

**AMERICAN CIVIL LIBERTIES UNION
OF UTAH FOUNDATION, INC.**

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

NATHAN FLORENCE, et al.,)	
)	
Plaintiffs,)	
)	Civil No. 2:05CV00485 DB
vs.)	
)	Judge Dee Benson
MARK SHURTLEFF, et al.,)	Magistrate Judge Samuel Alba
)	
Defendants.)	

DECLARATION OF CHRISTOPHER FINAN

I, Christopher Finan, do declare:

1. I am the President of the American Booksellers Foundation for Free Expression (“ABFFE”), a plaintiff in this action. I submit this declaration on behalf of ABFFE, its members, and their customers, in support of the plaintiffs' motion for summary judgment requesting a declaration of unconstitutionality and permanent injunctive relief prohibiting enforcement of

Sections 5 and 9 of House Bill 260, enacted on March 2, 2005, as applied through amended Utah Code § 76-10-1206 and Utah Code § 76-10-1233 (collectively the “Challenged Statutes”).

2. ABFFE is incorporated in Delaware and has its principal place of business in New York, New York. ABFFE is affiliated with the American Booksellers Association (“ABA”), the leading association of general interest bookstores in the United States. ABFFE has three members in the State of Utah.

3. ABFFE was formed in February 1990 to combat escalating threats to the First Amendment freedoms of booksellers, publishers, librarians and other distributors of books, magazines, records, films and videos. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, as well as to promote and protect the free expression of ideas, particularly in the choice of reading materials.

4. ABFFE has traditionally been a strong supporter of the First Amendment and has been at the forefront of insuring public access to information. Since its inception, ABFFE has been an active champion of First Amendment rights through its support of the National Endowment for the Arts and the Salman Rushdie Defense Committee USA, its service as *amici* in a number of Supreme Court cases involving First Amendment issues, its distribution of educational materials on current First Amendment issues, its production and distribution of materials to celebrate Banned Books Week each year, and various other efforts.

5. ABFFE has hundreds of bookseller members who are located from coast to coast, as well as in the State of Utah, many of whom sell materials that contain descriptions or depictions of nudity or sexual conduct, and which deal frankly with the subject of human sexuality. ABFFE’s members are not “adult bookstores.”

6. Many ABFFE member bookstores are active users of the Internet. Over 1,000 ABA member bookstores currently have active websites on the World Wide Web (“Web”), and many who have such sites are members of ABFFE. Indeed, some bookstores have no physical location and rely on their Internet websites to make their products available to consumers. This is not surprising, given that books have become the second largest selling item on the Internet (software being the largest selling item).

7. Bookstores with websites utilize the Internet in several ways. Many member bookstores use the Internet and electronic communications to obtain information and excerpts of books from publishers. For example, member booksellers may review popular titles such as *Nymph* by Francesa Lia Block, *American Pastoral* by Philip Roth, *Anne Frank: Diary of a Young Girl*, *Sex: A Natural History* by Joann Ellison Rodgers, *The World of Picasso* by Lael Tucker Wertenbaker, and *The Joy of Sex* by Alex Comfort, which include passages or images depicting or describing nudity and sexual conduct. Some member bookstores also have their own web pages that discuss the contents of books sold in stores. Obviously, bookstores use their websites to list and sell books. They also use their websites to promote events, to advertise book signings, and to share information with other bookstores about various titles. For many small bookstores, the Internet offers an inexpensive marketing tool that they cannot replace. A small bookstore might not be able to take out a full-page advertisement in a national newspaper, yet through the Internet that same bookstore can advertise nationally (indeed, globally). In addition, while a television or newspaper advertisement might be overlooked by many readers not interested in purchasing books, the individuals accessing a bookstore website do so specifically because they are interested in making a book purchase or obtaining information about books.

8. ABFFE itself has a website, located at <http://www.abffe.com/>, which discusses challenged books and has links to other websites on the Internet.

9. The online information that ABFFE members provide serves both adults and minors.

10. Online users anywhere in the world can access the content provided by ABFFE and its members on the Web and via e-mail.

Fear Of Prosecution Under the Challenged Statutes

11. ABFFE members' right to learn about, acquire and distribute material describing or depicting nudity and sexual conduct, and their patrons' right to purchase such materials, will be seriously infringed by the Challenged Statutes if they are not enjoined because ABFFE members and the publishers with whom they transact business will be forced to self-censor or risk prosecution under the Challenged Statutes.

12. The Challenged Statutes affect bookstores' websites nationwide. Users of the Internet can often access actual images and excerpts from these books at bookstores' websites. ABFFE bookstore members often also offer links through their websites to the websites of publishers, who also often place images and excerpts from their books on the Internet. Some of the language and those excerpts would invariably be subject to the Challenged Statutes.

13. Many bookstores use their websites to list their available titles and show book covers. Some of these titles or book covers may contain material which depicts sexual activity or sexual excitement, making their appearance on the Web subject to the Challenged Statutes. For example, the celebrated book *The Joy of Sex* by Alex Comfort speaks frankly about sexual activity, and books examining famous art often contain nudity.

14. As shown by the banned books materials on ABFFE's website, throughout United States history both popular and canonical books have been banned in print form by different local communities who labeled them "harmful". Banned books include *I Know Why the Caged Bird Sings* by Maya Angelou, *Funhouse* by Dean Koontz, *The Adventures of Huckleberry Finn* by Mark Twain, and *The Color Purple* by Alice Walker. ABFFE fears that the Challenged Statutes essentially work to ban dissemination of many books over the Internet.

Internet Use by ABFFE Members is Interstate in Nature

15. Much of the Internet use by booksellers is interstate in nature. For example, any bookseller's Web page can be accessed by Internet users not only throughout the United States, but throughout the world. Similarly, ABFFE members from across the country communicate with one another, as well as with Internet users across the country, via e-mail. Moreover, ABFFE members cannot effectively prevent their websites or discussion groups from being accessed by Utah users. Thus, both in-state and out-of-state ABFFE users -- who post information which may be considered "harmful to minors" as established by the Challenged Statutes on websites, chat rooms and discussion groups -- must comply with the Challenged Statutes or risk criminal prosecution in Utah.

16. The only certain method of compliance with the Challenged Statutes is for ABFFE and its members to exclude from their websites anything which might possibly fall under the purview of the Challenged Statutes, thus severely constricting the usefulness and informational content of the websites. ABFFE strongly believes that adults are constitutionally entitled to unrestricted access to all First Amendment-protected material, even that which contains sexual activity or excitement.

17. Even if one seeks to avoid liability under Utah Code § 76-10-1233, by rating and labeling the content in accordance with Utah Admin. R. 152-1a, the vagueness of the term “minors” makes this task more difficult. Labeling specific content as harmful to younger minors would certainly discourage and restrict older minors from accessing the content or cause them to believe that a law is being violated if they do access the labeled content.

18. The Internet is an important source of business for ABFFE bookseller members. As discussed above, booksellers conduct business over the Internet in a variety of ways. If the Challenged Statutes are not enjoined and ABFFE members are forced to self-censor, they will suffer immeasurable injury through significant loss of sales and recognition otherwise generated by use of their Internet websites with respect to both censored and uncensored materials and resources. Additionally, if a bookstore must self-censor certain books, it will likely lose the profits from the sale of those books generated both by its presence in the store and by the book’s listing on the bookseller’s website. It will likely lose even more business because it will appear that the bookstore has an incomplete or inadequate listing of books in its inventory. Customers will choose to buy their books elsewhere.

Conclusion

19. For all the reasons stated above, ABFFE and its members fear prosecution under the Challenged Statutes . If the Challenged Statutes are not enjoined, we will be forced either to self-censor our communications to a great degree or to risk criminal liability.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day of June 2011.

s/ Christopher Finan
Christopher Finan