this court granted Plaintiffs' Preliminary Injunction Motion, another federal court, the U.S. District Court for the District of Massachusetts, came to the same conclusion and issued a preliminary injunction against enforcement of Mass. Gen. Laws ch. 272, §§ 28 & 31, law similar to the Amended Act, which criminalized dissemination of "harmful to minors" material. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 at *4 (D. Mass. October 26, 2010).

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[4] See, e.g., Ark. C. Ann § 5-68-501(3); Colo. R.S. § 18-7-501(3); N.Y. Pen. L. §§ 235.05, 235.21.

[5] *See* n. 2, *supra*.

The Amended Act, like these other statutes, bans the communication of a broad category of material that by definition is lawful as to adults but may be prohibited as to certain minors. The Amended Act would criminalize the mere display and communication of such speech by a large number of speakers using any method of Internet communication. Due to the Internet's worldwide reach, the practical inability of speakers on the Internet to choose or restrict viewers of their speech, and the Amended Act's lack of a requirement that a speaker have actual knowledge of a recipient's age, the Amended Act would effectively limit much constitutionally protected content available through the Internet to a level deemed suitable for younger minors.[6] Such a broad and restrictive content-based regulation of speech is not narrowly tailored to advance the State's asserted interest. In addition, as this Court noted, less restrictive methods exist for parents to control minors' access to sexually explicit Internet content using "parental control" software (Comp. ¶ 100; Ans. ¶ 100), and for the State to prosecute the online "grooming" of minors for sexual activity using other existing statutes such as AS 11.41.452 (Order Granting Preliminary Injunction at 7). Given these alternatives, it is clear that the Amended Act is not narrowly tailored to achieve a compelling government interest. Accordingly, the Amended Act violates the First Amendment and must be permanently enjoined and declared unconstitutional.

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[6] The National Research Council, the working arm of the National Academy of Sciences and the National Academy of Engineering, has issued a comprehensive study, which was commissioned by Congress, on protecting children on the Internet. Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, *Youth, Pornography, and the Internet* 11-13 (Dick Thornburgh & Herbert S. Lin, eds., 2002) ("NRC Report") (summarizing alternatives); *id.* at § 14.4.3 ("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").

1. <u>The Supreme Court Has Ruled That Internet Regulations Such as the Amended Act Are Per Se Unconstitutional Because They Ban Speech That Is Constitutionally Protected Speech for Adults.</u>

The Supreme Court has made clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno,* 521 U.S. at 874 (quoting *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)). At the same time, Internet speakers cannot distinguish between minors and adults in their audience. *Reno* at 876; (Bradner Decl. at ¶ 18).[7] Moreover, in most cases, the Internet also does not permit users to control who accesses the information they make available online or where those persons are. *Reno*, 217 F. 3d at 175; (Bradner Decl. at ¶ 19). Since every Internet speaker "knows" that there are many minors using Internet browsers, Internet users can only prevent sexually frank material from passing to minors by restricting such material from distribution to all Internet users, thus effectively rendering the Amended Act a ban on such communications.

Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech because doing 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 v. FCC,* 518 U.S. 727, 759 (1996) (the government may not "reduc[e] the adult population … to … only what is fit for children") (internal quotations omitted); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002) ("The Government cannot ban speech fit for adults simply because it may fall into the hands of children"); *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 814 (2000) ("even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if protection can be accomplished by a less restrictive alternative."). In striking down the CDA's prohibitions on

[7] Citations herein to declarations are to those declarations attached to Plaintiffs' Motion for a Preliminary Injunction (Docket 5).

transmissions to minors by means of the Internet, the Supreme Court noted that while "we have repeatedly recognized the governmental interest in protecting children from harmful materials … that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 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*.[8]

Adult Internet speakers cannot engage in "sexually frank" communications and also comply with the Amended Act. Rather, Internet users in general, and Plaintiffs in particular, can only comply with the Amended Act if they speak in language suitable for children. Thus, like the CDA found unconstitutional by the Supreme Court in *Reno*, the Amended Act operates unconstitutionally as a criminal ban on constitutionally protected speech among adults on the Internet. *Reno*, 521 U.S. at 874.

In addition, Defendant admits that the Amended Act does not require the transmitter to have actual knowledge of the age of a minor. (Ans. ¶¶ 2, 15). The Supreme Court addressed the constitutionality of similar scienter provisions of the Communications Decency Act and found them wanting. *Reno, supra.*

The Amended Act imposes a flat ban on constitutionally protected speech over the Internet, and is, therefore, unconstitutional.

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[8] *See also Bolger v. Young Drug. Products Corp.,* 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *cf. Ginsberg v. New York*, 390 U.S. 629, 634-35 (1968) (upholding restriction on the direct commercial sale to minors of material deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" only to adults); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990), (noting that *Ginsberg* did not address the "difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them"). *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001) (holding Massachusetts may not totally bar truthful speech contained in cigarette advertisements in an attempt to achieve substantial and compelling interest of protecting minors).

2. <u>The Amended Act Unconstitutionally Restricts Older Minors' First Amendment Rights.</u>

As set out in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction (Docket No. 7) ("Prelim. Injunction Memo.") and not explicitly ruled upon by the Court, the Amended Act is also unconstitutionally overbroad because it proscribes speech on the Internet that may be "harmful" to younger minors but that is constitutionally protected for older minors. The Supreme Court has ruled in many contexts 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 their intellectual development and for their participation as citizens in a democracy, including information about reproduction and sexuality. *See Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975) (minors are entitled to a "significant measure" of constitutional protection); *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 511 (1969) (school district could not suspend student for engaging in constitutionally protected expressive conduct); *Carey v. Population Servs*., *Int'l*, 431 U.S. 678, 693 (1977) (state cannot ban distribution of contraceptives to minors) (plurality opinion); *Board of Educ. v. Pico*, 457 U.S. 853, 865, 870-71 (1982) (First Amendment rights apply to students in the school setting and therefore local school boards could not remove books from school library shelves simply because they disliked the ideas contained in those books).

The Amended Act 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 noted above, given the universal access to the Internet, the Amended Act can make no distinction between "nudity" and "sexual conduct" that may be inappropriate for younger minors and "nudity" and "sexual conduct," such as explicit safer 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 Am. Booksellers Ass'n v. Webb*, 919 F.2d at 1505; *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125 (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" (quoting *State v. Am. Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988))).

3. The Amended Act Cannot Survive Strict Scrutiny.

As a content-based regulation of protected speech, the Amended Act is presumptively invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Turner Broad. Sys., Inc.*, 512 U.S. at 641 (The First Amendment "does not countenance governmental control over the content of messages expressed by private individuals"). A content-based regulation of speech such as the Amended Act can be upheld only if it is justified by a compelling governmental interest and is "narrowly tailored" to effectuate that interest. *See Reno*, 521 U.S. at 879. The Amended Act is not narrowly tailored.

Material that is "harmful to minors" is constitutionally protected as to adults. Thus, the Amended Act is presumptively invalid and subject to strict scrutiny under well-established First Amendment precedent. *Playboy Entm't Group, Inc.*, 529 U.S. at 817; *Reno v. ACLU*, 521 U.S. at 868, 870 (holding content-based restrictions on speech are reviewed under a strict scrutiny analysis and there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"). Under strict scrutiny, it is not enough for Alaska merely to identify a compelling government interest; it must show that the Act will actually and materially "achieve its goal" and that no less restrictive alternatives exist to achieve that interest. *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (the government "must demonstrate" that "the regulation will in fact alleviate these harms in a direct and material way"), *claim dismissed*, 910

F. Supp. 734 (D.D.C. 1995); *Sable*, 492 U.S. at 126-29 (the government must prove that less restrictive alternatives have been tested and failed).

(1) The Amended Act Is Not Narrowly Tailored to Achieve a Compelling State Interest.

The State contends that this section of the statute is intended to deal with the situation of a person in the process of committing a sexual offense who is grooming a child by showing that child sexually explicit material. (D. Br. in Op. to P.I. at. 7). The Amended Act's legislative history provides some support for this conclusion. (*See* Comm. Minutes, 2/15/10, at 2). That is clearly a legitimate state interest. However, the legislature, apparently desiring to protect minors from all "harmful to minors" material anywhere including on the Internet, prohibited *any* distribution of such material, not just material directed at a particular minor. Such a sweeping ban is not narrowly tailored to meet the State's legitimate interest. A statute that prohibited only direct distribution to a specific minor known to the distributor and that otherwise met all the constitutional tests could serve the state's legitimate interests without impinging unnecessarily on protected speech. But that is not this statute. Indeed, as this Court recognized, the state already has a narrower, constitutional law the vigorous enforcement of which addresses the state's interest in protecting minors from sexual exploitation. (Order Granting Preliminary Injunction at 7-8 (citing AS 11.41.452, "Online Enticement of a Minor")); *see also* American Booksellers Foundation v. Dean, 342 F.3d 96, 102 (2d Cir. 2003).

The Defendant argued in its Opposition to Plaintiffs' Motion for a Preliminary Injunction 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.[9] (D. Br. in Op. to P.I. 2). However, as is clear from the Preliminary Injunction Motion (Docket 7) and

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

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). 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).

Thus, as a practical matter, the Amended Act forces speakers to fear that they might have to defend themselves against prosecution whenever sexually frank content is posted to the Internet or available in their stores.

(2) The Amended Act Is Not an Effective Means of Advancing the Government's Interest.

The Amended Act also fails strict scrutiny because it is a strikingly ineffective means of addressing the government's assumed 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). The government bears the burden of showing that its scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broadcast Systems*, 512 U.S. at 664. In this case, Defendant has not met and cannot meet this burden.

As Justice Scalia wrote in *Florida Star v. B.J.F.,* "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." 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring). Due to the nature of the online medium, even a total content-based ban in the United States would fail to eliminate "harmful to minors" 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. "[A] large percentage, perhaps 40% or more, of content on the Internet originates abroad." *Reno,* 929 F. Supp. at 848.[10] Thus, the Amended Act will not prevent minors from receiving the large percentage of "harmful" material that originates abroad. This reality prompted Judge Dalzell of the Eastern District of Pennsylvania to conclude 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.

Reno, 929 F. Supp. at 882-83 (Dalzell, J.). Thus, the Amended Act is unconstitutional because it fails to alleviate the alleged "harms in a direct and material way." *Turner Broadcast Systems,* 512 U.S. at 664.

(3) Less Restrictive, More Effective Alternatives Are Available.

The Amended Act also fails strict scrutiny because it is not the least restrictive means of achieving the government's asserted interest. *See Sable*, 492 U.S. at 126 (in order to survive strict scrutiny, means chosen to regulate speech must be carefully tailored to achieve legislative purpose). Less restrictive and more effective solutions lie both in vigorous enforcement of AS 11.41.452, and in use by parents of widely-available user-based (*i.e.*, parental) controls on computers. *See Reno*, 521 U.S. at 877 (noting user-based software can provide a "reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children . . .") (emphasis in original); *Denver Area*, 518 U.S. at 759 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to

[10] A more recent finding is approximately 50%. *Gonzales*, 478 F. Supp. 2d at 789. *See also* Bradner at para. 20.

indecent material). *See also Reno,* 521 U.S. at 877; NRC Report, Executive Summary at 10 ("filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable"); *see generally id.* at Section 2. "The most reliable method of protecting minors and others from unwanted Internet content is through the use of filtering software installed on the user's own computer." (Bradner Decl. at ¶ 67). Plaintiffs detailed such effective solutions in their previous submissions to the Court and will not repeat them here. (*See* Prelim. Injunction Memo. p. 18-20). The Defendant's response to this demonstration was to dismiss such possible alternatives out of hand, rejecting filters which have been praised as narrower alternative by courts. Defendant also rejected the possibility of passing a narrower statute that "prohibited only direct distribution to a specific minor known to the distributor." (P. Br. 16)[11]. Nor has Defendant presented any information indicating that the State did any of its own analysis or testing of less restrictive means before enacting the Amended Act.

Of equal importance, the State already has a statute that allows it to prosecute "online enticement of a minor." 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." (Order Granting Preliminary Injunction at 8). Other states have similarly narrow statutes, some of which address solicitation of minors both online and off. *See, e.g.*, Vermont statute 13 V.S.A. § 2828. If the State is concerned about offline solicitation of minors, it could easily expand 11.41.455 to cover this contingency without the Amended Act's far-reaching impact on constitutionally-protected speech.

[11] 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, Docket No. 46).

All of these approaches are notably less restrictive than the Alaska criminal ban.

In contrast to broad harmful to minors laws such as the Amended Act that are applicable to all Internet communications, statutes that criminalize one-on-one "harmful to minors" communications from a person to a specific person known to him or her to be a minor have been held constitutional. *State v. Simmons*, 944 So.2d 317 (Fla. 2006).

Although Defendant "denies that parents' ability to safeguard their children online ends government interest in safeguarding minors," (Ans. ¶ 100), the relevant question in applying the strict scrutiny test is not whether there is any government interest underlying a statute, but whether the statute is narrowly tailored to address that interest. Here, based upon the broad swath of speech restricted by the statute and the presence of narrower, more effective alternatives, the Amended Act does not pass strict scrutiny.

On the basis of the foregoing, it is clear that the Amended Act is unconstitutional as applied to electronic/Internet communications.

C. **The Amended Act Violates The Commerce Clause.**

The Amended Act violates the Commerce Clause in three ways. First, it regulates commercial activity occurring entirely in other states. Second, it directly regulates inherently interstate activity, threatening it with inconsistent standards. Third, it imposes an undue burden on interstate commerce that is not justified by unique local benefits.

1. The Amended Act Impermissibly Attempts To Regulate Commercial Activity Entirely In Other States.

Our federal system necessarily forbids one state from directly regulating commercial activity occurring entirely outside its borders or regulating in-state conduct with the "practical effect of exporting that state's domestic policies" to every other state. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). There is no doubt that the Amended Act falls squarely within this proscription.

The Amended Act applies both in-state and out-of-state to speakers on the Internet. A speaker on the Internet knows as a certainty that his or her speech is capable of being received in Alaska. Indeed, all Internet communications are available in the State of Alaska or anywhere else with Internet access, regardless of where they originated, even if they are not directed to Alaska. Thus, the Amended Act directly burdens commerce in every other state by improperly requiring speakers in those states, both on the Web and otherwise over the Internet, to consider Alaska's standards and requirements to avoid potential prosecution in Alaska, even if the particular message is not intended to be directed to any one in Alaska.

The State argued in its opposition to the Preliminary Injunction Motion 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. P.I. 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.

2. The Amended Act Directly Burdens A Means Of Commerce That Inherently Requires Nationally Uniform Regulation.

The Amended Act also independently runs afoul of the Commerce Clause because it violates the "long-established rule barring the states from regulating those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Pataki*, 969 F. Supp. at 181-82 (collecting authority) (internal quotation marks omitted).

Just as trucks and trains carry tangible items interstate, the Internet transmits speech and expression interstate, as well as commercial goods. The considerations that have foreclosed most state regulation of other modes of interstate transportation apply with even more force to the Internet:

> The Internet, like rail and highway traffic at issue in the cited cases, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different [communities]. . . New York is not the only state to enact a law purporting to regulate the content of communications on the Internet. Already [as of 1997] Oklahoma and Georgia have enacted laws designed to protect minors from indecent communications over the Internet; as might be expected, the states have selected different methods to accomplish their aims. Georgia has made it a crime to communicate anonymously over the Internet, while Oklahoma, like New York, has prohibited the online transmission of material deemed harmful to minors.

Id. at 182.

As the Supreme Court has made clear, the critical element is the potential for burdensome inconsistencies if states attempt to regulate in the field. *Wabash*, 118 U.S. at 572. ("If each state was at liberty to regulate the conduct of carriers … the confusion likely to follow could not but be productive of great inconvenience and . . . hardship. Each state could provide for its own passengers and regulate … regardless of the interest of others."); *accord Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945)("If one state may regulate train length, so may all the others, and they need not prescribe the same . . . limitation.") Because of the inherently

interstate nature of railroad operations, just like the Internet, allowing any state regulation would impermissibly permit the state with the lowest limit "to control train operations beyond the boundaries of the state." *Id.* at 775; *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88-89 (1987) (restating vitality of "needed uniformity" constraint on states).

The Internet is precisely the type of interstate commerce that requires regulation at the national level. If Alaska can regulate Internet content, the other 49 states can also do so, with predictably unfortunate results. This is yet another reason why the Amended Act cannot stand.

3. The Balance Of Benefits And Burdens Strongly Disfavors The Amended Act.

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*, 108 F. Supp. at 626-27 (same conclusion with respect to Virginia 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 (1907) (fruit-packing statute invalid because the burden it imposed on interstate commerce was "clearly excessive in relation to the putative local benefits"); *Edgar v. Mite Corp.*, 457 U.S. 624, 643-44 (1982) (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 fails under a burden analysis.

First, as set forth above, the Amended Act regulates a wide range of entirely out-of-state communications that Alaska has *no* legitimate interest in regulating.

Second, also as noted above, the Amended Act will be wholly ineffective in achieving Alaska's goal of protecting minors because nearly half of all Internet communications originate overseas, and will not be affected by a state Internet censorship statute. *Gonzales*, 478 F. Supp. 2d at 789; *Pataki*, 969 F. Supp at 177-79.

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.

Balanced against the limited local benefits, the Amended Act imposes "an extreme burden on interstate commerce" which cannot be justified. *Pataki*, 969 F. Supp. at 179. For the reasons detailed above, the Amended Act violates the Commerce Clause. It must be declared unconstitutional and its enforcement enjoined.

D. **The Amended Act's Restrictions on Physical Distribution Violates The First Amendment.**

The lack of any scienter requirement relating to the age of a recipient, as well as the deficiencies in any scienter requirement relating to the nature of the contents of the material to be distributed, as previously discussed in Argument Section III.A. above, render the Amended Act blatantly unconstitutional.

E. **The Amended Act Is Unconstitutionally Vague.**

As this Court has recognized, the Amended Act is similar to other statutes that have been found unconstitutionally vague. (Order Granting Preliminary Injunction at 5 (citing *Reno,* 521 U.S. at 844; *Mukasey*, 534 F.3d at 198)).

Like these statutes, the Amended Act's unconstitutional vagueness violates the Plaintiff' due process rights as guaranteed by the Fifth and Fourteenth Amendments. *See United States v. Williams*, 553 U.S. 285, 304 (2008). First, the term "minors" in the phrase "harmful to minors"

is vague because material that may be considered appropriate for a fifteen year old may not be considered appropriate for an eleven year old. *Mukasey*, 534 F.3d at 205 (holding the federal COPA statute was unconstitutionally vague).

Second, the Amended Act requires that three components "taken as a whole" (appeal to the prurient interest of minors, patent offensiveness, and serious value) be applied to matter to determine whether it is "harmful to minors." This language mirrors the test established by the Supreme Court for determining what is "harmful to minors" in *Miller v. California*, 413 U.S. 15 (1973) as applied to *Ginsberg v. New York*, 370 U.S. 629 (1968). In the Internet context, as opposed to the physical world, what constitutes a "whole" is not clear. Is it the screen view, the web page or the web site? Does one include hyperlinked materials?

> Instead of having a two-hundred page book or an issue of a magazine to look to for context, . . . [the Amended Act] invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute.

Gonzales, 478 F. Supp. 2d at 818-19 (E.D. Pa. 2007). *See also N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"); *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964); *Ozonloff v. Berzak*, 744 F.2d 224, 231 (1st Cir. 1984) ("government standards tending to inhibit speech must be clear and precise").

For these same reasons, the federal COPA statute was found unconstitutionally vague:

> [A] Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies, and thus will not have "fair notice of what conduct would subject them to criminal sanctions under COPA" and "will be deterred from engaging in a wide range of constitutionally protected speech."
>
> *   *   *
>
> COPA's use of the phrase "as a whole" is vague because it is unclear how that phrase would apply to the Web.

Mukasey, 534 F.3d at 205.

Finally the word "depict" is vague. While discussion at a legislative hearing indicates the intent of at least one legislator to limit the Amended Act to pictures, "the word 'depict' also has a standard sense of *represent or portray in words* and it has been used in that manner since the colonial era (*see* 4 Oxford English Dictionary 477 [2d ed. 1982])." *People v. Kozlow*, 8 N.Y. 3d 554, 558, 838 N.Y.S. 2d 800, 802 (Ct. App. 2007). In *Kozlow*, the highest court of the State of New York held, in the context of restrictions on harmful to minors material, that "depict" meant both text and pictures. Such an ambiguity in the Amended Act is constitutionally unacceptable.

The Amended Act is unconstitutionally vague.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that the Court (1) permanently enjoin enforcement of the Amended Act and the Prior Act, and (2) issue a declaratory judgment declaring that the Amended Act and the Prior Act are unconstitutional.

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Respectfully submitted,

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The undersigned certifies that a true and correct copy of the foregoing Memorandum in Support of Plaintiffs' Motion for Summary Judgment was served via electronic filing this 27th day of December, 2010, upon counsel for Defendant.

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