

ORIGINAL

In the
Supreme Court of Ohio

OHIO ATTORNEY GENERAL RICHARD
CORDRAY and FRANKLIN COUNTY,
OHIO, PROSECUTING ATTORNEY RON
O'BRIEN,

Petitioners,

v.

AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION,
et al.,

Respondents.

Case No. 2009-0609

On Review of Certified Question from
The United States Court of Appeals
for the Sixth Circuit

U.S. Court of Appeals Case
No. 07-4375/4376

**REPLY BRIEF OF PETITIONERS
OHIO ATTORNEY GENERAL RICHARD CORDRAY, AND
FRANKLIN COUNTY, OHIO PROSECUTING ATTORNEY RON O'BRIEN**

H. LOUIS SIRKIN
Sirkin, Pinales & Schwartz LLP
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2726
513-721-4876

MICHAEL A. BAMBERGER*
**Counsel of Record*

RICHARD M. ZUCKERMAN
Sonnenschein, Nath & Rosenthal
1221 Avenue of the Americas, 24th Floor
New York, New York 10020-1089

Counsel for Respondents
American Booksellers, et al.

NICK A. SOULAS, JR. (0062166)
Franklin County Prosecuting Attorney
373 S. High Street, 13th Floor
Columbus, Ohio 43215
614-462-3520

Counsel for Petitioner
Franklin County, Ohio, Prosecuting Attorney
Ron O'Brien

RICHARD A. CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

ELISE W. PORTER (0055548)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Petitioners
Ohio Attorney General Richard Cordray
and County Prosecutors

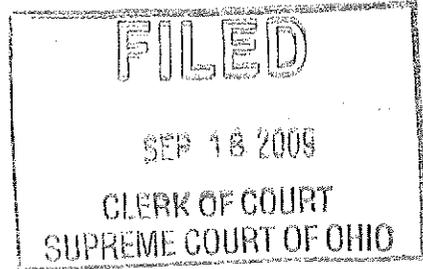


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	3
 <u>Petitioner Ohio Attorney General’s Proposition of Law:</u>	
<i>R.C. 2907.31(D) criminalizes only the knowing or reckless transfer of harmful material directly to juveniles over personally directed devices, not the use of generally accessible forums to disseminate harmful material.....</i>	
A. The plain text of R.C. 2907.31 provides ready, affirmative answers to the Sixth Circuit questions, because the statute criminalizes only knowingly or recklessly transmitting harmful material to juveniles over personally directed devices, not posting such material to generally accessible electronic forums such as websites.....	3
B. American Booksellers’ remaining arguments do not answer the Sixth Circuit’s certified questions because they ignore the statutory text and purpose and raise immaterial issues.....	6
1. Even if American Booksellers’ vagueness arguments are properly presented to this Court (and they are not), the statute is not unconstitutionally vague.....	6
2. The Sixth Circuit’s certified questions likewise are not vague.	7
3. The Court should reject American Booksellers’ invitation to hobble the statute by imposing needless specificity.	9
4. R.C. 2907.31 adds legislative value not served by existing importuning and luring provisions.	11
5. User-based parental controls are not relevant to the legal issues.	12
CONCLUSION.....	13
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>American Commc 'ns Ass'n v. Douds</i> (1950), 339 U.S. 382	9
<i>City of Norwood v. Horney</i> , 110 Ohio St.3d 353, 2006-Ohio-3799	7
<i>Columbia Gas Transmission Corp v. Levin</i> , 117 Ohio St. 3d 122, 2008-Ohio-511	3
<i>Connection Distrib. Co. v. Holder</i> (6th Cir. 2009), 557 F.3d 321	8
<i>Grayned v. Rockford</i> (1972), 408 U.S. 104	9
<i>N.Y. State Club Ass'n v. City of New York</i> (1988), 487 U.S. 1	8
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937).....	12
<i>Rendon v. Transp. Sec. Admin.</i> (6th Cir. 2005), 424 F.3d 475	7
<i>Reno v. ACLU</i> (1997), 521 U.S. 844	6, 12
<i>United States v. Williams</i> (2008), 128 S. Ct. 1830	8
 Statutes, Rules and Constitutional Provisions	
Fla. Stat. § 847.0138	6, 10
R.C. 2907.01(E) & (H)	12
R.C. 2907.07(C) & (D)	11
R.C. 2907.31	<i>passim</i>
R.C. 2907.35 (2001).....	12
 Other Authorities	
American Heritage College Dictionary (3d ed. 1997).....	1, 4

INTRODUCTION

In their response to the questions certified by the Sixth Circuit Court of Appeals, Plaintiffs-Respondents (collectively, “American Booksellers”) put the cart before the horse. Currently pending before the Sixth Circuit is American Booksellers’ constitutional challenge—on vagueness, overbreadth, and dormant Commerce Clause grounds—to R.C. 2907.31, the Ohio statute that prohibits knowingly or recklessly transmitting material harmful to juveniles directly to minors over the Internet and other electronic media. To help it resolve those constitutional issues, the Sixth Circuit has asked this Court to answer two straightforward questions about statutory interpretation.

American Booksellers respond that the questions are unanswerable because the statute is unconstitutionally vague. But it is not helpful to assume a constitutional conclusion to answer the Sixth Circuit’s predicate questions. It is for the Sixth Circuit, not this Court, to resolve the vagueness question. This Court’s task is simply to resolve whether the Attorney General’s construction of the statute’s language is correct. And the Court can easily answer both certified questions “yes.”

The certified questions ask whether the Attorney General is correct to read R.C. 2907.31 as (1) limited to personally directed electronic communication devices such as e-mail and instant messaging and (2) excluding websites and chat rooms that are available to the general public. The text of the statute provides ready answers. The law applies only to persons who “*directly*” furnish harmful materials to juveniles. R.C. 2907.31(A)(1) (emphasis added). And to send a communication directly means “[t]o indicate the intended recipient on (a letter, for example).” American Heritage College Dictionary (3d ed. 1997) 393. That is not the only textual limitation. The statute also contains an exception for methods of mass distribution that excludes senders who either (1) have “inadequate information to know or have reason to believe that a particular

recipient of the information . . . is a juvenile,” or (2) cannot “prevent a particular recipient from receiving the information.” R.C. 2907.31(D)(2). Taken together, these provisions make clear that a person violates the statute only when she directly sends the prohibited material by electronic means knowing, or having reason to believe, that a particular recipient is a juvenile, with no ability to exclude the juvenile from the recipient list. That limited prohibition means that adults may use generally accessible websites and other open forums to distribute materials harmful to juveniles to mass audiences on the Internet without fear of criminal liability.

American Booksellers insist that the statute is vague because it does not spell out exactly which Internet forums—websites, listservs, chatrooms, and the like—would or would not fall within the statute, but this argument misses the point. The label attached to the conduit for the communication is irrelevant. The critical questions under the statute are whether a particular message containing the forbidden content is a directed communication to a person known or reasonably believed to be a juvenile, and whether the sender can control who receives the message. These two criteria may or may not apply to a particular type of Internet communication. Moreover, new methods of electronic communication are developed constantly. If the General Assembly or this Court ties R.C. 2907.31 to a particular type of Internet message, the statute will rapidly become obsolete. For these reasons, the key is the control and knowledge of the message sender, not the specific conduit by which the message is sent.

This Court should ignore the extraneous arguments raised by American Booksellers and answer “yes” to the certified questions.

ARGUMENT

Petitioner Ohio Attorney General's Proposition of Law:

R.C. 2907.31(D) criminalizes only the knowing or reckless transfer of harmful material directly to juveniles over personally directed devices, not the use of generally accessible forums to disseminate harmful material.

Throughout their brief, American Booksellers argue the wrong issues to the wrong court. The Sixth Circuit has before it the constitutional questions whether R.C. 2907.31 is impermissibly vague or overbroad. That court determined that it could not resolve the First Amendment questions without guidance as to the application of the statute under Ohio law. The task for this Court is not to determine whether the law is vague or accept American Booksellers' assumption that it is, but rather to answer the questions certified to it by the Sixth Circuit. Once those questions are answered, the Sixth Circuit will determine whether the statute is constitutional.

The answers to the Sixth Circuit's certified questions are apparent from the statutory text. R.C. 2907.31 applies only to electronic communications that a person sends directly to a particular recipient, and only if the speaker can control who receives the message and knows, or has reason to know, that a particular recipient is a juvenile. The statute covers e-mails, instant messages, and private chat rooms controlled by the sender, but not Internet websites that everyone can surf.

A. The plain text of R.C. 2907.31 provides ready, affirmative answers to the Sixth Circuit questions, because the statute criminalizes only knowingly or recklessly transmitting harmful material to juveniles over personally directed devices, not posting such material to generally accessible electronic forums such as websites.

As previously explained, R.C. 2907.31(D) "conveys a clear, unequivocal, and definite meaning" that this Court can apply "according to its terms." *Columbia Gas Transmission Corp v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 19. The only Internet communications the

statute criminalizes are those “*directly*” transmitted “*to a juvenile, a group of juveniles,*” or law enforcement officers posing as juveniles. R.C. 2907.31(D) (emphasis added). To send a communication directly means “[t]o indicate the intended recipient on (a letter, for example).” American Heritage College Dictionary (3d ed. 1997) 393. Thus, an electronic communication is only sent “directly . . . to a juvenile” if the juvenile is listed in the “To:” line of the e-mail, instant message, or the like.

What is more, if the communication does not contain a “To:” line, then it falls within the statute’s broadcast communication exemption. That exemption provides that the statute does not apply to “method[s] of mass distribution,” such as the Internet, that “do[] not provide the person the ability to prevent a particular recipient from receiving the information.” R.C. 2907.31(D)(2)(b). And even if the speaker can exclude particular recipients, she does not violate the statute’s general prohibitions “by means of an electronic method of remotely transmitting information” unless she “knows or has reason to believe” that a juvenile is on the receiving end of that transmission. R.C. 2907.31(D)(1). To further clarify this scienter requirement, the statute exempts from prosecution people who lack “[]adequate information to know or have reason to believe that a *particular* recipient of the [communication] is a juvenile.” R.C. 2907.31(D)(2)(a) (emphasis added). American Booksellers are therefore wrong to state that R.C. 2907.31 imposes criminal sanctions “independent of the actor’s intent.” American Booksellers’ Brief (“Br.”) 9. An adult violates the statute only if, with knowledge of the message’s harmful content, he directly furnishes it to a person he knows or has reason to believe is a minor. R.C. 2907.31(A), (D).

As to the first certified question, the statute provides that a person can only incur criminal liability when he uses personally directed devices to send harmful material to known juveniles.

As explained in earlier briefing, e-mails, instant messages, and private chat rooms controlled by the sender are paradigmatic examples of this type of device. All contain some sort of “To:” line that allows the sender to direct her communication to a particular recipient or recipients. Likewise, such personally directed devices fall outside of R.C. 2907.31(D)(2)(b)’s broadcast communication exemption. E-mail, instant messenger, and private chat rooms all provide senders “the ability to prevent a particular recipient from receiving the information.” A user can send an e-mail to a particular e-mail address and not to others, can instant message a specific person and not others, or can invite selected individuals into a private chat room and exclude all others. In short, the statute expressly criminalizes illicit transmissions to juveniles that occur over personally directed devices like e-mails, instant messages, and private chat rooms.

The text also provides a ready “yes” to the second question—whether the statute exempts from liability material posted on generally accessible websites and in public chat rooms. The R.C. 2907.31(D)(2) broadcast communication exemption covers both of these forums, because neither device gives speakers the ability to exclude particular recipients. The statute requires that the harmful communication (1) be knowingly or recklessly directed to particular juveniles, R.C. 2907.31(D)(2)(a); and (2) take place over a device that allows senders to exclude particular recipients, R.C. 2907.31(D)(2)(b). It therefore does not criminalize communications posted on a website or public chat room. Such forums are unlike e-mails, instant messages, or private chat rooms, which neither permit the speaker to direct his message to particular recipients nor allow the speaker to restrict who views it.

In sum, the Ohio statute applies only to those electronic communications that the speaker can send directly to a particular recipient, and from which the sender can exclude other, unintended recipients. Such devices include e-mails, instant messages, and private chat rooms

controlled by the sender. They do not include websites that anyone can view, or public chat rooms that anyone can enter. And the sender only falls within the statute's reach if she knows, or has reason to believe, that a particular recipient is a juvenile. In this way, the Ohio statute is closely similar to the Florida statute—embraced by American Booksellers as a model of constitutionality—which is restricted to direct communications to persons “known by the defendant to be a minor.” (Br. 25 (quoting Fla. Stat. § 847.0138).)

All of this fits with the statute's purpose. In earlier federal attempts to regulate the Internet, Congress essentially reached anyone who posted obscene or indecent materials online, and the U.S. Supreme Court invalidated those efforts as overbroad under the First Amendment. See, e.g., *Reno v. ACLU* (1997), 521 U.S. 844 (striking down the Communications Decency Act). That is neither the General Assembly's intent nor the Ohio statute's effect. As explained in the State's opening brief (State Br. 6-10) and in Part B below, the Ohio law is principally designed to reach sexual predators who reach out to individual juveniles in an effort to “groom” them for sex. Such offenders prey on particular juveniles with communications sent directly to those juveniles. As the statute's text reflects, R.C. 2907.31 is designed to cover that activity, and affirmative answers to the Sixth Circuit's certified questions are consistent with this statutory text and purpose.

B. American Booksellers' remaining arguments do not answer the Sixth Circuit's certified questions because they ignore the statutory text and purpose and raise immaterial issues.

1. Even if American Booksellers' vagueness arguments are properly presented to this Court (and they are not), the statute is not unconstitutionally vague.

The above discussion makes clear that the statutory text provides ready, affirmative answers to the Sixth Circuit's questions. American Booksellers' argument that the statute is too vague to provide answers is therefore incorrect. It also assumes the answer to the constitutional

questions pending before the Sixth Circuit—questions that are not before this Court. But even if this Court could consider American Booksellers’ constitutional vagueness argument, the claim fails on the merits.

The Ohio statute satisfies the void-for-vagueness standard. “[A] statute is not void simply because it could be worded more precisely or with additional certainty.” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 380, 2006-Ohio-3799, ¶ 86. “The critical question in all cases is whether the law affords a reasonable individual or ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those that do not are void for vagueness.” *Id.* R.C. 2907.31 meets this standard because it provides reasonable notice of what conduct is condemned and what conduct is not. Moreover, because the statute “does not proscribe a substantial amount of constitutionally protected conduct,” it fails the vagueness test only if it “is impermissibly vague in *all* of its applications.” *Rendon v. Transp. Sec. Admin.* (6th Cir. 2005), 424 F.3d 475, 480 (internal quotation marks and citation omitted) (omission in original). It is not. For instance, a person of ordinary intelligence would know R.C. 2907.31 applies to a little-league coach who e-mails a sexually explicit video clip to a ten-year-old player.

Thus, although the void-for-vagueness doctrine is not before this Court, the Ohio statute satisfies the constitutional standard.

2. The Sixth Circuit’s certified questions likewise are not vague.

In an argument that is of a piece with their vagueness claim, American Booksellers contend that the Sixth Circuit’s certified questions are too vague to answer (Br. 20-21), and that they “themselves beget other questions” (Br. 23). American Booksellers then set forth a litany of further questions that they claim the certified questions raise, and they argue that R.C. 2907.31 cannot be saved because it does not provide answers to those additional questions. (Br. 23-24.) Relatedly, American Booksellers add that the certified questions are unclear because they do not

perfectly track the arguments made by the State in the course of this seven-year litigation. (Br. 3-4.) There are two problems with these arguments.

First, American Booksellers did not raise this problem in their preliminary memorandum. Nowhere did they argue that “the certified questions were different from the Attorney General’s position,” or that the Sixth Circuit “did not make clear whether it was embracing the Attorney General’s position.” (Br. 3-4, 21.) If the questions are so unclear, American Booksellers should not have urged the Court to answer the questions. Now that the questions are before this Court on the merits, they should be answered on the merits.

Second, even if American Booksellers’ litany of questions were relevant, this suit challenges the statute on its face, not as applied to a particular situation. A statute will survive a facial challenge under the First Amendment unless it “prohibits a *substantial* amount of protected speech’ both ‘in an absolute sense’ and ‘relative to the statute’s plainly legitimate sweep.’” *Connection Distrib. Co. v. Holder* (6th Cir. 2009) (en banc), 557 F.3d 321, 336 (quoting *United States v. Williams* (2008), 128 S. Ct. 1830, 1838) (emphasis added). In other words, American Booksellers “must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.” *N.Y. State Club Ass’n v. City of New York* (1988), 487 U.S. 1, 14.

The question for this Court, then, is whether the statutory text permits answers to the Sixth Circuit’s certified questions; if so, the Sixth Circuit will use those answers to determine whether R.C. 2709.31 is unconstitutional in a substantial number of instances vis-à-vis its plainly legitimate scope. American Booksellers’ efforts to muddy the waters by devising a handful of additional questions that, they claim, the certified questions might not answer is beside the point. “It will always be true that the fertile legal ‘imagination can conjure up hypothetical cases in

which the meaning of [disputed] terms will be in nice question.” *Grayned v. Rockford* (1972), 408 U.S. 104, 111 n.15 (quoting *American Commc’ns Ass’n v. Doubs* (1950), 339 U.S. 382, 412). After all, “[c]ondemned to the use of words, we can never expect a mathematical certainty from our language.” *Id.* at 110. But that fact does not render the terms of the statute—or, for that matter, the language used by the Sixth Circuit—indecipherable or unconstitutional in “a substantial number of instances,” as the facial-challenge standard demands. And, as explained in the State’s opening brief and in Part A.1 above, the scope of the statute’s plainly legitimate applications is clear.

3. The Court should reject American Booksellers’ invitation to hobble the statute by imposing needless specificity.

What American Booksellers are demanding—that the statute define with specificity the precise communication mechanisms that are and are not covered—is untenable, both because it is unrealistic and because it would weaken, not strengthen, the law. The means of electronic communication change constantly. When the amended complaint was filed in 2003, for instance, Twitter and Facebook—common forms of telecommunication today—did not exist. For that matter, those communication methods were barely on the scene when the case was appealed to the Sixth Circuit in 2007. If the statute identified specific communication devices or mechanisms, it would require continuous amendment. The General Assembly would not be able to keep pace with technology, and the statute would be rendered ineffectual. The General Assembly reasonably chose instead to identify a category—“electronic method[s] of remotely transmitting information”—and then to limit the statute’s application within that category by identifying the qualities of the communication devices that are covered—those that are direct, that allow the sender to exclude particular recipients, and so on. Such is the nature of laws and regulations. Congress or the USDA would never regulate, say, “Cheerios, Frosted Flakes, and

Wheaties.” Instead the law or regulation would regulate “breakfast cereals” as a category and then identify the qualities of the specific cereals at issue.

For that reason, the Court should decline American Booksellers’ twin arguments that either (1) the statute should spell out in detail precisely which communication mechanisms are covered, or (2) that “this Court should answer the certified questions with narrative answers” that accomplish the same thing. (Br. 26.) The General Assembly did not speak with such specificity for good reason: because to do so would quickly leave the statute feckless. This Court should not read into the statute limitations that are both needless and artificial. The statute provides all the guidance that is needed by asking whether the message is a directed communication to a person known or reasonably believed to be a juvenile, and whether the sender can control who receives the message. The key criteria are the control and knowledge of the sender, not the label placed on the conduit by which the message is sent—be it by instant message, e-mail, listserv, private chat room, or text message.

Finally, American Booksellers argue that Ohio should follow the model of a Florida law that applies to “any person in this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors . . . to a specific individual known by the defendant to be a minor.” Fla. Stat. § 847.0138 (cited at Br. 24-25). Although the Florida law is limited to e-mails, not just direct communications, there is little daylight between R.C. 2907.31 and the Florida law when it comes to scienter. The Ohio law, much like the Florida statute, applies only when a direct communication is sent to a recipient whom the sender knows or has reason to know is a juvenile. While the constitutionality of the Ohio law is, as explained above, beside the point in this Court, the resemblance between R.C. 2907.31 and the Florida law—which American Booksellers readily concede is constitutional—demonstrates that the Ohio law

is neither radical nor unparalleled. More to the point, the construction of the statute posited by the Sixth Circuit's questions is a correct one.

4. R.C. 2907.31 adds legislative value not served by existing importuning and luring provisions.

American Booksellers make two arguments regarding importuning and luring statutes. First, they assert that the State claimed in its Sixth Circuit brief that R.C. 2907.31 is an importuning or luring statute. (Br. 8.) Second, they argue that Ohio's importuning statute is adequate to protect the well-being of children in Ohio. Both positions are mistaken. R.C. 2907.31 is founded on an understanding of the way sexual predation of children typically occurs. The provision therefore covers different conduct and serves a different purpose from the importuning statute.

Ohio's importuning statute is aimed at adults who actually lure children to a particular location for the purpose of having sex with them. Importuning by electronic communication contains four elements: (1) the solicitation of another (2) by a telecommunications device (3) to engage in sexual activity (4) with knowledge or reckless disregard of the fact that the other person is a minor. R.C. 2907.07(C) & (D). The provision therefore applies to an adult who invites a child to engage in sexual activity.

R.C. 2907.31 catches the predator at an earlier stage. Before the adult ever lures the youth to a particular location, he will often engage in hours of sexually explicit conversation, all designed to accustom the child to the idea of sex. This "grooming" may occur for days or weeks before the actual importuning or luring takes place. See Supp. at 697, 782. Sometimes the luring does not occur at all, because the adult contents himself with the grooming process alone. Either way—whether importuning occurs or not—the child suffers psychological harm from the grooming process. Accordingly, R.C. 2907.31 aims to stop the grooming before any

importuning or luring can take place. The law's purpose, in other words, is not only to preempt the *physical* sexual abuse that can follow from grooming, but also to prevent the *psychological* sexual abuse of grooming in and of itself. Supp. at 558-559.

This is nothing new. The language at issue here is a clarification of a prohibition under Ohio law that for many years imposed criminal sanctions on those who provided or displayed to juveniles materials or performances deemed harmful to juveniles. R.C. 2907.01(E) & (H), 2907.31, 2907.35 (2001).

The statute here is not an importuning statute, it is not intended to be one, and it does not *have* to be one. “The Constitution does not forbid ‘cautious advance, step by step,’ in dealing with the evils which are exhibited in activities within the range of legislative power.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937). The General Assembly has properly chosen to prevent separate harms that derive from separate conduct, and that legislative choice has no bearing on the Sixth Circuit's certified questions.

5. User-based parental controls are not relevant to the legal issues.

American Booksellers also submit that effective “parental control” software exists. (Br. 15-16.) But they do not explain how such software relates to the Sixth Circuit's questions concerning R.C. 2907.31. It does not, for two reasons.

First, parental-control software is relevant, if at all, only to the constitutional question of tailoring—that is, whether less restrictive means are available for targeting the evil of sexual predation by the Internet. See, e.g., *Reno v. ACLU* (1997), 521 U.S. 844, 877. But that constitutional question is, again, not before this Court, and a tailoring analysis is not pertinent to the Sixth Circuit's certified questions.

Second, even if it were legally relevant, parental-control software is largely ineffective in the context of R.C. 2907.31, because it is designed to prevent children from accessing unsuitable

content, not to preclude them from receiving e-mail from unknown adults. The software may filter out some content in the form of words, but no program can effectively filter pictures. Supp. at 487-489, 666-675. And many remote communications are now conducted on hardware other than a desktop computer, including Internet-compatible wireless phones, for which there is no record evidence that parental-control features exist.

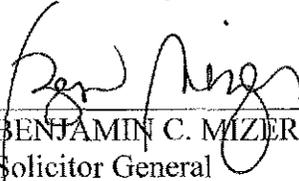
Moreover, many children have access to the Internet on computers at schools, libraries, and the like that lack parental-control software. R.C. 2907.31 therefore helps to protect children from predatory communications even when their parents are powerless to do so.

CONCLUSION

For these reasons, and the reasons presented in its first brief, the State asks this Court to answer “yes” to both questions certified to it by the Sixth Circuit.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

ELISE W. PORTER (0055548)

Assistant Solicitor

30 East Broad Street, 17th Floor

Columbus, OH 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Petitioners

Ohio Attorney General Richard Cordray
and County Prosecutors

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Petitioners Ohio Attorney General, Richard Cordray, and Franklin County, Ohio Prosecuting Attorney Ron O'Brien was served by U.S. mail this 18th day of September, 2009, upon the following counsel:

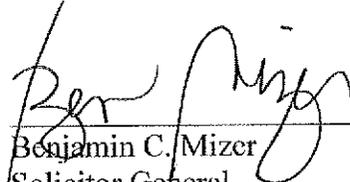
H. Louis Sirkin
Sirkin Pinales & Schwartz LLP
920 Fourth & Race Tower
105 W. Fourth Street
Cincinnati, Ohio 45202-2726

Michael A. Bamberger
Sonnenschein Nath & Rosenthal
1221 Avenue of the Americas, 24th Floor
New York, New York 10020-1089

Counsel for Respondents
American Booksellers, et al.

Nick A. Soulas, Jr.
Franklin County Prosecuting Attorney
373 S. High Street, 13th Floor
Columbus, Ohio 43215

Counsel for Petitioner
Franklin County, Ohio, Prosecuting
Attorney Ron O'Brien



Benjamin C. Mizer
Solicitor General