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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

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| AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION OF ALASKA; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; ENTERTAINMENT MERCHANTS ASSOCIATION; FREEDOM TO READ FOUNDATION; DAVID & MELISSA LLC d/b/a Fireside Books; BOOK BLIZZARD LLC d/b/a Title Wave Books; BOSCO'S, INC.; DONALD R. DOUGLAS d/b/a Don Douglas Photography; and ALASKA LIBRARY ASSOCIATION,<br><br>Plaintiffs,<br><br>v.<br><br>JOHN J. BURNS, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA<br><br>Defendant. | CIVIL ACTION NO.:<br><br>3:10-cv-00193-RRB |

**CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION FOR CERTIFICATION**

## INTRODUCTION

Plaintiffs have brought a sweeping constitutional challenge to AS 11.61.128, the Alaska statute prohibiting the distribution of indecent material to minors. This challenge was brought in this court, before any Alaskan court had an opportunity to address how either the former or the current AS 11.61.128 should be interpreted, even though the issue before this court is one of statutory interpretation. Should AS 11.61.128 be interpreted in the broadest sense possible or should it be construed more narrowly? The Alaska Supreme Court has not yet addressed the issue and it is unclear how it would interpret this Alaskan statute. There is precedent in other states for interpreting similar statutes narrowly to ensure that the statute passes constitutional muster. There is also precedent in other states that it is best to let state courts first decide how to interpret their own statutes. Only after the federal court knows the breadth of the statute's interpretation should the court then answer whether that interpretation runs afoul of the federal constitution.

As such, the Defendant moves the court to certify to the state supreme court how to interpret AS 11.61.128. Should the court deny that, the defendant moves the court to grant summary judgment in its favor. The defendant agrees that there are no disputed issues of material fact because the central issue is the interpretation of AS 11.61.128. The plaintiffs argue that it should be interpreted as broadly as possible while the Defendant submits that the court should give more weight to construing the statute narrowly to maintain its constitutionality.

The Defendant does not disagree that similar statutes have been found unconstitutional across the country. However, a similar statute has also been found constitutional. *See Am. Booksellers Found. for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010). The question before this court should not be one of tallying which side has the most decisions in its

favor, but of actually examining the specific wording of Alaska's statute to see how it comports with established precedent. Constitutionality is not determined by majority rule.

## MOTION FOR CERTIFICATION

The Defendant moves for certification to the Alaska Supreme Court because the statute at issue is an Alaska statute and the Alaska courts have not yet addressed how broadly or narrowly it should be interpreted. Under Alaska Appellate Procedure Rule 407, certification is appropriate if the proceeding involves "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state." Here, the question of how to interpret AS 11.61.128 is determinative of whether it is constitutional. The Defendant concedes that when the statute is interpreted at its broadest, the statute is unconstitutional. However, the broad interpretation urged by the plaintiffs is not obvious from the face of the statute. Thus, it is necessary for the Alaska Supreme Court to address the proper interpretation of the statute. *See Bellotti v. Baird*, 428 U.S. 132, 147 (1976)(stating that a federal court should certify questions if an "unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.")(internal quotations omitted). *See also Virginia v. Am. Booksellers Assoc.*, 484 U.S. 383, 396 (1988)(certifying a question to the state supreme court involving the interpretation of a statute similar to the one at issue here).

For First Amendment cases where the statute at issue has already been enjoined, certification is the proper procedure when the state court has not yet had an opportunity to interpret the statute at issue. In a case filed in the United States District Court for the Southern

District of Ohio, the trial court judge enjoined the enforcement of a statute similar to the one at issue here. *Bookfriends, Inc. v. Taft*, 223 F. Supp.2d 932, 951 (S.D. Ohio 2002). Similar to here, the issue between the parties was how broadly or narrowly to interpret the statute at issue. *Id.* at 938. On appeal, the Sixth Circuit held that rather than speculate on how to interpret the statute, it was better to allow the Supreme Court of Ohio to interpret the statute's breadth. *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009). Also, in the Fourth Circuit, the appellate court found it appropriate to obtain guidance from the state supreme court when interpreting a statute similar to the one at issue here. *PSINet, Inc. v. Chapman*, 317 F.3d 413, 419 (4th Cir. 2003). The court found that the scope of the amendment to the statute at issue was determinative of the constitutionality of the statute. *Id.* at 422.

When a statute has already been enjoined, there is no danger that the additional delay caused by certification would itself impermissibly chill protected speech. *See Southeast Booksellers Assoc. v. McMaster*, 282 F.Supp.2d 389, 398 (D. South Carolina 2003). Here, because enforcement of AS 11.61.128 has already been enjoined, any delay in certification could only harm the Defendant who is the party requesting the certification. As such, this case is akin to other cases where courts found certification appropriate. Should the court certify this case to the Alaska Supreme Court, the state court will have the first opportunity to interpret a state statute. Depending on how narrow or broadly the court interprets the statute directly impacts whether AS 11.61.128 is constitutional.

## CROSS-MOTION FOR SUMMARY JUDGMENT

## STATUTORY BACKGROUND

In 2005, the Alaska legislature recognized that there was a loophole in Alaska law that allowed predators to legally give pornography to children. *See SB* 118, 24th Legislature (hearing

on March 10, 2005). Prior to the enactment of the former AS 11.61.128, there was no means to prosecute offenders in state court who sent pornographic pictures to children. *Id.* However, law enforcement was increasingly seeing pornography distributed to minors via electronic means. *Id.* In 2005, the Alaska legislature choose to focus only on "electronic distribution" to minors because predators were purposefully sending pornography to children in their homes. *See SB 119,* 24th Legislature (hearing on March 10, 2005). The purpose of this proposed law was to keep middle aged predators away from young children. *See SB 119*, 24th Legislature (hearing on March 24, 2005). The legislature enacted AS 11.61.128. No lawsuits were filed challenging this statute.

In 2010, among other things, amendments to AS 11.61.128 were proposed in the legislature as part of a comprehensive bill addressing the scourge of sexual assault and domestic violence in Alaska. *See HB 298*, 26th Legislature (hearing on January 25, 2010). On one hand, the amendments to AS 11.61.128 expanded the statute to include distribution of indecent material to minors *by any means* and not just by a computer. *Id.* On the other hand, the amendments to AS 11.61.128 limited the statute by requiring that the distributed material also be harmful to minors and defining that term of art. *See HB 298,* 26th Legislature (hearing on February 8, 2010). The legislature so amended AS 11.61.128. In its current form, AS 11.61.128 provides:

> (a) A person commits the crime of distribution of indecent material to minors if
>  (1) the person, being 18 years of age or older, knowingly distributes to another person any material that depicts the following actual or simulated conduct:
>  (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;
(2) the material is harmful to minors; and
(3) either
(A) the other person is a child under 16 years of age; or
(B) the person believes that the other person is a child under 16 years of age.

…

(c) In this section, "harmful to minors" means
(1) the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest in sex for persons under 16 years of age;
(2) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age; and
(3) the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable for persons under 16 years of age.

Neither the Alaska Court of Appeals nor the Alaska Supreme Court has had occasion to examine either the former or current AS 11.61.128.

## ARGUMENT

At the outset, it is important correct a misconception put forth by the Plaintiffs. AS 11.61.128 does *not* prohibit the distribution to minors of all materials that contain (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. Rather, for a person to commit this crime, three separate elements must be met. First, the adult must knowingly distribute to another person material that they know depicts this specific enumerated conduct.

Second, and only if the material fits into one of the enumerated categories and the distributor knows this, the material must also be harmful to minors. For the material to be

harmful to minors, there is a second test where the material must satisfy all three prongs to be found harmful to minors. The first prong requires that the average person, applying contemporary community standards, would find that the material as a whole appeals to the prurient interest in sex for persons under 16 years of age. The second prong requires that this reasonable person would find that the material as a whole lacks serious literary, artistic, educational, political, or scientific value for these young people. The third prong requires that this material depict the conduct in a way that is patently offensive to the prevailing standards in the adult community as to what is suitable for these young people.

If both the first two elements of AS 11.61.128 are proven, then the minor must either actually be under 16 years of age or the adult must believe that the person is under 16 years of age. These three elements must be read in conjunction with one another to determine the constitutionality of the statute as a whole.

Finally, given both the Plaintiffs and the court's reliance on AS 11.41.452, online enticement of a minor, and AS 11.41.455, unlawful exploitation of a minor, as appropriate substitutes for AS 11.61.128, it is important to identify the different reaches of the statutes. Online enticement of a minor essentially criminalizes adults who use a computer to convince a child to engage in sex or other lewd behavior. *See* AS 11.41.452. Unlawful exploitation of a minor essentially criminalizes adults who produce child pornography. *See* AS 11.41.455. Without minimizing those crimes, neither of them prohibits the grooming behavior that often precedes them. Neither statute prohibits adults from giving adult pornography to children. Neither statute prohibits adult males from online "chatting" with minors and then exposing themselves via a "webcam." Neither statute prohibits adult males from posting pictures of their

exposed penises on a minor's social network page. However, AS 11.61.128 was designed and used to prosecute those types of behavior.

## I. Summary Judgment is Appropriate

Summary judgment will be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.1982).

Here, both parties agree that the dispute is not over the facts but over the correct interpretation of AS 11.61.128.

## II. The Statute Does Not Violate the First Amendment

The First Amendment is one of the pillars of the Constitution, but that does not require every law that regulates speech to fall in its shadow. Courts should not be swayed by a fear of regulating speech especially when examining a facial challenge. A court considering a facial challenge must strike a balance between the competing interests of protecting the exercise of free speech rights with the potential harm in invalidating a statute that may be constitutional in some of its applications. *U.S. v. Williams*, 553 U.S. 285, 292 (2008). Invalidating a statute because it is deemed overbroad is "strong medicine" and should not be casually employed. *Id.* at 293. Statutes should be construed in a manner to avoid constitutional problems. *Hooper v. California*, 155 U.S. 648, 657 (1895)("every reasonable construction must be resorted to, in order to save a

statute from unconstitutionality."); *see also Ferber v. New York*, 458 U.S. 747, 769 n.2 (1982)(nothing that federal courts addressing overbreadth claims "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction"). Here, as will be discussed, AS 11.61.128 is readily susceptible to a limiting construction rendering it constitutional.

In Alaska, statutory interpretation is based on: "(1) the plain meaning of the statute; (2) the legislative purpose of the statute; and (3) the intent of the statute." *W. Star Trucks v. Big Iron Equip.*, 101 P.3d 1047, 1050 (Alaska 2004). As such, it is critical to the court's analysis to consider the intent of the legislature in passing and then amending AS 11.61.128. Here, the legislature's intent was to criminalize the grooming of children for sexual abuse either online or in person. *See SB 222*, 26th Legislature (hearing on June 25, 2010); *HB 298*, 26th Legislature (hearing on June 25, 2010). There was no intent evidenced in the legislative process to criminalize general websites of the type concerning to the Plaintiffs. Further, the plain meaning of the statute is to criminalize pedophilic acts.

AS 11.61.128 is constitutional and survives even a strict scrutiny analysis. Under this scrutiny, the Defendant can show that the statute furthers a compelling interest and is narrowly tailored to achieve that interest. *See Citizens United v. Fed. Election Comm'n*, 130 S.Ct 876, 898 (2010). Here, the State has a compelling interest in the well-being and safety of its youth. *Ginsberg v. State of N.Y.*, 390 U.S. 629, 640 (1968); *see also T.P. v. Dep't of Children and Family Services*, 935 So.2d 621, 624 (Fla. App. 3 Dist. 2006)(recognizing that "the State has a compelling interest in protecting all its citizens – especially its youth – against the clear threat of abuse, neglect and death."); *State v. Booker*, 292 Wis.2d 43, 60 fn. 7 (Wis. 2006)(noting that "the language of the statute reflects the state's compelling interest to protect the well-being of its

youth by examining the nature of the materials."); *Freeman v. Com.*, 288 S.E.2d 461, 465 (Va. 1982)(holding that "the state has a compelling interest, one central to its right to survive, in protecting its children from treatment it determines to is physically or psychologically injurious to youth."). The State's specific interest is preventing predators from using pornography to groom children for sexual abuse by adults. *See SB 222*, 26th Legislature (hearing on June 25, 2010); *HB 298*, 26th Legislature (hearing on June 25, 2010).

AS 11.61.128 is narrowly tailored and the least restrictive means to achieve the State's compelling interest. First, it does not impede the distribution of all material that might be deemed harmful to minors. It only affects those materials that fall within the specifically enumerated categories. Second, "harmful to minors" is a defined term that limits the reach of the statute. The material that falls in one of the enumerated categories must appeal to the prurient interest in sex for minors, have no serious merit for minors and depict the conduct in a way that is patently offensive. *Compare Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010)(holding unconstitutional a statute that did not require that the material be "harmful to minors"). As such, this is not the type of statute that encompasses the selling of books that teach minors about their bodies, maternity photographs or other works of adult dealing with a sexual subject matter. The issue is not whether some person would find some type of material harmful to minors generally, but whether the specific material describes enumerated activity that meets the statutory definition of "harmful to minors" and that the distributor knows this. The issue is not whether sex is discussed or depicted on the internet, but whether it is done in such a way that it is without any type of merit and patently offensive. These limitations restrict the reach of the statute.

Plaintiffs also argue that the statute is not narrowly tailored because the state already has AS 11.41.452 and AS 11.41.455 at its disposal. However, because the legislature has multiple statutes concerning online predators does not mean that the statutes criminalize the same acts. AS 11.41.452 and AS 11.41.455 do not prohibit giving minors pornography. Without AS 11.61.128, sexual predators could legally text images of hard-core pornography to children. Without AS 11.61.128, sexual predators could legally distribute Xeroxes of hard-core pornography in children's cubbies at school. The existences of AS 11.41.452 and AS 11.41.455 are separate from the goals and interests of AS 11.61.128.

In *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court of the United States held that the Communications Decency Act ("CDA") of 1996 abridged the First Amendment. *Id.* at 849. In *Reno*, among other things, the Court found the CDA vague because it did not meet the obscenity standard established in *Miller v. California*, 413 U.S. 15 (1973). *Reno*, 521 U.S. at 872-74. In *Miller*, the Supreme Court of the United States set forth a three-part test to determine whether expressive material is obscene and not entitled to First Amendment protection. The *Miller* test asks: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24. The Court has also recognized that what is not obscene for adults may still be considered obscene for minors. *See Ginsberg v. New York*, 390 U.S. 629, 631 (1968)(holding constitutional a statute forbidding the sale to children sexually explicit material that was not obscene for adults).

Here, AS 11.61.128, taken as a whole, is not as vague as the CDA and it conforms with the *Miller-Ginsberg* test. Comparing the definition of "harmful to minors" with the *Miller-Ginsberg* test reveals their similarity:

| *Miller-Ginsberg* test | AS 11.61.128(e) |
|---|---|
| 1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest of minors; | 1) the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest in sex for persons under 16 years of age; |
| 2) the work depicts or describes, in a patently offensive way with regard to minors, sexual conduct specifically defined by the applicable state law; | 2) the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable for persons under 16 years of age; |
| 3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. | 3) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age. |

This depiction demonstrates that Alaska's definition of "harmful to minors" comports with the *Miller-Ginsberg* test.

The argument that AS 11.61.128 unconstitutionally restricts older minors' rights is a red herring. Because a type of material only has value for older minors, that does not render the statute unconstitutional. The focus of the inquiry should not be whether material is suitable for the youngest members of the class, the most sensitive members of the class, or the majority of the class. Rather, "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 taken as a whole." *Am. Booksellers Ass'n v. Virginia*, 882

F.2d 125, 127-28 (4th Cir. 1989); *see also Am. Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1505 (11th Cir. 1990). Thus, for constitutional analysis, it is irrelevant that a material may not have value for the youngest minors as long as it has value for some of the minors. After all, one of the basic premises of the First Amendment is that a majority cannot dictate to other segments of the population whether value may be found in a particular piece of work. *See Pope v. Illinois*, 107 S.Ct. 1918, 1924 (1987)(Blackmun, J., concurring in part and dissenting in part). And, the "reasonable person" standard found in the third prong of the "harmful to minors" definition differentiates between what is appropriate for a five year old and what is appropriate for a young teen-ager.

Finally, the less-restrictive means of filters suggested by the Plaintiffs do not achieve the State's compelling interest of keeping its youth safe from sexual predators. First, the Plaintiffs presented no evidence on the actual effectiveness of these filters. Plaintiffs' expert, Scott Bradner, stated that such software can block only "certain forms" of incoming transmissions. Declaration of Scott Bradner ¶ 68. Bradner does not elaborate on what forms of communication would be filtered by the software. Nor does Bradner elaborate on whether these filters cover webcams, text messages, or social networks. In sum, plaintiffs have not demonstrated that filtering software provides an effective and less restrictive means of furthering the compelling government interest in protecting minors from sexual predators who use electronic forms of communication to groom potential victims.

Second, the State does not disagree that parents should also have an interest in the well-being of their children. However, because a parent fails to install such filters either because of neglect, inability, or some other reason, that does not mean that the State's interest in the well-being of the child disappears. Rather, the State has an interest separate from the parents in

protecting minors and cannot abdicate this responsibility in the hope that parents will adequately safeguard their children from online grooming. *See Reno v. ACLU*, 521 U.S. 844, 881 (1997)(noting that it is impossible to know that every parent has enacted adequate screens on their computers for indecent material).

## III. The Statute Does Not Violate the Commerce Clause

The internet is undeniably an incident of interstate commerce and the Defendant does not dispute that. However, the presence of the internet in a state statute does not automatically mean that the statute burdens interstate commerce. *See People v. Hsu*, 82 Cal. App. 4th 976, 983 (Cal. App. 1. Dist. 2000). Absent conflicting federal legislation, states retain their authority under the general police powers to regulate matters of legitimate local concern, even if interstate commerce may be affected. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980). The test to determine if a state statute violates the commerce clause is:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Statutes affecting public safety carry a strong presumption of validity. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959). As already discussed, Alaska has a compelling interest in protecting minors from harm. Even though the internet is affected by this statute, the effect on interstate commerce is minimal. Further, this minimal intrusion is necessary for the State to promote its compelling interest.

The State is unable to effectively address the problems associated with the distribution of

pornography to minors without touching on the Internet. *See Rousso v. State*, 204 P.3d 243, 251 (Wash. App. Div. 1. 2009)(identifying that "it is doubtful that the State can effectively address the problems associated with Internet-based gambling without regulating the internet itself."). Here, the State is unable to effectively prevent underage Alaskan residents from receiving pornography via electronic means without directly regulating the transmission of such materials. As such, the State cannot prevent Internet-based sexual predator grooming if it is precluded from enacting any regulation that touches upon the Internet. For purposes of the *Pike* balancing test, the State has established that regulating transmission of pornography to minors furthers important interests and that these interests cannot be adequately protected without regulating the Internet. Further, there is no legitimate commercial interest served by distributing to minors material that contains the enumerated content and meets the harmful to minors test. The Plaintiffs arguments otherwise are unpersuasive.

First, the Plaintiffs claim that AS 11.61.128 regulates commercial activity that occurs wholly outside of Alaska. In its opposition to the motion for preliminary injunction, the Defendant relied on an argument based on *People v. Hsu*, 82 Cal.App.4$^{th}$ 976 (Cal. App. 1. Dist. 2000). However, the Defendant now relies on the alternative argument that this activity occurs in Alaska when an Alaskan resident receives the indecent material. Alaska is not regulating activity that occurs wholly outside of Alaska. Alaska is involved when the material is distributed to Alaskan minors. The scienter requirement of the statute limits the statute from the general breadth of websites argued by the plaintiffs and limits it to those adults who knowingly distribute the enumerated material that is harmful to minors to Alaskan minors.

While a court in New York accepted the plaintiffs' argument, that is not the end analysis, nor is it binding authority. *See Am. Libraries Ass'n v. Pataki*, 969 F.Supp 160 (S.D.N.Y. 1997).

Because, "[u]nder this view, practically any state law that affects the Internet is unconstitutional, because 'the Commerce Clause precludes a state from enacting legislation that has the practical effect of exporting that state's domestic policies.'" *Rousso,* 204 P.2d at 252. The *Pataki* approach has been persuasively and widely criticized as resting "on an impoverished understanding of the architecture of the Internet," "misread[ing] dormant Commerce Clause jurisprudence," and "misunderstand[ing] the economics of state regulation of transborder transactions." Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 YALE L.J. 785, 787 (2001)).

Here, the regulation of the internet is not excessive. Indeed, it is worth noting that some of the prohibited conduct at issue here - the knowing transmission of obscene material to minors over the internet is prohibited by federal law. *See* 18 U.S.C.A. 1470. The internet, as a technological medium for transmitting information, is not so novel that special rules need apply, or that it should render unconstitutional any state law that subjects it to regulation. This court should decline to follow those cases that view the Internet as entirely off-limits to state regulation. Rather, the question is whether the burdens on commerce that the regulation imposes are "clearly excessive" in relation to the interests that the regulation seeks to serve. Ultimately, given the importance of the State's interests in protecting its citizens from the ills associated with sexual predation, and the relatively small cost imposed on businesses by complying with this statute, the Plaintiffs have failed to meet their burden of showing that AS 11.61.128 is "clearly excessive."

## IV. The Statute Has An Appropriate Scienter Requirement

Some scienter is required when the government regulates obscene material, but the Court has not specified the required level. In *Smith v. California*, 361 U.S. 147 (1959), the Court stated:

> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.

*Id.* at154-55. Thus, the level of scienter required is a matter that is left to individual states to determine.

Here, this is not a strict liability statute regarding the content of the materials. Rather, the State is required to prove that the distributor of the materials knew that they contained depictions of sexual penetration, the lewd touching of a person's genitals, anus, or female breast, masturbation, bestiality, the lewd exhibition of a person's genitals, anus, or female breast, or sexual masochism or sadism. In *Strane v. State*, 61 P.3d 1284 (Alaska 2003), the Supreme Court of Alaska held that the culpable mental state of "knowingly" applied to both the defendant's conduct and the circumstances. *Id.* at 1288. The statute in *Strane* stated, "A person commits the crime of violating a protective order if the person is subject to a protective order containing a provision listed in AS 18.66.100(c)(1)-(7) and knowingly commits or attempts to commit an act in violation of that provision." *Id.* at 1286. The Supreme Court held that the State was required to prove "that Strane's actions were knowing, that he knew of the restraining order's existence, and that he was aware of its literal requirements." *Id.* at 1292. Similarly, in AS 11.61.128, the "knowingly" element includes distribution and knowing that the distributed material contains the

enumerated conduct. *See also U.S. v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002)(examining the principle of statutory construction counseling courts to interpret a statute in favor of constitutionality). This reading of the statute comports with the actual use of the statute where no case has been brought against a defendant who did not know the content of the material he was distributing.

Even if this court declines to follow the *Strane* analysis, this is still not a strict liability statute regarding the content of the materials. AS 11.81.610(b) provides that, "if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to (1) conduct is 'knowingly;' and (2) a circumstance or a result is 'recklessly.'" Recklessly is defined in AS 11.81.900(a)(3) as:

> A person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk.

This comports with the precedent that some scienter is required, but that it is up to the individual states to determine what level is necessary. This does not require a bookseller or librarian to do anything out of the ordinary – rather they must conform with what a reasonable person would do in such a situation. As already discussed, the materials at issue here are not every possible book, movie, or magazine. Rather, it is only those materials that already fall into the enumerated categories identified in section (a) of the statute and that meet the constitutional "harmful to minors" test.

Finally, regarding scienter for the minor's age, the statute requires "either (A) the other person is a child under 16 years of age; or (B) the person believes that the other person is a child

under 16 years of age. AS 11.61.128(a)(3). This is constitutional. The Supreme Court of the United States has never held that a defendant is required to know the age of a recipient of sexually explicit material. The cases relied on by the plaintiffs concern knowledge of the material distributed, and not knowledge of the minor's age, as the plaintiffs own quotations illuminate. And, as already discussed, AS 11.61.128 requires the distributor to know the contents of the distributed material.

## V. The Amended Act is not Unconstitutionally Vague

Plaintiffs assert that the amended statute is void for vagueness due to the supposed ambiguity of two of its terms. *Plaintiffs Memorandum for Summary Judgment* at 23-25. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *U.S. v. Williams*, 553 U.S. 285, 304 (2008). A statute is unconstitutionally vague on its face if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* Of course, to require perfect clarity would ignore the limitations inherent in any attempt to communicate meaning through the written word. Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.*

Responding to the plaintiffs claims in order, the term "minors" is not unconstitutionally vague as has already been discussed. The issue is not whether material is harmful to some minors, but whether it has value for any class of minors.

Second, "as a whole" in the "harmful to minors" definition is not unconstitutionally vague as it mirrors the language found constitutional by the Supreme Court of the United States in *Miller* and *Ginsberg*. *Ginsberg v. New York*, 390 U.S 629 (1968); *Miller v. California*, 413

U.S. 15 (1973). Plaintiffs argument is based on the Third Circuit's opinion in *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), which held that the Child Online Protection Act's ("COPA") use of the term "as a whole," among a number of other ambiguous terms, rendered the statute unconstitutionally vague. In reaching this conclusion, the Third Circuit adopted the reasoning of the district court, which observed that, unlike a printed book or magazine, "Web pages and sites are hyperlinked to other Web pages and sites. . . . Instead of having a two-hundred page book or an issue of a magazine to look to for context, COPA invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute. As a result, a Web publisher cannot determine what could be considered context by a fact finder, prosecutor, or court." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 818-19 (E.D. Pa. 2007).

The reasoning of the *Gonzales* court and the appellate court that adopted it should be viewed skeptically. As observed by a district judge in the District of Columbia, "Since *Miller*, the definition of obscenity and, in particular, the 'as a whole' requirement have had settled legal meaning." *U.S. v. Stagliano,* 693 F. Supp. 2d 25, 35 (D.D.C. 2010)(rejecting vagueness and overbreadth challenge to a federal obscenity statute). Although the term may be somewhat less precise in the context of the internet, "the Supreme Court has held that 'a lack of precisions is not itself offensive to the requirements of due process.'" *Id. (*quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). All that is required is that the statute give sufficient warning of what is proscribed. The "as a whole" requirement of *Miller* is no less clear in the Internet setting "than in countless other cases where courts have applied that requirement in a new factual setting." *Stagliano*, 693 F. Supp. 2d at 35. By using the settled *Miller-Ginsberg* standard for juvenile obscenity, including the "as a whole" requirement, the amended statute provides sufficient

guidance to potential defendants that whatever material they distribute that they know falls into the enumerated categories will be judged, not in isolation, but in context.

In conclusion, AS 11.61.128 is constitutional and for the above-state reasons, the motion for summary judgment should be GRANTED in favor of the defendant. To charge a person with violating this statute, the State must prove (1) that a person over 18 years of age (2) knowingly distributed (3) materials that the person knew depicted the enumerated conduct (4) and that meet the constitutional test for harmful to minors (5) to a person under 16 years of age or who the distributor believed was under 16 years of age.

DATED this 18th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2011, a copy of the foregoing document was served electronically on:

Michael Bamberger
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s/Marika R. Athens
Marika R. Athens