UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SOUTHEAST BOOKSELLERS ASS'N, *ET AL.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	C.A. No. 2 02 3747 23
	)	
	)	
	)	
HENRY D. MCMASTER, ATTORNEY GENERAL, *ET AL.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In their motion for summary judgment, defendants merely rehash three contentions that this Court has already rejected. See Defendants' Memorandum in Support of Motion for Summary Judgment ("Defs. Mem."); Order Denying Defendants' Motion to Dismiss or, in the Alternative, to Abstain or Certify, Dated July 25, 2003 ("July 25 Order"). Specifically, this Court has already rejected defendants' arguments (1) that scienter, mens rea, and criminal intent "are elements or affirmative defenses" of the Act (Defs. Mem. at 3); (2) that plaintiffs lack standing; and (3) that the Act survives First Amendment strict scrutiny (a) because it criminalizes only material that contains at least some visual depiction, and (b) because it employs the established "harmful to minors" standard.

These arguments still have no merit. As to the first and third, Defendants do nothing more than repeat arguments explicitly rejected by this Court's July 25 Order. There is no reason

for the Court to depart from its earlier rulings, which were grounded in well-established precedent. As to the second, in addition to rehearsing their prior arguments, defendants cite an earlier decision from the Southern District of New York for a proposition that contrasts starkly with the standard set forth repeatedly by the Supreme Court and the Fourth Circuit -- which this Court properly applied in its July 25 decision -- and even with more recent Second Circuit precedent. A misstatement of law in a decision from the Southern District of New York hardly provides any basis for the Court to ignore the Supreme Court and Fourth Circuit standard.

Finally, defendants do not even dispute that the Act imposes restrictions on communications occurring wholly outside the State of South Carolina, and subjects online speakers to inconsistent state obligations. Each of these independent bases for plaintiffs' Commerce Clause claim is, by itself, sufficient grounds for striking down the Act.[1/]

Accordingly, defendants' motion for summary judgment should be denied.

I. DEFENDANTS' SCIENTER ARGUMENT URGES IMPERMISSIBLE JUDICIAL LAWMAKING AND IS -- IN ANY EVENT -- CONSTITUTIONALLY IRRELEVANT

Defendants concede, as they must, that the Act as written provides for criminal sanctions for disseminating harmful material to minors without regard to a party's intent, or lack thereof.

[1/] Defendants cite the certification of a similar state statute to the Virginia Supreme Court in *PSINet, Inc. v. Chapman*, 317 F.3d 413 (4th Cir. 2003), as evidence that construing the South Carolina Act to include an intent element could preclude the *third* of the independent grounds for a Commerce Clause violation. Specifically, defendants contend that "if the statutes in question are interpreted as including a scienter or mens rea element, plaintiffs could not show a significant burden, if any, on commerce in relation to local benefits." (Defs. Mem. at 10)

That argument, however, is squarely at odds with the holding of the Virginia Supreme Court, which declined to construe that statute's "knowledge" requirement *on the ground that* the element "bears no relation to" and "would not be determinitive of" the Commerce Clause issue. *PSINet, Inc. v. Chapman*, No. 030235, at 3 (Va. Sept. 12, 2003) (attached at Appendix A).

(Defs. Mem. at 3). Indeed, the Act explicitly precludes a safe harbor or scienter requirement, stating that, in the absence of certain exceptions not applicable in this case, "mistake of age is not a defense to prosecution under this section." S.C. CODE ANN. § 16-15-385(C). Nonetheless, Defendants argue that the statute "should be construed" to include defenses of criminal intent, scienter or mens rea. (Defs. Mem. at 3.); *see also ibid*. (scienter, mens rea, and criminal intent "are elements or affirmative defenses" of the Act); *id*. at 14 ("the statute incorporates elements of mens rea, scienter and criminal intent").

The statutory revision they urge, however, is impermissible under South Carolina law, which requires that "[w]hen the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language." *Hodges v. Rainey*, 341 S.C. 79, 87 (2000); *see also Fitts v. Kolb*, 779 F. Supp. 1502, 1511 (D.S.C. 1991) ("The South Carolina Supreme Court has also recognized that courts generally should not invade the province of the legislature by judicially rewriting state statutes."). *Cf. United States v. Albertini*, 472 U.S. 675, 680 (1985) ("Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature."). This Court therefore correctly held that it was not at liberty to "rewrite the express provisions" of the Act to include a scienter element. (July 25 Order at 12.) That conclusion should not be disturbed.

In any event, as this Court (July 25 Order at 13) and the United States Supreme Court have recognized, *Reno v. ACLU*, 521 U.S. 844 (1997), even if the implausible construction defendants suggest were adopted, it *would not eliminate the Act's constitutional infirmity*. The federal government, in its unsuccessful attempt to defend a similar statute, urged the same limiting construction that defendants suggest here, namely that it was a crime to disseminate over the Internet material deemed "harmful to minors" *only* where the transmitter *knew* that the

recipients were under 18. *Id*. at 880. The Supreme Court held that such a knowledge requirement, even if present, would not save the statute:

> [M]ost Internet forums-- including chat rooms, newsgroups, mail exploders, and the Web--are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. . . It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17 year-old child . . . would be present.

Id.; *accord ACLU v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999) (affirmative defenses to Internet harmful-to-minors law "do not salvage an otherwise unconstitutionally broad statute"). Thus Supreme Court precedent leaves no doubt that, even if this federal district court *could* interpret the state Act to provide a scienter requirement, such revision would not cure the Act's constitutional infirmity.[2/]

II. PLAINTIFFS HAVE STANDING

This Court, in its July 25 Order, held that each of the six plaintiffs had successfully pled the elements of standing. (July 25 Order at 3-6.) By means of declarations attached to their Motion for Summary Judgment, plaintiffs have placed ample evidence of each of those elements into the record in this case. The Supreme Court and lower federal courts across the country have -- on factual records materially identical to that here -- upheld the standing of several of the plaintiffs in this case, along with other similarly-situated plaintiffs, to challenge federal and state criminal laws similar to the Act challenged here.

[2/] Defendants once again make the inscrutable suggestion that the Act's "exclusion of entirely written material may also eliminate the heckler's veto of which Plaintiffs complain." (Defs. Mem. at 14.) Yet the scenario feared by the Supreme Court is no less likely if the communication includes, for example, a representation of a statue or drawing, whether or not it is accompanied by words.

Now, citing a case from the Southern District of New York, *Nitke v. Ashcroft*, 253 F. Supp. 2d 587, 596 (S.D.N.Y. 2003), defendants contend that there is an additional requirement for standing under the First Amendment: speaker plaintiffs must "assert that they have refrained from speaking." (Defs. Mem. at 13.)[3/] This conclusion, however, conflicts with the standard repeatedly applied by the Supreme Court and the Courts of Appeals, including the Second Circuit.

In *Nitke*, the district court relied on the Supreme Court's statement in *Laird v. Tatum*, 408 U.S. 1 (1972), that "allegations of a subjective 'chill' are not an adequate substitute for" the required elements of standing: "a claim of specific *present objective harm* or *a threat of specific future harm*." *Id*. at 13-14. (emphasis added).

Laird rejected plaintiffs' claims of standing, however, because of the attenuated connection between the alleged chill and the challenged governmental action, *i.e.*, *Laird* *was a case about causation*. *Laird,* therefore, stands for the proposition that a plaintiff's subjective decision to stop speaking, alone, cannot manufacture standing. An allegation of chill -- present or future -- instead requires a causal connection to "an 'objectively reasonable' fear of prosecution," *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 30-31 (1st Cir. 1999) (citing *Laird*, 408 U.S. at 13); *see also*, *e.g.*, *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 835 (6th Cir. 2001) (the mere fact that a plaintiff "subjectively fears . . . sanctions" or "feels inhibited" by the government's sanctioning power, does not "objectively establish" threat of chill

[3/] Defendants' argument does not, in any event, implicate the standing of Plaintiff Families Against Internet Censorship (FAIC) and its members, whose claim arises not from the First Amendment's protections accorded to speakers, but from the rights of *listeners*. *See Va. St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 ("[T]he protection afforded is to the communication, to its source and to its recipients both."). FAIC does not claim that its members' speech will be chilled; rather, it contends that a credible fear of prosecution will limit the amount of protected speech to which they will have access on the Internet, as speakers are forced to choose between self-censorship and the threat of criminal sanctions.

sufficient for standing); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) ("[I]f no credible threat of prosecution looms, the chill is insufficient to sustain the burden that Article III imposes. A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable.").

Plaintiffs have not, as defendants mistakenly assert, alleged a "subjective chill" (Defs. Mem. at 13). To the contrary, they have alleged, and established, an "objectively reasonable" fear of prosecution, which satisfies the test for standing prescribed by the Supreme Court, and set forth in this Court's July 25 Order.

The correct test was employed by the Second Circuit -- the Circuit in which the *Nitke* court is located -- in *American Booksellers Foundation v. Dean*, 342 F.3d at 101, decided five months after *Nitke*. *American Booksellers* involved a challenge to the Vermont "harmful to minors" Internet speech statute analogous to the Act at issue here. The court required no allegation by plaintiffs that they had refrained from speaking, and none was made. Rather, the court held:

> [The Act] presents plaintiffs with the choice of risking prosecution or censoring the content of their sites. Plaintiffs have therefore met the threshold for establishing standing for a First Amendment claim by demonstrating "'an actual and well-founded fear that the law will be enforced against [them].'" *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (*quoting Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

Id.

More importantly to this proceeding, this analysis tracks the rule set forth by the Supreme Court and followed by the Fourth Circuit. In stark contrast to defendants' contention that plaintiffs must silence themselves to establish standing, the Supreme Court has made clear that a justiciable case or controversy exists where plaintiffs have "alleged *an intention to engage in a*

course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. United Farmworkers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)); *see also North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) ("When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute.")[4/]

In *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), the Supreme Court held that plaintiffs had standing, despite defendants' reliance below on the absence of "proof that [plaintiffs] have been prosecuted, threatened with prosecution, or have detrimentally changed their behavior as a result of the amendment." *American Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691, 693-94 (4th Cir. 1986), *probable jurisdiction noted by* 479 U.S. 1082 (upholding standing); 802 F.2d 691, *judgment vacated by* 488 U.S. 905 (1988); *see Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. at 393 (concluding, nonetheless, that "the alleged danger of th[e] statute is, in large measure, one of self-censorship"). The requirements of standing are met instead where plaintiffs "will have to take significant and costly compliance measures or risk criminal prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. at 392.

Indeed, the ACLU and other plaintiffs in *Reno v. ACLU*, 521 U.S. 844 (1997), submitted affidavits expressly stating that they *did not intend* to delete materials from their Internet communications in order to avoid criminal liability. *See* Affidavit of Ira Glasser, Executive Director of the American Civil Liberties Union, in *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa.

[4/] This does not suggest, of course, that evidence of actual (subjective) chill, combined with an objectively reasonable fear of prosecution, cannot establish *present harm* sufficient to establish standing. However, it does mean that an intention to continue engaging in proscribed but protected conduct, in conjunction with a credible threat of prosecution, creates the type of *threatened future injury* on which standing may also be based.

1996), *aff'd Reno v. ACLU*, 521 U.S. 844 (1997) (available at http://archive.aclu.org/court/aclu.html (visited November 19, 2003)) ¶ 16 ("Because the ACLU believes that 'indecent' and 'patently offensive' material is protected by the Constitution even for minors, it does not currently intend to delete such materials from its online communications in order to avoid criminal liability.").[5/] The three-judge district court in that case rejected the government's suggestions that plaintiffs lacked standing, *see ACLU v. Reno*, 929 F.Supp. at 830, n.9, and the Supreme Court struck down the statute. 521 U.S. at 885.

Thus, to establish standing, speaker plaintiffs do *not* need to demonstrate actual or subjective changes in their behavior, but rather an objective threat of prosecution. "A non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *Bartlett*, 168 F.3d at 710; *see Mobil Oil Corp. v. Attorney Gen. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991) (courts will not assume that the legislature "enacted [a] statute without intending it to be enforced"); *see also Majors v. Abell*, 317 F.3d 719, 721 (7th

[5/] The affidavits from this case are available on the ACLU archive website, http://archive.aclu.org/court (visited November 19, 2003). *See, e.g.*, Affidavit of Glenn Hauman, President and Primary Stockholder of Plaintiff BiblioFile Books On Computer, doing business as BiblioBytes, at ¶ 7 (available at http://archive.aclu.org/court/biblio.html) ("[B]ecause BiblioBytes believes that 'indecent' and 'patently offensive' material is protected by the Constitution even for minors, it will not delete books that contain such materials from its online communications in order to avoid criminal liability."); Affidavit of Kiyoshi Kuromiya, Director of Plaintiff Critical Path Project, Inc., at ¶ 20 (available at http://archive.aclu.org/court/cp.html) ("Critical Path does not intend to attempt to censor the information it provides. In our view, to do so would be to condemn those who need the information to needless illness and death."); Affidavit of Audrie Krause, Executive Director of Plaintiff Computer Professionals for Social Responsibility, at ¶ 25 (available at http://archive.aclu.org/court/cpsr.html) ("CPSR currently has no plans to change either the content or access procedures of our various on-line services."); Affidavit of Marc Rotenberg, Director of Plaintiff Electronic Privacy Information Center, at ¶ 9 (available at http://archive.aclu.org/court/epic.html) ("Because EPIC believes that 'indecent' and 'patently offensive' material is protected by the Constitution even for minors, it will not delete such materials from its online communications in order to avoid criminal liability."); Affidavit of Patricia Nell Warren, partner with Wildcat Press Entertainment, at ¶ 9 (available at http://archive.aclu.org/court/wp.html) ("[D]espite the law's passage, in order to maintain our artistic and financial integrity, Wildcat Press currently does not intend to self-censor its Internet sites.").

Cir.2003) (plaintiffs need not show that their members' speech "clearly" fits within the terms of the Act, but need only show that the statute "arguably" covers the speech in question."). Accompanying their motion for summary judgment, the five speaker plaintiffs have introduced competent evidence establishing standing under this standard. Plaintiff FAIC, whose claim to standing is not implicated by defendants' arguments here, *see supra*, note 3, have also introduced competent evidence establishing standing on the basis of its members' right to receive information. Defendant's motion should therefore be denied.

III. THE ACT CANNOT SURVIVE STRICT SCRUTINY

Finally, Defendants contend that they are entitled to Summary Judgment because the Act is "narrowly drawn as to the material covered." (Defs. Mem. at 13-14.) These arguments reflect a misconception of the First Amendment's scope, and cannot save the Act.

Defendants first point out that the Act excludes material consisting entirely of written words, and criticizes Plaintiffs' reference "to material such as book contents and 'artistic, scientific or educational materials,'" because "such material would not be within the scope of the [Act] if it consisted 'entirely of written words.'"

Because the First Amendment protects the dissemination of visual images, this contention is immaterial.[6/] The Act violates the First Amendment by abridging the rights of adults to

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[6/] As this Court held in its July 25 Order:

> Defendants also argue that the Act is constitutional because it excludes material consisting entirely of words. ([Motion to Dismiss] Memo at 7-8.) Although it is true that the Act excludes such material, Plaintiffs claim that their members send and receive *images,* which are also entitled to constitutional protection. *See Stromberg v. California*, 283 U.S. 359, 369 (1931).

July 25 Order at 10, n.6.

transmit to other adults communications that consist, at least in part, of visual representations. *E.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

Defendants next rely on the proposition that the definition of "harmful to minors" is constitutional because of its "consistency with the *Miller* [*v. California*, 413 U.S. 15 (1973)] test" for obscenity, and that the "harmful to minors" analysis does not necessarily set standards based upon the youngest minors. (Defs. Mem. at 15.) These points, too, lack any relevance to plaintiffs' First Amendment claims.[7/]

As plaintiffs made clear at the motion to dismiss stage, their challenge does not turn on the validity of the Act's definition of "harmful to minors" insofar as it prevents dissemination of material to *minors*. This suit challenges the application of that standard to the *Internet*, because such application effectively censors communications to *adults*. The Supreme Court has consistently made clear that the "harmful to minors" standard cannot be applied to adults and that constitutionally-protected communications among adults cannot be sacrificed in order to safeguard minors from viewing material deemed harmful to them. *See, e.g.*, *Reno v. ACLU*, 521 U.S. at 875; *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 128 (1989); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (holding that the First Amendment will not permit restrictions that interfere with

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[7/] With regard to these arguments, this Court in its July 25 Order stated:

> It is true that the Act defines "harmful to minors" by reference to the test set forth in *Miller*, and it is also true that obscenity is not entitled to any First Amendment protection. However, what is considered obscene for an audience of minors is not necessarily considered obscene for an adult audience. The South Carolina Act explicitly defines obscenity by reference to the type of content that is 'suitable for minors.' Thus, it is incorrect to assert that the protected speech of adults is not implicated . . . ."

July 25 Order at 7-8 (citation omitted).

the rights of adults to obtain constitutionally protected speech and effectively "reduce the adult population . . . to reading only what is fit for children.").

Under strict scrutiny, defendants must demonstrate that the Act is narrowly tailored to advance a compelling governmental interest and there are no less restrictive alternatives. *See, e.g., Reno*, 521 U.S. at 879. None of defendants' arguments goes to establishing these elements.[8/] They do not address whether the Act "in fact alleviate[s] [the harms recited] to a material degree." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001); they do not (and cannot) establish that the Act narrowly targets dissemination of materials to minors; and they do not even attempt to challenge this Court's conclusion that "[t]here is no indication in the case *sub judice* that the State considered less restrictive means, such as filtering mechanisms, to protect children from receiving obscene materials over the Internet." (July 25 Order at 9, n.5.) For these reasons, as well as those set forth in Plaintiffs' own motion for summary judgment, Defendants have not and cannot establish that the Act passes constitutional muster.

[8/] To the extent Defendants suggest that the Act's restriction of some, but not all, speech makes it narrowly tailored, they misapprehend the governing legal standard. Indeed, nearly all speech restrictions (especially those that limited the scope of proscription by content or viewpoint -- the most suspect of restrictions) would satisfy that test.

CONCLUSION

For the foregoing reasons, the Court should deny defendants motion for summary judgment.

Respectfully submitted,

Dated: December __, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on December __, 2003, I served the foregoing Plaintiffs' Opposition to Defendants' Motion for Summary Judgment by first-class U.S. mail, postage pre-paid, on the following:

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