UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN LIBRARY ASSOCIATION; FREEDOM TO READ FOUNDATION, INC.; NEW YORK LIBRARY ASSOCIATION; WESTCHESTER LIBRARY SYSTEM; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; BIBLIOBYTES, INC.; MAGAZINE PUBLISHERS OF AMERICA, INC.; INTERACTIVE DIGITAL SOFTWARE ASSOCIATION; PUBLIC ACCESS NETWORKS CORPORATION; ECHO; NEW YORK CITY NET; ART ON THE NET; PEACEFIRE; and AMERICAN CIVIL LIBERTIES UNION, Plaintiffs, v. GEORGE PATAKI, in his official capacity as Governor of the State of New York; and DENNIS VACCO, in his official capacity as Attorney General of the State of New York, Defendants.	97 Civ. 0222 (LAP)

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES AND STATUTES

OTHER

The Act[1], like the federal Communications Decency Act, effectively bans constitutionally protected speech between adults on the Internet. As the facts in this case will show, and as the courts found in ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa.), prob. juris. noted, 117 S. Ct. 554 (1996), and Shea v. Reno, 930 F. Supp. 919 (S.D.NY.), petition for cert. filed, 65 U.S.L.W. 3323 (No. 96-595) (Oct. 15, 1996), there is simply no way for the vast majority of speakers on the Internet to comply with the Act other than to refrain from speaking at all. See Plaintiffs' Memorandum of Law In Support of Their Motion for a Preliminary Injunction at 16-17 ("Opening Brief"). Defendants' brief ignores these facts and instead attempts to re-write the Act to narrow its scope. These narrowing attempts are confusing and inconsistent, and contribute to the vagueness of the Act. In addition, some of defendants' new interpretations would render the Act completely ineffective. Finally, even if defendants' new and non-binding interpretations were adopted, constitutional problems would remain.

I. DEFENDANTS' INCONSISTENT INTERPRETATIONS HAVE INCREASED THE VAGUENESS OF THE ACT'S CRIMINAL PROHIBITIONS

Defendants' brief is filled with inconsistent interpretations of the Act that make it impossible for a speaker to determine with clarity what the Act in fact criminalizes. First, defendants assert that the Act does not cover "those who merely post material on the Internet without intending to communicate with minors." See State Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 18 ("Opp. Brief"); see also id. at 26 ("Merely displaying on a . . . web-site material that is harmful to minors . . . is not prosecutable."). This interpretation is inconsistent with defendants' concession elsewhere in the brief that the Act requires Web providers to label their speech in order to avoid criminal

---

[1] New York Penal Law § 235.21(3)

prosecution. See, e.g., Opp. Brief at 23-24 ("The Act merely requires that a content provider take the affirmative . . . step of coding a web address . . . ."). Web providers rarely "intend" to communicate with a particular speaker, and have no way of knowing who has accessed their speech. If defendants believe that the Act only applies to speakers who "intentionally" communicate with a minor, why do Web providers need to label their speech? See Opp. Brief at 18-19.

Second, defendants assert that the Act only targets pedophiles, which is also inconsistent with their position that Web providers must label their speech. Opp. Brief at 16-17. It is unclear how a pedophile would ever use the Web to lure a minor into sexual conduct -- the Web is a relatively static, non-interactive environment. It is also highly unlikely that a pedophile would choose the entirely public environment of the Web to attempt criminal conduct; even if he did, it is doubtful that he would bother to label his speech "indecent." Also perplexing is defendants' telling omission of any mention of § 235.22, the unchallenged provision of the Act which explicitly covers use of the Internet to communicate harmful materials for the purpose of enticing, inducing, or engaging a minor to engage in sexual conduct; plaintiffs do not challenge §235.22 in this case. This section was added at the same time as the challenged § 235.21(3) and appears to directly address the pedophile scenario. Unlike the other statutes defendants discuss, see Opp. Brief at 16-17, § 235.22 does not require actual sexual contact between the defendant and the victim. If defendants cannot define the Act in a consistent and coherent way, then certainly ordinary people will be unable to determine whether their speech is criminal under the

vague language of the Act[2]. See Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1982).

II. THE ACT BANS "INDECENT" SPEECH IN BROAD AND VAGUE TERMS AND CANNOT BE REWRITTEN AS DEFENDANTS PROPOSE

In addition to providing contradictory interpretations of the law, defendants invite this Court to rewrite the Act. But the Supreme Court made clear in Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 397, 108 S. Ct. 636, 645 (1988), that it is only if a statute is "readily susceptible" to a narrowing construction that such an interpretation will be applied to save an otherwise unconstitutional law. Defendants ask the Court to perform "radical surgery" on the Act in two ways. See Shea, 930 F. Supp. at 923 (declining to perform "radical surgery" to save the CDA). First, defendants argue that a "criminal defendant must have intentionally communicated with a minor to be prosecuted."[3] Opp. Brief at 25. Second, defendants argue that

---

2 Defendants are also confused about the Act's ban on speech to older as well as younger minors. They apparently concede that statutes regulating material that is "harmful to minors" is constitutional only if "construed to prohibit only that material that would lack serious value for older minors." Opp. Brief at 8-9; see cases cited in Opening Brief at 36-38. But there is currently no such ruling under New York law. Thus, absent a definitive ruling by the court that the Act only prohibited material that lacked value for older minors, the Act is facially overbroad. Because a narrowing construction cannot save the many additional defects in the Act, the Act must be struck down on its face. See infra at II and Opening Brief.

3 Defendants argue that the Act's prohibition is distinct from the "display" provision struck down in Shea and ACLU v. Reno. However, because all online communication (with the possible exception of one-to-one e-mail) is made "available" in a manner that allows both minors and adults to access it, there is no meaningful distinction between "displaying" indecent material "in a manner available to a minor" and "use of a computer" to "initiate or engage in communication with a person who is a minor." Similarly, the ACLU v. Reno court found no meaningful distinction between three separate provisions in the CDA. Compare §223(d)(1)(B) (prohibiting the "display" of indecency to minors) with §223(a)(1)(B) (making it a crime if a person "makes, creates, or solicits, and initiates the transmission of" any indecent communication to minor) and § 223(d)(1)(A) (making it a crime to "use[] an interactive computer service to send [an indecent communication] to a specific person or persons under 18 years of age"). Because all three provisions had the effect of banning speech between adults, all three violated the First Amendment.

the Act is limited to "communications that contain graphic or pictorial representations." Opp. Brief at 26-27. Both of these arguments fly in the face of the clear language of the statute and its legislative history.[4] Equally important, these attempts to rewrite the Act fail to cure its constitutional defects. Finally, they are not binding on the state courts who will be called on to adjudicate prosecutions.

Defendants first attempt to save the Act by arguing that it only covers "intentional" communications with a minor. But as plaintiffs point out in their initial brief, the Act itself only requires that the defendant "intentionally use" a computer, and does not require that the defendant "intentionally" communicate with a minor. See Opening Brief at 6. In addition, as defendants are forced to acknowledge, the legislators specifically discussed the requisite level of intent required for prosecution: the defendant need only have had "reason to believe" that he was communicating with a minor.[5] See New York State Executive Chamber Memorandum, Charter 600, Approval #84 (September 4, 1996) (hereinafter "Exec. Chamber Memo"), attached hereto as Exhibit A to the Declaration of Anat Hakim ("Hakim Decl."). All speakers who communicate in the public

---

See also Shea, 930 F. Supp. at 939-42 (striking down Sections 223(d)(1)(A) and (B) (the plaintiff in Shea did not challenge 223(a)(1)(B))).

[4] In addition, defendants ask the Court to dismiss the case because the Act is not unconstitutional if read as defendants suggest. Opp. Brief at 2. Even if its interpretation were possible under the plain language of the Act -- and clearly it is not -- the proper remedy would not be dismissal but rather would be an adjudication that narrowed the permissible scope of the Act. Otherwise the Act would remain valid as written and there would be no precedent to bind future prosecutors from applying the Act broadly and unconstitutionally. The Act would continue to chill protected speech, as it has already done.

[5] In addition, if the Act were meant to apply only to persons who intentionally communicated "indecent" material to a particular person they knew to be a minor, it would be nonsensical for such speakers to be able to assert the credit card and other defenses in order to avoid prosecution.

areas of cyberspace -- to which both adults and minors have access -- have "reason to believe" they are communicating with minors. Thus, because speakers have no way to prevent access by minors to their online speech, the "intent" clause fails to rectify the Act's ban on protected speech between adults, in violation of Butler v. Michigan, 352 U.S. 380, 77 S. Ct. 524 (1957) and Sable Communications v. FCC, 499 U.S. 115, 109 S. Ct. 2829 (1989). See Opening Brief at 20-22.

Even if the Act required actual knowledge that the speaker is communicating with a minor, the Act would still prohibit communications between adults. Once a speaker in a chat room, mailing list, newsgroup or on the Web knows that a minor is present, the speaker has no way to continue communicating a message to all of the adults in these forums without communicating it to the minor as well.[6] Defendants ignore the drastic impact on adult speech that the Act, even if narrowed in contradiction to its plain meaning, would have.

Defendants next try to distinguish the Act from the overwhelmingly unconstitutional CDA by arguing that the Act covers only pictures, not text. Under the golden rule of statutory construction, "the starting point is the language of the statute itself," Communications Workers of America v. Beck, 487 U.S. 735, 108 S. Ct. 2641, 2658 (1988) (Blackmun, J., concurring in part, dissenting in part), and the plain language of the Act covers text as well as pictures.[7] The Act makes it a crime to use any computer communication system to

---

[6] For example, if a member of ECHO's "lambda" conference reads a posting by someone who identified himself as a minor, does that speaker have to refrain from possibly "indecent" speech when she posts her next message to the conference because she has no way of preventing the minor from receiving the message?

[7] Subsections (1) and (2) of §235.21 show that §235.21(3) was intended to cover both text and pictures. Section 235.21(1) specifically sets out a list of the types of material that may not be sold or loaned to a minor: "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation . . ." Similarly, §235.21(2) provides a specific list of prohibited material: "any book, pamphlet, magazine, [or] printed matter . . ." Taken together, these subsections cover

"depict actual or simulated nudity, sexual conduct or sado-masochistic abuse . . . which is harmful to minors." The dictionary definition of the verb "depict" includes both visual representations and "description." Webster's Third New International Dictionary 605 (1981). The Act itself also defines material that is "harmful to minors" as including any "description or representation," which supports an interpretation of the Act's use of the verb "depict" to include both pictures and text. Section 235.20(6) (emphasis added).

The legislative history of the Act reinforces the position that the Act is intended to broadly prohibit textual as well as visual communications. When the Act was first introduced in the New York State Senate, the sponsors indicated that the Act would prevent persons from engaging in "discussions of sex and sexuality" with a minor. See New York State Senate Introducer's Memorandum in Support of S.210, at 2, attached hereto as Exhibit B to Hakim Decl. It is thus not surprising that defendants' brief was unable to point to any part of the legislative history that would indicate an intention to cover pictures only. The Governor's memorandum upon signing the Act also presumed that the Act would cover textual messages. In support of the Act, the memorandum cites to cases in which "pedophiles have engaged in sexually explicit communications with minors and then attempted to arrange sexual encounters with these minors." See Exec. Chamber Memo, Hakim Decl. Exh. A. It would certainly be difficult to use the Internet to arrange a sexual encounter with a minor without using words. In fact, limiting the Act to only pictures would fatally undermine defendants' asserted interest in the challenged *and*

---

the gamut of available textual and visual representations of "indecency." Section 235.21(3) contains no specific list, but rather implies that both categories are covered because the subsection prohibits all "uses" of "computer communication system[s]" to depict "indecency." This comports with the legislature's intent to expand all of the existing prohibitions in Section 235.21 to apply specifically to computer communications

unchallenged provisions of the Act because it would allow a pedophile who sent an "indecent" textual message to a minor, *even for the purpose of enticing a minor into sexual conduct*, to avoid prosecution under § 235.22. According to defendants' argument, the Act would not cover the Barlow incident -- which clearly included textual e-mail messages -- to which defendants repeatedly refer in their brief. Opp. Br. at 15, 16, 17-18. See John Heilemann, The Crusader, New Yorker, Feb. 24 & Mar. 3, 1997, at 122, attached hereto as Exhibit C to Hakim Decl. (quoting from e-mail sent by Barlow).

Finally, even if the Act covered only pictures, it would still be unconstitutional on its face because such materials, as defendants concede, are clearly constitutionally "protected for adults." Opp. Brief at 31. Because the Act provides no means for speakers to prevent minors from accessing the materials without also banning them from adults, the Act is fatally overbroad. See Opening Brief at 20-32.

III. THE DEFENSES IN SECTIONS 235.23(3)(a) AND (d) DO NOT SAVE THE ACT

Defendants next argue that the Act contains defenses not found in the CDA and that these defenses cure its constitutional defects; they are wrong. For example, defendants claim that Section 235.23(3)(d) "merely requires that a content provider take the affirmative, and inexpensive step of coding a web address so that it can be identified by screening software that is reasonably available," Opp. Brief at 24, and that this step need not be effective in blocking indecent material. However, the provision expressly requires a content provider to exercise "good faith" when she picks a label to ensure that the label "enable[s] such material to be automatically blocked or screened" by the various different user-based filtering software. Section 235.23(3)(d). Moreover, technology for self-labeling is only now emerging and is not widely

available or adopted. Even with self-labeling, there is currently no universally recognized label that enables material to be automatically blocked by the various different user-based blocking programs. Opening Br. at 30.

In addition, contrary to defendants' assertion, self-labeling is neither simple nor inexpensive, and is exacerbated by the inherent vagueness of the Act. A content provider on the Web must review every Web page, picture or file to determine if it is potentially "indecent," choose the appropriate label and then imbed the label into the code of each file. The cost of continually reviewing and labeling existing and new content will be enormous and will put many commercial and non-commercial Web sites out of business. See Opening Brief at 29 n. 19.

Mandatory self-labeling (or self-registration) also amounts to unconstitutional forced speech. As the Court recently affirmed in Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 114 S. Ct. 2445, 2458 (1994), the First Amendment prohibits "Government action that ... requires the utterance of a particular message favored by the Government." It is thus well-established that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977).[8] Mandating self-labeling (or self-registration) is particularly inappropriate when there is a far less restrictive alternative available -- the availability of user-based blocking programs that rely on third parties to rate sites. See Opening Brief at 17-18.

Finally, and crucially, defendants concede that §235.23(3)(d) provides a defense only to content providers on Web sites. Opp. Brief at 24. Defendants do not and cannot dispute

---

[8] See also Interstate Circuit Inc. v. City of Dallas, 390 U.S. 676, 678-80, 88 S. Ct. 1298, 1300-01 (1968) (invalidating a city ordinance that imposed a misdemeanor penalty for showing movies deemed by a classification board "not suitable for minors").

that the vast majority of speakers on the Internet lack any mechanism for self-labeling their conversations -- whether distributed by e-mail, newsgroups, mail exploders or chat rooms -- in a way that would enable them to be automatically blocked or screened from minors. Opening Brief at 29. For content providers via these other communication methods, defendants instead argue that Section 235.23(3)(a) somehow narrows the Act. As set forth previously, however, this defense provides no safe harbor to speakers; there is no way for the vast majority of speakers to take any efforts -- let alone "reasonable efforts" -- to ascertain an Internet user's age or to segregate their speech into "adults-only" areas. Opening Brief at 28, 30. Defendants' suggestion that a person sending an indecent e-mail could benefit from the "reasonable effort" defense by asking questions of the potential recipient is totally unpersuasive. Opp. Brief at 24. Minors could always gain access to "indecency" simply by lying, rendering the Act totally ineffective at achieving defendants' purportedly "compelling" interest.

IV. ABSTENTION IS INAPPROPRIATE IN THIS CASE

Defendants' argument that this Court abstain from exercising its jurisdiction should also be denied because the federal constitutional issues presented here cannot be eliminated by any State court construction of the Act, and abstention would simply delay an adjudication to protect the plaintiffs' rights.[9]

The Supreme Court has stated that where abstention is sought based upon supposed ambiguity in state law, the pivotal question is whether the statute is "'fairly subject to an

---

[9] While defendants have repeatedly referred to the plain language of the Act to support their case that the Act is not unconstitutionally vague, their abstention claim is grounded in the opposite proposition: that the Act is ambiguous and in need of State court interpretation. Opp. Brief at 47-48. This contradictory argument should be rejected.

interpretation which will render unnecessary or substantially modify the federal constitutional question.'" City of Houston v. Hill, 482 U.S. 451, 468, 107 S. Ct. 2502, 2513 (1987); Zwickler v. Koota, 389 U.S. 241, 251 & n.14, 88 S. Ct. 391, 397 & n.14 (1967).[10] For all the reasons set forth previously, the Act is not "obviously susceptible" to a limiting construction[11]

Moreover, abstention will cause irreparable harm from further delay in determining plaintiffs' free speech rights. Cate v. Oldham, 707 F.2d 1176, 1184-85 (11th Cir. 1983) (declining to abstain in First Amendment case "alleging immediate and ongoing irreparable injury" and "considering the great costs imposed in abstaining in this type of case."); Baggett v. Bullitt, 377 U.S. 360, 378-79, 84 S. Ct. 1316, 1326 (1964). The Act has already chilled the speech of certain plaintiffs such as NYC NET and Mr. Kinsky. The "delays, expense and procedural complexity" entailed in a Pullman abstention, Arizonans for Official English v. Arizona, 1997 WL 84990, at *20 (U.S. Mar. 3,1997), are neither necessary nor appropriate.[12]

---

10 The Supreme Court held in City of Houston v. Hill, 482 U.S. at 468, 107 S. Ct. at 2513, that abstention is not appropriate if "the statute is not obviously susceptible of a limiting construction," even if the statute was never interpreted by a state court.

11 In addition, plaintiffs' Commerce Clause argument will remain regardless of the construction a State court might give to the Act. See Rindley v. Gallagher, 929 F.2d 1552, 1557 (11th Cir. 1991) (reversing abstention because resolution of unsettled questions of state law will not avoid all federal constitutional questions).

12 Defendants' reliance on Arizonans for Official v. English, Opp. Brief at 49-50, is misplaced. That decision addressed the question of whether certain state law issues should have been certified to the Arizona Supreme Court by the United States District Court for the District of Arizona and later by the Ninth Circuit Court of Appeals. Id. at *20. No such certification procedure is available in this case. The only certification procedure available in New York is from the United States Supreme Court, any United States Court of Appeals or a court of last resort of any other state to the New York Court of Appeals. See McKinney's New York Rules of Court § 500.17(a) (1966).

V. DEFENDANTS' REMAINING ARGUMENTS ARE UNPERSUASIVE

Defendants offer a number of additional arguments, none of which is persuasive. First, defendants do not offer any credible opposition to plaintiffs' claim that the Act clearly violates the Commerce Clause. In yet another inconsistency, defendants argue that the Act affects only "intrastate" communications but then repeatedly refer to the Barlow incident -- which involved an interstate communication between Washington and New York -- to justify the Act. Opp. Brief at 15, 16, 17-18. Moreover, defendants concede that speakers outside New York will be required to employ software programs that "screen material that is harmful to minors" in order to comply with the Act. Id. at 13. Defendants even assert that the Act is intended to "influence the behavior of foreign speech providers," a concession that the Act's impact is global as well as interstate. Id. at 42. Having made these admissions, defendants try to minimize the impact that compliance with the Act's defenses would have on interstate communications. Id. at 13 (describing burden on speakers of complying with defenses as "incidental" or "slight"). However, as set forth previously, the defenses do not offer protection to the vast majority of speakers on the global Internet. Moreover, even if feasible, the defenses would require millions of speakers around the world to self-label, self-register, age verify or take some other step to block minors in New York from accessing their speech -- even if New Yorkers never in fact access their speech. See Opening Brief at 42-44. These steps cannot be credibly described as "incidental."[13]

---

[13] The Act imposes a much heavier burden than the burden held unconstitutional in Pike v. Bruce Church, 397 U.S. 137, 145, 90 S. Ct. 844, 849 (1970) (holding that a statute that required a single plaintiff to expend $200,000 in order to build and operate an unnecessary plant imposed an impermissible burden on interstate commerce), a case cited by defendants.

Second, in an effort to attack plaintiffs' standing, defendants take great pains to distinguish between "substantial overbreadth" and "substantive unconstitutionality" challenges. Opp. Brief at 32. Plaintiffs clearly have standing to bring both types of challenges.[14] The first is proper where a statute -- even though it might be validly applied in some circumstances -- nevertheless is so "broad[] that [it] 'may inhibit the constitutionally protected speech of third parties.'" City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, 104 S. Ct. 2118, 2125 (1984). As set forth in plaintiffs' Opening Brief, plaintiffs have met their burden of showing that the Act is substantially overbroad. Opening Brief at 20-32.

The second type of facial challenge -- "substantive unconstitutionality" -- is "a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Joseph H. Munson 467 U.S. at 965 n.13, 104 S. Ct. at 2852 n.13; see Vincent, 466 U.S. at 797-98, 104 S. Ct. at 2124-25; New York State Club Ass'n v. City of N.Y., 487 U.S. 1, 11, 108 S. Ct. 2225, 2233 (1988) (explaining the nature of facial challenges). Because the Act "in all its applications . . . creates an unnecessary risk of chilling free speech," Joseph H. v. Munson, 467 U.S. at 968, 104 S. Ct. at 2853, there is "no set of circumstances" under which it "would be valid." Rust v. Sullivan, 500 U.S. 173, 182-83, 111 S. Ct. 1759, 1767 (1990). If defendants'

---

[14] As will be shown, each of the Plaintiffs or their members currently engage or seek to engage in online communications of the type banned by the Act, and therefore fears prosecution. See Opening Brief at 3-6; see Virginia v. American Booksellers Ass'n, 484 U.S. at 393-94, 108 S. Ct. at 643 (finding standing where plaintiffs would have to risk prosecution or significantly change their conduct if their interpretation of statute was correct); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. at 947, 956-57, 104 S. Ct. 2839, 2847 (1984) (permitting litigants to challenge a statute on First Amendment grounds "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected expression.").

interpretation of a non-overbreadth facial challenge were followed, Opp. Brief at 32, no statute could ever be facially unconstitutional so long as defendants could conceive of some way in which it could apply to constitutionally unprotected speech. Under the government's theory, even a patently unconstitutional viewpoint discriminatory law, prohibiting, for example, any speech in favor of capitalism, socialism, the Republican Party, or the repeal of the CDA, would not be facially unconstitutional because some speech falling within the statutory prohibitions (e.g., incitement, fighting words, obscenity, or defamation) could legitimately be punished.

Finally, defendants argue that an injunction against them would not prevent prosecution by the sixty-two local District Attorneys. Defendants, however, admit in their brief that "the Governor and Attorney General have the authority to enforce the law pursuant to Executive Law." Opp. Brief at 7. Therefore, an injunction should be effective. Moreover, under Fed. R. Civ. P. 65(d), parties such as the local District Attorneys who "participate" with defendants and who have actual notice of the injunction would be bound by an injunction against defendants. See American Booksellers v. Webb, 590 F. Supp. 677, 693-94 (N.D. Ga. 1984) (injunction against Attorney General binds state law enforcement officials who might seek to enforce the challenged Act); see also United Transportation Union v. Long Island Rail Rd. Co., 634 F.2d 19, 22 (2d Cir. 1980) (non-party Attorney General bound by an injunction against defendants because Attorney General "undoubtedly had knowledge of the instant action and could have participated therein had he chosen to do so"), rev'd on other grounds, 455 U.S. 678 (1982). Even if this Court holds that an injunction would not bind the District Attorneys, the local District Attorneys can be added as defendants and/or pursuant to Fed. R. Civ. P. 65(a)(2), the preliminary injunction hearing can be turned into a trial on the merits so that a final declaratory judgment can

be issued. A final order from this Court declaring that the Act is unconstitutional would certainly "bind" the District Attorneys.

CONCLUSION

For the reasons set forth above and in plaintiffs' Opening Brief, plaintiffs respectfully request that the Court grant them preliminary injunctive relief.

Dated: New York, New York
March 21, 1997

Respectfully submitted,

By: 

Michael K. Hertz (MH-5587)
LATHAM & WATKINS
885 Third Avenue
Suite 1000
New York, New York 10022
(212) 906-1200

Christopher A. Hansen (CH-6776)
Ann Beeson
AMERICAN CIVIL LIBERTIES UNION
132 West Forty-Third Street
New York, New York 10036
(212) 944-9800

Arthur N. Eisenberg (AE-2012)
NEW YORK CIVIL LIBERTIES UNION
132 West Forty-Third Street
New York, New York 10036
(212) 944-9800

Michael A. Bamberger (MB-9577)
SONNENSCHEIN NATH & ROSENTHAL
1221 Avenue of the Americas
New York, New York 10020
(212) 768-6700

Attorneys for Plaintiffs