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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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

PLAINTIFFS' COMBINED MEMORANDUM

(A) REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,

(B) IN OPPOSITION TO THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT

AND

(C) IN OPPOSITION TO THE STATE'S MOTION FOR CERTIFICATION

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Plaintiffs respectfully submit this combined memorandum (A) as a reply, in further support of their motion for summary judgment, (B) in opposition to the State's cross-motion for summary judgment and (C) in opposition to the State's motion for certification.[1]

INTRODUCTION

On October 20, 2010, this Court issued an order granting Plaintiffs' motion for a preliminary injunction against the Amended Act,[2] finding that

> Even a cursory review of the cases cited by Plaintiffs reveal legitimate concerns regarding AS 11.61.128. . . . The Court concludes that there is a strong likelihood of success on the merits in this matter.

(Docket No. 47). Plaintiff subsequently moved for summary judgment, upon the undisputed facts and the same legal grounds that had been the basis of the motion for a preliminary injunction.

In response, the State has moved this Court either (1) to certify the issues in this action to the Alaska Supreme Court, or (2) to grant summary judgment in its favor. Neither course of action is appropriate.

None of the requirements for certification is met. The State has failed to identify a question or questions to be posed to the Alaska Supreme Court. There is ample precedent for this Court to decide the basic issues of statutory interpretation in this case, without resort to certification. Nor is certification warranted to give the Alaska Supreme Court an opportunity to adopt a narrow, constitutional construction of the Amended Act, because the Amended Act is not

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[1] Although the State did not designate its "Cross Motion for Summary Judgment and Motion for Certification," (Docket No. 58) ("D. Br.") as a response to Plaintiffs' Motion for Summary Judgment (Docket No. 51) ("P. Br."), the State has not otherwise filed a response, and Plaintiffs will therefore treat the State's cross-motions both as cross-motions in their own right and as the State's response to Plaintiff's Motion for Summary Judgment. Plaintiffs file this combined memorandum in order not to burden the Court with duplicative briefing.

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

obviously susceptible to such a narrowing construction. Indeed, the State has not proposed any constitutionally-sound narrowing construction that has any relationship to the language of the Amended Act or other Alaska law.

In the face of this Court's conclusion that Plaintiff had shown "a strong likelihood of success on the merits," it is odd, indeed, for the State to move for summary judgment without even attempting to demonstrate why this Court's conclusions of law, as set forth in the decision granting the motion for a preliminary injunction, were incorrect. Instead, the State simply recycles the legal arguments which the State had advanced, and which this Court rejected, on the motion for a preliminary injunction.

In its cross-motion for summary judgment, the State maintains that there are no disputed issues of fact. On that issue, the parties agree. On those undisputed facts, Plaintiffs are entitled to judgment as a matter of law.

ARGUMENT

—

THIS COURT SHOULD DENY CERTIFICATION AND GRANT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DECLARING AND ENJOINING THE AMENDED ACT AS UNCONSTITUTIONAL

I. CERTIFICATION IS INAPPROPRIATE

Although the Amended Act is clearly unconstitutional on its face, the State asks this Court to delay its ruling and instead "certify *this case* to the Alaska Supreme Court" (emphasis added) pursuant to ALASKA APP. PROC. R. 407 ("Rule 407"). However, none of the criteria necessary for certification are met. Rule 407 does not allow a *case* to be certified, as the State requests. It merely allows the Alaska Supreme Court to "answer questions of law certified to it by . . . a United States district court." Rule 407(a). Certification is appropriate only where specific questions of law 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." *Id.*

Even if a party, seeking to uphold the constitutionality of a statute, identifies such proposed questions for certification, that party still bears the burden of proffering a narrowing construction—the answers that the party believes the state supreme court should give to those questions—that would render the statute constitutional. *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1025 (9th Cir. 1999) ("We find this case unsuitable for certification, however, because . . . the State has proffered no possible narrowing construction of the statute that would avoid the vagueness issue."). To warrant certification, the statute must be "obviously susceptible" to the limiting construction. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 471 (1987). "A federal court may not properly ask a state court if it would care in effect to rewrite the statute." *Id.*

Here, it does not appear that the State has even asked this Court to certify a "specific question[] of law to be answered," Rule 407(c)(1), let alone one that would be determinative of the cause pending before this Court. The only question that appears anywhere in the State's "Cross Motion for Summary Judgment and Motion for Certification" appears not in its section designated Motion for Certification but in its Introduction, where the State asks, "Should AS 11.61.128 be interpreted in the broadest sense possible or should it be construed more narrowly?" (D. Br. at 2). If that is, indeed, the question which the State suggests that this Court pose to the Alaska Supreme Court, it is inappropriate for certification.

Ample controlling precedent from the Alaska Supreme Court already exists as to whether or not a statute should be "interpreted in the broadest sense possible or should [] be construed more narrowly." This is not a question specific to AS 11.61.128, it is merely a question of

principles of statutory interpretation in Alaska, a straightforward legal issue upon which this Court does not need guidance from the Alaska Supreme Court.

As the State correctly states (D. Br. at 9), the leading Alaska case on statutory interpretation is *Western Star Trucks v. Big Iron Equipment*, 101 P.3d 1047, 1050 (Alaska 2004), whose holding was reiterated by the Alaska Supreme Court this January:

> In interpreting a statute we "look to the plain meaning of the statute, the legislative purpose, and the intent of the statute." We have declined to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach: "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."

*State, Dept. of Commerce, Community & Economic Deve*lopment v. *Alyeska Pipeline Service Company*, ___ P.3d ___, 2011 WL 193592, *3 (Alaska, January 21, 2011). When the issue of a statute's constitutionality arises in a criminal case, the statute must be construed narrowly—that is, against the government. *Worden v. State*, 213 P.3d 144, 148 (Alaska App. 2009), citing *State v. ABC Towing*, 954 P.2d 575, 579 (Alaska App.1998). However, in applying that principle,

> we may not read into a statute that which is not there, even in the interest of avoiding a finding of unconstitutionality, because "the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits this court from enacting legislation or redrafting defective statutes."

Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 192 (Alaska 2007). The State presents no reason why this Court is not competent to apply these principles of statutory interpretation to this case.

The State's vague question on statutory interpretation principles stands in stark contrast to direct questions, specific to the statute at issue, which may warrant certification. For example, in *Berg v. Popham*, 307 F.3d 1028 (9th Cir. 2002), the Ninth Circuit certified these questions to the Alaska Supreme Court, relating to the relationship between provisions of the federal

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1994), and an Alaska statute governing the release of hazardous substances, Alaska Statutes § 46.03.822:

> 1. Alaska Statute section 46.03.822(a)(4), in contrast to 42 U.S.C. § 9607(a)(3), contains the word "or" preceding the phrase "by any other party or entity." In light of the inclusion of the word "or," does section 46.03.822(a)(4) require that a person own, possess, have "authority to control," or "have a duty to dispose of" the hazardous substance that is released, before that entity can be subject to arranger liability as is required under 42 U.S.C. § 9607(a)(3)?
>
> 2. If the answer to Question 1 is "no," may an entity be subject to arranger liability under Alaska Statute section 46.03.822(a)(4) if it manufactures, sells, and installs a useful product that, when used as designed, directs a hazardous substance into the city sewer system?

307 F.3d at 1029.

The plain language of the Amended Act suffers from a myriad of constitutional defects, including that (i) its restrictions on electronic distribution are *per se* unconstitutional; (ii) it fails strict scrutiny; (iii) it violates the Commerce Clause; and (iv) it is unconstitutionally vague. The State does not give any indication as to how the Alaska Supreme Court could provide this Court with an answer to any question, let alone the vague question in the Introduction of the State's brief, that remedies these defects.

The State has not met its burden of putting forth a limiting construction to which the Amended Act would be susceptible, which would render it constitutional. Instead, the State is essentially asking the Alaska Supreme Court "if it would care in effect to rewrite the statute." *City of Houston*, 482 U.S. at 471. This is improper. As the U.S. Supreme Court has stated, "It would [] be inappropriate for a federal court to certify the entire constitutional challenge to the state court, of course, for certified questions should be confined to uncertain questions of state law." *Id.*

Neither can a narrowing construction that would make the Amended Act constitutional be cobbled together from other portions of the State's brief. The core of the State's argument in its Cross-Motion for Summary Judgment is that either (1) the Amended Act is constitutional on its face, (see D. Br. at 9; "the plain meaning of the statute is to criminalize pedophilic acts."), or (2) that the statute should be interpreted to comport with the intent of the legislature, which was to "prosecute offenders in state court who sent pornographic pictures to children," (*Id.* at 5), to "keep middle aged predators away from young children," (*Id.*), or to "criminalize the grooming of children for sexual abuse either online or in person," (*Id.* at 9). However, none of these legislative intentions are plainly reflected on the face of the statute, nor are they even internally consistent. The plain language of the Amended Act encompasses a far broader range of behaviors, many of them constitutionally-protected, than those cited by the State. "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be." *State, Dept. of Commerce, Community & Economic Development v. Alyeska Pipeline Service Company*, 2011 WL 193592, *3.

Where, as here, there is no question that would be determinative of the pending cause of action, certification must be denied. *Stenberg v. Carhart*, 530 U.S. 914, 945 (2000) ("It would be manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim.") (quoting *City of Houston*, 482 U.S. at 471); *Stollenwerk v. Tri-West Health Care Alliance*, 254 Fed. Appx. 664, 665 (9th Cir. 2007) ("[T]he answer to this question would not be dispositive of the case. . . . we deny Plaintiffs' certification request."); *Spada v. Unigard Ins. Co.*, 80 Fed.Appx. 27, 30 (9th Cir. 2003) ("[W]e deny the Spadas' motion for certification, because the question of the constitutionality of the City's code provision is not determinative of the outcome above.").

The cases the State cites are inapposite. In each such case in which a question was certified, the statute contained a discrete element that was obviously susceptible to a narrowing construction that would drastically limit the statute's burden on both on Plaintiffs' First Amendment rights and on interstate commerce. This is not so here.

The Ohio "harmful to juveniles" statute at issue in *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443 (6th Cir. 2009) prohibited only the distribution of such information "directly" to juveniles and defined "directly" to exclude distribution by certain "methods of mass distribution." In *Strickland*, the Sixth Circuit certified to the Ohio Supreme Court questions regarding whether or not the statute covered only "personally directed devices, such as instant messaging, person-to-person e-mails, and private chat rooms"—an issue that could be, and was, determinative of the case. 560 F.3d at 625. No such statutory limitations on methods of distribution appears in the Amended Act at issue here. Similarly, the Virginia "harmful to minors" statute at issue in *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) and *PSINet, Inc. v. Chapman*, 317 F.3d 413 (4th Cir. 2003) criminalized the display of harmful to juveniles material "for commercial purposes in a manner whereby juveniles may examine and peruse it." The certified questions in those cases attempted to determine what manner of display was appropriate under the statute and what material had to be so displayed. *Virginia,* 484 U.S. at 398. Again, the Amended Act at issue here contains no such display requirement, nor any other component that is obviously susceptible to a narrowing construction that would render it constitutional.

The two cases cited by the State most factually similar to this case, *PSINet v. Chapman*, 317 F.3d 413 (4th Cir. 2003) and *Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D.S.C. 2003), support denial of the motion to certify. In *PSINet*, the Virginia Supreme Court

rejected certification on the grounds that the certified questions were not outcome-determinative, *PSINet v. Chapman*, 362 F. 3d at 231, and in *Southeast Booksellers*, the federal court refused to certify because, as here, the plain language of the statute was determinative. *Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d at 398-99.

Even if the State had articulated some specific legal question which it wished the Alaska Supreme Court to answer, certification would still be inappropriate because the Plaintiffs have proved the unconstitutional effect of the statute in ways which the State does not contest. For instance, the Plaintiffs demonstrated that the absence of a scienter requirement as to the age of the recipient of the prohibited materials facially violates the First Amendment under *Reno.* (P. Br. at 8-12). The interpretation of that provision needs no assistance from the Alaska Supreme Court, as the State admits that the statute does not require knowledge or even recklessness as to the age of the recipient. (Answer ¶¶ 2, 15). Instead, the State claims that the statute is constitutional, even without any scienter as to the age of the recipient of the prohibited materials. (D. Br. at 18-19). Since this Court can and should hold the Amended Act to be unconstitutional on that basis alone, further interpretation of any other part of the statute by the Alaska Supreme Court would not render the statute constitutional.

The State's Motion for Certification should be denied.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT; THE STATE IS NOT.

A. The State Ignores Applicable Precedents

The United States Courts of Appeals for the Second, Third, Fourth, Sixth and Tenth Circuits, as well as United States District Courts in Arizona and South Carolina have all held

statutes similar to the Amended Act unconstitutional under the First Amendment (Pl. Br. at 3, fn. 2).[3]

The State continues to fail to distinguish these cases or explain why, in the State's view, the statutes struck down in these cases differ from the Amended Act. The State merely claims that in the face of this overwhelming consensus, a single statute "similar" to the Amended Act was found constitutional in *Strickland*, 601 F.3d 622. In fact, unlike the Amended Act, the Ohio statute at issue in *Strickland,* as it applies to electronic communications, is limited to communications

> by means of an electronic method of remotely transmitting information if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

and further excludes from liability communications where

> The method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information.

Ohio R.S. § 2907.31(D)(1), (2)(b). That language—unlike the Amended Act here—was susceptible to a narrowing construction, and was construed to be limited to "personally directed communications" such as e-mail and instant messaging. 601 F.3d at 628.

B. The State's Attempt to Narrow the Amended Act's Scope to Render it Constitutional are Unavailing

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

[3] In addition, the United States District Court for the District of Massachusetts has preliminary enjoined such a statute. *American Booksellers Foundation for Free Expression v. Coakley,* 2010 WL 4273802 (D.Mass., Oct. 26, 2010).

were, it would nevertheless be unconstitutional, at least as applied to electronic communications such as the Internet.

For example, the State argues that the Amended Act is constitutional because it prohibits dissemination of only some categories of "harmful to minors" material—those that involve explicit sexual material. (D. Br. at 2).[4] However, as is clear from Plaintiffs' moving brief and the declarations of the Plaintiffs in this action, these broad categories still encompass a great deal of constitutionally-protected material that the State has no legitimate interest in limiting access to, including serious works of art and educational books such as "*Changing Bodies, Changing Lives* by Ruth Bell, *The Joy of Sex* by Alex Comfort . . . *Beauty and Art: 1750-2000* by Elizabeth Prettejohn and *Frida Kahlo: The Paintings* by Hayden Herrera." (Decl. of Allan R. Adler ¶ 10, Docket No. 10). Despite the State's unsupported claims to the contrary (D. Br. at 10), the Amended Act in no way prevents Plaintiffs or others from "be[ing] prosecuted for simply . . . selling such books in [their] store[s], or for posting to [their] website[s] excerpts or images from material that [they] carry." (Decl. of Julie Drake ¶ 9, Docket No. 19).

The State additionally argues that the Amended Act is constitutional because of its scienter requirements: "[s]ome scienter is required when the government regulates obscene material, but the [Supreme] Court has not specified the required level." (D. Br. at 17). But the State's broad discussion of scienter cannot obscure this fatal constitutional flaw. The Amended Act imposes criminal liability even if the person sending material, or the retailer selling material, does not know that the recipient is a minor. The State so admits in its Answer (Answer, ¶¶ 2, 12). In its brief, the State argues that, "The Supreme Court of the United States has never held that a

[4] In fact, *Ginsberg v. New York*, 390 U.S. 629 (1968), which established the "harmful to minors" concept in constitutional law, explicitly limited it to "sex material." *Id.* at 636-37.

[criminal] defendant is required to know the age of a recipient of sexually explicit material "(D. Br. at 19), thus brushing aside the Supreme Court's decision in *U.S. v. X-Citement Videos, Inc.*, 513 U.S. 64, 78 (1994), which held that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."

In reliance on *Western Star Trucks, Inc. v. Big Iron Equip. Service, Inc.*, 101 P.3d 1047, the State argues that Alaska statutes should be construed to conform to the legislature's intent. The State then concludes that, because the Amended Act was intended to prevent grooming of minors, that should narrow the scope of the Act. (D. Br. at 9), without saying how it should be narrowed. But such a doctrine cannot alter what it is that the legislature actually passed. The plain language of the Amended Act criminalizes activities in which Plaintiffs engage in the course of their work, as is their constitutional right. They therefore could be prosecuted under the Amended Act regardless of the legislature's putative intent. In fact, the court in *Western Star* ***rejected*** the States' argument that the legislature's intent changed the plain meaning of the statute at issue in that case. *See Western Star*, 101 P.3d at 1048, 1050 ("the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be"). The plain meaning of the Amended Act criminalizes dissemination of a wide range of constitutionally-protected material that the State need not criminalize in order to achieve its purpose. The State's allegation that the "plain meaning of the statute is to criminalize pedophilic acts" (D. Br. at 9) confuses "plain meaning" with possible legislative intent; there is no mention in the Amended Act of "pedophilic acts." And in fact, the legislature was repeatedly informed that the Amended Act far exceeded the supposed purpose, and did not cure this constitutional error. (See Decl. of David Horowitz, Docket No. 46).

C. The Amended Act Cannot Survive Strict Scrutiny

Although the State does not deny that the Amended Act must pass strict scrutiny to be constitutional (D. Br. at 9), it fails to meet the heavy burden that test imposes. Strict scrutiny requires the State to show that the Amended Act will actually and materially "achieve its goal" of furthering a compelling state interest and that no less-restrictive alternatives exist. *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). The State continues to claim that the Act is necessary to "prevent[] predators from using pornography to groom children for sexual abuse by adults." (D. Br. at 10) No one could or does argue that that is anything less than a very compelling state interest.

However, as this Court has found, the Amended Act's broad prohibitions are not directed at that state interest and the State has ignored other much narrower means available to achieve that goal, both in statutes already on the books and in statutes that could be enacted. (Order Granting Preliminary Injunction at 7-8).

That the Amended Act is not limited to activities that could constitute "grooming" is evident by comparing the Amended Act with AS 11.41.452, a statute specifically addressed to grooming:

THE AMENDED ACT AT ISSUE HERE (EMPHASIS ADDED)	THE "GROOMING" STATUTE (EMPHASIS ADDED)
§ 11.61.128. Distribution of indecent material to minors (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:*** [list of conduct] (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.	**§ 11.41.452. Online enticement of a minor** (a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, ***knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in*** an act described in AS 11.41.455(a)(1)-(7) and (1) the other person is a child under 16 years of age; or (2) the person believes that the other person is a child under 16 years of age.

Thus, the Amended Act prohibits communications that include depictions of sexual conduct, without regard to the intent of the person who sends the communication. In contrast, the grooming statute—which is constitutional—prohibits sending communications to entice a minor into sexual conduct, without regard to the content of the communication.

If a predator sends sexual material to a minor with the intent of enticing the minor into sexual conduct, the predator can be (and should be) prosecuted under the grooming statute. That is exactly what happened in *State v. Moore,* which was the subject of the State's Motion to Clarify (Docket No. 54).

> In invalidating Vermont's "harmful to minors" law, which was similar to the Amended Act, the United States Court of Appeals for the Second Circuit found, Vermont's interest in preventing pedophiles from "grooming" minors for future sexual encounters can be effectively addressed through enforcement of Section 2828, which regulates electronic luring.

Amer. Booksellers Found. for Free Expression v. Dean, 342 F.3d 96, 102 (2d Cir. 2003).

The State also argues that there is offensive conduct—such as "adult males [engaging in] online 'chatting' with minors and then exposing themselves via a 'webcam'" (D. Br. at 7)—which should be criminal, but is not within the scope of the grooming statute. But that is no basis to defend an unconstitutional statute; if the legislature wishes to address the issue of online exposure of an adult's genitals to a person known to be a minor, it should pass a constitutional act to do so.

The State also rejects filters which have been recognized as narrower alternatives by courts and governmental agencies. *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; National Research Council, *Youth, Pornography and the Internet*. Executive Summary at 10 (Dick Thornburgh & Herbert S. Lin, eds, 2002) ("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. *ACLU v. Mukasey*, 534 F.3d 181, 203 (3d Cir. 2008), cert. den. 129 S. Ct. 1032 (2009). "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. The State also rejects the possibility of passing a narrower statute that "prohibited only direct distribution to a specific minor known to the distributor." (P. Br. at 15)[5]. Nor does the State present evidence that the State did any of its own analysis or testing of less restrictive means before enacting the Amended Act.

Most importantly, although Plaintiffs have suggested several less-restrictive alternatives to the Amended Act, the burden is not on the Plaintiffs to evaluate less restrictive alternatives, it is on the State. The State has not even attempted to meet this burden; thus, it has not shown that the Amended Act passes the strict scrutiny test. *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126-29 (1989) (holding government must prove that less restrictive alternatives have been tested and failed).

As this Court has recognized, the Amended Act is similar to the statutes in at least 12 recent cases in which statutes were struck down on the identical grounds that Plaintiffs have submitted to this Court. (Order Granting Preliminary Injunction at 4-5). Of those cases, the State mentions only *Reno v. ACLU*, 521 U.S. 844 (1997), and does so only to make the uncontested observation that the statute in *Reno* was a federal statute that was struck down in part due to concerns over its vagueness.[6] (D. Br. at 11). *Reno*, however, unambiguously stands for the proposition that a statute will not survive constitutional scrutiny if

> [i]n order to deny minors access to potentially harmful speech, [the statute] effectively suppresses a large amount of speech that adults have a constitutional right to receive.

[5] Such a narrower statute was recommended to the legislature by Media Coalition, a trade association to which some Plaintiffs are members, prior to passage of the Amended Act. (See Declaration of David Horowitz, Docket No. 46).

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

Id. at 874. Although the State claims that "[t]he question before this court should not be one of tallying which side has the most decisions in its favor," the fact that there is a near unanimous consensus, much of it controlling law, is a critical factor in determining the Amended Act's constitutionality.

D. The State Fails to Address the Unconstitutional Vagueness of the Amended Act

The State does not address Plaintiffs' contention that the Amended Act's term "depict" is vague, effectively conceding its vagueness. The vagueness of this term alone is enough to render the Amended Act unconstitutional.

As to the vagueness as to how the "harmful to minors" standard is applied, the State relies on *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989) and *Am. Booksellers Ass'n v. Webb*, 919 F.2d 1493 (11th Cir. 1990), arguing that the phrase "harmful to minors" must be construed to apply only to material which is inappropriate to minors of all ages. (D. Br. at 12). The State cites no Alaska case that holds (or even suggests) that material which is "harmful to minors" to a 11-year old girl could, under Alaska law, nevertheless be distributed to her because it is appropriate (i.e., not "harmful to minors") to a 15-year old boy. In addition, the more recent decision of *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), held that the phrase "harmful to minors" is vague and open to multiple constructions. 534 F.3d at 205. It is by no means settled that "harmful to minors" will be construed as it was in *Virginia*.

Similarly, the State argues that the phrase "as a whole" is not vague as applied to the Internet, relying on *U.S. v. Stagliano*, 693 F.Supp.2d 25 (D.D.C. 2010). However, Stagliano does not even address the Third Circuit's decision in *Mukasey* holding that the phrase "as a whole" is vague as applied to Internet communications. *Mukasey*, 534 F.3d at 205.

E. The Amended Act Violates the Commerce Clause

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

Once again the State simply ignores most of the precedents cited by Plaintiffs. Indeed, the State claims, without citing any authority, that although the Amended Act can be used to prosecute out-of-state individuals who post material to the Internet that could be considered "harmful to minors," such prosecution is permissible under the Commerce Clause because "this activity occurs in Alaska when an Alaskan resident receives the indecent material." (D. Br. at 15). The State admits that there is nothing on the face of this statute, nor does the State cite any other authority, that would prevent prosecution of an out-of-state speaker on the Internet under the theory that access of his or her Internet communication by a minor in Alaska constituted consummation of a crime "by other means proceeding directly from the State." Despite the State's unsupported claims to the contrary, prosecuting such out-of-state posting of material to the Internet would be an impermissible attempt to regulate activity occurring entirely outside of Alaska. *Pataki*, 969 F. Supp. at 173-77; *PSInet*, 362 F.3d at 239-40; *Johnson*, 194 F.3d at 1161; *Cyberspace*, 142 F. Supp. 2d at 831.

Although *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), held that a similar statute violated the "rule barring the states from regulating those phases of the national

commerce which . . . demand that their regulation. . . be prescribed by a single authority," The State takes issue with its holding and argues that this Court should disregard it. In doing so, The State disregards the broad range of other federal cases adopting the holding in *Pataki*. (Pl. Br. at 20-23) In fact, the State fails to discuss these cases at all. In their stead, the State urges to this Court that "[t]he *Pataki* approach has been persuasively and roundly criticized," citing a single case from a Washington state intermediate appellate court[7] and a law journal article[8] in support of its argument that the State's regulation of commerce over the Internet is merely the inevitable byproduct of a constitutionally-sound statute. The well-founded decision of the *Pataki* court and others following it that local regulation of the Internet "will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities" is persuasive. *Pataki*, 969 F. Supp. at 182.

The State next makes the conclusory statement that "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." (D. Br. at 14). The State, however, provides no evidence and refers to no authority that the effect on interstate commerce is minimal, or that the Amended Act is necessary to promote the State's interest. Indeed, the effect on interstate commerce is great. The Amended Act as written reaches all speakers on the Internet and criminalizes posting of "harmful to minors" material regardless of the location of the speaker. Indeed, the Amended Act has the potential to dramatically alter the way that Plaintiffs both in-state and out-of-state do business. (*See, e.g.* Decl. of David Cheezem ¶ 7, Docket No. 15).

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

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

F. Plaintiffs Have More Than Met the Applicable Standards for Summary Judgment

Plaintiffs and the State agree that in order to prevail on a summary judgment motion, the moving party must show (1) "there is no genuine dispute as to material facts," and (2) "the moving party is entitled to judgment as a matter of law." (P. Br. at 6; D. Br. at 8). They further agree that there is no genuine dispute as to material facts in this case. (P. Br. at 7; D. Br. at 8).

Given that no material facts have changed since this Court issued its Order Granting Plaintiff's Motion for a Preliminary Injunction, and that Plaintiffs have demonstrated above and in their moving brief that they are entitled to judgment as a matter of law, Plaintiff's Motion for Summary Judgment should be granted and the State's Cross Motion for Summary Judgment and Motion for Certification should be denied.

CONCLUSION

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

Dated: March 23, 2011

Respectfully submitted,

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The undersigned certifies that a true and correct copy of the foregoing Plaintiffs' Combined Memorandum (A) Reply In Further Support Of Plaintiffs' Motion For Summary Judgment, (B) In Opposition To The State's Cross-Motion For Summary Judgment And (C) In Opposition To The State's Motion For Certification was served via electronic filing this 23rd day of March, 2011, upon counsel for Defendant.

s/ Michael A. Bamberger
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