IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Southeast Booksellers Association, et al.,

Plaintiffs,

v.

Henry D. McMaster, Attorney General of South Carolina, et al.,

Defendants.

C.A. No. 2:02-3747-23

ORDER

In this action, Plaintiffs have brought a pre-enforcement constitutional challenge to permanently enjoin the operation of S.C. Code § 16-15-375, which provides criminal sanctions for "disseminating harmful material to minors." *See* S.C. Code Ann. § 16-15-375; S.C. Code Ann. § 16-15-385 (collectively hereinafter "the Act"). The parties are now before the court upon cross motions for summary judgment. Having throughly considered the parties' submissions, the oral arguments, the applicable law, and the entire documented record, the court grants Plaintiffs' motion for summary judgment, and denies Defendants' motion.

BACKGROUND

Plaintiffs, with the exception of Families Against Internet Censorship ("FAIC"),[1] are organizations that represent artists, writers, booksellers, and publishers who use the Internet to engage in expression, including graphic arts, literature, and health-related information. Most

[1] FAIC is an organization that represents families with Internet access and at least one child. These families are advocates of the right to "acquire educational and artistic material" via the Internet. (Compl. ¶ 10.) FAIC fights against government regulation and censorship of Internet content, arguing that parents should have ultimate authority over the content to which their children are exposed on the Internet.

of these organizations maintain their own websites which contain resources on obstetrics, gynecology, and sexual health; visual art and poetry; and other speech which could be considered "harmful to minors" in some communities under the Act, despite the fact that their speech is constitutionally protected as to adults.

The Act provides criminal sanctions for "disseminating harmful material to minors." The term "harmful to minors" is defined by S.C. Code Ann. § 16-15-375(1), which provides:

> "Harmful to minors" means that quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:
> (a) the average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and
> (b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and
> (c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

S.C. Code Ann. § 16-15-375. A violation of § 16-15-375 is a felony, punishable by up to five years in prison, a fine of $5,000, or both. *See* S.C. Code Ann. § 16-15-385.

The controversy in this case centers primarily around an amendment to the Act, signed by former Governor Jim Hodges on July 20, 2001, which added the following definition of "material":

> "Material" means pictures, drawings, video recordings, films, *digital electronic files, or other visual depictions or representations* but not material consisting entirely of written words."

S.C. Code § 16-15-375 (2) (emphasis added). Pursuant to this amendment, the Act proscribes the dissemination to minors of obscene "digital electronic files."

Plaintiffs allege that this proscription violates the First Amendment and the Commerce

Clause because it prohibits adults, and even older minors, from viewing and sending constitutionally-protected images over the Internet and has the effect of prohibiting constitutionally-protected communications nationwide. (Compl. ¶ ¶ 1; 78-81; 84-86). With respect to their First Amendment claim, Plaintiffs argue that the Act, as a content-based restriction on speech, cannot survive strict scrutiny and is unconstitutionally overbroad because it substantially infringes on protected speech of adults. As for their Commerce Clause arguments, Plaintiffs contend that the proscription constitutes an unreasonable and undue burden on interstate and foreign commerce and subjects interstate use of the Internet to inconsistent state regulation. (Compl. ¶ ¶ 84-86)

PROCEDURAL HISTORY

On February 6, 2003, Defendants moved to dismiss the action, arguing that Plaintiffs lacked standing to pursue their First Amendment and Commerce Clause challenges. Defendants also argued that the Complaint was subject to dismissal for failure to state a claim upon which relief could be granted because the statute, properly construed, did not violate either the First Amendment or the Commerce Clause. Following a hearing, the court considered and rejected each of Defendants' arguments. *See Southeast Booksellers v. McMaster,* 282 F.Supp.2d 389 (D.S.C. 2003).

Shortly thereafter, both sides moved for summary judgment. This court held the cross-motions for summary judgment in abeyance pending the United States Supreme Court's decision in *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004), due to the similarities between the relevant provisions of the Child Online Protection Act ("COPA"), which were under review in *Ashcroft*, and those at issue in the present action. On June 29, 2004, the Supreme Court issued its opinion

in *Ashcroft*. Finding the pending summary judgment motions ripe for adjudication after *Ashcroft,* the court issued its ruling denying summary judgment to both sides on July 6, 2004.[2]

In the July 6, 2004 ruling, the court denied Defendants' motion for summary judgment on the basis that Defendants simply reasserted arguments previously addressed and rejected by the court at the motion to dismiss stage. The court concluded that there was no basis to disturb its previous disposition of those arguments. With respect to Plaintiffs' motion, the court concluded that summary judgment was inappropriate under the reasoning of *Ashcroft*. Specifically, the court denied summary judgment pursuant to the *Ashcroft* Court's admonition that a full trial on the merits might be necessary before a court could rule on the constitutionality of a statute such as the one at issue in order to allow for adequate development of the record with respect to the question of plausible, less restrictive alternatives. At the time of the court's July 6th Order, the record simply did not contain sufficient evidence regarding the effectiveness of less restrictive alternatives vis-a-vis the challenged statute.

On October 7, 2004, Plaintiffs filed an updated motion for summary judgment including the Supplemental Expert Declaration of Dr. Lorrie Faith Cranor ("Cranor Declaration"), in which Cranor discusses relevant facts concerning the operation of the Internet, the current state of Internet technology, and technological alternatives to the South Carolina statute. On November 24, 2004, Defendants filed their updated motion for summary judgment, including a Declaration of Dr. Dan R. Olsen, Jr ("Olsen Declaration"), who, like Cranor, offers a factual

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[2] After the court's denial of the summary judgment motions, Defendants requested that the court hold the case in abeyance "until such time as a final decision is reached in [sic] *ACLU v. Ashcroft* on remand and on any subsequent review by the Court of Appeals for the Third Circuit and the United States Supreme Court." (Def. Motion for Stay or to Hold in Abeyance at 1). The court denied this request on October 13, 2004.

account of pertinent Internet technology. Through these expert declarations, both parties attempt to answer the question of whether the restriction at issue is the least restrictive means of furthering the goals of the statute.

ANALYSIS

In seeking summary judgment on their First Amendment claim, Plaintiffs argue that the Act fails strict scrutiny because Defendants have failed to prove that the Act is the least restrictive means of preventing minors from using the Internet to access materials deemed harmful to them. Moreover, Plaintiffs contend that the Supreme Court's ruling in *Ashcroft* does not require a full trial on the merits, where, as here, Defendants have failed to present adequate evidence demonstrating that the Act is the least restrictive alternative. Finally, Plaintiffs argue that their Commerce Clause claim is squarely governed by *PSINet, Inc. v. Chapman,* 362 F.3d 227, 239-240 (4th Cir. 2004), in which the Fourth Circuit held that a Virginia law criminalizing the dissemination of material harmful to minors over the Internet violated the Commerce Clause.

Defendants, on the other hand, argue that summary judgment in their favor is appropriate because they have "shown that South Carolina's restrictions on dissemination of harmful material to minors does not unduly burden adults' access to protected speech," and because "the alternatives suggested by the Plaintiffs are not less restrictive." (Def. Mem. at 1). Defendants then argue that they are entitled to summary judgment on the Commerce Clause claims because they have shown that South Carolina's restrictions on dissemination of harmful material to minors does not burden commerce.

The court begins by considering the First Amendment claim, and in particular, by explaining the *Ashcroft* holding and its import on the matter *sub judice*. The court then

considers whether the Act violates the Commerce Clause.

I. The First Amendment Claim

A. The Ashcroft Holding

In *Ashcroft*, the Supreme Court held that Internet content providers and civil liberties groups were entitled to a preliminary injunction against enforcement of the Child Online Protection Act ("COPA") because the plaintiffs were likely to prevail on their claim that COPA violated the First Amendment by unduly burdening adults' access to protected speech. 1245 S.Ct. at 2794. Notably, however, the Supreme Court stopped short of declaring COPA unconstitutional. *Id.* at 2793 - 95. The Court held that, instead of considering the broader question of the constitutionality of COPA, the United States Court of Appeals for the Third Circuit should have remanded the case to the district court to conduct a "full trial on the merits."[3]

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[3] In *Ashcroft*, the plaintiffs initially sought and received a preliminary injunction in district court against enforcement of COPA. The Government appealed the district court's decision to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the preliminary injunction, but on a different ground. 217 F.3d 162, 166 (3d Cir. 2000). The Third Circuit concluded that the "community standards" language in COPA by itself rendered the statute unconstitutionally overbroad. *Id.* The Supreme Court granted certiorari and reversed, holding that the community-standards language did not, standing alone, make the statute unconstitutionally overbroad. *Ashcroft I*, 535 U.S. at 585. The Court remanded the case to the Third Circuit to reconsider whether the district court had been correct to grant the preliminary injunction. On remand, the Third Circuit again affirmed the district court. 322 F.3d 240 (3d Cir. 2003). This time, the Court of Appeals concluded that the statute was not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them. *Id.* at 266-71. The Supreme Court again granted certiorari. 540 U.S. 944 (2003). The Court upheld the Third Circuit's decision insofar as it affirmed the entry of the preliminary injunction, but the Court specifically declined to engage in the statutory construction embraced by the Court of Appeals. *Id.* at 6 ("[W]e agree with the Court of Appeals that the District Court did not abuse its discretion in entering the preliminary injunction. Our reasoning in support of this conclusion, however, is based on a narrower, more specific grounds than the rationale the Court of Appeals adopted. The Court of Appeals, in its opinion affirming the decision of the District Court, construed a

Id. at 2794. The Court held in relevant part as follows:

> A statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving [the legislature's] goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve [the legislature's] legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Id. at 2791 (internal quotation marks and citations omitted) (first alteration in original). Applying this framework, the Court held that the district court should conduct a trial before ruling on the constitutionality of COPA in order to allow for adequate development of the record with respect to the question of plausible, less restrictive alternatives to the statute. *Id.* at 2794.

B. *Ashcroft's* Impact on the Pending Motions

Plaintiffs argue that while the Supreme Court in *Ashcroft* directed the district court to undertake additional factual development, *Ashcroft* does not dictate that the court hold a trial to resolve the matter *sub judice*. Plaintiffs distinguish *Ashcroft* on four principal bases: (1) the record in this case is not stale, as it was in *Ashcroft*; (2) the procedural posture of *Ashcroft* and

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number of terms in the statute, and held that COPA, so construed, was unconstitutional. None of those constructions of statutory terminology, however, were relied on by or necessary to the conclusions of the District Court.").

this case differ significantly; (3) the Act is a total ban on speech, whereas COPA provided safe harbors or affirmative defenses to some speakers and thus factual development on those issues had the potential to render the act constitutional; and (4) the existence of COPA itself demonstrates that the Act is not the least restrictive alternative, as COPA was more narrowly tailored and still was potentially problematic in the Supreme Court's eyes.[4]

The court agrees that *Ashcroft* is distinguishable for many of the reasons cited by Plaintiffs. First, as Plaintiffs note, the record in this case reflects the current state of Internet technology, including the availability and usefulness of filtering software and other blocking tools. In *Ashcroft,* at least one of the Court's bases for remanding for additional factfinding was that the factual record did "not reflect current technological reality" where the factfinding of the district court had been entered over five years before the case reached the Supreme Court. 124 S.Ct. at 2794. As the Court noted, this constitutes a "serious flaw in any case involving the Internet" because "the technology of the Internet evolves at a rapid pace." *Id.* In contrast, the present case does not involve stale information, as both parties' expert disclosures have been prepared in the last year and a half. Moreover, Plaintiffs' expert, Dr. Cranor, affirms in a

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[4] Importantly, Defendants do not argue that *Ashcroft* requires a full trial on the merits. In fact, both parties conceded at oral argument that a trial was unnecessary as the case was ripe for disposition on the record presently before the court.

As discussed more fully below, Defendants, for the first time, raise affirmative arguments that the Act is the least restrictive means of accomplishing the state's goals. To this end, Defendants state simply that

> the least restrictive alternative is the statute in question because an internet publisher can use age verification measures or labeling to block access to harmful material by minors while imposing minimal burdens on users or internet publishers. Filtering, which Plaintiffs advocate, is not completely effective and imposes financial burdens on families.

(Def. Mem. at 2).

Supplemental Declaration that her earlier conclusions regarding "[I]nternet technology, the ineffectiveness of the Act, and the greater effectiveness of less restrictive alternatives remain true today." (Pl. Mem. at 8; Cranor Suppl. Decl. at ¶¶ 3, 4). There is no danger of stale information on Defendants' part, either, as Defendants' expert, Dr. Olsen, prepared his report on the technological issues in November of 2004. Given Cranor's uncontroverted affirmation that her report reflects current technology, and that Olsen's report was only recently prepared, the stale information concern that motivated the *Ashcroft* Court to remand for additional factfinding and a full trial is not at issue here.

Moreover, as Plaintiffs point out, *Ashcroft* arose in a decidedly different procedural posture than the matter *sub judice*. In *Ashcroft,* the question presented was whether the district court had acted properly in *preliminarily enjoining* COPA based on its determination that the plaintiffs were likely to succeed on the merits. Thus, the district court had only made a threshold determination, based on the preliminary evidence before it, as to the ultimate merits of the plaintiffs' claims. *See Ashcroft,* 124 S.Ct. at 2795 ("The parties, because of the conclusion of the Court of Appeals that the statute's definitions rendered it unconstitutional, did not devote their attention to the question whether further evidence might be introduced on the relative restrictiveness and effectiveness of alternatives to the statute."). In the matter *sub judice*, in contrast, the parties' briefing is devoted to precisely the issues of relative restrictiveness and effectiveness of alternatives to the Act, as the case is already at the summary judgment/permanent injunction stage.[5]

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[5] In addition, the questions surrounding the alternative technologies at issue have been repeatedly litigated recently in both the Supreme Court and the Fourth Circuit, rendering the court's task of making determinations about the restrictiveness and effectiveness of available

Additionally, the fact that COPA contained safe harbor and affirmative defense provisions for speakers who restricted access to prohibited materials by using age verification measures may explain the Court's remand for additional factfinding.[6] Because the Act was not a total ban on "harmful to minors" speech, it was possible that, upon remand and additional factfinding on credit card verifications and digital pins, COPA could be found to be constitutional. The same is not true with respect to the Act, as it constitutes a total ban on speech and explicitly provides that mistake of age does not constitute a defense to criminal liability. Thus, while further factfinding in *Ashcroft* could serve the purpose of proving that COPA was constitutional, the same cannot be said here.[7] *Cf. PSINet,* 362 F.3d at 227 ("Both sides concede that the 1999 Act is not narrowly tailored if it effects a total ban on the display of all 'electronic file[s] or message[s]' containing 'harmful' words, images or sounds records . . . as the plain language of the statute seems to indicate."). While the State does not concede that this is true with respect to the Act, as explained more fully below, the Act, which, unlike COPA, is absent any safe harbors and affirmative defenses and constitutes a total ban on an entire

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technologies all the easier.

[6] COPA contains an affirmative defense which shields from liability Internet speakers who restrict access to prohibited materials through (1) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," or (2) acceptance of a "digital certificate that verifies age," or (3) "any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1).

[7] As an additional distinguishing factor not cited by Plaintiffs, remand in *Ashcroft* was at least partially premised on the notion that the district court should "take account of a changed legal landscape[,]" as in the intervening years between the district court and Supreme Court opinions, Congress had passed at least two additional statutes that "might qualify as less restrictive alternatives to COPA[.]" 124 S.Ct. at 2795. In stark contrast, the court is aware of no actions by the South Carolina legislature that would in any way impact the least restrictive alternatives determination.