ORIGINAL

THE SUPREME COURT OF OHIO

No. 2009-0609

OHIO ATTORNEY GENERAL RICHARD CORDRAY AND FRANKLIN COUNTY, OHIO, PROSECUTING ATTORNEY RON O'BRIEN, etc. et. al.,

Petitioners

v.

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION et al.,

Respondents.

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On Certification of Questions of Law
from the United States Court of Appeals for the Sixth Circuit

PRELIMINARY MEMORANDUM OF
AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION ET AL.,
RESPONDENTS.

FILED
APR 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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PRELIMINARY STATEMENT

When the Ohio Legislature sought to make Internet communications subject to the State's "harmful to juveniles" criminal law, O.R.C. § 2907.31, which prohibits disseminating material with certain sexual content to minors, the legislature exempted material disseminated to a juvenile by a "method of mass distribution [which] does not provide the [sender] the ability to prevent a particular recipient from receiving the information." O.R.C. § 2907.31(D)(2)(b). However, the legislature provided no guidance as to what that exemption meant. Could a person be prosecuted for using an "listserv" to send an e-mail to a single address, knowing that it would be automatically forwarded to subscribers to the listserv, some of whom might be minors? Could a participant in a chat room be prosecuted if others in the chat room included minors? Could a Website publisher be prosecuted for maintaining a Website accessible to the general public, rather than using password protection to attempt to prevent minors from visiting the Website? Through its overbreadth and vagueness, the statute criminalized non-obscene, constitutionally-protected speech among adults, as well as to or among older minors, not only within the State of Ohio, but also across and outside its borders.

American Booksellers Foundation for Free Expression and other Respondents, including a broad group of mainstream publishers, distributors, retailers, and Website publishers (the "Booksellers / Website Publishers"),[1] brought this action in the United States District Court for the Southern District of Ohio, seeking to have the statute, as it applied to Internet communications, held unconstitutional, because it violates both the First Amendment and the Commerce Clause of the United States Constitution. The Booksellers / Website Publishers named as defendants the Attorney General of Ohio and Prosecuting Attorneys throughout the

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[1] The Booksellers / Website Publishers are American Booksellers Foundation For Free Expression, Association of American Publishers Inc., Freedom To Read Foundation, National Association of Recording Merchandisers, Ohio Newspapers Association, Sexual Health Network Inc, Video Software Dealers Association, Web Del Sol, and Marty Klein.

State ("Attorney General / Prosecutors").

On September 4, 2007, the district court held the statute, which had been amended during the course of the litigation (the "Amended Act"), unconstitutional as applied to Internet communication, because it is overbroad and violates the First Amendment. *American Booksellers Foundation. for Free Expression v. Strickland,* 512 F.Supp.2d 1082, 1106 (S.D.Ohio 2007). The district court enjoined the enforcement of the Amended Act.

The injunction had no effect whatsoever on other Ohio criminal laws—which are not at issue in this action, and are not challenged by the Booksellers / Website Publishers—relating to the regulation of obscenity, child pornography, speech intended to lure minors into sexual activity, or speech constituting harassment over the Internet. While the Attorney General has argued that one purpose of the Amended Act is to prevent child predators from using the Internet to lure minors into sexual activity, there is a separate Ohio statute, O.R.C. § 2907.07, which specifically addresses such abhorrent conduct, which is (and should be) vigorously and effectively enforced.[2]

The Attorney General / Prosecutors appealed. The Booksellers / Website Publishers cross-appealed from the district court's holding that the Amended Act was not vague and did not violate the Commerce Clause.

On appeal, in an effort to remedy the overbreadth and vagueness of the Amended Act, the Attorney General argued that the Amended Act "does not regulate Web communications, other than such personally directed devices as instant messaging ('IM') or person-to-person e-mail."[3]

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[2] Detective Darren Barlow, called as a witness before the district court by the Attorney General / Prosecutors, testified that his work under that statute yielded 51 arrests and 51 convictions. JA 708. Citations to "JA" are to the Joint Appendix in the Sixth Circuit.

[3] *American Booksellers Foundation for Free Expression v. Strickland,* 560 F.3d 443, 447 (6th Cir. 2009), quoting Final Third Brief of Attorney General / Prosecutors, *American Booksellers Foundation for Free Expression v. Strickland,* Nos. 07-4375, 4376 (6th Cir.) ("AG 6th Cir. Third Br.), p. 3.

The Attorney General / Prosecutors thus changed the position they had taken in the district court, where they suggested that some Websites, chat rooms, and discussion groups would make participants subject to criminal prosecution under the Amended Act, and had explicitly argued that some listservs would "fall within the purview of the statute." JA 749-50.

Noting that the Attorney General's reading of the Amended Act "does not bind the state courts or local law enforcement authorities", and that the Attorney General has not issued a formal opinion on this issue, the Sixth Circuit, *sua sponte,* certified these questions to this Court:

> (1) Is the Attorney General correct in construing O.R.C. § 2907.31(D) to limit the scope of § 2907.31(A), as applied to electronic communications, to personally directed devices such as instant messaging, person-to-person e-mails, and private chat rooms?
>
> (2) Is the Attorney General correct in construing O.R.C. § 2907.31(D) to exempt from liability material posted on generally accessible Websites and in public chat rooms?

American Booksellers Foundation for Free Expression v. Strickland, 560 F.3d 443, 447 (6th Cir. 2009).

In certifying these questions, the Sixth Circuit noted that the "the statute provides no guidance" on the meaning of the statutory language that gives rise to the questions, and that that Court should not "speculate" on the meaning of the Amended Act. 560 F.3d at 447.

But just as the Sixth Circuit cannot answer the certified questions except through "speculation," neither can this Court. The vague language of the Amended Act neither supports nor negates the Attorney General's position. The Booksellers / Website Publishers would welcome this Court's acceptance of the certified questions, and respectfully submit that each question can only be answered by stating, "The Amended Act is too vague to permit the Supreme Court of Ohio to answer this question."

STATEMENT OF THE CASE AND FACTS

The Booksellers / Web Publishers

The Booksellers / Web Publishers represent a broad spectrum of persons—including online businesses and organizations representing booksellers, newspaper publishers, book publishers, video stores, and record shops. They use the Internet to communicate, disseminate, display, and access a broad range of speech. Although the Booksellers / Web Publishers do not speak with a single voice, they all engage in speech which may at times involve sexually explicit matters, violence, death, or foul language. Their direct and online speech may be considered by some to be "harmful to juveniles" under the Amended Act, even though it is constitutionally protected for adults and often for older juveniles as well.

The Amended Act

The Amended Act extended the realm of material which may be deemed "harmful to juveniles" to the Internet with this provision:

> (D) (1) A person directly sells, delivers, furnishes, disseminates, provides, exhibits, rents, or presents or directly offers or agrees to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present material or a performance to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section by means of an electronic method of remotely transmitting information if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

O.R.C. § 2907.31 (D)(1). The Amended Act includes this exemption:

> (2) A person remotely transmitting information by means of a method of mass distribution does not directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present or directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present the material or performance in question to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section if either of the following applies:
>
> (a) The person has inadequate information to know or have reason to believe that a particular recipient of the information or offer is a juvenile.

(b) The method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information.

O.R.C. § 2907.31 (D)(2). The Amended Act contains no definition of what is meant by "remotely transmitting information," or by "a method of mass distribution," or by "the ability to prevent a particular recipient from receiving the information," or by many of the other phrases in this provision. A violation of the Amended Act is punishable by imprisonment of up to eighteen months, or a fine of up to $5,000, or both, depending on the nature of the offense. O.R.C. §§ 2929.14(A)(4) and (5), 2929.18(A)(3)(d) and (e).

The Internet

The basic structure and operation of the Internet is at the core of the Booksellers / Website Publishers' challenge to the constitutionality of the Amended Act.

A. "As Diverse as Human Thought"

"The Internet is a 'unique and wholly new medium of worldwide human communication' ... [where] the content ... is as diverse as human thought." *ACLU v. Reno,* 521 U.S. 844, 850-52 (1997) (internal citations omitted). The Internet is a decentralized, international network of interconnected computers that links people, institutions, corporations, and governments around the world and allows them to communicate in a variety of ways. *Reno*, 521 U.S. at 849-58 (1997); *PSINet, Inc. v. Chapman,* 108 F. Supp. 2d 611, 614 (W.D. Va. 2000); *Cyberspace Commc'ns, Inc. v. Engler,* 55 F. Supp. 2d 737, 741 (E.D. Mich. 1999). "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web." *Reno,* 521 U.S. at 853; *PSINet,* 108 F. Supp. 2d at 615; JA 259. Over 40% of the content on the Internet originates outside the United States, and all of the content on the Internet is available to Internet users worldwide. *ACLU v. Gonzales,* 478 F. Supp. 2d 775, 789 (E.D. Pa. 2007); *Reno,* 521 U.S. at 850.

B. How Individuals Access the Internet

Individuals access the Internet through computers maintained by schools, libraries, "Internet cafés" which provide access for an hourly fee, and through the computers in their homes or workplaces. *Reno,* 521 U.S. at 850; *PSINet,* 108 F. Supp. 2d at 615; *Engler,* 55 F. Supp. 2d at 742. "[T]he receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial [and a] child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." *Reno,* 521 U.S. at 854; *PSINet*, 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 741.

Most Internet users have a user name, password, and e-mail address that allow them to sign on to the Internet and to communicate with others. *Engler,* 55 F.Supp.2d at 742 (citing *American Libraries Ass'n v. Pataki,* 969 F. Supp. 160, 165 (S.D.N.Y 1997)). Persons communicating with other users generally know them only by their usernames and e-mail addresses. *Id.*; JA 261.

C. Ways of Communicating Over the Internet

Once an individual accesses the Internet, there are a wide variety of methods for communicating and exchanging information with other users, including:

- **e-mail** "enables an individual to send an electronic message — generally akin to a note or letter — to another individual or to a group of addressees." *Reno v. ACLU,* 521 U.S. at 851; see *PSINet,* 108 F. Supp. 2d at 615; *Engler,* 55 F. Supp. 2d at 742; *Pataki,* 969 F. Supp. at 165; JA 261. Instant messages ("IMs") are similar to e-mail when used to communicate with one individual or a group of addressees.
- **Online discussion groups** cover virtually every topic imaginable — creating a new, global version of the village green. There are three common forms:

- **Mail exploders, also called listservs,** are a sort of e-mail that allows subscribers to send messages to a common e-mail address, which then forwards the message to the group's subscribers. JA 262; *Reno,* 521 U.S. at 851.
- **USENET newsgroups** are similar to listservs, but postings on USENET newsgroups can be read by persons other than subscribers. "There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic." *Reno,* 521 U.S. at 851; JA 263.
- **"Chat rooms"** allow two or more individuals to engage in real time "dialogue," through written messages, with other users. *Reno v. ACLU,* 521 U.S. at 851; *Engler,* 55 F. Supp. 2d at 742; JA 263-264.

- **Websites** allow users worldwide to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. *Reno,* 521 U.S. at 852; *Gonzales,* 478 F. Supp. 2d at 782. Websites can include written text, still or video visual images, and sound. *Reno,* 521 U.S. at 851; *Engler,* 55 F. Supp. 2d at 743. Website publishers which impose fees for visiting their Websites typically require registration and passwords, but those Website publishers which do not impose fees view passwords as an impediment to persons visiting their sites.

D. The Inability of Speakers on the Internet to Prevent Their Speech From Reaching Minors

For the vast majority of communications over the Internet, including communications over the Web, or by e-mail, newsgroups, mail exploders, and in chat rooms, it is not technologically possible for a speaker to determine the age of a recipient who is accessing such communications. *Reno,* 521 U.S. at 855 ("[T]here 'is no effective way to determine the identity

or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms.'"); *PSINet,* 108 F. Supp. 2d at 616; *Engler,* 55 F. Supp. 2d at 743; JA 257-258, 272, 572, 574-577. Thus, in order for online users to make their information available on the Internet, they must do so to all Internet users, including users who may be minors, or not make it available at all. *Engler,* 55 F. Supp. 2d at 744. Even password-protected Websites cannot be certain of a user's age (absent a prior relationship established in person, such as between a bank and its customer).

E. The Availability of User-Based "Parental Controls" To Shield Minors From Material That Is "Harmful To Minors"

Although there is no way for speakers to prevent minors from accessing their speech on the Internet, there are many effective user-based "parental controls" available to restrict access to online communications that parents, teachers, or others consider unsuitable for minors under their supervision. Many computers—straight out of the box—include a "parental controls" feature.[4] If a computer does not already have such a feature, it is easy to download one, for free, from many online services, such as AOL.[5] These features enable parents to block access to sexually explicit materials on the Web, to prevent minors from giving personal information to strangers by e-mail or in chat rooms, and to maintain a log of all online activity on a home computer. *Reno,* 521 U.S. at 855; *Engler,* 55 F. Supp. 2d at 744. Parents can also use screening software that blocks messages containing certain words, as well as tracking and monitoring software. *Engler,* 55 F. Supp. 2d at 744. Perhaps most effectively, a parent can restrict and

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[4] See, *e.g.,* http://www.apple.com/macosx/features/parentalcontrols.html (visited April 14, 2009) ("With a simple setup, you can manage, monitor, and control the time your kids spend on the Mac, the sites they visit, and the people they chat with."); http://www.microsoft.com/windows/windows-vista/features/parental-controls.aspx (visited April 14, 2009) ("These controls help parents determine which games their children can play, which programs they can use, and which Websites they can visit—and when. Parents can restrict computer use to specific times and trust that Windows Vista will enforce those restrictions, even when they're away from home.").

[5] *See, e.g.,* https://parentalcontrols.aol.com (visited April 14, 2009).

observe a child's use of the Internet by placing the computer in a family room.

Proceedings in the District Court

The Booksellers / Website Publishers filed this action in 2002, challenging a prior version of the Amended Act. The District Court issued a preliminary injunction and, in response, the Ohio Legislature amended the statute to address some, but not all, of the issues raised. On September 24, 2007, the District Court held the Amended Act unconstitutional:

> Although § 2907.31(D)(2) may act to limit the scope of this statute, § 2907.31(D)(1) is still overbroad and infringes on constitutionally protected adult-adult speech. The limiting provisions do not extend to one-to-one methods of communication in places such as chat rooms. According to the Court in *Reno,* every user of the internet has reason to know that some participants in chat rooms are minors. An adult would have no way of ensuring that her communications in a chat room would be between and among other adults alone. There is simply no means, under existing technology, to restrict conversations in a chat room to adults, only. Consequently, an adult sending a one-to-one message which is unprotected as to minors under the *Miller-Ginsberg*[6]standard, but protected as to adults under the standard in *Miller,* will be liable under § 2907.31(D)(1). Therefore, the provision is overbroad. * * *
>
> No matter the subjective intent of a chat room participant and regardless of whether he or she meant to communicate with juveniles, if a minor is in the chat room, the participant could be prosecuted under the statute in question, even though the conversation was intended only for adults and was protected vis a vis adults. Since the limiting provision of the statute would not prevent such a result and that result would violate the First Amendment, as interpreted by the Supreme Court in *Reno,* this Court concludes that § 2907.31(D)(2) does not sufficiently narrow subsection (D)(1) to save it from a challenge under the overbreadth doctrine.

512 F.Supp.2d at 1094. The district court issued an injunction, "permanently enjoining Ohio Revised Code § 2907.31(D)(1), as applied to internet communications." 512 F.Supp.2d at 1106. The district court held that the Amended Act was not unconstitutionally vague, and did not violate the Commerce Clause. 512 F.Supp.2d at 1098-1105.

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[6] *Miller v. California,* 413 U.S. 15 (1973); *Ginsberg v. New York,* 390 U.S. 629(1968).

The Appeal and Cross-Appeal to the Sixth Circuit, and the Questions Certified to this Court by the Sixth Circuit

The Attorney General / Prosecutors appealed, and the Booksellers / Website Publishers cross-appealed, to the Sixth Circuit. The Attorney General / Prosecutors argued that the Amended Act is constitutional because it only covers "direct communications ... with juveniles,"[7] and thus would not apply either to Websites or chatrooms. To support this narrowing construction of the statute, the Attorney General / Prosecutors stated:

> most Internet technologies—including the Web, USENET discussion groups, chat rooms, and mailing lists—do not allow senders to prevent particular recipients from receiving the transmissions.

AG 6th Cir. Third Br., p. 3. Based on that statement, the Attorney General concluded:

> [C]ontrary to Plaintiffs' repeated suggestions, the statute does not regulate Web communications, other than such personally directed devices as instant messaging ("IM") or person-to-person e-mail.

Id. After taking note of the Attorney General's argument, the Sixth Circuit pointed out:

> Notably, as Plaintiffs point out, the statute provides no guidance about when a person has "inadequate information" to "have reason to believe that a particular recipient of the information ... is a juvenile,"§ 2907.31(D)(2)(a), or has the "ability to prevent a particular recipient from receiving the [harmful to juveniles] information,"§ 2907.31(D)(2)(b).

560 F.3d at 447. The Sixth Circuit concluded that it should not "speculate" on the meaning of the Amended Act, and "the better course ... is to provide the Supreme Court of Ohio with the opportunity to interpret the scope of § 2907.31(D)(2)'s exemptions and the statute's coverage." 560 F.3d at 447. The Sixth Circuit therefore certified the questions quoted above.

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[7] Final First Brief of Attorney General / Prosecutors, *American Booksellers Foundation for Free Expression v. Strickland,* Nos. 07-4375, 4376 (6th Cir.) ("AG 6th Cir. First Br.), p. 28.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I. THIS COURT SHOULD ACCEPT THE CERTIFIED QUESTIONS BECAUSE THERE IS A QUESTION OF OHIO LAW THAT MAY BE DETERMINATIVE OF THE PROCEEDING AND FOR WHICH THERE IS NO CONTROLLING PRECEDENT IN THE DECISIONS OF THIS SUPREME COURT.

The Sixth Circuit's questions meet this Court's standards for certification: "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." S.CT.PRAC.R. XVIII § 1.

This Court has not previously reviewed the Amended Act, and there is thus no controlling precedent in the decisions of this Court. The Amended Act uses undefined phrases, such as "remotely transmitting", a "method of mass distribution", and "the ability to prevent a particular recipient from receiving the information" not found in any other Ohio statute.

If this Court answers the certified questions with the response suggested by the Booksellers / Website Publishers—by stating that the Amended Act is too vague to permit answers to the certified questions, that is likely to be "determinative" of the federal litigation, because the Booksellers / Website Publishers would ask the federal courts to hold the Amended Act void for vagueness.[8] If this Court were to adopt the construction of the Amended Act suggested by the Attorney General, the response would not likely be determinative of the federal proceeding. Additional issues would remain to be addressed in the federal courts, including whether the Amended Act (as construed by this Court) remains overbroad and thus violates the First Amendment, whether the Amended Act criminalizes constitutionally-protected speech among or to older minors, and whether the Amended Act violates the Commerce Clause.

[8] The Booksellers / Website Publishers do not ask this Court to hold the Amended Act void for vagueness, but simply ask this Court to respond to the certified questions by stating that the Amended Act is too vague to permit answers. Based on that construction of the Amended Act by this Court, the federal courts can address the issue of the Amended Act's constitutionality (just as the federal courts will do so if this Court answers the certified questions "yes" or "no").

PROPOSITION OF LAW II. THIS COURT SHOULD RESPOND TO THE CERTIFIED QUESTIONS BY STATING THAT "THE AMENDED ACT IS TOO VAGUE TO PERMIT THIS COURT TO ANSWER THE QUESTIONS."

Would that the Ohio Legislature had enacted the statute that the Attorney General has asked the Sixth Circuit and this Court to draft. It goes without saying that the Booksellers / Website Publishers would much prefer a narrower statute that would diminish the threat of unconstitutional criminal prosecutions. But that is not the statute that the legislature enacted. Instead, the legislature enacted a convoluted statute, the vagueness of which is demonstrated by the varying interpretations proffered in the federal proceedings:

- The Attorney General / Prosecutors took the position in the district court that "Web sites, chat rooms, discussion groups, etc., ***for the most part*** are also methods of communication that do 'not provide the person [transmitting the information] the ability to prevent a particular recipient from receiving the information. R.C. 2907.31(D)(2)(b). These generalized broadcasts of information are therefore specifically excepted from the operation of R.C. 2907.31." JA 749 (emphasis added). But the Attorney General / Prosecutors' use of the phrase ***"for the most part"*** implied that, ***in some instances,*** Web sites, chat rooms, and discussion groups do provide the speaker with the ability to prevent a particular recipient from receiving the information, and that ***in those instances,*** the use of Web sites, chat rooms, and discussion groups would be subject to this criminal statute.
- With respect to e-mails and IMs, the Attorney General / Prosecutors took the position in the district court that "These methods of Internet communication ***might fall within*** the reach of the statute if a person uses IM or e-mail to send material harmful to juveniles directly to a person (or persons) he has reason to believe is a juvenile (or are juveniles)." JA 750 (emphasis added). The Attorney General / Prosecutors did not

state what would determine whether such communications ***"would fall within"*** the scope of the statute, but added a footnote that "Listservs or mail exploders fall between the two extremes," so that listservs "open to subscribers from the public or a large subset of the public" would be exempt from the statute while "a listserv with a smaller address list of e-mail recipients, open or of interest only to particular people" might fall within the purview of the statute. *Id.* The Attorney General did not state where the statute drew the line between those listservs whose use could result in prosecution and those that could be used without such fear.

- The district court's opinion used a "chat room" as an example of a communication that came within the scope of the statute, without stating whether all chat rooms, or only some, could subject a user to criminal prosecution. 512 F.Supp.2d at 1094.
- In the Sixth Circuit, the Attorney General / Prosecutors changed their position, and argued that "the statute does not regulate Web communications, other than such personally directed devices as instant messaging ("IM") or person-to-person e-mail." AG 6th Cir. Third Br., p. 3.
- The Sixth Circuit's certified questions used the terms "private chat rooms" and "public chat rooms" without stating what distinguished the two.
- The Sixth Circuit's certified questions made reference to "instant messaging" and "person-to-person e-mails" without stating whether that Court was including, within those phrases, the use of all listservs (and all USENET groups), or whether it was embracing the Attorney General's position (taken in the district court but not in the court of appeals) that one had to draw distinctions among listservs.

While this range of positions would be appropriate as part of a legislative debate while a statute was being drafted, the very fact that these varying positions have been taken by the

Attorney General, by the Prosecutors, and by judges—all struggling to figure out the meaning of the Amended Act—compels but one conclusion: The Amended Act is vague, and does not "convey an understandable standard capable of enforcement in the courts." *Norwood v. Horney,* 110 Ohio St.3d 353, 378-79. 853 N.E.2d 1115, 1142 (2006). As this Court held in *Norwood:*

> Due process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached. See, generally, *Kolender v. Lawson (*1983), 461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.Ed.2d 903; *Colten v. Kentucky* (1972), 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584. Implicitly, the law must also convey an understandable standard capable of enforcement in the courts, *Giaccio v. Pennsylvania* (1966), 382 U.S. 399, 403, 86 S.Ct. 518, 15 L.Ed.2d 447, for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct.

Id. In certifying questions to this Court, the Sixth Circuit frankly stated that, because "the statute provides no guidance" on the certified questions, if the Sixth Circuit attempted to answer those questions, it could only "speculate." Absent legislative guidance, this Court, too, could only "speculate" as to the scope of the Amended Act, and it should not do so. Whether a question as to the construction of a statute reaches this Court through the Ohio judicial system (as it did in *Norwood*), or by a certified question from a federal court (as it does here), if the correct answer is that a statute is vague, that is the answer that this Court should give. *State of Nevada v. Richard,* 108 Nev. 626, 836 P.2d 622 (Nev. 1992) (on certified question from federal court, Supreme Court of Nevada held statute was vague). As this Court held in *Norwood,*

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

110 Ohio St.3d 353, 377, 853 N.E.2d 1115, 1142, quoting *Grayned v. Rockford*, 408 U.S. 104,

108-109 (1972). See also *City of Alliance v. Carbone,* 2009 WL 690408 (Ohio App. 5 Dist., March 16, 2009).

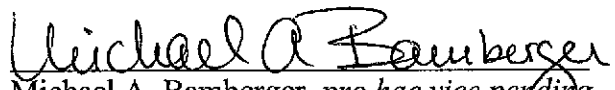
Do communications in chat rooms subject the speaker to criminal prosecution or not? Does that depend on the size of the chat room, or its name, or who put it together? What is the difference between a "public chat room" and a "private chat room"? Does the use of some, but not all, listservs subject the speaker to criminal prosecution? If so, how does a speaker know whether a particular listserv is on one or the other side of the line? Is a Website publisher subject to criminal prosecution, because she could require passwords to use the Website—and a prosecutor might argue that passwords would give the Website publisher the "ability to prevent a particular recipient from receiving the information"? Because it does not provide answers to any of these questions, the Amended Act neither "provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence," nor "is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood,* 110 Ohio St.3d 353, 377, 853 N.E.2d 1115, 1142, citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

In *Norwood,* this Court declined to provide a definition for the vague statute at issue—an eminent domain statute that used "deteriorating area" as a standard for appropriation—but instead held the statute void for vagueness. Similarly, here, it would be an act of legislation—not statutory interpretation—for this Court to answer the certified questions "yes" or "no" and thus engraft definitions onto this vague statute.

CONCLUSION

For the foregoing reasons, the Booksellers / Website Publishers respectfully request that this Court accept the certified questions, and answer each question by stating that "The Amended Act is too vague to permit the Supreme Court of Ohio to answer this question."

Dated: April 21, 2009



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CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 2009, I served a copy of the foregoing Preliminary Memorandum of American Booksellers Foundation for Free Expression et al., Respondents, by first class mail, postage prepaid, upon each of:

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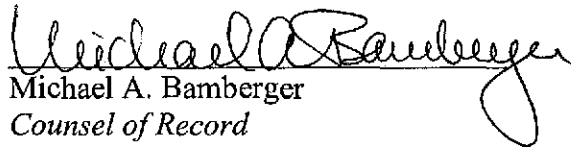

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