

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
CINCINNATI DIVISION**

G.B.,	:	Case No. 1:08CV437
c/o Sirkin Pinales & Schwartz LLP	:	(Judge Weber)
105 West Fourth Street, Suite 920	:	
Cincinnati, Ohio 45202,	:	
	:	
Plaintiff,	:	
	:	<b>AMENDED</b>
v.	:	<b>COMPLAINT FOR</b>
	:	<b>DECLARATORY AND</b>
NANCY H. ROGERS,	:	<b>INJUNCTIVE RELIEF</b>
In Her Official Capacity Only,	:	
Ohio Attorney General,	:	
30 East Broad Street, 17th Floor	:	
Columbus, OH 43215	:	
	:	
Defendant.	:	

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Comes now Plaintiff G.B., who for her complaint against Defendant Nancy H. Rogers, in her official capacity only, states the following:

**PRELIMINARY STATEMENT**

1. This is an action under the laws and Constitution of the United States, as well as the laws and Constitution of the State of Ohio, alleging that Defendant Nancy H. Rogers, in her official enforcement capacity as Ohio's attorney general, has sought and is seeking to violate the protected First Amendment rights of G.B. and others by enforcing Ohio's newly enacted Sex Offender Registration and Notification Act, which for the first time requires individuals convicted of distributing material later found to be obscene to register as sex offenders. By this complaint, Plaintiff challenges the constitutionality of the statute both on its face and as it may be applied to

Plaintiff. Plaintiff seeks a declaration that the law itself is unconstitutional, as well as preliminary and permanent injunctive relief prohibiting its enforcement.

### **JURISDICTION**

2. Jurisdiction over Plaintiff's claims for declaratory and injunctive relief is conferred on this Court by 28 U.S.C. §§ 1331, 1343, 2201, and 2202, and 42 U.S.C. §§ 1983 and 1988. This Court may exercise pendent jurisdiction over Plaintiff's state law claims on the basis of 28 U.S. C. § 1367.

3. This suit is authorized by law to redress deprivations under color of state law of rights, privileges, and immunities secured by the Fifth and Fourteenth Amendments to the United States Constitution and for declaratory and injunctive relief.

4. Venue in this Court is appropriate as Plaintiff faces potential injury within the Cincinnati Division of the Southern District of Ohio.

### **PARTIES**

5. G.B. is a resident of northern Kentucky and is employed in a managerial capacity at Hustler-Cincinnati, Inc. in Cincinnati, Ohio, a retail store that offers for sale, among other items, sexually explicit videos, DVDs, and magazines. A single mother, G.B. has two young children who attend a Catholic school that requires background checks. G.B. also coaches children's volleyball. G.B. earned her associate's degree in mental health and human services from Northern Kentucky University, where she is currently working on a bachelor's degree in geography. To support her children and her education, G.B. has worked for Hustler-Cincinnati, Inc. since 2006. G.B. fears facing obscenity charges due to the history of censorship and strict enforcement of obscenity laws in Hamilton County, which includes multiple criminal obscenity chargers arising out of Hustler

business ventures in Cincinnati. She fears that, under Ohio's Senate Bill 10, she will be forced to register as a sex offender. Such registration, and the stigma that attaches, will have a devastating effect on her children, impacting their eligibility to attend a school that performs background checks, and the community's faith in her suitability to coach children's volleyball. Further, because of the public access component, G.B. fears that stalking and harassment will result if her personal information is posted on the internet, particularly given the threats she has endured in the past.

6. Nancy H. Rogers is the Attorney General of the State of Ohio. Pursuant to the Ohio Constitution and related state laws, she is vested with the responsibility of defending the laws of the State of Ohio in litigation.

## **STATEMENT OF THE FACTS**

### **A. The Adam Walsh Child Protection and Safety Act of 2006**

7. In 2006, the President signed the Adam Walsh Child Protection and Safety Act. The Act establishes minimum requirements for state sex offender registration and community notification, creating a tiered classification system with specified scope and duration requirements for both registration and verification. The Act mandates what types of information must be both gathered and made available to the public. Further, the Act requires that criminal penalties, including at least a year's imprisonment, be available for failure to comply with the registration and verification requirements.

8. The Adam Walsh Act augments the existing obscenity statutes, reaching any individuals who produce obscene material with the intent to transport the material across state lines for sale or distribution. 18 U.S.C. § 1465 (2006). The Act also reaches individuals engaged in the

business of producing obscenity for transit in interstate commerce with the intention of selling or distributing the material. 18 U.S.C. § 1466 (2006).

9. The Act requires jurisdictions to come into full compliance with the Act's provisions by July 27, 2009, or face a ten percent reduction in funding previously available under the Omnibus Crime Control and Safe Street Act of 1968.

#### **B. Ohio's Senate Bill 10**

10. In response to Congress' directive, Ohio enacted Senate Bill 10, effective January 1, 2008. The Senate Bill brought Ohio into compliance with the Adam Walsh Act, mirroring Congress' tiered system of classification, registration periods, and frequency of verification. Sex offenders are assigned to one of three categories. Notification, registration, and verification duties and obligations vary among the tiers, but are mechanically applied to all individuals within the tier class.

11. An individual classified as a Tier I sex offender is, above and beyond completion of the conviction's sentence, required to register in the counties of residence, conviction, employment, and education, for a period of fifteen years. Ohio Rev. Code § 2950.07(B)(3). Tier I offenders must verify the accuracy of registration information in person at least once a year. Ohio Rev. Code § 2950.06(B)(1).

12. An individual classified as a Tier II sex offender is, above and beyond completion of the conviction's sentence, required to register in the counties of residence, conviction, employment, and education, for a period of twenty-five years. Ohio Rev. Code § 2950.07(B)(2). Tier II offenders must verify the accuracy of registration information in person at least once every six months. Ohio Rev. Code § 2950.06(B)(2).

13. An individual classified as a Tier III sex offender is, above and beyond completion of the conviction's sentence, required to register in the counties of residence, conviction, employment, and education, for the remainder of the individual's life. Ohio Rev. Code § 2950.07(B)(1). Tier III offenders must verify the accuracy of registration information in person at least once every ninety days. Ohio Rev. Code § 2950.06(B)(3).

14. Like the Adam Walsh Act, classifications under Ohio's tier system are based solely on the specific crime committed, without reference to likelihood of re-offending, with the exception of increased tier classification for repeat offenders. No longer are there registration-exempt sexually-oriented offenses. No longer are judges given discretion to base sex offense rankings on the seriousness of the crime and the likelihood of re-offense.

15. Among other changes, Senate Bill 10 makes a conviction for pandering obscenity a registratable offense in Ohio. Ohio Rev. Code § 2950.01(E). The maximum sentence in Ohio for one count of pandering obscenity is twelve months in prison, Ohio Rev. Code § 2907.32(C), but, under Senate Bill 10, pandering obscenity is a Tier I offense requiring convicted adults to register annually for fifteen years.

16. Unlike the remainder of the Adam Walsh Act, Ohio's automatic Tier I classification for individuals convicted of pandering obscenity is neither intended to protect children or the community at large, nor is it narrowly tailored to serve those objectives. Under the new classification system unveiled in Senate Bill 10, an individual convicted of pandering obscenity involving a minor, a separate offense, falls into the Tier II category for the purposes of registration and verification. Ohio Rev. Code § 2950.01(F). Therefore, the requirement that individuals convicted of pandering obscenity be mechanically classified as Tier I sex offenders and subject to

all registration, residency, and verification requirements therein, expressly targets obscenity that does not involve minors in any capacity.

17. Individuals convicted of a sexually oriented offense, including pandering obscenity, are prohibited from residing within one thousand feet of any school, preschool, or day-care. Ohio Rev. Code § 2950.034. Ohio's residency restriction applies to individuals convicted of any sexually oriented offense, regardless of whether children were involved in the offense charged. Therefore, an individual convicted of selling an obscene video that does not include child pornography is nevertheless subject to the residency restriction. Senate Bill 10 does not provide any rationale, much less a compelling one, for this sweeping provision.

18. The subjective and ever-evolving definition of obscenity, coupled with Hamilton County's history of censorship and aggressive enforcement of obscenity laws, threatens to limit both the availability of sexually oriented non-obscene materials and the willingness of adults to involve themselves in the sale, distribution, and transportation of sexually oriented non-obscene materials. In fact, as noted above, G.B. is in constant fear that she could be prosecuted for pandering obscenity and forced to register as a Tier I sex offender as a result. Therefore, G.B. is resistant to any effort to expand the selection of sexually oriented non-obscene materials available at the Hustler-Cincinnati, Inc. location she helps manage.

19. By attaching public registration duties to pandering obscenity sentences, and by automatically limiting the areas in which an individual convicted of obscenity may reside, Ohio's Senate Bill 10 impedes upon the inalienable and fundamental right to choose where to live, and the broad right to privacy as guaranteed by the Substantive Due Process doctrine of the Fourteenth Amendment and analogous provisions of the Ohio Constitution. These provisions also violate First

Amendment free speech rights by functioning as a prior restraint and imposing an impermissible chilling effect on sexually explicit non-obscene speech in the Ohio marketplace.

### **C. G.B.'s Response to Ohio Rev. Code § 2950**

20. G.B. is a manager of a Hustler-Cincinnati, Inc. store that displays and sells a variety of materials of a sexual nature, including but not limited to video tapes, DVDs, magazines, lotions, massage oils, lingerie, novelties, and other general merchandise. G.B. is one manager of the retail store in Cincinnati located at 411 Elm Street.

21. G.B., in her capacity as a manager and in response to Senate Bill 10, is resistant to any suggestions or efforts to expand the store's product selection or variety. Based upon strong sales figures, she believes there is a demand in the marketplace for a larger selection of sexually oriented adult material. A primary reason G.B. does not want to expand the product line to include additional merchandise is her fear of being prosecuted for pandering obscenity under Ohio Rev. Code § 2907.32 and thereafter labeled as a sex offender under Senate Bill 10.

22. G.B.'s fear of prosecution is grounded in actual enforcement activities throughout Hamilton County. Hamilton County has a history of aggressively prosecuting sexually explicit materials, including, for example, the 1990 prosecution of the Contemporary Arts Center and its director on charges of pandering obscenity, regarding the installation of Robert Mapplethorpe's *The Perfect Moment* exhibit. In addition, various Hustler outlets have been the target of obscenity prosecutions and investigations in each of the past four decades. It is relentless prosecutions like these that inspire justified fear in individuals like G.B., whose work may come under unpredictable criminal scrutiny at any moment. To now have sex offender registration, verification, and arbitrary

residency restrictions attach as a result of a single charge of obscenity understandably and exponentially amplifies that fear to a paralyzing and silencing degree.

## **STATEMENT OF THE CASE**

### **Claim One: Violation of First Amendment Speech Rights**

23. Plaintiff realleges and incorporates by reference each and every paragraph of the foregoing complaint.

24. Because Ohio Rev. Code § 2950.07(B)(3) automatically attaches Tier I registration and verification obligations to an obscenity conviction based on subjective and evolving community standards, the severity of the added social stigma and prolonged effect accompanying classification act as a prior restraint on constitutionally-protected sexually explicit non-obscene material. Because Plaintiff's fear of lasting and unappealable classification has chilled her protected right to engage in the distribution and sale of sexually explicit non-obscene materials, the inclusion of pandering obscenity as a Tier I mandatory registratable offense violates her First Amendment rights.

25. In light of the foregoing, Plaintiff is entitled to a declaration that the Ohio Revised Code's inclusion of pandering obscenity as a registratable offense violates the First Amendment, both on its face and as applied, and is therefore unenforceable. Plaintiff is equally entitled to an injunction restraining the enforcement and application of Ohio Rev. Code § 2950.01(E)(1)(a) with respect to obscenity convictions

### **Claim Two: Burden on Right to Travel/Dormant Commerce Clause**

26. Plaintiff realleges and incorporates by reference each and every paragraph of the foregoing complaint.

27. By requiring that all individuals classified as Tier I sex offenders register in every county in which the individual is domiciled for a period of three or more days, Ohio Revised Code places an excessive burden on an individual's fundamental right to travel.

28. Ohio Revised Code § 2950.03(A) requires that an individual convicted of pandering obscenity in Ohio register in her county of residence, employment, and education, even if such residence, employment, or education is not in Ohio. Out-of-state registration is required regardless of whether the out-of-state jurisdiction requires registration for similar offenses, and regardless of whether the out-of-state's community standards would consider the material obscene. Therefore, the State unnecessarily burdens the ability of convicted individuals to find meaningful residence, employment, or education outside the State, an excessive burden on commerce with little local benefit. Because G.B. may be forced to register as a sex offender in her home state of Kentucky for the sale of materials that her Kentucky residential community may not consider obscene, Ohio's § 2950.03(A) also introduces the possibility for inconsistent registration standards in her residential jurisdiction.

29. Ohio, in enacting one of the toughest residency restrictions, not only to contain, but to keep sex offenders out of the state, aims to make it undesirable or impossible for sex offenders to remain in the state, or to enter the state for residency. Because the residency restriction prohibits an individual convicted of pandering adult-oriented obscenity from living near areas where children are likely to be present, without providing any causal link or rationale, the restriction cannot fairly be said to be aimed at addressing legitimate local goals, and instead seeks to isolate the State from sex offenders in a protectionist and unconstitutional fashion.

30. In the foregoing ways, provisions of Ohio's Senate Bill 10 impermissibly burden the fundamental right to travel and impact the dormant Commerce Clause in violation of the Fourteenth Amendment to the United States Constitution and related provisions of the Ohio Constitution. There is no compelling government interest to justify this intrusion. Plaintiff is therefore entitled to the requested declaratory and injunctive relief as set forth below.

**Claim Three: Violation of Fourteenth Amendment Procedural Due Process**

31. Plaintiff realleges and incorporates by reference each and every paragraph of the foregoing complaint.

32. Ohio Revised Code § 2950.01(E)(1)(a) requires that an individual convicted of pandering obscenity be automatically subjected to Tier I classification, and the registration requirements and residency restrictions that follow. Such classification is in addition to the completion of the sentence terms. Tier I classification is mechanically applied, without consideration of the likelihood of re-offense, nor the severity of the crime's circumstance. No hearing is afforded an individual wishing to challenge sex offender classification. The State is excused from proving any likelihood of re-offense to justify the additional registration attachment. The absence of a meaningful opportunity to challenge tier classification violates the Fourteenth Amendment Procedural Due Process guarantee. This is particularly the case with regard to obscenity convictions that implicate the First Amendment right to free expression.

33. For this reason, Plaintiff is therefore entitled to a declaration that the mandatory Tier I classification of individuals convicted of pandering obscenity, without opportunity afforded for a hearing respecting the classification, is invalid on its face, as well as injunctive relief precluding enforcement of that provision.

## **Claim Four: Violation of Fourteenth Amendment Substantive Due Process**

### **Right to Privacy**

34. Plaintiff realleges and incorporates by reference each and every paragraph of the foregoing complaint.

35. Congress' Adam Walsh Act allows complying jurisdictions to opt not to include Tier I offender information on mandatory public registry websites. Ohio does not exempt Tier I offenders from public disclosure. Because obscenity convictions are unique in that the crime's very definition is ever-changing and community-specific, revealing an individual's personal information and sex offender classification on public websites based on obscenity charges alone violates the individual's right to privacy, as protected by the Fourteenth Amendment Substantive Due Process doctrine. Such individuals are marked as "sex offenders" for public viewing in jurisdictions with starkly different interpretations of obscenity, jurisdictions in which the material prompting conviction may not be criminalized.

36. The release of information to the general public about individuals classified as "sex offenders" for violation of local obscenity standards does not serve the governmental interests of public safety as offered in Ohio Revised Code § 2950.02(6).

36. Plaintiff is therefore entitled to a declaration that the public registration requirement contained in Ohio Revised Code § 2950. is invalid with respect to pandering obscenity counts, as well as injunctive relief precluding enforcement of that provision with respect to pandering obscenity counts.

## PRAYER FOR RELIEF

WHEREFORE Plaintiff respectfully prays that on her behalf, this Court:

1. Assume jurisdiction of this case and set this case for a prompt hearing;
2. Permit Plaintiff to proceed in this action under her initials as opposed to her full legal name in order to protect her anonymity;
3. Enter a declaration that Ohio's registration, verification, and residency requirements for individuals convicted of pandering obscenity, Ohio Rev. Code § 2907.32, are unconstitutional, both facially and as they may be applied against Plaintiff;
4. Enter judgment for preliminary and permanent injunctive relief prohibiting Defendant from enforcing those provisions;
5. Award reasonable attorney fees and costs pursuant to 42 U.S.C. § 1988; and
6. Enter any other such award or relief that the Court finds justified under the circumstances.

Respectfully submitted,

/s/ H. Louis Sirkin

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