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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

GARDEN DISTRICT BOOK SHOP, INC.; OCTAVIA
BOOKS, L.L.C.; FUTURE CRAWFISH PAPER,
L.L.C.; AMERICAN BOOKSELLERS
ASSOCIATION; AND COMIC BOOK LEGAL
DEFENSE FUND,

Plaintiffs,

-v-

JAMES D. CALDWELL, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
LOUISIANA, et al.,

Defendants.

Case No. 3:15-CV-738-BAJ-SCR

**Declaration of
Britton Trice
(Garden District Book Shop, Inc.)**

BRITTON TRICE declares:

1. I am the owner of Garden District Book Shop, Inc. (“Garden District”), a plaintiff in this action. I submit this declaration on behalf of Garden District, its employees (including me), its customers, and the readers of its website, in support of Plaintiffs’ request for a preliminary injunction against enforcement of Louisiana’s H.B. 153, Act 187 of the Laws of 2015 (the “Act”), which provides, subject to limited exceptions, that:

Any person or entity in Louisiana that publishes material harmful to minors on the Internet shall, prior to permitting access to such material, require any person attempting to access such material to electronically acknowledge and attest that the person seeking to access such material is eighteen years of age or older.

L.a. Rev. Stat. § 14:91.14(A)(1). I have read the Act, including the statutory definitions referenced therein.

2. I understand that violation of the Act is a crime punishable by a fine of up to \$10,000.

3. I have personal knowledge of the facts set forth in this declaration.

GARDEN DISTRICT BOOK SHOP

4. Garden District is a Louisiana corporation which owns and operates a bookstore located at 2727 Prytania Street, New Orleans, Louisiana, in the Garden District of New Orleans. We also sell books and electronic books (“eBooks”) through our website, on the Internet, at <http://www.gardendistrictbookshop.com/>. Garden District has served Louisianans for over 35 years. In the physical store, Garden District offers a large collection of regional titles—new, used, and rare books; design, art, and gardening books; fiction and non-fiction; children’s books; and signed first editions and limited editions by many regionally and nationally acclaimed authors. We also host events in our store, including book signings with authors, which we promote on our website.

5. We also use social media sites run by third-parties such as Facebook, Twitter, and Instagram to promote events in our store and books that we offer for sale. We rely on our website

and social media pages to generate business, including by encouraging individuals to buy books through the website and by bringing people into the store, where they may buy books.

6. Through our own website, Garden District offers millions of books for sale, which can either be shipped to the customer or picked up in the store. We ship books both within Louisiana and outside Louisiana. We also sell eBooks on our website. In order to sell books through our website, we use third-party providers, which not only maintain book and eBook inventories of millions of book titles, but also prepare and provide the listings of the books and eBooks which appear on our website. These third-party services are available to us through two programs run by the American Booksellers Association: IndieCommerce (for print books) and Kobo (for eBooks). These programs provide independent bookstores around the country with access to third-party book inventories.

7. When individuals visit our website, they can search for books and eBooks that are available for sale. Many of the books and eBooks offered for sale online are accompanied by images of the covers, some of which contain images of nudity, and some of which could be deemed to be material harmful to minors under the Act. In some cases, the book listing may include a “Google Preview” which provides digital images of select pages from the book, some of which could be deemed to be material harmful to minors under the Act because they include depictions or descriptions of sexual activity, for example. These images are selected and provided by the third-party database operators through the IndieCommerce and Kobo programs—or, in the case of “Google Previews,” by Google, Inc.

8. Whenever our website users view these images and purchase these books and eBooks, they do not leave the Garden District website. Therefore, when someone sees the books and eBooks provided through the third-party database, they are being offered for sale by Garden District, and if someone purchases a book or eBook, they are in fact purchasing the book from

Garden District. If a reader purchases an eBook from us, the entire content of the eBook is delivered to the reader electronically over the Internet.

9. However, the very same third-party book and eBook inventory that we use (with the accompanying book listings containing book covers and other images) is provided to other booksellers across Louisiana and in other states. Garden District does not select the books or eBooks that are listed, nor do we prepare the appearance of the listings. We may occasionally add books to the database of books for sale, such as a book by a self-published author. In that case, we follow a procedure dictated by the third-party provider to add to the inventory of books sold through our website. We do not have any ability to remove books from the third-party databases.

FEAR OF PROSECUTION UNDER THE ACT

10. I fear that the Act places Garden District and its employees (including me) at risk of prosecution for displaying or distributing constitutionally-protected material through our website and social media pages. The Act forces Garden District and its employees to choose between forgoing our First Amendment rights or facing the threat of prosecution. It also threatens the First Amendment rights of a vast quantity of our readers, website visitors, and customers.

11. I do not know how to determine what material on our website and social media pages might qualify as “harmful to minors” under the Act, including whether I am to consider an image such as a book cover in isolation, or the entire contents of a book, in making that determination. Many books that we sell contain sexually related narrative or pictorial content that might be deemed “harmful to minors.” In addition, many books or images that may be appropriate for 16- and 17-year-old minors (“older minors”) may not be appropriate for younger minors. In order to comply with the Act, Garden District may have to place all of our book listings behind an age-attestation button except for those that could not be deemed harmful to

any minor—no matter what age. Many of the books we sell have serious value to older minors but may be deemed harmful to younger minors under the Act, including books in the young adult genre, such as the coming-of-age graphic novel *Blankets* by Craig Thompson (Top Shelf Productions 2003), or books on sexual and reproductive health, such as *100 Questions You'd Never Ask Your Parents: Straight Answers to Teens' Questions About Sex, Sexuality, and Health* by Elisabeth Henderson et al. (Roaring Book Press 2013). This is particularly true if the book cover image alone might be deemed harmful to some subset of minors, even though the book as a whole has serious value for all minors, or even just older minors. If such book listings need to be placed behind an age-attestation button, our older minor readers and customers will be unable to view or purchase them on our website.

12. I do not know which community's standards I am supposed to use in judging the offensiveness to minors of any given image on our website. We ship books to customers outside Louisiana who purchase through our website, and our website can be viewed by individuals throughout the country and the world. I do not know whether the potential offensiveness of images should be judged by the community standards of New Orleans, where Garden District is physically located, or those of any viewer's community. If I am supposed to consider the website viewer's community, I do not know how to anticipate from where in the world an individual might be accessing our website and what the community standards of offensiveness are in such distant communities.

13. I do not know how to comply with the Act without burdening access to material that adults, older minors, and all minors have a constitutional right to access. To comply with the Act, my employees at Garden District and I would either have to 1) review each of the millions of books and eBooks that we offer for sale through third-party databases and place an age-attestation button in front of each book listing which might contain an image deemed harmful to

minors; 2) place an age-attestation button in front of our entire website; or 3) restrict our website displays and book listings to a small enough inventory of books such that my staff or I could review each and every image.

14. To take the first approach would make operation of our bookstore nearly impossible. In the first place, we do not ourselves maintain or control the selection of books that appear for sale through the third-party database, including the book cover images that appear alongside the books listings. I do not know how I could single out book listings to place behind an age-attestation button. But even if I could technically do so, it would be an insurmountable burden for a small business such as Garden District to review each of the millions of titles we make available for sale. We simply do not have the staff to spend time conducting an individual review of millions of books, including review of their book covers and, in the case of eBooks, potentially their entire contents if the whole text of the eBook is considered to be “publish[ed]” on the Internet within the meaning of the Act. Such a review is extraordinarily burdensome for a small bookstore such as Garden District and would not be feasible for us.

15. To take the second approach of placing an age-attestation button in front of our entire website would deprive all minors of access to books and other material on our website that they have a constitutional right to receive, including material suitable for and indeed, targeted at, children. For example, we offer for sale *To Kill a Mockingbird*, which is singled out as a “Store Favorite” on our website. But if our entire website were behind an age-attestation button, a 17-year-old in high school could not view our Store Favorite page or purchase the book from us, even though it is not obscene and could not be deemed harmful to any minor under the Act.

16. Additionally, I am concerned that placing an age-attestation button in front of our entire website would give the wrong impression that Garden District is an “adult” bookstore or website. This could have a negative effect on our business by making adults less likely to view

our website, which in turn would affect our online book sales and our ability to effectively promote events that bring people to our store.

17. The third approach would be to limit our inventory to only those books and eBooks whose covers and contents we can individually review. This would require us to self-censor, because we do not have the time and resources to review all the books we would wish to offer for sale, even though those books are protected under the First Amendment. As a result, Garden District's business would be harmed because we would offer a much smaller selection of books, which would likely result in fewer customers and sales.

18. I do not know how to comply with the Act when it comes to Garden District's use of social media sites run by third parties, other than by restricting the material we post. I have no way to implement an age-attestation requirement on our Facebook, Twitter, or Instagram pages. In order to avoid the threat of prosecution, I would therefore have to stop using social media to promote any content that could possibly be deemed "harmful to minors" under the Act. Censoring our use of social media in such a way could result in the loss of customers.

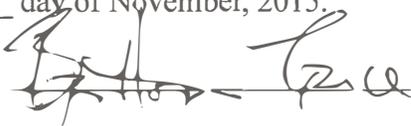
19. Our website and social media pages are accessible anywhere in the world, and so our ability to share material with and sell to readers outside Louisiana is burdened by the Act, because we must follow the age-attestation requirements regardless of where our viewers are located.

CONCLUSION

20. For all the reasons stated above, unless the Act is enjoined, Garden District and its employees, customers, and readers of its website will be irreparably harmed. Garden District will be forced to either self-censor the material available on our website and the books we offer for sale, thereby denying our customers and readers of our website access to constitutionally-protected material, or risk criminal prosecution.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New Orleans, Louisiana
on this 19 day of November, 2015.

A handwritten signature in black ink, appearing to read 'Britton Trice', written over a horizontal line.

Britton Trice

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

GARDEN DISTRICT BOOK SHOP, INC.; OCTAVIA BOOKS, L.L.C.;
FUTURE CRAWFISH PAPER, L.L.C.; AMERICAN BOOKSELLERS
ASSOCIATION; AND COMIC BOOK LEGAL DEFENSE FUND,

Plaintiffs,

-v-

JAMES D. CALDWELL, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
LOUISIANA, et al.,

Defendants.

Case No. 3:15-CV-738-BAJ-SCR

**Declaration of
Charles Brownstein
(Comic Book Legal Defense Fund)**

CHARLES BROWNSTEIN declares:

1. I am the Executive Director of the Comic Book Legal Defense Fund (“CBLDF”),
a plaintiff in this action. I submit this declaration on behalf of CBLDF, its members, and the

readers of their material, in support of Plaintiffs' request for a preliminary injunction against enforcement of Louisiana's H.B. 153, Act 187 of the Laws of 2015 (the "Act"), which provides, subject to limited exceptions, that:

Any person or entity in Louisiana that publishes material harmful to minors on the Internet shall, prior to permitting access to such material, require any person attempting to access such material to electronically acknowledge and attest that the person seeking to access such material is eighteen years of age or older.

La. Rev. Stat. § 14:91.14(A)(1). I have read the Act, including the statutory definitions referenced therein.

2. I understand that violation of the Act is a crime punishable by a fine of up to \$10,000.

3. I have personal knowledge of the facts set forth in this declaration.

COMIC BOOK LEGAL DEFENSE FUND

4. CBLDF is a non-profit corporation dedicated to defending the First Amendment rights of the comic book industry. CBLDF, which has its principal place of business in New York, NY, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located in Louisiana and throughout the country and the world. CBLDF has members in Louisiana, including comic book artists, sellers, and minor and adult comic book readers.

5. CBLDF was formed in 1986 to assert and protect the First Amendment rights of authors, artists, distributors, publishers, and retailers of comic books, as the result of a challenge to such rights in Lansing, Illinois.

6. I have been professionally involved for over twenty years in the publishing and marketing of comic books.

7. While comic books are often thought of in the context of material directed primarily at children, they have also represented satirical, critical, and dramatic comments on

culture. Over time, the comic book industry has matured and developed in various genres, including young adult fiction, teenage fiction, and materials addressed to older audiences, often picturing nudity and sexually frank plots. This maturity was recognized when *Maus*, a Holocaust comic book narrative created by Art Spiegelman, was awarded a Pulitzer Prize in 1992.

8. An increasing number of comic books find digital distribution through the Internet. Today, the largest individual retailers of comic books in the United States are Internet-based, while hundreds of “web comics” artists are posting work online every year. Some of this material involves frank sexual content or depictions of nudity.

FEAR OF PROSECUTION UNDER THE ACT

9. The rights of CBLDF members, including reader members, as well as other readers of its members’ material will be seriously infringed if the Act is not enjoined. CBLDF members in Louisiana will be forced to self-censor the materials they publish, or risk prosecution under the Act. And minor readers of online comic books will be unable to access material they are constitutionally entitled to receive if they truthfully attest to their age.

10. CBLDF members in Louisiana do not know how to determine what comic books might qualify as “harmful to minors” under the Act. Many comic books contain sexually related narrative or pictorial content that might be deemed “harmful to minors.” A greater number contain elements of classic heroic fantasy which could be misconstrued as “harmful to minors.” If the Act is not enjoined, CBLDF members in Louisiana are concerned that they will have to censor any material that could conceivably be deemed “harmful to minors,” even when that material is constitutionally protected.

11. In addition, many comics that may be appropriate for 16- and 17-year-old minors (“older minors”) may not be appropriate for younger minors. Unless the Act is enjoined, CBLDF members in Louisiana must censor material to be appropriate for the youngest minors who might

conceivably access it over the Internet. Older minors who view comics online will therefore be prevented from accessing material that has serious value to them. For example, Neil Gaiman's *The Sandman*, a critically lauded series that contains frank portrayals of sexual themes and nudity, is a widely-read and sold comic book series. Though it is widely recognized as a classic series for young adult and teen readers, Louisiana CBLDF members could be vulnerable to prosecution under the Act for including images from this book in selling it online.

12. Furthermore, CBLDF and its members do not know which community's standards they are supposed to use in assessing whether any given comic book is "harmful to minors." CBLDF members in Louisiana publish material to websites that are accessible throughout the country and the world. They do not know whether the possible "harmfulness" of this content will be judged by their own community's standards, or those of the reader's community. If it is the latter, CBLDF members do not know how to anticipate where in the world their Internet audiences will be, nor how to determine what the community standards are in distant communities across the state, country, and around the globe.

13. Even if they could determine with any certainty which comic books would be deemed harmful to minors under the Act, the task of sorting through vast amounts of material that is sold or published on the Internet to determine which of it may be "harmful to minors" would be nearly impossible for many comic book stores. Such a store's only option for avoiding prosecution under the Act would therefore be to censor the entirety of its online content by either pulling it offline or imposing a blanket age-attestation requirement on access to its website as a whole. Both options would severely burden the constitutional rights of CBLDF members and the readers of their material. CBLDF members are concerned that the imposition of a blanket age-attestation button that blocks access to an entire website would have the damaging effect of branding the site as "adult," even though it contains no pornography or obscene material.

14. Technical difficulties are even worse for CBLDF members who use social media sites such as Facebook, Twitter, Instagram, or Tumblr to promote their inventory. Because these websites are run by third-parties, Louisiana CBLDF members have no way to ensure that age-attestation buttons are imposed in compliance with the Act. In order to avoid the threat of prosecution, they must therefore stop using social media to promote any content that could possibly be deemed “harmful to minors” under the Act. For some Louisiana CBLDF members who rely on social media to generate viewership and business, ceasing to use such sites may result in the loss of readers and/or revenue.

15. Because many CBLDF members in Louisiana use websites and social media that are accessible throughout the United States and around the world, all of the chilling effects described above would be felt anywhere in the country or the world where a comic book reader might have access to the Internet. Louisiana CBLDF members’ ability to share material with readers outside Louisiana is therefore burdened by the Act.

16. At the same time, however, the vast majority of comic book stores, publishers, and artists, including CBLDF members, are not located in Louisiana, and therefore not subject to the Act. Material published by them on the Internet would thus be viewable by all minors in Louisiana without age attestation. The Act would thus burden Louisianans while doing virtually nothing to shield minors from “harmful to minors” material.

CONCLUSION

17. For all the reasons stated above, unless the Act is enjoined, Louisiana CBLDF members must choose between foregoing their First Amendment rights to publish and sell non-obscene material or face the threat of criminal prosecution. And minors throughout the country may have restricted access to constitutionally protected comic book content that is published in Louisiana unless the Act is enjoined.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York
on this 19 day of November, 2015.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long horizontal line extending to the right.

Charles Brownstein

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(admitted *pro hac vice*)
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(admitted *pro hac vice*)
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IN THE UNITED STATES DISTRICT COURT
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GARDEN DISTRICT BOOK SHOP, INC.; OCTAVIA
BOOKS, L.L.C.; FUTURE CRAWFISH PAPER,
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ASSOCIATION; AND COMIC BOOK LEGAL
DEFENSE FUND,

Plaintiffs,

-v-

JAMES D. CALDWELL, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
LOUISIANA, et al.,

Defendants.

Case No. 3:15-CV-738-BAJ-SCR

**Declaration of
Christopher Finan
(American Booksellers Association)**

CHRISTOPHER FINAN declares:

1. I am the Director of the American Booksellers for Free Expression (“ABFE”), an advocacy program within the American Booksellers Association (“ABA”), which is a plaintiff in this action. I submit this declaration on behalf of the ABA, its members, and their customers, in support of Plaintiffs’ request for a preliminary injunction against enforcement of Louisiana’s H.B. 153, Act 187 of the Laws of 2015 (the “Act”), which provides, subject to limited exceptions, that:

Any person or entity in Louisiana that publishes material harmful to minors on the Internet shall, prior to permitting access to such material, require any person attempting to access such material to electronically acknowledge and attest that the person seeking to access such material is eighteen years of age or older.

La. Rev. Stat. § 14:91.14(A)(1). I have read the Act, including the statutory definitions referenced therein.

2. I understand that violation of the Act is a crime punishable by a fine of up to \$10,000.

3. I have personal knowledge of the facts set forth in this declaration.

AMERICAN BOOKSELLERS ASSOCIATION

4. The ABA is the leading association of general interest bookstores in the United States, with over 1,600 bookstore members located from coast to coast. The ABA has bookstore members in the State of Louisiana. The ABA is incorporated in New York and has its principal place of business in New York.

5. American Booksellers Foundation for Free Expression (“ABFFE”), a not-for-profit subsidiary of the ABA, was formed in February 1990 to combat escalating threats to the First Amendment freedoms of booksellers, publishers, librarians and other distributors of books, magazines, records, films and videos. In 2014, the ABFFE merged with the ABA, which now fulfills through the ABFE program the former ABFFE’s purposes of informing and educating booksellers, other members of the book industry, and the public about the dangers of censorship,

as well as promoting and protecting the free expression of ideas, particularly in the choice of reading materials. (The ABFFE and ABFE are hereinafter referred to simply as the “ABA.”)

6. The ABA has traditionally been a strong supporter of the First Amendment and has been at the forefront of ensuring public access to information. The ABA has been an active champion of First Amendment rights through its support of the National Endowment for the Arts and the Salman Rushdie Defense Committee USA, its service as *amicus curiae* in a number of Supreme Court cases involving First Amendment issues, its distribution of educational materials on current First Amendment issues, its production and distribution of materials to celebrate Banned Books Week each year, and various other efforts.

7. ABA members offer and sell First Amendment-protected works both in “brick and mortar” retail stores and via the Internet. They also promote their stores and their inventories on social media sites such as Facebook, Instagram, and Twitter.

8. The ABA sponsors two programs for its member booksellers that enable them to sell books and electronic books (“eBooks”) through the Internet, both of which are used by ABA member booksellers in Louisiana. The IndieCommerce program gives booksellers access to a database of over five million print books, which they can sell through their own websites. Similarly, the Kobo program enables booksellers to sell eBooks from a database of over four million titles. For both programs, inventory is selected and managed by the third-party providers; an individual bookseller can request that a title be added to the database, but neither the ABA nor an individual bookseller can remove titles from the database or otherwise customize the database. Individual booksellers also have no control over the text and images that appear on their websites when users search for a given title—those are determined entirely by third-party providers. Both the IndieCommerce and Kobo programs are offered to booksellers throughout the country, and not just in Louisiana.

9. ABA members are not “adult bookstores.” However, many of the ABA’s bookseller members, including Louisiana booksellers, offer and sell First Amendment-protected non-obscene materials that contain depictions or descriptions of nudity or sexual conduct that may qualify as “harmful to minors” under the Act.

FEAR OF PROSECUTION UNDER THE ACT

10. The rights of ABA members and their customers will be seriously infringed if the Act is not enjoined. ABA booksellers in Louisiana will be forced to limit the ways in which they promote and sell books on the Internet, or else risk criminal prosecution. Furthermore, those minors in Louisiana and throughout the country who seek to learn about and buy books sold by ABA members in Louisiana will be unable to do so without falsely attesting that they are eighteen years of age or older.

11. I have read the declarations of the Louisiana ABA bookseller members who are plaintiffs in this action: Judith Lafitte of Octavia Books, L.L.C. and Britton Trice of Garden District Book Shop, Inc. The impact that the Act will have on these plaintiff bookstores, as set forth in the declarations of Ms. Lafitte and Mr. Trice, will similarly be felt by other Louisiana ABA members.

12. The databases provided to ABA members, including booksellers in Louisiana, through the IndieCommerce and Kobo programs, contain many titles that depict or describe nudity or sex. For example, the following books are available through the third-party IndieCommerce database: *Bettina Rheims: Retrospective* by Berndt Atell et al. (Schirmer/Mosel 2004), *Edward Weston* (J. Paul Getty Trust Publications 2005); and *The Nude Figure: A Visual Reference for the Artist* by Mark Edward Smith (Watson-Guptill 1998). The covers of these books, which are automatically shown to users when they search a bookseller’s website, display nude photographs, and the contents address themes such as the artistic representation of the

naked human form and the exploration of human sexuality through art. This material, although not pornographic or obscene, and although of legitimate value to many minors, may qualify as harmful to minors under the Act.

13. For multiple reasons, it would be nearly impossible for individual booksellers to restrict access to this material while leaving other material on their websites uncensored. For one thing, I am aware of no technical way for individual booksellers to control the third-party inventories supplied through the IndieCommerce and Kobo programs or the images associated with books and eBooks in those inventories. But even if this were technically feasible, it would be nearly impossible for individual booksellers to sort through the millions of titles in those inventories to determine what might be harmful to minors under the Act. This task would require staff and resources that individual bookstores simply do not have. And it would be a never-ending endeavor, as books are added to the IndieCommerce and Kobo programs on an ongoing basis.

14. The task would be further complicated by the vagueness of the term “harmful to minors” as defined in the Act. It is unclear whether, when applying this standard, a given image is to be judged in isolation, or in the context of the webpage on which it appears or the book from which it is pulled. If context is relevant, the task of sorting through vast inventories to determine what material is harmful to minors would become even more burdensome, as a book’s narrative, plot, or themes may have to be considered in determining whether the images it contains are harmful to minors.

15. It is also unclear which community’s standards are to be used in determining whether material is offensive under the Act—those of the bookseller or those of the website visitor. Thus, the Act may require booksellers to anticipate community standards of offensiveness anywhere in the country or the world where their websites can be accessed.

16. Because the Act fails to define the word “publish,” it is unclear, moreover, what it means to publish material on the Internet under the Act. Users who purchase eBooks through the Kobo database have those materials delivered to them electronically. If sending an eBook through the Internet constitutes “publication” under the Act, then any image in any eBook sold by a Louisiana bookseller that could be deemed harmful to minors could give rise to criminal liability, even if never posted on the bookseller’s website. Booksellers would have to sort through the entirety of every eBook in the Kobo database to determine whether an age-attestation button is required before an eBook is sold. This would be all but impossible.

17. Because of these limitations on ABA member booksellers’ ability to control material supplied by third-party book databases, to sort through that material to determine which of it is harmful to minors, and to determine what even qualifies as harmful to minors, the only option that remains for complying with the Act is for booksellers to show blanket age-attestation screens to every user who seeks to access any part of their websites. This would infringe the right of any minor anywhere in the country to access and purchase constitutionally-protected material on the websites of Louisiana booksellers, and the concomitant First Amendment right of booksellers to display and sell this material to minors. Thus, for example, a 17-year-old sister could not buy the classic children’s book, *Goodnight Moon* by Margaret Wise Brown (HarperTrophy 2007), for her younger brother from a Louisiana bookseller’s website without falsely attesting to her age.

18. The use of blanket age-attestation buttons would have the additional effect of branding Louisiana booksellers as “adult”-themed, even though their inventory is neither pornographic nor obscene. The negative ramifications for booksellers’ business would likely include loss of traffic to their websites and loss of revenue from book sales.

19. The Act will also impede ABA members' ability to promote themselves and their inventory using social media. Sites such as Facebook, Instagram, and Twitter are managed by third-parties, and give users no ability to impose age-attestation screens. A Louisiana bookseller's promotion of any book on these sites that contains images that could be harmful to minors under the Act could give rise to criminal liability. Given the individual bookseller's inability to implement age-attestation buttons on a national third-party website, the only way to avoid such liability would be to stop promoting any book on social media that contains material that could be deemed harmful to minors.

20. ABA members' websites are typically available to any user anywhere in the world. Thus, the burdens described above are likely to fall on many individuals throughout the country and the world who have no connection whatsoever with Louisiana.

CONCLUSION

21. For all the reasons stated above, unless the Act is enjoined, Louisiana ABA members will be forced to self-censor or risk criminal prosecution. If they choose to self-censor, the First Amendment rights of visitors to their websites and would-be readers of their books will also be severely burdened. Thus, the only way to avoid irreparable injury is to enjoin enforcement of the Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York
on this 23rd day of November, 2015.


Christopher Finar

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

GARDEN DISTRICT BOOK SHOP, INC.; OCTAVIA
BOOKS, L.L.C.; FUTURE CRAWFISH PAPER,
L.L.C.; AMERICAN BOOKSELLERS
ASSOCIATION; AND COMIC BOOK LEGAL
DEFENSE FUND,

Plaintiffs,

-v-

JAMES D. CALDWELL, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
LOUISIANA, et al.,

Defendants.

Case No. 3:15-CV-738-BAJ-SCR

**Declaration of
Dan Fox
(Antigravity Magazine)**

DAN FOX declares:

1. I am the Publisher and Editor-in-Chief of Antigravity Magazine (“Antigravity”), an alternative magazine published by Future Crawfish Paper, L.L.C. (“FCP”), a plaintiff in this action. I submit this declaration on behalf of FCP and the staff, writers, photographers, illustrators, and readers of Antigravity, in support of Plaintiffs’ request for a preliminary injunction against enforcement of Louisiana’s H.B. 153, Act 187 of the Laws of 2015 (the “Act”), which provides, subject to limited exceptions, that:

Any person or entity in Louisiana that publishes material harmful to minors on the Internet shall, prior to permitting access to such material, require any person attempting to access such material to electronically acknowledge and attest that the person seeking to access such material is eighteen years of age or older.

La. Rev. Stat. § 14:91.14(A)(1). I have read the Act, including the statutory definitions referenced therein.

2. I understand that violation of the Act is a crime punishable by a fine of up to \$10,000.

3. I have personal knowledge of the facts set forth in this declaration.

ANTIGRAVITY MAGAZINE

4. Antigravity is a free monthly publication, published on newsprint and distributed in over 180 locations throughout the New Orleans metro region, and on the Internet. It has a print circulation of 10,000 copies per month.

5. For over eleven years, Antigravity has published original content, with a particular focus on the news and culture of New Orleans. Its content includes interviews, music reporting, art, food, and event reviews, previews of local film festivals, opinion and editorial pieces, comics, and photography. For example, our November 2015 issue includes a column about the landscape of the southwestern rim of Lake Pontchartrain, an interview with bassist Sean Yeaton of the band Parquet Courts, a story about the New Orleans Comics and Zines festival, a report on sexual assault in New Orleans, and an analysis of the effects of incarceration.

This content has broad appeal not only to adults, but to older minors, such as 16- and 17-year-olds. None of the content is obscene or pornographic.

6. In addition to its print circulation, Antigravity is published on the Internet at <http://www.antigravitiymagazine.com>. This website includes text and images from the magazine, as well as downloadable PDF versions of current and past issues of the print magazine.

7. Antigravity has no full-time employees and no physical office space. We employ independent contractors, who, like me, work on the magazine on a part-time basis. Although some of our staff are able to work on our website, we do not have a dedicated web developer.

8. All revenue from the magazine comes from advertising. We use our website to promote the magazine and increase readership for the print publication. Our website is also an important source of demographic information about our readership, which we use to sell ad space. We also have pages on the social media sites Facebook, Instagram, Twitter, and Tumblr, which we use to increase readership for the magazine and drive visitors to our website.

FEAR OF PROSECUTION UNDER THE ACT

9. The rights of FCP and the rights of the publishers, staff, writers, illustrators, photographers, and readers of Antigravity will be seriously infringed if the Act is not enjoined. Antigravity will be forced to self-censor its website or risk prosecution under the Act. Furthermore, minor readers of Antigravity's Internet content will be unable to access material they have a constitutional right to view and read unless they falsely attest to their age.

10. Although none of Antigravity's contents is obscene or pornographic, some of its material could be deemed "harmful to minors" under the Act. For example, Antigravity regularly publishes illustrations by Kate Lacour, some of which concern sexual themes and depict nudity. These illustrations are often satirical and have serious social, political, historic, artistic, or other value for many minors, especially older minors. For instance, on page 27 of our April 2015 issue

and page 30 of our May 2015 issue, we published illustrations by Lacour with artistic renderings of nude female figures. *See*

http://www.antigravmagazine.com/pdf/antigravity_vol13_issue4.pdf;

http://www.antigravmagazine.com/pdf/antigravity_vol13_issue5.pdf.

11. I have no idea how to determine, however, whether this or any other material on Antigravity's website would ultimately subject us to criminal liability under the Act because I cannot tell what the term "harmful to minors" means. For one thing, I do not know whether "community standards" for offensiveness refers to the community from which Antigravity maintains its website (that is, New Orleans), or any community in which a visitor to our website might be found. If the latter, I do not know how to anticipate what the standards might be in distant communities across the state or even the country.

12. Also, I do not know what it means to "publish" material on the Internet under the Act. If Antigravity posts a single image on an individual webpage, would that entire page be deemed "harmful to minors," or just the image, or perhaps the entire section of our website devoted to the issue in which the image appears? Furthermore, we post each issue of Antigravity as a single, downloadable PDF. If a given PDF contains an image that may be harmful to minors, must the entire PDF be censored behind an age-attestation button? The Act provides no answers to these questions.

13. I am aware that the Act contains an exemption for "news-gathering organization[s]," defined as any "newspaper, or news publication, printed or electronic, of current news and intelligence of varied, broad, and general public interest, having been published for a minimum of one year and that can provide documentation of membership in a statewide or national press association" La. Stat. Ann. § 14:91.14(B)(3)(a). But this exemption provides no comfort to Antigravity because we cannot tell whether it applies to our magazine. I do not

know what it means for a news publication to be of “varied, broad, and general public interest.” Antigravity is an alternative magazine that contains some news, but also reviews, social commentary, comics, and art. I have no idea if this makes Antigravity a “news-gathering organization” under the Act. Nor do I know what constitutes a “statewide or national press association” and, in any event, Antigravity is not a member of any such associations and should not be compelled to join any such association to benefit from the exemption.

14. Even if it were possible to discern what material from our website would be deemed harmful to minors under the Act, it would not be technically possible for Antigravity to put this material behind age-attestation buttons without censoring its Internet content. We have a limited budget, and must rely on part-time contract staff for web development. These staff members have other jobs, and do not have the time to commit to sorting through back issues (virtually all of which are available on our website) to determine which material must be censored. Nor do we have the funds to hire additional staff to undertake this task. Furthermore, we would not be able to implement age-attestation buttons for individual pages or images in the PDF versions of our issues that are posted on our website because those PDFs are downloadable as single files of entire issues. To avoid the prohibitively burdensome tasks of (a) sorting through vast amounts of content to find harmful-to-minors material and (b) breaking up the PDFs of our back issues into portions that can be censored behind age-attestation buttons, we would be forced to put our entire website behind a blanket age-attestation button. This would prohibit all minors from accessing our website without falsely attesting to their age, and it would falsely brand our site as “adult” or pornographic, even though Antigravity contains no pornography. The stigmatizing effect of the “adult” label would reduce our Internet traffic and could even decrease our print readership by eroding our magazine’s reputation for providing serious content.

15. We promote Antigravity by using Facebook, Twitter, and other social media. Our use of these social media sites to promote Antigravity would also be hindered by the Act. We cannot implement age-attestation buttons on these sites. Thus, we would have to cease promoting any content that could be deemed harmful to minors or risk criminal prosecution for having "published" material on the Internet that is harmful to minors.

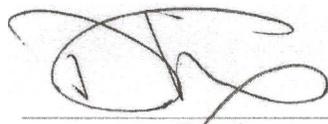
16. Finally, although our online readership is largely in Louisiana, our website is available from any part of the country or the world. If we were to self-censor, that would affect the ability of minors everywhere to access our constitutionally-protected content.

CONCLUSION

17. For all the reasons stated above, unless the Act is enjoined, Antigravity will be forced to either self-censor its website or risk criminal prosecution. This will infringe the First Amendment rights of FCP, Antigravity, and its publishers, staff, writers, photographers, illustrators, and minor readers, thus resulting in irreparable injury.

I declare under penalty or perjury that the foregoing is true and correct.

Executed at New Orleans, Louisiana
on this 4th day of December, 2015.



Dan Fox

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

GARDEN DISTRICT BOOK SHOP, INC.; OCTAVIA BOOKS, L.L.C.;
FUTURE CRAWFISH PAPER, L.L.C.; AMERICAN BOOKSELLERS
ASSOCIATION; AND COMIC BOOK LEGAL DEFENSE FUND,

Plaintiffs,

-v-

JAMES D. CALDWELL, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
LOUISIANA, et al.,

Defendants.

Case No. 3:15-CV-738-BAJ-SCR

**Declaration of
Judith Lafitte
(Octavia Books, L.L.C.)**

JUDITH LAFITTE declares:

1. I am the owner, along with my husband, Tom Lowenburg, of Octavia Books, L.L.C. (“Octavia Books”), a plaintiff in this action. I submit this declaration on behalf of Octavia

Books, its employees (including me), its customers and the readers of its website, in support of Plaintiffs' request for a preliminary injunction against enforcement of Louisiana's H.B. 153, Act 187 of the Laws of 2015 (the "Act"), which provides, subject to limited exceptions, that:

Any person or entity in Louisiana that publishes material harmful to minors on the Internet shall, prior to permitting access to such material, require any person attempting to access such material to electronically acknowledge and attest that the person seeking to access such material is eighteen years of age or older.

La. Rev. Stat. § 14:91.14(A)(1). I have read the Act, including the statutory definitions referenced therein.

2. I understand that violation of the Act is a crime punishable by a fine of up to \$10,000.

3. I have personal knowledge of the facts set forth in this declaration.

OCTAVIA BOOKS, A NEW ORLEANS BOOKSTORE

4. Octavia Books is a Louisiana limited liability company which owns and operates a bookstore at 513 Octavia Street in New Orleans, Louisiana, and also sells books and electronic books ("eBooks") through a website on the Internet, at <http://www.octaviabooks.com>. Octavia Books has served Louisianans for over 15 years. In our physical shop, Octavia Books offers a large collection of regional titles—design, art, and gardening books; fiction and non-fiction; children's books; and signed first editions and limited editions by many regionally and nationally acclaimed authors. We also offer programs directed at children both in the store and in schools.

5. On our website, Octavia Books offers millions of books for sale, which can either be shipped to the customer or picked up in the store. We ship books to customers both within Louisiana and outside Louisiana. We also sell eBooks on our website. In order to sell books through our website, we use third-party providers, which not only maintain book and eBook inventories of millions of book titles, but also prepare and provide the listings of the books and eBooks which appear on our website. These third-party services are available to us through two

programs run by the American Booksellers Association: IndieCommerce (for print books) and Kobo (for eBooks). These programs provide independent bookstores around the country with access to third-party book inventories.

6. Individuals who visit our website can search for books and eBooks for sale. The books offered for sale online are usually accompanied by images of the covers, some of which contain images of nudity, and some of which could be deemed to be material harmful to minors under the Act. In some cases, the book listing may include a “Google Preview,” which provides digital images of select pages from the book, some of which could be deemed to be material harmful to minors under the Act because they include depictions or descriptions of sexual activity, for example. These images are selected and provided by third-party database operators through the IndieCommerce and Kobo programs—or, in the case of “Google Previews,” by Google, Inc.

7. Any of our website users can view these images, and purchase these books and eBooks, without leaving Octavia Books’ website. The third-party database providers offer this same book and eBook inventory, and these same web listings, to other booksellers, both in Louisiana and in other states. Octavia Books does not select the books or eBooks to be listed, nor prepare the listings on the web pages. Octavia Books does, occasionally, add books to the database of books for sale, such as books that may be of particular interest to our local customers, by submitting a request to the third-party database provider to add the book, but we have no ability to limit the book listings offered by the third-party databases. When a customer views the books and eBooks provided through the third-party databases, they appear to be, and are, offered for sale on Octavia Books’ website. If a customer selects a book or eBook for purchase through our website, the customer is purchasing the book from Octavia Books, and the

book is sent to the customer by Octavia Books. If a reader purchases an eBook from us, the entire content of the eBook is delivered to the reader, electronically, over the Internet.

8. In addition to our website, we also use the third-party social media sites Facebook, Twitter, and Instagram to promote our bookstore, including by posting information about upcoming events in the store, or new books and eBooks for sale. We typically hold four to five events per week in our physical store, which we promote on our website and social media pages. We therefore rely on our website and social media pages to drive traffic into our physical stores, which often results in sales, as well as to generate sales through the website itself.

FEAR OF PROSECUTION UNDER THE ACT

9. I fear that the Act places Octavia Books and its employees (including me) at risk of prosecution for displaying or distributing constitutionally-protected material through our website and social media pages. The Act also threatens the First Amendment rights of our readers and website visitors.

10. Even if I were able to review the millions of books and eBooks which we offer for sale on our website—an impossible task, as I describe below—I would not know how to determine what images, and therefore which book listings on our website, might qualify as “harmful to minors” under the Act, including whether I am to consider an image in isolation, or the entire contents of a book, in making that determination. Many books contain sexually related narrative or pictorial content that might be deemed “harmful to minors.”

11. In addition, many books or images that may be appropriate for 16- and 17-year-old minors (“older minors”) may not be appropriate for younger minors. Unless the Act is enjoined, Octavia Books may have to restrict access to all books except those that are appropriate for the youngest minors who might conceivably access them over the Internet. Older minors who purchase books and eBooks online would therefore be prevented from accessing material that

has serious value to them, such as many books that fall within the young adult genre, because such material might have to be placed behind an age-attestation button. For example, we recently held an event promoting a book for sale by Leslie Zemeckis, titled *Goddess of Love Incarnate: The Life of Stripteuse Lili St. Cyr*. The book is offered for sale through our third-party database and the book cover contains an image of nudity that may be deemed harmful to minors under the Act if the image is considered alone, even though the book as a whole is a historical biography by an award-winning documentarian that is not obscene, and has serious literary, artistic, political, or scientific value for at least older minors. Additional examples include books on sexuality and sexual health, such as *Changing Bodies, Changing Lives: A Book for Teens on Sex and Relationships* by Ruth Bell (Harmony 1998), or books on art, such as *Masculine Beauty* by David Vance (Bruno Gmuender 2015), which may contain sexual images or descriptions of sexuality on their covers or in their contents, but which may have serious value for older minors within the meaning of the Act.

12. The Act not only infringes the First Amendment rights of older minors but, in doing so, tells older minors, “If you want to exercise your right to read, you have to lie about your age.” That is a terrible message to send to teenagers.

13. I do not know which community’s standards I am supposed to use in assessing whether any given image or text on our website might be deemed harmful to minors. Our book listings are accessible throughout the country and the world, and we ship books to customers outside Louisiana who purchase through our website. I do not know whether the potential offensiveness of images should be judged by the community standards of New Orleans, where Octavia Books is physically located, or those of any viewer’s community, in Louisiana or out-of-state. If it is the latter, I do not know how to anticipate where in the world an individual might be

accessing our website or social media pages, nor how to determine what the community standards of offensiveness are in such distant and diverse communities.

14. I do not know how to comply with the Act without burdening access to material that adults, older minors, and all minors have a constitutional right to access. To comply with the Act, my employees and I at Octavia Books would either have to 1) review each of the millions of books and eBooks that we offer for sale through third-party databases and place an age-attestation button in front of each book listing which might contain an image deemed harmful to minors; 2) place an age-attestation button in front of our entire website; or 3) restrict our website displays and book listings to a small enough inventory of books such that my staff or I could review each and every image.

15. To take the first approach would make operation of our bookstore nearly impossible. In the first place, we do not ourselves maintain or control the selection of books that appear for sale through the third-party database, including the book cover images that appear alongside the books listings. I am aware of no technical solution to enable us to single out individual book listings within the third-party databases for purposes of placing an age-attestation button on such listings. But even if the task were technically possible, it would be an insurmountable burden for a small, independent bookstore such as Octavia Books to review each of the millions of titles we make available for sale. We do not have enough staff to spend the time that would be required to review each book listing image, especially where the third-party databases are constantly changing or adding titles, including new editions of books that may have different book cover images. Even attempting to comply with the Act through individual review of our inventory of books could shut us down. Furthermore, if delivering an eBook to a reader electronically over the Internet is considered to fall within the scope of the Act, the burden

on our staff would be exacerbated by having to review the full contents of each of the millions of eBooks we offer for sale, an impossible task for a small bookstore such as ours.

16. To take the second approach of placing an age-attestation button in front of our entire website would deprive all minors of access to books and other material on our website that they have a constitutional right to receive, including material suitable for and indeed, targeted at, children. For example, a 17-year-old could not access our website to purchase an eBook of *Catcher in the Rye*, even though it is entirely suitable for that age (but might be deemed by some to be harmful to younger minors). Nor could a 14-year old purchase *Little House on the Prairie*, which we offer for sale, for herself or for a younger sibling, even though the book is not obscene and could not be considered harmful to any minor under the Act.

17. Under this approach of compliance with the Act, we could no longer use our website to promote our books or store events to any minors whatsoever. For example, we used our website earlier this month to promote a reading and signing with children's book author Deborah Diesen of her new book, *The Not Very Merry Pout-Pout Fish*, which was held on November 20, 2015. Complying with the Act by placing an age-attestation button in front of our entire website would prevent us from promoting that event.

18. Furthermore, placing an age-attestation button in front of our entire website would wrongly suggest that Octavia Books is an "adult business," and would carry negative ramifications for our business. Such an age-attestation button might make adults less likely to access our website, and would severely impact our business by limiting our ability to use the website to promote book sales or traffic to our physical store.

19. The third approach of limiting our inventory to only those books and eBooks whose contents we can individually review would require us to engage in massive self-censorship, depriving us of the opportunity to offer books for sale that have great social,

political, historic, or other value, simply because we do not have the ability to review them for compliance with the Act.

20. I do not know how to comply with the Act when it comes to Octavia Books' use of social media sites run by third parties short of censoring the material we post. I have no way to implement an age-attestation requirement on our Facebook, Instagram, or Twitter pages. In order to avoid the threat of prosecution, I would therefore have to stop using social media to promote any content that could possibly be deemed "harmful to minors" under the Act. As mentioned above, that might mean that I could no longer use social media to distribute information about an event such as the recent promotion of the Leslie Zemeckis book. Censoring our use of social media could result in the loss of customers and revenue for our bookstore.

21. Because our website and social media pages are accessible anywhere in the world, our ability to share material with and sell to readers outside Louisiana is burdened by the Act.

CONCLUSION

22. For all the reasons stated above, unless the Act is enjoined, Octavia Books and its employees, customers, and readers of its website will be irreparably harmed. Octavia Books will be forced either to self-censor the material available on our website and the books we offer for sale, thereby denying our customers and readers of our website access to constitutionally-protected material, or to risk criminal prosecution.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New Orleans, Louisiana
on this 24 day of November, 2015.


Judith Lafitte

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

GARDEN DISTRICT BOOK SHOP, INC.; OCTAVIA
BOOKS, L.L.C.; FUTURE CRAWFISH PAPER,
L.L.C.; AMERICAN BOOKSELLERS
ASSOCIATION; AND COMIC BOOK LEGAL
DEFENSE FUND,

Plaintiffs,

-v-

JAMES D. CALDWELL, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
LOUISIANA, ct al.,

Defendants.

Case No. 3:15-CV-738-BAJ-SCR

**DECLARATION OF
MICHAEL A. BAMBERGER**

MICHAEL A. BAMBERGER declares:

1. I am counsel for Plaintiffs in this case.

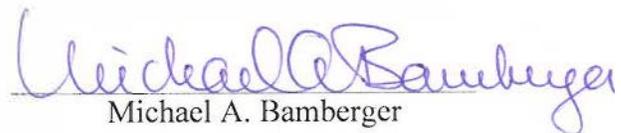
2. On August 31, 2015, prior to the commencement of this case, I sent a letter to Hon. James D. "Buddy" Caldwell, Louisiana Attorney General, and to Hon. Hillar C. Moore III, the President of the Louisiana District Attorneys Association and the District Attorney – 19th Judicial District, both of whom are now Defendants in this case ("the letter"). The letter was sent via federal Express and e-mail. A copy of the letter is attached as Exhibit A to this declaration.

3. The letter requested a limiting construction of Louisiana's H.B. 153, Act 187 of the Laws of 2015 (the "Act"), that would resolve some of its constitutional problems. The letter noted that our clients were evaluating whether to bring an action in federal court challenging the constitutionality of the Act.

4. As of the date the case was commenced, and to date, I have not received a response to the letter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York
on this 20th day of November, 2015.


Michael A. Bamberger

DENTONS

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August 31, 2015

By Federal Express

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**Is Louisiana's Harmful to Minors /
Internet Law unconstitutional?**

Dear Attorney General Caldwell and District Attorney Moore:

Our clients, numerous Louisiana citizens (including many of the State's largest and most respected mainstream booksellers), are evaluating whether to bring an action in federal court challenging the constitutionality of R.S. 14:91.14 - Unlawful distribution of material harmful to minors through the Internet ("H.B. 153"). We would appreciate the opportunity to speak or meet with you or your designee with the common goal of properly construing H.B. 153, which became effective August 1, 2015, so that the law is not held unconstitutional. We are writing to District Attorney Moore both in his capacity as District Attorney for the 19th Judicial District and as President of the Louisiana District Attorneys Association. We would appreciate District Attorney Moore advising us whether we should also communicate directly with all of the District Attorneys.

Whether H.B. 153 is constitutional turns, in principal part, on the definition of "material harmful to minors." H.B. 153 provides:

Any person or entity in Louisiana that publishes material harmful to minors on the Internet shall, prior to permitting access to the material, require any person attempting to access the material to electronically acknowledge and attest that the person seeking to access such material is eighteen years of age or older.

There is a broad range of material that has serious literary, artistic, political or scientific value for a legitimate minority of normal 16- and 17-year olds which might be considered harmful to a 10- or 12-year old. For example, materials about sexual relations, the risk of sexually-transmitted diseases, sexual health, and the enjoyment of sex certainly have serious value to many 16- and 17-year olds in Louisiana (where 16-year old minors may marry with parental consent).

- If "harmful to minors" is defined based on what might be considered to have no value to a 10- or 12-year old, then under H.B. 153, persons who post such material on the Internet would be required to put it behind an 18-year-old attestation screen, which would deny 16- and 17-year olds access to such materials (unless they lied about their age). With that definition, H.B. 153 would infringe First Amendment rights, and would be unconstitutional.

Exhibit A

- If, on the other hand, material that has serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents is not considered "harmful to minors" and would not have to be placed behind an 18-year-old attestation screen, then these older minors would not be denied their First Amendment right to access these materials, though younger minors, e.g., 10- and 12-year olds, would have access to materials that might be considered inappropriate for them.

The Virginia Attorney General and the Virginia Supreme Court addressed this precise issue in *Commonwealth of Virginia v. American Booksellers Ass'n, Inc.*, 236 Va. 168, 372 S.E.2d 618 (1988). The Virginia Supreme Court saved Virginia's "harmful to minors on the Internet" statute from a constitutional challenge by embracing the opinion of the Virginia Attorney General on the definition of "harmful to minors." Answering certified questions from the United States Supreme Court, *Commonwealth of Virginia v. American Booksellers Ass'n, Inc.*, 484 U. S. 383, 398 (1988), the Virginia Supreme Court held:

The [Virginia] attorney general responds that the focus of the inquiry is not upon the youngest members of the class, not upon the most sensitive members of the class, and not upon the majority of the class. A book will pass statutory muster, she contends, if it has serious value for a legitimate minority of juveniles, and in this context, a legitimate minority may consist of older, normal (not deviant) adolescents. We agree with the attorney general. ... We conclude that if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.

236 Va. at 176, 372 S.E.2d at 623-24. Based on that definition, the United States Court of Appeals for the Fourth Circuit held the Virginia statute constitutional. *American Booksellers Ass'n, Inc. v. Commonwealth of Virginia*, 882 F.2d 125, 127-28 (4th Cir. 1989)

The Tennessee Attorney General and the Tennessee Supreme Court similarly construed a similar Tennessee statute and saved the statute from a constitutional challenge. The Tennessee Supreme Court held:

The Tennessee statute ... is readily susceptible to the narrowing construction advanced by the State and adopted by other courts considering similar statutes. Accordingly, we hold that the ... statute applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor.

Davis-Kidd Booksellers, Inc. v. McWhorter, 866 S.W. 2d 520, 528 (Tenn. Sup. Ct. 1993). The Tennessee Supreme Court thus concluded:

Such a construction significantly reduces the scope of materials covered and produces only a minimal burden on adult access to constitutionally protected expression. The statute as construed is, therefore, not overbroad and fully complies with the First Amendment of the United States Constitution and Article I, § 19 of the Tennessee Constitution

866 S.W. 2d at 522. See also *American Booksellers v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991) ("*Pope* [v. *Illinois*, 481 U.S. 497 (1987)] "teaches that if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors.'")

In contrast, a similar New Mexico statute was held unconstitutional because its "harmful to minors" restriction was construed to be based on the entire population of minors and therefore "it interferes with the rights of minors to access and view material that to them is protected by the First Amendment." *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F. 3d 1149 (10th Cir. 1999).

And the federal Child Online Protection Act ("COPA"), 47 U.S.C. § 231, was held unconstitutional because, among other reasons,

the fact that COPA applies to speech that is obscene as to all minors from newborns to age sixteen, and not just to speech that is obscene as to older minors, also renders COPA over-inclusive

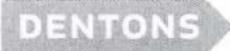
ACLU v. Gonzales, 478 F.Supp.2d 775, 810 (E.D. Pa. 2007), *aff'd*, 534F.3d 181 (3d Cir. 2008).

Thus, whether or not H.B. 153 is constitutional turns, in principal part, on the definition of "harmful to minors." We respectfully suggest that H.B. 153 should be construed so that material is not "harmful to minors" if it has serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, *i.e.* 17-year old minors. So construing H.B. 153 would be consistent with State Attorney General opinions and State Supreme Court decisions construing similar laws in other States, which saved those laws from constitutional challenges. Such construction is supported by the Louisiana Supreme Court's decision in *State of Louisiana v. Cinel*, 646 So.2d 309, 312 (1994) ("when a state court is dealing with a state statute challenge of overbreadth, it should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction ..."). See also *City of Baton Rouge v. Ross*, 654 So.2d 1311 (La. 1995) (Calogero, C.J., concurring) ("a statute which is unconstitutional on its face may be preserved by a constitutional construction, provided that the saving construction of the statute is a plausible one").

Were H.B. 153 held unconstitutional, the State of Louisiana could not bring any prosecutions under the law. In contrast, if H.B. 153 is properly construed and therefore constitutional, Louisiana could bring prosecutions. *State of Louisiana v. Cinel*, 646 So.2d at 312. ("if the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct.").

Absent a definitive construction of "harmful to minors," our clients have a reasonable fear that, unless they comply with the attestation requirement, thus imposing an unconstitutional burden and depriving older minors of access to constitutionally-protected speech, they could be prosecuted. To obviate that fear, we ask that the Attorney General and the District Attorneys of the State of Louisiana: (1) agree that H.B. 153 should be construed so that material is not "harmful to minors" if it has serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, *i.e.* 17-year old minors, and therefore (2) disavow any prosecution under H.B. 153 inconsistent with that construction of the statute. *Susan B. Anthony List v. Driehaus*, --- U.S. ---, 134 S.Ct. 2334, 2343 (2014) (pre-enforcement constitutional challenge was proper where "Government ... declined to disavow prosecution," *citing Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010)); *Blum v. Holder*, 744 F.3d 790, 800 (1st Cir. 2014) (pre-enforcement constitutional challenge to federal criminal statute dismissed because "the United States disavows" broader interpretation of statute under which plaintiffs feared prosecution).

Our clients would much prefer to work with you so that H.B. 153 is properly construed, and so that the State and parishes disavow any prosecution inconsistent therewith, than to be in a position of seeking to have H.B. 153 held unconstitutional.



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McKanna Long
dentons.com

We look forward to your response. We would appreciate receiving your response by September 21, 2015.

Respectfully yours,

A handwritten signature in black ink that reads "Michael A. Bamberger".

Michael A. Bamberger

A handwritten signature in black ink that reads "Richard M. Zuckerman".

Richard M. Zuckerman