

**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**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, by their undersigned attorneys, for this complaint against Defendant Daniel S. Sullivan, in his official capacity as Attorney General of the State of Alaska, allege:

**PRELIMINARY STATEMENT**

1. By passing Sections 9-12 in Senate Bill No. 222, 26th Leg., 2d Sess. (2010) (“SB 222”), amending AS 11.61.128, the Alaska Legislature has further expanded an already broad censorship law. AS 11.61.128, as amended by SB 222 (the “Amended Act”), imposes severe content-based restrictions on the availability, display, and dissemination of constitutionally protected speech on the Internet and in Alaska retail establishments. The Amended Act makes it a crime to distribute to a person under 16 years of age, by means of the Internet, other electronic

means or otherwise, any depictions of nudity or sexual conduct that are “harmful to minors.” For most communications over the Internet, it is not possible for a person sending or posting the communication to ensure that the communication will not be read or seen by a minor. The Amended Act thus sweeps within its scope all Internet communications—such as postings on websites and through listservs that might be read or seen by a minor—and not merely those communications directed to a specific minor.

2. The Amended Act does not provide for a national community standard for Internet communications. AS 11.61.128(e). And the Amended Act criminalizes the distribution of such material, whether over the Internet or in person, such as in a library or bookstore, even when the person distributing the material has no actual knowledge of its character or content and does not know the age of the recipients.

3. The United States Supreme Court invalidated on First Amendment grounds a federal law that similarly restricted Internet communications in Reno v. ACLU, 521 U.S. 844 (1997), and the Third Circuit invalidated a second such federal law on First Amendment grounds in ACLU v. Mukasey, 534 F. 3d 181 (3d Cir. 2008), cert. denied, 129 S.Ct. 1032 (2009).

4. Seven state laws containing similar content-based restrictions on Internet communications have now been struck down or enjoined as unconstitutional. PSINet, Inc. v. Chapman, 362 F. 3d 227 (4<sup>th</sup> Cir. 2004) (Virginia); American Bookseller Foundation v. Dean, 342 F. 3d 96 (2<sup>nd</sup> Cir. 2003) (Vermont); Cyberspace Communications, Inc. v. Engler, 238 F. 3d 420 (6<sup>th</sup> Cir. 2000) (Michigan); ACLU v. Johnson, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999) (New Mexico); ACLU v. Goddard, Civ. 00-0505 (D. Ariz. Aug. 11, 2004); Southeast Booksellers Ass’n v. McMaster, 282 F. Supp. 2d 389 (D.S.C. 2003) (South Carolina); American Library

Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York). A similar state statute in an eighth state (Ohio) was upheld only after the state’s attorney general declined to defend the full breadth of the statute and instead argued for a narrowing construction of the statute, which the courts adopted, so that the statute would apply only to person-to-person Internet communications, such as email and instant messages. American Booksellers Foundation for Free Expression v. Strickland, 601 F.3d 622 (6<sup>th</sup> Cir. 2010). No state statute similar in scope to the Amended Act has been found to be constitutional.

5. Nevertheless, on May 14, 2010, Governor Sean Parnell signed into law SB 222, which contains these constitutionally unsound provisions and which expanded on the existing law’s unconstitutional provisions.

6. SB 222 also addresses other subjects—including the crimes of harassment, distribution and possession of child pornography, and registration of sex offenders. Those portions of SB 222 are not at issue in this case. Nor does this case concern other Alaska statutes that concern those subjects or the criminalization of obscenity or speech used to entice or lure minors into inappropriate activity.

7. The Amended Act took effect on July 1, 2010. A copy of the Amended Act is attached as Exhibit A hereto.

8. Before being amended by SB 222, AS 11.61.128 (the “Prior Act”) prohibited distribution to minors by computer of certain sexually explicit material. The recent amendments broadened the statute by deleting the word electronic before distribute so that all forms of distribution whether electronic or physical are covered. In addition, the amendments added

sections requiring the application of community standards and requiring that the material be harmful to minors as that term is defined in the amended statute.

9. The Prior Act was unconstitutional under the U.S. Constitution for the following reasons:

(a) It regulated material as to its sexual content in violation of the decisions of the U.S. Supreme Court for a variety of reasons, including that it did not consider the material taken a whole, it failed to exempt material with serious value for the minor, and it failed to apply community standards.

(b) It violated the Commerce Clause.

(c) It was unconstitutionally vague in that it did not define “distributes.”

(d) It did not require that that distributor know that a recipient was under 16, or know the nature and content of the material distributed.

10. A copy of the Prior Act is attached as Exhibit B hereto.

11. This action seeks to have the Amended Act declared facially unconstitutional and void by reason of the First, Fifth and Fourteenth Amendments to, and the Commerce Clause of, the United States Constitution, and to have the State enjoined from enforcing the Amended Act. The Prior Act should not be restored because it, too, is unconstitutional as set forth herein.

12. Under the Amended Act, depictions of nudity or sexual conduct can potentially be criminal if communicated on the Internet and accessible in Alaska, so long as they are found to be “harmful to minors.” This is true even if the communicator does not direct the communication to a specific individual but, instead, for example, merely posts the material on a website. This could include book or DVD covers displayed on the website of one of the plaintiffs, or movies streamed on or downloaded from those sites. This is also true even if the

communicator does not know the nature or content of the material or that the recipient is under 16 years of age.

13. Under the Amended Act, any depiction of nudity or sexual conduct can potentially be criminal if distributed in a retail establishment or library in Alaska, so long as someone finds it to be “harmful to minors.” This is true even if the retailer or librarian does not know the nature and content of the material, or that the recipient is under 16 years of age.

14. Based on the legislative history, it appears that the Alaska Legislature intended the Amended Act to apply only to visual depictions of nudity or sexual conduct. However, the Amended Act is ambiguous since it does not limit itself to *visual* depictions, and “depict” can refer to either visual or textual matter.

15. There is no exemption in the Amended Act for persons misled by a recipient, for example by use of a false ID.

16. There is no exemption in the Amended Act for parents or for store clerks or librarians acting in a ministerial manner.

17. Since all speech on the Internet is accessible in Alaska, regardless of the geographical location of the person who posted it, the Amended Act threatens Internet communications nationwide and even worldwide. The Internet represents the most participatory marketplace of mass speech yet developed. It is in many ways a far more speech-enhancing medium than radio, television, print, the mails, or the proverbial village green. Hundreds of millions of people can now engage in interactive communication on a national and global scale via computer networks that are connected to the Internet. The Internet enables average citizens, with a few simple tools and at a very low cost, to participate in local or worldwide conversations,

publish an online newspaper, distribute an electronic pamphlet, and communicate with a broader audience than ever before possible. The Internet also provides millions of users with access to a vast range of information and resources. Internet users are far from passive listeners—rather, they are empowered by the Internet to seek out exactly the information they need and to respond with their own communication if they desire.

18. Because of the way the Internet works, the Amended Act’s prohibition on the electronic distribution to minors of material that is “harmful to minors” and the Prior Act’s prohibition of all listed categories of materials effectively ban distribution of that same material to adults. Material deemed “harmful to minors” is constitutionally protected for adults. This includes, for example, valuable works of literature and art, safer sex information, examples of popular culture, and a wide range of robust human discourse about current issues and personal matters that may include provocative or sexually oriented language and images.

19. The Amended Act also prohibits speech that is valuable and constitutionally protected for minors, especially older minors, including sex education materials.

20. The inevitable effect of the Amended Act, if not enjoined, will be that Internet content providers and others speaking by electronic means will limit the range of their speech because there are no reasonable technological means that enable users of the Internet to ascertain the age of persons who access their communications or to restrict or prevent access by minors to certain content. Consequently, the Amended Act will have the effect of reducing adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children.

21. The Amended Act thus violates the First and Fourteenth Amendments to the United States Constitution through the impermissible criminalization of protected speech, violates the First and Fourteenth Amendment rights of plaintiffs, their members, their users, and tens of millions of other speakers and users of the Internet, and threatens them with irreparable harm.

22. The Amended Act's prohibition on physical distribution of materials to minors that is "harmful to minors" is similarly constitutionally defective. The Amended Act does not require that the distributor have actual knowledge of the content of the material being distributed and does not require that the distributor have actual knowledge of the age of the person to whom the material is distributed. For these reasons, the Amended Act's blanket prohibition on physical distribution violates the First and Fourteenth Amendment rights of the plaintiffs, their members, their users, and their customers.

23. The chilling effect that the Amended Act has and will have on the activities of plaintiffs and others is exacerbated by the statutory structure that it is a part of. A conviction under the Amended Act is a "sex offense" under the law of Alaska. AS 12.63.100(6)(C)(v). Anyone convicted of a sex offense is a "sex offender" who is required to register with the Department of Corrections or with the Alaska state troopers or municipal police and to renew that registration annually for 15 years. AS 12.63.100(5); AS 12.63.010; AS 12.63.020. As part of the registration process, the sex offender must provide fingerprints, license plate numbers, addresses, and "a statement concerning whether the offender . . . has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter." AS 12.63.010(b)(1)(H). If a person convicted under the

Amended Act notifies the department that that person is moving out of Alaska, the department “shall notify the Federal Bureau of Investigation” as well as the state to which the person is moving. AS 12.63.030. Any property used to “aid a violation” of the Amended Act may be forfeited. AS 11.61.129.

24. Plaintiffs (including the members of the named plaintiffs and others on whose behalf they bring this action, hereinafter collectively “Plaintiffs”) include a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. Plaintiffs post and discuss content including visual and verbal depictions of nudity and sexual conduct, visual art and images, resources on AIDS prevention, and books and resources for sex education for all youth, including gay and lesbian youth.

25. Plaintiffs also include a broad range of individuals and entities who sell and buy books, magazines, other printed material, as well as DVDs and other forms of audio-visual content within the State of Alaska. This material includes visual and verbal depictions of nudity and sexual conduct, visual art and images, resources on AIDS prevention, and books and resources for sex education for all youth, including gay and lesbian youth, which are constitutionally protected as to adults but may be deemed by some to be “harmful to minors.”

26. The portions of the Amended Act that on their face regulate Internet activity violate the Commerce Clause of the United States Constitution because they regulate commerce occurring wholly outside of the State of Alaska; because they impose an impermissible burden on interstate and foreign commerce; and because they subject interstate use of the Internet to inconsistent state regulations. An online user outside of Alaska cannot know whether someone



in Alaska might download his or her content posted on the Internet; consequently, the user must comply with Alaska law or face the threat of criminal prosecution.

27. The Amended Act violates the Due Process Clauses of the Fifth and Fourteenth Amendments because it is impermissibly vague and fails to provide a person of ordinary intelligence fair notice of what is prohibited. The term “minor” for the purposes of the Amended Act is defined as “a person under sixteen years of age.” “Harmful to minors” is defined as material that “the average individual, applying contemporary community standards, would find . . . taken as a whole, appeals to the prurient interest in sex” for minors, lacks “serious literary, artistic, educational, political, or scientific value” for minors, and “depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community . . . with respect to what is suitable” for minors. However, matter could have “serious literary, artistic, political or scientific value” for a fifteen-year-old that would not necessarily have the same value for an eleven-year-old. Plaintiffs would therefore be forced to guess at the bottom end of the range of ages to which the Amended Act applies and thus would not have fair notice of what conduct would subject them to criminal sanctions under the Amended Act.

28. Also impermissibly vague as applied to the Internet is the term “taken as a whole” in the above definition of “harmful to minors.” As described further below, the Internet is a vast collection of interconnected networks with links to each other. What is a “whole” in that context is unclear. Is it a single text work or group of pictures on a website? Is it a page of a website? Is it the entire website? Further, although some Plaintiffs in the current action may exert some control over the websites they themselves operate, they generally exert no control over other

websites that link to theirs. It is therefore unclear how the phrase “as a whole” would apply to websites operated by Plaintiffs.

29. An additional element of impermissible vagueness is the use of the word “depict.” While in its plain meaning and ordinary usage, “depict” includes verbal as well as visual renditions of conduct or people or objects, it appears from the legislative history that the Alaska Legislature believed that “depict” reach only visual depictions. This additional uncertainty forces Plaintiffs to guess about what is covered by the Amended Act on the most basic level.

30. Plaintiffs seek to have the Amended Act declared void and seek injunctive relief prohibiting enforcement of the Amended Act and the Prior Act.

#### **JURISDICTION AND VENUE**

31. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court’s jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 1983 and 1988, and Fed. R. Civ. Proc. 65.

32. Venue is proper in this district under 28 U.S.C. § 1391(b).

#### **THE PARTIES**

33. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION (“ABFFE”) was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE is incorporated in Delaware and has its principal place of business in New York City. Most of the

members of ABFFE are bookstores in the United States, including five in Alaska. Many of ABFFE's members engage in electronic communications, including maintaining websites to sell books, and emails to communicate with customers. The websites and material sold at member bookstores may include images of nudity or sexual conduct, especially when such images appear in the books offered for sale, which are constitutionally protected as to adults but may be deemed by some to be "harmful to minors." ABFFE sues on its own behalf, on behalf of its members (including its Alaska members, and its members outside of Alaska which sell books and other materials to consumers in Alaska, and which maintain websites accessible in Alaska), and on behalf of those members and their readers and customers.

34. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF ALASKA ("Alaska ACLU") is the Alaska affiliate of the American Civil Liberties Union, a nationwide, nonpartisan organization of over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution, including the Bill of Rights. The Alaska ACLU is incorporated in Alaska and has its principal place of business in Anchorage. Many (and likely all) members of the Alaska ACLU engage in electronic communications. Members of the Alaska ACLU distribute and receive communications, both by electronic means and in person, which are constitutionally protected as to adults but may be deemed by some to be "harmful to minors." The Alaska ACLU, which has over 19,000 members in Alaska, sues on its own behalf, on behalf of others who use its online computer communications systems, and on behalf of its members who use online computer communications systems. The Alaska ACLU maintains a website ([www.akclu.org](http://www.akclu.org)).

35. Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. (“AAP”) is the national association of the United States book publishing industry. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment. AAP’s approximately 300 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly associations. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary, and professional markets. In addition to publishing in print formats, AAP members are active in the ebook and audiobook markets and also produce computer programs, databases, websites, and a variety of multimedia works for use in online and other digital formats. AAP members also produce computer software and electronic products and services. In addition, AAP members have websites featuring their publications, which may include images of sexual conduct that appear in the publications. AAP is incorporated in New York, and has its principal places of business in New York City and in the District of Columbia. AAP sues on its own behalf and on behalf of its members.

36. Plaintiff COMIC BOOK LEGAL DEFENSE FUND (“CBLDF”) is a non-profit corporation dedicated to defending the First Amendment rights of the comic book industry. CBLDF represents over 1,000 comic books authors, artists, retailers, distributors, publishers, librarians, and readers located in Alaska, throughout the country and the world. CBLDF sues on its own behalf, on behalf of its members, and on behalf of the readers of their material.

37. Plaintiff ENTERTAINMENT MERCHANTS ASSOCIATION (“EMA”) is the not-for-profit international trade association dedicated to advancing the interests of the \$34

billion home entertainment industry. EMA-member companies operate approximately 35,000 retail outlets in the U.S. and 45,000 around the world, including 22 in Alaska, that sell and/or rent motion pictures on DVDs and Blu-ray discs, computer and console video games, and electronically distribute digital versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry. Many EMA members operate Internet assets that stream or download movies and/or video games, and preview the content and packaging of video games and movies available for purchase or rental online and at their physical stores. Some depictions available online may include sexual conduct which, although constitutionally protected as to adults, may be deemed by some to be “harmful to minors.” EMA is incorporated in Delaware and headquartered in Encino, California. EMA sues on its own behalf and on behalf of its members that use online communications systems, its members that have establishments or outlets in Alaska, and their customers.

38. Plaintiff FREEDOM TO READ FOUNDATION, INC. (“FTRF”) is a non-profit membership organization established in 1969 by the America Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire and to set legal precedent for the freedom to read on behalf of all citizens. FTRF is incorporated in Illinois and has its principal place of business in Chicago. Its members include libraries and librarians, including 12

in Alaska, most (if not all) of whom engage in electronic communications. FTRF sues on its own behalf, on behalf of its members and on behalf of the librarians, employees and users of its member libraries.

39. Plaintiff DAVID & MELISSA LLC, d/b/a Fireside Books (“Fireside Books”) operates a bookstore in Palmer, Alaska. It carries a broad range of new and used books and recordings. Fireside Books also operates a website ([www.goodbooksbadcoffee.com](http://www.goodbooksbadcoffee.com)) on which visitors may obtain information, both written and pictorial, about Fireside Books and the books and recordings that it has available. Some of the books and recordings carried by the store and described and discussed on the website relate to sexual themes and topics and are constitutionally protected as to adults but may be deemed by some to be “harmful to minors.” Fireside Books is an Alaska LLC; its principal place of business is in Palmer. Fireside Books sues on its own behalf and on behalf of its employees, customers and the users of its website.

40. Plaintiff BOOK BLIZZARD LLC, d/b/a Title Wave Books (“Title Wave Books”) operates a bookstore in Anchorage, Alaska. It carries a broad range of new and used books and recordings. Title Wave Books also operates a website ([www.wavebooks.com](http://www.wavebooks.com)) on which visitors have been able to and soon again may obtain information, both written and pictorial, about Title Wave Books and the books and recordings that it has available. Some of the books and recordings carried by the store and described and discussed on the website relate to sexual themes and topics and are constitutionally protected as to adults but may be deemed by some to be “harmful to minors.” Title Wave Books is an Alaska LLC; and its principal place of business is in Anchorage. Title Wave Books sues on its own behalf and on behalf of its employees, customers and the users of its website.

41. Plaintiff BOSCO'S, INC. ("Bosco's") operates two bookstores in Anchorage, Alaska. These stores carry a broad range of comics, graphic novels, manga, sports and nonsports cards and other goods. Bosco's also operates a website ([www.boscocom.com](http://www.boscocom.com)) on which visitors may obtain information, both written and pictorial, about Bosco's and the material it has available, and an eBay store at which material is for sale. Some of the material in the stores and some links from [www.boscocom.com](http://www.boscocom.com) described on the website may relate to sexual themes and topics, and are constitutionally protected as to adults but may be deemed by some to be "harmful to minors." Bosco's is an Alaska corporation, with its principal place of business in Anchorage, Alaska. Bosco's sues on its own behalf and on behalf of its employees, customers and the users of its website.

42. Plaintiff DONALD R. DOUGLAS, d/b/a Don Douglas Photography ("Douglas") is a photographer with a full-service photographic studio located in Juneau, Alaska, specializing in custom portraiture, wedding, commercial and fine art photography. He offers his services and shows examples of his photography on and through his website ([www.dondouglasphotography.com](http://www.dondouglasphotography.com)). Some of the photographs on his website show unclothed women, which photographs are constitutionally protected as to adults but may be deemed by some to be "harmful to minors." Douglas sues on his own behalf and on behalf of his customers and the users of his website.

43. Plaintiff ALASKA LIBRARY ASSOCIATION ("AKLA") is a professional association for individuals who work in libraries throughout Alaska. AKLA has more than 400 members, including both individuals and institutions. Members include university and school libraries, public libraries, special libraries, government and court libraries, commercial vendors

of books and other library media, electronic resources, equipment, services and supplies, and the employees of these institutions. Many of the libraries who are members of AKLA or at which members work carry materials with depictions which, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Amended Act. Many of the libraries maintain websites. AKLA sues on behalf of its members, and on behalf of the librarians, employees and users of its member libraries and their websites.

44. Defendant DANIEL S. SULLIVAN is the Attorney General of the State of Alaska and is sued in his official capacity as such. He is the chief law enforcement officer of the State of Alaska and has the responsibility for prosecution of violations of state criminal law. AS 44.23.020(b)(4).

## FACTS

### I. The Internet Generally

45. The Internet is a decentralized, global medium of communication that links people, institutions, corporations and governments around the world. It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers. While estimates are difficult due to its constant and rapid growth, the Internet connects billions of users. It is estimated that there are 1.73 billion Internet users worldwide (September 2009). There are Internet users in virtually all (if not all) of the approximately 195 countries in the world. In many countries, including the United States, Japan, South Korea, Finland, and the Netherlands, more than three-fourths of the population uses the Internet. There are over 250 million Internet users in North America.



46. Because the Internet merely links together numerous individual computers and computer networks, no single entity or group of entities controls the material made available on the Internet or limits the ability of others to access such materials. Rather, the range of digital information available to Internet users—which includes text, images, sound and video—is individually created, maintained, controlled and located on millions of separate individual computers around the world.

47. The Internet presents extremely low entry barriers to anyone who wishes to provide or distribute information or gain access to it. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides the average citizen with an affordable means for communicating with, accessing and posting content to a worldwide audience.

## **II. How People Access the Internet**

48. Individuals have several easy means of gaining access to computer communications systems in general, and to the Internet in particular. Many educational institutions, businesses, and local communities maintain a computer network linked directly to the Internet and enable users to easily gain access to the network.

49. Many libraries provide their patrons with free access to the Internet through computers located at the library. Some libraries also host online discussion groups and chat rooms. Many libraries also post their card catalogs and online versions of material from their collections.

50. Individuals may connect to the Internet anonymously and without charge at many hotels, coffee shops and fast food restaurants. Some cities run municipal wireless Internet

services that allow individuals similar free and anonymous connectivity throughout large metropolitan areas.

51. Internet Service Providers (“ISPs”) allow subscribers access to the Internet by using a modem and a personal computer or other device to access computer networks that are linked directly to the Internet.

### **III. Ways of Exchanging Information on the Internet**

52. Most Internet users select user names, email addresses, or both that allow them to connect to the Internet and to communicate with other users. Many user names are pseudonyms or pen names that often provide users with a distinct online identity and help to preserve their anonymity and privacy. The user name and email address are the only indicators of the user’s identity; that is, persons communicating with the user will only know them by their user name and email address (unless the user chooses to reveal other personal information).

53. Once an individual connects to the Internet, there are a wide variety of methods for communicating and exchanging information with other users.

54. The simplest and perhaps most widely used method of communication on the Internet is via electronic mail, commonly referred to as “email.” Using one of dozens of available “mailers”—software capable of reading and writing an email—a user is able to address and transmit via computer a message to a specific individual or group of individuals who have email addresses.

55. Mail exploders, often called “listservs” (online discussion groups) are another of the most popular forms of electronic communication. Users also can communicate within a group by subscribing to automated electronic mailing lists that allow any subscriber to a mailing

list to post a particular message that is then automatically distributed to all of the other subscribers on that list. Listservs cover virtually every topic imaginable. Listservs can be formed by individuals, institutions, organizations or businesses, or by particular computer networks.

56. “Chat rooms” also allow users to engage in simultaneous conversations with another user or group of users by typing messages and reading the messages typed by others participating in the “chat.” Chat rooms are available on the Internet and on commercial online services. Although chat rooms are often set up by particular organizations or networks, any individual user can start an online “chat.”

57. Online discussion groups, listservs, mailing lists, and chat rooms create an entirely new global public forum—a cyberspace village green—where people can associate and communicate with others who have common interests, and engage in discussion or debate on every imaginable topic.

#### **IV. The World Wide Web**

58. The World Wide Web (the “Web”) is the most popular way to provide and retrieve information on the Internet. The Web comprises more than 230 million separate “websites” that display content provided by particular persons or organizations. The growth is outstanding; there were about 47 million websites added in 2009.

59. Most website addresses, including websites that end in .com, .org, and .edu, which are the most common “top-level” domain names, do not indicate the location of the website or the location of the entity which operates the website. For example, both the website of Amazon, www.amazon.com, based in the United States, and the website of the bookstore

Waterstones, [www.waterstones.com](http://www.waterstones.com), based in the United Kingdom, end in [.com](http://.com). Some websites use country code top-level domains (e.g., [.cn](http://.cn), [.uk](http://.uk), [.us](http://.us), etc.) which may indicate the country in which the entity maintaining the website is located. For example, the British Library's website is [www.bl.uk](http://www.bl.uk).

60. It is thus difficult to determine where the entities that maintain most websites are located.

61. It is estimated that at least 40%, and likely substantially more, of the websites in the world are maintained outside of the United States.

62. Any Internet user anywhere in the world can read text, look at images and video, and listen to sounds on Web pages posted by other, and, with relatively easy-to-use software, can create her own Web page.

63. The Web serves in part as a global, online repository of knowledge, containing information from a diverse array of sources, which is easily accessible to Internet users around the world. Though information on the Web is contained on individual computers, each of these computers is connected to the Internet through Web protocols that allow the information on the Web to become part of a single body of knowledge accessible by all Web users.

64. Many large corporations, banks, brokerage houses, newspapers and magazines now provide online editions of their publications and reports on the Web or operate independent websites. Many government agencies and courts also use the Web to disseminate information to the public. In addition, many individual users and small community organizations have established individualized home pages on the Web that provide information of interest to members of the particular organization, communities, and other individuals.

65. To gain access to the information available on the Web, a person generally uses a Web “browser”—software such as Internet Explorer, Firefox or Safari—to display, bookmark, save, print and download content that is formatted in the standard Web formatting language. Each document on the Web has an address that allows users to find and retrieve it.

66. Most Web documents also contain “links.” These are short sections of text or image that refer and link to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user on her computer screen, the referenced document is automatically displayed, wherever in the world it actually is stored. Links, for example, are used to lead from overview documents to more detailed documents on the same website, from tables of contents to particular pages, and from text to cross-references, footnotes, and other forms of information. For example, the National ACLU’s Web page provides links to several other Web pages also offered by the ACLU, including issue pages such as “Immigrants’ Rights,” as well as advocacy pages such as those linked to “ACLU Updates.”

67. Links may also take the user from the original website to another website on a different server connected to the Internet, a server that may be located in a different area of the country, or even the world. For example, the National ACLU has a Web page about its Reproductive Freedom Project, which also includes links to similar resources elsewhere on the Web, including the Web pages of Planned Parenthood and the National Organization of Women. While linking to these websites from the ACLU website appears seamless from the user’s point of view, in fact these websites are each located on entirely separate computers that are not maintained or controlled by the ACLU.

68. Through the use of these links, the Web unifies access to the diverse and voluminous information made available by millions of users on the Internet into a single body of knowledge that can be searched and accessed.

69. A number of “search engines” and directories—such as Google, Yahoo, and Bing—are available free of charge to help users navigate the World Wide Web. Once a user has accessed the search service, he or she simply types a word or string of words as a search request and the search engine provides a list of sites that match the search string.

70. As can be seen from the various ways that people can exchange information and communicate via this new technology, the Internet is “interactive” in ways that distinguish it from traditional communication media. For instance, users are not passive receivers of information as with television and radio; rather, a user can easily respond to the material he or she receives or views online. In addition, “interactivity” means that Internet users must actively seek out with specificity the information they wish to retrieve and the kinds of communications in which they wish to engage. For example, a user wishing to read news articles on a topic must connect to the Internet and then, using a search engine, define a search, review the relevant header lines—which provide brief content descriptions—for each message, and then access a particular message to read its content. Similarly, to gain access to material on the World Wide Web, a user must know and type the address of a relevant site or find the site by typing a relevant search string in one of several available search engines or by activating a website link.

**V. The Range of Content Available on the Internet**

71. The information made available on the Internet is as diverse as human thought. Content on the Internet is provided by the millions of Internet users worldwide, and the content

ranges from academic writings, to humor, to art, to literature, to medical information, to music, to news, to movie clips, and to human sexuality. For example, on the Internet one can view the full text of the Bible, all of the works of Shakespeare, and numerous other classic or current works of literature. One can browse through paintings from museums around the world, view in detail images of the ceiling of the Sistine Chapel, or hear selections from the latest hip hop music albums. At any one time, the Internet serves as the communication medium for literally hundreds of thousands of global conversations, political debates, and social dialogues.

72. Although the overwhelming majority of the information on the Internet does not involve nudity or sexual activity, such material is available on the Internet. For example, an Internet user can read online John Cleland's eighteenth-century novel, *Fanny Hill: Memoirs of a Woman of Pleasure*, and view the 1766 illustrations; receive visual instructions on how to practice safer sex; participate in a question and answer forum on methods for enhancing sexual experiences; and exchange links to a popular new hip hop music video. Much of this material is similar, if not identical, to material that is routinely discussed in cafes and on street corners, and that is distributed through libraries, bookstores, record stores, and newsstands.

## **VI. The Statutory Language at Issue**

73. On May 14, 2010, Governor Sean Parnell signed into law SB 222, which, among other things, amended AS 11.61.128 to expand and amplify the prohibitions applicable to dissemination of indecent material to minors. The Amended Act is constitutionally unsound.

74. SB 222 amends the Prior Act so that AS 11.61.128 as amended reads as follows:

- (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:

- (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;
- (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.

75. A new definition of "harmful to minors" was added which states that, as used in this section, harmful to minors means:

- (a) 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;
- (b) 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
- (c) 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.

76. AS 11.81.610(b) defines the level of scienter required unless otherwise set out in a specific statute. It provides:

Except as provided in AS 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

- (1) conduct is "knowingly"; and
- (2) a circumstance or a result is "recklessly."



77. “Knowingly” is defined in AS 11.81.900(a)(2) as

a person acts “knowingly” with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

78. “Recklessly” is defined in AS 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.

79. A violation of the Amended Act is a Class C felony, punishable by a term of imprisonment of up to two years for a defendant with no prior felony convictions, from two to four years for a defendant with one prior felony conviction, and from three to five years for a defendant with two prior felony convictions. AS 12.55.125. If, at the time of the offense, the defendant was required to register as a sex offender or a child kidnapper, violation of the Amended Act is a Class B felony, subject to longer terms of imprisonment. As set out above, conviction under the Amended Act may result in forfeiture of a website or bookstore and requires the violator to register for 15 years as a sex offender.

80. When the Amended Act is held unconstitutional, the Prior Act should not be restored because it, too, is unconstitutional as set forth herein.

**VII. The Amended Act's Impact on Internet Speech**

81. Because of the nature of the Internet, the Amended Act bans certain constitutionally protected speech among adults.

82. The United States Congress and the states of Arizona, Michigan, New Mexico, South Carolina, Vermont and Virginia previously enacted laws that, like the Amended Act, applied the harmful to minors test to Internet speech. All of them were either held unconstitutional or enjoined on First Amendment grounds. Ohio and Utah also passed such laws. The Ohio statute has been narrowed by the courts to constitutional dimensions. The Utah statute is being challenged in federal court and has been preliminarily enjoined.

83. Speech on the Internet is generally available to anyone with access to this technology. Anyone who posts content to the Web, chat rooms, listserves, mailing lists, and discussion groups makes it automatically available to all users worldwide, including minors. Because minors have access to all of these forums, any "harmful to minors" communication in these forums could be punishable under the Amended Act. Knowledge that the recipient is a minor is not required under the Amended Act, and actual knowledge of the "character and content" of the material is not an element of the crime. Due to the very nature of the Internet, virtually every communication on the Internet may potentially be received by a minor and therefore may potentially be the basis for prosecution.

84. Because many of the terms in the Amended Act are vague and overbroad, the Amended Act further chills the speech of content providers on the Web. For example, the Amended Act fails to distinguish between material that is "harmful" for older as opposed to younger minors. Matter that would have "serious literary, artistic, political or scientific value"

for a fifteen-year-old would not necessarily have the same value for an eleven-year-old.

Consequently, providers of content would be forced to guess at the bottom of the age range defined by the Amended Act as to what constitutes material that lacks such value.

85. The Amended Act also fails to define the term “as a whole” in the definition of matter that is “harmful to minors,” a phrase whose meaning is particularly ambiguous when applied to the Internet.

86. Most of the millions of users on the Internet are speakers and content providers subject to the Amended Act. Anyone who sends an email, participates in a discussion group or chat room, or maintains a home page on the Web potentially is subject to the Amended Act because his or her communication might be accessed by a minor in the State of Alaska. Given the technology of the Internet, there are no reasonable means for these speakers to ascertain the age of persons who access their messages, or for restricting or preventing access by minors to certain content. From the perspective of these speakers, the information that they make available on the public spaces of the Internet either must be made available to all users of the Internet, including users who may be minors, or it will not be made available at all.

87. Users who communicate on mailing lists have no way to determine the ages of other subscribers to the list. Content providers on the Web have no reasonable way to verify the age of persons who access their websites. For these reasons, there is no practical way for content providers to withhold material that may be “harmful to minors”—as prohibited by the Amended Act—from people younger than 16 years old.

88. Moreover, the Amended Act is overbroad because it allows prosecution even if the sender had no knowledge or reason to know of the recipient’s age.

89. Because Internet speakers have no means to restrict minors in Alaska from accessing their communications, the Amended Act effectively requires almost all discourse on the Internet—whether among citizens of Alaska or among users anywhere in the world—to be at a level suitable for young children. The Amended Act therefore bans an entire category of constitutionally protected speech between and among adults on the Internet.

90. In addition, any person who disagrees with or objects to sexual content on the Internet could cause a speaker to be prosecuted under the Amended Act by having a minor view the online speech, resulting in a “heckler’s veto” of Internet speech. Further, any person who disagrees with sexual content on the Internet could cause a speaker to fear prosecution under the Amended Act by claiming to be a minor, whether or not the person actually is so.

91. The Acts also prohibit older minors from communicating and accessing protected speech. Even if some depictions or discussions of nudity and sexual conduct may be considered by some to be inappropriate or “harmful” for younger minors, many depictions and discussions—including safer sex resources—are valuable, at least for older minors.

92. Even if there were means by which speakers on the Internet could ascertain or verify the age of persons who receive their content (and there are no such means), requiring users to identify themselves and to disclose personal information in order to allow verification of age would prevent Internet users from maintaining their privacy and anonymity on the Internet.

### **VIII. The Amended Act’s Burden on Interstate Commerce**

93. The Amended Act impacts the speech of online speakers across the nation—not just in the State of Alaska—because it is practically and economically unfeasible for most Internet users to determine the geographic location of persons who access their information.

Internet users elsewhere have no practical way to determine whether information posted to the Web, discussion groups, listservs, or chat rooms will be accessed by persons residing in Alaska. The various sites on the Internet can be accessed by anyone in the world; therefore, there is no feasible way for speakers to ensure that residents of Alaska will not receive their communications. Thus, all users, even if they do not reside in Alaska or intend to communicate with residents of Alaska, must comply with the Amended Act.

94. The Amended Act unjustifiably burdens interstate commerce and regulates conduct that occurs wholly outside the State of Alaska. The Amended Act chills speakers outside of Alaska and curtails speech that occurs wholly outside the borders of Alaska, thereby causing irreparable harm. Like the nation's railways and highways, the Internet is by its nature an instrument of interstate commerce. Just as goods and services travel over state borders by train and truck, information flows across state (and national) borders on the Internet. Internet content providers that are located outside of Alaska, such as the National ACLU and Sexual Intelligence, as well as people participating in chat rooms, newsgroups, or listservs, have no feasible way to determine whether their information will be accessed or downloaded by someone who is located in Alaska. Just as a user of the Internet cannot identify the age of another user of the Internet, one also cannot identify where a particular user or speaker resides, or from where a particular user may be accessing or downloading information on the Internet. Due to the nature of the technology, a non-Alaska resident, even if he or she has no desire to reach anyone in Alaska, will be forced to self-censor his or her speech on the Internet in order to comply with the Acts and avoid the possibility that a minor from Alaska will gain access to this information,

thereby subjecting the speaker to prosecution in Alaska. Therefore, the Amended Act interferes significantly with the interstate flow of information and with interstate commerce.

95. Moreover, interstate and international computer communications networks—like the nation’s railroads—constitute an area of the economy and society that particularly demands uniform rules and regulations. The states of Arizona, Michigan, New Mexico, New York, South Carolina, Vermont and Virginia previously enacted laws similar to the Amended Act, which were enjoined on Commerce Clause grounds because of the inconsistent obligations imposed on online speakers across the country.

96. If each state implements its own regulations, as Alaska has done, regarding what information can be legally distributed via this new technology, interstate commerce will be greatly inhibited and disrupted as persons around the world try to discern what can and cannot be communicated in the many different jurisdictions connected to the Internet.

**IX. The Ineffectiveness of the Amended Act and the Effectiveness of Alternative Means**

97. Because of the global nature of the Internet, defendants cannot demonstrate that the Amended Act is likely to reduce the availability in Alaska of material that may be “harmful to minors” on the Internet.

98. It is estimated that at least 40%—and probably much more—of the content provided on the Internet originates abroad. Content is available to users worldwide and may be accessed as easily and as cheaply as content that originates locally. Because it is not technologically possible to prevent content posted abroad from being available to Internet users in Alaska, the Amended Act will not accomplish its purported purpose of keeping inappropriate content from minors in Alaska.

99. Conversely, there are many alternative means that are more effective at assisting parents in limiting a minor's access to certain material if desired.

100. Many computers—straight out of the box—include a “parental controls” feature. Almost all browsers also have parental control options, and they are built into most operating systems as well. If a computer does not already have such a feature, it is easy to download one, for free, from many online services, such as AOL. These features enable parents to block access to sexually explicit materials on the Web, to prevent minors from giving personal information to strangers by email or in chat rooms, and to maintain a log of all online activity on a home computer. Parents can also use screening software that blocks messages containing certain words, as well as tracking and monitoring software. Perhaps most effectively, a parent can restrict and observe a child's use of the Internet by placing a computer in a family room.

101. User-based blocking programs are not perfect, both because they fail to screen all inappropriate material and because they inadvertently block valuable Internet sites. However, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive, and more effective, alternative than the Amended Act's imposition of criminal penalties for protected speech upon the universe of Internet users.

**X. The Amended Act's Impact on the Plaintiffs**

102. Plaintiffs interact with and use the Internet in a wide variety of ways, including as content providers, access providers, and users. The Amended Act burdens Plaintiffs in all of these capacities. Plaintiffs who are users and content providers are subject to the Amended Act. These plaintiffs fear prosecution under the Amended Act for communicating, sending, displaying, or distributing material that might be deemed by some to be “harmful to minors.”

They also fear liability for material posted by others to their online discussion groups, chat rooms, mailing lists, and websites. Plaintiffs have no way to avoid prosecution under the Amended Act and are left with two equally untenable alternatives: (a) risk prosecution under the Amended Act, or (b) attempt to engage in self-censorship and thereby deny adults and older minors access to constitutionally protected material.

**A. American Booksellers Foundation for Free Expression**

103. Plaintiff ABFFE has hundreds of bookseller members who are located from coast-to-coast, as well as in Alaska, many of whom sell materials that contain nudity and deal frankly with the subject of human sexuality. ABFFE's members are not "adult bookstores." Many member bookstores use the Internet and electronic communications to obtain information and excerpts of books from publishers. For example, member booksellers may feature current popular books that include images depicting nudity and sexual conduct. Some member bookstores also have their own Web pages that discuss the contents of books sold in stores.

104. ABFFE members' right to learn about, acquire, and distribute material containing nudity and sexual conduct, and their patrons' right to purchase such materials, will be seriously infringed by the Amended Act if it is not enjoined because ABFFE members and the publishers with whom they transact business will be forced to self-censor or risk prosecution under the Amended Act.

**B. American Civil Liberties Union of Alaska**

105. In addition to their legal advocacy to uphold the Bill of Rights, plaintiff ACLU of Alaska and the National ACLU have long devoted considerable resources to public education about civil liberties. Since 1993, the ACLU's public education efforts have included extensive



online resources that offer electronic copies of ACLU publications, reports, court briefs, news releases, and other material related to the ACLU's legal, legislative, educational and advocacy work.

106. The ACLU of Alaska maintains its extensive online resources on the Internet's World Wide Web. The ACLU of Alaska's website, in addition to offering its own resources, provides links to the National ACLU's website. Some of the ACLU of Alaska and the National ACLU's online resources contain sexual subject matter or nudity. Examples include copies of ACLU court briefs in cases involving arts censorship, obscenity, and discrimination against gays and lesbians.

107. The ACLU of Alaska also hosts online discussions that allow citizens to discuss and debate a variety of civil liberties issues. These services allow online users to express their uncensored views on civil liberties issues and to interact with ACLU staff or featured speakers. Many of the communications in the ACLU's discussion groups have included and will continue to include sexual content, such as a discussion of teen pregnancy and teen parenthood, a discussion of sexual privacy and state laws on criminal sodomy, and a discussion of the defense of pornography, and other erotic expression under the First Amendment.

108. The ACLU does not moderate its computer communications systems for content (other than to preclude certain commercial purposes, requests for legal assistance, or postings that could cause the ACLU of Alaska to incur legal liability) because such editing or censorship would be antithetical to the ACLU's belief in freedom of speech. Furthermore, the ACLU considers minors to be an important audience for its online resources. The ability of minors to participate in chat rooms or discussion groups with other minors and with adults is a vital part of

their education. It is particularly important that minors be able to access information about their rights and to learn about and debate controversial issues.

109. In addition to its own online resources, ACLU staff and members use other online services such as email, outside discussion groups, and online mailing lists as an important low-cost method of communicating and sharing documents and information with each other and with those outside of the ACLU. Some of this material also discusses nudity or sexual conduct, such as descriptions of the human body or human reproduction.

110. If the Amended Act is not enjoined, ACLU of Alaska and the National ACLU will be compelled either to refrain from offering constitutionally protected civil liberties materials and from sponsoring constitutionally protected political debates, or to face potential criminal prosecution.

**C. Association of American Publishers, Inc.**

111. Plaintiff AAP sues on behalf of its member publishers who are content providers and users of the Internet. Both the portions of their businesses that are based on print publishing as well as their active involvement in the Internet would be negatively affected by this law. AAP's members print millions of books every year, and create electronic products to accompany and supplement their print publications; create custom educational material on the Internet; communicate with authors and others, receive manuscripts, and edit, typeset, and design books electronically; transmit finished products to licensed end-user customers; communicate with bookstores and other wholesale and retail accounts; and promote authors and titles online.

112. Many of AAP's members have Web pages and provide information to the world on the Internet. Some of the content provided by AAP members contains visual depictions of

nudity or sexual conduct. Many of the efforts to ban books in various communities have been directed at books published by AAP members, and AAP fears that the Amended Act will encourage similar efforts directed at online publishing by AAP members. If the Amended Act is not enjoined, AAP members will be forced either to risk criminal liability or to stop providing online access to constitutionally protected books and other related materials.

**D. The Comic Book Legal Defense Fund**

113. Plaintiff CBLDF is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world, including in Alaska.

114. Some of the comic books created, published, distributed, and offered for sale by CBLDF's members, which include manga (a form of comic book which originated in Japan, but is now widely distributed in other parts of the world, including the United States, in which the drawings sometimes include sexually-explicit images), though constitutionally protected, could be deemed to be harmful to minors and therefore subject to the Amended Act. The First Amendment rights of CBLDF and its members will be adversely affected unless the Amended Act is enjoined.

**E. Entertainment Merchants Association**

115. Plaintiff EMA sues on behalf of its members, which operate approximately 35,000 retail outlets in the U.S., including 22 in Alaska, selling and/or renting DVDs and Blu-ray

discs, computer and console video games, and electronically distribute digital versions of these products.

116. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry.

117. Material shown on members' websites, or sold and rented at their retail outlets include images of nudity or sexual conduct that are constitutionally protected as to adults but may be deemed by some to be "harmful to minors."

118. If the Amended Act is not enjoined, EMA members will be forced either to risk criminal liability or stop providing access, online and at their retail outlets, to constitutionally protected materials.

**F. Freedom to Read Foundation, Inc.**

119. Plaintiff FTRF and its library and librarian members, both public and private, serve as both access and content providers on the Internet. Because the Internet offers their patrons a unique opportunity to access information for free, many libraries provide their patrons with facilities that patrons can use to access the Internet. Many libraries also have their own websites and use the Internet to post card catalogues, to post information about current events, to sponsor chat rooms, to provide textual information or art, or to post online versions of materials from their library collections. Patrons can, for example, access the websites of certain libraries from anywhere in the country to peruse the libraries' card catalogues, review an encyclopedia reference, or check a definition in the dictionary.

120. Some of the materials provided or made available by libraries contain nudity or sexual content. For example, FTRF member libraries' online card catalogues include such works as *Joy of Sex* by Alex Comfort, *Changing Bodies, Changing Lives* by Ruth Bell, *Our Bodies, Ourselves* by the Boston Women's Health Collective, *It's Perfectly Normal* by Robie Harris, and books of photographs by renowned photographers featuring nudity or sexual conduct.

121. If the Amended Act is not enjoined, libraries will be inhibited from both posting and providing access to materials on the Internet that contain visual depictions of nudity or sexual conduct. Adult library patrons and Internet users would thus be deprived of access to these constitutionally protected library materials. Given the global and unrestricted nature of the Internet and the past attempts by persons to bar literature and reference items from library collections, many of FTRF's members may choose not to post a substantial amount of expressive material at all—material that many adults might consider useful for themselves or their own children—rather than risk prosecution for posting material that might be illegal in Alaska.

**G. Title Wave Books**

122. Plaintiff Title Wave Books, in addition to operating two “bricks and mortar” bookstores in Anchorage, Alaska, operates a website ([www.wavebooks.com](http://www.wavebooks.com)) which had highlighted and will soon again highlight the variety of First Amendment-protected products that it stocks. Title Wave Books stocks a wide variety of books. It stocks over 250,000 titles in its store. Over the past seven years it has had 1,474,535 different titles in its inventory.

123. The titles that Title Wave Books carries include both fiction and non-fiction works about sexual relationships, many of which include depictions. The website has and will soon again announce and describe recent books and other materials of interest. Were the

Amended Act to be enforced, Title Wave Books would be “chilled” in determining what materials would be featured and described, and how they would be featured and described on the Internet, as well as what books and materials it would stock in its stores.

124. Plaintiff Title Wave Books fears prosecution under the Act because it stocks, and its website will on occasion contain, material containing images that may be deemed by some to be “harmful to minors.” In addition, since the Act does not require knowledge of the character and content of the material or that the recipient is under 16, Title Wave Books fears prosecution for the unknowing distribution to a person whom it may not know is under 16 of material that may be deemed depictions which are harmful to minors.

**H. Fireside Books**

125. Plaintiff Fireside Books, in addition to operating a “bricks and mortar” bookstore in Palmer, Alaska, operates a website ([www.goodbooksbadcoffee.com](http://www.goodbooksbadcoffee.com)) highlighting the variety of First Amendment-protected products that it stocks. Fireside Books stocks a wide variety of books. It stocks over 10,000 titles in its store; its website currently offers a numbers of titles, including books, videos, magazines, books on tape, music and calendars.

126. The titles that Fireside Books carries include both fiction and non-fiction works about sexual relationships, many of which include visual depictions. The website announces and describes recent books and other materials of interest. Were the Amended Act to be enforced, Fireside Books would be “chilled” in determining what materials would be featured and described, and how they would be featured and described on the Internet, as well as what books and materials it would stock in its store.

127. Plaintiff Fireside Books fears prosecution under the Act because it stocks, and its website on occasion contains, material that may be deemed by some to be “harmful to minors.” In addition, since the Amended Act does not require knowledge of the character and content of the material or that the recipient is under 16, Fireside Books fears prosecution for the unknowingly distribution to a person whom it may not know is under 16 of material that may be deemed depictions which are harmful to minors.

**I. Bosco’s**

128. Plaintiff Bosco’s in addition to operating two “bricks and mortar” bookstores in Anchorage, Alaska, operates a website ([www.boscocos.com](http://www.boscocos.com)) highlighting the variety of First Amendment-protected products that it stocks. It stocks over 6,000 graphic novels and manga titles and more than 100,000 comic books in its stores.

129. The titles that Bosco’s carries include both fiction and non-fiction works with depictions which, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Act. The website announces and describes recent books and other materials of interest. Recently the website featured the winning entries in a manga/anime art contest.

130. Were the Amended Act to be enforced, Bosco’s would be “chilled” in determining what materials would be featured and described, and how they would be featured and described, and what material it would stock in its stores.

131. Plaintiff Bosco’s fears prosecution under the Amended Act because it stocks, and its website on occasion contains, material that may be deemed by some to be “harmful to minors.” In addition, since the Act does not require knowledge of the character and content of

the material or that the recipient is under 16, Bosco's fears prosecution for the unknowing distribution to a person whom it may not know is under 16 of material that may be deemed depictions which are harmful to minors.

**J. Don Douglas Photography**

132. Plaintiff Douglas is a professional photographer who has a full service photographic studio located in Juneau, Alaska, specializing in custom portraiture, wedding, commercial and fine art photography. Douglas posts examples of his photography on and through his website ([www.dondouglasphotography.com](http://www.dondouglasphotography.com)).

133. Among his offerings to clients of "personal portraiture," Douglas offers "maternity portraiture" photographs. As described on his website, these portraits are "a means of artistically capturing either a tender and intimate moment in your relationship with the new person to whom you have given birth, or the maternal, feminine beauty of a woman shortly before birthing." The maternity portraits are "generally made as nude or semi-nude expressions, celebrating a shortly expectant woman's round, maternal beauty." Images of such portraits may be accessed through a link on his website. Some may deem such photographs to be "harmful to minors."

134. Were the Amended Act to be enforced, Douglas would be "chilled" in determining what materials would be featured, and how they would be featured.

**K. Alaska Library Association**

135. Plaintiff AKLA is a professional association for individuals who work in libraries throughout Alaska. AKLA has more than 400 members who are both individuals and institutions. Members include university and school libraries, public libraries, special libraries,



government and court libraries, commercial vendors of books and other library media, electronic resources, equipment, services and supplies, and the employees of these institutions. Many of the libraries who are members of AKLA or at which members work carry materials with depictions which, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Act.

136. The members of plaintiff Alaska Library Association offer to their borrowers thousands of books, both in print and ebook form, as well as DVDs, receiving new material on a regular basis. There is no practical way for them to read or review each title completely. Since there is no requirement in the Amended Act that the seller know the character and content of the material that the library is lending, nor that they know that the recipient is under 16, they are at risk of prosecution for unknowingly distributing material which may be deemed to be harmful to minors to persons they don't know to be under 16, a risk that will likely chill their desire to lend or purchase protected materials. The chill is heightened by the fact that ordinary library staff are liable under the Amended Act.

## CAUSES OF ACTION

### COUNT I

#### **Violation of Adults' Rights Under the First and Fourteenth Amendments of the United States Constitution**

137. Plaintiffs repeat and re-allege paragraphs 1–136 as if set forth entirely herein.

138. The Amended Act violates the rights of Plaintiffs, their members, and their users under the First and Fourteenth Amendments of the United States Constitution on its face and as applied because it effectively bans constitutionally protected speech by and between adults.

139. The Amended Act violates the rights of Plaintiffs, their members, and their users under the First and Fourteenth Amendments to the United States Constitution because it is not the least restrictive means of accomplishing any compelling governmental purpose.

140. The Amended Act violates the rights of Plaintiffs, their members, and their users under First and Fourteenth Amendments to the United States Constitution because it is substantially overbroad.

## COUNT II

### **Violation of Minors' Rights Under the First and Fourteenth Amendments of the United States Constitution**

141. Plaintiffs repeat and re-allege paragraphs 1–136 as if set forth entirely herein.

142. The Amended Act violates the rights of Plaintiffs, their members, and their users under the First and Fourteenth Amendments to the United States Constitution because it interferes with the rights of minors to access and view material that to them is protected by the First Amendment.

143. The Amended Act is unconstitutional because it prohibits the dissemination to all minors of any material that is deemed “harmful to minors” of any age, despite the fact that some of the material has value for older minors.

144. The Amended Act violates rights of Plaintiffs, their members and their minor users under the First and Fourteenth Amendments because it is substantially overbroad.

## COUNT III

### **Violation of the Right to Communicate and Access Information Anonymously Under the First and Fourteenth Amendments of the United States Constitution**

145. Plaintiffs repeat and re-allege paragraphs 1–136 as if set forth entirely herein.

146. The Amended Act violates the rights of Plaintiffs, their members, and their users under the First and Fourteenth Amendments to the United States Constitution to communicate and access information anonymously, insofar as it effectively requires Internet users to identify themselves in order to gain access to constitutionally protected speech.

#### **COUNT IV**

##### **Violation of the Commerce Clause of the United States Constitution**

147. Plaintiffs repeat and re-allege paragraphs 1–136 as if set forth entirely herein.

148. The Amended Act violates the rights of Plaintiffs, their members, and their users under the Commerce Clause because it regulates communications that take place wholly outside of the State of Alaska.

149. The Amended Act violates the rights of Plaintiffs, their members, and their users under the Commerce Clause because it constitutes an unreasonable and undue burden on interstate and foreign commerce.

150. The Amended Act violates the rights of Plaintiffs, their members, and their users under the Commerce Clause because it subjects interstate use of the Internet to inconsistent regulations.

#### **COUNT V**

##### **Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution**

151. Plaintiffs repeat and re-allege paragraphs 1–136 as if set forth entirely herein.

152. The Amended Act violates the rights of Plaintiffs, their members, and their users under the Due Process Clauses of the Fifth and Fourteenth Amendments because it is

impermissibly vague and fails to provide a person of ordinary intelligence fair notice of what is prohibited.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that the Court:

- A. Declare that AS 11.61.128 violates the First, Fifth and Fourteenth Amendments and the Commerce Clause of the United States Constitution;
- B. Preliminarily and permanently enjoin defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from enforcing that provision or its predecessor provision;
- C. Award Plaintiffs their reasonable costs and fees pursuant to 42 U.S.C. § 1988; and
- D. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Dated: August 31, 2010

Respectfully submitted

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Certificate of Service

The undersigned certifies that he caused to be served a true and correct copy of the foregoing Complaint and attachments thereto (Exhibits A and B), by hand-delivery this 31<sup>st</sup> day of August, 2010, upon counsel for Defendant Daniel Sullivan, the State of Alaska, Department of Law, 1031 W. Fourth Ave., Suite 200, Anchorage, AK 99501

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D. John McKay

# EXHIBIT A

**TEXT OF AMENDED ACT**

**Sec. 11.61.128. Electronic 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:
    - (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;
  - (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) Except as provided in (d) of this section, distribution of indecent material to minors is a class C felony.
- (d) Distribution of indecent material to minors is a class B felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.
- (e) 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.

# EXHIBIT B

**TEXT OF ACT PRIOR TO AMENDMENT**

**Sec. 11.61.128. 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) 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) Except as provided in (d) of this section, electronic distribution of indecent material to minors is a class C felony.

(d) Electronic distribution of indecent material to minors is a class B felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction