UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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

****

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

NOW INTO COURT, through undersigned counsel, come the Defendants, the 42 elected District Attorneys of the State of Louisiana, sued in their official capacity (hereinafter "the State"). The State respectfully requests that this Honorable Court dismiss this complaint pursuant to F.R.C.P. 12(b)(6) for the following reasons. The Plaintiffs, Garden District Book Shop, Inc., Octavia Books, L.L.C., Future Crawfish Paper, L.L.C., American Booksellers Association, and the Comic Book Legal Defense Fund, assert a constitutional challenge to La. R.S. 14:91.14 (Act 187, H.B. 153 of the 2015 Regular Legislative Session). Alleging the Act violates the First, Fifth and Fourteenth Amendments to the U.S. Constitution, as well as the Commerce Clause, the Plaintiffs seek injunctive and declaratory relief, as well as an award of costs and fees. This Court should dismiss the Plaintiffs' complaint. *See* Doc. 5.

The first step in determining whether the State's Motion to Dismiss should be granted is for this Court to determine whether the Plaintiffs have been deprived of the rights secured by the Constitution mentioned in their complaint:

> Section 1983 imposes civil liability on "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizens of the United States ... to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...." 42 U.S.C. § 1983. To plead a section 1983 claim adequately, a plaintiff must allege that a state actor violated the plaintiff's constitutional right or a right otherwise protected by federal law. *Cornish v. Correctional Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)). "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right secured by the Constitution and laws." *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

Doe v. Jindal, 2015 WL 7300506 at *5 (E.D. La. 2015). If the Plaintiffs "cannot satisfy the threshold requirement of stating a claim under section 1983... [then this] complaint must be dismissed as a matter of law." *Id.* at 10 (citing *Baker*, 443 U.S. at 140).

The Plaintiffs have not alleged facts that would render La. R.S. 14:91.14 unconstitutional.[1]

La. R.S. 14:91.14 is Not Overbroad.

One of the Plaintiffs' main arguments is an allegation that La. R.S. 14:91.14 is unconstitutionally overbroad. In order to succeed, the Plaintiffs' allegations must overcome a heavy burden: "[t]he overbreadth *claimant bears the burden* of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (citation omitted and emphasis added). The United States Supreme Court recognized several ways to mount a successful overbreadth challenge: (1) "that no set of circumstances exist under which [the statute] could be valid,"[2] (2) "that the statute lacks 'any plainly legitimate sweep,'"[3] or (3) that a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. at 472-73 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008). "[A] statute's overbreadth [must] be *substantial,* not only in an absolute sense, but also relative to the statute's

[1] The State incorporates by reference all of the arguments contained in Docs. 28 and 41 to the extent they are not reproduced here.
[2] *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).
[3] *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments)).

plainly legitimate sweep." *U.S. v. Williams*, 553 U.S. 285, 292 (2008) (citations omitted and emphasis in original). Therefore, even if the Plaintiffs could somehow show that the statute can be applied unconstitutionally, that alone does not require the statute to be struck as a matter of overbreadth. The number of invalid applications would have to be substantial, and there is no claim supported by provable allegations that such a substantial number exists. This is a high burden because the use of the overbreadth doctrine is "strong medicine" to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

"In a facial challenge to the overbreadth... of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (footnotes omitted). At the outset, the United States Supreme Court has consistently "held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) (citations omitted); *see also Brown v. Entm't Merchants Ass'n*, -- U.S. --, 131 S.Ct. 2729, 2735 (2011) ("obscenity is not protected expression") (citation omitted). The law at issue, La. R.S. 14:91.14, only applies to material that meets the United States Supreme Court's standard for obscenity for some persons. *See U.S. v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 1547 (2015) (discussing *Miller v. California*, 413 U.S. 15, 24 (1973)); *see also* La. R.S. 14:91.14(B)(2).

In evaluating an overbreadth challenge, this Court must evaluate each proposed hypothetical example through a case-by-case analysis of the proffered fact situation. *See J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 367 (5th Cir. 1998) (citing *Broadrick*, 413 U.S. at 615-16). The Plaintiffs argue that Louisiana's statute is unconstitutionally overbroad because it fails to

differentiate a younger minor from an older minor. *See, e.g.*, Doc. 5 at 21. In other words, the Plaintiffs' specific facial challenge is that a state may not regulate material that would be obscene for a six-year-old the same as it would for a seventeen-year-old, and that it may only regulate what is obscene for the oldest part of the age category. This argument must be rejected:

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

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

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

Moreover, fundamental constitutional rights can be subject to rules that treat minors as a

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

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

Roper, 543 U.S. at 574; *see also Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (applying *Roper* to non-homicide crimes committed by juveniles). If anything, *Roper* supports the argument that the Constitution does not necessarily prohibit treating minors as a single, generic class. Recently, the Louisiana Supreme Court found that La. R.S. 14:95.8, which generally prohibits the possession of a handgun by *any* person under 17 years old, passed strict scrutiny under Louisiana's fundamental right to keep and bear arms. *See, generally, State in Interest of J.M.*, 2013-1717 (La. 01/28/14), 144 So.3d 853; *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 212 (5th Cir. 2012) (finding that federal law, which prevents persons under 21 from purchasing handguns from federally licensed dealers, is constitutional under the Second Amendment, notwithstanding the plaintiffs' claim that the law is unconstitutional as applied to 18 to 20 year-old persons and noting, in the context of an Equal Protection claim, that "an age classification is presumptively rational...") (Citation omitted). The Supreme Court has treated minors as a generic class for the purposes of speech restrictions too. *See, e.g., Morse v. Frederick*, 551 U.S. 393 (2007)

[4] *See, e.g., State v. Craig*, 1995-2499 (La. 05/20/97), 699 So.2d 865, 866-68 (brutal crime); *see also id.* at 872 (the defendant "was only eight days away from his eighteenth birthday, at the time of the offense"); *State v. Craig*, 2005-2323

(restrictions upon a minor's speech at school are not dependant upon the age of the student-speaker).

La. R.S. 14:91.14 Passes Strict Scrutiny.

The Plaintiffs also argue that La. R.S. 14:91.14 must survive strict scrutiny as a content-based restriction upon expression. The State notes that strict scrutiny was applied to a somewhat similar statute in the past and strict scrutiny is likely to be applied here. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670 (2004). This analysis is wrong; restrictions upon commercial speech involving the Internet should be dealt with using intermediate scrutiny. *See Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 505-07 (5th Cir. 2001); *M.S. News Co.*, 721 F.2d at 1291-92 ("Commercial enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors. Hence, making a distinction between commercial and non-commercial enterprises is sufficiently grounded in a legitimate state interest.") The State notes that this statute qualifies as commercial speech as it only applies to material harmful to minors that is published for "commercial gain." *See* La. R.S. 14:91.14(B)(2).

The Plaintiffs argue that La. R.S. 14:91.14(B)(2) only criminalizes works involving people having sex for money: i.e. "depictions of illicit sex or sexual immorality for commercial gain..." *See State v. Anderson*, 540 So.2d 974 (La. App. 2nd Cir. 1989), *writ denied*, 544 So.2d 398 (La. 1989) (two justices would grant the writ), *cert. denied*, 493 U.S. 865 (1989). This does not capture the clear purpose of the statute based on its text: to encompass the constitutional standard for obscenity and is not to simply regulate depictions of prostitution. Under the statute before the Court in this case, if the definitional phrase "material harmful to minors" is replaced with the definition itself, the statute most naturally reads in a way that would apply only to material published on the Internet for the

(La. App. 1st Cir. 10/25/06), 944 So.2d 660, 661 (noting that the death penalty was set aside by virtue of *Roper*).

purpose of commercial gain: "Any person or entity in Louisiana that publishes... any digital image, photograph, or video which exploits, is devoted to or principally consists of, descriptions or depictions of illicit sex or sexual immorality for commercial gain..." La. R.S. 14:91.14(A)(1) and (B)(2). If the State correctly understands the Plaintiffs' reading of the statute, it is absurd.

There is a compelling interest in regulating material that is obscene for minors. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (citations and internal quotations marks omitted). Notwithstanding the applicability of the speech at issue to younger and older minors, the affected speech is *low-value speech*. The material covered by the statute (which would include, among other things, all material obscene for adults) "ordinarily lack[s] literary, political, or scientific value... [but is] not entirely outside the protection of the First Amendment." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 746 (1978). The qualitative value of the speech at issue is important because, in a strict scrutiny analysis, "[c]ontext matters." *Cf. Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (citation omitted). This Court must similarly evaluate First Amendment restrictions in context. *See, e.g., F.C.C.*, 438 U.S. at 747 ("one occasion's lyric is another's vulgarity.") (Citation omitted).[5] Because the protected speech at issue ordinarily lacks literary, political, or scientific value, the rigidity with which strict scrutiny is applied should be weaker than a situation involving high-value speech:

> Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ depending upon context, this Court has distinguished for First Amendment purposes among different contexts in which speech takes place.

[5] *Cf. id.* at 749-50 ("Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg*... that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression... *The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.*") (Emphasis added, citations and footnote omitted).

> Thus, the First Amendment imposes tight constraints upon government efforts to restrict, *e.g.*, 'core' political speech, while imposing looser constraints when the government seeks to restrict, *e.g.*, commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program.

Sorrell v. IMS Health Inc., -- U.S. -- 131 S.Ct. 2653, 2673-74 (2011) (citations omitted).

In order for Louisiana's statute to fall short of the narrow tailoring test, the statute must fail to choose "the least restrictive means to further the articulated interest." *Sable Communications of California, Inc.*, 492 U.S. at 126. This alternative must be "offered" to the State. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). This test is not wholly unforgiving though; the "First Amendment requires that [the statute] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee*, 135 S.Ct. at 1671 (citing *Burson v. Freeman*, 504 U.S. 191, 209 (1992)); *see also Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 757 (1996) (a legislature "must have a degree of leeway in tailoring means to ends") (citation omitted). Therefore, the statute *cannot* fail the narrow tailoring test unless the Plaintiffs have "offered" an alternative restriction to the State, *Playboy Entertainment Group, Inc.*, 529 U.S. at 816, that is (1) constitutional, (2) "less restrictive" and (3) "would be at least as effective in achieving the legitimate purpose" being served. *See Serv. Employees Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997)). The Plaintiffs' claim must be dismissed because they have not offered such a restriction. *See* Doc. 5 at 33-34.

The United States Supreme Court has already unequivocally stated that the burden imposed under a similar (but more restrictive) statute is minimal, particularly when considering the State's compelling interest in protecting the psychological well-being of minors:

> In addition, [the federal statute] does not, as Justice KENNEDY suggests, " 'foreclose an entire medium of expression.' " *Post,* at 1719 (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 55, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994)). While Justice KENNEDY and Justice STEVENS repeatedly imply that [the federal statute] banishes from the Web material deemed harmful to minors by reference to community standards, see, *e.g., post,* at 1719 (opinion concurring in judgment); *post,* at 1725–1726, 1727–1728 (dissenting opinion), the statute does no such thing. *It only requires that such material be placed behind adult identification screens.*

Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 583, n. 14 (2002) (plurality) (emphasis added); *see also id.* at 584 (plurality) (rejecting the argument that the statute was unconstitutional "because it will require Web publishers to shield some material behind age verification screens that could be displayed openly in many communities across the Nation...") (Citation omitted).

The Plaintiffs argue that private content-filtering technology, activated on the computer by the minor's parents, meets this criteria. *See* Doc. 5 at 34. The State disagrees and has presented evidence to the contrary. *See, generally*, Docs. 28-1 and 41-1. The Plaintiffs rely upon *Ashcroft II*, a 5-4 decision. *See, generally*, 542 U.S. at 656. Under those facts, the Court merely held that the District Court did not abuse its discretion in finding that parental content-filtering was likely to be the least restrictive means. *Id.* at 663 ("On this record, the Government has not shown that the less restrictive alternatives proposed by respondents should be disregarded. Those alternatives, indeed, may be more effective than the provisions of [the statute]. The District Court did not abuse its discretion when it entered the preliminary injunction.") The federal statute in the *Ashcroft* cases was much more restrictive than the statute here.[6] For example, Louisiana's statute does not require the

[6] The statute created an affirmative defense to the criminalization of communicating material that would be obscene for minors if a defendant demonstrated that he or she "has restricted access by minors to material that is harmful to minors—(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." *Ashcroft*, 542 U.S. at 662 (citing 47 U.S.C. § 231(c)(1)) (internal quotation marks omitted).

use of a credit card or a digital certificate. *See id.*[7]

Therefore, the federal statute at issue in the *Ashcroft* cases is not comparable to Louisiana's statute in all respects because the burden put upon the speaker by the Louisiana statute is greatly lessened. Even presuming for the sake of argument that a content filter is more effective than an attestation screen, it is not less restrictive because parental-control content filters either do not gauge the literary, artistic, political, or scientific value of any particular work or cannot adequately review the content actually being uploaded to the Internet from Louisiana. *See* Docs. 28-1 and 41-1. In fact, using content filters would actually restrict *much* more speech than Louisiana's statute requires. *See* La. R.S. 14:91.14(B)(2)(c). A content filter based upon an algorithm cannot distinguish breasts from an anatomy textbook and breasts in a pornographic film. In other words, a machine cannot gauge literary, artistic, political, or scientific value. Content filters based upon the decisions of human programmers also restrict much more speech than is necessary. For example, a content filter might have considered Playboy's content wholly off-limits, but, according to USA Today, many of its works have literary, artistic, political, or scientific value.[8] Further, content filters cannot categorize everything uploaded to the Internet in Louisiana. The individual uploader, on the other hand, is in the best position to categorize what he or she is putting on the Internet for commercial gain. In short, the State is principally arguing that the Plaintiffs' proffered alternative is much more restrictive than the requirements of the statute.

Further, the technological world has changed dramatically since *Ashcroft* was decided in 2004, and the Supreme Court cautioned readers about the effects of the passage of time in that case:

[7] *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 236-37 (4th Cir. 2004) (Louisiana's statute is also much less burdensome than a similar Virginia statute).

[8] *See* USA Today, Roger Yu, *Yes, people DID buy 'Playboy' for the articles*, http://www.usatoday.com/story/money/2015/10/13/yes-people-did-buy-playboy-articles/73890020/ (Oct. 13, 2015).

> [This] factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago. Since then, certain facts about the Internet are known to have changed.

Ashcroft, 542 U.S. at 671 (Citation omitted). With every year that passes, minors have access to more and more devices with Internet capability and parents have less and less control over them. The age of the family (or school) computer being the sole method of reaching the Internet is over.[9] Parents cannot require that their local coffee shop or restaurant use content filtering at their business. The proliferation of new ways to connect to the Internet (through phones, tablets, etc.) has made content filtering a much less effective alternative, even if it could be compared to restrictions on the speaker.

The Plaintiffs' proffered alternative assumes, of course, that most parents even understand how to turn content filters on (and off) for the various devices present in their homes. Although Louisiana has enacted a law to promote their use, that promotion cannot combat the ubiquity of Internet-capable devices outside the home. *See* La. R.S. 51:1426. Perhaps as importantly, the State of Louisiana should be allowed to regulate obscenity from both the speaker and the user perspective because there is more than one way to combat the problem of juvenile access to obscenity on the Internet. Louisiana has already promoted content filtering through legislation and the First Amendment cannot mean that the Louisiana Legislature is now deprived of doing anything else about this dilemma.

The Plaintiffs also argue that Louisiana's law is ineffective because it does not block material that was not published in Louisiana. This argument must be dismissed out-of-hand because the Plaintiffs in this case cannot succeed by requiring Louisiana to adopt restrictions that are

unconstitutional. If Louisiana's law attempted to regulate wholly out-of-state obscene-to-minors material on the Internet, the statute would be struck down. To borrow the Tenth Circuit's conclusion, "an attempt to regulate interstate conduct occurring outside [Louisiana's] borders, and is accordingly a per se violation of the Commerce Clause." *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (footnote omitted); *see also Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 757 (1996) (the Louisiana Legislature "need not deal with every problem at once") (citing *Semler v. Oregon Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935) ("the legislature need not 'strike at all evils at the same time'")). This statute cannot be declared unconstitutional because it has not adopted unconstitutional breadth.[10]

The Plaintiffs' Miscellaneous Arguments are Meritless.

The Plaintiffs do not cleanly categorize some of their arguments in their complaints, but, they appear to deal with the alleged burdens associated with the statute. Many assertions are based upon misapprehensions about the reach of the statute. For example, the Plaintiffs argue that they will have to sort through vast inventories of content and determine what matter would be obscene for a seventeen-year-old. This argument does not offer a less restrictive alternative and, therefore, it is not purely a strict scrutiny argument. In any event, the Plaintiffs' complaint about the burden allegedly created by the statute might be accurate if the statute prohibited *maintaining* such material on their websites, but the statute does not prohibit the mere display of such material. The statue only prohibits a "person or entity in Louisiana that publishes material harmful to minors on the Internet..." La. R.S.

---

[9] *See, e.g.*, Forbes, Alex Konrad, *Applebee's Will Install 100,000 Intel-Backed Tablets Next Year In Record Rollout*, http://www.forbes.com/sites/alexkonrad/2013/12/03/applebees-intel-tablet-rollout/ (Dec. 3, 2013).

[10] Moreover, venue and jurisdiction are synonymous for the purposes of Louisiana criminal law. *State v. Roblow*, 623 So.2d 51, 55 (La. App. 1st Cir. 1993); *See State v. Frank*, 355 So.2d 912, 914, 917 (La. 1978); *see also* La. C.Cr.P. art. 615. In order for a crime to be prosecuted in Louisiana state court, an element of the crime must occur in Louisiana. *See*

14:91.14(A)(1). The verb at issue–to publish on the Internet–is most naturally read as synonymous with the verb–*to upload* onto the Internet. *See* Doc. 41-1 at 2. Further, the statute only became effective on June 23, 2015. *See* La. Legis. 2015 Reg Sess. Act 187 (H.B. 153). So, the statute would only cover material uploaded onto the Internet by a person or entity in Louisiana after that date. Nor would the statute apply to persons or entities outside of Louisiana uploading the material onto the Plaintiffs' websites from outside of Louisiana.

Further, reading all of the allegations submitted by the Plaintiffs, it appears that the material uploaded onto the Internet is principally performed by third parties, *which are not alleged to be physically located within Louisiana.* Many of the Plaintiffs disclaim the ability to control the content published by their third-party providers. These issues are of no moment because, in the State's view, the statute criminalizes the act of a person, physically located in Louisiana, pressing a button that uploads obscene material for commercial gain.

With respect to material that the Plaintiffs physically upload material onto the Internet, the Plaintiffs may simply upload harmful-to-minors material onto the Internet separately and put that material behind a hyperlink that requires the user to attest to his or her age prior to accessing the material. Presuming it to be true, the assertion that the Plaintiffs could not upload material using software (such as Kobo and IndicCommerce) that does not allow them to create a basic attestation screen is the smallest of burdens. *See* Doc. 19-1 at 7. With respect to books or artwork, the Plaintiffs could simply upload the material in a PDF format and, using Adobe, password-protect the uploaded PDF. Then, the Plaintiffs' websites could simply list the password on their website and post a phrase like the following: "By entering the provided password, you are acknowledging and attesting that

La. C.Cr.P. art. 611(A). Louisiana cannot criminalize actions in South Dakota or South Africa. Therefore, material uploaded to the Internet outside of Louisiana would not be subject to La. R.S. 14:91.14.

you are eighteen years of age or older." *See* Doc. 41-1 at 1.

Finally, the Plaintiffs argue that some of the Plaintiffs use third-party social media sites (specifically Facebook, Instagram, and Twitter) and cannot put age-attestation screens on them. *See* Doc. 19-1 at 10, n. 1. These third-party sites, however, have their own rules which prohibit pornography *even if it is not obscene.*[11] Therefore, this argument is irrelevant because material covered by the statute cannot be posted on these sites anyway because it would violate their terms of service. Further, the Plaintiffs can simply write "by pressing this link, you are acknowledging and attesting that you are eighteen or older" next to a link to the materials at issue. Whatever insignificant burden this creates, it does not render the statute unconstitutional. To the extent that these miscellaneous arguments constitute claims, they must be denied.

La. R.S. 14:91.14 is not Vague, nor does it violate Equal Protection.

The Plaintiffs argue that certain terms of the *Miller* test are vague (such as "average," and "taken as a whole") but this test can be constitutionally applied. The United States Supreme Court's own definition of obscenity is not unconstitutionally vague precisely because those words have "settled legal meanings." *See Williams*, 553 U.S. at 306 (citations omitted). The United States Supreme Court has explained that the "meaning" of this test is "clear":

> *Just because a definition including three limitations is not vague*, it does not follow that one of those limitations, standing by itself, is not vague.[FN38] Each of *Miller's* additional two prongs—(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it "lac[k] serious literary, artistic, political, or scientific value"—critically limits the uncertain sweep of the obscenity definition.
>
> [FN 38] Even though the word "trunk," standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, *its meaning is clear when it is one prong of a three-part description* of a species of gray animals.

[11] *See* Facebook, https://www.facebook.com/legal/terms (Last Accessed Dec. 14, 2015); *see* Twitter, Developer Agreement & Policy, Twitter Developer Agreement (Effective May 18, 2015); *see* Instagram, Terms of Service, http://instagram.com/legal/terms/ (Effective Jan. 19, 2013).

Reno v. Am. Civil Liberties Union, 521 U.S. 844, 873-74 (1997) (emphasis added).

In fact, the Fifth Circuit has squarely rejected a vagueness attack upon terms in the *Miller* test. *J & B Entm't, Inc.*, 152 F.3d at 367-68 (holding that the words "serious literary, artistic, scientific, or political value" are not vague because the language was not pulled "from thin air" "and are the subject of a plethora of opinions handed down by state and federal courts throughout this nation in the quarter century since *Miller* was decided.") (Citations omitted).[12]

The first phrase that the Plaintiffs take issue with is "contemporary community standards" in La. R.S. 14:91.14(B)(2)(b). Again, because this phrase has a settled legal meaning, this claim must be dismissed. Also, the United States Supreme Court held that the somewhat similar federal statute's "reliance on community standards to identify 'material that is harmful to minors' does not by itself render the statute substantially overbroad for purposes of the First Amendment." *Ashcroft*, 535 U.S. at 585 (emphasis deleted). Again, because the State's construction would seek to criminalize the act of uploading obscene material while present in Louisiana, the community at issue is ascertainable. *See* La. C.Cr.P. art. 611(A). For example, if a person uploaded obscene material on his cell phone while walking in Lafourche Parish, the community at issue would be that of Lafourche Parish. *See also Ashcroft*, 535 U.S. at 580-81 (plurality) ("The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional.") (Citation omitted); *United States v. Rudzavice*, 548 F. Supp. 2d 332, 335 (N.D. Tex. 2008), *aff'd*, 586 F.3d 310 (5th Cir. 2009) ("It follows [from *Ashcroft*], *a fortiori*, that a publisher is also responsible for abiding by the community standards prevailing in the community from which it sends its material.")

With respect to the phrase "average adult" in La. R.S. 14:91.14(B)(2)(b), the United States Supreme Court noted: "[T]he primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that... it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one.'" *Hamling v. U.S.*, 418 U.S. 87, 129-130 (1974) (citations omitted). The State notes that the Plaintiffs' argument that the phrase "average adult" is vague is ironic because the Fifth Circuit has held that "a statute is void for vagueness if it does not put the *average* reasonable person on notice of what conduct is prohibited." *U.S. v. Fox*, 248 F.3d 394, 406 (5th Cir. 2001), *cert. granted, judgment vacated on other grounds*, 535 U.S. 1014 (2002) (emphasis added). The average reasonable person is able to understand the phrase "average adult."

The phrase "taken as a whole" also has a settled legal meaning and is not vague. *See* La. R.S. 14:91.14(B)(2)(c). It means that the entire work should be considered in context. This means that a single phrase, such as "she was topless" cannot be looked at in isolation. If the phrase comes from a book, the entire book must be considered. *Compare Playboy Entertainment Group., Inc.*, 529 U.S. at 828-29 (Stevens, Concurring) ("[A]dvertising a bareheaded dancer as 'topless' might be deceptive, but it would not make her performance obscene."); *with* Doc. 19-1 at 6 (the phrase, 'she was topless,' could [violate the statute.]") Again, context matters, and the phrase "taken as a whole" allows the factfinder to consider the material at issue in the context of the greater piece. *See Ashcroft*, 542 U.S. at 681, Breyer, J. Dissenting (Arguing that the statute at issue should not be struck because, among other things, "[o]ther qualifying phrases, such as 'taking the material as a whole'... and 'for commercial purposes'... limit the statute's scope still more, requiring, for example, that individual

[12] As an aside, the United States Supreme Court has held that a "statute prohibiting [the] mailing of obscene materials does not require proof that defendant knew the materials at issue met the legal definition of 'obscenity.'" *Posters 'N'*

images be considered in context. In sum, the Act's definitions limit the statute's scope to commercial pornography.") (Citations omitted). Also, note that the majority in *Ashcroft* did not take issue with the phrase "as a whole." *Id.* at 660-73. If there was a question in an individual case regarding whether a single website or whether multiple websites should be considered together, the doctrine of lenity would generally require the factfinder to consider the allegedly obscene material within the greater set of multiple websites. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (citation omitted). The requirement that "[t]he material" must be "taken as a whole" must mean the entire work, even if the entire work was not published online for one reason or another. No reasonable statutory interpretation would allow a court to determine whether a work has "serious literary, artistic, political, or scientific value for minors" when there is a specific directive to consider the material in context. Just like the famous idiom, one must not "judge a book by its cover."

The Plaintiffs also argue that the words "publish" and "Internet" are vague. *See* La. R.S. 14:91.14(A)(1). Again, the State asserts that the phrase "[a]ny person... in Louisiana that publishes material harmful to minors on the Internet..." means any person physically located in Louisiana that uploads material that would be obscene to a seventeen-year-old to the Internet. The word "Internet" is not vague; it is a global network connection of computers. *See* Black's Law Dictionary, INTERNET (10th ed. 2014) ("A global network connecting countless information networks and computing devices from schools, libraries, businesses, private homes, etc., using a common set of communication protocols.") (Citations omitted).[13]

Things, Ltd. v. United States, 511 U.S. 513, 524-25 (1994) (citing *Hamling v. United States*, 418 U.S. 87 (1974)).

[13] The Plaintiffs also argue that they are unsure whether the act would cover a communication between only two people. Although the statute could theoretically cover a communication between only two persons, these would not be purely private conversations because the statute only covers communications *made for commercial gain*. *See* La. R.S.

Finally, the Plaintiffs attack the news-gathering exemption on both vagueness and Equal Protection Clause grounds. *See* La. R.S. 14:91.14(B)(3). Although the Plaintiffs take the Louisiana Legislature to task for this definitional section, the import of the paragraph is merely to provide a defense in a civil action should a person assert that the statute creates a private right of action and sue a news-gathering organization for an alleged violation. The portion of the statute using the term "news-gathering organization" states: "This Section shall not apply to any bona fide news or public interest broadcast, website, video, report, or event and shall not be construed *to affect the rights* of any news-gathering organization." La. R.S. 14:91.14(A)(5) (emphasis added). The statute does not exempt any "news-gathering organization" from *criminal* liability. If the Louisiana Legislature had meant to do that, it would have used the words found earlier in that same sentence: that the statute "shall not apply" to any news-gathering organization. Other statutes that have both civil and criminal implications use similar language. *See, e.g.*, La. R.S. 14:90.1(B)(2)(a). Therefore, these constitutional challenges are inappropriate as this language does not define the reach of the criminal prohibitions associated with the statute. If the Louisiana Legislature had meant to exempt news-gathering organizations from criminal liability, there would have been no need for the first half of paragraph (A)(5) of the statute: "This Section shall not apply to any bona fide news or public interest broadcast, website, video, report, or event..." *See Shane v. Parish of Jefferson*, 2014-2225 (La. 12/08/15), -- So.3d --, 2015 WL 8225830, at *6 ("[C]ourts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to, and preserving, all words can legitimately be found.") (Citations omitted). The

14:91.1(B)(2). In any event, if a person were trying to sell material that would be considered obscene for a seventeen-year-old on a private messaging system, like Google Hangouts or Facebook Messenger, then the publisher would simply have to ask the other person to acknowledge and attest that he or she is eighteen or older before permitting access to that material. *See* Doc. 19-1 at 20, n. 7. No separate screen is required.

proffered reading of the statute by the Plaintiffs on this point is absurd: it would make no sense to give a news-gathering organization carte blanche to violate La. R.S. 14:91.14. Because no person is asserting (or threatening to assert) a civil suit against one of the Plaintiffs, these Plaintiffs have no standing to raise these challenges here. *See Women's Health Clinic v. State*, 2002-0016 (La. App. 1st Cir. 05/10/02), 825 So.2d 1208, 1210, *writ denied*, 2002-2002 (La. 11/01/02), 828 So.2d 586 (discussing *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001)). This claim must be dismissed too.

La. R.S. 14:91.14 does not violate the Commerce Clause.

Again, the statute criminalizes uploading certain material on the Internet by a person or entity in Louisiana. A crime that takes place partly in one state and partly in another can be prosecuted in either state without violating the Constitution. *See, generally, Heath v. Alabama*, 474 U.S. 82 (1985). This law presents no Commerce Clause problem: "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, (1970) (citation omitted). Again, the State's interest in regulating material uploaded in Louisiana and considered to be obscene for minors is compelling. *See Sable Communications of California, Inc.*, 492 U.S. at 126. The law does not regulate speakers who are not located in Louisiana. *See* La. R.S. 14:91.14(A)(1). There are no compliance costs imposed upon speakers outside of Louisiana. Users of the material must simply acknowledge and attest that they are eighteen-years-old or older. That minimal burden is narrowly tailored in light of the State's compelling interest and, therefore, the burden upon the small amount of protected speech at issue must be considered "incidental" under *Pike*.

The Fifth Circuit does not invalidate a state's restriction under the Commerce Clause simply

because the restriction involves the Internet. *See, generally*, *Ford Motor Co.*, 264 F.3d at 493-512. Contrary to *Ford Motor Co.*, the Plaintiffs rely upon a line of cases that proceeds from the absurd assumption that the nature of the Internet makes it impossible for the states to restrict the malevolent effects of the Internet, no matter how a statute is written. *See Rousso v. State*, 204 P.3d 243, 252 (Wash. Ct. App. 2009) *aff'd*, 239 P.3d 1084 (Wash. 2010) (citing, *inter alia*, *Ford Motor Co.*, 264 F.3d at 502-03). Even if this law could somehow be construed as requiring out-of-state businesses to modify their websites (and it should not), the statute should still be upheld. *See, e.g., Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006). Finally, the Fifth Circuit has found that the need for nationwide uniformity does not prevent a state from enacting any laws that incidentally regulate the Internet outside of the state. *Ford Motor Co.*, 264 F.3d at 504-05. The Court concluded that the "In the absence of Congressional legislation… incidental regulation of internet activities does not violate the Commerce Clause." *Id.* at 505. The State knows of no federal law that both enforceable and on point. For all these reasons, all of these claims must be dismissed.

RESPECTFULLY SUBMITTED:
JEFF LANDRY, ATTORNEY GENERAL
By: /s/ Colin Clark
Colin Clark (La. Bar Roll No. 33775)
Angelique Duhon Freel (La. Bar Roll No. 28561)
Andrea Barient (La. Bar Roll No. 35643)
Jeffrey M. Wale (La. Bar Roll No. 36070)
Assistant Attorneys General
Louisiana Department of Justice
1885 North 3rd Street, P. O. Box 94005
Baton Rouge, Louisiana 70804-9005
Telephone: (225) 326-6200; Fax: (225) 326-6297
Email:clarkc@ag.state.la.us; freela@ag.state.la.us; barienta@ag.state.la.us; walej@ag.state.la.us

CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2016, I electronically filed the forgoing with the Clerk of Court by using the CM/EMF system, which will send a notice of electronic filing to all counsel of record.

/s/ Colin Clark
Assistant Attorney General