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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

NATHAN FLORENCE, et al., Plaintiffs, vs. MARK SHURTLEFF, et al., Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR MOTION TO DISMISS FOR MOOTNESS** Judge Dee Benson Case No. 2:05CV00485 DB

Defendants respectfully submit this Memorandum in Support of their Motion for Judgment on the Pleadings or in the alternative for their Motion to Dismiss for Mootness.

INTRODUCTION

With respect to Utah Code § 76-10-1206, Defendants move this Court for Judgment on the Pleadings pursuant to Federal Rules of Civil Procedure 12(c), and/or for an Order of Dismissal based on Mootness. This Motion relies upon the facts and arguments originally set forth in Defendants' July 29, 2011, Memorandum in Support of their Motion to Dismiss for Lack

of Standing and Cross-Motion for Summary Judgment. As that Memorandum pointed out, Plaintiffs' Memorandum in support of their Motion for Summary Judgment completely omits any reference to the 2008 amendments to Utah's Harmful to Minors statute contained in H.B. 18 – which amendments significantly changed the Harmful to Minors statute and deleted the two provisions Plaintiffs previously had claimed rendered § 1206 unconstitutional.

This Motion and Memorandum addresses only those issues related to Utah Code § 76-10-1206. It does not address issues related to § 76-10-1233.

I. JUDGMENT ON THE PLEADINGS.

Federal Rules of Civil Procedure 12(c) states that: "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings."

A. Facts Pertinent to Rendering Judgment on the Pleadings.

This Motion is based upon the following facts:

1. The Amended Complaint upon which Plaintiffs have filed their Motion for Summary Judgment was filed April 30, 2007. It challenges the constitutionality of Utah Code § 76-1-1206, as amended by HB 260 (2005) and HB 5 (2007). (Doc. 43.)

2. Plaintiffs are Internet content providers.

3. In 2008 the Utah Legislature passed HB 18 amending Utah's Harmful to Minors statute. (H.B. 18 is attached hereto as Exhibit A.) H.B. 18 deleted the provision in § 76-10-1206 referencing Internet content providers and deleted the provision in § 76-10-1230 requiring

content providers to verify viewers age through an age verification mechanism – both of which were provisions Plaintiffs alleged were unconstitutional. (HB 18, lines 147 - 148, 155 - 157.)

4. Plaintiffs Amended Complaint does not challenge the constitutionality Utah's current Harmful to Minors statute, as amended by HB 18.

5. Plaintiffs' Memorandum in Support of their Motion for Summary Judgment also challenges only the the 2005 and 2007 amendments. (Doc. 82, p. 7.) It makes no reference to the current law or the changes brought about to § 1206 by HB 18.

B. Defendants Amended Complaint and Motion for Summary Judgment Do Not State a Claim Upon Which Relief Can Be Granted.

The simple fact of the matter is: Plaintiffs are challenging a law that no longer exits. Their Amended Complaint alleges problems with the 2005 and 2007 amendments to Utah's Harmful to Minors statute. Their Memorandum in Support of Summary Judgment also addresses only the 2005 and 2007 amendments. Plaintiffs are clearly not challenging the current law. The effect of the 2008 amendments in terms of content providers was to return statute to the way it existed prior to 2005.

In addition, the "access restricted" provisions applicable to content providers in § 76-10-1230, were also deleted from the statute in 2008. Yet Plaintiffs cite this provision in their Memorandum as support for their argument that § 76-10-1206 is unconstitutional. (Doc. 82, p. 22.) They are clearly not challenging the current law.

There are two aspects to Defendants Motion for Judgment on the Pleadings. The first is that Plaintiffs' pleadings, by challenging the constitutionality of provisions of HB 260 and HB 5 that have been repealed, clearly do not state a claim upon which relief may be granted.

Second is the fact that Defendants do not understand what Plaintiffs are challenging at this point. The provisions of HB 260 and HB 5 that they alleged were unconstitutional in their Amended Complaint have been removed. And since § 1206 has been returned to the same language as existed prior to 2005, are Plaintiffs essentially mounting a facial challenge to a 35-year old statute? Are they challenging the current law? Is there a difference? Does Plaintiffs claim there is a difference?

The fact is, Defendants do not know what Plaintiffs are currently challenging. Based on their Amended Complaint and Memorandum in Support of their Motion for Summary Judgment, it is clear they are challenging the law as it existed prior to 2007. If that's not right, then Defendants have no notice of what the challenge constitutes or the grounds upon which it is based. The allegations of their Amended Complaint, along with the Memorandum, simply fail to give "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 555 (2007).

Based thereon, Defendants should be granted Judgment on the Pleadings.

II. THE 2008 AMENDMENTS TO UTAH'S HARMFUL TO MINORS STATUTE HAVE RENDERED PLAINTIFFS' CHALLENGE MOOT.

A. The Three Year Odyssey of § 76-10-1206: 2005 -2008.

Utah's Harmful to Minors statute was originally passed by the Utah Legislature in 1973. Section 1206 remained unchanged from 1973 through 2005. In 2005, the Utah Legislature amended § 1206 by adding a subsection 4 which referenced both Internet Service Providers (ISPs) and Internet content providers. It stated:

> (4)(a) A service provider, as defined in § 76-10-1230, complies with this section if it complies with §§ 76-10-1231 and 76-10-1232.
> (b) A content provider, as defined in § 76-10-1230, complies with this section if it complies with § 76-10-1233.

HB 5 in 2007 added some safe harbor provisions to ISPs and hosting companies in § 1206, but otherwise left Subsection (4) essentially intact. Following the passage of HB 5, Plaintiffs amended their complaint challenging, among other things, the existing portions of HB 260, as amended by HB 5. (Doc. 43.) Defendants filed a Motion to Dismiss (Doc. 48), which was heard by this Court in October, 2007.

Defendants never understood Subsection (4) to apply § 1206 to the whole-world of Internet content providers and so moved for the dismissal of out-of-state plaintiffs.[1] But Plaintiffs did not read it that way, and neither did this Court. (Memorandum Opinion and Order,

[1]Defendants rational, though not articulated particularly well, was that content providers referenced in § 1206(4)(b) had to comply with § 1230, and since § 1230 only applies to Utah-based content providers, § 1206 did not apply to out-of-state Internet content providers. The court did not agree. (Doc. 63, p. 7.)

dated Nov. 29, 2007, p. 7.) (Doc. 63.) The Utah Legislature's response to that ruling was to just delete the provision relating to content providers in § 1206 (4)(b).[2] (HB 18, lines 147 - 148.)

The effect of that deletion, as it related to Internet content providers, was to return § 76-10-1206 back to the same language as existed prior to 2005. But in addition, the Legislature also deleted the "access restricted" provision in § 1230 requiring content providers to verify the age of users. (HB 18, Lines 155 - 157.) In spite of that deletion, Plaintiffs' Memorandum in Support of their Motion for Summary Judgment cites the "access restricted" provision from the 2005 legislation, quoting it in its entirety. (Doc. 82, p. 22.) In the only portion of statute they quote in their Memorandum as evidence of unconstitutionality is one of the provisions deleted three years prior.

Being that it is these two provisions upon which Plaintiffs base their claim that § 1206 is unconstitutional, their claim is moot.

B. Mootness.

The issue here is whether Plaintiffs still have a case to pursue given that the Legislature repealed the provisions in the statute to which they object. As the Supreme Court has said: "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed'." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 1068, (1997), citing *Preiser v. Newkirk*, 422 U.S. 395,

[2] Subsection 4(a) dealing with ISPs still survives.

401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, n. 10, 39 L.Ed.2d 505 (1974)) (internal quotation marks omitted).

The most oft cited case on mootness in the Tenth Circuit is *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (2000). In *Davidson*, various citizens groups challenged the constitutionality of the Colorado Fair Campaign Practices Act on First and Fourteenth Amendment grounds. While appeals were pending, the Colorado General Assembly substantially amended the Act, deleting and/or repealing various sections of the original legislation. In discussing the legal parameters for mootness, the Court said:

> Because "the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction," the court must determine whether a case is moot before proceeding to the merits. *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (citing *Beattie v. United States*, 949 F.2d 1092, 1093 (10th Cir. 1991)) "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1390, 146 L.Ed.2d 265 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (citation omitted)). The crucial question is whether "granting a present determination of the issues offered . . . will have some effect in the real world." *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir. 1999) (quotations and citations omitted).

Davidson, 263 F.3d at 1181-82.

In addition, the Court said that the parties have "no legally cognizable interest in the constitutional validity of an obsolete statute," but if the new statute is "sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues," then the

controversy is not mooted by the change and the federal court continues to have jurisdiction. *Id.* at 1182, citing *Northeastern Fla. Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993). After comparing the challenged provision in the old statute to the most analogous provision in the amended statute, the Court concluded that "the differences between the statutes were too numerous and too fundamental to preserve the court's jurisdiction over the challenged section." *Id.*

In *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (2009), a political action committee and candidates for judicial elective office challenged the Kansas Code of Judicial Conduct limiting campaign activity by judicial candidates. After having been granted their motion for preliminary injunction, the Kansas Supreme Court adopted a new code of judicial conduct revising the challenged provisions. Relying on *Arizonans for Official English v. Arizona* and *Citizens for Responsible Gov't v. Davidson*, cited above, the Tenth Circuit Court again cited guidelines for determining whether a case is moot. "The critical inquiry in deciding whether a case is moot," the Court said, "is whether granting a present determination of the issues offered will have some effect in the real world." *Stout,* 562 F.3d at 1245, citing *Davidson*, 236 F.3d at 1182. And, the Court said:

> Generally, repeal of a challenged statute causes a case to become moot because it extinguishes the plaintiff's legal cognizable interest in the outcome, rendering any remedial action by the court ineffectual.

Id., at 1246, citing *Davidson*, 236 F.3d at 1182. Finding that the Kansas Supreme Court had "completely eliminated the challenged portion" of one clause, and that the new canons contained "significant narrowing language not present in the old canons," *id*. at 1246, the Court determined "this change is fundamental to a degree that impacts our jurisdiction over the plaintiffs' challenges to the old 'canons.'" *Id*. At 1247. Plaintiffs' case was dismissed.

CONCLUSION

Plaintiffs have failed to state a claim pertaining to Utah Code § 76-10-1206 upon which relief can be granted. Defendants should be granted a Judgment on the Pleadings, or in the alternative an Order should be granted dismissing Plaintiffs' claims against § 76-10-1206 for mootness.

DATED this 6th day of October, 2011.

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CERTIFICATE OF DELIVERY

This is to certify that copies of the foregoing **Memorandum in Support of Defendants' Motion for Judgment on the Pleadings And/or Motion to Dismiss for Mootness** was served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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