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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,)

CIVIL ACTION NO.:

3:10-cv-00193-RRB

Plaintiffs,)

v.)

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

Defendant.)

**REPLY IN FURTHER SUPPORT OF DEFENDANT’S CROSS-MOTION FOR
 SUMMARY JUDGMENT**

While it is true that many similar statutes to the one at issue here have been found unconstitutional, similarity is not the same as identical. No identical statute to AS 11.61.128 has been found unconstitutional. Mere similarity is not an appropriate basis to strike down an entire statute. Rather than advocating that this court blindly follow other courts, the State asks this court to look at the specific language in AS 11.61.128. As this court already noted in its Order Granting Preliminary Injunction, this statute is markedly different from the statute at issue in *Reno v. ACLU*, 521 U.S. 844 (1997). See Order at 5. Specifically, the Alaska statute spells out what depicted conduct qualifies and defines “harmful to minors.” See AS 11.61.128.

While AS 11.61.128 relies on the same definition of “harmful to minors” present in the statute struck down by the Court of Appeals for the Third Circuit in *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), that opinion is not binding precedent and the Defendant urges this court not to follow that flawed path. The definition of “harmful to minors” used in AS 11.61.128 mirrors what has already been found constitutional by the Supreme Court of the United States. See *Ginsberg v. New York*, 390 U.S. 629 (1968); *Miller v. California*, 413 U.S. 15 (1973). However, the Court of Appeals for the Third Circuit deviated from this settled case law to hold that the term “taken as a whole,” as used in the definition, is vague. As observed by a district judge of the District of Columbia, “Since *Miller*, the definition of obscenity and, in particular, the ‘as a whole’ requirement have had settled legal meaning.” *Stagliano*, 693 F. Supp. 2d 25, 35 (D.D.C. 2010) (rejecting vagueness and overbreadth challenges to federal obscenity statute). It is not at all clear that either the Court of Appeals for the Ninth Circuit or the Supreme Court of the United States would adopt the conclusions reached by the *Mukasey* court. See *Mukasey v. ACLU*, 129 S.Ct. 1032 (2009)(denying petition for writ of certiorari).

One of the values of the three-pronged definition of “harmful to minors” is that it ensures that serious works of art and educational books are not subject to this statute. Despite the plaintiffs’ claims, the second prong of the test ensures that books about Frida Kahlo’s paintings or books about the human body are not covered by the statute. *See* AS 11.61.128(c) (requiring, among other things, that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age). The plaintiffs’ arguments to the contrary only heightens the need for certification. The plaintiffs’ broad reading of “harmful to minors” also ignores the settled principle of statutory construction that statutes should be interpreted narrowly.

As for the plaintiffs’ opposition to the Defendant’s rejection of the commerce clause and vagueness arguments, the Defendant relies on its motion for summary judgment.

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

DATED this 7th day of April, 2011.

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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