

IN THE
SUPREME COURT OF VIRGINIA

PSINET INC., *et al.*,)
)
 Plaintiffs-Appellees,)
)
 v.) Case No. 030235
)
 WARNER D. CHAPMAN, *et al.*,)
)
 Defendants-Appellants.)

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| ASSIGNMENTS OF ERROR | 2 |
| QUESTIONS PRESENTED..... | 2 |
| NATURE OF THE CASE AND MATERIAL PROCEEDINGS | 3 |
| STATEMENT OF FACTS | 4 |
| A. Legislative and Litigation Background of Virginia Code § 18.2-391 | 4 |
| B. Facts and Inferences from the Record | 8 |
| ARGUMENT | 19 |
| I. USE OF EITHER OF THE TECHNOLOGICAL ACCESS CONTROLS IDENTIFIED BY THE ATTORNEY GENERAL PRECLUDES CONVICTION UNDER THE STATUTE | 19 |
| A. In Cyberspace, Credit Card Numbers And Adult-Check Pins Are Analogous To The Measures Approved By This Court For Use In The Physical World | 21 |
| B. Credit Cards And Adult-Check Pins Are Reasonably Effective In Depriving Minors Of Access To Harmful Materials..... | 23 |
| C. Federal Law Reinforces The Conclusion That Credit Cards And Adult-Check Pins Are A Reasonable And Effective Means Of Protecting Minors From Harmful Materials | 26 |
| D. As A Practical Matter, There Is Nothing More A Website Operator Can Do | 28 |
| II. THE TERM “DISPLAY FOR COMMERCIAL PURPOSE” APPLIES ONLY TO DISPLAYS MADE IN CONNECTION WITH THE “SALE, RENTAL, OR LOAN” OF HARMFUL MATERIALS..... | 30 |

A. This Court’s Decision In *American Booksellers* Adopted A
Narrow Construction.....32

B. Maxims of Statutory Construction Mandate A Narrow.....32

C. Because The Plaintiffs’ Extreme Construction Results In A
Finding Of Unconstitutionality, It Must Be Rejected.....33

III. ANSWERING THE FOURTH CIRCUIT’S QUESTIONS WILL
RESOLVE THIS LITIGATION.....34

CONCLUSION.....36

CERTIFICATE OF SERVICE38

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|--------------------|
| <u>CASES</u> | |
| <i>American Booksellers Ass'n v. Strobel</i> , 617 F. Supp. 699 (E.D. Va. 1985) | 5 |
| <i>American Booksellers Ass'n v. Virginia</i> , 494 U.S. 1056 (1990)..... | 2, 7 |
| <i>American Booksellers Ass'n v. Virginia</i> , 882 F.2d 125 (4th Cir. 1989) | 5 |
| <i>American Booksellers Ass'n v. Virginia</i> , 802 F.2d 691 (4th Cir. 1986) | 7 |
| <i>Carlin Communication, Inc. v. FCC</i> , 837 F.2d 546 (2nd Cir. 1988)..... | 26, 27 |
| <i>Commonwealth v. American Booksellers Ass'n, Inc.</i> , 236 Va. 168, 372 S.E.2d 618 (1988)..... | <i>passim</i> |
| <i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988)..... | 32 |
| <i>Eaton v. Davis</i> , 176 Va. 330, 10 S.E.2d 893 (1940)..... | 29 |
| <i>Edgar v. MITE Corp.</i> 457 U.S. 624 (1982)..... | 34 |
| <i>Hess v. Snyder Hunt Corp.</i> , 240 Va. 49, 392 S.E.2d 817 (1990)..... | 29 |
| <i>INS v. St. Cyr</i> , 533 U.S. 289 (2001)..... | 33 |
| <i>Martin v. Commonwealth</i> , 224 Va. 298, 295 S.E.2d 890 (1982)..... | 33 |
| <i>PSINet, Inc. v. Chapman</i> , 167 F. Supp. 2d 878 (W.D.Va. 2001) | 7 |

| | |
|---|------------|
| <i>Sable Communications of California, Inc. v. FCC</i> , 492 U.S. 115 (1989)..... | 26, 27, 28 |
| <i>Virginia v. American Booksellers Ass'n</i> , 484 U.S. 383 (1988)..... | 5 |
| <i>Virginia v. American Booksellers Ass'n</i> , 488 U.S. 905 (1988)..... | 7 |
| <i>Virginia Soc'y for Human Life v. Caldwell</i> , 256 Va. 151, 500 S.E.2d 814 (1988)..... | 28, 29 |
| <i>Woolfolk v. Commonwealth</i> , 18 Va. App. 840, 447 S.E.2d 530 (1994)..... | 32 |
| <i>Yamaha Motor Corp. v. Quillian</i> , 264 Va. 656, 571 S.E.2d 122 (2002)..... | 29, 33 |
| <i>Zelnick v. Adams</i> , 263 Va. 601, 561 S.E.2d 711 (2002)..... | 34 |

STATUTES

| | |
|--|---------------|
| Child On-Line Protection Act, § 1402, 47 U.S.C. § 231 (1999) | 26 |
| Va. Code § 18.2-390(6) | 5 |
| Va. Code § 18.2-391 | <i>passim</i> |
| 2001 Va. Acts, ch. 451 | 5 |
| 2000 Va. Acts, ch. 1009 | 4 |
| 1999 Va. Acts, ch. 936 | 1, 4 |

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BRIEF OF APPELLANTS

This brief is filed by the Attorney General of Virginia on behalf of the two Commonwealth's Attorneys named as Defendants: Warner D. Chapman (City of Charlottesville), and James L. Camblos, III (County of Albemarle) (collectively, "the Commonwealth").

INTRODUCTION

Since 1970, Virginia has protected its children from pornography by regulating the sale of materials harmful to minors. VA. CODE ANN. § 18.2-391. In 1985, recognizing that the protection was "obviously incomplete," the General Assembly amended the statute to "preclude the perusal, by juveniles standing in a bookstore, of harmful materials they are unable to buy." *Commonwealth v. American Booksellers Ass'n, Inc.*, 236 Va. 168, 178, 372 S.E.2d 618, 624 (1988). In 1999, taking note of the availability of harmful materials on the Internet, the General Assembly again amended § 18.2-391, this time adding "electronic files or messages" to the list of examples contained in the statute. 1999 Va. Acts, ch. 936.

In *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989), the Fourth Circuit held that the 1985 amendment to the statute was constitutional, but only *after* this Court had explained the meaning of the statute in a previous certification proceeding. Now that the 1999 amendment has provoked a new lawsuit – and a new certification – the Commonwealth again asks this Court to explain the meaning of the statute in a way that will demonstrate its constitutionality.

ASSIGNMENTS OF ERROR

It is unclear from this Court's rules whether assignments of error are necessary or even appropriate in the context of certification pursuant to Rule 5:42. To the extent that assignments of error may be required, the Commonwealth offers the following:

1. The trial court erred by failing to find that use of the technological access controls identified by the Attorney General of Virginia (*i.e.* credit card numbers and adult-check PINs) preclude conviction under Virginia Code § 18.2-391, as amended in 1999.
2. The trial court erred by failing to find that the prohibition against knowingly displaying materials harmful to juveniles “for commercial purpose” applies to displays made only in connection with the sale, rental, or loan of such materials.

QUESTIONS PRESENTED

1. Would the use of any of the technological access controls (*i.e.* credit card numbers and adult-check PINs) identified by the Attorney General of Virginia preclude conviction under Virginia Code §18.2-391 as amended in 1999? (Relates to Assignment of Error # 1.)

2. Does the prohibition against knowingly displaying pornographic materials that are "harmful to juveniles" apply to displays made only in connection with the sale, rental, or loan of such materials? If not, what must the government establish to prove that a defendant has knowingly displayed such materials "for commercial purpose"? (Relates to Assignment of Error # 2.)

3. Are these questions determinative of the outcome of Plaintiffs' challenge of Virginia Code §18.2-391? (Briefed by Order of this Court, dated March 6, 2003.)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This matter is before this Court on a certification of questions from the United States Court of Appeals for the Fourth Circuit. The procedural history is straightforward. Plaintiffs filed their challenge seeking declaratory and injunctive relief in the United States District Court for the Western District of Virginia. They alleged that the 1999 amendment to Virginia Code § 18.2-391 violated the First Amendment, as made applicable to the states by the Fourteenth Amendment, and the dormant Commerce Clause of the United States Constitution. They did not challenge the remainder of the statute.

Plaintiffs moved for a preliminary injunction. Substantial testimony was offered by affidavit. After hearing argument on Plaintiffs' motion, the District Court construed the statute broadly and, on August 8, 2000, entered its preliminary injunction against enforcement of the 1999 amendment. Plaintiffs moved for Summary Judgment. The District Court granted Plaintiffs' motion on October 11, 2001.

The Commonwealth appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. The appeal was briefed and argued before the Fourth Circuit in October of 2002. On January 21, 2003, the Fourth Circuit issued an opinion certifying to this

Court two questions relating to the meaning and scope of the 1999 amendment. By Order of March 6, 2003, this Court accepted the questions of law certified by the Fourth Circuit and requested that, in addition, counsel brief and argue whether the certified questions are outcome determinative.

STATEMENT OF FACTS

A. Legislative and Litigation Background of Virginia Code § 18.2-391

Virginia Code § 18.2-391 – with the 1999 amendment highlighted – reads as follows:

- A. It shall be unlawful for any person knowingly to sell, rent or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:
 1. Any picture, photography, drawing, sculpture, motion picture film, *electronic file or message containing an image*, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
 2. Any book, pamphlet, magazine, printed matter however reproduced, *electronic file or message containing words*, or sound recording which contains any matter enumerated in subdivision 1 of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

Va. Code § 18.2-391; 1999 Va. Acts, ch. 936 (emphasis added).¹

¹ In 2000, the following language was added to paragraph A to provide express immunity for Internet service providers (“ISPs”):

However, if a person uses services of an Internet service provider or an electronic mail service provider in committing acts prohibited under this subsection, such Internet service provider or electronic mail service provider shall not be held responsible for violating this subsection.

2000 Va. Acts, ch. 1009. In 2001, the word “knowingly” in the first line of paragraph A was amended to read “knowing or having reason to know that such person is a juvenile” and the word

The challenged statute – as it existed before the 1999 amendment – was upheld as constitutional in 1989 after a long, tortuous path through the courts in the *American Booksellers* litigation.² Upon its adoption in 1970, the statute made it illegal to “sell” to minors any materials defined as “harmful to juveniles.” In 1985, Virginia amended the statute to make it also unlawful “to knowingly display” these materials “in a manner whereby juveniles may examine and peruse” them. 1985 Va. Acts, ch. 506. The plaintiffs in *American Booksellers* challenged the 1985 amendment as facially unconstitutional on the grounds that it was vague and violated the First Amendment.

At first, plaintiffs in *American Booksellers* prevailed. *American Booksellers Ass’n v. Strobel*, 617 F. Supp. 699 (E.D. Va. 1985). The Fourth Circuit affirmed the District Court’s decision. *American Booksellers Ass’n v. Virginia*, 802 F.2d 691 (4th Cir. 1986). On appeal, however, the United States Supreme Court was skeptical of that result and certified to this Court two questions about the proper interpretation of the statute. *Virginia v. American Booksellers Ass’n*, 484 U.S. 383 (1988). This Court responded by construing the statute narrowly. *Commonwealth v. American Booksellers Ass’n*, 236 Va. 168, 372 S.E.2d 618 (1988). Two aspects of that narrow construction are worthy of note. First, this Court concluded that the phrase “harmful to juveniles,” as used in § 18.2-391, does not simply mean anything inappropriate for young children. The definition begins with Virginia Code § 18.2-390(6), which says:

“film” in subparagraph A(1) was amended to read “in any format or medium.” 2001 Va. Acts, ch. 451.

² The Commonwealth argued in both the District Court and the Fourth Circuit that the 1999 amendment did not alter the scope of § 18.2-391, and that, therefore, the Fourth Circuit decision in *American Booksellers* precluded Plaintiffs’ First Amendment challenge to the

“Harmful to juveniles” means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

- (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles,
- (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and
- (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

The definition received further refinement from this Court, which held:

[T]he 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 ... 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.

236 Va. at 176, 372 S.E.2d at 623.³ Second, and more important to the case at bar, this Court read into the statute a kind of “safe harbor” for booksellers who take reasonable precautions. It said that, in a prosecution for violating the “display” provision, “the Commonwealth would have the burden of proving beyond a reasonable doubt that the defendant bookseller *knowingly* afforded juveniles an opportunity to peruse harmful materials, or took no reasonable steps to prevent such perusal when the juvenile’s opportunity was reasonably apparent to the bookseller.”

236 Va. at 178, 372 S.E. 2d at 624-625 (emphasis in original). This Court also said:

amendment. The District Court expressly rejected this argument; and, by its certification order the Fourth Circuit has also done so.

³ The plaintiffs in that case submitted sixteen books that they feared might subject them to prosecution. Many of the sixteen contained passages that many parents would undoubtedly deem inappropriate for their children, dealing with topics such as rape, masturbation and adulterous conduct. Yet, the Court found none of these books to be “harmful to juveniles” within the meaning of the statute, because the Court believed they had serious value for a legitimate minority of older, normal adolescents. 236 Va. at 177, 372 S.E.2d at 623.

“[r]easonable efforts to prevent perusal of harmful materials by juveniles are *all* that the statute requires of a bookseller.” *Id.* at 178, 379 S.E.2d at 625 (emphasis added).

In light of this Court’s narrow construction of the statute, the U.S. Supreme Court vacated the Fourth Circuit’s decision and remanded the case to the Fourth Circuit for further consideration. *Virginia v. American Booksellers Ass’n*, 488 U.S. 905 (1988). Upon remand, the Fourth Circuit found the statute constitutional on its face. *American Booksellers Ass’n v. Virginia*, 882 F.2d 125 (4th Cir. 1989). The Supreme Court subsequently denied certiorari. *American Booksellers Ass’n v. Virginia*, 494 U.S. 1056 (1990).

In spite of the fact that the underlying statute has already been held constitutional by the Fourth Circuit in *American Booksellers*, the 1999 amendment of Virginia Code § 18.2-391 provoked a new lawsuit. A group of Internet service providers (ISPs), web site operators, and related trade associations challenged the amended statute on its face as a violation of the First Amendment, as made applicable to the states by the Fourteenth Amendment, and the Dormant Commerce Clause of the United States Constitution. Plaintiffs alleged that the amendment extended the reach of the statute from physical space into cyberspace and that, given the nature of the Internet, the amended statute was not sufficiently precise to withstand strict scrutiny under the First Amendment.

To the contrary, with regard to distinguishing between adults and juveniles, cyberspace and physical space are not fundamentally different. There are minimally burdensome measures available to commercial internet pornographers who want reasonable assurances that juveniles will not peruse harmful materials on their site. The District Court rejected this argument, apparently because the 1999 amendment failed to expressly provide affirmative defenses that incorporate such measures. *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d. 878, 888 (W.D.Va.

2001). Instead, the District Court construed the statute broadly – ruling that extension of the law to the Internet created a violation of the First Amendment where previously there was none – and enjoined enforcement of the amended statute.⁴ Thus the court effectively eliminated any limitation on what materials may be made available to children over the Internet.

B. Facts and Inferences from the Record

The following constitutes the complete statement of “Facts and Inferences from the Record,” as presented by the Commonwealth to the Fourth Circuit. Some of these facts bear directly upon the terms used by the Fourth Circuit in its Order of Certification (*e.g.* “adult-check PIN”); others might also be useful to this Court in responding to the questions posed by the Fourth Circuit; still others are presented for purposes of background and to ensure that this Court has been directed to all portions of the record that may have prompted the Order of Certification.

Nature of the Internet

1. Decentralization of content control is not a phenomenon unique to the Internet. Neither print nor broadcast media are subject to any single control group. Moreover, print, broadcast and web-based communications are rapidly conflating. The Internet bears significant resemblance to other more traditional media, and is increasingly similar to multi-dimensional broadcasting. Olsen Dec. ¶¶23-24; JA 422. The primary differences between the Internet and traditional media are *speed and cost*. Olsen Dec. ¶127; JA 423.⁵

⁴ The District Court also held that the 1999 amendment violated the dormant Commerce Clause.

⁵ Dr. Dan Olsen is an expert in human-computer interaction. He has extensively studied technology development, user behavior on the Internet, specialized protocol development and multi-user applications involving the Internet and remote indexing of digitalized microfilm images. Dr. Olsen is familiar with the issues, costs, effort and technology involved in creating WWW services, including those that are membership restricted. He is likewise familiar with the

2. As a computer-based digital medium, the Internet is more flexible, and thus capable of more specific targeting than traditional media. Olsen Dec. ¶ 8 A-D, ¶ 25; JA 422-423.
3. The Internet is a rapidly changing environment driven by free market economics. Olsen Dec. ¶ 21; JA 421.

Commerce Burdens

4. The vast majority of online costs must be incurred before an Internet speaker can meaningfully engage in e-commerce at all. There is no such thing as speaking on the Internet without incurring significant costs upfront. Olsen Dec. ¶14 A-D; JA 417-418.
5. Minimally burdensome measures are readily available to commercial pornographers who want reasonable assurances that juveniles will not peruse materials on their site. The rapid proliferation of adult verification systems, the use of credit card verification, and other rudimentary technology are indigenous and inherent to e-commerce generally, provide practical and reliable means for commercial pornographers to take reasonable protective measures contemplated by the Act. Olsen Dec. ¶¶ 84; JA 413-447; Olsen Supp. Dec. ¶ 444; JA 835-843.
6. The burdens associated with age verification are negligible, particularly when viewed in contrast to the overall costs incurred by any website engaging in e-commerce. Olsen Dec. ¶¶ 53-55, ¶¶ 63-64, and ¶¶ 75-83; JA 433-34, 437-438, 443-45. Age verification is not only possible; the technology necessary to take reasonable measures is indigenous to e-commerce generally.

editorial process involved in soliciting, selecting, editing and disseminating materials to the public and to a membership. Olsen Dec. ¶¶ 1-7; JA 413-414; JA ¶¶ 448-455.

7. There are minimally burdensome steps that can be taken today to obtain a reasonable level of assurance that perusal by minors will be prevented. These steps include requiring a credit card or age verification passcode in order to gain access to such materials. Olsen Dec. ¶ 87; JA 438-46. Many pornographic Internet websites display free samples of such material in order to invite the viewer to make an on-line use of a credit card or adult verification code in order to obtain on-line access to other such materials. Olsen Dec. ¶ 84; JA 446.
8. In the physical world, commercial speakers bear some measure of the burden to protect children. In cyberspace, the burdens associated with “cyberzoning”, are significantly less onerous. Olsen Supp. Dec. ¶ 33; JA 841.
9. Age verification measures available today are minimally burdensome, in common use throughout the pathways of e-commerce, and may be obtained at no cost. A conclusion that such technology is “undoable” is factually unsupportable. Olsen Supp. Dec. ¶ 44; JA 843.
10. Security of transactions and information are fundamental to Internet business, not unique requirements imposed by Virginia law. Any site involved in commercial transactions faces security problems. Any site processing credit cards will have security issues requiring due vigilance. The Virginia law imposes no special burdens in this regard. The age restriction measures contemplated by Virginia law simply leverage off of existing conditions and capabilities. Olsen Dec. ¶ 54; JA 454.

Technical Steps To Prevent Access By Minors

11. Credit cards can be verified at no cost to the cardholder and at minimal cost to site owners. This mechanism can easily be used to protect all or part of a site. Once

adulthood has been verified, the adult need never know which parts of the site are restricted to adults and which are not. A minor that has not been verified, however, is automatically challenged by the server each time he or she attempts to access material that is harmful to juveniles. Olsen Dec. ¶ 47; JA 431-432.

12. Using adult verification technology involves a simple registration and addition of minor information to entry points of restricted site areas. Not only does this service not cost the site owner anything, adult verification services will pay site owners for referring users to them. Olsen Dec. ¶ 49; JA 432
13. The burdens imposed by Virginia law are the marginal costs of age verification and any additional editorial burdens associated with creating content. Olsen Dec. ¶ 55; JA 434. Each of these age verification measures, alone, or in combination, is minimally burdensome to commercial web site operators and affords a reasonable level of assurance that perusal of harmful materials by juveniles is prevented. Olsen Dec. ¶ 85; JA 446.
14. Many Internet enterprises already require users to register as part of their business model. Olsen Dec. ¶ 63; JA 438.
15. Many businesses already support credit card shopping from their WWW sites as a means of generating revenue from their WWW speech. Many web-based speakers, regardless of what they are offering, already have the technology in place to maintain member databases, credit card numbers, and to process credit card transactions. Olsen Dec. ¶ 64; JA 438.
16. Many pornographic sites either accept credit cards and thus are able to perform age verification, or demonstrate the basic, e-commerce infrastructure and technical readiness to do so. Olsen Supp. Dec. ¶ 26; JA 840.

17. Card verification procedures need only be done once, per user, per year, and do not cost the user anything. Olsen Dec. ¶ 66; JA 439.
18. Minors cannot obtain a credit card on their own because minors cannot enter into a binding contract to repay.
19. Age verification processes in use today are all publicly available in books as well as pre-coded public domain software. Any programmer capable of creating an electronic commerce WWW site is also capable of programming these processes. All of the technical resources required to implement these defenses are publicly available today. Olsen Dec. ¶ 71; JA 441.

Third Party Adult Verification

20. The proliferation of adult verification sites since 1996 demonstrates that there is a profitable business in adult verification. The expertise required to do this is minimal and the adult verification services bend over backwards to make it as simple as possible. This is a key advantage of a market economy. Most adult verification services pay sites for recommending them and commercial speakers actually generate revenue by using them. Olsen Dec. ¶ 72; JA 441-42
21. The District Court made the following factual findings about the use of adult verification codes: “[A] number of Websites condition access on the presentation of an adult identification number (PIN) issued to the user by any one of a number of independent third-party firms specializing in adult identification. Upon completion of an online application requiring name, address and a valid credit card number, adult identification firms issue one or two-year PINs to users for a fee of about seventeen dollars. Greg Miller, *Law to Control Online Porn Creates Strange Bedfellows*, L. A.. Times, Feb. 15,

1999, at A1. There are approximately twenty-five adult verification services on the web, and as of February 1999, the largest of these firms had issued approximately three million PINs which were accepted by approximately 46,000 Websites. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L. J. 785, 809 (2001). A Website operator can sign up for free with most adult identification firms and the site can earn commissions of up to 50% to 60% of the fees generated by users who sign up with a particular adult verification service. *Id.*⁶

Using Age Verification

22. Once users are identified as adults, they are able to move freely throughout the WWW site without re-verifying their age each time they pass through the screen. They only re-verify if they come back to that site at some later time. This is standard access control technology for WWW servers. Olsen Dec. ¶ 73; JA 442.
23. A WWW site is not a single monolithic entity containing a flat morass of web pages. All sizable WWW sites are organized into directories, which form a hierarchy. These directories help to classify and organize the material on the site. This structure is freely defined by the creators of the site and follows any organization that they choose. Olsen Dec. ¶ 74; JA 443-45.
24. When the creator of a WWW site wishes to restrict access to a portion of their site, they do so by specifying a directory that is accessible only to a particular class of users. Any

⁶ According to the same law journal article relied on by the District Court for evidentiary findings, geographical identity technology is currently in use and can correctly identify the content of receivers' geographical identity at the national level between ninety and ninety-eight percent of the time. This software allows the webpage operator to tailor content to comply with different regulations based on geography. Moreover, geography can be identified from addresses associated with credit cards. 110 Yale L. J. at 811-813 (2001).

WWW site programmer can avail themselves of such options. Age verification strategies can be readily added to a server. Olsen Dec. ¶ 75; JA 443-4.

25. Just because some of the material on a particular WWW site is deemed harmful to juveniles does not mean the entire site must be closed to minors. As the above discussion shows, it is simple to partition a site into "open" and "restricted" areas. Olsen Dec. ¶ 76; J.A. 444.

Skill Requirements For Using Age Verification

26. It is impossible to do business on the WWW without the specialized computer skills required to set up and maintain the hardware, software and Internet connections previously discussed. There is no way to commercially speak on the WWW without paying directly or indirectly for such expertise. This is true irrespective of the existence of the Virginia law. Olsen Dec. ¶ 77; JA 444-45.
27. The skill level required of commercial speakers for age verification is no greater than that required of any other electronic commerce WWW site. Verification of credit cards, management of user databases, information security, and controlling access to regions of a WWW site are all standard skills and practices required for electronic commerce, irrespective of Virginia law. Olsen Dec. ¶ 78; JA 445.

WWW Site Organization Burdens

28. Restructuring a site to incorporate age verification technology imposes a minimal burden since automated tools are available to support such re-organization. WWW sites are far easier to redesign than physical stores. Olsen Dec. ¶ 79; JA 445.
29. Restructuring of a WWW site need not be visible to users except during the initial challenge to verify adult status. The directories in which items are stored need not be

reflected in user experience. Unless the user is carefully watching the URL text at the top of their browser, they will never know that reorganization has occurred. Olsen Dec. ¶ 80; JA 445.

30. A WWW site is not like a book where material is printed and rarely changes. Sites that are not continually updated and which fail to present new information, particularly commercial sites, will soon lose their readership. Compliance with the Virginia law can occur as part of the natural and inevitable process of WWW site re-organization. Olsen Dec. ¶ 83; JA 446.

31. Protective measures may require modest reorganization of a WWW site, conceptually equivalent to placing a book on a different shelf or filing a document in a different folder. Olsen Dec. ¶73-83; JA 442-46.

Commercial Practice

32. Millions of net users purchase online and have been doing it for years. *See, Online Credit Card Purchases Double*, TechWeb News (Dec. 2, 1999) at <http://www.techweb.com> (citing a figure of 19.2 million card users online as of two years ago); *See also, Consumers Spent \$4.3 Billion Online* (April 25, 2001) at <http://www.businesswire.com> (according to Forrester Research Online Retail Index).⁷ Olsen Supp. Dec. ¶ 21; JA 839

⁷ The Intelliquest Technology Panel, *Panel News*, available at <<http://www.techpanel.com/news/indes.asp>> (90 million adult online users as of third-quarter 1999). Other sources place the number in the 70-75 million user range. *See* Cyber Dialogue, *Internet Users*, available at <<http://www.cyberdialogue.com/resource/data/ic/index.html>> (69 million users).

33. The practice of individuals submitting personally identifiable information for commercial purposes is commonplace. *Privacy Online, Fair Information Practices in the Electronic Marketplace: A Report to Congress*, 1-19 (May, 2000) (54% of Internet users have purchased products or services online. “Web sites collect a vast amount of personal information from and about consumers. This information is *routinely* collected from consumers through registration forms, order forms, surveys, contests, and other means, and includes personal identifying information, which can be used to locate or identify an individual,” and non-identifying information. *The Commission’s Survey findings demonstrate that nearly all web sites collect personal identifying information from consumers.*”) (emphasis added.) Olsen Supp. Dec. ¶ 22; JA 839
34. In *Privacy and Self-Regulation in the Information Age*, Chapter 5(B), a 1997 Department of Commerce publication, Dr. Lorrie F. Cranor writes: “[I]ndividuals *frequently reveal personal information* in the course of doing business in order to gain benefits such as home delivery of products, customized services, and the ability to buy things *on credit*” (emphasis added). Chapter 5 of this government report, authored by Dr. Cranor, states: “*The Internet and computerized databases make automated collection and processing of information easy and convenient.*” (emphasis added). Olsen Supp. Dec. ¶ 24; JA 839.

Juveniles and Cyberpornography

35. The proliferation of children online in this country is due, in part, to an enormous increase in spending by the federal government to wire schools and libraries. According to research conducted at Pittsburgh’s Carnegie Mellon University, in American families, it is *teenagers* who spend the most time online. Olsen Supp. Dec. ¶ 27; JA 840.

36. Sexually explicit materials can and do enter homes unbidden and may refuse to leave. Olsen Dec. ¶¶ 28-35; JA 424-427; Olsen Supp. Dec. ¶¶ 28-35; JA 842-43 (describing five ways in which juveniles may be subjected to unsolicited pornography including mistyping, ambiguous search terms, misleading promotions, aggressive solicitation, and ploys such as “mousetrapping”, used by commercial pornographers to purvey their materials.) *See also* Siegfried and Thomas-Hicks Affs. ¶ 4; JA 934-36 (“As I searched the contents of sexually explicit sites, I was confronted by sexually explicit “pop-up” banner ads and often found myself ‘trapped’ in a pornographic site in which my efforts to close the window, or to back out of the site, were futile”).
37. Juveniles, with minimal effort, can readily obtain online, free, graphic, color, close up photographs of sexually explicit activities of every type, including oral sex, anal sex, gay and group sex involving teens (alleged to be “barely legal”) and women in bondage. JA 934-37.
38. Most web-based pornography is purveyed for a commercial purpose. JA 245, 417-420, 934-935.

Ineffectiveness of Blocking and Filtering Technology

39. The clumsiness, ineffectiveness and the tendency of Internet filters to be both under and over-inclusive, are well-documented. Olsen Dec. ¶¶ 36-44; JA 427-30.
40. There is no simple evaluation of the name of a place where information is stored that will effectively filter material that is harmful to juveniles. It cannot be done. Olsen Dec. ¶ 41; JA 429.
41. It is impossible to construct a key word filter that can accurately evaluate what is harmful to juveniles within the meaning of Virginia law. Olsen Dec. ¶ 42; JA 429-30.

42. The most obvious problem with keyword filtering is that it cannot filter pictures or video. These two media are a large part of pornographic materials that are harmful to juveniles. No existing algorithm can differentiate between people performing sexual acts and those who are merely waving their hands. Not only is current filtering technology not effective in blocking images that are harmful to juveniles, no such technology exists in any form. Olsen Dec. ¶ 43; JA 429-30.
43. The only way in which images can be blocked is with the cooperation of whoever is providing the images. Olsen Dec. ¶ 44; JA 430.
44. Filtering technology today is demonstrably flawed and often suppresses valuable, age-appropriate speech. Olsen Supp. Dec. ¶ 86-88; JA 842.
45. Currently available filtering technology is both over-inclusive and under-inclusive in that it prevents access to some materials that are not harmful to juveniles (particularly mature juveniles), while failing to prevent access to other materials that are harmful to juveniles. Many kinds of commercially available filtering software, for instance, rely on scanning text for profanity. Such technology will block entire works containing profanity even if those works have been held by the Virginia Supreme Court not to be harmful to juveniles within the meaning of Virginia law. (See, e.g., *Hollywood Wives*, *American Couples*, *The Diamond Waterfall*, *Forever*, *Witches of Eastwick* and various other books that contain profanity, yet, according to the Virginia Supreme Court, are not harmful to minors). Olsen Dec. ¶ 86; JA 447.
46. There is no technology available today that will block substantially all materials harmful to juveniles while leaving unblocked substantially all other materials. Any technology widely available today that blocks substantially all materials harmful to juveniles will

also block a substantial amount of material that is valuable for a legitimate minority (or larger group) of normal, older adolescents. Olsen Dec. ¶ 87; JA 447.

47. There is no factual basis to conclude that technology will soon be available that will effectively block substantially all materials that are harmful to minors while leaving unblocked substantially all other materials. Images remain immune to filtering. Olsen Dec. ¶ 88; JA 447.

48. Since current filtering software is ineffective, particularly because commercial pornographers have a profit incentive to outmaneuver them, and because keyword filtering incorrectly blocks much age-appropriate, valuable information, the technical provisions proposed (*i.e.* credit card numbers and adult-check PINs) are far more effective than simply placing the burden on parents and crossing our fingers. Olsen Supp. Dec. ¶ 37; JA 842.

ARGUMENT

I. USE OF EITHER OF THE TECHNOLOGICAL ACCESS CONTROLS IDENTIFIED BY THE ATTORNEY GENERAL PRECLUDES CONVICTION UNDER THE STATUTE.

The first question certified by the Fourth Circuit asks the following:

Would the use of any of the *technological access controls* identified by the Attorney General of Virginia preclude conviction under Virginia Code § 18.2-391 as amended in 1999?

317 F.3d 413, 419 (4th Cir. 2003) (emphasis added). Elsewhere in its Order of Certification, the Fourth Circuit noted its sense of the Commonwealth's argument and, in so doing, identified the "technological access controls" that are the subject of this first question. The Fourth Circuit said:

Just as a physical store can create an adults-only section for videos or an adults-only shelf for books, the Commonwealth argued, so an Internet site can create

adults-only pages that may only be accessed after the user has input a *credit card number* or an *adult-check PIN*.

Id. (emphasis added). Thus, the first question posed by the Fourth Circuit relates to these two technological access controls: credit card numbers and adult-check PINs. Essentially, the Fourth Circuit asks this: whether a website operator who requires use of one of these controls in order to access harmful materials has a defense to a charge that he has knowingly displayed those materials “in a manner whereby juveniles may examine and peruse” them in violation of Virginia Code § 18.2-391? The answer is plainly yes.

The question is similar to a question addressed by this Court in the 1988 certification. The answer should be similar as well. In 1988, this Court made it clear that booksellers in the physical world need not implement foolproof measures to prevent minors from perusing harmful materials. Complying with the statute only required implementation of measures that are “reasonable.” *American Booksellers*, 236 Va. at 179, 372 S.E.2d at 625 (“[R]easonable efforts to prevent perusal of harmful materials by juveniles are all that the statute requires of a bookseller.”). This rule of reason – now firmly established for materials displayed in the physical world – should also apply in cyberspace.

The question thus becomes whether the precautions identified by the Commonwealth – use of credit card numbers and adult-check PINs – are reasonable means of preventing juveniles from perusing harmful materials on the Internet. Earlier in this litigation, the parties disputed whether such measures would be too “burdensome” to pass scrutiny under the First Amendment. This is not, however, the issue before this Court. Rather, the question here is whether a website that implements one of these measures will be in compliance with the requirements of Virginia Code § 18.2-391, as amended in 1999. The Commonwealth maintains that these *are* reasonable

means to prevent perusal of harmful materials by juveniles, and that use of one of them is all the statute requires. Not wishing to be subject to *any* compliance obligations, Plaintiffs disdain the safe harbor offered by the Commonwealth and insist that these measures afford them no defense.

There are four basic reasons why these technological access controls constitute “reasonable efforts” within the meaning of this Court’s decision in *American Booksellers*. First, in cyberspace, credit card numbers and adult-check PINs are analogous to the measures approved by this Court for use in the physical world. Second, studies of the “cyberporn” industry show that these control measures are reasonably effective in depriving minors of access to harmful materials. Third, federal law reinforces the conclusion that credit cards and adult-check PINs are a reasonable and effective means of protecting minors from harmful materials. Fourth, as a practical matter, there is nothing more a website operator can do. If these control measures do not constitute compliance with the statute, then compliance is essentially impossible and the Fourth Circuit will strike the 1999 amendment down as unconstitutional.

A. In Cyberspace, Credit Card Numbers And Adult-Check Pins Are Analogous To The Measures Approved By This Court For Use In The Physical World.

In *American Booksellers*, this Court described the sort of precautions that would qualify as “efforts to prevent perusal of harmful materials by juveniles.” 236 Va. at 179-80; 372 S.E.2d at 625. As the Court explained:

If a bookseller were to display materials harmful to juveniles, provide an area in which they could be perused without observation by the bookseller or his employees, and take no reasonable steps to inhibit such perusal by juveniles, a jury properly instructed under the foregoing principles might convict even in the absence of proof that juveniles had actually taken advantage of the opportunity thus afforded to them.

One of the booksellers' witnesses in the district court provided a clear example of a method a bookseller might easily adopt to avoid such a problem. Under the construction we have adopted, there was evidence in the record that the statute

would affect relatively few books -- less than a single shelf of a typical bookseller's wares. The witness testified that in that particular store, a shelf containing restricted books was located within sight of the bookseller. If a juvenile attempted to peruse them, an employee could readily intervene. This imposes a relatively light burden upon the bookseller, in contrast to the state's interest in protecting juveniles from materials harmful to them.

Id.

In other words, in the physical world, a bookstore operator who wishes to comply with the statute will keep the harmful materials in a place where a patron cannot reach them without his age being detected. In order to reach them, the patron must stand in a place where the store clerk can see him, thereby allowing the clerk to ascertain from his appearance (or from some form of identification, if the patron looks young) whether the patron is an adult or minor. In short, in order for the patron to reach the materials, he must permit individualized examination of his age by the bookstore operator.

Likewise, in cyberspace, a website operator can keep the harmful materials where an Internet user cannot reach them without an individualized examination of his age. While the website operator cannot see the face of the person seeking access to pornography, the operator can require reasonable proof of age – a credit card or adult-check PIN – before allowing access to those materials. Keeping the harmful materials on the far side of an electronic screen is the cyberworld equivalent of keeping such materials on a separate shelf or behind the counter of a bookstore. In both cases, the materials cannot be accessed unless the patron shows that he is an adult. In both cases, requiring demonstration of age is a reasonable precaution. And in both cases, the “display” provision of the statute is complied with.

B. Credit Cards And Adult-Check Pins Are Reasonably Effective In Depriving Minors Of Access To Harmful Materials.

The technological access controls suggested by the Commonwealth constitute “reasonable efforts” within the meaning of this Court’s decision in *American Booksellers*. To begin, it should be noted that use of these technological access controls is quite common. The prevalence of credit cards among adults in our society can hardly be disputed. As for adult-check PINs, the trial court observed:

[A] number of Websites condition access on the presentation of an adult identification number (PIN) issued to the user by any one of a number of independent third-party firms specializing in adult identification. Upon completion of an online application requiring name, address and a valid credit card number, adult identification firms issue one or two-year PINS to users for a fee of about seventeen dollars. Greg Miller, “Law to Control Online Porn Creates Strange Bedfellows,” *Los Angeles Times*, February 15, 1999, at A1. There are approximately twenty-five adult verification services on the web, and as of February 1999, the largest of these firms had issued approximately three million PINS which were accepted by approximately 46,000 Websites. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 809 (2001). A Website operator can sign up for free with most adult identification firms and the site can earn commissions of up to 50% to 60% of the fees generated by users who sign up with a particular adult verification service.

167 F. Supp. 2d at 878; J.A. 924-25. Examples of pornographic websites using these controls can be found in the Joint Appendix. See J.A. 1026-1032; 1037; 1039; 1054; 1061 (credit cards), J.A. 1012-1021; 1041; 1043 (adult-check PINs). Some of the sites display pornographic “teasers” on portions of the site that can be reached without use of a credit card or adult-check PIN. See e.g., JA 1012, 1015-21, 1027-32, 1039-41. This is precisely the problem at issue in this case.

When credit cards or adult-check PINs are used, they are effective. This conclusion is supported by the testimony of Dan R. Olsen, Jr., Ph.D., an expert in human-computer interaction who testified that credit cards and adult-check PINs “afford a reasonable level of assurance that

perusal of [harmful] materials by juveniles is prevented.” JA 413, 446. Moreover, a national study confirms that AVTS PINs (also known as “Adult Verification Technology” “clearly do eliminate some significant percentage of children who would otherwise gain access to sexually explicit material.” National Research Council, *Youth, Pornography, and the Internet* (Richard Thornburgh & Herbert S. Lin, eds. 2002); see JA Vol. IV. Indeed, this report suggests that pornographic websites using AVTS have been able to reduce the percentage of underage viewers to five percent. Some have suggested that AVTS may be able to reduce this level to two percent. JA Vol. IV, 78. In contrast, those websites that did not use AVS technology have a viewing audience that is between twenty and thirty percent children. *Id.* at 78. Moreover, the Commission on Child Online Protection, a body established by Congress to study how to reduce access by minors to sexually explicit material online, concluded that an age verification system “is generally effective at preventing access by children.” Commission on Child Online Protection, *Report to Congress* 27 (2000); JA Vol. V.

Credit cards are also an effective means of reducing access by minors to harmful materials on the Internet. It is a long-established rule in Virginia – as elsewhere – that a minor cannot be bound by his contracts, but may void them. See, e.g., *Zelnick v. Adams*, 263 Va. 601, 608, 561 S.E.2d 711, 715 (2002). There is an exception for necessities, but the open-ended uses to which credit cards may be put makes them ill-suited for that exception. See *id.* Thus, while there may be individual circumstances where a minor will be issued a credit card, such an event must be regarded as the exception, not the rule. As a general rule, minors in our society do not

have credit cards.⁸ Thus, requiring use of a credit card as a means of gaining access to materials harmful to juveniles is a reasonable precaution.

Admittedly, neither adult-check PINs or credit cards are foolproof, but that does not destroy their value as reasonable measures to prevent access by minors to harmful materials. In *American Booksellers*, this Court explained that, “[b]ecause it is criminal in nature, the statute is not to be given the broad interpretation the booksellers apprehend.” *Id.* at 179; 372 S.E.2d at 625. Avoiding a broad interpretation of criminal prohibitions means *giving* a broad interpretation to the means of compliance by which criminal liability may be avoided. Thus, criminal liability under the statute cannot be predicated on the fact that the means advocated by the Commonwealth are not foolproof. There may be instances where minors will obtain knowledge of valid adult verification, or credit card numbers, or an adult-check PIN, and use it to obtain harmful materials. But such a possibility does not jeopardize the website operator who has acted in good faith to implement these reasonable precautions. As this Court concluded in *American Booksellers*:

A scenario may always be envisioned wherein a juvenile, by stealth, secretes a book and manages to peruse it in a store despite the efforts of the most vigilant clerk. The absence of scienter precludes conviction of any bookseller under those circumstances. *Reasonable efforts to prevent perusal of harmful materials by juveniles are all that the statute requires of a bookseller.*

Id. The same is true in cyberspace. The technological control measures identified by the Attorney General are reasonable.

⁸ While some parents may allow their older teenage children to use their credit cards, the website operator cannot be reasonably held accountable if parents carelessly equip their children to gain access to harmful Internet sites. Moreover, even if older teenagers may use parental card in such a manner, younger children remain protected.

C. Federal Law Reinforces The Conclusion That Credit Cards And Adult-Check Pins Are A Reasonable And Effective Means Of Protecting Minors From Harmful Materials.

The Commonwealth is not alone in its belief that credit cards and adult-check PINs are an effective means by which to restrict access by minors to harmful materials on the Internet. Congress shares this view. In enacting the Child On-Line Protection Act (“COPA”) in 1998, Congress found that “the widespread availability of the Internet presents opportunities for minors to access materials through the worldwide web in a manner that can frustrate parental supervision or control.” Child On-Line Protection Act, P.L. No. 105-277, § 1402, 112 Stat. 2681-736 (1999); 47 U.S.C. § 231 (emphasis added). Congress also found that “a *prohibition on the distribution* of material harmful to minors, combined with *legitimate defenses*, is currently the *most effective* and least restrictive means by which to satisfy the compelling government interest” in “protect[ing] the physical and psychological well-being of minors by shielding them from materials that are harmful to them.” *Id.* (emphasis added). Thus, Congress provided that a website operator is not liable if he “in good faith, has restricted access by minors to material that is harmful to minors by requiring the use of a credit card ... adult access code, or adult personal identification number....” 47 U.S.C. § 231(c)(1).

The United States Supreme Court previously *approved* the use of credit cards and adult access codes as “a feasible and effective way to serve the compelling state interest in protecting minors.” *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 122 (1989) (*quoting Carlin Communication, Inc. v. FCC*, 837 F.2d 546, 555 (2nd Cir. 1988)). At issue in *Sable* was a federal statute aimed at commercial “dial-a-porn” services. As originally enacted, the statute directed the FCC to promulgate regulations establishing means by which dial-a-porn services could screen out underage callers, and to establish affirmative defenses for services that

complied with those regulations. The FCC regulations provided for a defense if the caller paid by credit card or used an identification code (*i.e.* adult-check PIN) issued by the service and sent to the adult applicant by mail. Congress then changed the statute to impose an absolute ban on indecent as well as obscene messages, thereby eliminating the affirmative defenses available under the FCC regulations. The government defended the absolute ban on indecent speech by arguing that credit cards and adult-check PINs were ineffective. The Supreme Court disagreed, concluding that these measures *are* effective:

The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. *The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors.*

* * *

The [Congressional] Committee heard testimony from the FCC and other witnesses that the FCC rules would be effective and should be tried out in practice.

* * *

For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages.

Sable, 492 U.S. at 130.

Additional analysis was provided by the Second Circuit when it upheld the FCC's credit card/access code regulation in *Carlin*. Rejecting arguments similar to those made here by Plaintiffs, the Court decided that credit cards and adult-check PINs are an *effective means* of restricting juveniles from dial-a-porn. *Carlin Communication, Inc. v. FCC*, 837 F.2d 546 (2nd Cir. 1988). The Second Circuit characterized the FCC's credit card/age verification defense

regulations as analogous to the requirements that sexually oriented materials be displayed behind blinder racks. *Id.* at 557. Since credit cards and adult access codes pass muster when the issue is minors' access to "dial-a-porn," then they should likewise pass muster when the issue is minors' access to cyberporn.

When the General Assembly added the words "electronic file or message" in 1999, it had before it not only the decisions in *Sable* and *American Booksellers*, but also the language of COPA, where Congress found credit cards and access codes to be reasonable means of restricting access by minors. The General Assembly is presumed to know the state of the law. *See, e.g., Virginia Soc'y for Human Life v. Caldwell*, 256 Va. 151, 156, 500 S.E.2d 814, 187 (1988). *American Booksellers* informed the General Assembly that "reasonable steps" were a defense, while *Sable* and COPA informed it that reasonable steps included the use of credit cards and access codes. It is therefore reasonable to conclude that the General Assembly intended for the Act to be construed accordingly.

D. As A Practical Matter, There Is Nothing More A Website Operator Can Do.

Given the present state of technology, there is really nothing more that a website operator can do to deprive minors of access while still allowing adults to exercise their First Amendment right to view materials harmful to juveniles. The Plaintiffs apparently agree, as they have not identified a single alternative that website operators might implement. If the measures identified by the Commonwealth do not satisfy the statute, then the statute cannot be satisfied. If that is the case, there would be no way for a website to avoid violating the statute other than to *remove* all materials harmful to juveniles, even though those materials are constitutionally protected as to adults.

Thus, it seems this Court has two options. On the one hand, the Court may *accept* the Commonwealth's argument that adult verification devices and credit cards are reasonable measures that will satisfy the statute, and answer the first certified question in the affirmative. On the other hand, this Court may conclude that there are *no* reasonable measures available, and answer the first certified question in the negative. The first option will almost certainly lead to a finding by the Fourth Circuit that the statute is constitutional, just as the Fourth Circuit found the statute constitutional following this Court's decision in *American Booksellers*. Conversely, the second option will almost certainly lead to a finding by the Fourth Circuit that the statute is unconstitutional. Given these outcomes, the jurisprudence of this Court counsels adoption of the first option favoring the constitutionality of the statute.

This Court has laid down the firm principle that statutes of the General Assembly are to be construed in a manner that renders them constitutional:

[W]hen the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional. Therefore, a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.

Yamaha Motor Corp. v. Quillian, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002) (citing *Virginia Soc'y of Human Life v. Caldwell*, 256 Va. 151, 156-57, 500 S.E.2d 814, 816 (1998); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52, 392 S.E.2d 817, 820 (1990); *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940)). This principle is clearly implicated here. Construing the statute to recognize that the measures identified by the Commonwealth are "reasonable," within the meaning of this Court's opinion in *American Booksellers*, will likely lead to the statute being declared constitutional. Conversely, rejecting the measures identified by the Commonwealth

will not only raise a constitutional question, but will almost certainly lead to a decision by the Fourth Circuit that the statute is unconstitutional.

II. THE TERM “DISPLAY FOR COMMERCIAL PURPOSE” APPLIES ONLY TO DISPLAYS MADE IN CONNECTION WITH THE “SALE, RENTAL, OR LOAN” OF HARMFUL MATERIALS.

The second question certified by the Fourth Circuit asks the following:

Does the prohibition against knowingly displaying pornographic materials that are “harmful to juveniles” apply to displays made only in connection with the sale rental, or loan of such materials? If not, what must the government establish to prove that a defendant has knowingly displayed such materials “for commercial purpose:?”

317 F.3d. at 419. By its wording of this question, the Fourth Circuit implicitly suggests a narrow construction of the phrase “display for commercial purpose,” which the 1985 amendment added to the list of acts prohibited by the statute. This narrow construction – which the Commonwealth believes is correct – stands in sharp contrast to the virtually unbound definition of commercial purpose advocated by Plaintiffs throughout this litigation. Before explaining why the narrow construction advocated by the Commonwealth and implicitly suggested by the Fourth Circuit must be adopted, it may be helpful to explain in more detail the competing alternative.

According to Plaintiffs, an Internet operator can be in violation of the “commercial purpose” clause even if it is “not selling *anything* over the Internet.” JA 850 (emphasis added). App’ee Fourth Cir. Br. at 23. The example they give is a hypothetical bookstore in Berkeley, California. They describe the bookstore as having “a website where it posts contents from new offerings” and “a chat room” where patrons and others can “discuss what they’ve read.” JA 850. Suggesting that some of the Berkeley chatter might qualify as harmful to minors, they contend that the bookstore would be in violation of the statute:

[I]t's displaying that material. It's doing it for a commercial purpose, but it's not selling anything over the Internet. It is simply making this available as an adjunct to its bookstore business. The bookstore has no interest in Virginia, not trying to sell anything to Virginia, doesn't have anything against Virginia, but it's simply operating out in California.

Now, suppose a Virginia juvenile gets on the Internet and decides to participate in that conversation out there in California? That puts the proprietor of that bookstore in California at risk of prosecution if it is displaying on its web site, which is part of its commercial activity in California, something that the communities, say in Danville or Lynchburg, might consider harmful to the Virginia juvenile.

JA 850-51. Plaintiffs contend that it would violate the Commerce Clause for Virginia to regulate such activity by the bookstore in California. JA 851. However, they attack a straw man. The statute simply does not apply to the situation they describe.

There are at least three reasons why the narrow construction suggested by the Fourth Circuit and advocated by the Commonwealth must be favored over the construction offered by Plaintiffs. First, the narrow construction is consistent with the legislative purpose of the 1985 "commercial purpose" amendment, a purpose this Court explained in *American Booksellers*. The Plaintiffs' broad construction goes far beyond that purpose. Second, the narrow construction advocated by the Commonwealth is mandated by two familiar maxims of statutory construction: *noscitur a sociis* and *ejusdem generis*. The Plaintiffs' construction ignores these maxims. Third, under the narrow interpretation, the 1999 amendment is constitutional, but under the Plaintiffs' construction, it would be struck down. It is well-settled that when confronted with two alternative interpretations of a statute, one which results in constitutionality and one which results in unconstitutionality, this Court will adopt the interpretation that results in a finding of constitutionality so long as that interpretation is plausible.

A. This Court's Decision In *American Booksellers*.

In *American Booksellers*, this Court explained the purpose of the phrase to “knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse.” It said:

The 1985 amendment adds nothing to the dual burden which the booksellers have borne since 1970. Its legislative purpose is plain: to preclude the perusal, by juveniles standing in a bookstore, of harmful materials they are unable to buy. Without the 1985 amendment, the protection of juveniles from harmful materials was obviously incomplete. *The thrust of the amendment, therefore, was directed at the perusal of harmful materials by juvenile readers in bookstores, not at the method chosen by booksellers to display their wares for adults. . . .*

The 1985 amendment is aimed at detailed examination of the kind embraced in the foregoing definition, not the casual examination available to a customer who simply surveys the labels, jackets, or dustcovers of books displayed on a bookseller's shelves. We therefore conclude that *the amendment is aimed not at the method chosen by the bookseller to display his wares for sale, but at the opportunity he may afford to juveniles to take off the shelves books which they are unable to buy, and to read them in the store.*

American Booksellers, 236 Va. at 178, 372 S.E.2d at 624 (emphasis added). In other words the purpose of the words “display for commercial purpose” was to regulate displays of pornographic materials made in connection with the “sale, rent or loan” of such materials (including the holding out of such materials for sale, rent or loan). The 1999 amendment did not change these terms, and there is no reason to believe that the scope of the display provision was intended to expand to cover the hypothetical situation created by Plaintiffs’ expansive reading of the statute.

B. Maxims of Statutory Construction Mandate A Narrow Construction.

Second, the maxims of statutory construction employed by this Court support a narrow interpretation. For example, the maxim *noscitur a sociis* or “it is known from its associates” explains that the meaning of a word takes color and expression from the entire phrase of which it is a part and must be in read in harmony with its content. *Woolfolk v. Commonwealth*, 18 Va. App. 840, 447 S.E. 530 (1994). Similarly, the maxim of *ejusdem generis* states that “when a

particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words.” *Martin v. Commonwealth*, 224 Va. 298, 301, 295 S.E.2d 890, 892 (1982). Applying these maxims, the term “commercial purposes” must be limited to the sale, rental, or loan of those items as explicitly referenced in the same statutory sentence. It cannot encompass items that are not listed in the statute or which are not analogous to items listed in the statute. *See Martin*, 224 Va. at 302, 295 S.E.2d at 893. Since the General Assembly only mentions pornographic materials, the term “commercial purposes” must be understood as meaning the sale, rental, or loan of *pornographic materials*. If the General Assembly had intended to include products other than pornography, it would have used words such as “any other product.” By not using such words, the General Assembly made it clear that the term “commercial purposes” is limited to pornographic materials.

C. Because the Plaintiffs’ Extreme Construction Would Result In A Finding Of Unconstitutionality, It Must Be Rejected.

As explained above, this Court has laid down a firm principle that statutes of the General Assembly are to be construed in a manner that renders them constitutional. *Yamaha Motor Corp.*, 264 Va. at 665, 571 S.E.2d at 126. Thus, if there are two fairly plausible interpretations of a particular statute, one which will result in a finding of constitutionality and one which will result in a finding of unconstitutionality, this Court should adopt the interpretation which results in a finding of constitutionality. *See INS v. St. Cyr*, 533 U.S. 289, 299 n.12, (2001) (reaffirming such a rule for the federal courts); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988). To construe this statute in a manner that avoids constitutional problems, this Court must

ask whether the Plaintiffs' extreme construction results in a finding of constitutionality. If it does not, then the Plaintiffs' construction must be rejected.

Quite simply, the Plaintiffs' construction of the statute – as described above – would result in a finding of unconstitutionality because it would violate the dormant Commerce Clause, a point Plaintiffs have made repeatedly and which the Commonwealth does not dispute. Where an out-of-state website offers nothing for sale and has no other contact with Virginia than being accessible here – just as it is accessible from everywhere else in the world – any attempt by Virginia to regulate that website would be an unconstitutional attempt to regulate commerce “wholly outside the State” and a violation of the dormant Commerce Clause. *See Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). Conversely, the Commonwealth's narrow interpretation does not result in such wholly extra-territorial application and would support a finding of constitutionality. Therefore, this interpretation must be preferred.

III. ANSWERING THE FOURTH CIRCUIT'S QUESTIONS WILL RESOLVE THIS LITIGATION.

In accepting the certification of issues from the Fourth Circuit, this Court directed the parties to brief the issue of “whether the certified questions are outcome determinative.” Order, March 6, 2003. Resolution of this issue is clear and straightforward. Quite simply, answering the Fourth Circuit's questions will determine whether the 1999 Amendment is constitutional and, thus, dispose of the litigation. As the Fourth Circuit observed:

[T]he scope of the 1999 Amendment *is determinative of whether the statute is constitutional at this time*. Ascertaining the scope of the law's coverage and what compliance measures would preclude conviction is necessary for resolution not only of the First Amendment claim, but also for resolution of the dormant Commerce Clause claim, should it be necessary for us to reach the latter issue.

317 F.3d at 422 (emphasis added). In other words, the Fourth Circuit has signaled that it has already resolved all other issues associated with this litigation. Yet, the outcome of the litigation is still in doubt because of uncertainty as to “the scope of the law’s coverage and what compliance measures would preclude conviction.” *Id.* Once this Court resolves the uncertainty regarding these points, then the outcome becomes certain.

The first certified question – dealing with compliance measures – is really a inquiry about what are “reasonable efforts to prevent perusal of harmful materials by juveniles.” *American Booksellers*, 236 Va. at 179, 372 S.E.2d at 625. By certifying this question, the Fourth Circuit implicitly has signaled that it has already reached two key conclusions. First, preventing minors from accessing pornography is a compelling governmental interest, a point that Plaintiffs have conceded. App’ees Fourth Cir. Br. at 29. Second, implementation of adult-only web pages through use of credit cards and adult-check PIN advances that compelling governmental interest without unduly burdening pornographic websites. In other words, the Fourth Circuit has implicitly concluded that it is not overly burdensome, as a constitutional matter, to require pornographic websites to implement the identified technological access controls. However, that conclusion leaves unresolved the issue of whether a pornographic website that implements such measures can still be prosecuted.

If this Court concludes that use of the identified measures would preclude a conviction under the statute, then pornographic websites have a means of complying with the law without being unconstitutionally burdened. They merely have to implement the technological access controls, measures that the Fourth Circuit apparently regards as not unconstitutionally burdensome, and they will avoid prosecution. Conversely, if this Court concludes that these measures do not constitute the “reasonable efforts” necessary to comply with the law, then the

only means of complying with the law would be to remove the harmful materials from the website. Requiring such a drastic curtailment of speech would create a substantial constitutional problem and the Fourth Circuit would strike it down. Thus, one way or the other, a resolution of the certified question will determine the outcome of the First Amendment challenge.

The second certified question is essentially whether the “commercial purpose” provision is limited to displays in connection with the sale, rental, or loan of harmful material or whether it reaches so far as to encompass the hypothetical applications feared by Plaintiffs. For reasons already explained, accepting the Plaintiffs’ extreme interpretation will put the statute in violation of the Commerce Clause, while the Commonwealth’s interpretation will lead to a finding of constitutionality.⁹ Moreover, by asking this question the Fourth Circuit implies that it has already reached the conclusion that different constitutional results will stem from the two competing interpretations. Thus, one way or the other, a resolution of the second question will determine the outcome of the Commerce Clause challenge.

CONCLUSION

For the foregoing reasons, the questions certified by the Fourth Circuit should be answered as follows:

1. The first question should be answered in the affirmative. The use of any of the technological access controls identified by the Attorney General of Virginia (*i.e.*, credit card numbers and adult-check PINs) would preclude conviction under Virginia Code § 18.2-391, as amended in 1999.

⁹ There may be other interpretations of the amendment that are broader than the one advocated by the Commonwealth but narrower than the extreme interpretation advanced by the Plaintiff’s. Where such an interpretation may fit on the continuum between these two positions would determine whether it results in a finding of constitutionality or unconstitutionality.

2. The second question should be answered in the affirmative. The prohibition against knowingly displaying pornographic materials that are "harmful to juveniles" only applies to displays made in connection with the sale, rental, or loan of such materials.

Respectfully submitted,

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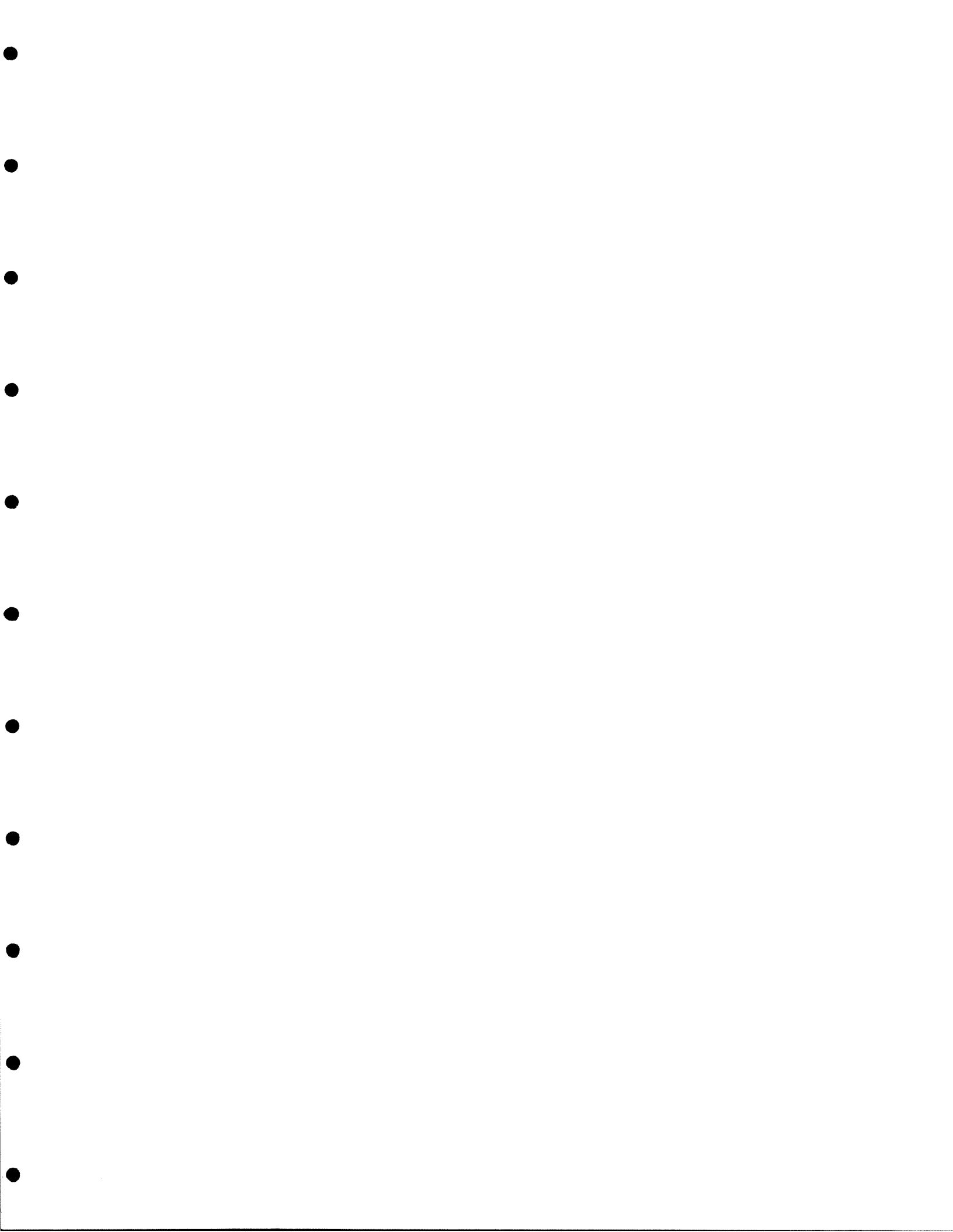
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Appellants was mailed on this 15th day of April, 2003, to Garrett M. Smith, Michie Hamlett Lowry Rasmussen & Tweel, 500 Court Square, Suite 300, P. O. Box 298, Charlottesville, Virginia 22902, and Thomas W. Kirby, Wiley, Rein & Fielding, 1776 K Street N.W., Washington, D.C. 20006.


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April 15, 2003

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BY HAND

The Honorable David B. Beach
Clerk
Supreme Court of Virginia
100 North 9th Street, 5th Floor
Richmond, Virginia 23219

Re: ***PSINET v. Chapman***
Case No. 030235

Dear Mr. Beach:

Please find enclosed 20 briefs of appellant and 20 copies of the Joint Appendix to be filed in the above-referenced case. Volumes IV and V of the Joint Appendix are filed separately.

If you have any questions or concerns, please do not hesitate to call me at (804) 225-4226.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen Riley Matsen".

Maureen Riley Matsen
Deputy State Solicitor

Enclosures

cc: Counsel of Record