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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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,

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 A PRELIMINARY INJUNCTION

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Plaintiffs respectfully submit this memorandum in support of their motion for a preliminary injunction.

INTRODUCTION

In January of 2010, Alaska passed a bill, SB 222, that amended a variety of statutes with the stated intent of strengthening initiatives relating to sexual assault and domestic violence. The key elements of the bill highlighted for the legislature by the Attorney General included several relating to sentencing and child pornography and restrictions related to convicted sex offenders. Apparently almost as an afterthought, the bill included Sections 9-12, which amended and expanded an already broad censorship law. These sections imposed severe content-based restrictions on the availability, display, and dissemination of constitutionally protected speech on the Internet and physically within the State of Alaska.

Section 11.61.128 of the Alaska Statutes, as amended by Senate Bill 222 (the "Amended Act"), presents several related but distinct problems. First, the Amended Act broadly restricts the dissemination to minors by the Internet of *any* material that is "harmful to minors." If the amendment were limited to electronic dissemination of "harmful to minors" material sent by a defendant knowing its character and content directly to an individual known or believed by the defendant to be a minor, the prohibition would be constitutional. But since it is not, the application of the Amended Act to the Internet violates the First, Fifth and Fourteenth Amendments because:

- As a practical matter it restricts adults from engaging in protected speech on the Internet.
- It is substantially overbroad.
- It criminalizes protected speech among and to older minors.
- The statutory requirement that the matter be "taken as a whole" is unconstitutionally vague in the context of Internet communications and speech.

- It requires that, for the determination of community standards, the relevant community be local, rather than the nation.

In addition, application of the Amended Act to the Internet violates the Commerce Clause because:

- It regulates speech that occurs wholly outside the borders of Alaska.
- It imposes an unjustifiable burden on the interstate commerce over the Internet.
- It subjects online speakers to inconsistent state laws.

Eighteen federal judges in five circuits have struck down state statutes forbidding Internet communications deemed harmful to minors like the one at issue here.[1] In doing so, they relied on Commerce Clause or First Amendment grounds that apply with equal force to the Amended Act.

Plaintiffs brought this litigation because the Amended Act's sweeping restrictions and burdens on the communication of constitutionally protected health, literature, arts, and other information over the Internet would seriously damage the commercial and democratic potential of this revolutionary, interactive global medium. Plaintiffs understand first-hand how, because

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[1] *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).[1] 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).

of the practical inability to limit the dissemination of information by geography and age of viewers, the Amended Act would chill and disrupt the free flow of information that is so essential to the functioning of the Internet. Plaintiffs also believe the Amended Act would be ineffective and are aware of a range of far more effective and flexible tools that enable parents and other responsible adults -- at low or no cost -- to control Internet access by minors consistent with their own needs and values.

Plaintiffs do not challenge the Alaska laws criminalizing child pornography, sexual solicitation or luring of minors, or obscenity on the Internet. Plaintiffs also do not challenge the portions of SB 222 that do not amend AS 11.61.128. However, a striking judicial consensus holds that state statutes such as the Amended Act, which impose a content-based criminal ban on fully protected adult speech in a medium that is inherently interstate in nature while providing no practical protection to children, cannot constitutionally stand. The Commerce Clause and First, Fifth and Fourteenth Amendment violations are described in detail below.

In addition, the Amended Act also impermissibly burdens constitutionally protected books, magazines, videos, and similar material sold from establishments within the State of Alaska. The weak scienter provisions in the statute allow a person to be convicted for selling (via a bookstore or other retail store) or loaning (via a library) material to a person he or she does not know is under 16 and without knowledge of the character and content of the material distributed.

STATEMENT OF FACTS

I. PLAINTIFFS AND THEIR SPEECH

Plaintiffs represent a spectrum of individuals and organizations—including booksellers, a photographer, libraries, and organizations representing booksellers, publishers and other media interests—that communicate, disseminate, display and access a broad range of speech in the

physical world as well as through the Internet.[2] Although Plaintiffs do not speak with a single voice or on a single issue, they all engage in speech that at times involves sexually explicit matters. They reasonably fear that their speech -- both online and offline -- may be considered by some to be "harmful to minors" under the Amended Act, even though it is constitutionally protected for adults. Plaintiffs include speakers and content providers who communicate online both within and outside of the State of Alaska, as well as establishments that distribute communicative material within the state. Like all speech on the Internet, all of the Plaintiffs' Internet speech is accessible within and outside of the State of Alaska. Plaintiffs also include speakers and content providers who speak offline within the State of Alaska.

Extensive information about the Plaintiffs is contained in the Complaint and the declarations accompanying this motion. Additional information can be obtained from the Internet websites of the Plaintiffs. Attachment A hereto is a list of the Plaintiffs' Web addresses.

II. THE AMENDED ACT

On July 12, 2010, Alaska amended its criminal "distribution of indecent material to minors" statute, AS 11.61.128, by expanding both the definitions applicable to that law as well as its reach. (The Amended Act is annexed as Attachment B.) The amendments extend the scope of the existing law so that the Amended Act's prohibitions apply to all communications, both in the physical world and over the Internet. While the amendments also added some definitions and other provisions intended to bring the statute into compliance with existing constitutional requirements, as more fully described below these provisions are insufficient as a matter of law, and the Amended Act is unconstitutional.

[2] "Plaintiffs" refers collectively to Plaintiffs, their members, subscribers, readers and users.

III. THE INTERNET

The basic structure and operation of the Internet has been examined and described by a number of courts, including the Supreme Court in *Reno*,[3] the Eastern District of Pennsylvania in *Gonzales,* the Third Circuit in *Mukasey* and the Southern District of New York in *Pataki*. Plaintiffs have submitted the expert declaration of Scott Bradner in support of their motion (cited herein as "Bradner").

A number of facts about the Internet are particularly relevant to the issues in this case:

(1) For the vast majority of Internet communications and information, including those potentially subject to prosecution under the Amended Act, it is not technically, economically and/or practically feasible for organizational or individual speakers to ascertain the age of persons accessing materials over the Internet, or to restrict or prevent access by minors to them. *See* Bradner at para. 18.

(2) For the vast majority of Internet communications and information, including those potentially subject to prosecution under the Amended Act, it is not economically and/or practically feasible for organizational or individual speakers to ascertain the geographic location of persons accessing materials over the Internet, nor is it technically, economically and/or practically feasible to restrict or prevent these communications and materials from traveling through or being received in Alaska. *See* Bradner at para. 19.

(3) Most communications and information on the Internet are available for free, even when displayed or disseminated by a commercial organization. Requiring users to register and provide personal data in order to receive such information will deter them from exploring or receiving such information to the detriment of commercial interests, users, and the development of new business models made possible by the Internet. *See* Bradner at para. 20.

(4) The majority of communications and materials on the Internet that could be subject to the prohibitions of the Amended Act are published outside the United States, and such material will continue to be as available to minors searching for it as information displayed or posted in Alaska itself. *See* Bradner at para. 21.

[3] The United States Supreme Court's decision in *Reno* was based on extensive factual findings by the district court, which the Supreme Court incorporated by reference into its ruling. *See Reno*, 521 U.S. at 849.

(5) Widely available, user-based methods and tools, which can block out unwanted material or services regardless of geography or commercial purpose, provide a far more effective and less restrictive alternative for parents and families to control access by minors to information that is deemed unsuitable based on individual family values and circumstances. *See* Bradner at para. 21.

(6) While computers connected to networks do have "addresses," they are digital addresses on the network rather than geographic addresses in real space. *See* Bradner at para. 37. The geographic indicators that do exist do not necessarily indicate the geographic location of the user, because users can gain access to their particular email accounts and other information from anywhere without any sort of indication that the user may be accessing the Internet from a place other than their home access point. *See* Bradner at para. 37-38.

(7) No aspect of the Internet can feasibly be closed off to users from another state. *See* Bradner at para. 19, 46. An Internet user who posts a Web page or participates in a chat room or discussion group cannot prevent residents of Alaska or New Mexicans or New Yorkers from accessing that page and, indeed, will not even know the state of residency of any visitors to that site, unless the information is voluntarily (and accurately) given by the visitor.

IV. SCIENTER

The Amended Act appears to be subject to the general Alaska scienter statutes that require only recklessness as to the character and contents of the material and of the age of the minor to convict a retailer or Internet communicator of distribution of First Amendment-protected materials. Under the applicable Supreme Court decisions discussed below at 25, this does not meet the constitutionally mandated level of scienter. Therefore the Amended Act cannot be applied either to distribution from bricks and mortar locations in Alaska or via the Internet.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION TO PREVENT DEFENDANTS FROM ENFORCING THE AMENDED ACT.

I. PLAINTIFFS MEET THE STANDARD FOR A PRELIMINARY INJUNCTION.

In order for the Court to grant a preliminary injunction, the Plaintiffs must demonstrate (a) a likelihood of success on the merits; (b) a likelihood of irreparable harm if the injunction is denied; (c) that the harm to the defendant from granting preliminary relief will not exceed the harm to the plaintiff from denying it; and (d) the effect of the court's ruling on the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 129 S.Ct. 365, 375 (2008); *Alliance for Wild Rockies v. Cottrell*, 2010 WL 2926463, at *7 (9th Cir. July 28, 2010); *Johnson v. Couturier*, 572 F.3d 1067, 1084 (9th Cir. 2009). In *Alliance for Wild Rockies,* the Ninth Circuit expressly reaffirmed the validity of its "serious questions" test and held that in applying the test in *Winter,* if "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff" are shown, that showing "can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance,* 2010 U.S. App. Lexis 15537 at 10.

A. Plaintiffs Are Likely to Succeed on the Merits.

1. With respect to electronic/Internet distribution.

Plaintiffs are likely to succeed on the merits with respect to electronic/Internet distribution because the Amended Act, like the state statutes in New York, New Mexico, Michigan, Virginia, Arizona, South Carolina and Vermont, is plainly unconstitutional under both the First Amendment and the Commerce Clause. We will fully discuss constitutional inadequacies of the Amended Act in the sections that follow, but, for the purposes of the preliminary injunction standard, Plaintiffs note that they are likely to succeed on the merits for the following reasons.

First, the Amended Act is unconstitutional in that it bans a large amount of speech that adults have a constitutional right to receive and address to one another, due to the impossibility of the vast majority of online speakers being able to distinguish between adults and minors in their audience. As a result, online users must either censor all their speech to a level fit for minors or risk criminal prosecution under the Amended Act. This chills protected speech, which is antithetical to the First Amendment.

Second, the Amended Act fails strict scrutiny, which is constitutionally required for content-based speech regulations, because it is not narrowly tailored to achieve Alaska's interest in protecting minors from material that may be "harmful." In particular, less restrictive alternatives include, *inter alia*, user-based content-filtering software, which enables individuals to regulate and monitor what their children read and see on the Internet.

Third, the Amended Act is substantially overbroad because it criminalizes a wide range of speech that is constitutionally protected for older minors when compared to what is "harmful" for younger minors.

Finally, the Amended Act violates the Commerce Clause of the United States Constitution because it regulates communications occurring wholly outside the State of Alaska, imposes an impermissible burden on interstate commerce, and subjects Plaintiffs to inconsistent state regulations.

2. With respect to the lack of a sufficiently robust scienter requirement.

Plaintiffs also are likely to succeed on this element of their claim, which applies both to distribution from establishments in Alaska as well as to electronic/Internet distribution, because of the lack of the requirement that the distributor know the character and content of the material and know that the recipient was under 16 years of age, all as more fully discussed below.

B. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction.

As the Supreme Court has stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Reno*, 929 F. Supp. at 851 ("[s]ubjecting speakers to criminal penalties for speech that is constitutionally protected in itself raises the specter of irreparable harm"). Likewise, deprivation of Plaintiffs' constitutional rights under the Commerce Clause constitutes irreparable injury. *See Pataki*, 969 F. Supp. at 168; *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1966) ("A presumption of irreparable harm flows from and is triggered by an alleged deprivation of constitutional rights."). Therefore, in order to show irreparable injury, Plaintiffs need only demonstrate that the Amended Act threatens their rights under the First Amendment and the Commerce Clause, which threat will be discussed fully below. *See Reno*, 929 F. Supp. at 851 (discussing irreparable harm under the First Amendment); *Pataki*, 969 F. Supp. at 168 (discussing irreparable injury under the Commerce Clause). In addition, Plaintiffs have submitted eleven declarations describing how the Amended Act unconstitutionally harms them.

C. The Harm to Plaintiffs in Denying the Relief Exceeds any Harm to Defendants from Granting It.

The only legitimate harm that defendant could allege is an inability to prosecute persons under the Amended Act. There is no evidence of a pressing need for such prosecutions and, in any event, defendant has no right to prosecute under an unconstitutional statute. On the other hand, Plaintiffs, mainstream businesspersons, are faced with unconstitutional restrictions on their communicative activities with the potential of a criminal charge hanging over them. It is also worth noting in this regard that the legislative history indicates that an (unconstitutional) version

of the statute has existed in Alaska for many years and that there is no reported case referring to a prosecution having been brought pursuant to it.

D. **A Preliminary Injunction Will Serve the Public Interest.**

There can be no judicial act more beneficial to the public interest than upholding the constitutional rights of the public. As shown below, the Amended Act violates no less than three fundamental provisions of the U.S. Constitution -- the Commerce Clause, the First Amendment and the due process clause of the Fifth Amendment as applied through the Fourteenth Amendment.

E. **Remedies at Law Are Inadequate.**

A remedy at law would be inadequate. Where state conduct threatens First Amendment rights, "[n]o remedy at law would be adequate to provide such protection." *Allee v. Medrano*, 416 U.S. 802, 815 (1974). Therefore, Plaintiffs need only show that the Amended Act threatens their rights under the First Amendment and the Commerce Clause in order to demonstrate the remedies at law are inadequate.

II. THE AMENDED ACT'S RESTRICTIONS ON ELECTRONIC/INTERNET DISTRIBUTION VIOLATE THE FIRST AMENDMENT.

In accord with the Supreme Court ruling striking down the Communications Decency Act, and as every federal court reviewing similar state Internet "harmful to minors" laws has held, the Amended Act violates the First Amendment.[4] Like these other enjoined federal and state statutes, the Amended Act bans the communication of an entire 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 unique nature of the online

[4] The Court in *Am. Libraries Ass'n. v. Pataki*, *supra*, after holding the New York statute unconstitutional under the Commerce Clause, declined to decide the First Amendment issue in light of the pending decision by the U.S. Supreme Court in *Reno*, *supra*.

medium and the practical inability of speakers on the Internet to choose or restrict viewers of their speech, the Amended Act would effectively limit much constitutionally protected content available through the Internet to a level deemed suitable for younger minors.[5] As explained further below, such a broad and restrictive content-based regulation of speech is not narrowly tailored to advance the State's asserted interest. In addition, less restrictive user-based methods exist for parents to control minors' access to sexually explicit Internet content. Accordingly, the Amended Act violates the First Amendment and, as applied to the Internet, must be enjoined as unconstitutional.

A. 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.

The Amended Act violates the First Amendment for precisely the same reasons that two federal statutes and seven state statutes have been found unconstitutional by the United States Supreme Court, four courts of appeals, and nine federal district courts.[6] 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 at para. 18. Moreover, in most cases, the Internet also does not permit users to control who accesses the information they make available online or

[5] 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").

[6] See citations, *supra*, p. 2, n. 1.

where those persons are. *Reno*, 217 F. 3d at 175; Bradner at para. 19. Since every Internet speaker "knows" that there are many minors using Internet browsers, Internet users, therefore, 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 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*.[7]

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, the Amended Act has no explicit scienter requirement for this section of the statute. It is possible that the catchall weak scienter requirement found in AS 11.81.900(a)(3) might apply. Even if it does, that does not obviate this constitutional deficiency. AS 11.81.900(a)(3)only requires that the transmitter have be "aware of and consciously disregard. . . a substantial and unjustifiable risk" as to the age of a minor. But even if the test were "actual knowledge," that would not support the constitutionality of the Amended Act. The Supreme Court addressed the constitutionality of similar provisions of the Communications Decency Act and found them wanting. *Reno, supra.*

There is no basis for distinguishing the Amended Act from the other statutes already addressed by other courts, particularly the CDA addressed in *Reno*. The various statutes are

[7] *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 Alaska may not totally bar truthful speech contained in cigarette advertisements in an attempt to achieve substantial and compelling interest of protecting minors).

comparable in all relevant respects. Thus, the Amended Act imposes a flat ban on constitutionally protected speech over the Internet, and is, therefore, unconstitutional.

B. The Amended Act Unconstitutionally Restricts Older Minors' First Amendment Rights.

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 a practical matter, given the blanket 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))).

C. **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.

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"). Such a regulation 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.

As a threshold matter, it is not entirely clear what the state interest is that the Amended Act purports to advance. The letter from Gov. Parnell dated January 15, 2010, which transmitted SB 222 makes no reference to sections 9-12 (the Amendments to the Act). There are mentions in the legislative history that this section 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. (Comm. Minutes, 2/15/10, at 2) Assuming that to be the state interest, it 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. 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. Further, the state already has a narrower, constitutional law the vigorous enforcement of which addresses the state's interest in protecting minors from sexual exploitation. AS 11.41.452

("Online Enticement of a Minor"); *see also* American Booksellers Foundation v. Dean, 342 F.3d 96, 102 (2d Cir. 2003).

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.

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, the defendants have 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.[8] Thus, the Amended Act will not

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

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). A less restrictive and more effective solution lies in 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 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. Recently finding unconstitutional a federal statute similar to the Amended Act, the Third Circuit stated that "given the vast quantity of [foreign-originated] speech that COPA [the federal statute at issue] does not cover but that filters do

cover, it is apparent that filters are more effective" than a criminal prohibition like that imposed by Alaska. *Mukasey*, 534 F.3d at 203.

"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 at para. 67. Most Internet Service Providers ("ISPs") and commercial online services provide without additional cost features that subscribers may use to prevent children from accessing chat rooms and to block access to websites and news groups based on keywords, subject matter, or other designations. "Parents can, and do, install such software on their children's computers and configure it to block access to content that the parent considers unsuitable for the child." *Id*. "This type of filtering software is widely available and works without regard to the geographic location of the content and without regard to the commercial or non-commercial nature of the source of the content." *Id*. These services also offer screening software that blocks messages containing certain words and tracking and monitoring software to determine which resources a particular online user, such as a child, has accessed. They also offer the possibility of children-only discussion groups that are closely monitored by adults. *See generally Gonzales*, 478 F. Supp. 2d at 789-792.

Online users also can purchase special software applications, known as user-based filtering software, that enable them to control access to online resources. These applications allow users to block access to certain websites and resources, to prevent children from giving personal information to strangers by email or in chat rooms, and to keep a log of all online activity that occurs on the home computer. AOL maintains a parental control feature that allows parents to establish a separate account for their children and to choose predefined limits for email, chat room capabilities, and Web access that are based on the age range of the child. *See Engler*, 55 F. Supp. 2d at 744; *Reno,* 929 F. Supp. at 842.

In addition, user-based, content filtering programs such as CyberPatrol, SurfWatch, and NetNanny maintain lists of web sites known to contain sexually explicit material. When installed, this software blocks access to web sites containing sexually explicit material, and blocks Internet searches, utilizing particular key words such as "sex" or character patterns such as "xxx." *PSINet*, *Inc. v. Chapman*, 108 F. Supp. 2d 611, 625; *Reno*, 929 F. Supp. at 839-42. Concerned parents can also choose to obtain Internet access through ISPs which allow their users to access only a limited number of child-appropriate sites. *See* Committee to Study Tools and Strategies for Protecting Kids from Pornography, *supra*, at 271-72.

The NRC Report highlights a number of other specific steps that the government can take to address the availability of sexually explicit material to minors online, including to:

> promote media literacy and Internet safety education (including development of model curricula, support of professional development for teachers on Internet safety and media literacy, and encouraging outreach to educate parents, teachers, librarians, and other adults about Internet safety education issues); support development of and access to high-quality Internet material that is educational and attractive to children in an age-appropriate manner; and support self-regulatory efforts by private parties.

NRC Report at 8. The NRC Report also noted that "neither technology nor policy can provide a complete -- or even a nearly complete -- solution.... [S]ocial and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure are foundational to protecting children from negative effects that may result from exposure to inappropriate material or experiences on the Internet." *Id.*, Executive Summary, at 12; *see also id.* at Chapter 10. All of these approaches are notably less restrictive than the Alaska criminal ban.

By 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).

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

III. 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.

A. 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.

> [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the 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.

B. 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.

Importantly, this doctrine does not depend upon Congressional preemption. To the contrary, *Wabash, St. Louis & Pacific Railroad v. Illinois*, 118 U.S. 557 (1886), which struck down state regulation of core railroad operations, was followed the next year by creation of the Interstate Commerce Commission. *Interstate Commerce Act of 1887*, 24 Stat. 379 (1887).

Federal legislation thus came in response to the declared constitutional and practical disabilities of the states.

This basis of invalidity does not depend upon a showing that, at this moment, commerce is in fact being subjected to inconsistent requirements or otherwise is being unduly burdened. The validity of Alaska's regulation of the Internet does not and cannot depend on what Maine decides to do; nor do Alaska statutes flicker in and out of validity as other states adopt and amend their laws. Instead, although the Supreme Court has noted actual inconsistencies in state regulation when they exist, 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."). As the Court explained in *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." Thus, the Court struck the statute down even though only one other state had actually imposed different limits. *Id.* at 774 n.3. Significantly, the Court recognized that trains could comply with the length limits of all states, however varied they might be, by simply conforming to the shortest limit imposed by any state. *Id.* at 773. Thus, the states did not impose unavoidably conflicting demands. Nevertheless, because of the inherently interstate nature of railroad operations, 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.

C. 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 dormant Commerce Clause. It must be declared unconstitutional and its enforcement as to Internet communications enjoined.

IV. THE AMENDED ACT'S RESTRICTIONS ON PHYSICAL DISTRIBUTION VIOLATES 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 falls 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. ("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.")

The Amended Act does not require knowledge by the distributor of the age of the recipient and does not 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.[9]

[9] 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.

The State will likely contend, even though "content and character" are not mentioned in the Amended Act, that pursuant to A.S. 11.81.610(b) a scienter standard of recklessness is to be applied, both as to the age of the minor and as to the content and character of the material. "Recklessly" is defined in A.S. 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 circumstance 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 is an unconstitutional standard under the First Amendment as to both physical distribution within the state and distribution electronically both within and without the state. To be safe, it would require every librarian, clerk in a retail establishment, parent, family friend, etc., to be familiar with the full content or to review the content of every book, magazine, etc. sold, given or loaned to a person likely to be under 16 for possibly offending material, since it might be viewed as "reckless" not to do so. To be safe it would require each librarian and clerk in a bookstore to "card" each teenager since it could be viewed as "reckless" not to do so.

Similarly, it might be viewed as "reckless" for a person to distribute "harmful to minors" material on a website, given that the Supreme Court has found that a "sender must be charged with knowing that one or more minors will likely view" the transmission. *Reno v. ACLU*, 521 U.S. at 876.

These few examples demonstrate the patent unconstitutionality of the "reckless" scienter standard under Smith and Hamling.

V. THE AMENDED ACT IS UNCONSTITUTIONALLY VAGUE.

The Amended Act is unconstitutionally vague and thus 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. As the Third Circuit recognized in *Mukasey*, "Web publishers cannot tell which of these minors should be considered in deciding the content of their Web sites." *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). When dealing with actual materials, the phrase "taken as a whole" is not vague. One looks at the book as a whole, the movie or video as a whole, the periodical as a whole, etc. In the Internet context, 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).

It is this sort of vagueness in a law directed at First Amendment protected freedoms that the Supreme Court in *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), said cannot be tolerated.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

* * *

> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their existence almost as potently as the actual application of sanctions. . . . .
>
> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. (Emphasis added.)

See also 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 enjoin enforcement of the Amended Act as applied to the Internet.

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Respectfully submitted,

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