

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

**ATHENACO, LTD dba ATHENA BOOK SHOP;
et al.,**

Plaintiffs,

v.

**MIKE COX, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
MICHIGAN; *et al.*,**

Defendants.

Civil No.

**MEMORANDUM OF LAW OF
PLAINTIFFS IN SUPPORT OF THEIR MOTION
FOR A PRELIMINARY INJUNCTION**

Herschel P. Fink
Honigman Miller Schwartz & Cohn LLP
2290 First National Building
660 Woodward Avenue
Detroit, Michigan 48226-3583
Telephone: 313-465-7000

Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
Telephone: 212-768-6700

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INTRODUCTION

Plaintiffs in this action are five Michigan booksellers; national and regional trade associations representing booksellers, book publishers, comic book retailers, publishers and creators, and national distributors of periodicals and paperback books and the Freedom to Read Foundation, whose members include readers and purchasers of communicative materials in the State of Michigan. They bring this action to safeguard their fundamental rights and the rights of their members under the U.S. Constitution to disseminate, receive and peruse constitutionally-protected books, magazines and other printed, visual and aural forms of expression. This memorandum of law is submitted in support of their motion for a preliminary injunction.¹

The Legislation Challenged

On November 4, 2003, Governor Granholm signed Act 192 (“the Amendment”), amending MCL §§ 722.671 (a), (b) and (e), 722.675 and 722.677. (A copy of Act 192 is attached hereto as Attachment A.) The Amendment took effect on January 1, 2004. In this action, plaintiffs challenge the statutory sections as amended the Amendment (collectively, the “Offending Sections”).

As the accompanying declarations spell out, 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, recordings, pamphlets and other means of

¹ Plaintiffs do not challenge Michigan's laws restricting sale and dissemination of obscene materials.

expression and elsewhere. Among other things, the Offending Sections make it unlawful for any person to

“allow [a minor] to examine” a “book, pamphlet, magazine..., sound recording..., picture, photographs, drawing..., [or] motion picture which depict, describes or narrates sexual excitement, erotic fondling, sexual intercourse, or sado-masochistic abuse.

MCL §§ 722.671 (b); 722.673 (a), (c) and (d).

The Offending Sections regulate the dissemination of material with sexual content deemed to be “harmful to minors.” That term is defined in MCL § 722.674 as set forth in Attachment B.

The Facts

In support of their motion for a preliminary injunction, plaintiffs have submitted declarations from Charles Brownstein, Executive Director of plaintiff Comic Book Legal Defense Fund; Cecile Fehsenfeld, co-proprietor of the four Schuler’s Books and Music Stores operated by plaintiff Schuler Books, Inc.; Christopher Finan, President of plaintiff American Booksellers Foundation For Free Expression, Inc.; Judith Krug, Executive Director of plaintiff Freedom To Read Foundation; Tom Lowery, proprietor of plaintiff Lowery Books; Karl Pohrt, proprietor of plaintiff Shaman Drum Bookshop; and Nicola Rooney, the proprietor of plaintiff Nicola's Books Little Professor.

The declarations of Brownstein, Fehsenfeld, Finan, Lowery, Pohrt, and Rooney demonstrate that the stores carry — or in the case of trade associations, their members carry — materials which could be deemed harmful to minors under the Michigan statute; that they are concerned about their ability to exercise their First Amendment rights to distribute protected materials to adults and older teenagers in light of the Offending Sections; and, in particular, that they are unable to comply physically

with the requirements of the Offending Sections without impairing the First Amendment rights of adults and older teenagers.

ARGUMENT

I

PLAINTIFFS ARE ENTITLED TO A PROMPT PRELIMINARY INJUNCTION TO PREVENT DEFENDANTS FROM ENFORCING THE OFFENDING SECTIONS.

In order to grant a preliminary injunction, a court must consider: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party will suffer irreparable harm without the grant; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction. *Six Clinics Holding Corp. II v. Cafoomb Systems*, 119 F.3rd 393, 399 (6th Cir. 1997). "[T]he four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors," *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

As discussed in this Memorandum, plaintiffs satisfy each of the requirements for preliminary injunctive relief.

1. Plaintiffs Have a Likelihood of Success on the Merits.

Plaintiffs have a likelihood of success on the merits because, as discussed below, the Offending Provisions criminalize constitutionally protected communication in violation of the First Amendment.

2. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction.

As the Supreme Court has stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, in order to show irreparable injury, plaintiffs need only demonstrate that the Act threatens their rights under the First Amendment. They will do so in the sections of this Memorandum which follow.

3. Granting the Injunction Will Not Cause Substantial Harm to Others.

While, on the one hand, plaintiffs' constitutional rights, and those of the public, will be irreparably injured in the absence of an injunction, **no** legitimate interest of the State will be injured by such an injunction. Enjoining enforcement of those Michigan statutes which are unconstitutional will not leave the State without recourse in the event "harmful to minors" material are sold, loaned or given to minors. The State is still free to prosecute those offenses under its existing criminal laws.

4. The Public Interest is Advanced by the Issuance of the Injunction.

The interests of the public in full and unfettered access to constitutionally protected materials will be furthered by granting the requested injunction. No interest of the public will conceivably be harmed through the issuance of an injunction.

5. Remedies at Law Are Inadequate

Where actions by the government threaten First Amendment rights, "[n]o remedy at law would be adequate to provide such protection." *Allee v. Medrano*, 416 U.S. 802, 815 (1974). As such, plaintiffs need only show that the Act threatens their rights under the First Amendment to demonstrate the lack of appropriate remedy.

II

THE OFFENDING SECTIONS VIOLATE THE FIRST AMENDMENT BY SUBSTANTIALLY RESTRICTING ADULTS' ACCESS TO CONSTITUTIONALLY PROTECTED MATERIALS.

At stake in this case is whether ordinary bookshops (and other places where books, periodicals and recordings are sold, such as newsstands, supermarkets, drugstores, and convenience stores) must conduct their business in such a way that only those books and periodicals appropriate for an elementary school library are readily available to adults (and older juveniles) for browsing and perusal.

This case is not addressed to the issue of whether obscene materials can be kept out of the hands of children. Materials that meet the constitutional standard for obscenity under *Miller v. California*, 413 U.S. 15 (1973), may be suppressed with respect to adults and children; and establishments that contain such materials (“adult” bookstores) may be placed entirely off limits to children. Thus, the State has ample means to prevent children from having access to those materials that could be deemed to present the most serious danger to them.

This case is about a different category of materials entirely: books that are normally found in the inventory of ordinary bookstores, like the neighborhood bookstores that are the plaintiffs in this case, as well as magazines and recordings that they and neighborhood convenience stores carry. The case is not about marginal or esoteric items within such bookstores; it is about serious works of literature, popular bestsellers, and a diverse range of books of art and psychology. It is about any book or periodical that describes or depicts human passion and sexuality in a way that makes it unsuitable for a ten- or twelve-year old.

It would seem clear, for instance, that Nabokov's *Lolita*, or William Faulkner's *Sanctuary* (with its powerful, and intentionally horrifying, scene of a sadistic rape), or Steinbeck's *Of Mice and Men*, Salinger's *The Catcher in the Rye*, Philip Roth's *Portnoy's Complaint* or *Joy of Sex* are just the sort of books that are vulnerable to attack under the Offending Sections. They are books that might very well be characterized as appealing to the "morbid" and "prurient" interest of a youngster, and the adult consensus would surely be that they are unsuited to (and lacking in merit for) youths not yet in their teens.

What, then is a Michigan bookstore or retailer supposed to do with respect to these works? For many years, it had been the law of Michigan that sexually explicit material may not be *sold* to juveniles and that if a child tries to buy a book with explicit sexual content, a sensible bookseller would tell him or her to run along. (Prior MCL § 722.675(1)) It also provided that a minor could not be permitted to examine harmful to minors material consisting of visual depictions of sexual intercourse or sadomasochistic abuse. (Prior MCL § 722.677(1)) The recent amendments, challenged in this action, radically changes these provisions in two respects: (1) most importantly, the "permit to examine" provision (now denominated "allow" to examine) has been significantly expanded to include written descriptions as well as visual depictions, and to apply to all sorts of the defined sexual explicit activity, including erotic fondling and sexual excitement; (2) an unclear "display" provision has been added, making it a crime to "put out" sexually explicit visual material depicting sexual intercourse or sadomasochistic abuse, thus "permitting" minors to view such material, a provision which apparently applies to contents as well as the cover.

Under the amended statutes, a Michigan bookseller or retailer must do one of three things: he or she can eliminate *Lolita*, *Sanctuary*, *Of Mice and Men*, *The Catcher in the Rye*, *Portnoy's Complaint*, *Joy of Sex* and all other materials potentially harmful to younger minors from the inventory entirely. He or she can put them in a segregated "adult" section of the store (making it difficult and embarrassing for adults to examine them), or remove them from display and sell or provide them only to customers who specifically ask for them. Or he or she can exclude all juveniles from the store entirely.

As shown below, the First Amendment does not permit the state to place such heavy burdens on the access of adults (or even of older juveniles) to a vast range of books and magazines solely on the ground that it would be unsuitable, because of its sexual content, for the youngest child to have access to them. Books, magazines and recordings are at the very heart of free speech. They are the sustainers of our intellectual and political and moral lives. Free trade in ideas requires free trade in books, periodicals and recordings. Serious obstacles to the ready availability of books, magazines and recordings represent a mortal danger to the ideal of a free and confident society.

1. The First Amendment prohibits a state from limiting adults to books that are suitable for children.

The Supreme Court unanimously held over four decades ago that the First Amendment does not allow a state "to reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383-384 (1957). In *Butler*, the state made it a criminal offense to sell or distribute to the general public sexually offensive materials that would have a "harmful" influence upon minors. The state defended the statute on the ground that it was "exercising its power to promote the

general welfare” by “quarantining the general reading public” from such books in order to “shield juvenile innocence” (*id.* at 383). The Court rejected this argument, holding that the restriction on adult access to that which was suitable minors “arbitrarily curtails one of those liberties of the individual . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society” (*id.* at 384). To limit what adults can read in order to keep indecent materials from children, the Supreme Court stated, “[s]urely . . . is to burn the house to roast the pig” (*id.* at 383).

The Supreme Court consistently has adhered to the guiding principle of *Butler*. In *Bantam Books Inc. v. Sullivan*, 372 U.S. 58 (1963), for example, the Court held unconstitutional a state commission that restrained the “sale, distribution or display” (*id.* at 61) of books and magazines that were designated as objectionable for minors but were not obscene for adults. Relying on *Butler*, the Court reasoned that although the commission’s supposed concern was limited to youthful readers, its action invariably entailed the “suppression of the listed publications; adult readers are equally deprived of the opportunity to purchase the publications in the State” (*id.* at 71). In *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964), the Court reiterated that the legitimate state interest in protecting children from sexually explicit material “does not justify a total suppression of such material, the effect of which would be to ‘reduce the adult population...to reading only what is fit for children’” (quoting *Butler*). And in *Pinkus v. United States*, 436 U.S. 293 (1978), the Court again relied on *Butler* in holding that the relevant “community” for deciding whether material is obscene for adults may not include children; even though the inclusion for minors in that standard would “not have an effect so drastic as the *Butler* statute,” nevertheless “a jury conscientiously striving to

define the relevant community of persons . . . would reach a much lower ‘average’ when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults” (*id.* at 298).

Defendants will likely argue that *Butler* is inapplicable here because the Offending Sections - even if they have a significant effect on adults - do not altogether prohibit adult access to covered materials and do not deny adults ultimate access to the materials. But, as *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983) makes clear, the First Amendment prevents the government from placing substantial roadblocks in the way of adult access to constitutionally protected books and periodicals even if such restrictions “fall short of a direct prohibition against the exercise of First Amendment rights” (*Laird v. Tatum*, 408 U.S. 1, 11 (1972) or limit “freedom of expression only incidentally” (*Schad v. Mount Ephraim*, 452 U.S. 61, 68 n.7 (1981)). See also *Erznoznik*, 422 U.S. at 211-212 n.8. Michigan, for example, surely could not ban the sale of all sexually candid (but non-obscene) materials in any bookstore and insist that such materials be purchased solely by mail, even though such a scheme might well reduce or eliminate juvenile access to “harmful” publications and would not “altogether bar” “ultimate access” by adults.

It is true, of course, that the Supreme Court held in *Ginsberg v. New York*, *supra*, that a state may prohibit the sale of sexually explicit material to minors even if the proscribed material is not “obscene” as to adults. However, *Ginsberg* in no way qualified the principle of *Butler* because the statute in *Ginsberg* had no spillover impact whatever on adults: it simply prohibited the sale of certain materials to *juveniles*. The Court in *Ginsberg* itself recognized this distinction, stating that the New York statute did

not prevent bookstores “from stocking the magazines and selling them to persons 17 years of age or older” (390 U.S. at 634-635).

The fact that a ban on sale to minors, unlike a ban on displays or access, has no spill-over effect on adults has a further important consequence: the injury to First Amendment interests from misapplication of the statute is immeasurably greater in the case of a display statute. If a bookseller or other retailer mistakenly refuses to sell or lend a book to a minor that in fact is not “harmful to juveniles,” the damage is limited to that one person. But if a bookseller or librarian decides not to display a book or magazine because of an erroneous fear that it falls within the Michigan statute, the damage is suffered by every customer of the store. These principles were recognized in *Virginia v. American Booksellers Ass’n*, 484 U.S. 383 (1988), which, like this case, involved restrictions on minors' ability to peruse or examine, and the cases which have followed it.² The Virginia statute was upheld only after:

- The definition of “harmful to juveniles” was limited only to “borderline” obscene materials; and, most importantly
- The burden on the retailer was limited so that the retailer would not have pre-review inventory or to guarantee that no minor had access to material that could be deemed harmful to minors.

Neither of these limitations applies here.

In sum, the First Amendment imposes a fundamental limitation on a state’s power to act for the purpose of protecting minors from sexually explicit (but non-obscene) materials: it may not use a method that substantially infringes the rights of

² *E.g.*, *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

adults to have access to books and other materials that they have a constitutional right to peruse. The Offending Sections violate this limitation.

2. The Offending Sections impermissibly restrict adults' access to Constitutionally-protected materials.

The extreme breadth of the Offending Sections that ensures that the impermissible spill-over effects on adults will be substantial. The statutes encompass “any book, pamphlet, printed matter reproduced in any manner, or sound recording” as well as “a picture, photograph, drawing, sculpture, motion picture film or similar visual representation.” MCL § 722.673(c) and (d). The restriction on “allow to examine” is, therefore, emphatically not directed only to explicit pictorial magazines with no editorial content; it covers textual descriptions of human passion and sexuality — and that, of course, is why many books on any reading list of a course on modern American (or French or English) literature constitute potential candidates for coverage.

The statute also defines “minor” extremely broadly: any “person under the age of eighteen (18) years.” MCL § 722.671(d). The statute thus forbids the display of any materials that would be unsuitable for a 10- or 12-year-old, even though they would not be inappropriate for a 17-year old (let alone for an adult). The statute limits the access of older minors to materials that are not “harmful” for their age groups and therefore are constitutionally protected as to them. For this reason, the Offending Sections violate the First Amendment rights of older juveniles as well as of adults. See *Bolger*, 463 U.S. at 74 n.30; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-214 & n.11 (1975).

The Michigan statute’s standard of “harmful to minors” is, further, so vague and unmanageable in the display context that booksellers, fearful of criminal sanctions,

will keep a wide berth in determining whether a particular book or magazine may be displayed, thereby broadening the sweep of the statute in practice. See *Smith v. California*, 361 U.S. 147, 153-54 (1959). It is hard enough to apply the three-part *Miller* test to decide whether a particular book is or is not obscene; it becomes even more difficult when the task is to decide whether a book that is not obscene for adults nonetheless lacks “serious literary, artistic, political or scientific value” for a child. And that difficulty is, in turn, compounded when the standard has to be applied not to a single book at the point of sale, but to the bookstore’s or library’s entire inventory as applied to a hypothetical composite juvenile.

Finally, all of this must be visualized in relation to the actual conditions under which the typical bookstore operates. New books flood in by the dozens; the clerks on hand barely have enough time to keep up with the sales slips and the shoplifters, much less read the new arrivals line by line looking for something that might be startling for young eyes. The temptation will be to take the easy way out and to refuse to display any books or periodicals that arguably may be considered “harmful to minors.”

The result of the statute is that, if it is upheld, an adult customer who wanders into a bookstore in Michigan may not find such materials on the shelves. It is true that an adult intent on buying a specific book can take the initiative and ask for it (assuming it has not been entirely eliminated from inventory), but that is not how the overwhelming majority of books and magazines are sold. As common experience demonstrates, the sale and selection of books and periodicals, and thus the dissemination of the information contained in the books and periodicals, is heavily dependent on browsing. Customers stroll the aisles, picking up books and periodicals whose title or dust jacket

attracts their attention, thumbing through the volumes and reading selected passages and eventually making impressionistic judgments whether or not to purchase. By prohibiting that practice in regard to a large number of constitutionally protected books and magazines, the statute has a devastating impact on fundamental freedoms protected by the First Amendment.

III

THE OFFENDING SECTIONS IMPERMISSIBLY RESTRICT THE ACCESS OF OLDER MINORS TO CONSTITUTIONALLY PROTECTED MATERIALS.

The Offending Sections are also unconstitutional under the standards in *Ginsberg* and *Butler* because they restrict older minors from accessing materials that are constitutionally protected as to them. Minors themselves are granted a significant degree of First Amendment protection. The Supreme Court has ruled in many contexts that the First Amendment protects minors as well as adults and that minors have the constitutional right to speak and to receive the information and ideas necessary for their intellectual development and their participation as citizens in a democracy, including information about reproduction and sexuality. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-214 (1975); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) (state cannot ban distribution of contraceptives to minors). The state's power to vary the adult obscenity standard for minors is thus not unbridled. As the Supreme Court explained in *Erznoznik* 422 U.S. at 212-13 (1975), "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to minors. Nevertheless, minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar free dissemination of protected

materials to them. (*citations omitted*). See also *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1041-3 (N.D. Ga. 1978), *aff'd*, 621 F.2d 141 (5th Cir. 1980), and cases cited therein.

The Offending Sections do not distinguish between material that is inappropriate for younger minors but that unquestionably is constitutionally protected for older minors, on the one hand, and that which may be restricted to all minors, on the other. The statute lumps together all persons under age 18, from ten-year-old fifth graders to 17-year-old high school or college students. Thus, the statute restricts 16 and 17-year old teenagers to accessing only cultural material that is suitable for much younger children.³ Cf. *Butler v. Michigan*, 352 U.S. 380 (1957). The statute is therefore patently overbroad. See, e.g., *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989) (upholding Virginia law only after it was construed to mean that material determined to be harmful to juveniles must be inappropriate for a "legitimate minority of normal, older adolescents") (internal quotation marks omitted); *American Booksellers v. Webb*, 919 F.2d 1493, 1504-1505 (11th Cir. 1990).

IV

THERE ARE NO CONSTITUTIONALLY ACCEPTABLE METHODS FOR COMPLYING WITH THE OFFENDING SECTIONS.

There is way for booksellers and librarians to comply with the statute that would avoid imposing unconstitutional burdens on adult readers and retailers.

First, retailers and librarians could comply with the display provision by refusing to stock any materials that might be "harmful to minors" under the statute. But

³ While the Michigan definition of "harmful to minors" limits the first prong of the test -- prurient interest -- to a 17-year-old level, the remaining two prongs remain entirely variable as to age and maturity. MCL § 722.674.

that is precisely the result condemned by the First Amendment: “reduc[ing] the adult population . . . to reading only what is fit for children.” *Butler*, 352 U.S. at 383.

Second, bookstores could keep books considered “harmful to minors” behind the counter. But it would surely be a dramatic — and tragic — change in the “free traffic” in important and controversial books if the inveterate reader’s custom of happening on books by serendipitous chance were simply eliminated, so that if prospective readers can find them only by specially asking for a specific title. Ready access to freely displayed books is a crucial element in an active intellectual life concerned with books. And, as noted above, display of books is, as a practical matter, vitally important to their sale and thus to the communication of the ideas they contain. To force adults to use other means (beyond simply browsing through the shelves) to find out about protected literature and to require them to ask to see a particular volume would inhibit many individuals from exercising their right to examine and purchase the material.

This alternative, too, would present the retailer with severe practical problems. Given the volume and diversity of books that are subject to the display provision, it would be virtually impossible for a bookseller to sort through his inventory to identify those items deemed “harmful” by statute. See *Smith v. California*, 361 U.S. at 153.⁴ Moreover, maintaining such books out of sight would require a fundamental and

⁴ The statute defines “knowingly” as to the nature of the material as either being “aware of its character and content or recklessly disregard[ing] circumstances suggesting its character or content.” MCL §§ 722.675(3); 722.677(3). For a mainstream bookseller or retailer, a charge of permitting a minor to examine “harmful” materials is crippling, whether or not the charge is ultimately sustained. Thus this defense is problematic from a practical point of view; nor can a bookseller or retailer be certain that a jury will not find the failure to review inventory as “reckless.”

disruptive change in the physical layout (and the general ambiance) of bookstores.

Third, bookstores could create an “adult only” section for display of materials that might be “harmful to minors.” But, even putting aside problems of book selection, store space, and monitoring, this alternative would do little to facilitate adult access, because of many adults would be reluctant and embarrassed to browse in an “adults only” section, and sales of books placed in this new area would undoubtedly drop.

Fourth, bookstores and other retailers could simply exclude youngsters from the premises. To state the proposition illustrates its foolishness. Booksellers are trained to encourage minors of all ages to read, not to exclude them or make it difficult to find challenging reading material, a training which is beneficial to the community. To turn general bookstores into “adult” establishments would create the impression that the store deals primarily in ‘adults only’ or pornographic material, which would have a devastating impact upon the store’s business because of the reluctance of most adults to patronize such a store. This solution also would have a dramatic impact upon the sale of children’s books, which constitute a significant share of the business of many bookstores. And the blanket exclusion of minors would have a serious effect on bookstores’ total revenues.

These interactive problems of compliance are especially pronounced with respect to periodical and book sellers such as newsstands, supermarkets, drugstores and convenience stores. Non-bookstore vendors — the neighborhood convenience store or supermarket — cannot realistically be expected to set up an “adults only” section or to exclude minors from the premises, since books and magazines occupy

only a small portion of their floor space and account for only a small percentage of their total revenues.

A possible effect of the Michigan statute is that outlets such as these will simply cease to carry any reading materials that might be covered by the statute or will dispense with their book departments altogether. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 86, 104 (1960). Yet many adults purchase their reading materials (especially paperbacks and magazines) in such establishments.

In any event, even if these practices constituted compliance, that would not solve the First Amendment problems presented by the statute. Labeling books as “adults only” or storing them in “adults only” racks would seriously inhibit adults from thumbing through and purchasing such materials. If the First Amendment is violated by requiring a general bookseller to become an “adult” bookstore or to establish a separate, cordoned-off, “adults only” section, it is equally violated by these other forms of “adult only” designations.

V

THE OFFENDING PROVISIONS ARE UNCONSTITUTIONALLY VAGUE.

“Where a statute imposes criminal penalties, the standard of certainty is higher.” *Kolender v. Lawson*, 461 U.S. 352, 258 n.8 (1983). As the Supreme Court stated in *Grayned v. City of Rockford*, a law is void for vagueness under the due process clause of the Fifth Amendment if its prohibitions are not clearly defined. 408 U.S. 104, 108 (1972). The Court then provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-109 (footnotes omitted). See also *Smith v. California*, 361 U.S. 147, 151 (1959) (“[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.”)

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).

As a direct result of this quintessentially vague language, the Offending Sections will have a chilling effect on booksellers and other retailers who deal with mainstream, valuable works. The Supreme court has noted the “[u]ncertain meanings” inevitably lead citizens to “steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

CONCLUSION

For the reasons set forth above, plaintiffs urge this Court to find the Offending Sections unconstitutional and therefore to grant a preliminary injunction to plaintiffs.

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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

