UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

GARDEN DISTRICT BOOK SHOP, INC., ET AL.	**CIVIL ACTION**
	NUMBER: 3:15-CV-00738
VERSUS	**JUDGE BRIAN A. JACKSON**
DALE COX, IN HIS OFFICIAL CAPACITY AS LOUISIANA DISTRICT ATTORNEY, ET AL.	**MAGISTRATE JUDGE ERIN WILDER-DOOMES**

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POST-HEARING MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOW INTO COURT, through undersigned counsel, come all Defendants, the 42 elected District Attorneys of Louisiana, who have been sued in their official capacity, (hereinafter the "the State"), who oppose the Plaintiffs' Motion for Preliminary Injunction for these additional reasons.[1]

Louisiana Revised Statute 14:91.14 is not unconstitutionally vague.

One of the issues raised during the December 18, 2015 argument on the Plaintiffs' Motion for Preliminary Injunction was whether the term "bona fide," which appears in the statute at La. R.S. 14:91.14(A)(5), is unconstitutionally vague. *See* Doc. 37 at 41-43. With respect to those words, this Court is not in a position to rule whether the Plaintiffs are likely to succeed on the merits because the Plaintiffs did not argue in a pleading that the term "bona fide" in La. R.S. 14:91.14(A)(5) is unconstitutional. *See, generally*, Docs. 5 and 19-1. In order for a court to declare a statute (or a specific word or phrase) unconstitutional, the argument accepted by the court must be advanced by a plaintiff in its complaint. *See, e.g.*, *Helm v. Colorado*, 244 F. App'x 856, 859 (10th Cir. 2007) (under the doctrine of constitutional avoidance, a court should generally avoid passing on a constitutional

issue when the matter is not fairly raised by the parties). This Court should adopt the Louisiana Supreme Court's procedural rules that "a district court may not *sua sponte* rule that a statute is unconstitutional, nor can it declare a statute unconstitutional on grounds other than those asserted by a movant." *State v. Overstreet*, 2012-1854 (La. 03/19/13), 111 So.3d 308, 316. That Court's decisions, including *Overstreet*, "rest on the principle that 'a judge's sua sponte declaration of unconstitutionality is a derogation of the strong presumption of constitutionality accorded legislative enactments." *State v. Smith*, 2013-2318 (La. 01/28/14), 144 So.3d 867, 871, n. 4 (citing, *inter alia*, *Overstreet*, 111 So.3d at 308). "Further, though [the Louisiana Supreme Court has] long held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized, these procedural rules exist to afford interested parties sufficient time to brief and prepare arguments *defending* the constitutionality of the challenged statute." *Id*. (emphasis added).[2]

Both of these principles are especially applicable to the Plaintiffs' vagueness arguments. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008).[3] This Court must resolve the Plaintiffs' vagueness arguments by giving the benefit of the presumption of constitutionality to the State because vagueness does not require a heightened scrutiny analysis. Therefore, La. R.S. 14:91.14 is entitled to the general presumption of constitutionality when

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[1] The State appears solely for the purpose of opposing the preliminary injunction and do not waive any defenses.

[2] The Louisiana Supreme Court in *Smith* further explained that the principle of providing an adequate opportunity to brief arguments in defense of a statute "is not implicated when the state wishes to advance additional arguments in support of the constitutionality of an enactment. This is especially true, in this case, where the defendant's argument to the district court was that the statute was unconstitutional based on overbreadth; thus, the district court necessarily found that the conduct prohibited by [the state statute] was protected speech under the First Amendment." *Id*.

[3] The right to not be prosecuted under a constitutionally vague *state* statute stems from the Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Due Process Clause. *See* U.S. Const. Amend. XIV; *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 754 (2010). The Fifth Amendment's Due Process Clause only applies to the federal government. *See McDonald*, 561 U.S. at 764, n. 12.

resolving the Plaintiffs' vagueness arguments. *See, e.g., United States v. Morrison*, 529 U.S. 598, 607 (2000); *State v. Bazile*, 2012-2243 (La. 05/07/13), 144 So.3d 719, 732. These general principles apply to a vagueness challenge. *See, e.g., Baskett v. Quinn*, 2008 WL 623714, at *10 (W.D. Wash. 2008), *aff'd sub nom. Baskett v. Miller-Stout*, 363 F. App'x 521 (9th Cir. 2010) (The Western District of Washington found that the following language did not violate any clearly established precedent by the United States Supreme Court: "*Any* challenge for vagueness must overcome two hurdles-the presumption of constitutionality, and the recognition that some degree of vagueness is inherent in any case. A statute is presumed to be constitutional unless the challenging party proves its unconstitutionality beyond a reasonable doubt.") (Citations omitted and emphasis added).

The second principle enunciated above, that sufficient time be afforded to a party defending the constitutionality of a statute, is also applicable here. For example, the State expects the Plaintiffs to argue in their post-hearing brief that the phrase in the statute "bona fide" is unconstitutionally vague, even though it was not specifically raised in their pleadings. If the Plaintiffs make that argument, this Court cannot agree because the Plaintiffs cannot use a post-hearing memorandum to amend their complaint. *C.f. Doe v. Jindal*, 2015 WL 7300506, at *5 (E.D. La. 2015) ("[I]t is axiomatic that a complaint cannot be amended by briefs in opposition to a motion to dismiss.") (Citation omitted); *see also Veasey v. Abbott*, 796 F.3d 487, 510 (5th Cir. 2015) ("We generally do not consider arguments raised for the first time in a reply brief.")

In any event, the term "bona fide" is not unconstitutionally vague. Rejecting the argument that the words "bona fide" were vague, the District Court of the Virgin Islands reasoned:

> [Even prior to the enactment of a definition of the term at issue, the] term "bona fide resident of the Virgin Islands" was not impermissibly vague. First, the term "bona fide" is not a technical term that requires further explanation to avoid running afoul

> of the Fifth Amendment. Black's Law Dictionary defines "bona fide" as "[m]ade in good faith; without fraud or deceit" and "[s]incere; genuine." Black's Law Dictionary (8th ed.2004). It is in essence a synonym for truthful or honest. A person of "common intelligence" would not need to "guess at its meaning." [*United States v. Lanier*, 520 U.S. 259, 266 (1997)].

U.S. v. Auffenberg, 2008 WL 4115997, at *9 (D.V.I. 2008); *see also Hill v. City of Scranton*, 411 F.3d 118, 122 (3rd Cir. 2005); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254-55 (1974).

Nor did the Plaintiffs argue in their complaint that the word "includes" in La. R.S. 14:91.14(B)(1) was merely illustrative, rendering the statute unconstitutionally vague. *See* Doc. 37 at 27-28. Discussing issues that had not been briefed, it appears that the State was mistaken when discussing the definition of "material harmful to minors," which appears at La. R.S. 14:91.14(B)(**2**) (not (B)(1)), because that definition does not use the word "includes." *See* Doc. 37 at 27-28. The definition that uses the term "includes" is La. R.S. 14:91.14(B)(1), which states: "'Descriptions or depictions of illicit sex or sexual immorality' includes the depiction, display, description, exhibition, or representation *of any of the following*…" (Emphasis added). Even if this Court finds that the Plaintiffs properly raised a vagueness claim as to the word "includes" in La. R.S. 14:91.14(B)(**1**), it must fail. Although the word "includes" is often an illustrative term, that is not the case when the context of a statute demands otherwise. Here, the phrase "of any of the following" expressly limits the word "includes" to the enumerated list in La. R.S. 14:91.14(B)(1)(a)–(e). Another court has interpreted the word "includes" to be exhaustive in a similar context. *Oldja v. Warm Beach Christian Camps & Conference Ctr.*, 793 F. Supp. 2d 1208, 1213 (W.D. Wash. 2011).

Louisiana Revised Statute 14:91.14 is not unconstitutionally overbroad.

After further research and review, the State notes that it (perhaps prematurely) argued, in the

alternative, on pages 6-7 of Doc. 28 that the statute is susceptible to a limiting construction. Since the hearing, the State learned of binding precedent that holds that a federal court cannot provide a narrowing construction. *See Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 509 (5th Cir. 1981); *Serv. Employees Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 597 (5th Cir. 2010). Be that as it may, this case may eventually be in a position to be certified to the Louisiana Supreme Court to provide limiting constructions if they are necessary. *See* La. Sup. Ct. R. XII; La. R.S. 13:72.1. Certification is only available to the Supreme Court and Circuit Courts of Appeal. La. Sup. Ct. R. XII, § 1. The task now appears to be to determine whether a limiting construction is necessary.

Notwithstanding the inapplicability of the State's alternative argument at this stage, the Plaintiffs are still unlikely to succeed on the merits of their overbreadth claim. The Plaintiffs' specific facial challenge is that a state may not regulate material that would be obscene for a six-year-old the same as it would for a seventeen-year-old, and that it may only regulate what is obscene for the oldest part of the age category. This argument has been rejected and must be rejected again:

> As noted, plaintiff News argues that the Wichita ordinance is overbroad, restricting the access of adults and minors approaching adulthood to constitutionally permissible publications. Brief of Appellant at 17. News says that as commercial enterprises seek to avoid violating the ordinance, the natural tendency will be to limit materials available for view by anyone. *Id.* at 13.
>
> We disagree. First, as noted, with respect to the sale or distribution of materials "harmful to minors," the ordinance has a clear and acceptable standard that will permit sale or distribution to adults of such materials. Second, the portion of the ordinance dealing with display of material "harmful to minors" is reasonably structured.

M.S. News Co. v. Casado, 721 F.2d 1281, 1288 (10th Cir. 1983); *see also Am. Booksellers Ass'n, Inc. v. Rendell*, 481 A.2d 919, 938, 942-43 (Pa. Sup. Ct. 1984) (upholding a state statute prohibiting display of sexually explicit materials to minors, and allowing minors to be treated as a generic class).

Because *Ginsberg v. New York*, 390 U.S. 629 (1968) has not been overruled, and because it approved of language like Louisiana's statute–without any exception for older minors–this Court may not declare La. R.S. 14:91.14 unconstitutional for that reason. *See Am. Booksellers v. Webb*, 919 F.2d 1493, 1511 (11th Cir. 1990) ("The *Ginsberg* Court held without equivocation that the Constitution does not protect the decision to sell or loan to minors material that is obscene under a variable obscenity standard.") The undersigned knows of no United States Supreme Court case or Fifth Circuit precedent that requires the Louisiana Legislature to treat older minors differently than younger minors.

Moreover, fundamental constitutional rights can be subject to rules that treat minors as a generic class. For example, the Eighth Amendment requires, by virtue of *Roper v. Simmons*, 543 U.S. 551 (2005), that the death penalty cannot be enforced against any minor younger than eighteen, no matter how brutal the crime and how mature the juvenile might be.[4] The Constitution does not necessarily require that older minors be treated differently from younger minors:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn… The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574; *see also Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (applying *Roper* to non-homicide crimes committed by juveniles). If anything, *Roper* supports the argument that the Constitution does not necessarily prohibit treating minors as a single, generic class. Recently, the

[4] *See, e.g., State v. Craig*, 1995-2499 (La. 05/20/97), 699 So.2d 865, 866-68 (brutal crime); *see also id*. at 872 (the defendant "was only eight days away from his eighteenth birthday, at the time of the offense"); *State v. Craig*, 2005-2323 (La. App. 1st Cir. 10/25/06), 944 So.2d 660, 661 (noting that the death penalty was set aside by virtue of *Roper*).

Louisiana Supreme Court found that La. R.S. 14:95.8, which generally prohibits the possession of a handgun by a person under 17 years old, passed strict scrutiny under Louisiana's fundamental right to keep and bear arms. *See, generally, State in Interest of J.M.*, 2013-1717 (La. 01/28/14), 144 So.3d 853; *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 212 (5th Cir. 2012) (finding that federal law, which prevents persons under 21 from purchasing handguns from federally licensed dealers, is constitutional under the Second Amendment, notwithstanding the plaintiffs' claim that the law is unconstitutional as applied to 18-20 year old persons and noting, in the context of an Equal Protection claim, that "an age classification is presumptively rational…") (Citation omitted). The Supreme Court has treated minors as a generic class for the purposes of speech restrictions too. *See, e.g., Morse v. Frederick*, 551 U.S. 393 (2007) (restrictions upon a minor's speech at school are not dependant upon the age of the student-speaker).

There is a more practical problem at issue. Again, in order to succeed in an overbreadth challenge, the *Plaintiffs* must prove that substantial overbreadth exists. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003). The State has noted that a substantial number of the statute's applications are unquestionably constitutional (i.e. material that is obscene for adults and material that is obscene for older minors). In order to succeed, the Plaintiffs must show that a "substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008) (citations and internal quotation marks omitted). Since the statute has plainly legitimate sweep, the Plaintiffs must show a substantial number of unconstitutional applications. They have not done so. Other than the affidavits previously submitted without objection (Docs. 19-2–19-7) the

Plaintiffs did not introduce any evidence at the hearing, at which the rules of evidence applied. F.R.E. 1101(a). This paltry showing is not the evidence upon which a statute should be invalidated because it deprives the State and this Court of actual examples of material that could be at issue. For example, the Plaintiffs impermissibly take it as an article of faith that the State and this Court are so familiar with "The Joy of Sex" (and the other works mentioned in their affidavits) that a statute may be declared unconstitutional without entering any work into evidence. *See* Doc. 37 at 56. There are only two works to which the State can respond, because a hyperlink was provided. *See* Doc. 19-5 at 3-4.[5] The State contends that neither example can be prosecuted under the statute, regardless of whether the statute is applied differently to younger minors, because no juror could ever legally find that "[t]he material incites or appeals to or is designed to incite or appeal to the prurient, shameful, or morbid interest of minors." La. R.S. 14:91.14(B)(2)(a); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("nudity alone is not enough to make material legally obscene under the *Miller* standards.") The bare record before the Court cannot be considered "substantial." *Compare Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 390-91 (1988) ("The booksellers introduced as exhibits a total of 16 books that they believed were examples of books the amended statute covered…")

The Plaintiffs' commercial gain argument was not made in their Amended Complaint.

On pages 30-31 of Doc. 37, the Plaintiffs refer to a commercial gain argument that has not yet been clearly made in their Amended Complaint or Motion for Preliminary Injunction. *See* Doc. 19-1 at 5-6. Having read the case cited by the Plaintiffs in open court, *State v. Anderson*, the State continues to assert that the statute only refers to material published for the purpose of commercial gain. 540 So.2d 974 (La. App. 2nd Cir. 1989), *writ denied*, 544 So.2d 398 (La. 1989) (two Louisiana

[5] The State objects in advance if the Plaintiffs attempt to submit evidence through their post-hearing memorandum.

Supreme Court justices would grant the writ), *cert. denied*, 493 U.S. 865 (1989). The *Anderson* decision, which is not a decision of the Louisiana Supreme Court, dealt with a different statute (La. R.S. 14:91.11) that had different (albeit similar) language. Under the statute before the Court in this case, if the definitional phrase "material harmful to minors" is replaced with the definition itself, the statute most naturally reads in a way that would apply only to material published on the Internet for the purpose of commercial gain: "Any person or entity in Louisiana that publishes… any digital image, photograph, or video which exploits, is devoted to or principally consists of, descriptions or depictions of illicit sex or sexual immorality for commercial gain…" La. R.S. 14:91.14(A)(1) and (B)(2). If the State correctly understands the Plaintiffs' reading of the statute, it is absurd, as it would only criminalize people having sex for money: i.e. "depictions of illicit sex or sexual immorality for commercial gain…" The purpose of the statute is to encompass the constitutional standard for obscenity and is not to simply regulate depictions of prostitution.

The State may use multiple methods for solving a problem.

Strict scrutiny does not limit the Louisiana Legislature's ability to regulate obscenity on the Internet to content filtering alone: "[s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear…" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2673 (2015) (citation omitted). Louisiana has already attempted to provide parents with content filtering, and the Plaintiffs appear to argue that only restrictions on the user (like content filtering) are constitutional, as opposed to restrictions on the speaker. *See* La. R.S. 51:1426. Because content filtering is fundamentally different from attestation screens, however, they should not be comparable. Taken out of the First Amendment

context, the Plaintiffs' arguments would seem absurd. For example, the State may use drug-sniffing dogs to combat Louisiana's drug problem even though the use of undercover narcotics agents are available. The Plaintiffs have not shown that they are likely to succeed on the merits because their proposed alternative would restrict more speech than La. R.S. 14:91.14 would, which suppresses no speech. The statute "only requires that such material be placed behind adult identification screens." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 583, n. 14 (2002) (plurality).

Even if part of La. R.S. 14:91.14 is unconstitutional, such parts might be severable.

On page 42 of Doc. 37, this Court seemed to suggest that severance cannot cure an unconstitutional portion of a statute. If this is what the Court meant, the State respectfully disagrees. *Love v. Foster*, 147 F.3d 383, 385 (5th Cir. 1998) ("Severability is a matter of state law… [and] [u]nder Louisiana law, when a portion of a statute is found to be invalid, a severability analysis is an essential element of judicial review.") (Footnotes omitted); La. R.S. 24:175 (permitting severance). *See, e.g. State v. Cinel*, 94-0942 (La. 11/30/94), 646 So.2d 309, 317.

RESPECTFULLY SUBMITTED: JEFF LANDRY, ATTORNEY GENERAL By: /s/ Colin Clark Colin Clark (La. Bar Roll No. 33775) Angelique Duhon Freel (La. Bar Roll No. 28561) Andrea Barient (La. Bar Roll No. 35643) Jeffrey M. Wale (La. Bar Roll No. 36070) Assistant Attorneys General **Louisiana Department of Justice** 1885 North 3rd Street, P. O. Box 94005 Baton Rouge, Louisiana 70804-9005 Telephone: (225) 326-6200; Fax: (225) 326-6297 Email:clarkc@ag.state.la.us; freela@ag.state.la.us; barienta@ag.state.la.us; walej@ag.state.la.us	**CERTIFICATE OF SERVICE** I hereby certify that, on January 19, 2016, I electronically filed the forgoing with the Clerk of Court by using the CM/EMF system, which will send a notice of electronic filing to all counsel of record. /s/ Colin Clark Assistant Attorney General

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Supplemental Declaration of Louis Lee

In addition to the declaration already filed, I also declare the following:

1. Based on my personal and professional experience, age verification would be a deterrent for some juvenile Internet users. For example, it may be effective to some juveniles who are casually browsing and accidentally browse to a restricted site. Some juveniles might also believe (whether it is true or not) that their Internet activity is being watched or recorded.

2. Based on my personal and professional experience, setting up age verification requires a small change to a website's code. It is a simple technical feat regardless of the size of the website. Although some content filters are free, many content filters require monthly or annual paid-for subscriptions to remain effective. The most effective content filters of which I am aware (such as Websense) are not free to the user.

3. Age verification can also be performed without changing a website's code. For example, with respect to books or artwork, a person could simply upload the material in a PDF format and, using Adobe (or a similar program), password-protect the uploaded PDF. Then, the website operator could simply list the password on their website and post a phrase like the following: "By entering the provided password, you are acknowledging and attesting that you are eighteen years of age or older."

4. Based on my personal and professional experience, setting up a content filter requires some technical knowledge and is likely beyond the skills of the average user. I have assisted hundreds of employees with basic computer problems and setting up content filtering at home to protect a person's children from encountering obscenity on the Internet would likely be beyond the skills of the

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average computer user. For a price, a parent can subscribe to a third-party content filter that will assist a parent in setting up a content filter. I know of no freely available program like this.

5. Based on my personal and professional experience, the term "publish," when used in the context of making something accessible on the Internet, is synonymous with the term "upload."

6. Based on my personal and professional experience, the number of Internet-capable devices outside the home has exponentially proliferated over the last ten years. Although there are programs that parents can install on devices parents own and physically control, there is no content-filtering program that would allow a parent to control what his or her child views on the Internet when the device is owned and controlled by a third party, such as a restaurant or coffee shop.

Louis Lee

DECLARED BY THE AFFIANT UNDER PENALTY OF PERJURY that the foregoing is true and correct, based on personal knowledge, and that affiant is competent to testify about the above stated matters. Before me, this 19th day of January, 2016, in East Baton Rouge Parish, Louisiana.

Colin Clark, Louisiana bar roll # 33775
My commission expires at death

COLIN ANDREW CLARK - ID NO. 92478 NOTARY PUBLIC BAR ROLL # 33775 STATE OF LOUISIANA