IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al., Plaintiffs, vs. DANIEL S. SULLIVAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA, Defendant.	Case No. 3:10-cv-0193-RRB **ORDER REGARDING PENDING MOTIONS**

I. BACKGROUND

In January of 2010, Alaska passed SB 222, a bill that amended a variety of statutes with the stated intent of strengthening initiatives relating to sexual assault and domestic violence. The bill included Sections 9-12, which amended and (according to Plaintiffs) expanded an existing censorship law. These sections imposed what Plaintiffs complain are "severe content-based restrictions on the availability, display, and dissemination of

constitutionally protected speech on the Internet and physically within the State of Alaska."[1]

Plaintiffs argue that the act, as amended and applied to the Internet, violates the First, Fifth, and Fourteenth Amendments because: (1) it restricts adults from engaging in protected speech on the Internet; (2) it is substantially overbroad; (3) it criminalizes protected speech among and to older minors; (4) it is unconstitutionally vague; and (5) it requires that, for the determination of community standards, the relevant community be local, rather than the nation.[2] In addition, Plaintiffs argue the application of the amended act to the Internet violates the Commerce Clause because: (1) it regulates speech that occurs wholly outside the borders of Alaska; (2) it imposes an unjustifiable burden on the interstate commerce over the Internet; and (3) it subjects online speakers to inconsistent state laws.

Pursuant to Fed. R. Civ. P. 65, Plaintiffs moved for a preliminary injunction and other appropriate relief against enforcement of AS 11.61.128, both as amended by Sections 9-12 in Senate Bill No. 222, 26th Leg., 2d Sess., and as prior to

---

[1] Docket 7 at 8.

[2] 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.

amendment, which purports to limit access to materials deemed "harmful to minors." The statute in its current form provides in relevant part:

> **Electronic Distribution of Indecent Material to Minors**
>
> **(a)** A person commits the crime of electronic distribution of indecent material to minors if
>
> **(1)** the person, being 18 years of age or older, knowingly distributes to another person by computer any material that depicts the following actual or simulated conduct:
>
> **(A)** sexual penetration;
> **(B)** the lewd touching of a person's genitals, anus, or female breast;
> **(C)** masturbation;
> **(D)** bestiality;
> **(E)** the lewd exhibition of a person's genitals, anus, or female breast; or
> **(F)** sexual masochism or sadism; and
>
> **(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.
>
> **(b)** In this section, it is not a defense that the victim was not actually under 16 years of age.
>
> **(c)** In this section, "harmful to minors" means
>
> **(1)** the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest in sex for persons under 16 years of age:
>
> **(2)** a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age; and
>
> **(3)** the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult

> community as a whole with respect to what is suitable for persons under 16 years of age.

AS § 11.61.128.[3]

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.

On October 20, 2010, in light of similar cases in other jurisdictions, this Court found a strong likelihood of success on the merits on the part of Plaintiffs and entered a preliminary injunction enjoining enforcement of AS § 11.61.128 until this matter is resolved.[4] Plaintiffs now seek summary judgment on all counts of their Complaint.[5] Defendant, the Attorney General of the State of Alaska, has filed a cross-motion for summary judgment, as well as a motion that this Court seek certification of the underlying statutory interpretation from the Alaska Supreme Court.[6]

---

[3] Sections (d) and (e) not printed here contain the penalties associated with violations of the statute.

[4] Docket 47.

[5] Docket 51.

[6] Dockets 59 & 60.

Oral argument has been requested, but the Court does not find that it would be helpful.

II. CERTIFICATION TO THE ALASKA SUPREME COURT (DOCKET 60)

Defendant moves for certification to the Alaska Supreme Court, arguing that the statute at issue is an Alaska statute and the Alaska courts have not yet addressed how broadly or narrowly it should be interpreted.[7] Plaintiffs oppose certification, arguing that 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.[8]

Rule 407 of the Alaska Rules of Appellate Procedure authorizes the Alaska Supreme Court to answer questions of Alaska law certified to it by another court. However, certification should not be routinely granted, but rather is appropriate where the state law question is a "close" one and a policy of importance to the State of Alaska is involved.[9]

The Supreme Court of the United States has previously addressed a case substantially similar to this one. In *Virginia v.*

---

[7] Docket 60 at 3.

[8] Docket 70 at 7.

[9] *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400, 1402, n. 1 (9th Cir.1990).

American Booksellers Assoc., Inc.,[10] Plaintiffs made a facial challenge to a 1985 amendment to a Virginia statute that made it "unlawful for any person knowingly to sell or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse," pictures or other visual representations of materials similar to those prohibited by the Alaska statute at issue here. Plaintiffs argued that the Virginia statute "burden[ed] the First Amendment rights of adults, as to whom at least some of the covered works [were] not obscene."[11] They argued that compliance with the Virginia statute required booksellers to restrict access to their stores, or reduce the adult population to reading and viewing only works suitable for children, something the Supreme Court has repeatedly held is prohibited by the First Amendment.[12]

Both the United States District Court for the Eastern District of Virginia, as well as the Court of Appeals for the Fourth Circuit, found that the 1985 amendment placed significant burdens on adult First Amendment rights by restricting adult access to non-obscene works and, concluding that the Virginia statute was

---

[10] 484 U.S. 383 (1988)

[11] *Id.* at 388.

[12] *Id.* at 389, citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957).

overbroad, permanently enjoined its enforcement.[13] But the United States Supreme Court reversed, concluding that "we should not attempt to decide the constitutional issues presented without first having the Virginia Supreme Court's interpretation of key provisions of the statute."[14] The Court noted that the State's attorney in the Virginia case, like in the case at bar, conceded that if the statue was read broadly, that it would be unconstitutional.[15] The Supreme Court found that the Virginia case "present[ed] the rare situation in which we cannot rely on the construction and findings below," noting that "where it appears the State will decline to defend a statute if it is read one way and where the nature of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court. Certification, in contrast to the more cumbersome and (in this context) problematic abstention doctrine, is a method by which we may expeditiously obtain that construction."[16]

---

[13] *Id.* at 391.

[14] *Id.* at 393.

[15] *Id.* at 393; Docket 72 at 2 ("The [State of Alaska] concedes that when the statute is interpreted at its broadest, the statute is unconstitutional.")

[16] *Id.* at 395-96.

In this case, the State proposes that two questions be certified 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; and

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.[17]

These questions are substantially similar to the questions certified to the Virginia Supreme Court in *Virginia v. American Booksellers*.[18]

Plaintiffs complain that to warrant certification, the statute must be "obviously susceptible" to the limiting construction, and "[a] federal court may not properly ask a state court it if would care in effect to rewrite the statute."[19] Furthermore, it is "inappropriate for a federal court to certify the entire constitutional challenge to the state court . . . for certified

---

[17] Docket 72 at 4.

[18] 484 U.S. at 398.

[19] Docket 70 at 8, citing *City of Houston, Tex. v. Hill*, 482 U.S. 451, 471 (1987).

questions should be confined to uncertain questions of state law."[20] In *City of Houston*, a city ordinance criminalized "a substantial amount of constitutionally protected speech, and accord[ed] the police unconstitutional discretion in enforcement."[21] The Supreme Court found "the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad. . ."[22] But *City of Houston* involved a criminal statute that had been previously interpreted by lower state courts. Furthermore, the Supreme Court found that the Houston statute was not ambiguous.

Here, the statute before the Court is more akin to the statute in *Virginia v. American Booksellers,* which also involved statutory language that had the potential to reduce the adult population to reading and viewing only works suitable for children, an outcome prohibited by the First Amendment.[23] The Supreme Court's requirement that the State's highest court weigh in on the statute is applicable here. This Court finds *Virginia v. American Booksellers Assoc., Inc.*, is controlling in this matter. Although the process of certifying questions to the Alaska Supreme Court may be time-

---

[20] *Id.*

[21] *Id.* at 466-67.

[22] *Id.*

[23] 484 U.S. at 389.

consuming, the only party harmed by delay in this case is the State, which cannot prosecute under this statute until this issue is resolved.

III. CONCLUSION

In light of the foregoing, the Motion for Certification at **Docket 70** is **GRANTED.** The Motions for Summary Judgment at **Dockets 51 and 59** are **DISMISSED WITHOUT PREJUDICE** pending the Alaska Supreme Court's decision. The Motion for Hearing at **Docket 71** is **DENIED.**

The parties are directed to meet and confer and file a stipulated Proposed Order for Certification on or before Monday, **May 2, 2011.** In the event that the parties cannot agree on a proposed order, separate proposed orders may be filed.

IT IS SO ORDERED.

ENTERED this 19th day of April, 2011.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE