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	:	On Appeal from the United States District Court for the Southern District of Ohio, Case No. 3:02cv210
v.	:	
RICHARD CORDRAY, Attorney General of Ohio, et al.,	:	
Defendants-Appellants-Cross-Appellees.	:	

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS RICHARD CORDRAY, ATTORNEY GENERAL OF OHIO, ET AL.

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
ELISE W. PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendants-Appellants Richard Cordray, Attorney General of Ohio, et al.

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INTRODUCTION

Plaintiffs-Appellees/Cross-Appellants ("American Booksellers" or "Plaintiffs") challenge the constitutionality of an Ohio law—Ohio Rev. Code § 2907.31(D)—which prohibits knowingly or recklessly transmitting obscene material directly to juveniles over the Internet. In seeking to resolve American Booksellers' constitutional claims, this Court asked the Ohio Supreme Court to confirm whether the Ohio Attorney General's construction of the statute is correct in two respects: (1) that the statute's prohibition on transmitting harmful materials directly to juveniles criminalizes only direct communications over "personally directed devices" (such as e-mail and private chat rooms); and (2) that the exemption for transmissions that occur over 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" exempts from criminal liability people who post harmful material "on generally accessible websites and in public chat rooms." *Am. Booksellers Found. v. Strickland* (6th Cir. Mar. 19, 2009), Nos. 07-4375/4376, slip op. at 6-7 ("Certification Order").

The Ohio Supreme Court has now answered both questions in the affirmative. The state court held "that the scope of [Ohio Rev. Code §] 2907.31(D) is limited to electronic communications that can be personally directed, because otherwise the sender of matter harmful to juveniles cannot know or have reason to

believe that a particular recipient is a juvenile." *Am. Booksellers Found. v. Cordray*, 922 N.E.2d 192, at ¶ 24 (Ohio 2010). The state court further concluded "that a person who posts matter harmful to juveniles on generally accessible websites and in public chat rooms does not violate [Ohio Rev. Code §] 2907.31(D), because such a posting does not enable that person to 'prevent a particular recipient from receiving the information.'" *Id*. at ¶ 25 (quoting Ohio Rev. Code § 2907.31(D)(2)(b)). In short, the Ohio Supreme Court expressly confirmed the Attorney General's reading of the statute.

The state court's authoritative construction of § 2907.31 clears the way for this Court's easy disposition of American Booksellers' suit. For one thing, American Booksellers lack standing because § 2907.31 does not reach web publications like theirs. Even if standing exists, however, the law's narrow compass means that the statute easily survives First Amendment scrutiny and is neither vague nor overbroad. Nor, for that matter, does a law that applies only to personally directed, one-to-one electronic communications unconstitutionally burden interstate commerce in violation of the dormant Commerce Clause.

American Booksellers' earlier briefs in this Court insisted, in effect, that the law did not mean what it said. Plaintiffs seemed to disbelieve that the Ohio General Assembly could have intended to enact a law so narrow. But Ohio lawmakers had good reasons for tailoring the statute so carefully. Their principal

purpose was to target sexual offenders who use electronic communications to groom particular juveniles for predation. The law is also designed to reach other communications that are not protected by the First Amendment—a pornographic e-mail, say, from a middle school basketball coach to one or more of his female players.

Plaintiffs should find much to admire in the Ohio law as construed by the Ohio Supreme Court, because that court has supplied them with a safe harbor. They need not fear that the statute will be applied to any of their communications—either the websites that they open to all comers or the educational advice their health experts provide to particular individuals. Yet even in its narrowness, the law provides a valuable tool for law enforcement's ongoing efforts to combat sexual predators and to protect Ohio's youth.

Given the Ohio statute's narrow scope, this Court should reverse the district court's opinion and uphold the law on its face.

STATEMENT

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

The certified questions this Court posed to the Ohio Supreme Court focused on the Attorney General's construction of Ohio Rev. Code § 2907.31 as it applies to certain technologies—specifically, "personally directed devices such as instant messaging, person-to-person e-mails, and private chat rooms"; "generally

accessible websites"; and "public chat rooms." Certification Order at 7. To provide context for the Ohio Supreme Court's analysis, the Attorney General described these devices and technologies in his state court briefing. Because the state court opinion, in turn, focused on the devices specified in this Court's certified questions, the Attorney General again will explain briefly how those devices work, and how sexual predators use them to exploit children.

1. Individuals accessing the Internet have at their disposal a variety of devices for communicating, transmitting, and receiving information.

a. Generally Accessible Websites

"The best known category of communication over the Internet is the World Wide Web." *Reno v. ACLU*, 521 U.S. 844, 852 (1997). The Web consists of millions of separate websites. Cranor Exp. Decl. ¶ 26, 1 J.A. 264. Most websites are "generally accessible," in that anyone may access the website and view all its contents. *Reno*, 521 U.S. at 852-53. Users who post material to generally accessible websites, then, "make their material available to the entire pool of Internet users." *Id*. at 853; see also Cranor Exp. Decl., 1 J.A. 264-65. Thus, by and large, websites—and all of their content—can be viewed by anyone with an Internet connection. *Id*.

b. Public Chat Rooms

A public chat room is an online forum where an Internet user can type messages that appear almost instantaneously on the screen of all other users who

are in the chat room at the same time. Cranor Exp. Decl. ¶ 25, 1. J.A. 263. Public chat rooms allow users to engage in real-time communication "similar to a party line on a phone conversation," in that everyone in the chat room can read everything that each user posts. Buxton Test., Hr'g Tr. 132-33, 2 J.A. 664-65. At any one time, "thousands of different" public chat rooms are available, "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." *ACLU v. Reno*, 929 F. Supp. 824, 835 (E.D. Pa. 1996). Public chat rooms are often given names to attract people of common interests. For example, there might be chat rooms named "Miley Cyrus Fans" or "Disney Princesses," where children congregate to meet and converse with others that share the same interests. See *Internet Safety*, http://kidshealth.org/parent/positive/family/net_safety.html (last visited Apr. 2, 2010).

To enter a public chat room, a user typically does not have to reveal his identity or age. Cranor Test., Hr'g Tr. 42, 2 J.A. 574. Some chat rooms require users to register before entering. *Id*. For other rooms, users simply create a pseudonym (or "screen name"), type it in, and press an "enter" button to gain entry. *Id*. Once inside, the user can type messages that instantly appear on all the other participants' screens. *Id*. at 41, 2 J.A. 573. Chat rooms often allow users to post images, sounds, and links to other websites. See *United States v. Williams*, 128 S. Ct. 1830, 1837-38 (2008).

When posting a message to the chat room, the user's pseudonym appears in front of the message he sends, identifying him as the speaker. See Sealed Portion of Tr., on file with the Sixth Circuit Clerk. In most chat rooms, the pseudonyms are the only information that users initially have about each other. See Cranor Test., Hr'g Tr. 42, 2 J.A. 574. Unless an individual user chooses to disclose her real name, age, or residence, that information would not be known to any of the room's participants. *Id*. Because of the anonymity typically associated with public chat rooms, "there is no reasonable way to ascertain with any certainty whether some of the participants presently in the chat rooms are minors, or to restrict or prevent minors from receiving the information." Cranor Exp. Decl. ¶ 25, 1 J.A. 263. Even in public chat rooms that require users to register, no means exist to verify whether the information provided at registration is accurate. See *id*., Cranor Test., Hr'g Tr. 59-60, 2 J.A. 591-92. And public chat rooms do not allow users to send a message only to adults in the room, while excluding all juveniles. Cranor Test., Hr'g Tr. 42-43, 2 J.A. 574-75.

c. Private Chat Rooms

Private chat rooms operate like public chat rooms, with a key difference: only selected participants can communicate and view the information exchanged in them. Buxton Test. 133, 2 J.A. 665. A common way that private chat rooms operate is best demonstrated by example: Suppose, for instance, that 50

individuals are in a public chat room. Many public chat rooms offer the ability to break off into a secondary, private chat room. *Id*. At some point, one user decides he wants to communicate with only a select individual or group of individuals. To prevent the rest of the public chat room from seeing the conversation, the user invites individuals he chooses to join him in a separate, private chat room. *Id*. Once inside the private chat room, the user and the invited individuals can communicate in real time with each other—much like an "instant messaging" conversation, described below. *Id*. The uninvited individuals remaining in the public chat room do not see and cannot access the private-room conversation. *Id*.

d. Person-to-Person E-mail

E-mail is an electronic message similar to a note or a letter that a user sends "to another individual or to a group of addresses." *Reno*, 521 U.S. at 851. Once a user sends an e-mail, the message is stored electronically in the designated recipient's "mailbox." *Id*. When the recipient opens the online mailbox, the message is there for her to read. *Id*. Unless the recipient gives access to her mailbox to someone else (by, for example, disclosing her password), the message can be read only by the designated recipient.

e. Instant Messaging

Instant messaging, commonly referred to as "IM," is similar to a private chat room. The user writes a message and sends it to a specific recipient. Cranor Exp.

Decl. ¶ 21, 1 J.A. 261. The message appears almost immediately on the recipient's computer screen. Buxton Test., Hr'g Tr. 133-34, 2 J.A. 665-66. No one except the individuals engaged in the instant messaging conversation can see the messages; they are not available for general perusal by any other Internet user. Cranor Test., Hr'g Tr. 60-61, 2 J.A. 592-93. In essence, instant messaging is an electronic version of a telephone call. See *id*.

2. Sexual predators employ personally directed devices to target children on the Internet.

Personally directed devices such as e-mail, instant messaging, and private chat rooms make it easier than ever for a predator to sexually exploit a child. Before the advent of these devices, a sexual predator trying to seduce children not otherwise known to him had to approach the child in person. Barlow Test., Hr'g Tr. 164-65, 2 J.A. 696-97. He did not have much time to get the child comfortable both with him and with the idea of having sex. *Id*. For instance, a predator might go to a playground to try and talk to a child. But 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*.

On the Internet, predators do not have the same limitations. Using e-mail, instant messaging, or a private chat room, a predator can target a particular child. At first, he makes the child feel comfortable by discussing issues that interest the child. He communicates with the child often, sometimes daily. The child feels

safe because the conversations are anonymous, innocuous, and friendly. By repeatedly contacting the child over a long period of time, 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, may travel to meet him, and may even be coaxed into a sexual encounter. See Barlow Test., Hr'g Tr. 165, 2 J.A. 697; see also Janis Wolak, David Finkelhor & Kimberly Mitchell, *Internet Sex Crimes Against Minors: The Implications for Prevention Based on Findings from a National Study*, 35 J. of Adolescent Health 242.e15 (2004), available at http://www.unh.edu/ccrc/pdf/CV71.pdf (last visited Apr. 2, 2010).

The nature of e-mail, instant messaging, and private chat rooms make them particularly useful tools for predators looking to exploit children. See Sealed Portion of Tr., on file with the Sixth Circuit Clerk. Each of these devices permits direct transmission of sexually explicit materials, whether words or images, to a particular child in order to "groom" her for sexual activity. See Barlow Decl. ¶ 10, 2 J.A. 782. By communicating over instant message or private chat, the predator faces little threat of discovery, because the conversations occur under pseudonyms and can be read only by the real-time participants. See Cranor Test., Hr'g Tr. 59-60, 2 J.A. 591-92. E-mail is similarly low-risk. Because a variety of websites

permit users to register for a free e-mail account, and there is generally no way to verify whether the name on the account is the registrant's actual identity, predators can send private e-mails under pseudonyms. See Buxton Test., Hr'g Tr. 143, 2 J.A. 675. And on the receiving end, there is only so much that parents can do to monitor their children's e-mail. *Id*. Any child with access to the Internet can set up an e-mail account without the knowledge or control of a parent. *Id*. Once a predator knows a child's personal e-mail address, he can converse with the child wholly undetected by parents. And with the Internet's nearly universal availability, even a child who is well-monitored at home can hide involvement with the predator from her parents by using computers at the library, a friend's house, or school. See *id*.

During the district court proceedings in this case, police detectives demonstrated just how easily predators can draw minors into dangerous situations through personally directed devices. Posing as a young girl, a police detective logged onto a public chat room with a pseudonym he used for undercover online investigations. Moments later, another online user—apparently believing that the detective was a child—messaged the police detective privately and began a sexually related discussion. The detective testified that the primary method of enforcing R.C. 2907.31(D) would be through similar undercover operations: A predator's initial contact with a detective posing as a child might occur in a public

chat room, but predators would only be susceptible to prosecution upon taking the next step—using a personally directed device to send the detective a private message containing material harmful to juveniles. See Sealed Portion of Tr., on file with the Sixth Circuit Clerk.

B. On certification from this Court, the Ohio Supreme Court authoritatively construed Ohio Rev. Code § 2907.31 as applying only when (1) the sender knows or has reason to believe that a particular recipient is a juvenile *and* (2) the communication method enables the sender to exclude particular recipients.

In both this Court and the Ohio Supreme Court, the Attorney General explained that, by its terms, Ohio Rev. Code § 2907.31 places two key limitations on the statute's application to electronic communications. See Final First Brief of Defendants-Appellants Nancy H. Rogers, Attorney General of Ohio, et al. (6th Cir.), at 12-13; Merit Brief of Petitioners Ohio Attorney General Richard Cordray and 88 County Prosecutors (Ohio Supreme Court), at 9-10, available at http://www.sconet.state.oh.us/tempx/647323.pdf. First, the statute clarifies that a person who does not "know or have reason to believe that a particular recipient of the information or offer is a juvenile" does not violate the statute upon transmitting harmful-to-juveniles material, even if a minor receives it. Ohio Rev. Code § 2907.31(D)(2)(a). Second, the statute exempts from prosecution people who transmit material harmful to juveniles "by means of a method of mass distribution" when the "method of mass distribution does not provide the person the ability to

prevent a particular recipient from receiving the information." *Id.* § 2907.31(D)(2)(b).

Given the dispute between the parties over the meaning and scope of the Ohio law, this Court asked the Ohio Supreme Court to resolve two questions of state law:

> (1) Is the Attorney General correct in construing O.R.C. § 2907.31(D) to limit the scope of § 2907.31(A), as applied to electronic communications, to personally directed devices such as instant messaging, person-to-person e-mails, and private chat rooms?
>
> (2) Is the Attorney General correct in construing O.R.C. § 2907.31(D) to exempt from liability material posted on generally accessible websites and in public chat rooms?

Certification Order at 6-7.

The Ohio Supreme Court accepted this Court's request and expressly confirmed the Attorney General's reading of the statute's plain terms. The state court first concluded that the statute "can be violated only when matter harmful to juveniles is transmitted to someone who the sender knows is a juvenile or has reason to believe is a juvenile." *Am. Booksellers*, 922 N.E.2d 192, at ¶ 24. "The statute does not require," the Ohio Supreme Court explained, "that the sender know the recipient by name, but that the sender know or have reason to believe that the recipient is a juvenile." *Id.* The court accordingly held "that the scope of [Ohio Rev. Code §] 2907.31(D) is limited to electronic communications that can

be personally directed, because otherwise the sender of matter harmful to juveniles cannot know or have reason to believe that a particular recipient is a juvenile." *Id.*

Next the Ohio Supreme Court concluded that the statute "is not violated when matter harmful to juveniles is disseminated by a method of mass distribution that does not allow the sender to prevent the distribution to particular recipients." *Id*. at ¶ 25. The court explained, "[b]ased on [its] understanding of generally accessible websites and public chat rooms," that "they are open to all, including juveniles, and current usage and technology do not allow a person who posts thereon to prevent particular recipients, including juveniles, from accessing the information posted." *Id*. The court therefore held "that a person who posts matter harmful to juveniles on generally accessible websites and in public chat rooms does not violate [Ohio Rev. Code §] 2907.31(D), because such a posting does not enable that person to 'prevent a particular recipient from receiving the information.'" *Id*.

"Based on the plain language of" the statute, then, the Ohio Supreme Court "answer[ed] both certified questions in the affirmative." *Id*. at ¶ 23.

ARGUMENT

The Ohio Supreme Court's authoritative construction of Ohio Rev. Code § 2907.31 dooms American Booksellers' constitutional challenge for three separate reasons. First, no Plaintiff has standing to challenge the law. Second, even if the Court reaches the merits, all of American Booksellers' First Amendment arguments fall short: The law is not overbroad, it does not fail strict scrutiny, and it is not impermissibly vague. And third, the statute does not offend the dormant Commerce Clause.

A. No Plaintiff has standing to challenge the Ohio law because none can assert a reasonable fear of prosecution.

In the order certifying questions to the Ohio Supreme Court, this Court observed that the state court's guidance "may well determine whether any of the Plaintiffs has standing." Certification Order at 5.[1] Indeed it does: The narrow

[1] This Court also suggested that it was not bound by the Ohio Attorney General's interpretation of the statute because "'the Attorney General does not bind the state courts or local law enforcement authorities.'" Certification Order at 6 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988)). What this Court overlooked, however, is that the Attorney General here is acting not only as a party to the case, but also as counsel for the county prosecutors, who will enforce the law once it goes into effect. Thus, the Attorney General *can* speak authoritatively to how the law will be enforced. See *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) ("This narrow reading is supported by the representations of counsel for [the government entity] at oral argument, which indicate that the [government] takes, and will enforce, a limited view [of the local law]."). In any event, the Ohio Supreme Court's opinion removes any doubt about the correct interpretation of the law.

scope of § 2907.31, as confirmed by the state high court, makes clear that no Plaintiff to this case has standing to challenge the law, because none faces a realistic possibility of enforcement.

"When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," the plaintiff has standing if "there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Because "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972), "persons having no fears of state prosecution except those that are imaginary or speculative . . . are not to be accepted as appropriate plaintiffs in such cases," *Younger v. Harris*, 401 U.S. 37, 42 (1971). "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt*, 442 U.S. at 298-99 (quoting *Younger*, 401 U.S. at 42).

No credible threat of prosecution exists against any Plaintiff in this case. In the main, Plaintiffs' standing allegations are founded on their assertion that the Ohio statute reaches Plaintiffs' generally accessible websites. See Principal and Response Brief of Plaintiffs-Appellees/Cross-Appellants American Booksellers

Foundation for Free Expression, et al. (6th Cir.) ("Pls.' Principal Br."), at 23 (insisting that the Attorney General's narrower interpretation is "not reasonable or appropriate"). For example, American Booksellers Foundation for Free Expression claims that its member bookstores "have their own Web pages that discuss the contents of books sold in stores," and some of those books contain frank discussions of sexuality. Second Am. Compl. ¶ 86, 1 J.A. 141. Other Plaintiffs similarly claim to provide access to materials on their Internet websites. See Second Am. Compl. ¶ 89 (Association of American Publishers, Inc.), ¶ 92 (Freedom to Read Foundation, Inc.), ¶ 93 (National Association of Recording Merchandisers), ¶ 94 (Ohio Newspaper Association), ¶ 95 (Sexual Health Network, Inc.), 1 J.A. 142-44.

There is no possibility, let alone a credible threat, that material made publicly available on these organizations' websites will trigger enforcement actions under Ohio Rev. Code § 2907.31. The Ohio Supreme Court has confirmed what the Attorney General has maintained—that the statute does not apply to Internet postings on "generally accessible websites and public chat rooms," because those forms of electronic communication do not allow the speaker to prevent particular recipients from receiving the communication. *Am. Booksellers*, 922 N.E.2d 192, at ¶ 25. Thus, Plaintiffs cannot ground their standing on their repeated assertion that

the statute reaches generally accessible websites, because the state high court has authoritatively interred that faulty reading of the law.

To the extent Plaintiffs claim to engage in constitutionally protected one-to-one electronic communications, still they have not shown a credible threat of prosecution. The record suggests that some Plaintiffs do engage in person-to-person electronic communications. The founder and president of the Sexual Health Network ("Network") testified that his organization "communicates with its users through personal e-mails" and "questions and answers submitted to experts," among other things. Tepper Decl. ¶ 3, 1 J.A. 362. As the Ohio Supreme Court has made clear, however, the Ohio statute would apply to the Network's person-to-person e-mails only if the Network knows the recipient is a juvenile or has reason to believe the recipient is a juvenile. *Am. Booksellers*, 922 N.E.2d 192, at ¶ 24 (citing Ohio Rev. Code § 2907.31(D)(1).

Even then, the statute affords additional protections that would shelter the Network from prosecution. The material falls within the statute's compass only if it qualifies as "harmful to juveniles" because, among other things, it "lacks serious literary, artistic, political, and scientific value for juveniles." Ohio Rev. Code § 2907.01(E)(3). The Network's whole purpose is scientific and educational—to provide "a comprehensive curriculum to educate and train health professionals in providing sexual health care to individuals with disabilities." Tepper Decl. ¶ 3,

1 J.A. 362. And if the "harmful to juveniles" definition is not an adequate safe harbor, the statute also provides an affirmative defense "that the material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person." Ohio Rev. Code § 2907.31(C)(1). In the Network's own words, its communications are by educational and scientific "experts." Tepper Decl. ¶ 3, 1 J.A. 362. Plaintiffs can show no realistic possibility that such expert educational communications would be targeted for prosecution under a statute that expressly exempts educational and scientific material.

For a credible threat of prosecution to exist, Plaintiffs would need to show that they send (or intend to send) person-to-person electronic communications directly to juveniles, and that some likelihood exists that a prosecutor—despite the bona fide educational or other proper purpose of those communications—would file charges against them. Plaintiffs make no such allegation. Plaintiffs' putative standing therefore rests on sheer speculation, not the kind of "realistic danger" of prosecution that Article III requires for federal court review. *Babbitt*, 442 U.S. at 298.

B. The Ohio law is consistent with the First Amendment.

Even if American Booksellers have standing, their claims fail on the merits. Plaintiffs' First Amendment challenge takes three different forms: the overbreadth doctrine, First Amendment tailoring analysis, and vagueness. Because the law has never been applied, Plaintiffs' challenge is necessarily facial, and "[e]ven in free-speech cases . . . facial challenges remain 'disfavored.'" *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 336 (6th Cir. 2009) (en banc) (citation omitted). Given the Ohio Supreme Court's confirmation of the statute's narrow compass, all three of American Booksellers' First Amendment theories fail.

1. The Ohio statute is not overbroad.

First, as to overbreadth, the hurdle is a high one. American Booksellers must discharge their burden of showing that the statute's overbreadth is "substantial" relative to its "plainly legitimate sweep." *Id*. at 336 (internal quotations and citations omitted). That is to say, Plaintiffs "'must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.'" *Id*. (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988).

Plaintiffs cannot show that the Ohio statute is overbroad at all, let alone substantially so. The statute contains many restrictions that limit its scope. First, it covers only materials defined as "harmful to juveniles." Ohio Rev. Code

§ 2907.01(E) (setting forth three-part "harmful to juveniles" definition). This statutory definition mimics the *Miller-Ginsberg* standard for materials that may be proscribed as to minors. See *Miller v. California*, 413 U.S. 15, 24 (1973); *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968). Second, as the Ohio Supreme Court has now confirmed, the statute applies only to communications that are "personally directed," not to broadcast communications "disseminated by a method of mass distribution that does not allow the sender to prevent the distribution to particular recipients." 922 N.E.2d 192, at ¶¶ 24-25. Third, personally directed communications fall within the statute's reach only if the "sender of matter harmful to juveniles . . . know[s] or ha[s] reason to believe that a particular recipient is a juvenile. *Id*. at ¶ 24 (citing Ohio Rev. Code § 2907.31(D)). Fourth, several affirmative defenses exist, including for parental involvement, Ohio Rev. Code § 2907.31(B)(1)-(2), and bona fide proper purposes, *id*. § 2907.31(C)(1).

American Booksellers' arguments in support of their overbreadth claim ignore these many limitations. Plaintiffs assert that "restrictions which criminalize the exchange of constitutionally protected speech between adults over the Internet are unconstitutional under the First Amendment." Pls.' Principal Br. 33. For this proposition they rely heavily on *Reno v. ACLU*, 521 U.S. at 849, which invalidated a federal law that broadly sought to protect minors from indecent material on the Internet. Because the Ohio statute applies only to person-to-person

communications sent directly to juveniles, however, it bears no resemblance to the broad Internet regulation struck down in *Reno*.

American Booksellers also submit that the law is overbroad because it "burdens the right of older minors to obtain ideas and information about sexuality, reproduction, and the human body." Pls.' Principal Br. 37. Even assuming for the sake of argument that the *Miller-Ginsberg* standard is invalid as to older minors—an assumption that flies in the face of *Ginsberg* itself, where the line was drawn at age 17, see 390 U.S. at 631—Plaintiffs have not shown that any overbreadth in this regard is *substantial*. Plaintiffs' theory as to older minors is more properly tested in an as-applied challenge, where actual facts can provide context to shape the appropriate constitutional rule. See *Connection Distrib.*, 557 F.3d at 336.

Finally, American Booksellers assert that the Ohio statute is overbroad because it "defines 'harmful to juveniles' according to the 'prevailing standards in the adult community' of the state of Ohio," and "online speakers cannot restrict their messages to persons in a particular geographic area." Pls.' Principal Br. 38. But again Plaintiffs' argument assumes that the law applies to generally accessible websites, and the Ohio Supreme Court has authoritatively said it does not. 922 N.E.2d 192, at ¶ 25. The statute simply says that a speaker who sends a person-to-person electronic communication to an Ohio recipient who the speaker knows or has reason to believe is a juvenile must comport with local standards of decency.

The Supreme Court has repeatedly held that such standards may apply to out-of-state speakers, see, e.g., *Sable Commc'ns of Cal., Inc., v. FCC*, 492 U.S. 115, 125 (1989), and has said that such a speaker "is free to tailor its message, on a selective basis, if it so chooses, to the communities it chooses to serve," *id.*

What was overbroad in this case was American Booksellers' earlier, expansive reading of the Ohio statute. Now that the Ohio Supreme Court has confirmed that the statute's plain terms apply more narrowly, Plaintiffs' overbreadth theory collapses.

2. The Ohio statute survives First Amendment review.

The Attorney General explained at length in his opening brief in this Court that the Ohio statute does not even trigger First Amendment tailoring analysis, because it does not affect constitutionally protected speech among adults. See Final First Brief of Defendants-Appellants 34-39. That argument carries even greater force in light of the Ohio Supreme Court's reading of the statute's plain language. The only materials subject to the statute's prohibition are those defined by the *Miller-Ginsberg* standard, and the State may regulate those materials when they are directed at juveniles. See *Ginsberg*, 390 U.S. at 641-42. Because the statute does not touch on constitutionally protected speech, the First Amendment analysis need go no farther. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

Even assuming for the sake of argument, however, that the Ohio statute triggers heightened scrutiny because it affects adult-to-adult protected speech, the state law is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). 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 Commc'ns*, 492 U.S. at 126 (citing *Ginsberg*, 390 U.S. at 639-40). Ohio's statute is narrowly tailored to this interest because it is the least restrictive means of promoting this interest. The state law proscribes only juvenile obscenity, which does not receive constitutional protection, and it criminalizes such speech only if the speaker knowingly or recklessly *directs* such speech to juveniles, the audience for which the speech is not protected. And as the Ohio Supreme Court's opinion establishes, 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 while still advancing the government's interest in shielding juveniles from materials that are obscene as to them.

American Booksellers argue that filtering software offers a less restrictive means of achieving the governmental interest. Pls.' Principal Br. 45-46. Yet again, Plaintiffs' argument assumes that the Ohio statute reaches generally

accessible websites (for which filtering software is somewhat effective). But when it comes to the kind of one-to-one, directed communications that the statute actually covers, the State has shown that commercially available filtering software is incapable of filtering materials harmful to juveniles, especially to the extent the materials contain video or audio. Buxton Decl. ¶¶ 8-9, 12-14, 2 J.A. 485-88. Filtering software therefore does nothing to advance the government's special interest in preventing the direct communication of juvenile obscenity to minors.

3. The Ohio statute is not vague.

American Booksellers' final First Amendment theory is that the Ohio Rev. Code § 2907.31 is impermissibly vague. "To withstand a facial challenge, an enactment must define the proscribed behavior with sufficient particularity to provide a person of ordinary intelligence with reasonable notice of prohibited conduct and to encourage non-arbitrary enforcement of the provision." *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999).

The terms of the Ohio statute are sufficiently clear for a person of ordinary intelligence to understand, and sufficiently definite to prevent arbitrary enforcement. The Ohio Supreme Court has explained that the statute's "plain language" states that it "can be violated only when matter harmful to juveniles is transmitted to someone who the sender knows is a juvenile or has reason to believe is a juvenile." 922 N.E.2d 192, at ¶¶ 23-24. Nor does "a person who posts matter

harmful to juveniles on generally accessible websites and in public chat rooms . . . violate [Ohio Rev. Code §] 2907.31(D), because such a posting does not enable that person to 'prevent a particular recipient from receiving the information.'" *Id.* at ¶ 25. This definitive guidance from the state high court dispatches three of the four statutory terms that Plaintiffs claim render the law vague. Pls.' Principal Br. 28-30 (claiming that the phrases "method of mass distribution," "does not provide the person [transmitting] the ability to prevent a particular recipient from receiving the information," and "by means of an electronic method of remotely transmitting information" are impermissibly vague); see *Am. Booksellers Ass'n*, 484 U.S. at 397 (explaining that an authoritative interpretation by the state high court can save a state law from vagueness and other potential constitutional defects).

That leaves only American Booksellers' objection, founded entirely on *Reno*, to Ohio Rev. Code § 2907.01(E)'s use of the phrase "offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles." Pls.' Principal Br. 30. As the district court noted, however, *Reno* provides no support for this argument. See *Am. Booksellers Found. v. Strickland*, 512 F. Supp. 2d 1082, 1099 (S.D. Ohio 2007). At least two defects were fatal to the federal statute at issue in *Reno*: (1) The law broadly regulated generally accessible websites, and (2) it failed to adhere to the limitations of *Miller* and

Ginsberg. See *Reno*, 521 U.S. at 864-65, 873. Because the Ohio law shares neither defect, it is not vague.

D. The Ohio statute does not violate the dormant Commerce Clause.

Only American Booksellers' dormant Commerce Clause claim remains (assuming Plaintiffs have standing), and that claim easily fails. The chief purpose of the dormant Commerce Clause "is to prohibit outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors." *E. Ky. Res. v. Fiscal Ct. of Magoffin County, Ky.*, 127 F.3d 532, 540 (6th Cir. 1997) (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988)). Dormant Commerce Clause analysis accordingly has two steps. The first question is "whether [the] challenged law discriminates against interstate commerce." *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1808 (2008). "A discriminatory law is 'virtually per se invalid' . . . ." *Id.* (citation omitted). "Absent discrimination for the forbidden purpose, however, the law 'will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). "State laws frequently survive this *Pike* scrutiny . . . ." *Id.*

The first step of this analysis is easily satisfied here, because the Ohio law draws no distinction between in-state and out-of-state interests. The statute's application does not depend on the geographic source of the electronic

communication at issue, and it in no way impedes the flow of goods and services into or out of Ohio. To the extent American Booksellers argue that the statute directly burdens commerce because it has extraterritorial effects, their argument once again is founded on the now-discredited assumption that the law applies to generally accessible websites. For that reason, the decision in *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), is no help to Plaintiffs, because the statute there applied to websites, see *id*. at 177 ("An Internet user may not intend that a message be accessible to New Yorkers, but lacks the ability to prevent New Yorkers from visiting a particular Website or viewing a particular newsgroup posting or receiving a particular mail exploder.").

The state law also easily passes the *Pike* balancing test. It is hard to see how the Ohio law imposes *any* burden on commerce, since it reaches only person-to-person communications where the sender knows (or has reason to believe) that the recipient is a juvenile. But even assuming that some burden on commerce exists, that burden is vastly outweighed by Ohio's heavy interest in shielding its youth from harmful materials, see, e.g., *Sable Commc'ns*, 492 U.S. at 126, not to mention sexual predation.

CONCLUSION

For the above reasons and those stated in their earlier briefs, 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,

RICHARD CORDRAY
Attorney General of Ohio

s/Benjamin C. Mizer
BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
ELISE W. PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendants-Appellants
Richard Cordray, Attorney General of Ohio, et al.