BIG HAT BOOKS et al v. PROSECUTORS: Doc. 22

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BIG HAT BOOKS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:08-CV-596 SEB-TAB
	)	
PROSECUTORS, *et al.*,	)	
	)	
Defendants.	)	

Plaintiffs' Memorandum in Support of Motion for Summary Judgment or Alternatively in Support of Motion for Preliminary Injunction

Kenneth J. Falk, No. 6777-49
ACLU of Indiana
1031 E. Washington Street
Indianapolis, IN 46202
317-635-4059 ext. 229 (Telephone)
317-635-4105 (Facsimile)
kfalk@aclu-in.org

Attorney for Big Hat Books, Boxcar Books and Community Center, Inc., American Civil Liberties Union of Indiana Foundation

Jon B. Laramore, No. 17166-49
Matthew T. Albaugh, No. 23293-49
Baker & Daniels LLP
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204
317-237-0300 (Telephone)
317-237-1000 (Facsimile)
jon.laramore@bakerd.com
matthew.albaugh@bakerd.com

Attorneys for Indianapolis Museum of Art, Indianapolis Downtown Artists and Dealers Association

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Michael A. Bamberger*, Admitted Pro Hac Vice*
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020
212-768-6756 (Telephone)
212-768-6800 (Facsimile)
mbamberger@sonnenschein.com

Attorney for American Booksellers Foundation Free Expression, Association of American Publishers, Freedom to Read Foundation, Entertainment Merchants Association, National Association of Recording Merchandisers, and Great Lakes Booksellers Association

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I. Introduction

Effective July 1, 2008, Indiana law requires that persons (individuals and businesses) who sell literature and other material deemed harmful to minors under Indiana law must register with the Secretary of State and pay a fee of $250. Because failure to register is a crime, the law will force those engaged in activities entitled to the highest protection under the First Amendment to either (1) engage in self-censorship and cease to offer for sale material constitutionally protected as to adults and older minors, or (2) publicly label themselves with the injurious label of purveyors of sexually explicit material harmful to minors.

This intrusion into areas protected by the First Amendment is unconstitutional for numerous reasons, each of which is sufficient to require that the provision be stricken:

- it is not narrowly tailored to meet a compelling governmental interest;
- it unlawfully imposes a content-based fee or tax on First Amendment rights;
- it represents a content-based permit requirement before First Amendment rights may be exercised; and
- it is both fatally overbroad and vague.

Plaintiffs have sought summary judgment or, alternatively, a preliminary injunction. Plaintiffs have met all appropriate standards and are entitled to relief.

II. The standard for the grant of summary judgment or a preliminary injunction

The standard for the grant of summary judgment is clear.

> Under Fed.R.Civ.P. 56(c), summary judgment is warranted only if there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law.
>
> The initial burden of production rests upon the moving party to identify ○those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." . . . . Once the moving party satisfies

> this burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The nonmovant must do more, however, than demonstrate some factual disagreement between the parties; the issue must be material. . . . If no genuine issues of material facts exists, the sole question is whether the moving party is entitled to judgment as a matter of law.

Logan v. Commercial Union Ins. Co., 96 F.3d 971, 978 (7th Cir. 1996) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). There are no contested issues of material fact in this case and judgment should be entered for the plaintiffs.

The standard for granting a preliminary injunction in the Seventh Circuit is also clear.

> [T]he plaintiff bears the burden of establishing five requirements . . . (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on the merits; and (5) that the injunction will not harm the public interest.

Baja Contractor, Inc. v. City of Chicago, 830 F.2d 667, 675 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). Following this standard, a preliminary injunction should be granted in this case if summary judgment is not.

III. The statutory background of House Enrolled Act No. 1042

House Enrolled Act No. 1042 ("HEA No. 1042" or "the Statute"), which will be effective July 1, 2008, provides, in relevant part,

> A person (as defined in IC 35-41-1-22) that intends to offer for sale or sell sexually explicit materials shall register with the secretary of state the intent to offer for sale or sell sexually explicit materials and provide a statement detailing the types of materials that the person intends to offer for sale or sell.

HEA No. 1042 (to be codified at IND. CODE § 23-1-55-2 (eff.7/1/08)). The Statute specifies further that the term "persons" is as defined in Indiana Code § 23-1-55-2, which provides that a "person" is "a human being, corporation, limited liability company, partnership, unincorporated

association, or governmental entity." HEA No. 1042 (to be codified as IND. CODE § 23-1-55-2 (eff. 7/1/08)).

Once the Secretary of State receives this registration, he or she is to notify local officials in the county where the person intends to offer the material for sale. HEA No. 1042 (to be codified as IND. CODE § 23-1-55-3 (eff. 7/1/08)). In addition to the registration, the person must pay a $250 fee. HEA No. 1042 (to be codified as IND. CODE § 23-8-12-3(a)(24) (eff. 7/1/08)). Before the enactment of the Statute, the fees charged by the Secretary of State's office for the filing of prescribed documents ranged from a low of no fee (certificate of change of registered agent's business address; certificate of resignation or change of agent) to a high of $90 (articles of organization; articles of merger involving a domestic limited liability company). IND. CODE § 23-18-13-3(a). Thus the fee or tax imposed here is over 250% larger than the previous highest charge by the Secretary of State.

The term "sexually explicit materials" is defined in the Statute as a product or service:

> (1) that is harmful to minors (as described in IC 35-49-2-2), even if the product or service is not intended to be used by or offered to a minor, or
>
> (2) that is designed for use in, marketed primarily for, or provides for:
>
> > (A) the stimulation of the human genital organs; or
> > (B) masochism or a masochistic experience, sadism or a sadistic experience, sexual bondage, or sexual domination.

HEA No. 1042 (to be codified as IND. CODE § 24-4-16.4-2 (eff. 7/1/08)). But the Statute exempts from its proscriptions birth control or contraceptive devices and services, programs, products or materials provided by a communications services provider (defined by IND. CODE § 8-1-32.6-3) or by a physician or public or nonpublic school. HEA No. 1042 (to be codified as IND. CODE § 24-4-16.4-2(b) (eff. 7/1/08)).

The statute defining "harmful to minors" provides that:

> A matter or performance is harmful to minors for the purposes of this article if:
>
> > (1) it describes or represents, in any form, nudity, sexual excitement, or sado-masochistic abuse;
> > (2) considered as a whole, it appeals to the prurient interest in sex of minors;
> > (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
> > (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

Ind. Code § 35-49-2-2.

A person or employee or agent of a person who knowingly or intentionally sells sexually explicit materials without the registration and statement required by the Statute commits an unregistered sale of sexually explicit materials, which is a Class B misdemeanor. HEA No. 1042 (to be codified as IND. CODE § 24-4-16.4-4 (eff. 7/1/08)).

The Statute notes that it "does not apply to a person who sells sexually explicit materials on June 30, 2008, unless the person changes the person's business location after June 30, 2008." HEA No. 1042 (to be codified as IND. CODE § 23-1-55-1 (eff. 7/1/08)). Any registration under the Statute is a matter of public record and fully disclosable under Indiana law. IND. CODE § 5-14-3-3.

IV. Statement of material facts not in dispute

Big Hat Books

Big Hat Books is a bookstore located in Indianapolis. (Affidavit of Elizabeth Barden, Attachment 1 to Plaintiffs' Submission of Affidavits and Declarations in Support of Motion for Summary Judgment or, alternatively, Motion for Preliminary Injunction ["Plaintiffs' Submission"], ¶ 2). The bookstore is currently located in the Broad Ripple area of Indianapolis, but it will be moving to a new location after July 1, 2008 (*Id.* ¶ 3). Big Hat Books sells literature

that its proprietor believes is not obscene under Indiana law, but which has adult sexual content and is not appropriate for all children. (*Id.* ¶ 4). Examples of such literature include works by Henry Miller such as *Tropic of Cancer* and *Tropic of Capricorn*; D.H. Lawrence, such as *Lady Chatterley's Lover*; and Vladimir Nabokov's *Lolita,* all of which have strong sexual content. (*Id.* ¶ 5). It also sells books that deal with adult human sexuality including works that contain explicit information of a sexual nature. (*Id.* ¶ 6).

In addition to selling literature to adults, Big Hat Books also has a large children's section, and it receives more than 50% of its revenues from the sale of children's literature. (*Id.* ¶ 7). If Big Hat Books registers as required by the Statute and becomes known as a purveyor of sexually explicit material, it will injure the store's business among those seeking children's literature. (*Id.* ¶ 8). Therefore, rather than register under the Statute, Big Hat Books will attempt to purge its shelves of any items that could possibly be construed as sexually explicit material under the Statute. (*Id.* ¶ 9). This action would, of course, diminish the amount of constitutionally-protected material available to adult patrons and older youths, but the owner of Big Hat Books feels it is necessary to do this if the Statute becomes effective. (*Id.* ¶ 10). This course of action, deemed necessary by Big Hat Books to avoid losing business, will require the store constantly to comb through Big Hat Books' inventory to make sure that it is not offering for sale anything that meets the definition of sexually explicit materials, whether or not the material is being offered for sale to minors. (*Id.* ¶ 11).

The Statute will therefore inhibit Big Hat Books in its business operations, will cause increased costs and administrative burdens for Big Hat Books and will restrict the availability of literature for older youths and adult patrons of the store. (*Id.* ¶ 12).

Boxcar Books and Community Center, Inc.

Boxcar Books and Community Center, Inc. ("Boxcar Books") is a not for profit, volunteer run, bookstore in Bloomington, Indiana. (Affidavit of Abbey Friedman, Attachment 2 to Plaintiffs' Submission, ¶ 2.) It is located in a building that is currently for sale, meaning that Boxcar Books may have to move and is currently looking at potential new spaces if it has to move after June 30, 2008. (*Id.* ¶¶ 4-5).

Boxcar Books sells books and magazines and has sections on erotica and art books that contain nudity and sexuality. (*Id.* ¶¶ 3, 6). Additionally, it sells literature with sexual content such as works by D.H. Lawrence, Henry Miller, Michel Foucault, the Marquis de Sade, and Vladimir Nabokov as well as books that concern women's sexual health. (*Id.* ¶¶ 7-8). It also sells magazines with sexual content. (*Id.* ¶ 9). It sells nothing obscene. (*Id.* ¶ 15). It also sells children's literature in an area that is not proximate to the area for the more mature readers. (*Id.* ¶ 11).

Boxcar Books will be adding new employees and/or volunteers after June 30, 2008. (*Id.* ¶ 9). As Boxcar Books understands HEA No. 1042, it will have to register unless it purges the store of any material that can be construed to be sexually explicit. (*Id.* ¶ 16). In order to register, it will have to pay $250 and then an additional $250 for each new employee who is hired. (*Id.* ¶ 10). This requirement will pose a severe economic burden on Boxcar Books. (*Id.*) Even a single payment of $250 is burdensome to Boxcar Books, a not for profit organization. (*Id.*)

If Boxcar Books registers, it will be labeled as a seller of material that is harmful to minors, which will negatively affect its business because persons desiring children's literature will be less likely to come to the store. (*Id.* ¶ 14). Additionally, Boxcar Books does not understand what is required by the Statute's requirement that it detail the types of material it

intends to sell. (*Id.* ¶ 13). It is unsure if information, once provided, has to be supplemented and how specific the information must be. (*Id.*)

Registering as required by HEA No. 1042 will impose increased costs and burdens on Boxcar Books.

American Booksellers Foundation for Free Expression

The American Booksellers Foundation for Free Expression ("ABFFE") is affiliated with the American Booksellers Association, the leading association of general interest bookstores in the United States. (Declaration of Christopher Finan, Attachment 3 to Plaintiffs' Submission, ¶ 2). ABFFE was formed in February 1990 to combat escalating threats to the First Amendment freedoms of booksellers, publishers, librarians, and other distributors of books, magazines, records, films, and videos. (*Id.* ¶ 3). The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, as well as to promote and protect the free expression of ideas, particularly in the choice of reading materials. (*Id.*)

Many ABFFE members are bookstores and booksellers, eleven of which are located in the State of Indiana, including, for example, co-plaintiff Big Hat Books. (*Id.* ¶ 5). Any general bookstore, including ABFFE's Indiana members, is likely to contain hundreds or even thousands of books or other materials with sexually-related narrative or pictorial content, that could be considered "harmful to minors." (*Id.* ¶ 6). They include such literary classics as Vladimir Nabokov's *Lolita,* William Faulkner's *Sanctuary,* and Philip Roth's *Portnoy's Complaint.* Bookstores also offer for sale contemporary work such as romance novels, graphic novels, art books, Judy Blume's *Forever* and books of photography. (*Id.*) In addition, ABFFE's Indiana members sell books relating to a variety of sexual education and health topics, the prevention of,

and risks associated with, STDs, AIDS and teenage pregnancies. (*Id.*) Books addressing issues of sexual orientation or sexuality in general also are sold at many bookstores and also may be directed to older minors as well as to adults as a means of providing desired information and education. (*Id.*)

ABFFE's Indiana members and their staff members fear prosecution under the Statute if they continue to sell these and other mainstream materials containing sexually-related narrative or pictorial content in the same manner that some have done for decades. (*Id.*)

Most of ABFFE's Indiana members are general bookstores, seeking to bring in a general clientele, including younger readers. (*Id.* ¶ 8). Having to register as a purveyor of sexually explicit materials would be injurious to their business and reputation. (*Id.*) The only way they avoid such a label would be to purge from their inventory hundreds of books and other materials protected by the First Amendment as to adults and older youths. (*Id.*)

American Association of Publishers

The American Association of Publishers ("AAP") is the national association of the U.S. book publishing industry. (Declaration of Allan R. Adler, Attachment 4 to Plaintiffs' Submission, ¶ 2). AAP's 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. (*Id.*) 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. (*Id.*)

Some of the content published by AAP members contains material which may be considered "harmful to minors" as defined by Indiana law. (*Id.* ¶ 4). Many of the efforts to ban books in various communities have been directed at books published by AAP's members. (*Id.*)

Many of the Indiana booksellers purchasing AAP-member published books are general bookstores, seeking to bring in a general clientele, including younger readers. (*Id.* ¶ 6). Having to register as a purveyor of sexually explicit materials would be injurious to their business and reputation. (*Id.*) The only way to avoid such a label would be to purge from their inventory hundreds of books and other materials that are First Amendment-protected for adults and older minors. These options impermissibly limit the ability of AAP members to sell their constitutionally protected books in Indiana. (*Id.*)

Entertainment Merchants Association

The Entertainment Merchants Association ("EMA") is a not-for-profit international trade association for the home entertainment industry. (Declaration of Sean Devlin Bersell, Attachment 5 to Plaintiffs' Submission, ¶ 2). Its member companies operate approximately 500 retail outlets in the State of Indiana that sell and rent DVDs and computer and console video games. (*Id.*) Members comprise 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. (*Id.*) EMA members manufacture, distribute, sell, and rent a wide variety of expressive works in the motion picture and video game formats, some of which may contain material covered by the Statute. (*Id.* ¶ 2).

EMA's Indiana members (some of which are likely to move after July 1, 2008) seek to bring in a general clientele, including younger customers. (*Id.* ¶ 5). Having to register as a purveyor of sexually explicit materials would be injurious to their business and reputation. (*Id.*)

The only way they avoid such a label would be to purge from their inventory DVDs and other materials protected by the First Amendment as to adults and older youths. (*Id.*)

Freedom to Read Foundation

The Freedom to Read Foundation ("FTRF") is a sister organization of the American Library Association ("ALA"). (Declaration of Judith Krug, Attachment 6 to Plaintiffs' Submission, ¶ 1). FTRF was established by the ALA in 1969 to promote and defend the First Amendment right to free expression, including the right to read and listen to the ideas of others. (*Id.* ¶ 2). The FTRF was founded in part to support and defend librarians whose positions are jeopardized because of their defense of the First Amendment. (*Id.*) FTRF members include librarians, library patrons, public libraries, private libraries, academic libraries, private organizations and individuals committed to promoting the freedom to read on behalf of all individuals. (*Id.*)

Any library, including FTRF's Indiana members, is likely to contain hundreds or even thousands of books or other materials with sexually-related narrative or pictorial content that could be considered "harmful to minors" to children of different ages. (*Id.* ¶ 5). These include not only works of literature but also romance novels, graphic novels, art books, and books of photography. (*Id.*) Libraries also generally carry books relating to a variety of sexual education and health topics, including the prevention of, and risks associated with, STDs, AIDS and teenage pregnancies. (*Id.*) Books addressing issues of sexual orientation or sexuality in general also are carried at many libraries. (*Id.*)

Many libraries sell excess used books periodically, both for the cash received and the space created. (*Id.*) If any of such used books could be deemed "harmful to minors" as defined in Indiana law, the librarian and the library would have to register under the Statute. (*Id.*)

Having to register as a purveyor of sexually explicit materials would be injurious to the library's reason for being and the reputation of the librarian and library. (*Id.* ¶ 6). The only way they avoid such a label would be to review all used books to be sold and purge from that sale books and other materials protected by the First Amendment as to adults and older youths. (*Id.*)

Great Lakes Booksellers Association

The Great Lakes Booksellers Association ("GLBA") is a trade association representing independent bookstores in the Great Lakes Region, including Indiana. (Declaration of James Dana, Attachment 7 to Plaintiffs' Submission, ¶ 2). GLBA has twenty-six members in Indiana. (*Id.*) At least two of them presently intend to move their business location after July 1, 2008. (*Id.*)

Any general bookstore, including GLBA's Indiana members, is likely to contain hundreds or even thousands of books or other materials with sexually-related narrative or pictorial content, that could be considered "harmful to minors." (*Id.* ¶ 5). They include literary classics, contemporary work, books relating to a variety of sexual education and health topics, and books addressing issues of sexual orientation or sexuality in general that may be directed to older minors as well as to adults as a means of providing desired information and education. (*Id.*)

GLBA's Indiana members and their staff members fear prosecution under the Statute if they continue to sell these and other mainstream materials containing sexually-related narrative or pictorial content in the same manner that some have done for decades without registration. (*Id.*)

GLBA's Indiana members are general bookstores, seeking to bring in a general clientele, including younger readers. (*Id.* ¶ 7). Having to register as a purveyor of sexually explicit

materials would be injurious to their business and reputation. (*Id.*) The only way they avoid such a label would be to purge from their inventory hundreds of books and other materials protected by the First Amendment as to adults and older youths. (*Id*.)

National Association of Recording Merchandisers

The National Association of Recording Merchandisers ("NARM") is the leading trade association for music retailers, wholesalers, distributors, record labels, multimedia suppliers, suppliers of related products and services, and individual professionals and educators in the music business. (Declaration of John Lyons, Attachment 8 to Plaintiffs' Submission, ¶ 2). NARM's retail members operate thousands of physical and digital storefronts that account for about 85% of the music sold in the U.S. market. NARM has approximately 150 members in Indiana. (*Id.*)

Almost all music recording retailers, including NARM's Indiana members, are likely to offer for sale recordings, the lyrics of some of which have sexual content that could be considered "harmful to minors." (*Id.* ¶ 4). NARM's Indiana members (some of which are likely to move after July 1, 2008) and their staff members fear prosecution under the Statute if they do not register under the Statute and continue to sell these and other mainstream materials containing sexually-related content in the same manner that some have done for decades. (*Id.*)

NARM's Indiana members seek to bring in a general clientele, including younger listeners. (*Id.* ¶ 6). Having to register as a purveyor of sexually explicit materials would be injurious to their business and reputation. (*Id.*) The only way they avoid such a label would be to purge from their inventory recordings and other materials protected by the First Amendment as to adults and older youths. (*Id.*)

Facts Common to the Associational Plaintiffs

The stores that are members of the ABFFE, EMA, GLBA and NARM are not what are colloquially referred to as "adult bookstores." (Plaintiffs' Submission Attachments:. No. 3, ¶ 5; No. 5, ¶¶ 2, 3; No. 7, ¶ 4; No. 8, ¶ 3). Also, the Statute requires "a statement detailing the types of [sexually explicit] materials the person intends to offer for sale or sell." It is not clear how detailed this statement must be. (Plaintiffs' Submission Attachments: No. 3, ¶ 7; No. 5, ¶ 6; No. 6, ¶ 7; No. 7, ¶ 6; No. 8, ¶ 5). Even if the Associational Plaintiffs' Indiana members had time to review each book, video or other piece of merchandise individually before they were shelved (which they do not because their inventories change constantly), determining which items fall under the Statute's proscriptions is not possible and would lead to over-inclusive self censorship. (*Id.*)

Indianapolis Museum of Art

The Indianapolis Museum of Art (the "IMA" or the "Museum"), the fifth largest encyclopedic art museum in the United States, features a collection of more than 50,000 works and national and international traveling exhibitions that span the scope and range of art history. (Affidavit of Maxwell L. Anderson, Attachment 9 to Plaintiffs' Submission, ¶ 2).

Through various portals, the IMA sells products and materials that could be deemed to fall within the broad definition in the Statute. (*Id.* ¶ 3). For instance, the IMA has two retail stores, the IMA Store and the Gallery Shop, where visitors can purchase books, gifts and other merchandise related to art featured in the Museum's special exhibitions and permanent collections. (*Id.*) Via the Museum's website, at http://shop.imamuseum.org/, members of the public can purchase merchandise similar to that found in its two stores. (*Id.*) Although the IMA sells nothing obscene or unlawful, some might conclude that certain of this merchandise falls

within the definition of "sexually explicit materials" covered by the Statute, in that the works of art contain images of nudity or sexuality that may be inappropriate for minors. (*Id.*) Further, while the IMA's permanent collections are offered free to the public, tickets must be purchased by non-members for certain of the IMA's traveling exhibitions. (*Id.* ¶ 4). The IMA also hosts the Summer Nights film series on the Museum's amphitheater, for which a small admission fee is charged; both certain of the traveling exhibitions and some of the Museum's film series contain images of nudity or sexuality. (*Id.*)

The Museum will hire new sales employees after June 30, 2008, and plans to open a new retail store in or about November 2008. (*Id.* ¶ 5). To comply with the Statute, IMA staff will have to devote significant time and resources to review items sold in its stores, on its website, in its permanent collection and in its traveling exhibitions to determine whether any portion of these items falls within the Statute. (*Id.* ¶ 6). The elements in the definition, including "prevailing standards in the adult community" and "serious literary, artistic, political, or scientific value for minors" are sufficiently complex and vague that the Museum will be required to devote significant resources to training employees and hiring legal assistance to comply with the statute, if they are able to comply at all. (*Id.*)

Indianapolis Downtown Artists and Dealers Association

IDADA has approximately 150 members, representing a broad spectrum of artists, galleries and art dealers located in and around downtown Indianapolis. (Affidavit of Jason C. Zickler, Attachment 10 to Plaintiffs' Submission, ¶ 2). Many of IDADA's members offer to sell or sell works of art that contain images of nudity or sexuality. (*Id.* ¶ 3). Although IDADA's members sell nothing obscene or unlawful, some might conclude that certain of this merchandise

falls within the definition of "sexually explicit materials" contained in the Statute, in that some works of art may be inappropriate to minors. (*Id.*)

After June 30, 2008, IDADA and its members will host numerous exhibitions and shows at a variety of locations in Indianapolis where works of art that contain images of nudity or sexuality will be offered for sale. (*Id.* ¶ 4). Many of IDADA's members will change locations or open new locations after June 30, 2008. (*Id.* ¶ 5). Many of IDADA's members will hire new sales employees after June 30, 2008. (*Id.*)

To comply with the Statute, IDADA's members will have to devote significant time and resources to review items to determine whether any portion of these items falls within the Statute. (*Id.* ¶ 6). The elements in the definition, including "prevailing standards in the adult community" and "serious literary, artistic, political, or scientific value for minors" are sufficiently complex and vague that IDADA's members will be required to devote significant resources to training employees and hiring legal assistance to comply with the statute, if they are able to comply at all. (*Id.*)

If IDADA and its members pay the registration fee and are labeled purveyors of sexually explicit materials, customers and potential customers may refuse to patronize the business; IDADA's members do not want to be labeled as purveyors of sexually explicit material and believe that this would be injurious to their businesses and reputations. (*Id.* ¶ 7).

The American Civil Liberties Union of Indiana Foundation

The American Civil Liberties Union of Indiana Foundation ("ALCU-IN") is the Indiana affiliate of the American Civil Liberties Union and is dedicated to protecting the constitutional rights and liberties of its members and all Hoosiers. (Affidavit of William O. Harrington, Attachment 11 to Plaintiffs' Submission, ¶ 5). The ACLU-IN currently has 5,500 members in

Indiana. (*Id.* ¶ 6). Members of the organization visit the bookstores affected by the Statute and wish to be able to purchase, and to continue to purchase, the full range of mature literature available, including non-obscene literature having sexual content that may be inappropriate for children. (*Id.* ¶¶ 7-12). If the Statute is allowed to go into effect, it will restrict the literature available to purchase by members of the ACLU-IN. (*Id.* ¶ 13).

V. The Statute is unconstitutional

A. The Statute regulates matter that is protected by the First Amendment and will, if allowed to become effective, cause injury to the plaintiffs.

The Statute concerns itself with matter that is harmful to minors because of its sexual content. The material included within the definition of "sexually explicit material" includes matter that may be inappropriate for some children, but that is not obscene under the standards established by *Miller v. California*, 413 U.S. 15 (1973). "[S]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Comm'ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down the prohibition on indecent, but not obscene, interstate commercial telephone messages). "[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977).

The plaintiffs in this case who, or whose members, are engaged in the sale of material that may have non-obscene sexual content are therefore involved in the distribution of material protected by the First Amendment. The First Amendment interests here are not diminished by the fact that some of the plaintiffs are selling such material, or have members selling such material, for profit. As the Supreme Court noted almost fifty years ago, referring to the liberty of the press and speech, it "requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these

constitutionally protected freedoms." *Smith v. California*, 361 U.S. 147, 150 (1959). And, "[i]t is of course no matter that the dissemination takes place under commercial auspices . . . Certainly a retail bookseller plays a most significant role in the process of the distribution of books." *Id.* The First Amendment protects not only those who distribute the written word but also those who distribute movies, music, and art. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (corporation distributing movies is protected by the First Amendment, although operated for profit); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602-03 (1998) (Souter, J. dissenting) (collecting cases establishing that artistic expression, including painting, music, poetry, drawing, and engravings are protected by the First Amendment).

The affidavits in this case outline the injury that will be caused to the plaintiffs. Those who are sellers of material are faced with a number of unpleasant choices. They may choose to pay the registration fee, thereby being caused economic harm. The harm is not just the payment of the fee, but the potential loss of business as they become known as purveyors of sexually explicit material to minors. Or, they may engage in self-censorship, paring down their collections in an effort to remove potentially offending material, thereby reducing the constitutionally-protected material that adults and older youths, such as the members of the ACLU and the patrons of retailer-plaintiffs, have access to, and altering their fundamental roles as distributors of expressive activity. This "self-censorship" is a "major First Amendment risk." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988). As the Supreme Court noted, in finding that plaintiffs, including organizations of booksellers, had standing to challenge a Virginia law making it unlawful knowingly to display sexually explicit material in a manner accessible to juveniles, such a law will require the plaintiffs "to take significant and costly

compliance measures or risk criminal prosecution." Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392 (1988). The same is true here.[1]

B. The statute is unconstitutional as a content-based regulation that is not narrowly tailored to meet a compelling governmental interest.

Merely because First Amendment rights are impaired by the Statute does not, however, automatically condemn it to a finding of unconstitutionality. The Supreme Court has noted that laws or regulations that impose neutral burdens on First Amendment rights are not unconstitutional if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n* , 460 U.S. 37, 45 (1983); s*ee also United States v. O'Brien,* 391 U.S. 367, 383 (1968). On the other hand, content-based regulations of First Amendment activities are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). They can be upheld only if they further a compelling governmental interest and are narrowly tailored to meet that interest. *Id.* at 395.

A regulation of expressive activity is content-based if it "is defined by its content." *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000). Therefore, the Supreme Court has noted repeatedly that attempted regulation of speech containing sexual content which might make its way to minors is content-based. *Id.* finding that requirements imposed on cable operators to scramble or otherwise limit sexually explicit channels were content based); s*ee also, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 660, 671 (2004) (noting that the Child Online Protection Act that criminalized certain internet material deemed harmful to minors was content-based); *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (finding Communications Decency Act, with

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[1] "Collectively the plaintiffs (or their members, whose interest they represent) make, sell, or read just about every kind of material that could be affected by the [Statute]." *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

provisions designed to protect minors from indecent and patently offensive communications on the internet, is "a content-based blanket restriction on speech"). Like these regulations of First Amendment activities, the Statute is also content-based. It regulates by content only. Matter that is not deemed to be "sexually explicit materials" is not regulated. As with the above cases, this is "a content-based restriction." *Ashcroft*, 542 U.S. at 670.

The initial inquiry, therefore, is whether the Statute is supported by a compelling governmental interest. Presumably, the State will argue that this "content-based restriction [is] designed to protect minors from viewing harmful materials." *Id.* The Supreme Court has "repeatedly recognized the governmental interest in protecting children from harmful materials." *Reno*, 521 U.S. at 875; *see also Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that states can, consistent with the First Amendment, punish adults who sell matters of a sexual nature to minors that are not obscene for adults).

> But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children." . . . "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."

Reno, 521 U.S. at 875 (internal citations omitted).

The question then is whether the challenged statute is appropriately tailored and "is the least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666. The Statute falls woefully short of being a proper least restrictive alternative.

Any narrowly tailored statute must focus directly on the State's interest in preventing minors from improperly obtaining the harmful material. But Indiana law already prohibits persons, plaintiff retailers and their members included, from knowingly disseminating matter to minors that is harmful to them as defined by Indiana Code § 35-49-2-2. *See* IND. CODE § 35-49-

3-3(a)(1). The prohibition in Title 35 focuses on the specific conduct of dissemination to youth. *See Scuro v. State*, 849 N.E.2d 682 (Ind. Ct. App. 2006), *trans. denied.* In contrast, the Statute impinges on First Amendment rights and interests "even if the product or service is not intended to be used or offered to a minor." The Statute thus facially concedes that it is to be applied broadly to legitimate First Amendment expression (matter of a sexual nature that is not intended to be used or offered to minors), as opposed to applying only to that which is specifically disclosed to minors and is therefore criminal. Enforcement of Indiana's existing criminal law is certainly a "plausible, less restrictive alternative[ ] to the statute." *Ashcroft*, 542 U.S. at 666.

Moreover, the relationship between the Statute and a legislative purpose of protecting children from matter that is harmful to minors is tenuous, at best. The Statute does not prohibit distribution, but requires the person selling to disclose to the Secretary of State the intent to sell this material and directs the Secretary of State to notify local officials in the area where the sale is to take place. Again, a narrowly tailored statute is one that targets the precise state interest and prohibits the distribution of material to minors, unlike the Statute, which establishes an elaborate notification scheme that does not ultimately prohibit distribution.

The Statute is therefore unconstitutional, because it is a content-based regulation on protected First Amendment activities that is not narrowly tailored to meet a compelling governmental interest.

C. The Statute exacts an unconstitutional content-based tax or fee on the dissemination of information protected by the First Amendment.

In *Grosjean v. Am. Press Co., Inc.,* 297 U.S. 233 (1936), the Court considered a tax that was levied only on publications having a circulation of more than 20,000 copies a week. This tax affected only thirteen of more than 120 publications in the state of Louisiana. *Id.* at 240-41.

The Court found that this tax had a direct impact on the dissemination of information to the public and was therefore unconstitutional.

> The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Id. at 250.

Similarly, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court found a city ordinance unconstitutional that imposed on Jehovah's Witnesses a fee for going door to door distributing literature and soliciting the purchase of pamphlets. The question was whether such a "license tax" could be constitutionally imposed. *Id.* at 110. In striking down the fee, the Court concluded that this was "a license tax -- a flat tax imposed on the exercise of a right granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Id.* at 113. The fee was not designed to defray the expenses of regulating the activities in question. It was instead "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise." *Id.* at 114. The same is true of the Statute.

In *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), a use tax was imposed on the cost of paper and ink products of periodic publication, but exempted the first $100,000 of ink and paper consumed annually, thus imposing a tax liability on only 14 of 388 newspapers in the state. *Id.* at 578. The Court found that this was not a neutral tax, such as a sales tax, but something that singled out and targeted a small group of newspapers. *Id.* at

586-90. "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its actions." *Id.* at 592-93. No such justification was made and the statute was struck down.

Of course, not all permit fees are unconstitutional. *Murdock* recognizes that " the government is permitted to exact a fee in order to defray the cost of legitimate regulations, even though such a fee incidentally burdens speech." *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1247 (10th Cir,), *cert. denied*, 543 U.S. 812 (2004); s*ee also, e.g., Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941); *Thomas v. Chicago Park District*, 227 F.3d 921, 925 (7th Cir. 2000), *aff'd*, 534 U.S. 316 (2002). "In other words, in order to transfer the cost of a government measure to a licensee, the measure itself must be legitimate . . . . Thus, the measure '*must not be based on the content of the message*, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.'" *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 502 (6th Cir. 2008) (internal citations omitted) (emphasis added). A fee that is not content-neutral becomes a specific charge for the exercise of constitutional rights. That is precisely the constitutional fault with the Statute. It is not content-neutral. It targets a particular type of First Amendment activity and assesses a fee or tax on those wishing to exercise their constitutional rights. The Statute is unconstitutional for this reason alone.

D. The Statute unconstitutionally requires a permit to engage in activity protected by the First Amendment.

The Statute requires that, before persons sell materials to adults that are constitutionally protected by the First Amendment, they must register and, in essence, obtain a permit to engage in the constitutionally-protected activity. This is anathema to the First Amendment, and the Supreme Court has so indicated.

In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court reversed a contempt citation for violating a Texas court's order that required compliance with a Texas statute preventing soliciting union membership without obtaining a permit; the permit was automatically issued once registration was made with the secretary of state. *Id.* at 519 n.1. The Court noted:

> As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.
>
> . . .
>
> If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. . . We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirement of the First Amendment.

Id. at 539-40. The requirement of registration was deemed to be "an invalid restriction." *Id.* at 541.

The Court reiterated the point that one cannot be made to register before engaging in pure First Amendment expression in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), where it was confronted with a village ordinance that required that those who canvassed, including religious and political canvassers, obtain a permit before doing so. The permit was issued without cost and was routinely approved. *Id.* at 154-55. Nevertheless, the Court found that the ordinance was unconstitutional.

> It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Id. at 165-66.

It is no less offensive that the plaintiffs and their members must inform the State of Indiana and obtain a permit before they engage in constitutionally protected dissemination of certain information. This is not a situation where the State is imposing a neutral rule, such as a zoning ordinance or building regulation that must be satisfied by all commercial retailers. Instead, the State is demanding notice and a permit before specific information is disseminated to the public. Such a permit runs counter to the accepted notion that "punishment or curtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct." *Beckerman v. City of Tupelo*, *Miss.,* 664 F.2d 502, 510 (5th Cir. 1981). Because the Statute requires that registration occur before certain types of lawful materials are sold, the Statute is unconstitutional.

E. The Statute is unconstitutional because several of its key terms are inherently vague or defined in a way that fails to provide fair notice.

Several key terms in the Statute either are inherently vague or are defined in such a way as to fail to provide fair notice, any one of which is sufficient to render the whole Statute unconstitutionally vague. The Constitution demands that statutes be set forth with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Such precision is essential to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 US. 104, 108 (1972). In particular, exacting precision is required of restrictions that concern or impact protected expression. *See Reno,* 521 U.S. at 871-72 (1997) (explaining that the vagueness of a "content-based regulation of speech," particularly one imposing criminal penalties, "raises special First Amendment concerns because

of its obvious chilling effect on free speech"); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) ("The objectionable quality of vagueness [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.").

1. The Statute's requirement that sellers "provide a statement detailing the types of materials" is vague.

One of the problematic provisions of the Statute is its requirement that persons "intend[ing] to offer for sale or sell sexually explicit materials shall register with the secretary of state the intent to offer for sale or sell sexually explicit materials and *provide a statement detailing* the types of materials that the person intends to offer for sale or sell." IND. CODE § 23-2-55-2 (emphasis added). The Statute includes no definition or explanation of what is to be included in the "statement detailing" the types of materials to be sold. The Statute fails to prescribe the level of detail necessary or how frequently a seller must file the detailed statement. Because failure to comply with this provision of the Statute may impose criminal penalties against persons who do not "properly" file the detailed statement, yet the Statute provides no instructions on the proper way to do so, it is unconstitutionally vague. HEA Act No. 1042 (to be codified at IND. CODE § 24-4-16.4-3).[2]

The extremely imprecise wording of the Statute fails to answer many questions. Inventories change constantly; does the arrival of an item absent from an initial statement require the submission of an amended statement? Would a statement indicating that "magazines and books" are sold be sufficient, or would the statement require specific titles, or even issues or

[2] As an example of the Statute's vagueness in this regard, the Statute includes absolutely no instruction or requirement that a seller identify *the location* where sexually explicit materials are intended to be sold. Nevertheless, the Statute mandates that local officials in the locality where the seller "intends to locate" be notified of the registration. If the seller's location is not required, how can the Secretary of State notify the "local authorities"?

volume numbers? The merchant is left to ponder these complexities, and does so at his peril as enforcement of the Statute is in the hands of 92 separate prosecutors. Thus, insofar as absolutely no guidance with respect to the types of materials required to be included in the "statement" is provided, the Statute fails to provide guidance to the person of ordinary intelligence so that "he may act accordingly," *Grayned*, 408 U.S. at 108, and should therefore be overturned.

The Statute is also vague (and internally inconsistent) regarding the term "materials." As discussed above, sellers of "sexually explicit materials" must register and provide a detailed statement of the types of "materials" for sale. HEA Act No. 1042 (to be codified at IND. CODE § 23-1-55-2). Yet under Indiana Code § 23-18-12-3(a)(24), the State sets the registration fee at $250 and describes it as the fee for "Registration of intent to sell sexually explicit materials, products, or services." Moreover, under the definition of "sexually explicit materials" found in Indiana Code § 35-49-2-2, the State refers to "matters" and "performances" that are harmful to minor. And finally, the Statute exempts "programs" offered by, *inter alia,* schools, physicians, and communications service providers. HEA Act No. 1042 (to be codified at IND. CODE § 24-4-16.1-2(b)(2)). As a result, a person attempting to comply will be forced to guess at what falls within the ambit of "materials" for the detailed statement, and what constitutes "products," "services," "matters," "performances" and "programs."

The confusing and convoluted language makes compliance with the Statute difficult or impossible and may subject to criminal penalties individuals who endeavor to comply, but fail to do so because they cannot understand the requirements of the poorly worded law.

2. The Statute's definition, use and application of "persons" is vague.

The Statute applies to "persons," defined as "human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity." IND. CODE § 23-1-

55-2 (incorporating definition from IND. CODE § 35-41-1-22). The requirement that all "persons" register with the State realistically could be read to require multiple registration fees and detailed statements for the same business, to the extent both biological persons and business entities are covered. For instance, if a corporation that operates a bookstore with five employees sells materials covered by the law, the corporation and each of the individual employees presumably would have to submit separate registration fees and detailed statements.

The ambiguous wording leads to this question: If new personnel are hired after the filing of the initial statement, must a merchant (or the employee himself or herself) file an additional statement in order to be in compliance with the law? This cycle of statements and amended statements would proceed *ad infinitum*. Because the Statute is irreducibly vague with respect to the word "persons," it is unconstitutionally vague and should be overturned.

The definition of "person" in the Statute is further confused by Sections 3 and 4 of the Statute, which will be codified at Indiana Code § 24-4-16.4-3 and 4. Those sections provide:

> Sec. 3. A person *or an employee or an agent of a person* may not offer for sale or sell sexually explicit materials unless a registration and statement are properly filed as described in IC 23-1-55-1.
>
> Sec. 4. A person *or an employee or agent of a person* who knowingly or intentionally offers for sale or sells sexually explicit materials in violation of this chapter commits unregistered sale of sexually explicit materials, a Class B misdemeanor.

(emphasis added).

The term "person" is defined to include "human beings," yet Sections 3 and 4 refer also to "an employee" and "agent of a person." In ordinary usage, "employee or agent" also refers to human beings. If "person" in Sections 3 and 4 refers to "human beings," what is contemplated by "employee" and "agent"? Is this a drafting error, placing redundancy in the statute? The principle of statutory construction applicable here is that each word of the enactment is to be

given meaning. *See, e.g.*, *Progressive Halcyon Ins. Co. v. Petty*, 883 N.E.2d 854, 864 (Ind. Ct. App. 2008). But it is difficult to understand what the General Assembly contemplated by this formulation. As a result, a "person" is left to guess (again, risking criminal sanction) whether just owners, managers and independent contractors must register with the State, or whether employees and agents also fall within purview of the Statute.

3. The multiple cross-references to various sections of the Indiana Code make the Statute vague.

The Statute also is unconstitutionally vague because no reasonable person should be expected to understand what material falls within the convoluted registration requirement created by the meshing and cross-referencing of Sections 23-1-55 *et seq.*, 23-18-12-3, 35-41-1-22, 8-1-32.6-3, 24-4-16.4 and 35-49-2-2. All of these sections are included or referenced in the Statute. Although the Statute's primary provisions are added by way of a new chapter of the Indiana Code at Section 23-1-55, which generally sets the registration requirement for sellers of sexually explicit materials, to determine who is covered by the new provision, one must refer to a different Title of the Code, Section 35-41-1-22, for the definition of "persons" covered by the Statute. *See* HEA No. 1042 (to be codified at IND. CODE § 23-1-55 *et seq.*). Once that is determined, the reader then needs to refer to Section 24-4-16.4 to find out what "sexually explicit materials" means. But that still is not sufficient, because that section defines "sexually explicit materials" to mean things that are "harmful to minors," which is further defined in a separate Title of the Code, at Section 35-49-2-2. Referring back to Section 24-4-16.4 for the remainder of the definition of "sexually explicit materials," the reader must also reference Section 8-1-32.6-3 to determine the extent of certain exclusions. Finally, the reader must reference Section 23-18-12-3 to determine the applicable registration fee.

"Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, *and by manifold cross-references to interrelated enactments and rules*." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 604 (1967) (emphasis added). The Statute at issue here contains cross-references to no less than six separate sections of the Indiana Code in four different titles. "Only those able to hire the best team of lawyers may one day be able to secure the advisory opinions . . . or otherwise figure out the myriad relevant rulings with any degree of assurance that they will escape civil and criminal sanctions for their speech." *N.C. Right to Life Comm. Fund For Indep. Political Expenditures*, No. 07-1438, ___ F.3d ___, 2008 WL 1903462, at *20 (4th Cir. May 1, 2008).

F. The Statute is overbroad with regard to both its intent and its application.

The Statute also is unconstitutional under the overbreadth doctrine because it penalizes substantial materials that are protected by the First Amendment in its attempt to regulate that which is unprotected. *See Lewis v. City of New Orleans*, 415 U.S. 130, 131-32 (1974); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982); *Plummer v. City of Columbus*, 414 U.S. 2, 2 (1973); *Grayned*, 408 U.S. at 114 (1972). The Statute places burdens on vast amounts of perfectly lawful, First Amendment-protected expression, and those burdens make the Statute unconstitutional. *See Eggert Group, LLC v. Town of Harrison*, 372 F. Supp. 2d 1123, 1135 (E.D. Wis. 2005) ("[I]f [an] ordinance covers a substantial amount of expressive activity that cannot be believed to cause negative secondary effects it will be invalidated as overbroad.").

While it is permissible for the General Assembly to regulate material available to minors within constitutionally prescribed limits, in addition to the constitutional infirmities discussed above, the mode of regulation embodied in the Statute is unconstitutional because it has the effect – through its overbreadth as well as the vagueness described above – of chilling the

distribution of vast amounts of material that is perfectly legal for adults. Because of its overbroad scope, this law reaches not just unlawful, obscene material; it is not even limited to material that most would consider pornographic; it reaches large amounts of material that are consumed by the general public such as romance novels, checkout-line magazines, and videos of movies shown at commercial theaters.

The Statute sets up incentives that completely frustrate the purpose of the First Amendment. A seller of material that is appropriate for adult consumption but that might be covered by the Statute because it may be inappropriate for the youngest minors – even if the material is not intended for sale to minors – has just two realistic choices. One, the seller may pull from its stock all material that might conceivably fall within the Statute's grasp. The second option, at least for the cautious seller, is to register under the Statute and provide some sort of listing of materials the seller believes to be covered by the Statute. The latter choice means that the public's access to lawful, constitutionally protected materials is not impeded, but it also may be costly for the seller, who has registered as a purveyor of sexually explicit materials and therefore may lose business because the seller is equated with "adult bookstores" and other such businesses. This problem is at its core overbreadth because the Statute requires registration by sellers of immense amounts of material that are entirely legal for sale to and use by adults and older minors.

In reviewing statutes similar to the one in question, the Supreme Court has repeatedly cautioned that the "governmental interest in protecting children from harmful material . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875; s*ee also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) (holding that "speech within the rights of adults to hear may not be silenced completely in an attempt to shield children

from it”). The Statute's enactment has done just this. The Supreme Court has consistently held that, as to adults, “sexual expression which is indecent but not obscene is protected by the First Amendment.” *Sable Communications*, 492 U.S. at 126. Other federal courts have reached the same conclusion when addressing the constitutionality of statutes that restricted communications between adults in an effort to shield minors from materials which are harmful to juveniles. For instance, in *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), the Tenth Circuit reached the same conclusion with respect to the constitutionality of a New Mexico statute that criminalized disseminating by computer material “harmful to a minor,” because that statute, as a practical manner, outlawed a substantial amount of protected speech between adults.

In press reports commenting upon House Enrolled Act No. 1042, the Statute's co-sponsor, State Representative Terry Goodin, stated that the law was "aimed at adult bookstore-type businesses that have been cropping up along interstates in some rural areas that do not have zoning rules or ordinances to regulate such operations."[3] If this was the General Assembly's aim, the actual language it chose went far wide of the mark. The language of the Statute encompasses much more than "adult bookstore-type businesses" to at least potentially cover videos rented at Blockbuster or sold at Wal-Mart; paperback novels sold at CVS or Walgreens as well as the bookstore plaintiffs in this case; magazines sold at Kroger and Marsh; and art and art books sold by the Indianapolis Museum of Art and galleries across the state. All of these businesses are likely to be put to the choice of registering under the Statute or substantially restricting the materials they sell. Moreover, depending upon how they interpret the amount of information that must be furnished on the "statement" the Statute requires, these businesses also may be required

[3] *See* "Goodin Law Over Explicit Material Draws Opposition," AP Reports, March 26, 2008; Tim Evans, "Indianapolis Museum of Art, ACLU Sue over New State Pornography Law," Indianapolis Star, May 8, 2008, at B1.

to devote thousands of employee hours (and attorney hours as well) to poring over the materials they sell to determine which of them must be declared as being covered by the statute (or not sold if they wish to avoid registering).

Stores and store clerks will be subject to steep liability if they guess wrong about what materials the Statute covers. As the federal district court in Washington stated in striking down a Washington State statute as unconstitutionally vague, "[n]ot only is a conscientious retail clerk (and her employer) likely to withhold from minors all games that could possibly fall within the broad scope of the Statute, but authors and game designers will likely 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked.'" *Video Software Dealers Ass'n v. Maleng,* 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004) (quoting *Grayned*, 408 U.S. at 109). This understandable, self-protective behavior will deprive both adult customers and minors alike of access to completely legitimate, legal expression. Because the Statute is overly broad, the Court should find it in violation of the Constitution.[4]

VI. All other requirements to obtain a preliminary injunction are met

A. Without an injunction the plaintiffs will be caused irreparable harm for which there is no adequate remedy at law.

The violation of the First Amendment, for even "minimal periods of time" is "unquestionably . . . irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality). And, "[i]t has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law." *Cohen v. Coahoma County, Miss.,* 805 F.Supp. 398, 406 (N.D. Miss. 1992) (granting a preliminary injunction to

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[4] In light of the above arguments the plaintiffs are not pursuing their additional argument that the statute is a violation of substantive due process because it is "utterly lacking in rational justification." *Brown v. City of Michigan City, Indiana*, 462 F.3d 720, 733 (7th Cir. 2006) (internal quotation marks and citation omitted).

prevent sheriff from using illegal force to extract information from prisoners). There is no adequate remedy at law to safeguard the plaintiffs against the violation of their constitutional rights which is irreparable harm.

B. The balance of harms favor the plaintiffs.

The defendants, the prosecutors of Indiana who would be prosecuting persons for failing to register as required by the Statute, will not be harmed by a preliminary injunction preventing enforcement of the Statute. On the other hand, without an injunction the plaintiffs are facing irreparable harm. The balance of harms favor the plaintiffs.

C. The public interest will be served by the issuance of an injunction.

"The public has an interest in the protection and preservation of First Amendment rights. 'Vindication of constitutional freedoms and protection of First Amendment rights is in the *public interest.*'" *Albright v. Bd. of Educ. of Granite Sch. Dist.,* 765 F. Supp. 682, 686-87 (D. Utah 1991); *see also McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3,* 804 F. Supp. 1415, 1429 (W.D. Okl. 1992). The public interest will be served by the grant of this injunction.

D. The injunction should issue without bond.

The defendants are not facing any monetary injury if an injunction is issued. In the absence of such injury, no bond should be required. *See, e.g., Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 983 (2nd Cir. 1996).

VII. Conclusion

HEA No. 1042 is unconstitutional. If summary judgment cannot be granted to the plaintiffs, a preliminary injunction should be entered for plaintiffs, enjoining enforcement of the Statute.

/s/ Kenneth J. Falk
Kenneth J. Falk
No. 6777-49
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059 ext. 229
fax: 317/635-4105
kfalk@aclu-in.org

Attorney for Big Hat Books, Boxcar Books and Community Center, Inc.; American Civil Liberties Union of Indiana Foundation

/s/ Jon B. Laramore
Jon B. Laramore
No. 17166-49

/s/ Matthew T. Albaugh
No. 23293-49
Baker & Daniels LLP
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204
317/237-0300
fax: 317/237-1000
jon.laramore@bakerd.com
matthew.albaugh@bakerd.com

Attorneys for Indianapolis Museum of Art, Indianapolis Downtown Artists and Dealers Association

/s/ Michael A. Bamberger
Michael A. Bamberger
Admitted Pro Hac Vice
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020
212/768-6756
fax: 212/768-6800
mbamberger@sonnenschein.com

Attorney for American Booksellers Foundation for Free Expression, Association of American Publishers, Freedom to Read Foundation, Entertainment Merchants Association, National Association of Recording Merchandisers, and Great Lakes Booksellers Association

Certificate of Service

I hereby certify that on this 23rd day of May, 2008, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

David A. Arthur
Deputy Attorney General
david.arthur@atg.in.gov

Eric James Beaver eric.beaver@atg.in.gov
Deputy Attorney General
eric.beaver@atg.in.gov

/s/ Kenneth J. Falk
Kenneth J. Falk
Attorney at Law