

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**ATHENACO, LTD. dba ATHENA BOOK SHOP;
BOOKS & MORE OF ALBION LLC; LOWRY'S
BOOKS, L.L.C.; ROONEY FAMILY LLC dba
NICOLA'S BOOKS LITTLE PROFESSOR;
SCHULER BOOKS, INC.; SHAMAN DRUM
BOOKSHOP, INC.; AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION, INC.;
ASSOCIATION OF AMERICAN PUBLISHERS,
INC.; COMIC BOOK LEGAL DEFENSE FUND;
FREEDOM TO READ FOUNDATION; GREAT
LAKES BOOKSELLERS ASSOCIATION; and
INTERNATIONAL PERIODICAL DISTRIBUTORS
ASSOCIATION, INC.,**

Plaintiffs,

v.

**MIKE COX, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
MICHIGAN; THOMAS JAY WEICHEL, Alcona
County Prosecuting Attorney; KAREN
BAHRMAN, Alger County Prosecuting Attorney;
FREDERICK L. ANDERSON, Allegan County
Prosecuting Attorney; DENNIS P.
GRENKOWICZ, Alpena County Prosecuting
Attorney; CHARLES H. KOOP, Antrim County
Prosecuting Attorney; CURTIS BROUGHTON,
Arenac County Prosecuting Attorney; JOSEPH
O'LEARY, Baraga County Prosecuting Attorney;
SHANE MCNEILL, Barry County Prosecuting
Attorney; JOSEPH K. SHEERAN, Bay County
Prosecuting Attorney; ANTHONY J. CICCELLI,
Benzie County Prosecuting Attorney; JIM
CHERRY, Berrien County Prosecuting Attorney;
KIRK KASHIAN, Branch County Prosecuting
Attorney; JOHN HALLACY, Calhoun County
Prosecuting Attorney; SCOTT L. TETER, Cass
County Prosecuting Attorney; MARY BETH
KUR, Charlevoix County Prosecuting Attorney;**

Civil No. _____

MICKEY CASTAGNE, Cheboygan County Prosecuting Attorney; BRIAN PEPPLER, Chippewa County Prosecuting Attorney; NORMAN M. GAGE, Clare County Prosecuting Attorney; CHARLES D. SHERMAN, Clinton County Prosecuting Attorney; JOHN HUSS, Crawford County Prosecuting Attorney; THOMAS L. SMITHSON, Delta County Prosecuting Attorney; CHRISTOPHER NINOMIYA, Dickinson County Prosecuting Attorney; JEFFREY L. SAUTER, Eaton County Prosecuting Attorney; ROBERT J. ENGEL, Emmet County Prosecuting Attorney; ARTHUR A. BUSCH, Genesee County Prosecuting Attorney; THOMAS R. EVANS, Gladwin County Prosecuting Attorney; RICHARD B. ADAMS, Gogebic County Prosecuting Attorney; DENNIS M. LABELLE, Grand Traverse County Prosecuting Attorney; KEITH J. KUSHION, Gratiot County Prosecuting Attorney; NEAL A. BRADY, Hillsdale County Prosecuting Attorney; DOUGLAS S. EDWARDS, Houghton County Prosecuting Attorney; MARK J. GAERTNER, Huron County Prosecuting Attorney; STUART J. DUNNINGS, III, Ingham County Prosecuting Attorney; GAIL BENDA, Ionia County Prosecuting Attorney; GARY W. RAPP, Iosco County Prosecuting Attorney; JOSEPH C. SARTORELLI, Iron County Prosecuting Attorney; LARRY J. BURDICK, Isabella County Prosecuting Attorney; HENRY C. ZAVISLAK, Jackson County Prosecuting Attorney; JAMES J. GREGART, Kalamazoo County Prosecuting Attorney; BRIAN DONNELLY, Kalkaska County Prosecuting Attorney; WILLIAM A. FORSYTH, Kent County Prosecuting Attorney; DONNA JAASKELAINEN, Keweenaw County Prosecuting Attorney; DAVE WOODRUFF, Lake County Prosecuting Attorney; BYRON KONSCHUH, Lapeer County Prosecuting Attorney; SARAH BRUBAKER, Leelanau County Prosecuting Attorney; IRVING C. SHAW, JR., Lenawee County Prosecuting Attorney; DAVID L. MORSE, Livingston County Prosecuting

Attorney; PETER TAZELAAR, Luce County Prosecuting Attorney; W. CLAYTON GRAHAM, Mackinac County Prosecuting Attorney; CARL J. MARLINGA, Macomb County Prosecuting Attorney; FORD STONE, Manistee County Prosecuting Attorney; GARY L. WALKER, Marquette County Prosecuting Attorney; CHRIS J. VAN OOSTERUM, Mason County Prosecuting Attorney; PETER M. JAKLEVIC, Mecosta County Prosecuting Attorney; DANIEL E. HASS, Menominee County Prosecuting Attorney; NORMAN W. DONKER, Midland County Prosecuting Attorney; BILL DONNELLY, Missaukee County Prosecuting Attorney; MIKE WEIPERT, Monroe County Prosecuting Attorney; ANDREA S. KRAUSE, Montcalm County Prosecuting Attorney; BENJAMIN T. BOLSER, Montmorency County Prosecuting Attorney; TONY D. TAGUE, Muskegon County Prosecuting Attorney; CRYSTAL ROACH, Newaygo County Prosecuting Attorney; DAVID G. GORCYCA, Oakland County Prosecuting Attorney; TERRY L. SHAW, Oceana County Prosecuting Attorney; DARRIS RICHARDS, Ogemaw County Prosecuting Attorney; JAY FINCH, Ontonagon County Prosecuting Attorney; SANDRA MARVIN, Osceola County Prosecuting Attorney; BARRY L. SHANTZ, Oscoda County Prosecuting Attorney; KEVIN L. HESSELINK, Otsego County Prosecuting Attorney; RONALD J. FRANTZ, Ottawa County Prosecuting Attorney; DONALD J. MCLENNAN, Presque Isle County Prosecuting Attorney; THOMAS SWANSON, Roscommon County Prosecuting Attorney; MICHAEL D. THOMAS, Saginaw County Prosecuting Attorney; JAMES V. YOUNG, Sanilac County Prosecuting Attorney; PETER J. HOLLENBECK, Schoolcraft County Prosecuting Attorney; RANDY COLBRY, Shiawassee County Prosecuting Attorney; PETER R. GEORGE, St. Clair County Prosecuting Attorney; DOUGLAS FISHER, St. Joseph County Prosecuting Attorney; MARK REENE, Tuscola County Prosecuting Attorney;

JURIS KAPS, Van Buren County Prosecuting Attorney; BRIAN L. MACKIE, Washtenaw County Prosecuting Attorney; MIKE DUGGAN, Wayne County Prosecuting Attorney; and WILLIAM M. FAGERMAN, Wexford County Prosecuting Attorney, in their official capacities as PROSECUTING ATTORNEYS,

Defendants.

COMPLAINT

1. This action seeks preliminarily and permanently to enjoin enforcement of, and to declare facially unconstitutional and void, portions of MCL §§ 722.671 (a), (b) and (e), 722.675 and 722.677, all as amended by Act 192, Public Acts of 2003, of the Michigan Legislature (the “Offending Sections”), on the ground that the Offending Sections are unconstitutional under the U.S. Constitution. Act 192 was signed by Governor Granholm of Michigan on November 5, 2003, and took effect on January 1, 2004. A true and correct copy of Act 192 is attached hereto as Exhibit A.

2. Plaintiffs bring this action to safeguard their fundamental rights, the rights of their members, and the rights of their customers and patrons under the U.S. Constitution to disseminate, receive and peruse constitutionally-protected books, magazines and other printed or visual forms of expression.

3. The Offending Sections impose severe restrictions on the availability, display and distribution of constitutionally protected, non-obscene materials in establishments that sell, rent, lend, exhibit and otherwise distribute books, magazines, pamphlets, recordings and other means of expression. Among other things,

MCL § 722.675 makes it unlawful for any person to allow minors to examine sexually explicit visual or verbal material that is harmful to minors.

4. Plaintiffs are not what are commonly known as "adult book stores." They do not challenge Michigan's laws with respect to the sale or dissemination of obscene materials.

5. The Offending Sections read as follows:

"Sec. 1. As used in this act:

- (a) "Display" means to put or set out to view or to make visible.
- (b) "Disseminate" means to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same.
- (e) "Restricted area" means any of the following:
 - (i) An area where sexually explicit matter is displayed only in a manner that prevents public view of the lower 2/3 of the matter's cover or exterior
 - (ii) A building, or a distinct and enclosed area or room within a building, if access by minors is prohibited, notice of the prohibition is prominently displayed, and access is monitored to prevent minors from entering.
 - (iii) An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that are sufficiently high to prevent a minor in a nonrestricted area from viewing sexually explicit matter within the perimeter if the point of access provides prominent notice that access to minors is prohibited."

"Sec. 5. (1) A person is guilty of disseminating sexually explicit matter to a minor if that person does either of the following

- (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
- (b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

- (2) A person knowingly disseminates sexually explicit matter to a minor if the person know both the nature of the matter and the status of the minor to whom the matter is disseminated.
- (3) A person knows the nature of matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content.
- (4) A person know the status of a minor if the person is either aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.
- (5) Disseminating sexually explicit matter to a minor is a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$10,000.00 or both. In imposing the fine, the court shall consider the scope of the defendant's commercial activity in disseminating sexually explicit matter to minors."

"Sec. 7. (1) A person is guilty of displaying sexually explicit matter to a minor if that person possesses managerial responsibility for a business enterprise selling sexually explicit visual material that visually depicts sexual intercourse or sadomasochistic abuse and is harmful to minors, and that person does either of the following:

- (a) Knowingly permits a minor who is not accompanied by a parent or guardian to view that matter.
 - (b) Displays that matter knowing its nature, unless the person does so in a restricted area.
- (2) A person knowingly permits a minor to view visual matter that depicts sexual intercourse or sadomasochistic abuse and is harmful to minors if the person knows both the nature of the matter and the status of the minor permitted to examine the matter.
 - (3) A person knows the nature of the matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content
 - (4) A person knows the status of a minor if the person either is aware that the person who is permitted to view the matter is under 18 years of age or recklessly disregards a substantial risk that the person who is permitted to view the matter is under a18 years of age.

- (5) A person who violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$5,000.00, or both."

6. The Offending Sections purport to regulate the dissemination of material with sexual content deemed to be "harmful to minors." In MCL § 722.674, the phrase "harmful to minors" is defined as:

- (a) ". . . sexually explicit material which meets all of the following criteria:
 - (i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.
 - (ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
 - (iii) Considered as a whole it lacks serious literary, artistic, political, educational, and scientific value for minors.
- (b) "Local community" means the county in which the matter was disseminated.
- (c) "Prurient interest" means a lustful interest in sexual stimulation of gratification. In determining whether sexually explicit matter appeals to the prurient interest, the matter shall be judged with reference to average 17-year-old minors. If it appears from the character of the matter that it is designed to appeal to the prurient interest of a particular group of persons, including, but not limited to, homosexuals or sadomasochists, then the matter shall be judged with reference to average 17-year-old minors within the particular group for which it appears to be designed."

7. The Offending Sections, pertaining to the display and dissemination of non-obscene materials and presumably intended to further the state's interest in protecting its youth, are not narrowly drawn to further that purpose and are unconstitutional in that:

- They impose an unconstitutional prior restraint on the availability, display, distribution, receipt and perusal of constitutionally-protected, non-obscene materials to both adults and older minors;
- They are unconstitutionally overbroad;
- They are unconstitutionally vague.

JURISDICTION AND VENUE

8. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 1983 and 1988, and FED. R. CIV. P. 65.

9. Venue is proper in this district under 28 U.S.C. § 1391(b).

THE PARTIES TO THIS LITIGATION

10. Plaintiffs in this litigation are or represent publishers, distributors, retailers, and distributors of books, magazines, comic books and recordings, and members of the reading public, both adults and older minors, in the State of Michigan. The rights and other legal relations of the plaintiffs will be impaired unless the Offending Sections are enjoined.

11. Plaintiff ATHENACO, LTD. dba ATHENA BOOKS ("Athena"), a Michigan corporation, is a mainstream general bookstore, located in Kalamazoo, Michigan. Athena carries over 11,000 titles, approximately 1/3 children's and 2/3 general fiction and non-fiction. Athena seeks to serve adults, students and children. Some of the books stocked by Athena, though constitutionally protected, could be deemed harmful

to minors and therefore subject to the Offending Sections. Athena's First Amendment rights, as well as the rights of its customers, will be adversely affected unless the Offending Sections are enjoined. Athena sues on its own behalf and on behalf of its customers and patrons.

12. Plaintiff BOOKS & MORE OF ALBION LLC ("B&M"), a Michigan limited liability company, is a mainstream general bookstore located in Albion, Michigan. B&M carries new and used books of general interest. B&M seeks to serve adults, students and children. Some of the books stocked by B&M, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. B&M's First Amendment rights, as well as the rights of its customers, will be adversely affected unless the Offending Sections are enjoined. B&M sues on its own behalf and on behalf of its customers and patrons.

13. Plaintiff LOWRY'S BOOKS, L.L.C. ("Lowry's"), a Michigan limited liability company, operates two mainstream general bookstores, one in Three Rivers and one in Sturgis, Michigan. The Three Rivers store, approximately 4,000 square feet in size, carries 16,000—18,000 titles in new books and approximately 80,000 used books. The Sturgis store carries 6,000—7,000 titles in new books and a particularly large selection of magazines. Lowry's seeks to serve adults, students and children. Some of the books stocked by Lowry's, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. Lowry's First Amendment rights, as well as the rights of its customers, will be adversely affected unless the Offending sections are enjoined. Lowry's sues on its own behalf and on behalf of its customers and patrons.

14. Plaintiff ROONEY FAMILY LLC dba NICOLA'S BOOKS, LITTLE PROFESSOR ("Nicola's"), a Michigan limited liability company, is a mainstream general bookstore located in Ann Arbor, Michigan. The store, which occupies approximately 8,500 square feet, carries over 55,000 book titles and 3,000 magazines. Nicola's carries books, magazines, newspapers, calendars, gifts, toys, cards, and CDs (both books and music). Nicola's seeks to serve both adults and children. Some of the books stocked by Nicola's, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. Nicola's First Amendment rights, as well as the rights of its customers, will be adversely affected unless the Offending Sections are enjoined. Nicola's sues on its own behalf and on behalf of its customers and patrons.

15. Plaintiff SCHULER BOOKS, INC. ("Schuler"), a Michigan corporation, has mainstream general bookstores located in Grand Rapids, Okemos, Lansing and Walker, Michigan. The larger Grand Rapids store occupies over 35,000 square feet. All the stores carry over 100,000 book titles and 50,000 music titles. Schuler seeks to serve adults, students and children. Some of the books stocked by Schuler, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. Schuler's First Amendment rights, as well as the rights of its customers, will be adversely affected unless the Offending Sections are enjoined. Schuler sues on its own behalf and on behalf of its customers and patrons.

16. Plaintiff SHAMAN DRUM BOOKSHOP, INC. ("Shaman"), a Michigan corporation, is a general bookstore located in Ann Arbor, Michigan, specializing in scholarly books in the humanities and literature, from U.S. and foreign publishers.

Some of the books stocked by Shaman, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. Shaman's First Amendment rights, as well as the rights of its customers, will be adversely affected unless the Offending Sections are enjoined. Shaman sues on its own behalf and on behalf of its customers and patrons.

17. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, INC. ("ABFFE") was created as a non-profit charitable organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE, which is incorporated in Delaware and has its principal place of business in New York, has hundreds of bookseller members who are located from coast to coast, as well as in the State of Michigan, many of whom sell materials that represent or describe nudity, erotic fondling, sexual intercourse, or sexual excitement, and which deal frankly with the subject of human sexuality. ABFFE's members are not "adult bookstores." The right of ABFFE's members in Michigan to learn about, acquire, and distribute material containing nudity and depicting and discussing sexual conduct or sexual excitement, and their patrons' right to learn about, browse and purchase such materials, will be seriously infringed by the Offending Sections if it is not enjoined because ABFFE members and the publishers with whom they transact business will be forced to self-censor or risk prosecution under the Offending Sections. ABFFE sues on behalf of its Michigan members.

18. Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. (“AAP”) is the national association for the book publishing industry in the United States. AAP is incorporated in New York, and has its principal places of business in New York and the District of Columbia. AAP’s approximately 300 members include most of the major American commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly associations. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary and professional markets, most of which are sold by bookstores in the State of Michigan. Books published by AAP’s members represent or describe nudity or sexual conduct that could be deemed “harmful to minors” under the Offending Sections. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment. AAP sues on its own behalf, on behalf of its members, and on behalf of the readers of those materials.

19. The COMIC BOOK LEGAL DEFENSE FUND (“CBLDF”) is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in Northampton, Massachusetts, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located in Michigan, throughout the country and the world. Some of the comic books created, published, distributed, and offered for sale by CBLDF’s members, though constitutionally protected, could be deemed to be harmful to minors and therefore subject to the Offending Sections. The First Amendment rights of CBLDF and its members will be adversely affected unless the Offending Sections are

enjoined. CBLDF sues on its own behalf, on behalf of its members, and on behalf of the readers of their materials.

20. Plaintiff FREEDOM TO READ FOUNDATION, INC. (“FTRF”) is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of all citizens. FTRF is incorporated in Illinois and has its principal place of business in Chicago. FTRF sues on behalf of its individual members in Michigan who are readers of and listeners to First Amendment protected speech.

21. Plaintiff GREAT LAKES BOOKSELLERS ASSOCIATION (“GLBA”) is a non-profit trade association, incorporated in Michigan. Its members are independent bookstores and others in the book industry, primarily located in Illinois, Indiana, Michigan and Ohio. GLBA’s members stock and sell materials which represent or describe nudity, sexual excitement, erotic fondling or sexual intercourse, and which deal frankly with human sexuality. GLBA’s members are not “adult bookstores.” The right of GLBA’s members in Michigan to learn about, acquire, and distribute material containing nudity and depicting and discussion sexual conduct or sexual excitement, and their patrons’ right to learn about, browse and purchase such materials, will be seriously infringed by the Offending Sections if it is not enjoined because GLBA members and the publishers with whom they transact business will be forced to self-censor or risk

prosecution under the Offending Sections. GLBA sues on behalf of its Michigan members.

22. Plaintiff INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC. ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States, for ultimate distribution to retailers and the public in the United States, including Michigan. Some of the paperback books and periodicals distributed by IPDA's members, though constitutionally protected, could be deemed to be harmful to minors and therefore subject to the Offending Sections. The First Amendment rights of IPDA and its members will be adversely affected unless the Offending Sections are enjoined. IPDA sues on behalf of its members.

23. Defendant MIKE COX is sued in his capacity as Attorney General of the State of Michigan.

24. Defendants THOMAS JAY WEICHEL, Alcona County Prosecuting Attorney; KAREN BAHRMAN, Alger County Prosecuting Attorney; FREDERICK L. ANDERSON, Allegan County Prosecuting Attorney; DENNIS P. GRENKOWICZ, Alpena County Prosecuting Attorney; CHARLES H. KOOP, Antrim County Prosecuting Attorney; CURTIS BROUGHTON, Arenac County Prosecuting Attorney; JOSEPH O'LEARY, Baraga County Prosecuting Attorney; SHANE MCNEILL, Barry County Prosecuting Attorney; JOSEPH K. SHEERAN, Bay County Prosecuting Attorney; ANTHONY J. CICCELLI, Benzie County Prosecuting Attorney; JIM CHERRY, Berrien County Prosecuting Attorney; KIRK KASHIAN, Branch County Prosecuting Attorney;

JOHN HALLACY, Calhoun County Prosecuting Attorney; SCOTT L. TETER, Cass County Prosecuting Attorney; MARY BETH KUR, Charlevoix County Prosecuting Attorney; MICKEY CASTAGNE, Cheboygan County Prosecuting Attorney; BRIAN PEPPLER, Chippewa County Prosecuting Attorney; NORMAN M. GAGE, Clare County Prosecuting Attorney; CHARLES D. SHERMAN, Clinton County Prosecuting Attorney; JOHN HUSS, Crawford County Prosecuting Attorney; THOMAS L. SMITHSON, Delta County Prosecuting Attorney; CHRISTOPHER NINOMIYA, Dickinson County Prosecuting Attorney; JEFFREY L. SAUTER, Eaton County Prosecuting Attorney; ROBERT J. ENGEL, Emmet County Prosecuting Attorney; ARTHUR A. BUSCH, Genesee County Prosecuting Attorney; THOMAS R. EVANS, Gladwin County Prosecuting Attorney; RICHARD B. ADAMS, Gogebic County Prosecuting Attorney; DENNIS M. LABELLE, Grand Traverse County Prosecuting Attorney; KEITH J. KUSHION, Gratiot County Prosecuting Attorney; NEAL A. BRADY, Hillsdale County Prosecuting Attorney; DOUGLAS S. EDWARDS, Houghton County Prosecuting Attorney; MARK J. GAERTNER, Huron County Prosecuting Attorney; STUART J. DUNNINGS, III, Ingham County Prosecuting Attorney; GAIL BENDA, Ionia County Prosecuting Attorney; GARY W. RAPP, Iosco County Prosecuting Attorney; JOSEPH C. SARTORELLI, Iron County Prosecuting Attorney; LARRY J. BURDICK, Isabella County Prosecuting Attorney; HENRY C. ZAVISLAK, Jackson County Prosecuting Attorney; JAMES J. GREGART, Kalamazoo County Prosecuting Attorney; BRIAN DONNELLY, Kalkaska County Prosecuting Attorney; WILLIAM A. FORSYTH, Kent County Prosecuting Attorney; DONNA JAASKELAINEN, Keweenaw County Prosecuting Attorney; DAVE WOODRUFF, Lake County Prosecuting Attorney; BYRON

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Schoolcraft County Prosecuting Attorney; RANDY COLBRY, Shiawassee County Prosecuting Attorney; PETER R. GEORGE, St. Clair County Prosecuting Attorney; DOUGLAS FISHER, St. Joseph County Prosecuting Attorney; MARK REENE, Tuscola County Prosecuting Attorney; JURIS KAPS, Van Buren County Prosecuting Attorney; BRIAN L. MACKIE, Washtenaw County Prosecuting Attorney; MIKE DUGGAN, Wayne County Prosecuting Attorney; and WILLIAM M. FAGERMAN, Wexford County Prosecuting Attorney, are sued in their capacity as Prosecuting Attorneys.

COUNT I

DUE PROCESS (VAGUENESS)

25. The Offending Sections are unconstitutionally vague because they fail to provide fair notice as to what constitutes a criminal offense under the Offending Sections, in violation of the Fifth Amendment to the U.S. Constitution.

26. The Offending Sections contain language purporting to describe prohibited acts which is vague and indefinite and subject to different meanings such that it fails to provide adequate notice of an offense under the Offending Sections, including the following:

(a) whether “put or set out to view” in MCL § 722.671(a) and "exhibit" and "show" in MCL § 722.671(b) apply only when the covers or binding of the items contain harmful to minors material, or whether the “matter” referred to in MCL §§ 722.675 and 722.677 includes books, periodicals, recordings, etc., the covers and bindings of which contain no harmful to minors material but the contents of which are harmful to minors;

(b) the meaning of “allow” in MCL § 722.671(b), including whether this requires a retailer to implement procedures so that no minor examines sexually explicit material, whether this only requires a retailer to prevent a minor from examining material known to be sexually explicit when it sees such examination taking place, or whether it means something else;

(c) what "only" modifies in MCL § 722.671 (e)(i).

The Offending Sections therefore violate plaintiffs’ right to due process under the Fifth Amendment to the U.S. Constitution.

COUNT II

RESTRICTIONS ON ADULT ACCESS TO CONSTITUTIONALLY PROTECTED MATERIALS

27. Under the First and Fourteenth Amendments to the U.S. Constitution, adults have the right to view, browse through and purchase material protected by the First Amendment of the U.S. Constitution, including material with sexual content that is not obscene. Vendors have the constitutional right freely to display and disseminate such materials to adults.

28. It is not possible, under the Offending Sections, to restrict the display to and perusal of materials covered by the Offending Sections to minors without also restricting such access by adults. These restrictions have a chilling effect upon the exercise of rights guaranteed by the First and Fourteenth Amendments of the Constitution in that they inhibit and discourage the perusal, possession, sale and distribution of materials, the perusal, possession, sale and distribution of which are and ought to be protected under the U.S. Constitution.

COUNT III

RESTRICTIONS ON MINORS' ACCESS TO CONSTITUTIONALLY PROTECTED MATERIALS

29. Under the First and Fourteenth Amendments to the U.S. Constitution, minors have the right to view, examine and purchase any material that is not obscene as to them.

30. The Offending Sections are unconstitutional because they prohibit retail establishments and libraries from displaying to and allowing to be examined by older minors any material with sexual content that contains visual or written representations of material "harmful to minors" and from allowing all minors to view such material, despite the fact that such material may be "harmful" only to younger minors, based on their ages or sexual maturity.

31. The Offending Sections severely inhibit and effectively preclude access by older, more mature, minors to material constitutionally protected as to them. Thus the Offending Sections violate plaintiffs' right of free expression under the First and Fourteenth Amendments to the U.S. Constitution.

COUNT IV

RESTRICTIONS ON SPEECH (PRIOR RESTRAINT)

32. The Offending Sections require the removal of constitutionally protected materials from readily viewed and accessible areas, and proscribes having these materials accessible to minors. The Offending Sections force establishments that trade in material covered by the Offending Sections and to which minors are lawfully admitted either:

- (a) to exclude minors from their establishment; or

(b) to place such material out of sight underneath the counter; or

(c) to review each and every title in the retail establishment and then create a segregated "adult area" to which minors are not admitted.

33. The restrictions imposed by the Offending Sections necessarily will result in the removal from circulation and accessibility of significant quantities of materials constitutionally protected as to adults and as to minors in violation of the First and Fourteenth Amendments to the U.S. Constitution.

34. The restrictions imposed by the Offending Sections will entail substantial monitoring costs to booksellers and other retailers. Further, in light of the difficulty of determining what material is harmful to minors in general, plaintiffs' First Amendment rights will be chilled because they will restrict access to any material that could potentially be implicated by the statute. Finally, the physical configurations of retailers affected, including bookstores, convenience stores, supermarkets, etc. in some cases prevent any practical method of compliance other than not carrying items which might be deemed "harmful" to any minors.

35. The Offending Sections impose unreasonable obligations on merchants selling printed, visual and aural materials, encourages such merchants to exclude from their establishments all persons under the age of 18, and restricts and chills the rights of the plaintiffs to make available and the rights of adults and persons under the age of 18 to view, browse through and purchase materials that are constitutionally protected as to minors or as to adults.

IRREPARABLE HARM

36. There is no adequate remedy at law for the violation of plaintiffs' constitutional rights, and unless the requested injunctive and declaratory relief is granted, plaintiffs and their members will suffer immediate and irreparable loss. The very existence of the Offending Sections has a chilling effect upon the exercise of plaintiffs' constitutional rights and they are causing plaintiffs irreparable personal and economic injury every day that they are in effect.

RELIEF

WHEREFORE, plaintiffs pray judgment in their favor and against defendants, and each of them, as follows:

1. That this matter be set for hearing on the requested preliminary injunctive relief at the earliest practical date;
2. That the Court enter a preliminary and permanent injunction enjoining the defendants, and each of them, and the defendants' agents, attorneys, servants, employees, and other representatives, from enforcing MCL § 722.671(a) and (e) as incorporated in § 772.677, and the restrictions on exhibition, showing and allowing to examine in MCL § 772.675 in any manner whatsoever;
3. That the Court enter a declaratory judgment that the Offending Sections are unconstitutional, void and of no effect;
4. That plaintiffs be awarded the costs of this action;
5. That plaintiffs recover of defendants their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and,

6. That plaintiffs be granted such other and further relief the Court deems proper.

Dated: January 5, 2004

Respectfully submitted,

Herschel P. Fink
Honigman Miller Schwartz and Cohn LLP
2290 First National Bldg.
660 Woodward Avenue
Detroit, Michigan 48226-3583
(313) 465-7000

Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700

Counsel for Plaintiffs