

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

SHIPLEY, INC., d/b/a THAT BOOKSTORE IN BLYTHEVILLE; ARKANSAS LIBRARY ASSOCIATION; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION, INC.; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS, INC.,

Plaintiffs,

v.

MIKE HUCKABEE, in his official capacity as GOVERNOR OF THE STATE OF ARKANSAS; MIKE BEEBE, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ARKANSAS; FLETCHER LONG, JR., District One Prosecuting Attorney; BRENT DAVIS, District Two Prosecuting Attorney; HENRY BOYCE, District Three Prosecuting Attorney; TERRY JONES, District Four Prosecuting Attorney; DAVID GIBBONS, District Five Prosecuting Attorney; LARRY JEGLEY, District Six Prosecuting Attorney; ED EASLEY, District Seven Prosecuting Attorney; WM. RANDAL WRIGHT, District Eight-North Prosecuting Attorney; BRENT HALTOM, District Eight-South Prosecuting Attorney; HENRY MORGAN, District Nine-East Prosecuting Attorney; TOM COOPER, District Nine-West Prosecuting Attorney; ROBERT DITTRICH, District Eleven-East Prosecuting Attorney; STEVE DAIRYMPLE, District Eleven-West Prosecuting Attorney; STEVE TABOR, District Twelve Prosecuting Attorney; JAMIE PRATT, District Thirteen Prosecuting Attorney; RON KINCADE, District Fourteen

Civil No. _____

Prosecuting Attorney; TOM TATUM, II, District Fifteen Prosecuting Attorney; DON MCSPADDEN, District Sixteen Prosecuting Attorney; CHRIS RAFF, District Seventeen Prosecuting Attorney; STEVEN D. OLIVER, District Eighteen-East Prosecuting Attorney; TIM WILLIAMSON, District Eighteen-West Prosecuting Attorney; TONY ROGERS, District Nineteen-East Prosecuting Attorney; BOB BALFE, District Nineteen-West Prosecuting Attorney; H. G. FOSTER, District Twenty Prosecuting Attorney; MARC MCCUNE, District Twenty-One Prosecuting Attorney; ROBERT HERZFELF, District Twenty-Two Prosecuting Attorney; and LONA HORN MCCAHLAIN, District Twenty-Three 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 Ark. Code § 5-68-502, all as amended by Act 858 of 2003 of the Arkansas General Assembly (the "Offending Sections"), on the ground that the Offending Sections are unconstitutional under the U.S. Constitution and the Arkansas Constitution. Act 858 was signed by Governor Huckabee of Arkansas on March 28, 2003, and thus takes effect on June 26, 2003. A true and correct copy of the Offending Sections as so amended are attached hereto as Exhibit A.

2. Plaintiffs bring this action to safeguard their fundamental rights and the rights of their members under the U.S. and Arkansas Constitutions 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, films, pamphlets and other means of expression and elsewhere. Among other things, the Offending Sections make it unlawful for any person

- “to display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material . . . provided, however, that a person shall be deemed not to have displayed material harmful to minors if the . . . lower two-thirds (2/3) of the material is not exposed to view and segregated in a manner that physically prohibits access to the material by minors;” (Ark. Code § 5-68-502(1)) or
- to “allow to view . . . to a minor, with or without consideration, any material which is harmful to minors.” (Ark. Code § 5-68-502(2))

4. The Offending Sections purport to regulate the dissemination of material with sexual content deemed to be “harmful to minors.” In Ark. Code § 5-68-501(2), the phrase “harmful to minors” is defined as:

that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics:

(A) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors;

(B) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that is patently offensive

to prevailing standards in the adult community with respect to what is suitable for minors; and

(C) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors.

5. 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:

(a) 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;

(b) They are unconstitutionally overbroad;

(c) They are unconstitutionally vague.

JURISDICTION AND VENUE

6. 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 also arises under Article II, Section 6 of the Arkansas Constitution. It seeks remedies under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 1983 and 1988, and FED. R. CIV. P. 65.

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

THE PARTIES TO THIS LITIGATION

8. The Plaintiffs in this litigation are or represent authors, publishers, wholesalers, retailers, and distributors of books, magazines, comic books and members of the reading public, both adults and older minors, in the State of Arkansas. The rights

and other legal relations of the plaintiffs will be damaged unless the Offending Sections are enjoined.

9. Plaintiff SHIPLEY, INC., d/b/a THAT BOOKSTORE IN BLYTHEVILLE ("TBIB"), an Arkansas corporation, is a mainstream general bookstore, located in Blytheville, Arkansas. Twenty-four hundred square feet in size, TBIB carries over 25,000 titles covering a broad range of fiction, non-fiction and reference materials. As a community resource, TBIB seeks to serve adults, students and children. Some of the books stocked by TBIB, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. TBIB's First Amendment rights, and the rights of its customers, will be adversely affected unless the Offending Sections are enjoined. TBIB sues on its own behalf and on behalf of its customers and patrons.

10. Plaintiff ARKANSAS LIBRARY ASSOCIATION ("ALA") is a professional association for individuals who work in libraries throughout Arkansas. ALA has more than 400 members who are both individuals and library facilities. Members include university and school libraries, public libraries, special libraries, government and court libraries, and the employees of these institutions. Many of the libraries who are members of ALA or at which members work carry materials which, though constitutionally protected, could be deemed harmful to minors and therefore subject to the Offending Sections. The First Amendment rights of ALA members and their patrons will be adversely affected unless the Offending Sections are enjoined. The Arkansas Library Association sues on its own behalf, on behalf of its members, and on behalf of library patrons and readers of library materials.

11. 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 Arkansas, many of whom sell materials that represent or describe nudity, sexual conduct 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 Arkansas 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 its own behalf and on behalf of its Arkansas members.

12. 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 Arkansas. 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.

13. 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 Arkansas, 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.

14. 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 its own behalf, on behalf of its members in Arkansas, and on behalf of the patrons of its member libraries.

15. 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. 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 Statutes are enjoined. IPDA sues on its own behalf, and on behalf of its members.

16. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS, INC.

("ACLU of Arkansas") is an affiliate of the American Civil Liberties Union, Inc., and is a statewide, nonprofit, nonpartisan membership organization dedicated to the preservation and advancement of individual civil rights and liberties guaranteed by the Laws and the Constitution of the United States and Arkansas. The right of members of the ACLU of Arkansas to learn about, browse and purchase materials containing nudity, and depicting and discussing sexual conduct or sexual excitement will be seriously

infringed by the Act if it is not enjoined. The ACLU of Arkansas sues on its own behalf, on behalf of its members, and on behalf of all Arkansas readers of such materials.

17. Defendant MIKE HUCKABEE is sued in his capacity as Governor of the State of Arkansas.

18. Defendant MIKE BEEBE is sued in his capacity as Attorney General of the State of Arkansas.

19. Defendants FLETCHER LONG, JR., District One Prosecuting Attorney; BRENT DAVIS, District Two Prosecuting Attorney; HENRY BOYCE, District Three Prosecuting Attorney; TERRY JONES, District Four Prosecuting Attorney; DAVID GIBBONS, District Five Prosecuting Attorney; LARRY JEGLEY, District Six Prosecuting Attorney; ED EASLEY, District Seven Prosecuting Attorney; WM. RANDAL WRIGHT, District Eight-North Prosecuting Attorney; BRENT HALTOM, District Eight-South Prosecuting Attorney; HENRY MORGAN, District Nine-East Prosecuting Attorney; TOM COOPER, District Nine-West Prosecuting Attorney; ROBERT DITTRICH, District Eleven-East Prosecuting Attorney; , District Two Prosecuting Attorney; STEVE DAIR YMPLE, District Eleven-West Prosecuting Attorney; STEVE TABOR, District Twelve Prosecuting Attorney; JAMIE PRATT, District Thirteen Prosecuting Attorney; RON KINCADE, District Fourteen Prosecuting Attorney; TOM TATUM, II, District Fifteen Prosecuting Attorney; DON MCSPADDEN, District Sixteen Prosecuting Attorney; CHRIS RAFF, District Seventeen Prosecuting Attorney; STEVEN D. OLIVER, District Eighteen-East Prosecuting Attorney; TIM WILLIAMSON, District Eighteen-West Prosecuting Attorney; TONY ROGERS, District Nineteen-East Prosecuting Attorney; BOB BALFE, District Nineteen-West Prosecuting Attorney; H. G. FOSTER, District

Twenty Prosecuting Attorney; MARC MCCUNE, District Twenty-One Prosecuting Attorney; ROBERT HERZFELF, District Twenty-Two Prosecuting Attorney; and LONA HORN MCCAFLAIN, District Twenty-Three Prosecuting Attorney, are sued in their capacity as Prosecuting Attorneys.

COUNT I

RESTRICTIONS ON ADULT ACCESS TO CONSTITUTIONALLY PROTECTED MATERIALS

20. Under the First and Fourteenth Amendments to the U.S. Constitution and Article II, Section 6, of the Arkansas Constitution, adults have the right to view, browse through and purchase material protected by the First Amendment of the U.S.

Constitution and Article II, Section 6 of the Arkansas Constitution, including material with sexual content that is not obscene. Vendors and libraries have the constitutional right freely to display and disseminate such materials to adults.

21. It is not possible, under the Offending Sections, to restrict the display of materials covered by the Offending Sections to juveniles without also restricting such access by adults. Ark. Code § 5-68-502(1)(B) provides a “safe harbor” from the prohibition on display to minors of material harmful to minors as part of the invited general public which is limited to segregating such material so that access by minors is physically prohibited. This effectively requires booksellers, other retailers and librarians to remove from their shelves and place in a segregated “adults only” section substantial amounts of constitutionally protected matter, and thereby restricts the voluntary viewing by, access to and sale of such material to adults. In addition, such adults-only sections carry opprobrium and discourage persons from entering therein. The same is true as to the prohibition of allowing viewing in Ark. Code § 5-68-502(2) (an anti-browsing

provision). These restrictions have a chilling effect upon the exercise of rights guaranteed by the First and Fourteenth Amendments of the Constitution and Article II, Section 6, of the Arkansas Constitution in that they inhibit and discourage the possession, sale and distribution of materials, the possession, sale and distribution of which are and ought to be protected under both the U.S. Constitution and the Arkansas Constitution.

COUNT II

RESTRICTIONS ON MINORS' ACCESS TO CONSTITUTIONALLY PROTECTED MATERIALS

22. Under the First and Fourteenth Amendments to the U.S. Constitution and Article II, Section 6, of the Arkansas Constitution, minors have the right to view and purchase any material that is not obscene.

23. The Offending Sections are unconstitutional because they prohibit retail establishments and libraries from displaying 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.

24. 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 and Article II, Section 6, of the Arkansas Constitution.

COUNT III

RESTRICTIONS ON SPEECH (PRIOR RESTRAINT)

25. 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;
- (b) to place such material out of sight underneath the counter; or
- (c) to place such material, with the lower two-thirds not exposed to view, in an adults-only restricted area which minors are physically restricted from accessing.

26. Many of plaintiffs' prospective customers will not enter an "adults-only" section.

27. The restrictions imposed by the Offending Sections necessarily will result in the removal from circulation and accessibility of large 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 and Article 2, Section 6 of the Arkansas Constitution.

28. 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, plaintiffs' First Amendment rights will be

chilled because they will restrict access to any material that could potentially be implicated by the statute.

29. The Offending Sections impose unreasonable obligations on merchants selling printed 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.

COUNT IV

DUE PROCESS (VAGUENESS)

30. 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.

31. 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:

(d) it is not clear whether “exposed to view such material” in Ark. Code § 5-68-502(1)(A) requires that the covers or binding of the items contain harmful-to-minors material, or whether the “material” referred to includes books, periodicals, etc., the contents of which are harmful to minors;

(e) the meaning of “allow” in Ark. Code § 5-68-502(2)(A);

(f) the meaning of “physically prohibits access” in Ark. Code § 5-68-502(2)(B).

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

IRREPARABLE HARM

32. 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 the Offending Sections 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.

Respectfully submitted,

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EXHIBIT A: THE OFFENDING SECTIONS

Ark. Supp. 5-68-502(1) and (2). Unlawful Acts. As Amended, 3/28/2003.

AN ACT TO REQUIRE MATERIAL HARMFUL TO MINORS TO BE OBSTRUCTED FROM VIEW AND SEGREGATED IN COMMERCIAL ESTABLISHMENTS AND FOR OTHER PURPOSES: AN ACT TO REQUIRE MATERIAL HARMFUL TO MINORS TO BE OBSTRUCTED FROM VIEW AND SEGREGATED IN COMMERCIAL ESTABLISHMENTS.

It shall be unlawful for any person, including, but not limited to, any persons having custody, control, or supervision of any commercial establishment, to knowingly:

(1)(A) Display material which is harmful to minors in such a way that minors, as part of the invited general public, will be exposed to view such material.

(B) Provided, however, a person shall be deemed not to have displayed material harmful to minors if the lower two-thirds (2/3) of the material is not exposed to view and segregated in a manner that physically prohibits access to the material by minors; or

(2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors.

(B) Provided, this prohibition shall not apply to:

(i) Any dissemination by a parent, guardian, or relative within third degree or consanguinity of the minor; or

(ii) Any dissemination with the consent of a parent or guardian of the minor; or