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**UNITED STATES DISTRICT COURT  
FOR THE 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. )

JOHN J. BURNS, in his official capacity as )  
ATTORNEY GENERAL OF THE STATE OF )  
ALASKA )

Defendant. )

CIVIL ACTION NO.:

3:10-cv-00193-RRB

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**REPLY IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR  
CERTIFICATION**

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Certification is appropriate because AS 11.61.128 is an Alaska statute and the Alaska courts have not yet addressed how broadly or narrowly it should be interpreted. Despite the Plaintiffs attempts to cloud the issue, it really is that simple. Under Alaska Appellate Procedure Rule 407, certification is appropriate if the proceeding involves “questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.” Here, the question of how to interpret AS 11.61.128 is determinative of whether it is constitutional and there is no controlling precedent. The Defendant concedes that when the statute is interpreted at its broadest, the statute is unconstitutional. However, the broad interpretation urged by the plaintiffs is not obvious from the face of the statute, despite the plaintiffs’ claims. Nor does this broad interpretation comport with standard tenets of statutory construction.

One example of a narrower constitutional reading of AS 11.61.128 is that it requires knowledge of the material being distributed. *See Opp. to Mot. for Prelim. Injunction* at 15-17. *See also U.S. v. X-Citement Videos, Inc.*, 513 U.S. 64, 68-69 (1994)(holding that knowingly applies to more than just the surrounding verbs, but also applies to subsections of the statute).<sup>1</sup> In fact, Alaska precedent would support this reading of “knowingly” as well. *See Strane v. State*, 61 P.3d 1284 (Alaska 2003). As such, as already discussed in the Defendant’s filings, one appropriate question to be certified to the Alaska Supreme Court is, “Whether the State of Alaska is required to prove under AS 11.61.128 that the defendant’s distribution was knowing and that the defendant knew what was being distributed.”

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<sup>1</sup> The statute at issue in *X-Citement Videos* concerned the distribution of child pornography, a crime where the age of the people depicted in the material is a critical element. Here, the age of the performers in the material is not critical – what matters is the age of the sender and the actual or believed age of the recipient. Thus, the plaintiffs’ reliance on this case to say AS 11.61.128(a)(3) is unconstitutional is not well founded.

Secondly, while the plaintiffs' claim that the definition of "harmful to minors" is vague, there is also precedent that this definition is constitutional. As such, it would be appropriate to certify the question, "Whether "harmful to minors" as used in AS 11.61.128 encompasses any of the material referenced in the plaintiffs' affidavits, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity." The Defendant submits that the material referenced by the plaintiffs would not be encompassed by 11.61.128 because that material is not harmful to minors. In the plaintiffs' motion for preliminary injunction, they seemed to cite with approval court decisions upholding statutes regulating the dissemination of material deemed "harmful to minors" by construing them to prohibit only material that would lack serious value for older minors. *See* Mot. for Prelim. Injunction at 14-15 (citing *Am. Booksellers Ass'n v. Webb*, 919 F.2d 1493 (11th Cir. 1990) and *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989)). However, in their most recent Opposition, the plaintiffs' now state that the court should not follow these cases because there is no Alaska case on point. *See Plaintiffs' Combined Memorandum* at 16. However, rather than picking and choosing which non-Ninth Circuit cases this court should follow, certification of the question will provide an Alaska decision that is precisely on point with how to interpret this statute.

It is well-settled that statutes should be construed in a manner to avoid constitutional problems. *Hooper v. California*, 155 U.S. 648, 657 (1895). Here, the narrow interpretations urged by the Defendant comports with this principle. It should be left to the Alaska Supreme Court to determine whether this principle should be followed with this statute or whether to abandon that principle of statutory construction. The Defendant's interpretation of AS 11.61.128 does not alter, change, or depart from the language of the statute. *See Alaskans for a Common*

*Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007). Rather, the State’s interpretation relies on the plain wording of the statute and standard tenets of statutory construction.

Because there is no controlling precedent and because this statute may be read broadly rendering it unconstitutional or narrowly rendering it constitutional, certification to the Alaska Supreme Court is necessary. Should this court accept the broad reading of the statute urged by the plaintiffs’, it will be rejecting tenets of statutory construction and doing so without the benefit of how the state court would interpret its own statute. In conclusion, this court should certify these questions to the Alaska Supreme Court:

1. Whether the State of Alaska is required to prove under AS 11.61.128 that the defendant’s distribution was knowing and that the defendant knew what was being distributed.
2. Whether “harmful to minors” as used in AS 11.61.128 encompasses any of the material referenced in the plaintiffs’ affidavits, and what general standard should be used to determine the statute’s reach in light of juveniles’ differing ages and levels of maturity.

DATED this 7th day of April, 2011.

JOHN J. BURNS  
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2011, a  
copy of the foregoing document was served electronically on:

Michael Bamberger  
D. John McKay  
Thomas W. Stenson  
Devereux Chatillon

s/Marika R. Athens  
Marika R. Athens