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**Admitted pursuant to Ariz. Sup. Ct. R. 38(f)

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11 IN THE UNITED STATES DISTRICT COURT

12 FOR THE DISTRICT OF ARIZONA

13 ANTIGONE BOOKS L.L.C.; INTERGALACTIC, INC.,
D/B/A, BOOKMANS; CHANGING HANDS
14 BOOKSTORE, INC.; COPPER NEWS BOOK STORE;
15 MOSTLY BOOKS; VOICE MEDIA GROUP, INC.;
16 AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION; ASSOCIATION OF AMERICAN
17 PUBLISHERS; FREEDOM TO READ FOUNDATION;
AND NATIONAL PRESS PHOTOGRAPHERS
ASSOCIATION,

18 Plaintiffs,

19 -v-

20 TOM HORNE in his capacity as Attorney General of
the State of Arizona, et al.,

21 Defendants.

Case No.
2:14-cv-02100-PHX-SRB

**DECLARATION OF
SEAN FEENEY (BOOKMANS)**

22 SEAN FEENEY declares:

23 1. I am the president of Intergalactic, Inc. d/b/a Bookmans Entertainment
24 Exchange (“Bookmans”), a plaintiff in this action. I have personal knowledge of the facts
25 set forth in this declaration.
26

1 2. I submit this declaration on behalf of Bookmans, its employees (including
2 me), and its customers, in support of plaintiffs' motion for a declaratory relief, and a
3 preliminary and permanent injunction to enjoin enforcement of an Arizona statute which
4 provides, subject to limited exceptions, that:

5 It is unlawful to intentionally disclose, display, distribute, publish, advertise
6 or offer a photograph, videotape, film or digital recording of another person
7 in a state of nudity or engaged in specific sexual activities if the person
8 knows or should have known that the depicted person has not consented to
9 the disclosure.

10 Ariz. Rev. Stat. § 13-1425 ("the Act"). I have read the Act, including the statutory
11 definitions incorporated by reference.

12 3. I understand that violation of the Act is a felony.

13 **BOOKMANS: ARIZONA'S LARGEST RETAILER OF USED BOOKS**

14 4. Bookmans is the largest retailer of used books in Arizona, with six
15 bookstores. We have three bookstores in Tucson, and one bookstore each in Phoenix,
16 Mesa, and Flagstaff. Bookmans has been in business in Arizona for over 30 years.

17 5. Bookmans operates a trade program at each of its stores where customers
18 receive store credit in exchange for used books, magazines, comics, music, movies, video
19 games, musical instruments, electronics, housewares, and more.

20 6. At any given time, Bookmans carries approximately 1 million books among
21 its six stores; the vast majority of our books are used. Last year, Bookmans sold
22 approximately 1.5 million books in its stores.

23 7. The inventory at each of our stores is contingent on what our local
24 customers bring in to trade. Bookmans carries a broad range of genres including both
25 fiction and non-fiction; each of our stores stocks and maintains an entire arts section, often
26 devoting six or more shelves to art and photography books. In addition to books,
Bookmans sells music, movies, video games and systems, magazines, comics, electronics,

1 musical instruments, and more. Some of these books, magazines, movies, and other media
2 offered for sale in our stores contain images of persons engaged in specific sexual
3 activities or in a state of nudity, as defined in the Act. As we do not categorize our
4 inventory by nude or sexual content, it is difficult to know what percentage of our media
5 may contain such images.

6 8. On the website operated by Bookmans, www.bookmans.com (last visited
7 Oct. 14, 2014), visitors are able to obtain information, both written and pictorial, about
8 Bookmans and the books it has available. Our website announces recent books, staff and
9 book club picks, and recent in-store events.

10 9. Bookmans also maintains an e-mail newsletter with over 6,800 subscribers
11 discussing upcoming events, new books, and other matters considered to be of interest.

12 10. Bookmans displays and offers approximately 130,000 books at any given
13 time for sale online through Amazon Marketplace, AbeBooks, Alibris, and eBay, and sells
14 approximately 150,000 books a year accounting for 10% of our total book sales. Some of
15 the books which we offer for sale online feature photographs of persons engaged in
16 specific sexual activities or in a state of nudity, as defined in the Act

17 **FEAR OF PROSECUTION UNDER THE ACT**

18 11. I fear that Bookmans and its employees (including me) are at risk of
19 prosecution under the Act for displaying, advertising, or distributing constitutionally
20 protected material which may contain images of another person in a state of nudity or
21 engaged in specific sexual activities, as defined in the Act.

22 12. The Act would subject Bookmans and its employees to prosecution for
23 offering and displaying non-obscene, constitutionally-protected images for several reasons.

24 13. Many of the terms in the law are vague and confusing. The provision of the
25 Act which imposes liability "if the person knows or should have known that the depicted
26

1 person has not consented to the disclosure” is vague. I do not know what that means.

2 What is a bookseller supposed to do to ascertain whether the depicted person consented to
3 the disclosure, so that the bookseller is not subject to criminal prosecution on the grounds
4 that he or she “should have known” that there was no consent? We do not routinely flip
5 through books in our inventory to take stock of all potential nude or adult images; even if
6 we did, employees would have no idea from looking at most pictures what the conditions
7 of consent behind the picture were.

8 14. In addition, although the law excludes images “involving voluntary
9 exposure in a public or commercial setting,” I also have no idea what this means. While
10 most of our images are contained within a book or other media that we sell, our
11 employees again would have no idea from looking at most pictures whether they were
12 *taken* in a public or commercial setting, or whether the subject was paid for the image.

13 15. Furthermore, the term “the disclosure” is also vague and troubling. Its plain
14 language would appear to mean that a depicted person must consent to the specific display,
15 advertisement, or sale of that book by Bookmans.

16 16. These are not abstract concerns given that a critical part of our business
17 includes the display, advertisement, and sale of images. We never make individual contact
18 with people who are depicted nude in any of our media to obtain their discrete consent to
19 use that image before offering it for sale. In that regard, we “know” that we do not have
20 the consent of depicted people to our particular disclosure of relevant images by
21 Bookmans.

22 17. We regularly offer content when we have no idea whether the person
23 depicted consented to the initial or subsequent disclosure of that image; instead, we rely
24 on the assumption that the photographer or its publisher obtained consent (or, because of
25 the circumstances, no consent was necessary). Because the Act ascribes criminal
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1 consequences to those who “should have known” they lack consent, the Act appears to
2 impose an affirmative duty for us to investigate the circumstances of consent for each
3 restricted image. The task of complying with the Act would make it nearly impossible to
4 operate Bookmans or any other bookstore which offers used books for sale. We buy used
5 books from our customers. As noted above, we have approximately 1 million books in our
6 inventory, and sold approximately 1.5 million books last year. That means that, on
7 average, we turn over our inventory one and a half times annually—selling 1.5 million
8 books, and purchasing 1.5 million books to replenish our shelves. Thus, we buy, on
9 average, just over four thousand books a day, which may include over four thousand
10 different titles (in contrast to a bookstore which sells new books, which might purchase
11 dozens of copies of an individual best seller). When we buy books from customers, we
12 cannot possibly review every page of every book to determine whether it contains a nude
13 image, let alone to ensure that the person depicted consented to our disclosure of that
14 image. Even attempting to comply with this vague, overbroad Act would virtually, if not
15 actually, shut us down.

16 18. Furthermore, we also offer nude images when we *know* the person depicted
17 likely did not consent to any disclosure. For example, there are many books and
18 publications of great historic and political significance which contain images of a person
19 “in a state of nudity,” where the depicted person consented neither to the taking of the
20 photograph nor to its publication, let alone to the specific publication in a particular book,
21 newspaper, magazine, or other publication, or the sale of such publication in a particular
22 bookstore or on a particular website. The Act makes no exception for such historic images.

23 19. To illustrate: among the thousands of books for sale in our Speedway store
24 in Tucson, Arizona is *Moments: The Pulitzer Prize Photographs* (Black Dog & Leventhal
25 Publishers 1999). That book includes such iconic images as the Marines raising the U.S.
26

1 flag in Iwo Jima in 1945, Babe Ruth's final salute to Yankee stadium in 1949, Lee Harvey
2 Oswald wincing in pain as he is shot in 1964, President Ronald Reagan being tackled into
3 his limousine after the 1982 assassination attempt, and the 1972 Pulitzer Prize Winning
4 Photograph by Nick Ut of a Vietnamese girl fleeing a village that was being bombed with
5 napalm. The nine-year-old girl in that iconic image, often called "Napalm Girl," appears
6 in what is now called "full frontal nudity." She most certainly did not consent to taking of
7 the photograph or to its publication; nor was she "voluntarily" nude; according to
8 *Moments*, she tore off her clothes to escape the fire, which had seared her back. Could
9 Bookmans and its employees, including me, be prosecuted—and subject to conviction of a
10 felony—for offering for sale *Moments: The Pulitzer Prize Photographs*? Is it necessary to
11 seek the consent of the person depicted, since identified as Phan Thi Kim Phuc, for any
12 further publication of that iconic image?

13 20. Publications containing that image are, of course, but one example of the
14 impact of the Act on images of historic significance. Included in our online inventory are
15 titles that include images of Holocaust survivors, such as in *Remembering to Forget:
16 Holocaust Memory Through the Camera's Eye* (University of Chicago Press 2000), and of
17 abused Abu Ghraib prisoners, such as in *Torture and Truth: America, Abu Ghraib, and
18 the War on Terror* (New York Review Books 2004). Does the Act now make it illegal, in
19 Arizona, to sell, or display, books and publications containing these images? If so, then
20 the Act infringes on the very core of our First Amendment rights.

21 21. I understand that supporters of the Act claimed that the stated intent of the
22 Act was to criminalize "revenge porn." I also understand "revenge porn" to refer to
23 publication of a nude image, taken of a person in a close personal relationship, and
24 disclosed by the other person after the break-up of that relationship, with the intent of
25 harassing or humiliating the person depicted. Of course, I have not reviewed every one of
26

1 the 1 million books in our inventory, and thus cannot state unequivocally that none of
2 those books contain images that might be considered revenge porn, but I highly doubt that
3 they do. However, many of the books and publications which we display or offer for sale
4 are swept within the vague, overbroad terms of this Act.

5 22. The only certain way for Bookmans to prevent the display or distribution of
6 images of another person in a state of nudity or engaged in “specific sexual activities”
7 when the person depicted has not consented to the disclosure would be (a) to eliminate all
8 books with nude or sexual photographs on sale in its six stores and through online
9 marketplaces such as Amazon, AbeBooks, and eBay (after reviewing the 1 million titles
10 and any new titles as they arrive) and (b) to hire additional staff to vet each used book
11 brought in to Bookmans under our exchange program.

12 23. Given that all of our activities—in displaying and offering for sale books
13 which contain images of persons in a state of nudity or engaged in sexual conduct—are
14 protected by the First Amendment, the Act creates an intolerable burden on Bookmans’
15 business and free speech rights.

16 24. If the Act is not enjoined, Bookmans would have to self-censor the books
17 and content in its stores in order to be certain to avoid felony prosecution under the Act. If
18 Bookmans could function at all, we would no longer be able to accept from our customers,
19 as part of the book trade program, any books containing nude or sexual images, let alone
20 offer and sell these First Amendment-protected works. In addition, Bookmans would lose
21 profits from the sale of those books. Bookmans would also likely lose further business
22 because the book trade program—which drives traffic into our stores—would be rendered
23 burdensome not only for Bookmans but for our customers, who would have to wait while
24 Bookmans staff reviewed the books they wanted to trade, page by page, to determine
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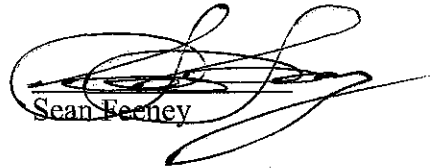
1 whether they contained images restricted by the Act and thus could not be accepted by
2 Bookmans.

3
4 **CONCLUSION**

5 25. If the Act is not enjoined, Bookmans, its employees, and its in-store and
6 online customers will be irreparably harmed. Bookmans will be forced to either self-
7 censor the content available in our stores and online, denying our customers access to
8 Constitutionally-protected material, or risk severe criminal liability.

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

10 Executed at Tucson, Arizona on this
11 15th day of October 2014.

12 
13 Sean Feeney

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13 ANTIGONE BOOKS L.L.C.; INTERGALACTIC, INC.,
14 D/B/A, BOOKMANS; CHANGING HANDS
BOOKSTORE, INC.; COPPER NEWS BOOK STORE;
15 MOSTLY BOOKS; VOICE MEDIA GROUP, INC.;
16 AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION; ASSOCIATION OF AMERICAN
17 PUBLISHERS; FREEDOM TO READ FOUNDATION;
AND NATIONAL PRESS PHOTOGRAPHERS
ASSOCIATION,

18 Plaintiffs,

19 -v-

20 TOM HORNE in his capacity as Attorney General of
21 the State of Arizona, et al.,

22 Defendants.

Case No.
2:14-cv-02100-PHX-SRB

**DECLARATION OF
GAYLE SHANKS (CHANGING
HANDS)**

23 GAYLE SHANKS declares:

24 1. I am the co-founder, co-owner and president of Changing Hands Bookstore
25 Inc. (“Changing Hands”), a plaintiff in this action. I have personal knowledge of the facts
26 set forth in this declaration.

1 2. I submit this declaration on behalf of Changing Hands, its employees
2 (including me), its customers, and the users of its website, in support of plaintiffs' motion
3 for declaratory relief, and a preliminary and permanent injunction to enjoin enforcement
4 of an Arizona statute which provides, subject to limited exceptions, that:

5 It is unlawful to intentionally disclose, display, distribute, publish, advertise
6 or offer a photograph, videotape, film or digital recording of another person
7 in a state of nudity or engaged in specific sexual activities if the person
8 knows or should have known that the depicted person has not consented to
9 the disclosure.

10 Ariz. Rev. Stat. § 13-1425 ("the Act"). I have read the Act, including the statutory
11 definitions incorporated by reference.

12 3. I understand that violation of the Act is a felony.

13 **CHANGING HANDS: AN AWARD-WINNING INDEPENDENT BOOKSTORE**

14 4. Changing Hands is an award-winning independent bookstore with locations
15 in Tempe and Phoenix, Arizona. Changing Hands has been in business at its Tempe
16 location for 40 years. We opened our second location in Phoenix in May of this year.

17 5. Changing Hands carries a broad range of new and used books in its
18 bookstores. We stock over 50,000 titles in our stores, include both fiction and non-fiction
19 works, some of which feature nudity (whole or partial), as defined in the Act.

20 6. On the website operated by Changing Hands, www.changinghands.com
21 (last visited Oct. 14, 2014), visitors are able to obtain information, both written and
22 pictorial, about Changing Hands and the books it has available. Our website currently
23 offers more than 8 million titles, including books, e-Books, and audio books. That
24 database of books for sale is provided by a third party, which also maintains (or has access
25 to) that massive inventory, and is responsible for fulfilling the orders. Our website also
26 announces recent books, staff picks, and upcoming in-store events. Changing Hands offers

1 an e-mail newsletter discussing upcoming events, new books, and other matters
2 considered to be of interest. Changing Hands also sells e-Books on its website.

3 7. Changing Hands also runs the Changing Hands Affiliate Program, through
4 which other websites host book ads which drive traffic to Changing Hands' website and
5 often result in sales.

6 8. Some of the books available and displayed on the website, affiliate ads, and
7 in the newsletter, feature images of a person in a state of nudity or engaged in specific
8 sexual activities, as defined in the Act. The website displays the covers (or book jackets)
9 of books available for sale. Some of those covers (or book jackets) contain images of
10 nudity, as defined in the Act.

11 **FEAR OF PROSECUTION UNDER THE ACT**

12 9. I fear that the Act places Changing Hands and its employees (including me)
13 at risk of prosecution for displaying or distributing constitutionally-protected material,
14 both in our bookstores and on our website, which may contain images of another person in
15 a state of nudity or engaged in specific sexual activities. In addition, our Affiliates are at
16 risk of prosecution for posting advertisements for Changing Hands and its books that offer
17 and advertise our inventory, and which enable readers to "click through" to our website.

18 10. The Act would subject Changing Hands and its employees and Affiliates to
19 prosecution for engaging in activities protected by the First Amendment.

20 11. First, the Act imposes liability "if the person knows or should have known
21 that the depicted person has not consented to the disclosure." That language is extremely
22 vague. Frankly, I do not know what it means. To comply with the law, I do not know how
23 a bookseller ascertains whether the depicted person consented to the disclosure, so that the
24 bookseller is not subject to criminal prosecution on the grounds that he or she "should
25 have known" that there was no consent to display the image.
26

1 12. Furthermore, the Act’s plain language indicates that “the disclosure” means
2 a specific disclosure—that is, our disclosure of any restricted image requires specific
3 consent from the person pictured. We do not engage in any original research to ascertain,
4 or obtain, consent from individuals who are pictured in each of our thousands of books.
5 So we affirmatively know that we do not have consent from these individuals to Changing
6 Hands’ disclosure of their images.

7 13. These are not theoretical concerns for our business. To illustrate: Among the
8 thousands of books which we sell are several photography books including photographs
9 by Edward Weston, many of which are also for sale in our bookstores. According to the
10 University of Arizona’s Center for Creative Photography, which houses Weston’s
11 archives, Weston was “[a]mong the twentieth century’s most influential art photographers,”
12 who “is widely respected for his many contributions to the field of photography.”¹ Among
13 the books including Weston photographs which Changing Hands offers for sale are
14 *Edward Weston* (Taschen 2013), *Edward Weston: 125 Photographs* (Ammo Books 2011),
15 *Edward Weston & Harry Callahan: He, She, It* (La Fabrica/Fundacion Banco Santander
16 2013), *Edward Weston* (Skira 2013), *Edward Weston: Nudes* (Aperture 1993), *Edward*
17 *Weston’s Book of Nudes* (Getty Publications 2007), and *Edward Weston: Portraits*
18 (Aperture 2005). Each of these books contains photographs of persons “in a state of
19 nudity.” It is impossible for me, or any other bookseller, to ascertain whether the persons
20 depicted consented to the disclosure of these images. If “disclosure,” as used in the Act,
21 means the specific disclosure in a specific publication, or the display and sale of that
22 publication in a particular store, it is certain that many of the persons depicted could not
23 have consented, and did not consent, because they passed away before publication of the
24 book—let alone our sale thereafter. I fear that my employees and I could be prosecuted for

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26 ¹ See e.g., <http://www.creativephotography.org/artists/edward-weston> (last visited Oct. 14, 2014).

1 continuing to offer Weston photography books for sale, on the basis that we “should have
2 known” that some of the persons depicted in the nude did not consent to the publication.
3 And, even if the persons depicted did not consent, felony prosecution for our selling these
4 books would violate our First Amendment rights, as they have clear artistic and public
5 value.

6 14. The website contains images of the covers (or book jackets) of books
7 available for sale. Some of these covers (or book jackets) contain images of persons in a
8 “state of nudity.” One example is *Joyce Tenneson: A Life in Photography* (Bulfinch 2008).
9 Thus, our website not only “offers” books containing such images for sale, but such
10 images are “displayed” on the website.

11 15. Second, the impact of the Act is not limited to artistic books. There are
12 many books and publications of great historic and political significance which contain
13 images of a person “in a state of nudity,” where the depicted person consented neither to
14 the taking of the photograph nor to its publication, let alone to the specific publication in a
15 particular book, newspaper, magazine, or other publication; or the advertisement or sale of
16 such publication in a particular bookstore or on a particular website. These include
17 *Moments: The Pulitzer Prize Photographs* (Black Dog & Leventhal Publishers 1999),
18 available in our online inventory, which contains the Pulitzer-Prize winning photograph of
19 a young Vietnamese girl running, unclothed, from the napalm bombing of her village; and
20 books containing images of abused Abu Ghraib prisoners, such as *Torture and Truth:
21 America, Abu Ghraib, and the War on Terror* (New York Review Books 2004), also
22 available in our online inventory. I fear that the Act now makes it illegal, in Arizona, to
23 sell, or display, books and publications containing these images. If so, the Act infringes on
24 the very core of First Amendment rights.
25
26

1 16. We have many additional books listed in our online inventory that likely
2 include images of nudity that fall under the Act. As we do not carry hard copies of these
3 titles in our store, I have not been able to review each for individual images; however, I
4 suspect that many more books contain images of nudity restricted by the Act. These books
5 span the spectrum from medical and self-help books to collections of essays and history
6 books. Titles in these categories include: *ABC of Breast Diseases* (BMJ Books, 2006);
7 *The Womanly Art of Breastfeeding* (Ballantine Books 2010); *Romantic Massage; A Step*
8 *by Step Guide for Lovers of All Ages* (Createspace 2010); *Better Sex in No Time: An*
9 *Illustrated Guide for Busy Couples* (Cleiss Press 2014); *What's it Really Like? Pregnancy*
10 *and Birth* (Createspace 2013); *Nudity: A Cultural Anatomy* (Berg Publishers 2004); *Naked*
11 *Politics: Nudity, Political Action, and the Rhetoric of the Body* (Lexington Books 2012);
12 *Understanding Naturism Including Nude Recreation, Nudity, and Sexuality* (Websters
13 Digital Services 2012); *The Art of Female Pleasure* (Booksurge Publishing 2007); and
14 *Auschwitz: A New History* (Public Affairs 2006).

15 17. Third, the task of complying with the Act would make operation of a
16 bookstore nearly impossible. We offer thousands of books for sale and add hundreds more
17 new titles each year. By vetting the publishers, we can be confident that all of the books
18 are protected by the First Amendment; that is, that none of the books are obscene. Many
19 reputable publishers publish books containing images that are (or could be) prohibited by
20 the Act and, to my knowledge, none vet books on that basis. We cannot review every
21 book to determine whether it contains a nude image, let alone to ascertain whether the
22 person depicted consented to the publication of the image. As noted above, we know they
23 have not consented to our disclosure of the image. Even attempting to comply with this
24 vague, overbroad Act would virtually, if not actually, shut us down.
25
26

1 18. I understand that supporters of the Act intended the Act to criminalize
2 “revenge porn.” I understand “revenge porn” to refer to the malicious publication of a
3 nude image taken in the context of an intimate relationship, and disclosed by the other
4 person after the break-up of that relationship, for purposes of harassment. To my
5 knowledge, none of the books and publications which we display or offer for sale could
6 even remotely be described as revenge porn—but many of the books and publications
7 which we display or offer for sale are swept within the vague, overbroad terms of this Act.

8 19. The only certain way for Changing Hands to prevent the display or
9 distribution of images of another person in a state of nudity or engaged in “specific sexual
10 activities” when the person depicted has not consented to the disclosure would be to
11 eliminate all books with nude or sexual photographs from its store (after reviewing the
12 50,000 titles and any new titles as they arrive) and website. That result would be the only
13 sure way of avoiding criminal liability under the Act, and would also be fundamentally
14 inconsistent with the protections of the First Amendment.

15 20. Fourth, if required to comply with the Act, Changing Hands could no longer
16 use its website to offer millions of books for sale to its customers and readers. As noted
17 above, the database for of those books is provided by a third party, which is also
18 responsible for maintaining (or having access to) the inventory and fulfilling orders. That
19 third party ensures that the books are not obscene but does not screen books for
20 compliance with the Act. We have no ability to limit particular titles made available by
21 that third party, but we certainly advertise and offer them. If required to comply with the
22 Act on its website, Changing Hands could no longer use the third party, and thus could
23 only offer books for sale that Changing Hands had in its own inventory and had vetted.

24 21. In sum, given that all of our activities—in displaying and offering for sale
25 books which contain images of persons in a state of nudity or engaged in sexual
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1 conduct—are protected by the First Amendment, this Act creates unconstitutional
2 restrictions on our ability to sell media of great historic, artistic, and public value.

3 22. If the Act is not enjoined, the only way Changing Hands could be certain to
4 avoid prosecution would be to censor the content in its stores and website, which would
5 violate our free speech rights. Assuming Changing Hands could continue to function with
6 such a burdensome requirement of prior review, it would lose profits from the sale of
7 those books, and likely lose further business because it would appear that the bookstore
8 has an incomplete or inadequate listing of books in its inventory.

9 **CONCLUSION**

10 23. If the Act is not enjoined, Changing Hands, its customers, and the users of
11 its website will be irreparably harmed. Changing Hands will be forced either to self-
12 censor the content available in our stores and on our website, denying our customers and
13 the users of our website access to constitutionally-protected material, or to risk criminal
14 liability.

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

16 Executed at Tempe, Arizona, on this
17 17 day of October, 2014.

18 
19 _____
20 Gayle Shanks
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10 *Attorneys for Plaintiffs*

11 IN THE UNITED STATES DISTRICT COURT

12 FOR THE DISTRICT OF ARIZONA

13 ANTIGONE BOOKS L.L.C.; INTERGALACTIC, INC.,
14 D/B/A, BOOKMANS; CHANGING HANDS
BOOKSTORE, INC.; COPPER NEWS BOOK STORE;
15 MOSTLY BOOKS; VOICE MEDIA GROUP, INC.;
AMERICAN BOOKSELLERS FOUNDATION FOR FREE
16 EXPRESSION; ASSOCIATION OF AMERICAN
PUBLISHERS; FREEDOM TO READ FOUNDATION;
17 AND NATIONAL PRESS PHOTOGRAPHERS
ASSOCIATION,

18 Plaintiffs,

19 -v-

20 TOM HORNE in his capacity as Attorney General of
21 the State of Arizona, et al.,

22 Defendants.

Case No.
2:14-cv-02100-PHX-SRB

**DECLARATION OF
HOLLISTER "HOP" DAVID
(COPPER NEWS BOOK STORE)**

23 HOLLISTER "HOP" DAVID declares:

24 1. I am a partner and co-owner of Copper News Book Store, a plaintiff in this
25 action. I have personal knowledge of the facts set forth in this declaration.
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2. I submit this declaration on behalf of Copper News Book Store, its partner-owners, its employees, and its customers, in support of plaintiffs' motion for a preliminary injunction, declaratory judgment, and permanent injunction to enjoin enforcement of an Arizona statute which provides, subject to limited exceptions, that:

It is unlawful to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.

Ariz. Rev. Stat. § 13-1425 ("the Act"). I have read the Act, including the statutory definitions incorporated by reference.

3. I understand that violation of the Act is a felony.

COPPER NEWS BOOK STORE: AN INDEPENDENT BOOK STORE IN A SMALL TOWN

4. Copper News Book Store is a small, independent bookstore in Ajo, Arizona, a town of about 4,000 people in rural, southwestern Arizona. Ajo is about 120 miles southwest of Phoenix and 130 miles west of Tucson. Ajo was originally a mining town, and is now a retirement community, which also has a growing artist community.

5. The bookstore has been in business since 1998, and is affiliated with Ajo Copper News, a weekly newspaper which has been published since 1916 (now published in both paper and digital form).

6. Copper News Book Store sells a broad range of books, including art and photography books. About half of the books sold in the store are used books.

7. Copper News Book Store also sells books online, through AbeBooks and Amazon.

8. Our book store is also an art gallery, which features mostly the work of local artists, including paintings, photographs, and drawings. As a small store in a small town, we also sell office supplies, both as a service to our customers and to make ends meet.

FEAR OF PROSECUTION UNDER THE ACT

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9. I fear that Copper News Book Store, its partners, and its employees (including me) are at risk of prosecution under the Act, because we display and sell, both in our bookstore and online, books which contain images of a person in a state of nudity (and we may display and sell books which contain images of persons engaged in specific sexual activities). These materials are all non-obscene and constitutionally protected.

10. The Act would subject Copper News Book Store and its partners and employees to prosecution for engaging in constitutionally-protected activities.

11. As a co-owner of a bookstore in a small town, it is not my role to decide what books our customers should purchase or view. It is up to our customers to peruse the books on the shelves of our store, and decide what they want to purchase. We do not sell obscene books but, as part of our ordinary business, we do not routinely review the books in our inventory to determine whether or not they contain images of nudity or specific sexual activities, as defined in the Act.

12. Thus, when the Act was brought to my attention, I did not know whether any of the books in our current inventory contained images of nudity or specific sexual activities, but I assumed that our inventory did contain such books.

13. A partial inventory review in response to the Act located at least two publications which contain images of nudity restricted by the Act: *Borneo Scene* (Anna Photo Company 1979), which shows images of women with bare breasts engaged in weaving, and *The New Sensual Massage* (Bantam Dell Publishing Group 1994), which shows full nudity, including persons receiving massages. I have not reviewed the Sensual Massage images to determine whether any of them might be considered "sexual activities" under the Act.

14. Our inventory on AbeBooks includes *Portrait of an Artist: A Biography of Georgia O'Keeffe* (Seaview Books 1980). There are many iconic photographs of O'Keeffe

1 in a state of nudity, as defined by the Act, taken by her partner, Alfred Stieglitz. I don't
2 know whether this O'Keeffe biography contains any such photographs, and I have not
3 checked.

4 15. From time to time, our inventory has included, and will in the future include,
5 other books which contain images of nudity and sexual activities.

6 16. The Act appears to prohibit and criminalize our display and potential sale of
7 these books. I can't be certain of this, because the Act is vague.

8 17. I understand that the Act prohibits offering and displaying images of nudity
9 and sexual activities, subject to limited exceptions, "if the person knows or should have
10 known that the depicted person has not consented to the disclosure." One of the
11 exceptions is of voluntary nudity in a "public setting" or a "commercial setting."

12 18. I do not know what that means. I don't know whether the women whose
13 images appear in the *Borneo Scene* book consented to their photographs being taken. Nor
14 do I know if they consented to the publication of the photographs. They certainly do not
15 know that the book is being displayed at Copper News Book Store, and did not consent to
16 that specific display. I have no idea if they were in a public setting. It does not appear so;
17 they are at work weaving, but I don't know. It is possible that our offering the *Borneo*
18 *Scene* book for sale is a violation of the Act.

19 19. It seems likely that the persons photographed in the *Sensual Massage* book
20 consented to being photographed, but I do not know if they consented to the publication of
21 the photographs. And if they consented to the publication, I don't know if that is enough
22 under the Act, or whether it is instead necessary that they consent to the display and sale
23 of the book in *our* store, and any subsequent display or use of the book by our customers.
24 I do not know if they were photographed in a commercial setting (whatever that means).
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20. I know that O’Keeffe was often photographed by Stieglitz, and that the photographs are widely published and distributed. But I do not know whether she consented to such publication. Before offering an O’Keeffe biography for sale, am I required, under the Act, to review the book page-by-page to see if it contains images of nudity prohibited by the Act? And if it does contain such images, as I cannot find out whether O’Keeffe consented to the publication (and know that she did not consent to our offering the book for sale), I am concerned that the Act requires that I refuse to sell the book.

21. I fear that I could be prosecuted under the Act for offering to sell *Borneo Scene, Sensual Massage*, the O’Keeffe biography, and many other books containing non-obscene images of nudity and sexual activity, which Copper News Book Store offers from time to time.

22. The only way for Copper News Book Store to be certain that it will not be prosecuted under the Act is to review every book, page-by-page, before offering it for sale, and refusing to sell any book which shows a person in a state of nudity or engaged in “specific sexual activities.” I will not do that. We do not sell obscene books, but I will not become the censor in our town.

23. As noted above, we also publish a weekly newspaper (online and in print) and have an art gallery in our book store. To my knowledge, we have not published any photographs in our newspaper, and we have not exhibited any images in our gallery, which show a state of nudity or sexual activities, as defined in the statute. It is also unlikely that we would do so, because our newspaper—the only newspaper in Ajo—is a general circulation paper, for the entire community, and because parents often bring young children into the bookstore. We have made our own decision not to exhibit nude

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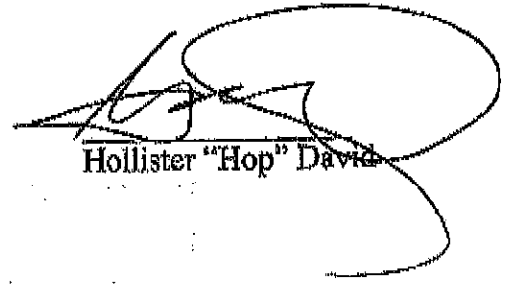
photographs because of the presence of young children, and because there is no separate room or alcove where we could hold an exhibition.

CONCLUSION

24. If the Act is not enjoined, Copper News Book Store, its partner-owners, its employees, and its customers will be irreparably harmed. I am not willing to be the censor in our small town. That means we will need to risk felony prosecution if the Act is not enjoined.

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

Executed at Ajo, Arizona on this 21 day of October 2014.



Hollister "Hop" David

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17 AMERICAN BOOKSELLERS FOUNDATION FOR FREE
18 EXPRESSION; ASSOCIATION OF AMERICAN
19 PUBLISHERS; FREEDOM TO READ FOUNDATION;
20 AND NATIONAL PRESS PHOTOGRAPHERS
21 ASSOCIATION,

22 Plaintiffs,

23 -v-

24 TOM HORNE in his capacity as Attorney General of
25 the State of Arizona, et al.,

26 Defendants.

Case No.
2:14-cv-02100-PHX-SRB

**DECLARATION OF
TRICIA CLAPP (MOSTLY BOOKS)**

TRICIA CLAPP declares:

1. I am the co-owner of Mostly Books, a plaintiff in this action. I have personal knowledge of the facts set forth in this declaration.

1 2. I submit this declaration on behalf of Mostly Books, its employees
2 (including me), its customers, and the users of its website, in support of plaintiffs' motion
3 for a declaratory relief, and a preliminary and permanent injunction to enjoin enforcement
4 of an Arizona statute which provides, subject to limited exceptions, that:

5 It is unlawful to intentionally disclose, display, distribute, publish, advertise
6 or offer a photograph, videotape, film or digital recording of another person
7 in a state of nudity or engaged in specific sexual activities if the person
8 knows or should have known that the depicted person has not consented to
the disclosure.

9 Ariz. Rev. Stat. § 13-1425 ("the Act"). I have read the Act, including the statutory
10 definitions incorporated by reference.

11 3. I understand that violation of the Act is a felony.

12 **MOSTLY BOOKS: AN INDEPENDENT TUCSON BOOKSTORE**

13 4. Mostly Books is an independent bookstore located in Tucson, Arizona.
14 Mostly Books has been in business for 26 years.

15 5. Mostly Books carries a broad range of new and used books in its bookstore;
16 more than half of the books we carry are used. We accept hundreds of used books for
17 resale every day; as such, our inventory is constantly shifting. We stock over 100,000
18 books in our store, including both fiction and non-fiction works of various genres. Many
19 of these books feature nudity as defined by the Act.

20 6. On the website operated by Mostly Books, <http://www.mostlybooksaz.com/>
21 (last visited Oct. 10, 2014), visitors are able to obtain information, both written and visual,
22 about Mostly Books and the inventory it has available. Our website currently offers more
23 than 8 million titles, including books, e-Books, and audio books. This database of books
24 for sale is provided by a third party, Ingram Book Group Inc., which is also responsible
25 for maintaining (or having access to) the inventory and fulfilling orders. Our website also
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1 announces recent books, staff picks, and upcoming in-store events. Mostly Books offers
2 an e-mail newsletter discussing upcoming events, new books, and other matters
3 considered to be of interest. Mostly Books sells e-Books available on its website through
4 the Kobo application.

5 7. Mostly Books also runs the Mostly Books Affiliate Program, through which
6 other websites host book ads which drive traffic to Mostly Books' website and often result
7 in sales.

8 8. Some of the books available on the website and app, and displayed on the
9 website, in affiliate ads, and in the newsletter, feature images of a person in a state of
10 nudity or engaged in specific sexual activities, as defined in the Act.

11 9. The website includes images of the covers of the books for sale. Some of the
12 covers, shown on the website, include images of a person in a state of nudity, as defined
13 by the Act.

14 **FEAR OF PROSECUTION UNDER THE ACT**

15 10. I fear that Mostly Books and its employees (including me) are at risk of
16 prosecution under the Act, because we display, advertise, and distribute material, both in
17 our bookstores and on our website, which may contain images of persons in a state of
18 nudity or engaged in specific sexual activities. These materials are all non-obscene and
19 protected by the First Amendment. Our Affiliates are also at risk of prosecution for
20 advertising our books and our website.

21 11. The Act would subject Mostly Books and its employees and Affiliates to
22 prosecution for engaging in First Amendment protected activities for several reasons.

23 12. The Act includes vague language which I do not understand and do not
24 know how to apply to our business model. This includes the main source of liability under
25 the Act for the posting of restricted images "if the person knows or should have known
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1 that the depicted person has not consented to the disclosure.” I do not know what that
2 means.

3 13. This is not an abstract concern. First, I am not certain what consent to “the
4 disclosure” consists of. It appears to mean consent to the display or sale of that book by
5 Mostly Books. Our business revolves around imagery, and many photographs within the
6 books we sell include nudity or sexuality. As a general matter, we never reach out to
7 individuals pictured in the books we sell to ensure they have consented to our particular
8 display or sale of those images; we rely on publishers, authors, and artists to screen out
9 unlawful or obscene material. Beyond that, we do not investigate the scope of consent
10 behind each picture; nor could we realistically do so. In that sense, we “know” we lack
11 specific consent to our use of each image; we also believe we have a constitutional right to
12 distribute and display these images. If “disclosure,” as used in the Act, means the specific
13 disclosure in a specific publication, or the display and sale of that publication in a
14 particular store, it is also certain that many of the persons depicted could not have
15 consented, and did not consent, because they passed away before publication or our
16 display.

17 14. Furthermore, I do not know what a bookseller is supposed to do to avoid the
18 prospect of criminal prosecution on the grounds that he or she “should have known” that
19 there was no consent to share an image. I do not know if this language places an
20 affirmative duty on Mostly Books to determine the circumstances behind each nude or
21 sexual image that appear among our hundreds of thousands of books.

22 15. I understand that the Act exempts certain images which are taken in a
23 “commercial setting.” I have no idea how to determine from looking at an image whether
24 the subject posed in a commercial setting. I do not know if that means the person depicted
25 was paid, or if “commercial” refers to the physical space where the image was taken. In
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1 either case, I have no idea how our employees would be able to determine, simply from
2 looking at a photo, whether it was taken in a commercial setting.

3 16. Finally, the Act's definitions of nudity and sexual activities are very broad,
4 and cover images that we would never think of as traditionally adult, and that don't even
5 include a human face or identifiable person. For example, the definition of "state of nudity"
6 includes any part of the "female breast below a point immediately above the top of the
7 areola." That would mean that images of women's torsos, even where the nipples are fully
8 covered, are subject to the Act's definition of restricted images. Further, I understand that
9 "sexual activities" include "Fondling...of the human genitals, pubic region, buttocks, anus
10 or female breast." This means that images of people grabbing their own buttocks or
11 breasts, even when fully clothed, are images that could create potential liability for us.
12 The scope of the Act therefore includes images that—far from being obscene—contain no
13 actual nudity, and many images where no reasonable person would think the person
14 depicted had an expectation of privacy in the image.

15 17. We accept for resale used books that may include¹ nude photography, such
16 as books featuring Modernist photographers and contemporaries Imogen Cunningham and
17 Edward Weston. Cunningham, whose work is in the permanent collection at the Museum
18 of Modern Art and the Library of Congress, is renowned as one of the greatest American
19 female photographers. Weston, meanwhile, is regarded by the University of Arizona's
20 Center for Creative Photography, which houses Weston's archives, as "[a.]mong the
21 twentieth century's most influential art photographers," and "widely respected for his
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23
24 ¹ As I mentioned in Paragraph 5, we sell and accept for resale hundreds of books each
25 day. Because of the ever-changing nature of our inventory, it is not possible to definitively
26 state the number of such books featured in our store at any given time. However, we have
in the past routinely accepted books that include nude photography, and will continue to
accept such books for resale if they are brought to the store.

1 many contributions to the field of photography.” The archive is available here:

2 <http://www.creativephotography.org/artists/edward-weston> (last visited Oct. 10, 2014).

3 18. Among the books currently available in the Mostly Books online inventory
4 which include Cunningham and Weston photographs are: *Group f.64: Edward Weston,*
5 *Ansel Adams, Imogen Cunningham, and the Community of Artists Who Revolutionized*
6 *American Photography* (Bloomsbury USA 2014); *Imogen Cunningham* (Zeitgeist Films
7 2013); *Edward Weston* (Taschen 2013); *Imogen Cunningham: Ideas Without End*
8 (Chronicle Books 1993); *Edward Weston: 125 Photographs* (Ammo Books 2011);
9 *Imogen Cunningham: Portraits* (Bulfinch Press 1998); *Edward Weston: Portraits*
10 (Aperture 2005); *Edward Weston & Harry Callahan: He, She, It* (La Fabrica/Fundacion
11 Banco Santander 2013); *Edward Weston* (Skira 2013); *Edward Weston: Nudes* (Aperture
12 1993); and *Edward Weston’s Book of Nudes* (Getty Publications 2007). Each of these
13 books contains photographs of persons “in a state of nudity.”

14 19. The covers (or book jackets) of books sold on our website are displayed on
15 the website. Some of those covers (or book jackets) contain images of persons in a state of
16 nudity, as defined by the Act. One such example is *Nudes* (Taschen 2012), by renowned
17 photographer Ralph Gibson, whose work has been exhibited widely in galleries and
18 museums, including at the Center for Creative Photography in Tucson, in 2001, and at the
19 High Museum of Art in Atlanta, Georgia in 2012. Another example is *Bill Brandt: Behind*
20 *the Camera* (Aperture 1985). Brandt was a prominent British photographer, whose work
21 was the subject of a retrospective at the Victoria & Albert Museum in London in 2004 and
22 an exhibition at the Museum of Modern Art in New York in 2013. Thus, we not only
23 “offer” to sell that book on our website, but we “display” the restricted images on the
24 website.

1 20. In working with established and trusted publishers, Mostly Books knows
2 that none of the books it displays or offers is obscene or could be considered child
3 pornography. Many reputable publishers screen for images that are not protected by the
4 First Amendment, but publish books containing images that might be prohibited by the
5 Arizona Act. In addition, the particular titles displayed on Mostly Books' website or app
6 are derived from a database maintained by a trusted third party, which ensures that the
7 books are not obscene, but does not screen books for compliance with the Act.

8 21. It is impossible for me, or any other bookseller, to ascertain whether the
9 persons depicted consented to the disclosure of these images. Could my employees and I
10 be prosecuted for continuing to offer Weston photography books for sale, on the basis that
11 we "should have known" that some of the persons depicted in the nude did not consent to
12 the publication? Even if there was no consent, I believe we have a First Amendment right
13 to sell and read these books.

14 22. The impact of the Act is not limited to artistic books or to books where we
15 aren't sure whether the depicted person consented to having the image displayed. We sell
16 many books and publications of great historic and political significance which contain
17 images of a person "in a state of nudity," where the depicted person consented neither to
18 the taking of the photograph nor to its publication, let alone to the specific publication in a
19 particular book, newspaper, magazine, or other publication, or the sale of such publication
20 in a particular bookstore or on a particular website.

21 23. For example, among the books for sale by Mostly Books is *Moments: The*
22 *Pulitzer Prize Photographs* (Black Dog & Leventhal Publishers 1999). This book includes
23 such iconic images as the Marines raising the U.S. flag in Iwo Jima in 1945, Babe Ruth's
24 final salute to Yankee stadium in 1949, Lee Harvey Oswald wincing in pain as he is shot
25 in 1964, President Ronald Reagan being tackled into his limousine after the 1982
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1 assassination attempt, and the 1972 Pulitzer Prize Winning Photograph by Nick Ut of a
2 Vietnamese girl fleeing a village that was being bombed with napalm. The nine-year-old
3 girl in that iconic image, often called “Napalm Girl,” appears in what is now called “full
4 frontal nudity.” She most certainly did not consent to the taking of the photograph or to its
5 publication; nor was she voluntarily nude. Could Mostly Books and its employees,
6 including myself, be prosecuted—and subject to the conviction of a felony for offering
7 *Moments: The Pulitzer Prize Photographs*? Is it necessary to seek the consent of the
8 person depicted for any further publication of that iconic image?

9 24. Publications containing that image are, of course, but one example of the
10 impact of the Act on images of historic significance. Images of Holocaust survivors and
11 abused Abu Ghraib prisoners are photographs of a person in a state of nudity or engaged
12 in sexual activity where the person depicted almost certainly did not consent to the
13 disclosure of the image. Does the Act now make it illegal, in Arizona, to sell, or display,
14 books and publications containing these images?

15 25. The task of complying with the Act would make the operation of a
16 bookstore nearly impossible. We offer thousands of books for sale and accept hundreds of
17 new books every day. By vetting the publishers, we can be confident that all of the books
18 are protected by the First Amendment; that is, that none of the books is obscene. Many
19 reputable publishers publish books containing images that could be prohibited by the Act,
20 and, as far as we know, none vet books on that basis. We cannot review every book to
21 determine whether it contains an image including nudity or the broad description of
22 “sexual activities,” let alone ascertain whether the person depicted consented to the
23 disclosure, especially because the majority of books we offer for sale in our store are used
24 and may be out of print. Even attempting to comply with this vague, overbroad Act would
25 virtually, if not actually, shut us down.
26

1 26. I understand that supporters of the Act stated that the intent of the Act was
2 to criminalize “revenge porn.” I believe “revenge porn” refers to the malicious posting of
3 a private image, taken within a relationship, by an ex-lover with the specific intent of
4 harassing or humiliating the person depicted. I do not believe any of the books we display
5 or offer for sale could possibly fit this description—but many of the books and
6 publications which we display or offer for sale certainly contain images restricted by the
7 vague and sweeping terms of this Act.

8 27. The only certain way for Mostly Books to prevent the display or distribution
9 of images of another person in a state of nudity or engaged in “specific sexual activities”
10 when the person depicted has not consented to the disclosure is to eliminate all books with
11 nude or sexual photographs from its store (after reviewing the 100,000 titles and any new
12 titles as they arrive) and website. In addition, as noted above, our database is provided by
13 a third party, which ensures that the books are not obscene but does not screen books for
14 compliance with the Act. Therefore since we have no ability to exclude particular titles
15 from our website we simply could not maintain a third-party database on our website. We
16 believe we have every right to do so.

17 28. Given that all of our activities—in displaying and offering for sale books
18 which contain images of persons in a state of nudity or engaged in sexual conduct—are
19 protected by the First Amendment, this is an intolerable situation.

20 29. If the Act is not enjoined and Mostly Books must self-censor the books and
21 content in store and on its website, assuming that Mostly Books can function at all, it will
22 no longer be able to offer and sell these constitutionally-protected mainstream works. In
23 addition, it will lose profits from the sale of those books, and it will likely lose further
24 business because it will appear that the bookstore has an incomplete or inadequate listing
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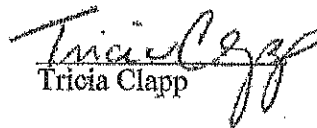
1 of books in its inventory. It will also lose much of its ability to promote itself on its
2 website using images and excerpts from the books and other material it carries.

3
4 **CONCLUSION**

5 30. If the Act is not enjoined, Mostly Books, its customers, and the users of its
6 website will be irreparably harmed. Mostly Books will be forced to either self-censor the
7 content available in our stores and on our website, denying our customers and the users of
8 our website access to constitutionally-protected material, or risk criminal liability.

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

10 Executed at Tucson, Arizona on this
11 21 day of October 2014.

12 
13 Tricia Clapp

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2 Victoria Lopez (Bar No. 330042)**
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16 MOSTLY BOOKS; VOICE MEDIA GROUP, INC.;
17 AMERICAN BOOKSELLERS FOUNDATION FOR FREE
18 EXPRESSION; ASSOCIATION OF AMERICAN
19 PUBLISHERS; FREEDOM TO READ FOUNDATION;
20 AND NATIONAL PRESS PHOTOGRAPHERS
21 ASSOCIATION,

19 Plaintiffs,

20 -v-

21 TOM HORNE in his capacity as Attorney General of
the State of Arizona, et al.,

22 Defendants.

Case No.
2:14-cv-02100-PHX-SRB

**DECLARATION OF
CHRISTOPHER FINAN
(AMERICAN BOOKSELLERS
FOUNDATION FOR FREE
EXPRESSION)**

23 CHRISTOPHER FINAN declares:

24 1. I am the President of the American Booksellers Foundation for Free
25 Expression (“ABFFE”), a plaintiff in this action. I submit this declaration on behalf of
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1 ABFFE, its members, and their customers, in support of the plaintiffs' request for a
2 declaration of unconstitutionality and preliminary and permanent injunctive relief
3 prohibiting enforcement of Ariz. Rev. Stat. § 13-1425 ("the Act"), which criminalizes the
4 offer, display and distribution of non-obscene First Amendment-protected images. I have
5 personal knowledge of the facts set forth in this declaration.

6 2. I understand that the Act provides, subject to limited exceptions, that:

7 It is unlawful to intentionally disclose, display, distribute, publish, advertise
8 or offer a photograph, videotape, film or digital recording of another person
9 in a state of nudity or engaged in specific sexual activities if the person
knows or should have known that the depicted person has not consented to
the disclosure.

10 Ariz. Rev. Stat. § 13-1425.

11 3. I have read the Act, including the statutory definitions incorporated by
12 reference.

13 4. I understand that violation of the Act is a felony.

14 **AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION**

15 5. ABFFE is incorporated in Delaware and has its principal place of business
16 in New York, New York. ABFFE is affiliated with the American Booksellers Association
17 ("ABA"), the leading association of general interest bookstores in the United States, with
18 over 1,300 bookstore members located from coast to coast, including in the State of
19 Arizona.

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

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

9 8. Many of ABFFE’s bookseller members, including many in the State of
10 Arizona, offer and sell First Amendment-protected non-obscene materials that contain
11 depictions of nudity or sexual conduct as defined in the Act (“restricted images”). As to
12 many of these images, it would be impossible to ascertain whether the depicted person
13 consented to the taking of the photograph, the publication of the photograph, or the
14 publication of the photograph in that particular book. As to other images, it is virtually
15 certain that the depicted person did not consent to the taking of the photograph or
16 subsequent display (*e.g.*, photographs taken during war) or did not consent to the
17 publication in that particular book (*e.g.*, the depicted person died years before the book
18 was published).

19 9. ABFFE members are not “adult bookstores.”

20 10. ABFFE members offer and sell First Amendment-protected works
21 containing restricted images both in “brick and mortar” retail stores and via the Internet.
22 Some bookstores have no physical location and rely on their Internet websites to make
23 their products available to consumers. This is not surprising, given that books have
24 become the second largest selling item on the Internet (software being the largest selling
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1 item). For Internet sales, some bookstores maintain their own stock, and others rely on
2 third party providers to maintain inventory and fulfill orders.

3 **FEAR OF PROSECUTION UNDER THE ACT**

4 11. ABFFE members' right to learn about, acquire, and distribute material
5 depicting nudity and sexual conduct, and their patrons' right to view or purchase such
6 materials, will be seriously infringed by the Act if it is not enjoined because ABFFE
7 members and the publishers with whom they transact business will be forced to self-
8 censor or risk prosecution under the Act.

9 12. I have read the declarations of the owners, officers, and employees of the
10 Arizona booksellers who are plaintiffs in this action: Trudy Mills of Antigone Books,
11 L.L.C.; Sean Feeny of Intergalactic, Inc., d/b/a, Bookmans; Gayle Shanks of Changing
12 Hands Bookstore, Inc.; Hop David of Copper News Bookshop; and Tricia Clapp of
13 Mostly Books. The impact that the Act will have on these plaintiff bookstores, as set forth
14 in the bookseller declarations, will similarly be felt by other Arizona bookstores, including
15 ABFFE members, with respect to both in-store and website sales.

16 13. Under the Act, ABFFE members located in Arizona would be unable to
17 display and sell books containing non-obscene images of nudity or sexual conduct, even
18 though such works are protected by the First Amendment, because in most if not all
19 instances, it would be impossible for a bookseller to ascertain whether a person depicted
20 had consented to the taking or disclosure of the image or if one of the limited exemptions
21 in the Act applied (and, if consent to the offer of the book by the particular bookseller is
22 required by the Act, the bookseller would know that there had been no such consent).
23 Application of the restrictions of the Act would restrain and ultimately preclude the
24 otherwise lawful offer, display and sale of popular, acclaimed, and socially important
25 books, including historical, photography and sex education books that contain images of
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1 nudity or sexual conduct, such as those described in the bookseller declarations. Under the
2 Act, the Arizona booksellers would be prohibited from selling books containing restricted
3 images to anyone, either in their bricks-and-mortar stores, or online.

4 14. The Act will also impact ABFFE member bookstores located outside of
5 Arizona, with respect to their websites, in a manner similar to the impact set forth in the
6 bookseller declarations. Under the Act, ABFFE members located outside of Arizona
7 would risk prosecution if their websites offered for sale books or other works containing
8 restricted images, because such offers would, necessarily, be received by persons in
9 Arizona who accessed the Internet. Thus, all ABFFE members—whether located in
10 Arizona or in other States—would risk criminal prosecution in Arizona if they did not
11 comply with the Act.

12 15. For example, Powell’s City of Books, an ABFFE member, is an independent
13 bookstore in Portland, Oregon, that fills a whole city block with more than a million new,
14 used, and out of print books, and offers several million additional books online at
15 www.Powells.com (last visited Oct. 14, 2014). Powell’s does not have a bricks-and-
16 mortar store in Arizona, but its website can be accessed by persons in Arizona. Among the
17 books offered online by Powell’s are *Light Warriors* by Joyce Tenneson (Bulfinch 2000),
18 *Bettina Rheims: Retrospective* (Schirmer/Mosel 2004), and *Eternal Body: A Collection of*
19 *Fifty Nudes*, by Ruth Bernhard (Chronicle Books 1994). Each of these books contains
20 photographs of persons “in a state of nudity.” The covers of the books *Light Warriors* by
21 *Joyce Tenneson* (Bulfinch 2000), *Bettina Rheims: Retrospective* (Schirmer/Mosel 2004),
22 each have an image of nudity, which is displayed on the Powell’s website. Thus, Powell’s
23 “offers” books with images of nudity to persons in Arizona, and “displays” such images to
24 persons in Arizona who use the Powell’s website.

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1 16. Similarly, Tattered Cover, Inc., an ABFFE member, operates the Tattered
2 Cover Book Store in Denver and Highlands Ranch, Colorado. It does not have a bricks-
3 and-mortar store in Arizona, but on its website www.tatteredcover.com (last visited Oct.
4 14, 2014) it offers to sell books which will be shipped by UPS to customers throughout
5 the United States, including to Arizona, and also to many foreign countries. Among the
6 books offered for sale on the website are: *Group f.64: Edward Weston, Ansel Adams,*
7 *Imogen Cunningham, and the Community of Artists Who Revolutionized American*
8 *Photography* (Bloomsbury USA 2014); *Imogen Cunningham* (Zeitgeist Films 2013);
9 *Edward Weston* (Taschen 2013); *Imogen Cunningham: Ideas without End* (Chronicle
10 Books 1993); *Edward Weston: 125 Photographs* (Ammo Books 2011); *Imogen*
11 *Cunningham: Portraits* (Bulfinch Press 1998); *Edward Weston: Portraits* (Aperture 2005);
12 *Edward Weston & Harry Callahan: He, She, It* (La Fabrica/Fundacion Banco Santander
13 2013); *Edward Weston* (Skira 2013); *Edward Weston: Nudes* (Aperture 1993); and
14 *Edward Weston's Book of Nudes* (Getty Publications 2007). Each of these books contains
15 photographs of persons “in a state of nudity.” The cover of the book *Edward Weston:*
16 *Portraits* (Aperture 2005) has an image of nudity, which is displayed on the Tattered
17 Cover website. Thus, Tattered Cover “offers” books with images of nudity to persons in
18 Arizona, and “displays” such images to persons in Arizona who use the Tattered Cover
19 website.

20 17. To comply with the Act, Tattered Cover, Powell’s, and hundreds of other
21 ABFFE member bookstores would have to remove such images from their websites (so
22 that the images would not be “displayed” in Arizona when a person in Arizona accessed
23 the website). If the bookstores were forced to do so, the result would be that a reader in,
24 *e.g.*, Texas who sought to purchase a book from a bookseller in Oregon would be
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1 prevented from seeing an image of the book's cover, because the bookseller had removed
2 the image from its website to comply with the Arizona Act.

3 18. Worse yet, the non-Arizona bookstores would have to institute measures to
4 ensure that no one in Arizona could purchase such books from their websites. Unless
5 booksellers were able to undertake the impossible and cost-prohibitive task of going page-
6 by-page through every book that a customer requested be shipped to Arizona to ensure
7 that the book did not contain images prohibited by the Act, the booksellers could be
8 forced to remove all such books from their websites entirely. If the bookstores were
9 forced to do so, the result would be that a reader in, *e.g.*, Illinois who sought to purchase a
10 book from a bookseller in, *e.g.*, Colorado would be prevented from purchasing the book
11 online because the bookseller had removed the book from its website to comply with the
12 Arizona Act.

13 19. The censoring of online booksellers would severely infringe upon free
14 speech. Unfortunately, the number of bricks-and-mortar bookstores has dwindled. Many
15 readers purchase books online not only because it is convenient to do so, but because there
16 are no bricks-and-mortar bookstores (or no bookstores which have the books they want to
17 purchase) near where they live and work. If these readers cannot buy the books online
18 they may not be able to buy them at all. Moreover, depriving bricks-and-mortar
19 bookstores of their revenue from online sales would deal yet another blow to booksellers.

20 20. The Act thus violates the First Amendment and imposes a substantial
21 burden on interstate commerce—regulating commerce and communications not only
22 between other States and Arizona, but also interstate commerce and communications that
23 take place wholly outside of the State of Arizona.

24 21. Therefore, the irreparable injury that will be sustained by the Plaintiff
25 bookstores if the Act is not enjoined, as set forth in the bookseller declarations, will
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1 similarly be sustained by other bookstores, both in Arizona and other States, including
2 ABFFE members.

3 **CONCLUSION**

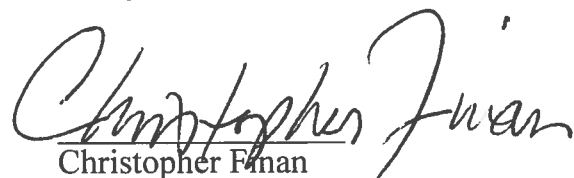
4 22. There is no practical method for ABFFE members to comply with the Act.
5 To comply with the Act, a bookseller would have to go through each book or other work
6 physically to see if it includes possibly restricted images (and, even then, could not
7 determine whether the depicted person gave consent, or whether an exemption of the Act
8 applied) and would have to similarly review all material available on its website. Even if
9 they could do that gargantuan task, ABFFE members would be forced to self-censor,
10 sustaining immediate and irreparable injury.

11 23. If the Act is not enjoined and ABFFE members are forced to engage in such
12 self-censorship, they will also suffer immediate, irreparable injury through the loss of
13 sales that would otherwise be generated in their stores and on their websites. These lost
14 sales would include not only books containing restricted images but, because traffic would
15 be reduced in the stores and on the websites, these lost sales would include other works
16 that customers, while in the “bricks-and-mortar” store or on the website, would have
17 purchased.

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

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

22 Executed at New York, New York
23 on this 29th day of October 2014.


Christopher Finan