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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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

DECLARATION OF DAVID HOROWITZ

DAVID HOROWITZ declares as follows:

1. I am the Executive Director of Media Coalition, Inc., a 501(c)(6) trade association based in New York, New York, dedicated to defending the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers and their consumers in the United States.

2. I have personal knowledge of the facts set forth in this Declaration, which I make in support of the application for an award of attorneys' fees by counsel for plaintiffs.

3. Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, and Freedom to Read Foundation are Media Coalition members.

4. Media Coalition members have been plaintiffs or filed *amicus curiae* briefs in support of plaintiffs in eight states where laws containing similar content-based restrictions on Internet communications have now been struck down or enjoined as unconstitutional. See American Booksellers Foundation for Free Expression v. Coakley, No. 10-11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010) (Massachusetts); PSINet, Inc. v. Chapman, 362 F. 3d 227 (4th Cir. 2004) (Virginia); American Booksellers Foundation for Free Expression v. Dean, 342 F. 3d 96 (2d Cir. 2003) (Vermont); Cyberspace Communications, Inc. v. Engler, 238 F. 3d 420 (6th Cir. 2000) (Michigan); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); ACLU v. Goddard, Civ. 00-0505 TUC AM (D. Ariz. Aug. 11, 2004); Southeast Booksellers Ass'n v. McMaster, 282 F. Supp. 2d 389 (D.S.C. 2003) (South Carolina); American Library Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York). In a ninth state (Ohio) a similar law 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 (6th Cir. 2010). No state statute similar in scope to the Amended Act has been found to be constitutional.

5. As Executive Director of Media Coalition, on behalf of Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, Freedom to Read Foundation, and other Media Coalition members I informed members of the Alaska legislature, including the House and Senate Judiciary and Finance Committees that Media Coalition believed S.B. 222 (and its House companion H.B. 298) and AS 11.61.128(a) in its original form violated the First Amendment. (Exhibits A-H) I further cautioned that if a court were to strike down the statute, the state would likely have to pay plaintiffs' attorneys' fees.

6. In January 2010, I sent a memorandum in opposition of H.B. 298 to the House Judiciary Committee, enclosed herewith, upon the belief that both H.B. 298 and the statute in its original form, AS 11.61.128(a), were unconstitutional under the First Amendment. (Exhibit A) I cautioned the Committee that if it passed unconstitutional legislation and the courts struck it down, there was a good possibility the court would award plaintiffs' attorneys' fees and it would be costly for the State.

7. In January 2010, I sent a memorandum in opposition of S.B. 222, a companion bill to H.B. 298, to the Senate Judiciary Committee upon the belief that Section 8 of S.B. 222 and the statute in its original form, AS 11.61.128(a), likely violated the First Amendment. (Exhibit B) As in the January 2010 memorandum to the House Judiciary Committee (Exhibit A), I cautioned the Committee that if it passed unconstitutional legislation and the courts struck it down, there was a good possibility the court would award plaintiffs' attorneys' fees and it would be costly for the State.

8. On January 27, 2010, I testified before the House Judiciary Committee, informing the Committee that AS 11.61.128(a) was unconstitutional and the proposed amendment, Section

8 of H.B. 298 would not render AS 11.61.128(a) constitutional. I noted that neither the existing statute nor H.B. 298 contained the three-prong Miller/Ginsberg test regarding restricting sexual content to minors. For the law to be constitutional, it must either be limited to material that could be proscribed under the Miller/Ginsberg test or tied to an otherwise illegal act, such as enticement. I suggested that were willing to work with legislators to help the state pass a law that did not violate the First Amendment. The Chairman invited me to work with Representative Gruenberg to work on such language.

9. During January and February, 2010, I sent memoranda in opposition of H.B. 298 as amended to the House Judiciary Committee upon the belief that H.B. 298 still likely violated the First Amendment. (Exhibits C-D) As in the January 2010 memorandum to the House Judiciary Committee (Exhibit A), in I continually cautioned the Committee that if it passed unconstitutional legislation and the courts struck it down, there was a good possibility the court would award plaintiffs' attorneys' fees and it would be costly for the State.

10. I continually made myself available for conferences with the House and Senate Judicial Committees to discuss H.B. 298 and S.B. 222 and to point out why the legislation didn't comply with the First Amendment.

11. On April 2, 2010, I submitted a letter to Senator Hollis French, Chair of the Senate Judiciary Committee, and the members of the Senate Judiciary Committee, expressing that Media Coalition believed that Section 8 of S.B. 222 and the existing Alaska statute, AS 11.61.128(a) violated the First Amendment. (Exhibit E) I explained that similar "harmful to minors" laws were held unconstitutional by the Supreme Court and several states. I noted that I was willing to work with the Committee to address our constitutional concerns about Section 8 and 11.61.128.

12. In the letter to Senator French, I informed him that "[p]assage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In the successful challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than $500,000." (Exhibit E)

13. On April 6, 2010, I sent a letter to Senator French, enclosed herewith (Exhibit F), informing him that Media Coalition believed that Committee Substitute E to Senate Bill 222 was an improvement, but still unconstitutional under the First Amendment. In consultation with Michael A. Bamberger of SNR Denton, I drafted recommendations for the Committee, suggesting to Senator French that, to satisfy the First Amendment, the Committee change the language of S.B. 222:

> We think the present version of Section 8 can be amended to avoid these constitutional weaknesses by limiting the law to speech by an adult communicated directly to a specific person either known or believed to be a minor.
>
> The present version of Section 8 (1) could be amended to read:
>
> > (1) the person, being 18 years of age or older, **knowing the character and content of the material**, knowingly **and intentionally** distributes to **a specific other** person any material that depicts the following actual or simulated:
>
> These are small but very important changes to the bill that track language in the opinions by the Supreme Court and Circuit Courts cited above and other important cases addressing minors' access to sexually explicit material

(Exhibit F) (Emphasis in original)

14. In an April 9, 2010 letter to Senators Lyman Hoffman and Bert Stedman, Co-Chairs of the Senate Finance Committee, and the rest of the Committee members, I informed the Senators that Media Coalition strongly believed S.B. 222 was unconstitutional based on the "substantial body of case law" including "[a] very similar federal law and seven state laws."

(Exhibit G) To help the Committee draft a constitutional law that achieved the goal of protecting minors from harmful materials, I proposed the same changes in the language of S.B. 222 previously submitted to Senator French. I offered to work with the Committee to work with Media Coalition to amend Section 8 of S.B. 222. I also informed the Senators, as in the January 2010 memorandum to the House Judiciary Committee (Exhibit A), that litigation could be costly in the event a court declares the law unconstitutional.

15. On April 12, 2010, I sent a similar letter to Representatives Mike Hawker and Bill Stoltze, Co-Chairs of the House Finance Committee, and the rest of the Committee members, informing them that Media Coalition strongly believed S.B.222 was unconstitutional. (Exhibit H) To help the Committee draft a constitutional law that achieved the goal of protecting minors from harmful materials, I proposed changes in the language of S.B. 222 previously submitted to Senators French, Hoffman and Stedman. I offered to work with the Committee to amend Section 8 of S.B. 222.

16. Thus, on behalf of a number of the Plaintiffs who are members of Media Coalition I repeatedly advised the legislature of the unconstitutional aspects of the bills at each phase of the legislative process leading up to and including the version of S.B. 222 that was passed and is the subject of this litigation. I also highlighted the potential costs to the State of Alaska of litigation if the constitutional deficiencies were not corrected. Nevertheless, S.B. 222 passed and on May 14, 2010, Governor Sean Parnell signed S.B. 222 into law.

17. Plaintiffs filed a complaint with the District Court on August 31, 2010 seeking to enjoin AS 11.61.128(a), and on October 20, 2010 the District Court granted Plaintiffs a preliminary injunction.

18. On January 26, 2011, lawmakers introduced S.B. 72 and H.B. 127, containing provisions added at the request of the governor to amend the statute at issue in this litigation.

19. On February 4, 2011, I sent a letter to House Judiciary Committee Chair Carl Gatto and Vice-Chair Steve Thompson and their Committee members, concerned that H.B. 127 sec. 9 would not cure the constitutional defects of AS 11.61.128(a) even though it presented an improvement. (Exhibit I) I offered to work with the Attorney General and the House Judiciary Committee to amend Section 9 to cure the constitutional defects while still providing law enforcement with the means to protect minors from adults looking to prey on them.

20. On February 14, 2011, I sent a similar letter to Senate Judiciary Committee Chair Hollis French and Vice-Chair Bill Wielechowski and their Committee members, informing them that Media Coalition believed Section 9 would not remedy the constitutional problems that caused the District Court to enjoin AS 11.61.128(a). (Exhibit J) I also offered to work with the Attorney General and Senate Judiciary Committee to amend Section 9 to cure the constitutional defects while still providing law enforcement with the means to protect minors from adults looking to prey on them.

21. On March 3, 2011, I sent a letter to House Judiciary Committee Chair Carl Gatto and Vice-Chair Steve Thompson, and their Committee members, expressing Media Coalition's concern that Section 9 of H.B. 127 was unconstitutional even with its addition of a knowledge standard. (Exhibit K) I presented a body of case law, noting that the Supreme Court and four federal courts of appeal have struck down similar statutes. Attached with the letter, I provided proposed changes to the bill for the Committee to consider.

I declare under penalty of perjury under the laws of the United States that the information contained in this Declaration is true and correct.

Dated: July 21, 2011

David Horowitz