BIG HAT BOOKS et al v. PROSECUTORS: Doc. 25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BIG HAT BOOKS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:08-cv-0596 SEB-TAB
	)	
PROSECUTORS, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. Introduction

This case is an appropriate facial challenge to House Enrolled Act 1042 ("HEA No. 1042" or "the Statute"), which requires registration and a $250 fee for any person selling matter deemed harmful to minors. Even if the Statute was not facially invalid, the Court could permanently enjoin the Statute as applied to the Plaintiffs. The facial challenge is appropriate, because, among other reasons, the Statute is substantially overbroad in violation of the First Amendment.

The defendant Prosecutors ("Prosecutors" or "State") also erroneously argue that the Statute satisfies the intermediate scrutiny applied to zoning of adult businesses; is not an unconstitutional fee, tax or permit on protected First Amendment activities; and is not vague. Because the Statute most assuredly is not a zoning regulation of secondary effects of adult business, intermediate scrutiny does not apply. In fact, the Statute is not a zoning regulation, but rather mandates a fee or tax that must be paid and a permit that must be obtained based on the content of speech. For these reasons as well as the Statute's vagueness, the Statute must be found to be unconstitutional and enjoined.[1]

II. Plaintiffs' Statements That Being Labeled Purveyors of Material Harmful To Minors May Hurt Their Businesses Are Relevant and Admissible.

Prosecutors contest the sworn statements of a number of the affiants in which they testify that being labeled a purveyor of "sexually explicit material" or "material harmful to minors" may hurt their respective businesses. Prosecutors claim these statements are speculative and should be deemed inadmissible, because they are based on "a personal

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[1] The Plaintiffs seek summary judgment, or alternatively a preliminary injunction. The Prosecutors concede that a ruling on the merits is appropriate and do not contest any of the preliminary injunction factors other than the merits of the Plaintiffs' complaint.

guess" and not supported by "studies or historical facts." (Defs.' Mem. at 3-4.)[2] Plaintiffs' conclusions regarding the impact that the Statute will have on their businesses are far from "flight of fancy, speculations, hunches, intuitions or rumors" that are inadmissible in summary judgment affidavits. *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (internal citations and quotations omitted). To the contrary, predicting how public perception will affect businesses and forecasting future performance are tasks that business owners do every day. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993) (holding owner allowed to testify as to damages he suffered, including future damages, because of defendant's tortious interference given that the franchisor had "knowledge and participation in the day-to-day affairs of his business" as well as knowledge of a report "prepared by an accountant"); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004-05 (8th Cir. 1986) ("[P]erceptions based on industry experience, [are] a sufficient foundation for lay opinion testimony.").[3]

The Plaintiffs perceive the risk of injury to their businesses to be so certain that, as indicated, one of them, Big Hat Books, simply will stop selling certain material rather than face the potential loss of business. This statement of future action is an admissible

[2] The Prosecutors also argue, with no support at all, that the sale of material harmful to minors is so serious that it causes "crime and . . . neighborhood blight" (Defs.' Mem. at 14). In light of this contention, it is curious for them also to argue that the fear that being labeled a purveyor of such material will cause harm to the business is "merely speculative."

[3] Moreover, the Prosecutors' own brief is full of purported facts that are unsupported by any affidavit whatsoever. These include statements about the statutory purpose (Defs.' Mem. at 2, citing newspaper articles, which are inadmissible hearsay); that the $250 fee "covers the costs of Secretary of State," (*Id.* at 14, with no evidentiary support); that the fee "only covers the Secretary of State's actions in giving the required notice," (*Id.* at 15, with no evidentiary support); and that "no speech is completely removed from the marketplace," (*Id.* at 25, with no evidentiary support).

fact that the Prosecutors do not challenge, and the Plaintiffs' statements regarding future injury to business and reputation are opinions "rationally based on the perception of the witness[es]" and are admissible. Rule 701, Federal Rules of Evidence.

Moreover, the Prosecutors' position on the affidavits is inconsistent with their other arguments. Although they argue against the affidavits, the Prosecutors do not contest the Plaintiffs' standing in this case. And Plaintiffs do have standing. With the exception of the American Civil Liberties Union, each Plaintiff is subject to the law on its July 1, 2008 effective date and must either pay the registration fee or face potential prosecution. "[A] plaintiff should not be required to face the Hobson's choice between forgoing behavior that he believes to be lawful and violating the challenged law at the risk of prosecution." *Smith v. Wisconsin Dept. of Agric.*, 23 F.3d 1134, 1141 (7th Cir. 1994).

Prosecutors also do not dispute that some Plaintiffs will stop selling material that would cause them to register and pay a fee under the Statute. (*See, e.g.,* Affidavit of Elizabeth Barden ¶¶ 9-10, Attachment 1 to Plaintiffs' Submission of Affidavits and Declarations of May 23, 2008 ["Plaintiffs' Submission"]). As such, the ACLU has standing to raise the interests of its members who will be unable to purchase items as a result of the Statute. *See, e.g., ACLU v. Reno,* 31 F. Supp. 2d 473, 480 n.2 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated on other grounds*, 535 U.S. 564 (2002). Thus, there is no basis to exclude the statements in the affidavits that Plaintiffs' commercial reputations will suffer if they are required to register.

III. A Facial Challenge To The Statute Is Appropriate; Even If Not, It Is An Appropriate As Applied Challenge.

A. The entire statute challenged affects the plaintiffs.

Plaintiffs' facial challenge to the Statute is proper. The Prosecutors argue at length that this case cannot proceed as a facial challenge because no challenge is made to the definition of "sexually explicit material" to be codified as Indiana Code § 24-4-16.4-2(a)(2) and that this section does not apply to the Plaintiffs. The Prosecutors' argument is erroneous for a number of reasons, not the least of which is that this section of the law does in fact apply to the Plaintiffs and violates the First Amendment.

The Prosecutors presume incorrectly that Indiana Code § 24-4-16.4-2(a)(2) applies only to sexual "*devices.*" (Defs.' Mem. at 7-9.) But subsection (a)(2), like subsection (a)(1), applies specifically to all *"products"* and *"services."* The word "devices" is not used in the Statute, and there is no reason to believe the definition is so limited. For example, the book *The Joy of Sex,* sold by the Indiana bookstore members of the American Booksellers Foundation for Free Expression (Attachment 3, ¶ 6 to Plaintiffs' Submission) and the Great Lakes Booksellers Association (Attachment 7, ¶ 5 to Plaintiffs' Submission), while not a "device," is certainly a "product" that is designed for one purpose and use only – the stimulation of sexual organs. Those selling it must register under Indiana Code § 23-1-55-2. To the extent that it provides illustrations to assist in sexual bondage, *see* Edward Moran, *The Joy of Sex*, ST. JAMES ENCYCLOPEDIA OF POP CULTURE, http://findarticles.com/p/articles/mi_g1epc/is_tov/ai_2419100656, those who sell it must register under Indiana Code § 23-1-55-2. The same is true of Boxcar Books, which sells works of the Marquis de Sade that most certainly provide for "sadism or a sadistic experience." (Attachment 2, ¶ 7 to Plaintiffs' Submission.)

Furthermore, Indianapolis artist Carol Tabac-Shank, an IDADA member, creates erotic sculptures that likely fall within the definition of Section 2(a)(2). (*See, e.g.,* http://www.caroljourdan.com/sculpture2.html.)

Both parts of the definition of sexually explicit materials plainly affect and burden the Plaintiffs. Their First Amendment challenge applies equally to both definitions.

B. *Salerno* does not apply to First Amendment challenges where overbreadth and the chilling of rights is a concern.

Prosecutors err in asserting that there can be no facial challenge to the Statute. Their argument, that the erroneously characterized "sexual devices" portion of the Statute does not apply to First Amendment expression, is based on *United States v. Salerno*, 481 U.S. 739 (1987). That case provides that "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1191 (2008) (internal citation omitted).

The State's invocation of *Salerno* is misplaced. The limitations suggested by *Salerno* do not apply to claims of overbreadth for violations of the First Amendment. *Salerno*, 481 U.S. at 745. Thus, "[t]he *Salerno* test does not apply in the area of First Amendment free speech rights, where statutes with some valid applications may nonetheless be struck down for overbreadth." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1406 n.9 (D.C. Cir. 1998). As indicated in the Plaintiffs' original memorandum and below, even if there was some constitutional application to the Statute, and none is apparent, the law is clearly overbroad in that it encompasses a substantial amount of protected First Amendment expression. Because all the definitions of

"sexually explicit materials" in Indiana Code § 24-4-16.4-2 are facially unconstitutional, there is no need to discuss *Salerno* further.

C. Even if the registration requirement for sexually explicit materials as defined by Indiana Code § 24-4-16.4-2(a)(2) is deemed to be constitutional in some applications, this court can find that the requirement for sexually explicit materials as defined in Indiana Code § 24-2-16.-4.2(a)(1) is unconstitutional both facially and as applied to the plaintiffs.

Both aspects of the definition of the term "sexually explicit material" in Indiana Code § 24-4-16.4-2(a)(1) and (a)(2) are unconstitutional. But even if there are constitutional applications to the definition in Indiana Code § 24-4-16.4-2(a)(2) (which there are not), the Court can still find that the required registration of persons selling the materials defined in Indiana Code § 24-4-16.4-2(a)(1) is facially unconstitutional. A facial challenge can be maintained against one part of a statute but not another, because a "finding of a constitutional flaw on the face of a statute does not require a wholesale invalidation of the statute." *United States v. Shields*, 522 F. Supp. 2d 317, 331 (D. Mass. 2007).

And this Court could certainly find Indiana Code § 24-4-16.4-2(a)(2) to be unconstitutional as applied to the plaintiffs, even though the Section 2(a)(1) definition of "sexually explicit material" renders the statute unconstitutional on its face. In an as-applied challenge, "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). Given the fundamental unconstitutional overbreadth of the definition, such a construction is not necessary, but it is available to the Court.

IV. The Statute Fails Because It Is An Overbroad Regulation, Without Justification, Of Constitutionally Protected Expression.

As demonstrated in Plaintiffs' opening memorandum, the Statute is an unconstitutional content-based regulation of protected First Amendment activities that is not narrowly tailored to meet any compelling governmental interest. The Prosecutors appear to argue that the Statute is not overbroad and burdensome because it is a mere registration requirement that does not prohibit materials from being sold. (Defs.' Mem. at 17.)

The State's brief fails to tackle the fact that the Statute will lead to self-censorship and burdens on First Amendment expression because it covers a wide array of First Amendment-protected material. Rather, the State's brief treats the Statute selectively, failing to address some of its most troubling elements and assuming away significant drafting problems. The Statute chills sex-related speech, without justification, that is nowhere near the gray area of protected activity, and it therefore is unconstitutional.

The State's casual comment that "[n]o sales are prohibited or restricted" by the Statute overlooks the law's real effect: if a merchant omits to enumerate its sale of something that falls within the "sexually explicit" category, the merchant may go to jail. HEA 1042 (to be codified at Ind. Code § 24-4-16.4-4 (eff. 7/1/08)). The Statute requires businesses to scour their inventories, describe covered material, and disclose it on pain of criminal penalty. The alternative is to engage in the "self-censorship" which is "a major First Amendment risk." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988).

Most significantly, the Prosecutors do not offer any binding limiting constructions of the Statute. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 617 (1973) (addressing

overbreadth in light of authoritative limiting construction offered by state). The Prosecutors do not disagree that the Statute applies to the unquestionably non-obscene material the Plaintiffs sell – books, magazines, DVDs, and art aimed for a diverse audience of adults. This is a content-based regulation of material that adults may constitutionally obtain and view. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997).

The Prosecutors also effectively concede the fact that the Statute reaches plainly legitimate activity, protected by the First Amendment, in their unexplained use of the term "sexual devices" in discussing Indiana Code § 24-4-16.4-2(a)(2). (Defs.' Mem. at 7-9.) That term is not in the Statute. As indicated above, the Statute applies to "products" and "services" and uses the broad language "designed for use in, marketed primarily for, or provides for" certain sexually oriented actions. *Id.* The language of the Statute undoubtedly applies to the written material, videos and the like that are sold by Plaintiffs. This portion of the Statute is thus another example of its unconstitutional overbreadth as it applies to large amounts of perfectly legal material and requires those selling legal material to register and pay a fee.

In an attempt to justify the Statute, the Prosecutors argue that its purpose is "to give local communities a 'heads up' if an adult bookstore is attempting to move into that community." (Defs.' Mem. at 2.) This hardly is the required narrowly tailored compelling reason that justifies a content based regulation on First Amendment expression. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (explaining requirement of narrow tailoring to fit a compelling state interest). The Prosecutors do not contest that the Statute also covers masses of material that are not sold by adult bookstores (and therefore not the Statute's professed targets). They thus concede that the

scope of the Statute is so broad that countless new businesses will be required to register, none of which are necessarily the "adult bookstores" at which the Statute is aimed, in turn requiring local officials to spend inordinate time determining whether any businesses are opening that they are truly interested in.

It also is unclear how this "heads up" purpose is related to any goal of protecting children, inasmuch as children do not go to adult bookstores.[2] *See* Ind. Code § 35-49-3-3 (prohibiting display to minors of material harmful to minors). Moreover, the Supreme Court has made it clear that an avowed purpose of protecting children was not sufficient to allow an overbroad impact on the First Amendment rights of adults. Thus, in *Reno v. ACLU*, 521 U.S. at 875, the Supreme Court invalidated a restriction on Internet pornography as overbroad even though the statute was designed directly to protect minors, holding that protecting children is not a sufficient rationale for unnecessarily broad suppression of speech. The Statute in this case is even more problematic because, while it is similarly overbroad, it is not designed to protect children because it applies "even if the product or service is not intended to be used by or offered to a minor." HEA 1042 (to be codified at 24-4-16.4-2 (eff. 7/1/08)).

The Prosecutors also do not seriously dispute that the registration requirements of the Statute are both burdensome and commercially harmful to the non-adult bookstores covered by the Statute, thus undercutting any possible claim that the Statute is narrowly tailored. They repeatedly point out that the Statute is "only" about registration, but they

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[2] An additional flaw in the Prosecutors' "heads up" argument is that the Statute does not require any *advance* notice when an adult business is opening. The Statute does not require any advance notification (e.g. 90 days) before opening, so local authorities can take no advance action to regulate the problem.

do not address the sworn statements by the Plaintiffs that registration would harm their commercial status and by many Plaintiffs that the requirement to file a "statement" would be arduous. The harmful effects of the Statute's unconstitutional overbreadth are clear in the summary judgment record and at no point do the Prosecutors attempt to demonstrate that the Statute "is the least restrictive means among available, effective alternatives" to achieve their asserted goal. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

V. The Statute Is Not A Zoning Law Subject To Secondary Effects Analysis; Even If It Was, It Would Fail Intermediate Scrutiny.

Perhaps recognizing that the Statute is doomed to failure under strict scrutiny, the Prosecutors argue that the Statute is "intended [to] perform the same function" as a zoning ordinance (Defs.' Mem. at 12), and therefore subject to the intermediate scrutiny assessed against zoning ordinances that target not protected speech, but the secondary effects of adult businesses. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). The Prosecutors' arguments fail for numerous reasons.

First, to point out the obvious, the Statute is neither a zoning ordinance nor a land use regulation, but a means to target First Amendment-protected expression. A secondary effects analysis is applied to a zoning ordinance because efforts to tackle the secondary effects of businesses selling sexually explicit material are deemed to be content neutral. *Renton*, 475 U.S. at 929-930. But even a zoning ordinance regulating sexually explicit businesses that is aimed at the expression itself rather than at secondary effects is valid only if justified under strict scrutiny. *See Joelner v. Vill. of Washington Park, Ill.*, 508 F.3d 427, 431 (7th Cir. 2007). Again, the Statute applies to anyone who sells sexually explicit material, regardless of any effects. It is not "a content-neutral

restriction that regulates conduct," but a regulation of "First Amendment expression." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (plurality).

Second, the Prosecutors' argument fails because there is no evidence whatsoever of any secondary effects. *Renton* and *Alameda Books* require that the government rely on some evidence to justify its conclusions concerning secondary effects. *Alameda Books*, 535 U.S. at 438. As this Court has noted:

> In applying *Renton/Alameda Books*, the Seventh Circuit observed that a critical deficiency in the Ordinance was the utter lack of evidence proffered to support the premise that nude dancing clubs were associated with adverse effects; simply *assuming* such effects exist does not satisfy the evidentiary standard. While the *Alameda Books* standard is admittedly a minimal one, the record in this case was "devoid of evidence" . . . .

Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773, 784 (S.D. Ind. 2004) (citing *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402 (7th Cir. 2004) (finding insufficient evidence of secondary effects arising from exotic dancing nightclubs to justify an ordinance restricting their operation)).

To say that the record here is lacking in secondary effects evidence is an understatement. The State proffered no evidence of any effects that the Statute is designed to combat. The State references a National Public Radio piece that indicates that the purpose of the Statute was to "give local communities a 'heads up' if an adult bookstore is attempting to move into that community," (Defs.' Mem. at 2), but this is hardly evidence of a negative secondary effect. Moreover, given the broad reach of the Statute to First Amendment activities like bookstores and art galleries, the possibility that any evidence of adverse side effects could be adduced is less than minimal.

Third, even if adverse secondary effects were present, the Statute would still have to satisfy intermediate scrutiny, which requires that the Statute "be narrowly tailored to

prevent the harms" constituting secondary effects. *New Albany DVD, LLC v. City of New Albany*, 362 F. Supp. 2d 1015, 1022 (S.D. Ind. 2005). This standard "is an effort to ensure that, given a genuine nexus between the purpose of [the statute]. . . that regulates First Amendment speech and the [statute] . . . itself, the law not be broader than necessary to achieve the City's goal." *Id.* at 1022. Here, the Statute is not narrowly tailored to any degree. Geographically speaking, it regulates and inhibits legitimate First Amendment expression that is far removed from "adult stores that have been opening up with increasing frequency along highways in rural areas." (Defs.' Mem. at 2.) Moreover, if a purpose of the Statute is to prevent children from being exposed to harmful material of a sexual nature, then why apply it to everyone who sells the material, "even if the product or service is not intended to be used by or offered to a minor"? As noted in Plaintiffs' opening brief, the State already has in place criminal statutes penalizing the knowing dissemination of harmful matters to minors. *See* Ind. Code § 35-49-2-2.

VI. The Statute Is A Content Based Fee Or Tax On, And Permit Requirement For, First Amendment Expression And As Such Is Unconstitutional.

The Prosecutors argue that the $250 registration fee is not an unconstitutional tax or fee on First Amendment expression because it is designed to cover the costs of the notice that the Secretary of State must deliver under the Statute. (Defs.' Mem. at 14-15.) This argument misses the point. The State cannot erect an unconstitutional mechanism and then constitutionally charge a fee to those regulated to finance the system. As the plaintiffs quoted in their initial memorandum, "[i]n order to transfer the costs 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).

The Prosecutors also claim, again erroneously, that the Statute does not impose a permit requirement to engage in First Amendment activity because the Statute does not allow expression to be denied and the Statute meets the standards for a permit established by *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). In *Freedman*, the Court held that a censorship system established to prevent the distribution of obscene movies could be upheld only if the censor bore the burden of going to court and the burden of proof to suppress the speech *and* only if any restraint before judicial review was for a brief period. *Id.* at 58-59. *Freedman* certainly does not stand for the proposition, advanced by the Prosecutors, that there is no First Amendment violation whenever a permit procedure creates no risk of censorship and does not grant the State unfettered discretion. The fact that no one will be denied a permit is irrelevant. "[C]onstitutional violations may arise from the 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of first amendment rights." *Penny Saver Publ'ns, Inc. v. Vill. of Hazel Crest,* 905 F.2d 150, 154 (7th Cir. 1990) (citing *Laird v. Tatum,* 408 U.S. 1, 11. (1972)). Indeed, in striking down the permit requirement in *Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), the Court noted that the permits were issued without cost and were routinely approved. *Id.* at 154-55. These features were not enough to save the permit requirement from a finding that it was unconstitutional.

The Statute will require a number of retailers to engage in self-censorship – "a major First Amendment risk." *City of Lakewood*, 486 U.S. at 759. Moreover, having to

pay a fee to exercise First Amendment rights, except in the context of a reasonable time, place and manner regulation, is unconstitutional inasmuch as a State may not assess a fee "as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943). The State makes no argument that the Statute is a reasonable time, place and manner regulation that is content neutral and narrowly tailored and leaving open ample alternative channels of communication. *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983).

To the contrary, the Statute is not content neutral and is not narrowly tailored. The Statute does not impose a permit requirement on expression in a public place or some other conduct that would then be subject to the reasonable time, place and manner analysis. It requires a permit to engage in pure First Amendment expression. This requirement is 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." *Watchtower,* 536 U.S. at 165-66.

VII. The Statute Is Unconstitutionally Vague.

In responding to the Plaintiffs' concerns, the State's brief acknowledges some "poor drafting" in the Statute, then addresses one claim of vagueness by saying that "the plaintiffs have provided sufficiently detailed statements of the types of materials they offer or intend to offer for sale in their affidavits." (Defs.' Mem. at 18-19.) But the affidavits run the gamut from enumerating specific works of literature (Att. 1, ¶¶ 5-6) to much more general descriptions (Att. 7, ¶ 5) ("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").

The Prosecutors do not indicate whether either or both of these approaches satisfies the Statute, nor does their statement purport to bind any prosecuting attorney to the views expressed in the brief. Those regulated by the Statute therefore are left with exactly as much uncertainty as they had before the brief was filed. The Prosecutors also address vagueness by offering that the Statute contains "no provision for rejecting a registration that inadequately details the sexually explicit materials" (Defs.' Mem. at 19) – but this argument conveniently overlooks the fact that an inadequate registration can subject the seller to criminal penalties.

The Prosecutors' effort to deal with the vague use of "person" in the Statute is similarly unavailing. Their indication that only one "person" can be a seller, so that only the business and not its employee is a "person" under the statute (Defs.' Mem. at 19), impermissibly renders some of the language in the Statute superfluous. *See, e.g., Vanderburgh County Elec. Bd. v. Vanderburgh County Democratic Central Comm.*, 833 N.E.2d 508, 511 (Ind. Ct. App. 2005) (referring to "basic tenet of statutory construction that [courts] will strive to avoid a construction that renders any part of the statute meaningless or superfluous"). The Prosecutors' construction renders superfluous a portion of the Statute creating a criminal offense when a "person *or an employee or agent of a person* who knowingly or intentionally offers for sale sexually explicit materials in violation of this chapter." HEA 1042 (to be codified at Ind. Code § 24-4-16.4-4 (eff. 7/1/08)) (emphasis supplied). If the Prosecutors' interpretation were correct, the italicized phrase would be superfluous, contrary to established principles of statutory drafting. The failure of the Prosecutors' attempt to solve this problem by construction underscores the Statute's vagueness.

The State's reliance on *Zitlaw v. State*, 880 N.E.2d 724 (Ind. Ct. App. 2008), is also unavailing because that decision had nothing to do with expression protected by the First Amendment. In a criminal prosecution, *Zitlaw* found that the "harmful to minors" language was unambiguous when applied to a defendant who had exposed himself in a public park. It raised no First Amendment issue.

In this context, however, the phrase "harmful to minors" is far more vague and troubling than in its original location in the criminal code at Indiana Code § 35-49-2-2. The Statute covers material that is "harmful to minors" "even if the product or service is not intended to be used by or offered to a minor." HEA No. 1042 (to be codified as Ind. Code § 24-4-16.4-2 (eff. 7/1/08)). This apparent contradiction makes applying the statutory language far from straightforward and would likely require expensive legal advice on a constant basis. Take, for example, a romance novel sold at Target, CVS or Marsh and containing an explicit sex scene. Applying the terms of the statute, it "represents sexual excitement" under Ind. Code § 35-49-2-2(1); it probably addresses the prurient interest of a 15-year old (under § 35-49-2-2(2)); it may be deemed offensive to a 5-year old under § 35-49-2-2(3); and it is certainly of no redeeming value to a 3-year old (who likely cannot read at all) under Ind. Code § 35-49-2-2(4). This analysis is convoluted, using the full range of ages of minors, and it leads to the conclusion that Target, CVS and Marsh had better register under the Statute if they want to be safe. This analysis demonstrates that the Statute falls far short of the mandated standard that it "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 U.S. 104, 108 (1972).

IX. Conclusion

The Statute is unconstitutional and appropriate relief should be entered for the plaintiffs enjoining its enforcement.

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Certificate of Service

I hereby certify that on this 12th day of June, 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.

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