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 E. STEWART, SR., in his official capacity, etc., *et al.*, Defendants.	Case No. 3:15-CV-738-BAJ-EWD **Plaintiffs' Opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6)**

Louisiana's H.B. 153, Act 187 of the Laws of 2015, codified at La. Stat. Ann. § 14:91.14 (the "Act"), violates the First, Fifth, and Fourteenth Amendments to the U.S. Constitution, as well as the Commerce Clause. Plaintiffs have pleaded facts sufficient to support their claims, and any factual disputes raised by Defendants are not appropriately considered on a motion to dismiss. For the reasons below, this Court should deny Defendants' motion to dismiss.

Given the overlap between the legal issues raised in Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss, Plaintiffs respectfully incorporate by reference those portions of their memoranda on the motion for a preliminary injunction that address Plaintiffs' likelihood of success on the merits (a higher threshold than that applicable to a motion to dismiss, which is merely whether the plaintiffs have stated plausible claims). Docs. 19-1, 42.[1]

A. Defendants improperly dispute Plaintiffs' factual allegations, which must be presumed true on a motion to dismiss.

As the Fifth Circuit has stated, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting

[1] Of course, Defendants' motion to dismiss is addressed to the face of the Amended Complaint, Doc. 5 ("Am. Compl."), and Plaintiffs do not ask the Court, on this motion, to consider the declarations or other factual material submitted by either party on the motion for a preliminary injunction.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In deciding a motion to dismiss, "a court should assume the[ ] veracity" of "well-pleaded factual allegations." *Iqbal*, 556 U.S. at 679; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (noting a court must make "the assumption that all the allegations in the complaint are true"). Defendants' motion is primarily based on disputes with the Amended Complaint's factual assertions. *See, e.g.*, Defendants' Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6), Doc. 43-1 ("Def. Mem."), at 9 (disputing factual allegations on the effectiveness of content-filtering); *id*. at 11 & n.9 (making factual allegations on the availability of computers); *id*. at 13-14 (disputing factual allegations on the difficulty and burden of implementing an age-attestation screen). Those disputes are not properly considered on a motion to dismiss. Plaintiffs have pleaded facts more than sufficient to demonstrate that they may plausibly succeed on their claims.

B. Plaintiffs have plausibly alleged that the Act is unconstitutionally overbroad for failing to exempt Older Minors Material.

There is a broad range of material that has serious literary, artistic, political, or scientific value for some 16- or 17-year-olds, but which might be considered harmful to a 10- or 12-year old ("Older Minors Material").[2] The Act, on its face, fails to distinguish between Older Minors Material and other material harmful to minors, requiring both to be placed behind an age-attestation screen. *See* La. Stat. Ann. § 14:91.14 (B)(2). The Act thus prohibits older minors—unless they lie about their age—from accessing material that may have serious value to them, and is unconstitutionally overbroad. Amended Complaint, Doc. 5 ("Am. Compl."), at ¶¶ 5, 30–37, 54–61.

By arguing that the Act can constitutionally require that Older Minors Material be placed

[2] For example, materials about sexual and reproductive health have serious value to many 16- and 17-year olds in Louisiana (where 16-year-old minors may marry with parental consent). *See* Am. Compl. ¶¶ 54–61.

behind an age-attestation screen that prevents older minors from viewing it, Defendants reject the cases which have held that, to pass constitutional muster, display restrictions on harmful-to-minors material must be defined to limit only materials which lack serious value for a reasonable 17-year-old. The Act must meet the same fate as other overbroad statutes—including, *e.g.*, a New Mexico Internet statute which, because its "harmful to minors" restriction was based on the entire population of minors, was found to unconstitutionally "interfere[] 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). Similarly, in *Commonwealth v. American Booksellers Association*, 372 S.E.2d 618 (Va. 1988), the Virginia Supreme Court, answering questions certified by the United States Supreme Court, *see Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383 (1988), saved a Virginia "harmful to minors" statute from a constitutional challenge through a limiting construction. The Virginia Supreme Court held 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." *Id.* at 624. Based on that definition, the Fourth Circuit held the Virginia statute constitutional. *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127–29 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990). The Tennessee Supreme Court construed a similar statute to avoid constitutional overbreadth by holding that "harmful to minors" covered only "those materials which lack serious . . . value for a reasonable 17-year-old." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 522 (Tenn. 1993); *see also Am. Booksellers v. Webb*, 919 F.2d 1493, 1504–05 (11th Cir. 1990) ("*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.'") (cited by

Defendants, Def. Mem. at 4).

In the face of this body of law, Defendants simply assert that "[b]ecause *Ginsberg v. New York*, 390 U.S. 629 (1968) has not been overruled," the Act is not unconstitutionally overbroad, and cite older cases inconsistent with *Virginia v. Am. Booksellers Ass'n, supra,* and its progeny. Def. Mem. at 4. But *Ginsberg* merely established that material "harmful to minors" could be regulated as to minors, defined by adapting the general variable test for obscenity under First Amendment doctrine. 390 U.S. at 638–39. The Supreme Court has since strongly suggested that such "junior obscenity" regulations are unlikely to survive First Amendment scrutiny if they do not exempt older minors. *Reno v. ACLU*, 521 U.S. 844, 865–66 (1997) (distinguishing the "junior obscenity" statute upheld in *Ginsberg* from the unconstitutional regulation before the Court because, among other things, the former exempted 17-year-olds, whereas the latter did not). And the older cases cited by Defendants do not address the application of harmful-to-minors laws to the Internet, which have been found unconstitutional on this and other grounds.[3]

Because it requires that Older Minors' Material be placed behind an age attestation screen, the Act is unconstitutionally overbroad.

C. Plaintiffs have plausibly alleged that the Act fails strict scrutiny.

The Act is clearly subject to strict scrutiny as a content-based restriction of speech, as was the federal Child Online Protection Act ("COPA"), which included language similar to the Act's in restricting its scope to speech "for commercial purposes." *See Ashcroft v. ACLU*, 542

[3] *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Am. Booksellers Found. v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011); *Am. Booksellers Found. v. Coakley*, No. 10 Civ. 11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010) (mem.); *ACLU v. Goddard*, No. 00 Civ. 505, 2004 WL 3770439 (D. Ariz. July 22, 2004) (mem.); *Se. Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D.S.C. 2003); *Cyberspace Commc'ns, Inc. v. Engler,* 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (per curiam) (mem.). A state statute in Ohio was upheld only after the state's attorney general declined to defend its full breadth, so that it would apply only to person-to-person Internet communications, such as email, and not generally accessible communications. *Am. Booksellers Found. for Free Expression v. Strickland,* 601 F.3d 622 (6th Cir. 2010).

U.S. 656, 661 (2004) ("*Ashcroft*").[4] Plaintiffs do not dispute Defendants' compelling interest in protecting minors from material that is harmful to them, but rather have plausibly alleged that the Act is not the least restrictive means to accomplish that interest, both because the Act is entirely ineffective, and because content-filtering is a less restrictive means of achieving the same ends as the Act. *See* Am. Compl. ¶¶ 90-95. Plaintiffs' allegations are backed up by the Supreme Court's findings in *Ashcroft* that content-filtering is less restrictive than restrictions on the source of speech. *See* 542 U.S. at 667 (filtering "impose[s] selective restrictions on speech at the receiving end, not universal restrictions at the source" and "the use of filters does not condemn as criminal any category of speech").[5] While the *Ashcroft* Court found COPA to be ineffective because it did not block material from outside the United States, *id*. at 667, the Act is even more ineffective because it does not block material from outside Louisiana, a fact the Defendants do not dispute.[6] In fact, Defendants' proposed interpretations of the Act render it even *more* ineffective, because any website or individual in Louisiana could continue to display or publish material harmful to minors without age attestation so long as the physical act of actually uploading the material to the Louisiana website occurs outside Louisiana. *See* Def. Mem. at 12–13.

Having conceded the ineffectiveness of the Act, Defendants engage in an extended discussion of a factual issue—whether content-filtering is a less restrictive alternative to the Act's age-attestation requirement. Def. Mem. at 9–11. That discussion is irrelevant at the

[4] Louisiana law does not restrict the phrase "for commercial gain" to commercial speech, because it has been applied to the non-commercial distribution of material where the underlying material was produced for commercial gain. *See State v. Anderson*, 540 So.2d 974, 976 (La. Ct. App. 1989). Defendants are therefore incorrect that the presence of the same phrase in the Act would limit its application only to commercial speech. *See* Def. Mem. at 6–7.

[5] Additionally, after remand and a bench trial in the challenge to COPA, the district court issued extensive factual findings that content filters were a less restrictive alternative to age verification. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775, 791, 795, 813–15 (E.D. Pa. 2007).

[6] The fact that Louisiana could not constitutionally regulate websites outside Louisiana does not mean that Louisiana should be given a "pass" on having to show the Act's effectiveness. *See* Def. Mem. at 11–12. In *Ashcroft*, even though Congress could not regulate websites outside the United States, the Supreme Court found COPA ineffective because COPA did not do so.

motion to dismiss stage; the motion to dismiss should be denied because Plaintiffs have adequately alleged that content-filtering is a less restrictive alternative.[7]

D. Plaintiffs have plausibly alleged that the Act impermissibly burdens their protected speech.

The Act imposes burdens on anyone in Louisiana who wishes to distribute constitutionally-protected materials on the Internet. Given that it requires age attestation for a swath of content that is not obscene but may be harmful to minors, it sweeps within its ambit a substantial amount of content that is routinely published on websites or in books and electronic books sold online, and which adults have a First Amendment right to distribute and receive. *See Reno*, 521 U.S. at 874–75 (noting that "[s]exual expression which is indecent but not obscene is protected by the First Amendment" and that the government cannot pursue its interest in protecting minors through an "unnecessarily broad suppression of speech addressed to adults").

Plaintiff booksellers have plausibly alleged that, to comply with the Act, they would need either to review the millions of books for sale on their websites, to place their entire websites behind an age-attestation screen, or to limit their inventory drastically so that it can be parsed for "harmful to minors" material in a practical way. Am. Compl. ¶¶ 5, 7, 25–28, 30–31, 35, 37, 66–73. They have also plausibly alleged that individuals in Louisiana who use email and social media sites will either have to comply with the Act or self-censor. *Id*. ¶ 12. Defendants' response is to dispute Plaintiffs' factual assertions, which must be accepted as true at the motion to dismiss stage. *See* Def. Mem. at 13–14 (arguing that "creat[ing] a basic attestation screen is the smallest of burdens" and proposing a manner of compliance for Plaintiff booksellers' websites and third-party social media sites). Defendants' argument that it is easy to create an age-

[7] If there is a factual dispute on that issue, Defendants will bear the burden of proof, because a content-based restriction on speech is presumptively invalid. *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Ashcroft*, 542 U.S. at 669 (it is the "*Government's burden*" "not merely to show that a proposed less restrictive alternative has some flaws" but "that it is less effective" (emphasis added)).

attestation screen not only introduces an issue of fact, but misstates the issue. The problem is not simply creating an age-attestation screen; the problem is reviewing millions of books to apply that screen, or being forced to put the age-attestation screen on the entire website (akin to a bricks-and-mortar bookstore, which carries a broad range of books including children's books, banning all minors from entering the store), or submitting to massive self-censorship. *See* Am. Compl. ¶¶ 66–73. It is no answer to claim, as the Defendants do, that this burden does not exist because they interpret the word "publish" to mean "upload" and therefore to exclude all material already on the websites when the Act went into effect (an issue further discussed below, as a vagueness problem). *See* Def. Mem. at 13–14. Even if the Act were so limited, the task of reviewing all new material would be unconstitutionally burdensome. Plaintiffs have plausibly alleged that their activities constitute "publish[ing]" material on the Internet within the meaning of the Act, that such material is non-obscene constitutionally-protected material that may be considered harmful to minors under the Act, and that they must either comply with the age-attestation requirement or self-censor.

E. The Act is unconstitutionally vague.

The Act is replete with vague terms that "are not clearly defined" as required by the Due Process Clause. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Defendants' response merely emphasizes the Act's vagueness by proposing interpretations of various terms that are neither obvious nor supported by the text of the Act.

Defendants assert that the vague term "publish" in the Act "is most *naturally* read as synonymous with the verb–*to upload* onto the Internet." Def. Mem. at 13 (emphasis added). But "publish" is not defined to mean "upload" within the Act, and the Louisiana Legislature could have done so if that was the meaning intended. In fact, there are other "natural[]" readings of the

term "publish" that encompass more than simply uploading material. For example, a magazine that maintains a website containing articles by individual authors might be considered the publisher of the articles, or the individuals might be considered the publishers. In the case of books sold online, is it the bookstore that displays the books for sale that is the publisher, or is it the publishing house which prepares and distributes the books and in common parlance is called the "publisher"? *See Publish*, Black's Law Dictionary (10th ed. 2014). The vagueness of the Act is further shown by Defendants' related argument that "publish" exempts material that appeared on a website before, and continues to appear on the website after, the Act became effective. Def. Mem. at 13. That construction of the Act is by no means clear in the context of digital content on the Internet, where the continued appearance of material on a website, which may be continually refreshed or updated, may constitute "publish[ing]" within the meaning of the Act.

While the phrase material "taken as a whole" in the Internet context was held to be unconstitutionally vague in *ACLU v. Mukasey*, 534 F.3d 181, 205 (3d Cir. 2008), Defendants' response is that "[i]f there was a question in an individual case regarding whether a single website or whether multiple websites should be considered together," the ambiguity could be resolved through application of the rule of lenity. Def. Mem. at 17. Defendants therefore acknowledge that Louisiana speakers, in fact, have no notice of what the relevant context might be for Internet material, and that they must risk criminal prosecution before any such ambiguity can be clarified.[8] The Due Process clause does not countenance this result. *Cf. Ashcroft*, 542 U.S. at 670–71. Additionally, Defendants' proposed interpretation of the relevant community for purposes of applying "contemporary community standards" is at odds with what federal courts

[8] Defendants add to the confusion and vagueness by arguing that material "taken as a whole" "must mean the entire work, even if the entire work was not published online." Def. Mem. at 17. This interpretation is inconsistent with the argument that material must be evaluated "within the greater set of multiple websites" if said websites do not contain the "entire work" and is, in a practical sense, unworkable and nonsensical. *See id.*

have considered the relevant community when evaluating the same phrase in COPA. Defendants argue the community is that where the publisher is physically present, Def. Mem. at 15, while the Supreme Court presumed it was the community to which the material was disseminated, as did the Third Circuit. *See ACLU v. Ashcroft*, 322 F.3d 240, 244, 248–50 (3d. Cir. 2003).

Defendants further demonstrate the vagueness of the Act with their attempt to rebut an argument that Plaintiffs never made—that the phrase "depictions of illicit sex or sexual immorality for commercial gain" could be read to mean only depictions of prostitution. *See* Def. Mem. at 6–7. Defendants thus highlight that it is unclear what the language "for commercial gain" modifies. Among the options are that the phrase means "depictions, made for commercial gain, of illicit sex or sexual activity" or that "for commercial gain" modifies "illicit sex or sexual immorality," so that the phrase means depictions of prostitution. The Defendants' interpretation is not supported by the language of the Act with the requisite clarity.[9]

And perhaps the greatest demonstration of the Act's vagueness is Defendants' contention, Def. Mem. at 18, that the following provision of the Act exempts news-gathering organizations (as defined in the Act) from civil liability but not from criminal liability:

> This Section shall not apply to any bona fide news or public interest broadcast, website, video, report, or event and shall not be construed to affect the rights of any news-gathering organization.

La. Stat. Ann. 14:91.14(A)(5). That language makes no reference whatsoever to civil liability, and, on its face, is an exemption from the Act, a penal statute. The fact that Defendants seek to read the Act to make such a distinction further emphasizes the Act's vagueness.

[9] Defendants suggested an additional vagueness in the Act during oral argument on Plaintiffs' motion for a preliminary injunction. The Act states that "'Descriptions or depictions of illicit sex or sexual immorality' *includes* the depiction, display, description, exhibition, or representation of any of the following . . ." (emphasis added). La. Stat. Ann. 14:91.14(B)(1). Defendants' claim that the word "includes" limits the definition to the specific types of sexual conduct listed, rather than listing items as merely illustrative of the types of sexual conduct and exhibition that require an age-attestation screen, is not the most obvious reading. *See* Transcript, Dec. 18, 2015, at 27–28.

F. The Act violates the Equal Protection Clause and the Commerce Clause.

The Act violates the Equal Protection Clause because it fails to exempt newspapers published for less than a year, organizations that are not in a press association, and publications with content for a narrowly-defined audience, thereby impermissibly favoring certain speakers over others. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

To the extent Defendants make factual assertions about the burdens of the Act or the amount of speech it affects in arguing against Plaintiffs' Commerce Clause claim, those factual issues should not be considered on a motion to dismiss. *See* Def. Mem. at 19–20. In any event, Plaintiffs have plausibly alleged that the Act violates the Commerce Clause because it regulates the interstate activity of Louisiana publishers, creates inconsistent regulation of the Internet, and because its burdens outweigh its illusory local benefits. Am. Compl. ¶¶ 84–86.

Defendants' motion to dismiss should therefore be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on March 1, 2016, I electronically filed the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants.

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