Case Nos. 07-4375 & 07-4376

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al.,

Plaintiffs-Appellees-Cross-Appellants

v.

MARC DANN, Attorney General of Ohio, et al.,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Case No. 3:02cv210

PROOF BRIEF OF DEFENDANTS-APPELLANTS MARC DANN, ATTORNEY GENERAL OF OHIO, ET AL.

MARC DANN
Attorney General of Ohio

WILLIAM P. MARSHALL*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC MEUTI
Deputy Solicitor
ELISE W. PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax

Counsel for Defendants-Appellants
Marc Dann, Ohio Attorney General, et al.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

STATEMENT IN SUPPORT OF ORAL ARGUMENT vi

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 6

A. Electronic communication has become child abusers' chief method of predation 6

B. Statutory backdrop: Ohio's statute prohibits the knowing or reckless dissemination to juveniles of materials deemed harmful to them, but does not prohibit constitutionally protected speech among adults 10

1. Ohio's statute prohibits only the direct dissemination of materials defined as "harmful to juveniles" 10

2. Ohio's statute narrows the universe of communications that can be the subject of prosecutions in three distinct ways 11

C. Procedural history 14

1. Plaintiffs challenged the constitutionality of Ohio's former law, and the district court granted an injunction 14

2. The Ohio General Assembly amended the statute, and Plaintiffs amended their complaint to challenge the statue as it presently stands 15

3. The district court granted in part and denied in part Plaintiffs' motion for summary judgment 17

SUMMARY OF THE ARGUMENT 20

STANDARDS OF REVIEW 22

ARGUMENT 24

A. None of Plaintiffs asserts facts sufficient to establish standing to sue, even under the exception for an overbreadth challenge under the First Amendment 25

1. A concrete and actual injury-in-fact is necessary to establish standing, even for plaintiffs raising a First Amendment overbreadth claim 25

2. Plaintiffs cannot establish an injury-in-fact by alleging that they fear prosecution for engaging in activities that the Ohio statute does not prohibit 27

B. The Ohio law's definition of materials that are harmful to juveniles satisfies the *Miller-Ginsberg* test for juvenile obscenity 31

C. The Ohio law does not affect constitutionally protected speech among adults 34

D. The Ohio law is not substantially overbroad 39

E. Ohio's statute satisfies strict scrutiny 43

F. Ohio's statute lacks the flaws that inhere in other "harmful to minors" statutes 45

1. Ohio's statute is distinguishable from the federal Communications Decency Act 46

2. Ohio's law differs from the federal Child Online Protection Act, which regulated only Web transmissions 47

3. Ohio's law is distinguishable from the Virginia statute at issue in *PSINet, Inc. v. Chapman* 48

4. Ohio's law differs from the New Mexico statute struck down in *ACLU v. Johnson* 49

5. Ohio's law is distinguishable from the Michigan statute at issue in *Cyberspace Communications v. Engler* 49

6. Ohio's law differs from the Arizona statute struck down in *ACLU v. Napolitano* 49

CONCLUSION 51

CERTIFICATE OF COMPLIANCE .... unnumbered

DESIGNATION OF APPENDIX CONTENTS .... unnumbered

CERTIFICATE OF SERVICE .... unnumbered

TABLE OF AUTHORITIES

Cases **Page(s)**

ACLU v. Johnson,
4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd.* 194 F.3d 1149 (10th Cir. 1999)........ 49

ACLU v. Napolitano,
Civ. No. 00-505 (D. Ariz. June 14, 2002) 49

American Booksellers v. Webb,
919 F.2d 1493 (11th Cir. 1990) 40

Ashcroft v. ACLU,
535 U.S. 564 (2002)... 32, 46, 47

Ashcroft v. ACLU,
542 U.S. 656 (2004)... 41, 47, 48

Blair v. Henry Filters, Inc.,
505 F.3d 517 (6th Cir. 2007) 22

Connection Distributing Co. v. Keisler,
505 F.3d 545 (6th Cir. 2007) ....*passim*

Cyberspace Communications v. Engler,
55 F. Supp. 2d 737 (E.D. Mich. 1999).. 49

DaimlerChrysler Corp. v. Cuno,
126 S. Ct. 1854 (2006)... 22

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,
466 F.3d 391 (6th Cir. 2006) 23

DiCarlo v. Potter,
358 F.3d 408 (6th Cir. 2004) 22

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)... 34

Erznoznik v. Jacksonville,
422 U.S. 205 (1975).. 33

Ferber v. New York,
458 U.S. 747 (1982) 35, 42

FW/PBS, Inc. v. Dallas,
493 U.S. 215 (1990) 35

Ginsberg v. New York,
390 U.S. 629 (1968) .... *passim*

Hein v. Freedom from Religion Foundation, Inc.,
127 S. Ct. 2553 (2007) 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 25, 26, 31

LULAC v. Bredesen,
500 F.3d 523 (6th Cir. 2007) 26

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 22

Miller v. California,
413 U.S. 15 (1973) .... *passim*

Mishkin v. New York,
383 U.S. 502 (1966) 32

Morrison v. Board of Education of Boyd County,
507 F.3d 494 (6th Cir. 2007) 40, 43

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 35

Prime Media, Inc. v. City of Brentwood,
485 F.3d 343 (6th Cir. 2007) 3, 25, 40

PSINet, Inc. v. Chapman,
167 F. Supp. 2d 878 (2001), *aff'd. PSINet, Inc. v. Chapman*, 362 F.3d 227
(4th Cir. 2004) 48, 49

Reno v. ACLU,
521 U.S. 844 (1997) .... *passim*

Sable Communications of California, Inc. v. FCC,
492 U.S. 115 (1989) 41, 42, 44

Sandusky County Democratic Party v. Blackwell,
387 F.3d 565 (6th Cir. 2004) 22

Steffel v. Thompson,
415 U.S. 452 (1974) 27

Thaddeus-X v. Blatter,
175 F.3d 378 (6th Cir. 1999) (en banc) 43

United States v. Playboy Entertainment Group,
529 U.S. 803 (2000) 44

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 34

Virginia v. American Booksellers Association,
484 U.S. 383 (1988) 26, 34, 40

Virginia v. Hicks,
539 U.S. 113 (2003) 40

Warth v. Seldin,
422 U.S. 490 (1975) 25, 26

Women's Medical Professional Corp. v. Baird,
438 F.3d 595 (6th Cir. 2006) 23

Younger v. Harris,
401 U.S. 37 (1971) 27

Statutes and Rules **Page(s)**

Arizona Revised Statute § 13-3506 .... 49, 50

Fed. R. Civ. P. 56(c) 22

Ohio Rev. Code § 1983 43

Ohio Rev. Code § 2901.31(D)(2)(a) 36

Ohio Rev. Code § 2901.31(D)(2)(b) 36

Ohio Rev. Code § 2907.01(E) .... *passim*

Ohio Rev. Code § 2907.01(E)(1) 33

Ohio Rev. Code § 2907.01(E)(2) 33

Ohio Rev. Code § 2907.01(E)(3) 28, 30, 33

Ohio Rev. Code § 2907.01(J) 14

Ohio Rev. Code § 2907.31 .... 35, 36

Ohio Rev. Code § 2907.31(A) 11, 12

Ohio Rev. Code § 2907.31(A)(1) 13, 36

Ohio Rev. Code § 2907.31(A)(2) 36

Ohio Rev. Code § 2907.31(A)(3) 11

Ohio Rev. Code § 2907.31(B)(2) 33

Ohio Rev. Code § 2907.31(C) 13

Ohio Rev. Code § 2907.31(D) 1, 16, 18

Ohio Rev. Code § 2907.31(D)(1) .... *passim*

Ohio Rev. Code § 2907.31(D)(2)(a) 13, 43

Ohio Rev. Code § 2907.31(D)(2)(b) 12, 42, 47

Other Resources **Page(s)**

Amanda Lenhart & Mary Madden, *Teens, Privacy & Online Social Networks; How teens manage their online identities and personal information in the age of MySpace,* April 18, 2007, avail. at http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf (last visited on 2/22/2008) 8

U.S. Constitution, Article III 3, 20, 256 27

Child Online Protection Act ("COPA") 47, 48

Communications Decency Act of 1996 ("CDA") 38, 46, 47, 48

Cox Communications, *Teen Internet Safety Survey, Wave II*, March 2007, available at http://www.cox.com/TakeCharge/includes/docs/survey_results_2007.ppt (last visited 2/22/2008) 9

House Bill 8 .... 14, 15

House Bill 490 .... *passim*

Wolak, Finkelhor and Mitchell, *Internet Sex Crimes Against Minors: The Implications for Prevention Based on Findings from a National Study,* 35 J. of Adolescent Health 424.e11, 424.e15 (2004) 7

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants-Appellants Marc Dann, Attorney General of Ohio, et al., respectfully request oral argument, which they believe will aid this Court's consideration of the varied and complex issues that this case presents.

JURISDICTIONAL STATEMENT

The district court had federal-question jurisdiction over Plaintiffs' First Amendment challenge under 28 U.S.C. § 1331. On October 22, 2007, Defendants-Appellants timely appealed the district court's final judgment entered on September 24, 2007. Accordingly, 28 U.S.C. § 1291 provides this Court with jurisdiction over Defendants-Appellants' appeal from the district court's final judgment.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Ohio Revised Code section 2907.31(D), which prohibits using the Internet to send directly to juveniles materials that are harmful to them survives a First Amendment overbreadth challenge because it (a) criminalizes the dissemination of sexually explicit speech only to an audience for which that speech is not protected and (b) does not ban or otherwise affect protected speech.

2. Whether Ohio Revised Code section 2907.31(D) passes strict scrutiny when no less-restrictive means equivalently further Ohio's compelling interest in protecting its children from materials that are harmful to them.

INTRODUCTION

Plaintiffs-Appellees ("Plaintiffs") filed this suit against Ohio's Governor and the prosecutors in each of Ohio's eighty-eight counties (collectively, "State Defendants") to challenge a prior version of Ohio's statute prohibiting the transmission of certain sexually explicit materials to juveniles via the Internet. Plaintiffs argued, and the district court concluded, that the former statute barred too much protected speech among adults.

The Ohio General Assembly revised the statute to fix this flaw. The revised statute prohibits only *knowing or reckless*, *direct* transmissions of such materials to juveniles, and exempts from its reach communications broadcast widely to the public, so Web pages are not covered. Yet Plaintiffs continue to pursue their First Amendment claims, notwithstanding that none of Plaintiffs have ever been prosecuted, or even arrested, for violating the statute, and none allege that they even *intend* to take any actions that *might* run afoul of the statute as it presently stands. The operative pleading in this case—Plaintiffs' Second Amended Complaint—reveals that although Plaintiffs maintain that the pleading addresses the "Revised Internet Restriction," they are actually still litigating against the prior version. Not one of Plaintiffs alleges anything sufficient to establish that a reasonable speaker in its shoes would be chilled by the Ohio statute's modest prohibitions. Nonetheless, Plaintiffs continue to scream, "the cyber-sky is falling!"

and invite the federal judiciary to dream up scenarios under which *some* speaker, fearing a *hypothetical* prosecution under the Ohio statute, *might* be chilled in the exercise of First Amendment freedoms.

Unfortunately, the district court took the bait. To reach its conclusion that the Ohio statute is overbroad, the district court ignored the canon of constitutional avoidance, relied on an overblown reading of inapposite precedent to judicially erase the Ohio statute's strict scienter element, and applied the wrong test to Plaintiffs' First Amendment overbreadth claim. Further, the district court cited no instance of how any Plaintiff suffered any injury-in-fact sufficient to confer standing. Once these errors are corrected, two conclusions are inescapable.

First, Plaintiffs lack standing to pursue their First Amendment overbreadth claim. As this Court has recognized, the doctrine of overbreadth does not excuse a plaintiff from meeting the Article III standing requirements, including showing a concrete and non-hypothetical injury-in-fact caused by the challenged statutory provisions. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343 (6th Cir. 2007). Plaintiffs have neither alleged nor established any harm caused to them by the statute. Because they do not allege that they presently engage, or intend to engage, in any conduct that even arguably violates the Ohio statute at issue, they fail to allege any likelihood that the statute will cause them any such injury. Without an actual or imminent injury, Plaintiffs cannot establish standing.

Second, the Ohio statute is not overbroad. To the contrary, it regulates only content fitting the Supreme Court's definition of materials that are obscene as to juveniles ("juvenile obscenity"), and it bans such speech only when the speaker (1) directs such speech toward a juvenile, and (2) can be charged with knowledge that the recipient is a juvenile. Because juvenile obscenity receives no First Amendment protection when directed at this audience, the Ohio statute does not apply to any constitutionally protected speech. Further, the statute contains an explicit exemption for widely disseminated communications using methods of communication that deny the speaker the ability to prune particular people from the roster of recipients, as well as demanding scienter requirements. These provisions prevent the prosecution of people who innocently transmit juvenile obscenity to minors and of those who post material on the Web for all to see. Thus, the chances are exceedingly slim that the Ohio statute's prohibition of juvenile obscenity can bleed into the realm of constitutionally protected sexually explicit adult-to-adult speech. Additionally, compelling government interests justify the statute—protecting minors' physical and psychological well-being both immediately, by preventing them from receiving harmful materials, and in the long-run, by denying child predators the ability to "groom" children for sexual abuse. Weighing each of these factors together, as this Court directed in *Connection Distributing Co. v. Keisler*, 505 F.3d 545 (6th Cir. 2007), reveals beyond cavil that the Ohio statute is not overbroad.

For these reasons, the State Defendants urge this Court to reverse the district court's judgment and to remand this case with instructions to enter judgment for the Defendants-Appellants.

STATEMENT OF THE CASE

This case presents a facial First Amendment challenge to Ohio's statute prohibiting the knowing or reckless, direct transmission to juveniles of materials that are obscene as to that audience. Ultimately, this prohibition is aimed at preventing child predators from "grooming" potential victims via targeted sexually explicit electronic communications. The district court concluded that the statute was overbroad and that it could not withstand strict scrutiny. It granted Plaintiffs-Appellees' motion for summary judgment on that issue and issued a permanent injunction enjoining the enforcement of Ohio Revised Code section 2907.31(D)(1) "as applied to internet communications." (R. 105; Dist. Ct. Order dated 9/24/07 at 47; J.A. at ___). Defendants-Appellants now appeal that portion of the district court's judgment.

STATEMENT OF THE FACTS

A. Electronic communication has become child abusers' chief method of predation.

The Ohio statute at issue is not aimed only at shielding children from pornographic materials. It is also designed to protect them from sexual predation. Before the advent of e-mail and instant messaging ("IM"), a sexual predator was limited in trying to seduce children not otherwise known to him because he had to approach the child in person and did not have much time to get the child comfortable both with him and with the idea of having sex. (R. 61; Hrg. Tr. at 164 (Barlow Test.); J.A. at ___). For example, a predator might go to a park or playground and try to talk to a child. If he could not get the child to trust him or go with him the first day, he usually could not try again with the same child the next day because the child would recognize him. (*Id.*)

The anonymity of Internet communications changed the nature of sex crimes against children, and especially against young teens. For a variety of reasons, the use of IM and e-mail makes it easier for a predator to sexually exploit a child. First, the predator can contact the child repeatedly over a long period of time, allowing him to gain the child's trust. He often begins by discussing issues the child is interested in, and tries to make the child comfortable. He communicates with the child often, sometimes daily. The child feels safe because the conversations are anonymous, innocuous, and friendly. The predator lulls the child

into a sense that the predator is no longer a stranger but a friend. The predator can then "groom" the child, or condition the child to the idea of sex with an adult, sometimes with words, other times by transmitting sexually explicit images. Over time, the child begins to trust the predator, and may travel to meet him and even be coaxed into a sexual encounter. (R. 61; Hrg. Tr. at 165 (Barlow Test.); J.A. at ___).

Scholars have reported that most offenders—64%—took a month or more to develop relationships with victims by communicating with them over the Internet. *See* Wolak, Finkelhor and Mitchell, *Internet Sex Crimes Against Minors: The Implications for Prevention Based on Findings from a National Study,* 35 J. of Adolescent Health 424.e11, 424.e15 (2004) ("Victim Study"). Indeed, the authors of this study state that it is "misleading" to characterize the offenders as strangers to the victims, "because in most cases they had communicated extensively with the victims, both online and off, before they actually met in person." *Id.* at 424.e18. "Offenders used these interactions to establish romantic or otherwise close relationships before they first met victims face-to-face." *Id.* Eighty percent of the offenders brought up sexual topics during Internet communications with victims, 20% had cybersex with victims, and 18% transmitted sexual pictures to victims over the Internet. *Id.* at 424.e15.

Second, the Internet makes it easier for a predator to prey on children because the predator is much less likely to attract the attention of parents and law enforcement when he uses IM or e-mail, and even if he does, he is often impossible to identify unless the predator and victim actually meet. With the near-universal availability of the Internet, a child can hide from her parents any involvement with the predator by using the computers at the library, a friend's house or at school.

Third, the Internet has made children more vulnerable and accessible to predators, through children's own Internet activity. As found in a study sponsored by Pew Internet & American Life Project, Internet social networking sites such as MySpace and Facebook are a source for personal information about young teens that is easily accessible to online predators. *See* Amanda Lenhart & Mary Madden, *Teens, Privacy & Online Social Networks; How teens manage their online identities and personal information in the age of MySpace,* April 18, 2007, avail. at http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf (last visited on 2/22/2008). The study found that "teens are one of the most wired segments of the American population." *Id.* at 1. Teenagers, who are going through a "tumultuous period of identity formation and role development" have embraced social networking sites, and have used them to access the numerous communication tools on the Internet. *Id.* at 1.

Social networking sites allow a participant to post a "profile" of herself. The profile often contains identifying information and interests, such as hobbies, sports, etc. The Pew Study found that 55% of online teens post profiles on social networking Internet sites such as MySpace and Facebook. *Id.* at 11. Among those teens who post profiles on the Internet, 46% are available to anyone online, 82% have included their first name, 79% have included a photograph of themselves, 61% have included the name of their city or town, 49% have included the name of their school, 40% have included their IM screen name, 29% have included their e-mail address, and 29% have included their last names. *Id.* at 16.

Moreover, a significant percentage of teenagers do not recognize that posting personal information online is unsafe. A 2007 survey sponsored by Cox Communications found that one out of five teenagers ages 13-17 reported that posting personal information and photos online is safe. Cox Communications, *Teen Internet Safety Survey, Wave II*, March 2007, available at http://www.cox.com/TakeCharge/includes/docs/survey_results_2007.ppt (last visited 2/22/2008), at 21. Almost half said that they were not concerned about other people using their personal information posted online—up almost ten percentage points from 2006. *Id.* at 22. And almost half said that they were unconcerned that posting personal information online might affect their future in undesired ways. *Id.* at 23.

In these ways, the Internet has revolutionized the practice of child predation. As technology continues to expand, new technological trends exacerbate this problem and make it more difficult for the States to pursue their compelling interest—indeed their duty—to protect children from sexual exploitation.

B. Statutory backdrop: Ohio's statute prohibits the knowing or reckless dissemination to juveniles of materials deemed harmful to them, but does not prohibit constitutionally protected speech among adults.

To prevent child abusers from using technology to "groom" children for abuse via sexually explicit materials, Ohio passed a law criminalizing the transmission of such materials directly to juveniles.

1. Ohio's statute prohibits only the direct dissemination of materials defined as "harmful to juveniles."

As amended in House Bill 490, Ohio's law makes it a criminal offense to *directly* disseminate material harmful to juveniles. The statute's general provisions state:

> No person, with knowledge of its character or content, shall recklessly do any of the following:
>
> (1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;
>
> (2) Directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile,

> or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles.

Ohio Rev. Code § 2907.31(A). Simply allowing a juvenile or juveniles to see material harmful to them, however, is a violation only when the person providing the material is in physical proximity to the juvenile. *See id.* § 2907.31(A)(3).

The Ohio law—as revised by House Bill 490—defines "harmful to juveniles" as follows:

> "Harmful to juveniles" means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:
>
> (1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.
>
> (2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.
>
> (3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

Ohio Rev. Code § 2907.01(E).

2. Ohio's statute narrows the universe of communications that can be the subject of prosecutions in three distinct ways.

In considering House Bill 490, the Ohio General Assembly sought to pursue the State's compelling interest in protecting minors from receiving materials that are harmful to their development, yet also to protect adults' constitutional right to

receive sexually explicit electronic communications. Accordingly, Ohio's statute does not prohibit *all* Internet speech meeting the "harmful to juveniles" definition. Instead, the General Assembly limited in three distinct ways the universe of communications that could form the basis for prosecutions under the Ohio statute.

First, as mentioned previously, the Ohio statute prohibits the transmission to juveniles of materials harmful to them only if that transmission is accomplished *directly*. Thus, merely posting a sexually explicit image—even one fitting the definition of "harmful to juveniles"—to a publicly available forum, such as the World Wide Web or a USENET discussion group, cannot violate the statute. To ensure that the statute does not trench on constitutionally protected adult-to-adult speech, the General Assembly employed a belt-and-suspenders approach by adding a "broadcast communications exemption." Under it, a person cannot be prosecuted for transmitting "harmful to juveniles" materials via a "method of mass distribution" when that particular technology "does not provide the person the ability to prevent a particular recipient from receiving the information." *Id.* § 2907.31(D)(2)(b).

Second, the Ohio statute does not proscribe the innocent or accidental transmission of "harmful to juveniles" materials, even to minors. Ohio Revised Code section 2907.31(D)(1) defines how section 2907.31(A)'s general provisions apply in cyberspace. It explains:

> A person [violates Ohio Revised Code sections 2907.31(A)(1) or (A)(2)] by means of an electronic method of remotely transmitting information if the person *knows or has reason to believe* that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

Id. § 2907.31(D)(1) (emphasis added). The statute further strengthens this robust scienter requirement. It clarifies that when a "person has inadequate information to know or have reason to believe that a *particular* recipient of the information or offer is a juvenile," that person does not violate the statute. *Id.* § 2907.31(D)(2)(a) (emphasis added). Thus, a person who communicates with another person via e-mail or IM cannot violate Ohio's law unless he or she knows or has reason to believe that the recipient of the message is a juvenile.

Third, the Ohio statute provides a "proper purpose" affirmative defense. Under it, even a direct transmission to a known juvenile of material meeting the definition of "harmful to juveniles" is not illegal if that material is presented for "a bona fide medical, scientific, educational, . . . or other proper purpose" by a "proper person," such as a doctor, teacher, or the like. Ohio Rev. Code § 2907.31(C).

Under the first two limiting provisions, a person who posts a sexually explicit image on a publicly available forum like the World Wide Web cannot violate Ohio's law. As Plaintiffs acknowledge, "[a]nyone who posts content to the Web, chat rooms, mailing lists, and discussion groups makes it automatically available to

all users worldwide, including minors." (R. 69; Second Am. Compl. ("SAC") ¶ 66; J.A. at ___). It is thus impossible for such a person to be guilty of violating Ohio's statute for at least two reasons. First, a person who posts materials to a Web site or in a chat room would lack sufficient information to suspect that any *particular* viewer of that transmission would be a minor, so the prosecution could not prove the statute's hardy scienter requirements. Second, and equally importantly, such methods of communication do not provide the poster with the ability to block the page from preventing particular recipients from viewing the image, so the broadcast exemption would insulate him from prosecution.

C. Procedural history.

1. Plaintiffs challenged the constitutionality of Ohio's former law, and the district court granted an injunction.

Plaintiffs originally filed this case in 2002 against the State Defendants, offering a constitutional challenge to Ohio's law as it stood after the passage of House Bill 8 in 2002. (*See* R. 1; Compl.; J.A. at ___; R. 5; Am. Compl.; J.A. at ___). The former law made it a crime to "disseminate" or "display" to a minor any "materials harmful to juveniles." Ohio Rev. Code § 2907.01 (E) & (J) (2002). Plaintiffs attacked the statute on various fronts. They argued that the definition of "material harmful to juveniles" was unconstitutionally overbroad and vague. They further alleged that the law's provisions aimed at Internet communications were

unconstitutionally overbroad. Finally, Plaintiffs argued that the H.B. 8 provisions of the law violated the Interstate Commerce Clause and the Fifth Amendment.

After a hearing on August 30, 2002, the district court granted Plaintiffs' motion for preliminary injunction. The court held that the definition of "harmful to juveniles" in former Ohio Revised Code section 2907.01 (E) was overbroad because it did not meet the three-part test for juvenile obscenity as defined in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968). (R. 51; Dist. Ct. Order dated 8/30/02 at __; J.A. at ___). Because the court resolved the case on this ground, it did not reach any of the other aspects of the challenge, including the First and Fifth Amendment challenges to the Internet-related aspects of the law or the Commerce Clause challenge.

2. The Ohio General Assembly amended the statute, and Plaintiffs amended their complaint to challenge the statute as it presently stands.

The State Defendants appealed the preliminary injunction ruling to this Court, but before the briefing schedule was set, the Ohio General Assembly passed House Bill 490, which substantially amended the underlying law. In light of these amendments, this Court remanded the case to the district court for reevaluation on June 20, 2003.[1] House Bill 490 went into effect on January 1, 2004.

In their Second Amended Complaint, Plaintiffs assert many of the same

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[1] The State Defendants did not move to dismiss the appeal, and this Court did not dismiss, but merely remanded.

constitutional challenges, despite House Bill 490's substantial amendments. (*See* R. 69; SAC; J.A. at ___). They challenge the new definition of materials that are "harmful to juveniles" in Ohio Revised Code section 2907.01(E), and also section 2907.31(D)'s prohibition of disseminating such materials over the Internet. The Second Amended Complaint also recycles the original complaint's allegations that many speakers on the Internet will have their speech "chilled" by Ohio law. (*E.g.*, R. 69; SAC ¶ 67; J.A. at ___). Plaintiffs again assert that the law does not achieve the government's interest in protecting juveniles from harmful material and that "alternative means"—specifically filtering software—are more effective at addressing that interest. (R. 69; SAC ¶¶ 79-84; J.A. at ___). In addition, Plaintiffs reassert that the law violates the Commerce Clause by burdening interstate commerce. (R. 69; SAC at 38, Count V; J.A. at ___).

In explaining how section 2907.31(D)'s provisions regarding the Internet inhibited their First Amendment rights, most Plaintiffs allege only that they (or their members) maintained Web sites. For instance:

- American Booksellers Foundation for Free Expression ("ABFFE") alleges that many of its members "use the Internet and electronic communications to obtain information and excerpts of books from publishers," and some of whom "have their own Web pages that discuss the contents of books sold in stores" (R. 69; SAC ¶ 86; J.A. at ___);

- the Association of American Publishers, Inc. ("AAP") alleges only that its members provide mainstream books to Ohio retailers and also provide content over the Internet (R. 69; SAC ¶ 88; J.A. at ___);

- Freedom to Read Foundation ("FTRF"), an organization of libraries and librarians, alleges that its members provide both on-site and Internet services to their patrons and that the Ohio statute inhibits it from doing so (R. 69, SAC ¶¶ 25, 90-92; J.A. at ___);
- the National Association of Recording Merchandisers ("NARM") alleges that some of its members sell sound recordings on-line and allow patrons to sample music before buying over the Internet as part of their public marketing strategy (R. 69; SAC ¶¶ 26, 93; J.A. at ___);
- the Ohio Newspaper Association ("ONA") alleges that its members print and provide news online (R. 69; SAC ¶ 94; J.A. at ___); and
- the Video Software Dealers Association ("VSDA"), the trade association for the home video industry, alleges that its members "produce the vast majority of video recordings in the United States," and that some of these videos are available on the Internet (R. 69; SAC ¶ 101; J.A. at ___).

The Second Amended Complaint neglects to mention two other Plaintiffs—Web Del Sol and Marty Klein—or to explain how the current version of Ohio's statute applies to them at all. No Plaintiff alleges that it directly communicates with individuals that it knows are juveniles or that it sends, or intends to send, juveniles materials fitting the statutory definition of "harmful to minors." (*See* R. 69; SAC ¶¶ 85-103; J.A. at ___).

3. The district court granted in part and denied in part Plaintiffs' motion for summary judgment.

The parties filed cross motions for summary judgment. On September 27, 2004, the district court granted in part, and denied in part, both parties' motions. (R. 104; Dist. Ct. Order on Mot. for Summ. J.; J.A. at ___). The ruling was based

on reasoning "to be set forth in an expanded opinion to be filed shortly." *Id.* Further, the ruling did not specify which parts of the law were unconstitutional, was not a final appealable order, and issued no injunction. *Id.*

On September 24, 2007—three years after its first order and over three years after the law had gone into effect—the district court filed its decision and entry granting in part and denying in part both parties' motions for summary judgment. (R. 105; Dist. Ct. Order dated 9/24/07; J.A. at ___). The court upheld the State Defendants' motion on all issues except one. Specifically, the court first agreed with the State Defendants that Ohio Revised Code § 2907.01(E) "defines material 'harmful to juveniles' in conformity with the *Miller-Ginsberg* standard." (R. 105; Dist. Ct. Order dated 9/24/07 at 15-17; J.A. at ___). Second, it held that various challenged terms in sections 2907.31(D) and 2907.01(E) are not void for vagueness. (R. 105; Dist Ct. Order dated 9/24/07 at 27-32; J.A. at ___). Third, the court below held that section 2907.31(D)(1) does not violate the Interstate Commerce Clause. (R. 105; Dist Ct. Order dated 9/24/07 at 32-46; J.A. at ___).

The district court did, however, grant Plaintiffs' motion for summary judgment on their First Amendment claim, concluding that Ohio Revised Code section 2907.31(D)'s provisions relating to the Internet were overbroad. (R. 105; Dist. Ct. Order dated 9/24/07 at 17-21; J.A. at ___). The court held that the statute "infringes on constitutionally-protected adult-adult speech" as it applies to speech

in an Internet chat room. (*Id.* at 19; J.A. at ___). Additionally, the district court held that the Ohio statute could not withstand strict scrutiny. (*Id.* at 21-26; J.A. at ___). The court permanently enjoined Revised Code section 2907.31(D)(1) "as applied to internet communications." (*Id.* at 47; J.A. at ___).

The State Defendants timely appealed (R. 112; Defs.' Notice of Appeal; J.A. at ___), and Plaintiffs cross-appealed (R. 116; Pls.' Notice of Appeal; J.A. at ___).

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's judgment for two reasons. First, none of Plaintiffs has alleged, much less proven, facts sufficient to establish standing. More to the point, Plaintiffs offer only vague allegations that they fear prosecution, but fail to tie their activities—online and otherwise—to the Ohio statute's prohibitions such that prosecution is even remotely likely. Without allegations sufficient to establish that a prosecution is likely, as opposed to merely conjectural, Plaintiffs cannot establish a concrete and particularized injury-in-fact, a prerequisite to Article III standing. Because Plaintiffs lack standing, this Court should reverse the district court's judgment without even reaching the merits.

If, however, the Court reaches the merits, it should still reverse the district court's judgment. The district court did not apply the proper test for assessing Plaintiffs' First Amendment overbreadth claim, and it reached the wrong result. In *Connection Distributing Co. v. Keisler*, 505 F.3d 545 (6th Cir. 2007), this Court defined a three-factor balancing test applicable when, as here, a plaintiff argues that a statute banning unprotected speech is overbroad and burdens protected speech. The district court should have applied the *Connection Distributing* test, and it should not have considered whether the statute satisfies strict scrutiny.

The Ohio statute at issue here passes the *Connection Distributing* test. The statute regulates only unprotected speech—specifically, juvenile obscenity, as

defined by the relevant Supreme Court precedents. The statute's prohibitions are carefully drawn to ensure that the only speech prohibited is juvenile obscenity and that this prohibition applies only when the speaker targets juveniles—an audience for which such speech receives no constitutional protection. Through its carefully drawn prohibitions, including a hardy scienter requirement and an exemption for widely broadcast communications, the Ohio statute ensures that speech between adults—even sexually explicit speech—is neither forbidden nor otherwise burdened. Because Ohio's statute reaches no protected speech, is justified by the State's compelling interest in safeguarding the well-being of its youth, and has infinitesimal (if any) effects on protected speech, the statute is not overbroad under the *Connection Distributing* test.

Further, and for similar reasons, the statute passes strict scrutiny. It is narrowly tailored to further Ohio's compelling interest in safeguarding its youth from harmful materials, and no less-restrictive but equivalently effective means of furthering this interest exist. Finally, the statute's carefully drawn prohibitions readily distinguish it from other statutes that courts have stricken down under the First Amendment. Accordingly, even if the Court reaches the merits of Plaintiffs' First Amendment claim—which it need not do—it should still reverse the district court's judgment.

STANDARDS OF REVIEW

This Court "review[s] the district court's determination of standing de novo because the issue of whether a claimant has constitutional standing is a question of law." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). When, as here, the parties dispute standing, the burden of proof rests with the plaintiffs, who assert federal jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006).

This Court also "review[s] de novo a district court's order granting summary judgment." *Blair v. Henry Filters, Inc.*, 505 F.3d 517 (6th Cir. 2007) (citing *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004)). The Court "will affirm a grant of summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,'" *Id.* (quoting Fed. R. Civ. P. 56(c)). In reviewing the district court's decision to grant summary judgment, this Court will "view all evidence in the light most favorable to the nonmoving party." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

A party pursuing a constitutional claim is entitled to a permanent injunction only if the party can establish a constitutional violation that, if left unabated, will cause continuing irreparable injury and for which there is no adequate remedy at

law. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 466 F.3d 391, 394 (6th Cir. 2006). When this Court reviews a district court's grant of a permanent injunction, it reviews the lower court's factual findings for clear error and its legal conclusions de novo. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006).

ARGUMENT

Plaintiffs cannot meet their burden of establishing standing because they fail to allege a concrete and particularized injury-in-fact. The only injury they assert is a hypothetical future prosecution. But each of Plaintiffs fails to offer any explanation of why a prosecution is beyond conjectural—or, for that matter, even possible. This failure precludes Plaintiffs from establishing standing, even under the relaxed standards applicable to First Amendment overbreadth claims. The Court should reverse the district court's judgment on this basis.

But even if Plaintiffs had standing, their First Amendment claim would still fail. Ohio's law passes First Amendment muster because its definition of material that is "harmful to juveniles" comports with the definition of juvenile obscenity established by the Supreme Court; because the statute prohibits only knowing or reckless transmissions of such material to juveniles, an audience for which such materials receive no First Amendment protection; and because these prohibitions do not bleed beyond the permissible boundaries to cover protected speech. The law's provisions are sufficiently carefully drawn that no reasonable person, in light of these prohibitions, would self-censor or otherwise withhold protected speech. Accordingly, the statute cannot be overbroad, and the district court erred by concluding otherwise.

A. None of Plaintiffs asserts facts sufficient to establish standing to sue, even under the exception for an overbreadth challenge under the First Amendment.

None of Plaintiffs has either alleged or proven facts sufficient to establish standing to sue. Accordingly, the Court should reverse the district court's judgment without even reaching the merits.

1. A concrete and actual injury-in-fact is necessary to establish standing, even for plaintiffs raising a First Amendment overbreadth claim.

Generally, to establish standing in federal court, a plaintiff must establish both constitutional and prudential standing. A plaintiff has constitutional standing when it can show: (1) an injury-in-fact that (2) was "fairly traceable to the defendant's allegedly unlawful conduct" and (3) is "likely to be redressed" by a decision in the plaintiff's favor. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Constitutional standing is the minimum necessary to establish a "case or controversy" under Article III of the U.S. Constitution. *See Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2574 (2007) (Scalia, J., concurring). Prudential standing, by contrast, is a rule of "judicial self-governance," *Prime Media*, 485 F.3d at 349 (quoting *Warth v. Seldin,* 422 U.S. 490, 500 (1975)), that

denies a plaintiff the ability to "rest his claim to relief on the legal rights or interests of third parties," *id.* (quoting *Warth*, 422 U.S. at 499).[2]

When, a plaintiff raises a First Amendment overbreadth claim, courts excuse the requirements of prudential standing. Such a plaintiff may "challenge the constitutionality of [a] particular rule of law regardless of the fact that a more circumscribed version of that rule of law could be applied in a constitutional fashion to prohibit the plaintiff's conduct." *Id.* at 350. But he may do so only if he can satisfy the elements of constitutional standing, including demonstrating that the provision of the law challenged has caused him an injury-in-fact. *Id.* (citing *Am. Booksellsers Ass'n*, 484 U.S. at 392-93).

Not all allegations of harm constitute injuries-in-fact. Instead, an injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560; *see also Virginia v. Am. Booksellsers Ass'n*, 484 U.S. 383, 392 (1988) (to establish an injury in fact, "there must be some 'threatened or actual injury resulting from the putatively illegal action'" (citations and quotations

[2] In this case, a bevy of voluntary membership organizations raise claims on behalf of their members. An organization can establish organizational standing by demonstrating that "(a) its members otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *LULAC v. Bredesen*, 500 F.3d 523, 528 (6th Cir. 2007) (internal quotation marks and citations omitted).

omitted)). To premise an injury-in-fact upon a threatened prosecution, a plaintiff raising a First Amendment claim must establish a reasonable basis for fearing prosecution, as opposed to a vague feeling of expressive inhibition. *Compare Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff who was twice threatened with arrest and prosecution for handbilling established an Article III case or controversy sufficient to invoke federal jurisdiction) *with Younger v. Harris*, 401 U.S. 37, 41-42 (1971) (plaintiffs who did not allege "that they ha[d] ever been threatened with prosecution, that a prosecution [wa]s likely, or even that a prosecution [wa]s remotely possible" failed to establish a case or controversy; allegations that plaintiffs "fe[lt] inhibited" in the exercise of First Amendment rights were insufficient).

2. Plaintiffs cannot establish an injury-in-fact by alleging that they fear prosecution for engaging in activities that the Ohio statute does not prohibit.

Because, as explained above, the Ohio statute applies only to direct communications to juveniles of certain materials, any Plaintiff that does not establish that it directly communicates such materials to minors cannot establish a credible threat of prosecution and thus lacks constitutional standing. Similarly, because the statute contains a broadcast communications provision exempting from prosecution non-targeted Web transmissions, alleging a fear of being prosecuted based upon posting materials on the Web is too conjectural to satisfy the injury-in-

fact requirement. As noted above, ABFFE, AAP, FTRF, NARM, ONA, and VDSA allege only that they provide materials over the Web, and do not allege that they engage in any direct communications, let alone with juveniles. *See supra* pp. 16-17. These Plaintiffs thus fail to allege any basis to believe that they could be prosecuted under the Ohio statute, and accordingly, they do not allege any injury-in-fact sufficient to confer standing.[3]

The remaining Plaintiffs also lack standing. Plaintiff The Sexual Health Network ("SHN") operates a website addressing sexual issues. (R. 69; SAC ¶ 95; J.A. at ___). SHN alleges that its website features frank sexual discussion, explicit sexual images, and interactive forums in which individuals can communicate with one another regarding sexual topics. (R. 69; SAC ¶ 96-97; J.A. at ___). Despite these allegations, SHN does not allege that it distributes such materials directly to juveniles. Instead, its allegations regarding its fear of prosecution center on materials published on its website. Such materials could not be the subject of a prosecution because of the Ohio statute's broadcast exemption, so any fear of prosecution on this

[3] Additionally, ABFFE, AAP, and ONA each assert that their members' materials have significant redeeming social, literary, or artistic value. (*See* R. 27; Finan Decl. ¶ 19 (attached to Pls.' Mot. for Prelim. Inj., filed on 6/25/02); J.A. at ____; R. 27; Adler Decl. ¶ 9 (attached to Pls.' Mot. for Prelim. Inj., filed on 6/25/02); J.A. at ___; R. 27; Deaner Decl. ¶ 8 (attached to Pls.' Mot. for Prelim. Inj., filed on 6/25/02); J.A. at ___). Taking these assertions at face value, it is extremely unlikely that these materials could be considered "harmful to minors" under Ohio's statute, *see* Ohio Rev. Code § 2907.01(E)(3), which further undermines the credibility of any asserted fear of prosecution.

basis is not well-founded and cannot constitute an injury-in-fact sufficient to confer constitutional standing. The record evidence regarding SHN is similarly insufficient to establish standing. Although SHN states that it fears prosecution based on the former definition of "materials harmful to juveniles," it does not explain whether this fear persists in the wake of House Bill 490's amendments. (R. 27; Tepper Decl. ¶ 17 (attached to Pls.' Mot. for Prelim. Inj., filed on 6/25/02); J.A. at ___; R. 61; Hrg. Tr. at 96-97 (Tepper Test.); J.A. at __). The network's sponsor states that some questions involving sexual content are asked and answered by e-mail from the website and that these e-mails *might be* directed toward juveniles. (R. 61; Hrg. Tr. at 98-101 (Tepper Test.); J.A. at __). But the sponsor never states that SHN *directs* its e-mails toward *known* minors or that these e-mails contain materials that fit Ohio's "harmful to juveniles" definition. In sum, even if SHN, unlike the other Plaintiffs, can identify record evidence of direct communication with juveniles, it cannot establish a credible fear of prosecution based upon these communications, and accordingly cannot establish standing.

Plaintiff Web Del Sol ("WDS") similarly lacks standing. WDS posts literary and artistic works on its website. As it is not even mentioned in the Second Amended Complaint, it has failed to assert any injury at all under Ohio's current statute. Even if the Court were to consider previous assertions of injury, WDS misses the mark. In a declaration offered in 2002, WDS specifically stated that it

feared prosecution because of the *former* definition of "harmful to juveniles." (R. 27; Neff Decl., ¶¶ 15-20 (attached to Pls.' Mot. for Prelim. Inj., filed on 6/25/02); J.A. at __). WDS has not updated the record to address the current Ohio statute. Additionally, WDS states that it posts literary and artistic works on its website and that it hosts a chat room, but it does not indicate that it directs any materials to known juveniles. (R. 27; Neff Decl. ¶ 14; J.A. at ___). Finally, WDS alleges that its material has literary, artistic, and educational value, so it is highly unlikely that its materials even fit the statute's definition of "harmful to minors." *See* Ohio Rev. Code § 2907.01(E)(3).

Finally, Plaintiff Marty Klein lacks standing to challenge the current Ohio statute. Klein, like WDS, is not even mentioned in the Second Amended Complaint, and thus has failed to assert any injury at all under the new statute. Even if the Court considers Klein's previous allegations, he fails to assert any meaningful injury. Although Klein alleges that he maintains a Web site and uses the site as "a forum for public education about human sexuality," he does not allege that he directs such answers at specific, known juveniles in Ohio. (R. 27; Klein Decl. ¶¶ 2-4 (attached to Pls.' Mot. for Prelim. Inj., filed on 6/25/02); J.A. at ___). Consequently, he has no basis to fear prosecution under the current Ohio statute.

In sum, none of Plaintiffs has alleged an injury sufficient to confer standing to challenge the Ohio statute's Internet provisions. No Plaintiff was prosecuted under the Ohio statute, and no Plaintiff has alleged that it has done, or intends to do, anything that could result in prosecution under the statute. As explained above, none of Plaintiffs has asserted the "irreducible constitutional minimum" of an injury-in-fact—necessary to establish standing in federal court. *Lujan*, 504 U.S. at 560. Accordingly, this Court should reverse the district court's judgment without reaching the merits.

B. The Ohio law's definition of materials that are harmful to juveniles satisfies the *Miller-Ginsberg* test for juvenile obscenity.

As the plain text of Ohio's statute demonstrates, the law does not directly regulate any protected speech. Instead, by conforming the definition of materials "harmful to juveniles" to the Supreme Court's standard for juvenile obscenity, the Ohio General Assembly ensured that the statute targets only unprotected speech.

The district court correctly held that the present Ohio statute's definition of "harmful to juveniles" explicitly complies with the Supreme Court's requirements for a statute sanctioning the dissemination of materials harmful to juveniles. In *Miller v. California*, 413 U.S. 15 (1973), the United States Supreme Court set forth a three-part test for determining whether expressive material is obscene, and not entitled to First Amendment protection. The *Miller* test asks (1) whether the average person, applying contemporary community standards would find that the

work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

The Court has recognized, however, that what is not obscene for adults might be obscene for juveniles. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld "a New York criminal obscenity statute" that forbade selling to children sexually explicit material that was not obscene for adults. *Id.* at 631, 636-37. Thus, a State may "adjust" the definition of obscenity "'by permitting the appeal of this type of material to be assessed in terms of the sexual interests' . . . of minors." *Id.* at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)). Any such definition, however, must follow the three-prong *Miller* framework. *See Ashcroft v. ACLU*, 535 U.S. 564, 576 n.7 (2002) (*Ashcroft I*).

The current statute's definition of materials "harmful to juveniles" satisfies the *Miller-Ginsberg* standard. First, no materials fall within the definition unless they "describ[e] or represent[] nudity, sexual conduct, sexual excitement, or sado-masochistic abuse." Ohio Rev. Code § 2907.01(E). This requirement comports with the Supreme Court's recognition that material can appeal to the prurient interest "only if it is, in some sense, erotic." *Ashcroft I,* 535 U.S. at 579 (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 n. 10 (1975). Further, comparing the

Miller-Ginsberg test and the Ohio statute side-by-side illustrates that the Ohio statute's definition of "harmful to juveniles" applies only to juvenile obscenity:

***Miller-Ginsberg* test**—material is obscene for minors if	**Ohio's statute**—prohibits the knowing or reckless, direct transmission to juveniles of material that
1.) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest of minors;	1.) "when considered as a whole, appeals to the prurient interest in sex of juveniles," Ohio Rev. Code § 2907.01(E)(1);
2.) the work depicts or describes, in a patently offensive way with regard to minors, sexual conduct specifically defined by the applicable state law; and	2.) "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles," Ohio Rev. Code § 2907.01(E)(2); and
3.) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.	3.) "when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles," Ohio Rev. Code § 2907.01(E)(3).

Additionally, Ohio's statute conforms to the Court's later case law. For instance, it contains a "parental override" that provides an affirmative defense if the juvenile involved "was accompanied by the juvenile's parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile." Ohio Rev. Code § 2907.31(B)(2). This provision satisfies the requirement that any statute regulating juvenile obscenity permit parents to provide such materials for their children, if the parents so desire. *See Reno v. ACLU*, 521 U.S. 844, 865 (1997).

For these reasons, the Ohio statute targets only juvenile obscenity, as defined by the relevant Supreme Court case law. The district court correctly held that Ohio Revised Code section 2907.01(E)'s definition of materials that are "harmful to juveniles" covers only materials that do not receive First Amendment protection, insofar as minors are considered.

C. The Ohio law does not affect constitutionally protected speech among adults.

As explained above, the only materials at issue are those defined by the *Miller-Ginsberg* standard, and therefore, the State may regulate them when they are directed at juveniles. *Ginsberg*, 390 U.S. at 641-43. And that is exactly what the statute does. In short, the statute is constitutional because it does not regulate—directly or indirectly—communications among adults.

The canon of constitutional avoidance applies in First Amendment cases. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69, 78 (1994); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Under this canon, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary" to the legislature's intent. *DeBartolo*, 485 U.S. at 575; *see also X-Citement Video*, 513 U.S. at 69 ("a statute is to be construed where fairly possible so as to avoid substantial

constitutional questions"). This canon applies with special force when, as here, plaintiffs raise a facial claim for First Amendment overbreadth. In such cases, the Court "must first examine the scope of the statute and try to construe that scope narrowly to avoid constitutional infirmity." *Connection Distrib. v. Keisler*, 505 F.3d 545, 552 (6th Cir. 2007); *see also Ferber v. New York*, 458 U.S. 747, 769 n.2 (1982) (noting that federal courts addressing overbreadth claims "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction"). Failing to apply the avoidance canon would produce the anomalous situation in which a facial challenge to a statute would be easier to win than an as-applied challenge. Such a result would fly in the face of basic principles of First Amendment litigation. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." (internal quotations and citations omitted)); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223, (1990) ("facial challenges to legislation are generally disfavored").

The Court need not strain to read the Ohio statute narrowly, however, because the current version of Ohio Revised Code section 2907.31 makes explicit that the only Internet communications it criminalizes are those directed at a particular juvenile or group of juveniles. The law explicitly and unmistakably exempts from its reach general broadcasts of materials—communications available to the public

or a large subset of the public. Specifically, section 2907.31 makes this clear in several ways. First, the statute's general prohibitions use the word "directly" to modify the act of dissemination. Thus, the law forbids only the *direct* transmission of juvenile obscenity. Ohio Rev. Code §§ 2907.31(A)(1) & (2). Second, the statute's provision defining these prohibitions in the context of the Internet contains a robust scienter requirement. A person cannot violate the statute's general prohibitions "by means of an electronic method of remotely transmitting information," such as the Internet, unless that "person knows or has reason to believe" that a juvenile is on the receiving end of that transmission. *Id.* § 2907.31(D)(1). Third, the statute's Internet exemptions further narrow its scope by exempting from prosecution people who lack "[]adequate information to know or have reason to believe that a *particular* recipient of the [communication] is a juvenile." *Id.* § 2901.31(D)(2)(a) (emphasis added). Finally, the statute also exempts from prosecution those who use a "method of mass distribution [that] does not provide . . . the ability to prevent a *particular* recipient from receiving the information." *Id.* § 2901.31(D)(2)(b) (emphasis added).

These carefully crafted provisions provide broad and clear protections to adults communicating among one another. An adult who wishes to post sexually explicit materials on the World Wide Web cannot be prosecuted, as the Web does not provide the capacity to exclude particular recipients. Lest there be any doubt

on this point, the Court need look no further than Plaintiffs' Second Amended Complaint to confirm as much. There, Plaintiffs admit that "[g]iven the technology of the Internet, there are no reasonable means . . . for restricting or preventing access by minors to certain content." (R. 69; SAC ¶ 69; J.A. at ___; *see also* R. 69; SAC ¶ 71; J.A. at ___ ("Internet speakers have no means to restrict minors in Ohio from accessing their communications")). Plaintiffs acknowledge that this is true of transmissions over USENET discussion groups, in addition to materials posted on the Web. (R. 69; SAC ¶ 70; J.A. at ___).

Similarly, an adult who wishes to send a sexually explicit image to a group of friends via e-mail cannot be prosecuted unless he has reason to believe that the list of recipients includes juveniles. The same is true of an adult who wishes to send sexually explicit messages or images via IM—he can be prosecuted only if he has reason to believe that the recipient is underage. Finally, an adult who wishes to post explicit messages or images to a chat room cannot be prosecuted unless he both (a) has reason to believe that a minor is present in the chat room *and* (b) lacks the technological capacity—in that particular chat room—to exclude individual participants. For these reasons, the Ohio statute has virtually no potential to burden adult-to-adult speech.

The district court erred by concluding to the contrary. The district court relied on dicta from an inapposite case to effectively erase the Ohio statute's scienter

requirement. According to the district court, the Supreme Court held that "any internet user is put on notice that the recipient may be a juvenile." (R. 105; Dist. Ct. Order dated 9/24/07 at 18; J.A. at ___). But the case cited for that proposition—*Reno*—is easily distinguishable. The *Reno* Court considered the constitutionality of the Communications Decency Act of 1996 ("CDA"), which forbade any display on the Internet of materials statutorily defined as inappropriate for minors. 521 U.S. at 860 (quoting 47 U.S.C. § 223(d) (Supp. 1997)). Unlike the Ohio statute at issue here, the CDA lacked an exemption for broadcast communications, so it criminalized the display of particular materials on the Web or in a large (e.g., 100-member) chat room. It was this application that the *Reno* Court addressed with its presumption of knowledge that any user *could* be underage. Because of the stark differences between the CDA and the Ohio statute, this passage from *Reno* is flatly inapplicable.

Further, even if the passage from *Reno* were relevant, it would not support the district court's analysis. At best, the *Reno* presumption might satisfy section 2907.31(D)(1)'s requirement that the sender of a one-to-one Internet transmission containing juvenile obscenity have a reason to believe that the recipient was a juvenile. But the presumption could not trump either of subsection (D)(2)'s limiting provisions. Under subsection (D)(2)(a), the statute cannot be violated when the sender has inadequate information to believe that a *particular* recipient is

underage. This protection applies even in light of the *Reno* presumption. And in the context of wide-ranging communications, such as the Web and large chat rooms, subsection (D)(2)(b)'s broadcast communications exemption precludes prosecution, even if the sender is "charged with knowing that one or more minors will likely view" the transmission." *See Reno*, 521 U.S. at 876. Accordingly, the district court erred by reading this inapt passage from an inapposite case to scuttle the constitutionality of Ohio's statute.

Contrary to Plaintiffs' assertion that the Ohio statute "reduces adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children" (R. 69; SAC ¶ 15; J.A. at ___), Ohio's law excises protected speech among adults from the scope of its prohibitions. Similarly, the Ohio statute ensures that its prohibitions do not bleed into speech among adults, thereby chilling constitutionally protected expressive conduct.

D. The Ohio law is not substantially overbroad.

Plaintiffs do not allege that the Ohio law has ever been applied against them. Instead, they raise a facial challenge, arguing that the statute violates the First Amendment because it is unconstitutionally overbroad. (R. 69, SAC ¶¶ 20, 105, J.A. at ___, ___). Several features of the overbreadth doctrine are noteworthy. First, the doctrine permits a party to raise claims of third parties who are not present, so long as the party raising the claim has constitutional standing in its own

right. *Morrison v. Bd. of Educ. of Boyd County*, 507 F.3d 494, 501 (6th Cir. 2007) (citing *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007)). Second, the overbreadth doctrine permits parties to challenge not just a statute's direct prohibitions, but also to argue that even a legitimate prohibition "indirectly places an undue burden on . . . protected activity." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1499 (11th Cir. 1990). Third, because of the hypothetical nature of such challenges, it is important that courts obey their "obligation to construe the challenged statute narrowly." *Id.* at 1500 (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. at 397). Finally, and consistently with these principles, the Supreme Court has recognized that invalidating a statute for overbreadth is "strong medicine." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). Accordingly, courts must not invalidate a statute under the overbreadth doctrine unless the statute is *substantially* overbroad. *Id.* at 119-20.

When addressing an overbreadth challenge, courts must balance a number of considerations. More specifically, they must consider the following:

1. "whether and to what extent the statute reaches protected conduct or speech";

2. "the plainly legitimate sweep of the statute, that is, the sweep that is justified by the government's interest";

3. "the likely chilling effects of the statute, stated otherwise as the statute's burden on speech"; and

4. the resulting balance when these factors are weighed together, "paying particular attention to the burden on speech when judging the illegitimate versus legitimate sweep of the statute."

Connection Distrib., 505 F.3d at 555 (internal quotation marks and citations omitted). When, as here, the Court faces a facial overbreadth challenge to a statute aimed at suppressing constitutionally unprotected speech, this analysis supplants the "levels of scrutiny" or "time, place, and manner" analysis applicable when the government regulates protected speech. *See generally id.* (declining to consider which level of scrutiny applied as to the plaintiffs' facial challenge); *id.* at 567-72 (Moore, J. concurring) (applying intermediate scrutiny when analyzing the plaintiffs' as-applied challenge); *see also Ashcroft v. ACLU,* 542 U.S. 656, 666 (2004) ("*Ashcroft II*") (in applying strict scrutiny, "a court assumes that certain protected speech may be regulated"); *Sable Comm'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying strict scrutiny because the law in question was a "regulat[ion of] the content of constitutionally protected speech").

Applying the factors identified in *Connection Distributing* to the Ohio statute demonstrates that the statute is not substantially overbroad. ***First***, as shown above, Ohio's statute does not reach protected conduct or speech. The statute forbids only unprotected speech—juvenile obscenity targeted directly at juveniles. By its plain terms, it does not apply to protected speech, even to sexually explicit speech among adults.

Second, the government interest in protecting minors justifies the statute's sweep. The statute is ultimately aimed at preventing the sexual abuse of children by child predators. This government interest is doubtlessly compelling, if not paramount. *See, e.g.*, *Ferber*, 458 U.S. at 756-57. As the Supreme Court has recognized, the "compelling interest in protecting the physical and psychological well-being of minors . . . extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Comm'ns*, 492 U.S. at 126; *see also Reno*, 521 U.S. at 875 ("we have repeatedly recognized the governmental interest in protecting children from harmful materials"). In *Ginsberg*, the Supreme Court held that this interest justified a prohibition on selling juvenile obscenity to minors. *Ginsberg*, 390 U.S. at 640. In light of the strength of the government's interest, and the Supreme Court's upholding the flat ban at issue in *Ginsberg,* the Ohio statute's prohibitions on unprotected speech are certainly legitimate.

Third, the statute burdens protected speech on the Internet only minimally, if at all. A plain reading of the statute reveals that it does not apply to methods of communication, like the World Wide Web, that deny speakers the ability to exclude particular recipients. *See* Ohio Rev. Code § 2907.31(D)(2)(b). Similarly, it does not apply unless the sender knows or has reason to believe that the recipient is a juvenile, *id.* § 2907.31(D)(1), and cannot apply when the method of remote transmission does not provide the sender sufficient information to believe that the

recipient is a juvenile, *id.* § 2907.31(D)(2)(a). No reasonable speaker would be chilled by such prohibitions, so Plaintiffs' allegations of an actual chill are insufficient to establish a burden on protected speech. *Cf. Morrison*, 507 F.3d at 506 (plaintiff seeking to establish a past chill must satisfy the objective inquiry that the regulation in question "would deter a person of ordinary firmness from exercising First Amendment rights" (internal quotation marks omitted)); *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (plaintiff alleging a § 1983 claim for First Amendment retaliation must prove that "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in [protected] conduct").

Fourth, weighing these factors together illustrates that the Ohio statute is not substantially overbroad. Indeed, considering the strength of Ohio's interests, the statute's carefully drawn boundaries separating (unprotected) speech that is banned from speech that is not, and the lack of any appreciable effect on protected conduct, the statute does not appear to be overbroad at all, much less *substantially* overbroad. Accordingly, this Court should reverse the district court's judgment in Plaintiffs' favor.

E. Ohio's statute satisfies strict scrutiny.

Even if the Court concludes that the Ohio statute affects adult-to-adult speech—a proposition that the State Defendants strenuously dispute—the Court

should still reverse the district court because the statute passes strict scrutiny. A statute can pass this test only if it is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000).

As noted above, Ohio has a compelling interest in "protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Comm'ns*, 492 U.S. at 126. Ohio's statute is narrowly tailored to this interest because it is the least restrictive means of promoting this interest. As shown above, Ohio's statute proscribes only juvenile obscenity, which does not receive constitutional protection. The statute does not criminalize such speech unless the speaker knowingly or recklessly *directs* such speech to juveniles, the audience for which the speech is not protected. And the statute's broadcast communications exemption ensures that adult-to-adult speech that might be accessible to a minor does not fall within the statute's confines. In short, the statute could not be any narrower, yet still advance the government's interest in shielding juveniles from materials that are obscene as to them.

Plaintiffs' suggestion that filtering software constitutes a less-restrictive means of advancing the government's interest is a red herring. The Ohio statute is targeted specifically at one-to-one communications, such as e-mail and IM,

knowingly directed toward juveniles because child predators frequently use such communications as part of the "grooming" process to prime future victims for abuse. As the State showed below, commercially available filtering software is incapable of filtering materials harmful to juveniles in such forms of communication, especially insofar as those materials contain video and/or audio. (R. 43; Buron Decl. ¶¶ 8-9, 12-14 (attached to Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj., filed 7/25/02); J.A. at ___). Indeed, the filtering software filters websites, not e-mail or other modes of one-to-one communication. (*Id.*) Filtering software may thus advance the government's interest in keeping children from accessing sexual materials on the Web. It does nothing, however, to advance the government's special interest in forestalling the direct communication of juvenile obscenity to minors.

F. Ohio's statute lacks the flaws that inhere in other "harmful to minors" statutes.

A number of cases address First Amendment challenges to statutes prohibiting the digital transmission of material deemed "harmful to minors." In many instances, these challenges were successful. Regardless, Plaintiffs can find no shelter in these holdings, for in each such instance, the statute at issue differed markedly from the Ohio statute at issue here.

1. Ohio's statute is distinguishable from the federal Communications Decency Act.

The Supreme Court addressed the CDA in *Reno v. ACLU*, 521 U.S. 844 (1997), and concluded that the statute violated the First Amendment. The aspects of the CDA that the Court found significantly flawed in its decision are notably absent from the Ohio law. First, the CDA's definition of material that was "harmful to minors" contained only one prong of the three-prong *Miller-Ginsberg* standard. 521 U.S. at 873; *see also Ashcroft I*, 535 U.S. at 578. As explained above, the Ohio statute contains all three. As the Court stated in that case, the presence of all three prongs drastically narrows the possible overbreadth and vagueness of the second prong alone. *Reno*, 521 U.S. at 873.

Another "crucial consideration," *Ashcroft I*, 535 U.S. at 568, in the *Reno* Court's analysis was the fact that "'existing technology does not include any effective method for a sender to prevent minors from obtaining access to its communications on the internet without also denying access to adults,'" *id.* (quoting *Reno*, 521 U.S. at 876). Thus, the Court struck down the CDA because it was aimed at materials broadcast to the public generally and contained only narrow affirmative defenses. The Ohio statute, by contrast, applies only where the speaker has the technological capacity to prevent a juvenile from receiving the speech. Ohio Rev. Code § 2907.31(D)(2)(b). Thus, Ohio law does not cover materials broadcast to the public generally and thus does not suppress speech that adults

have a constitutional right to receive, as the CDA did.

2. Ohio's law differs from the federal Child Online Protection Act, which regulated only Web transmissions.

After the Court invalidated the CDA, Congress passed the Child Online Protection Act ("COPA") "to make the Internet safe for minors by criminalizing certain Internet speech." *Ashcroft II*, 542 U.S. at 661. COPA applied only to communications on the World Wide Web posted for commercial purposes and deemed harmful to minors. *Id.* After determining in an earlier appeal that the inclusion of a "community standards" test did not render the statute overbroad, *see Ashcroft I*, 535 U.S. at 585, the Supreme Court held that the district court did not abuse its discretion in preliminarily enjoining COPA, *Ashcroft II*, 542 U.S. at 673. According to the Court, COPA was unconstitutional because it was not the least restrictive means of preventing minors from accessing sexually explicit content on the Web. Instead, according to the Court, commercially available filtering software was less restrictive and comparably effective at blocking materials on the Web fitting the definition of "harmful to minors." *Id.* at 666-70.

This analysis is irrelevant to Plaintiffs' First Amendment claim because the Ohio statute varies wildly from COPA. While COPA applied only to materials on the Web, the Ohio statute exempts technologies, such as the Web, that broadcast materials broadly and do not allow the sender to exclude a particular individual from receiving the message. The Ohio statute is thus focused on one-to-one modes

of communication, such as e-mail and IM. As noted above, commercially available filtering software can prevent minors from accessing sexual materials on particular *websites*, but cannot block sexually explicit one-to-one communications based on their content. Accordingly, *Ashcroft II*'s analysis of the Web-filtering software is simply irrelevant to Ohio's statute, and Plaintiffs have failed to provide a reason to conclude otherwise. Ohio's statute thus does not bear the constitutional flaws of COPA.

3. Ohio's law is distinguishable from the Virginia statute at issue in *PSINet, Inc. v. Chapman*.

The Virginia law struck down in *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (2001), *aff'd PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), also differs significantly from Ohio's statute. The Virginia statute criminalized the display of materials harmful to juveniles, but lacked narrowing language providing for direction of the materials to specific, known juveniles. In other words, the Virginia statute, like the CDA, attempted to regulate materials broadcast to the public generally. Ohio's statute, on the other hand, narrowly criminalizes only communications targeted at juveniles. In addition, the Ohio statute differs from the Virginia law in that the latter's definition of materials "harmful to minors" lacked the third "value" prong of the *Miller-Ginsberg* analysis.

4. Ohio's law differs from the New Mexico statute struck down in *ACLU v. Johnson*.

The New Mexico law struck down in *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd.* 194 F.3d 1149 (10th Cir. 1999), is virtually identical to the Virginia law analyzed in *PSINet*. It, too, was aimed at regulating internet broadcasts to the public at large, and not communications directed at juveniles, as under Ohio law. It too had no "value" prong.

5. Ohio's law is distinguishable from the Michigan statute at issue in *Cyberspace Communications v. Engler*.

The Michigan law struck down in *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), also targeted Internet "broadcasts" to the public at large, and not directed presentations of material to juveniles.

6. Ohio's law differs from the Arizona statute struck down in *ACLU v. Napolitano*.

Arizona Revised Statute § 13-3506, the Arizona statute struck down in *ACLU v. Napolitano,* Civ. No. 00-505 (D. Ariz. June 14, 2002), also bears little resemblance to Ohio's law as amended in House Bill 490. While the Arizona law required that the dissemination to minors be "knowing," the law did not narrow its application to directed speech where the speaker had control over whether a particular recipient received the information. The Arizona statute puts the onus on the speaker to determine whether the recipient of a communication is a minor, by looking for various "indicia" in the recipient's web address. Ohio's law, as

explained above, puts the burden on the State to prove that the speaker made a direct presentation to a person reasonably believed to be a juvenile. These differences make the constitutionality of Ohio's law a very different inquiry from that for A.R.S. § 13-3506, and render *Napolitano* useless as authority for this Court.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court REVERSE the district court's judgment in Plaintiffs' favor and REMAND the case with instructions to vacate the permanent injunction and to enter judgment for Defendants.

Respectfully submitted,

MARC DANN
Attorney General of Ohio

WILLIAM P. MARSHALL
Solicitor General
Counsel of Record
MICHAEL DOMINIC MEUTI
Deputy Solicitor
ELISE W. PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax

Counsel for Defendants-Appellants
Marc Dann, Attorney General of Ohio, et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al.,	:	Case Nos. 07-4375 & 07-4376
Plaintiffs-Appellees-Cross-Appellants	:	
v.	:	On Appeal from the United States District Court for the Southern District of Ohio, Case No. 3:02cv210
MARC DANN, Attorney General Ohio, et al.,	:	
Defendants-Appellants-Cross-Appellees.	:	

DESIGNATION OF APPENDIX CONTENTS OF DEFENDANTS-APPELLANTS MARC DANN, ATTORNEY GENERAL OF OHIO, et al.

Defendants-Appellants Marc Dann, Attorney General of Ohio, et al. pursuant to Sixth Circuit Rule 30(b), hereby designate the following portions of the record below for inclusion in the Joint Appendix:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Plaintiffs' Complaint	5/6/02	1
Plaintiffs First Amended Complaint	5/30/02	5
Exhibits to Plaintiffs' Motion for Preliminary Injunction	6/25/02	27

Finan Declaration		
Adler Declaration		
Horovitz Declaration		
Deaner Declaration		
Tepper Declaration		
Neff Declaration		
Klein Declaration		
Exhibits to Response in Support of Motion for Preliminary Injunction	7/1/02	30
Anderson Declaration		
Exhibits to Motion for Miscellaneous Relief	7/24/02	43
Burton Declaration		
Hearing Transcript	11/25/02	60
Second Amended Complaint	8/7/03	69
Order on Motion for Summary Judgment	9/27/04	104
Order	9/24/07	105
Judgment	9/24/07	106
Defendants' Notice of Appeal	10/22/07	112
Plaintiffs' Notice of Appeal	10/30/07	116