UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BUSHCO, a Utah Corp.; COMPANIONS, L.L.C.; AND TT II, a Utah Corp.	:	
Plaintiffs-Appellants,	:	
vs.	:	Court of Appeals No. 12-4083
MARK SHURTLEFF, in his official capacity as Utah Attorney General,	:	
Defendant-Appellee.	:	

BRIEF OF APPELLANT

On Appeal from United States District Court for the District of Utah, Central Division, the Honorable Dee Benson presiding

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs Bushco, Inc. and TT II are closely held corporations, incorporated in Utah. There is no related company which holds any stock in company. All stockholders are individual citizens of the State of Utah. Plaintiff Companions, L.L.C. is a Utah limited liability company.

TABLE OF CONTENTS

The Appendix submitted herewith is prepared according to Rule 30.1 of the Rules of the 10th Circuit.

CASES

STATUTES

LIST OF ALL PARTIES

In the District Court, Chris Burbank, the Salt Lake City Chief of Police, was also a Defendant. The District Court determined that Chief Burbank was not a necessary party, and granted his Motion to Dismiss. Plaintiffs do not appeal that dismissal.

PRIOR RELATED APPEALS

There are no prior or related appeals, except the cross appeal herein, filed by Defendant Shurtleff as Case No. 12-4093.

DECLARATION

This brief contains 9383 words, counted as a function of WordPerfect, excluding tables and Certificate of Service. It is printed in 14 point type, in Times New Roman font.

/s/_____
W. Andrew McCullough

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 granting the District Court jurisdiction to award equitable and other relief under any act of Congress in providing for the protection of civil rights. The Court has jurisdiction and power to issue injunctions pursuant to Rule 65 F.R.C.P. This Court also has jurisdiction, pursuant to 28 U.S.C. § 2201 to declare the rights and

obligations of any interested party seeking a declaration of rights pursuant to the Constitution and laws of the United States.

A. The matter is before the Court pursuant to Title 42 U.S.C. sections 1983 and 1988.

B. The jurisdiction of this Court to hear appeals from the District Court is conveyed by 28 U.S.C. § 1291.

C. The trial court entered its Judgment on June 7, 2012. The Notice of Appeal was deemed to have been filed on that same day, after the Judgment was entered. Fed. Rules of Appellate Procedure 4(2).

D. This appeal is from the final judgment of the District Court disposing of all issues between the parties.

STATEMENT OF ISSUES FOR REVIEW

1. Is the previous U.S. District Court case of Guinther v. Wilkinson, 679 F.Supp. 1066 (D.Utah 1988) controlling, or res judicata here?

2. Are the amendments to Utah Code Ann. § 76-10-1313 unconstitutionally vague in violation of the Constitutional guarantee of Due Process of Law?

3. Are the amendments to Utah Code Ann. § 76-10-1313 unconstitutionally

overbroad in violation of the First Amendment guarantee of freedom of expression?

All three issues herein were raised by Plaintiffs in their Motion for Summary Judgment herein, Aplt. App. 37-49; and were ruled upon by the Court, Aplt. App. 186-190.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs seek to obtain a permanent injunction, enjoining Defendant from enforcing those portions of the Utah State statute which are unconstitutionally overbroad and/or vague, against Plaintiffs, and their employees and agents.

Plaintiffs further seek a declaratory judgment specifically finding that the statute at issue is unconstitutional. The statute violates the due process clause of the Fourteenth Amendment of the United States Constitution in that it is overbroad, and is impermissibly vague. Plaintiffs claim that the statute denies them and others substantive and procedural due process in that it unduly causes deprivation of a protected activity; and it is arbitrary, capricious, unreasonable and unrelated to any legitimate State interest. Plaintiffs further seek relief based on the denial of equal protection of the law.

Plaintiffs seek declaratory and injunctive relief to prevent violations of Plaintiffs' rights, privileges and immunities under the Constitution of the United States and 42 U.S.C. § 1983, specifically seeking redress for the deprivation under color of State statute, of rights, privileges and immunities secured by the Constitution and Laws of the United States. The rights sought to be protected in this action arise and are secured under the First, Fifth and Fourteenth Amendments to the United States Constitution.

B. Course of Proceedings and Disposition Below.

The District Court rejected Plaintiffs' contention that the doctrine of res judicata applied from the previous legal action over the similar attempt to amend the sex solicitation statute. The Court also rejected Plaintiffs' contentions that Utah Code Ann. § 76-10-1313 (1)(c) was unconstitutionally overbroad and/or vague. The Court did find that Utah Code Ann. § 76-10-1313(2) was unconstitutionally vague, and ordered it severed from the statute.

STATEMENT OF FACTS

Plaintiffs are escort services, licensed by Salt Lake City and Midvale City as "Sexually Oriented Businesses" (SOB's). Such licenses specifically allow and

regulate certain behavior protected by the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment. Bush and Wilkinson Affs. ¶ 2-8.

Defendant is the Attorney General of the State of Utah. Defendant, as the Attorney General, has the legal responsibility to defend in Court the laws of the State of Utah, as passed by the Utah legislature. Utah Constitution, Art. VII Sec. 16; Utah Code Ann. 67-5-1.

Plaintiffs previously also impleaded Chris Burbank, the Chief of Police of Salt Lake City. The District Court found that he was not a necessary party to this action, and dismissed him from the case. Plaintiffs have not appealed that dismissal.. Plaintiffs are licensed and regulated by Salt Lake City or Midvale City to provide the services as escort agencies, which is a particular form of "Sexually Oriented Business" as defined in the respective City Sexually Oriented Business Ordinances. Plaintiffs provide services, on an individual basis, of entertainers and escorts as defined by the Salt Lake City and Midvale "Sexually Oriented Business "SOB" ordinances. Bush and Wilkinson Affs. ¶ 2-8.

In March, 2011, the Utah Legislature passed House Bill 121 entitled "Sex

Solicitation Amendments", amending Utah Code Ann. § 76-10-1313. Aplt. App. 23-24; and a copy is included as an Addendum to this Brief. The new law provided:

> (1) A person is guilty of sexual solicitation when the person:
>
> (c) with intent to engage in sexual activity for a fee or to pay another person to commit any sexual activity for a fee engages in, offers or agrees to engage in, or requests or directs another to engage in any of the following acts:
>
> (i) exposure of a person's genitals, the buttocks, the anus, the pubic area, or the female breast below the top of the areola;
>
> (ii) masturbation;
>
> (iii) touching of a person's genitals, the buttocks, the anus, the pubic area, or the female breasts; or
>
> (iv) any act of lewdness,
>
> (2) An intent to engage in sexual activity for a fee may be inferred from a person's engaging in, offering or agreeing to engage in, or requesting or directing another to engage in any of the acts described in Subsection (1)(c) under the totality of the circumstances. (Emphasis added)

Subsequently, the Governor of the State of Utah signed the act into law, to be effective on May 10, 2011.. The crime of "Sex solicitation" was previously defined by Utah Code Ann. § 76-10-1313 as occurring when someone "offers or agrees to commit any sexual activity with another for a fee." Previous Utah Code Ann. § 76-10-1313. Pursuant to Utah Code Ann. § 76-10-1301, "Sexual activity" is defined as

"acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant". Utah Code Ann. § 76-10-1301. Plaintiffs in this action employ or contract with licensed escorts who, as part of the entertainment and companionship services they are licenced to provide, may touch their own genitals, buttocks, anus, pubic area or breasts, or may expose their genitals, buttocks, anus pubic area or breast below the areola to consenting adults. Bush and Wilkinson Affs. ¶ 2-8.

The Utah legislature previously, in 1987, passed another law redefining "sexual activity" for purposes of prostitution and sex solicitation, to include:

> acts of masturbation, sexual intercourse, or <u>any touching of any person's clothed or unclothed genitals, pubic area, buttocks, anus, or if the person is a female her breasts, alone or between members of the same or opposite sex, or between humans and animals, in an act of apparent or actual stimulation or gratification</u>. (Emphasis by Court – See below).

The law was challenged by several adult entertainers, including exotic dancers, models, spa employees and other adult entertainers. The Utah District Court, in the case of <u>Guinther v. Wilkinson</u>, 679 F.Supp. 1066, 1070 (D.Utah 1988) held:

> that the underlined portion of the statute violates the due process clause of the Fourteenth Amendment of the United States Constitution in two particulars, <u>i.e.</u> that it is overbroad, and that it is impermissively [sic] vague.

Plaintiffs contend that this case is controlling, under the doctrine of res judicata..

STATEMENT OF STANDARD OF REVIEW

> We review the district court's grant of summary judgment de novo, employing the same legal standard applicable in the district court. Moreover, "[i]n exercising de novo review we afford no deference to the district court's interpretation of state law." A motion for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Internal citations omitted). Thomson v. Salt Lake County, 584 F.3d 1304, 1311-1312 (10th Cir. 2009).

SUMMARY OF ARGUMENTS

The law at issue in this action is essentially the same one reviewed by the District Court in 1988, and stricken by the Court. Under the doctrine of res judicata, the decision of the Court in Guinther v. Wilkinson, 679 F.Supp. 1066 (D.Utah 1988) is controlling. If the legislature reenacts a statute identical in all essential features to one which has been stricken by the Court, the new law is invalid as a matter of law.

This law suffers the same legal deficiencies that the previous enactment of the legislature in 1987 suffered. It is both unconstitutionally vague and overbroad. The law suffers from two main infirmities. First, it infringes on First Amendment rights to free expression in that it defines elements of free expression as indications of

criminal intent, and thus violates the First Amendment.

The law also allows a law enforcement officer to determine for himself when someone is violating the law, based on his subjective and individual criteria. It lacks objective and clear criteria, such that a person of average intelligence would be expected to know that their conduct was a criminal violation. Plaintiffs are entitled as a matter of law to a declaratory judgment that the law is invalid, and a permanent injunction prohibiting its enforcement.

ARGUMENT

POINT I

THE CONTESTED STATUTE IS ESSENTIALLY A RE-ENACTMENT OF A LAW INVALIDATED BY THE DISTRICT COURT; AND THE RE-ENACTMENT IS PROHIBITED BY THE COURT'S PREVIOUS ORDER.

Utah law prohibits a person from offering or agreeing to commit a sex act for a fee, and defines that conduct in Utah Code Ann. § 76-10-1301:

> "Sexual activity" means acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.

In 1987, the legislature added to the definitions in this section, as set out above. That law was challenged, also by adult entertainers, and was invalidated. A copy of the

Complaint, designated as Guinther v. Wilkinson, Case No. 87-C-423G, is at Aplt. App. 50-62, along with the full test of the bil from that year. Plaintiffs in that case claimed that, as part of their artistic expression, an individual Plaintiff might "touch his or her own clothed or unclothed pubic area, buttocks, or breast in an act of apparent sexual stimulation or gratification". Ex. A, ¶¶ 10-13. They also claimed that the amendment to the law violated their right to free expression under the First Amendment; and that it violated their right to due process and equal protection under the Fifth and Fourteenth Amendments. Ex. A, ¶¶ 17-23. Insofar as the language of the two statutes prohibits the same conduct, and is substantially identical, this matter is res judicata; and the State of Utah is bound by the previous decision of the District Court. The State, and the District Court, in the instant case, differentiated between this case and Guinther by pointing out that the former statute was an amendment to Utah Code Ann. § 76-10-1301, the definition section, while the changes here are found in Utah Code Ann. § 76-10-1313, the prohibition of "sexual solicitation". The language about prohibited touching remains. Moving that language from one section to another does not change the issue and prevent the application of res judicata. The effect of this statute is to criminalize as indicative of the willingness to become

involved in unlawful sexual activity, exactly the same activities as were outlawed by the old statute. The previous Court decision could have stricken just the reference to "apparent or actual sexual stimulation or gratification"; but it went quite a bit further. Once again, the following underlined language was stricken from the 1987 law:

> acts of masturbation, sexual intercourse, or any touching of any person's clothed or unclothed genitals, pubic area, buttocks, anus, or if the person is a female her breasts, alone or between members of the same or opposite sex, or between humans and animals, in an act of apparent or actual stimulation or gratification.

The language at issue in the new statute includes:

> offer or agree to engage in, or request or direct another person to engage in any of the following acts:
>
> (i) exposure of a person's genitals, the buttocks, the anus, the pubic area, or the female breast below the top of the areola;
>
> (ii) masturbation;
>
> (iii) touch of a person's genitals, the buttocks, the anus, the pubic areas, of the female breast; or
>
> (iv) any act of lewdness.

There is no substantive difference in the language stricken in Guinther, and the language of Subparagraph (iii) of the new law. The language of Subsection (i) is so similar and intertwined that it must necessarily also be stricken. Defendants do not

point out differences in those areas which justify striking one and not the other. The new statute uses exactly the same activity stricken out of the old law to define the intent of the person to engage in such sexual activity. Acts which are not properly proscribed as sexual activity will get a person arrested for solicitation. The new law dispenses with the very requirement that Utah Code Ann. § 76-10-1313 was designed to cover: an agreement for sexual activity for money. While the disputed conduct is not itself a solicitation for sexual activity, the statute makes it, at least sometimes, unassailable evidence of solicitation or agreement. The Salt Lake City police chief told the Utah legislative committee that the situation arises when one of his officers "encounters somebody that they believe is engaged in prostitution". Aplt. App. 77. The chief complained that, in order to arrest that "somebody", they must actually have evidence of the intent to engage in prostitution. Id. So the chief asked the legislature to allow his officer to act on his assumption. An officer is thus empowered to determine for himself who is engaged in prostitution. If the officer believes that a person is engaged in prostitution, he may arrest for something that would not constitute a crime without that belief. The officer's belief has now become an element of the crime.

Hence, the language which allows a person to be arrested for "touching of a person's genitals, the buttocks, the anus, the pubic area, or the female breasts" is not only unconstitutionally overbroad and unconstitutionally vague, it is specifically prohibited by the decision in Guinther. As in Guinther, the amendment to the law allows an arrest of a person touching themselves in a provocative manner. Prostitution requires two participants. The State contends that there is a difference between the previous enactment and the current one, as the self touching is not made a crime per se, but is only used to determine the state of mind, or willingness of the Defendant to commit an unlawful act. The District Court, in Guinther, ruled that the underlined language was both unconstitutionally overbroad and vague:

> In the case before us, the Utah prostitution statute applies to "sexual activity" with another person for a fee" Utah Code Ann. § 76-10-1302(1)(a) (emphasis added), but the term "sexual activity" in the underlined portion of the statute under scrutiny embraces acts of touching "whether alone or between members of the same or opposite sex" Utah Code Ann. § 76-10-1301 (emphasis added). The breadth and reach of the statute is clearly too wide, as well as being inconsistent with the prostitution law itself. As written, the statute embraces conduct that very well justifiably may be regulated under the police power of the state, but it is so broad as also to embrace conduct which could not justifiably be so regulated. Whether the particular offending language could be severed, or interpreted as consistent with the pre-existing law, is doubtful. In all events, however, the statute does not pass constitutional muster because it is impermissibly vague. Id.

Likewise, the instant statute is both vague and overbroad, as it allows conduct that is not unlawful to be the basis of a decision that a Defendant is willing to do something that is unlawful. As the District Court also stated in Guinther:

> The law is clear that persons who must conform their conduct to particular requirements are entitled to fair notice of what is permitted and what is proscribed. Village of Hoffman Estates v. Flipsid Hoffman Estates, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Grayned v. City of Rockford, supra; United States v. Salazar, 720 F.2d 1482, 1484-85 (10th Cir. 1983). If a law does not provide standards against which a person's conduct may be measured it is unconstitutionally vague and "incapable of an valid application," Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 604 (1974). The enactment at issue provides no standards against which a person's conduct may be measured and is susceptible to mischievous subjective application. Thus, it is unconstitutionally vague. Id. at 1071.

The State argues today that the current definition of sexual activity in Utah includes masturbation, which is a solo act. Plaintiffs claim, of course, that such a reading would in itself be overbroad, though the definitions contained in Utah Code Ann. § 76-10-1301 are not directly challenged here. In fact, in Guinther, the State also argued that a solo act was not contemplated by the Utah statute. They asked the Court to construe the statute as requiring two (2) actors, in order to save the constitutionality:

> Clearly the elements of prostitution require that the person engage in sexual

activity "with another". Actions like an actress touching her own breasts are not prostitution nor could such an act ever be construed to be included in the definition of prostitution contained in the statute. Acting, dancing, and touching oneself during these activities are all outside the prostitution ordinance by its own clear terms. This precise issue was raised in People v. Greene, 441 N.W.S.2d 636 (Crim.Ct. NYC, 1981). The defendant had been charged with prostitution in violation of a New York law, which read:

> A person is guilty of prositution when such person engages or agrees or offers to engage in sexual conduct anothrer person for a fee.. (Emphais added).

This provision under New York law is almost exactly the same as § 76-10-1302(1)(a) Utah Code Annotated cited above.

The defendant in Greene, supra, was charged with agreeing to commit a sexual act involving only herself, that is she agreed to perform an act of masturbation in front of an undercover officer. The Court held that sexual acts performed not "with another" were not covered by the statute. Aplt. App. 180-181.

The State has completely reversed its argument, now stating that Utah prostitution law does cover solo acts, and that this is constitutionally sound. This change of position is necessary to defend the new law; and the Court below, at least in dicta, seemed to agree :

> Here, Plaintiffs argue that masturbation is protected because, as they suggest, masturbation has not [been] and is not considered a "sexual activity" under the Utah Code Ann. § 76-10-1301. The court disagrees. Section 1301 includes "acts of masturbation" in the definition of "sexual activity." Utah Code Ann. § 76-10-1301. As a result, masturbation for a fee is not a protected activity and therefore, Subsection (1)(c) does not infringe on a substantial amount of

protected speech. Accordingly, Subsection (1)(c) is not overbroad. App. 191. The State previously conceded that such language would endanger the constitutionality of the statute; and that is still true. The Court clearly ruled on that point in 1988; and the State's argument now is without merit. The Court below construed a section of the code which was not directly at issue, Utah Code Ann. § 76-10-1301. But the consequence of its misconstruing that state was that it wrongfully upheld Utah Code Ann. § 76010-1313(1)(c). The fact remains that Utah Code Ann. § 76-10-1313(1) states: "A person is guilty of sexual solicitation when the person: offers or agrees to commit any sexual activity with another person for a fee." The Court below, in ruling that an agreement for masturbation was sufficient under Utah Code Ann. § 76-10-1301, and thus was also sufficient under Utah Code Ann. § 76-10-1313(1)(c), was in error. That error seriously affects the whole basis of the District Court's ruling. This Court is to review that interpretation de novo under Thomson v. Salt Lake County.

The Attorney General says that only those who touch their buttocks with intent to offer or agree to sexual activity for hire will be prosecuted. Chief Burbank's officers have already filed criminal charges against at least one Defendant under the

new statute, who is not accused of offering or agreeing to a sex act for compensation. Instead, she is accused of appearing nude before a police officer, and touching herself in a provocative way, despite the fact that she specifically refused to agree to a sex act. (App. Vol II, filed under seal). Chief Burbank, in his testimony before the Legislature, specifically denied that the statute would be misused in this manner. This highlights, however, why the statute is unconstitutional. This example in itself should be sufficient to point out the overbreadth and vagueness of the disputed law. In the Attorney General's Reply Memorandum below, is the following statement regarding this case:

> She was charged under the statute with engaging in a sexual activity (masturbation) for a fee - not for masturbating with the intent to engage in a sexual activity for a fee. Ironically, masturbation was not part of the definition of the sexual activity stricken by the Guinther Court. (Emphasis added). Aplt. App. 146.

That is true only in the sense that an act of masturbation by one person upon another was not at issue. The language which prohibited that activity was indeed not stricken. But the State itself, in the earlier case not only did not defend such an interpretation, but directly attacked it. The Language stricken by the Guinther Court included "any touching of the person's clothed or unclothed genitals . . . in an act of apparent or

actual stimulation or gratification". The difference between that language and the State's reading of the current law is a difference without a distinction. All sexual activity as defined in that section takes two (2) people to accomplish, including the reference to masturbation in the Utah Criminal Code (Utah Code Ann. § 76-10-1301). That has been assumed since the District Court's previous decision; and an exhaustive search by Plaintiffs' attorney for a conviction of anyone for prostitution by merely touching oneself has yielded no such convictions.

This Court outlined the doctrine of res judicata in MACTEC, Inc. v. Gorelick, 427 F.3d 821, 831 (10th Cir. 2005):

> The doctrine of res judicata, or claim preclusion, will prevent a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment. Id. at 1467. Under Tenth Circuit law, claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits. Wilkes v. Wyo. Dep't of Employment Div. of Labor Standards, 314 F.3d 501, 504 (10th Cir. 2003). If these requirements are met, res judicata is appropriate unless the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit. Yapp v. Excel Corp., 186 F.3d 1222, 1226 n.4 (10th Cir. 1999).*fn7

Thus, the main question at issue in this case has been previously litigated in this Court involving the same Defendants, or those standing in their stead. The Judgment was clear, and the facts and the issues were essentially the same. The previous case

dealt with the issue of whether the State could validly, within the limits of the Fourteenth Amendment, punish a person for touching him/herself as prostitution. The answer was in the negative.

Defendant Shurtleff has asserted that Plaintiffs are not entitled to invoke the doctrine res judicata in this matter, as that is a doctrine that prevents additional lawsuits. Defendant Shurtleff misreads the doctrine, as explained by the Utah Supreme Court in Oman v. Davis School District, 194 P.3d 956, 2008 UT 70 (Utah 2008):

> "The doctrine of res judicata embraces two distinct theories: claim preclusion and issue preclusion." Buckner v. Kennard, 2004 UT 78, ¶ 12, 99 P.3d 842. This appeal raises only the latter principle of issue preclusions. *fn5 Issue preclusion, which is also knows as collateral estoppel, "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." Id. (Internal quotation marks omitted). The purposes of issue preclusion "(1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previous litigated issues from being relitigated; (3) protecting litigants from harassment by vexatious litigation." Id. ¶ 14. (Emphasis added).
>
> ¶ 29 Issue preclusion applies only when the following four elements are met:
>
> > (i) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated and (iv) the first suit must have

resulted in a final judgment on the merits.

As the Utah Court has stated, it prevents "parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." Thus, a Plaintiff may bring a declaratory judgment action when Defendants, such as these Defendants, repeat actions which were previously declared by the Court to be unlawful. In this case, it is not the action by Plaintiffs that is prohibited by "claims preclusion"; it is the defenses asserted by the Defendants.

Defendant Shurtleff also has claimed that the parties are not identical; but he seems to admit that the parties are in privity to those who litigated the first case. In that case, a group of adult entertainers sued the Attorney General to block enforcement of the statute referred to above. In this case, the parties stand in exactly the same situation. A declaratory judgment is different than most private civil litigation. The result in Guinther was that the law at issue was declared unconstitutional. The cited language was stricken, and was not enforceable against anyone, whether a party or not. These Plaintiffs stand in the stead of Ms. Guinther and company, and are now the targets of an essentially identical statute. They may point out that State agents are doing exactly what the District Court previously

ordered them not to do. These parties, then, certainly have the right to bring the matter back before the Court; and Defendant should be estopped from asserting the same defenses to this law that they unsuccessfully asserted to the previous one.

In the Attorney General's Reply Memorandum below, Aplt. App. 147, he cites United States v. Mendoza, 464 U.S. 154 (1984) for the proposition that collateral estoppel should not be applied against the Government, as:

> a rule allowing non-mutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.

The Attorney General wrongfully suggests that all uses of collateral estoppel are similar or equal. When a statute is declared void, the Legislature is not free to re-adopt the same language in the next session. A declaratory judgment of this sort binds the State not to enforce a statute which is virtually identical. Such a use of collateral estoppel would not prevent the State from arguing that subsequent case law undermined the decision of the Court in the previous case. Thus, the State would be in a position to argue that the previous case should be overruled. What the State cannot do is to ask the Court to ignore the previous declaratory judgment. That is what the State is doing here.

POINT II A

THE STATUTE SUFFERS FROM THE SAME VAGUENESS PROBLEM AS ITS PREDECESSOR.

Defendant Shurtleff argued below that the new statute: "amended § 76-10-1313 . . .to include a further inchoate sexual solicitation crime. This is a crime that cannot be prosecuted without the requisite mens rea." App. 82. Blacks Law Dictionary (West Group, 1999) defines an inchoate offense as:

> A step toward the commission of another crime, the step in itself being serious enough to merit punishment. In criminal law, the three inchoate offenses are attempt, conspiracy, and solicitation.

The Utah Criminal Code, in Title 76 Chapter 4 treats and defines inchoate offenses. Under this Utah statutory scheme, an attempt to commit a crime is one degree less serious than actual commission of the crime, as is a conspiracy to commit it. Thus, an attempt or conspiracy to commit a Class B Misdemeanor is a Class C Misdemeanor. See Utah Code Ann. §§ 76-4-102(1)(h) and 76-4-202(6). Under Utah Code Ann. § 76-4-203, a criminal solicitation occurs only in the event that the crime solicited is a felony. Sex solicitation is an exception to that statutory scheme. Pursuant to Utah Code Ann. § 76-10-1313, "a person is guilty of sexual solicitation when the person: offers or agrees to commit any sexual activity with another person for a fee". Unlike

other inchoate offenses, this one is the same degree of seriousness as actually committing the crime solicited: prostitution. See Utah Code Ann. § 76-10-1302. Such a statute has been defended as necessary to allow a law enforcement officer to obtain an arrest, without the necessity of an act of prostitution being completed. Since the suppression of prostitution is the whole idea, police officers only need to obtain evidence that the person made such an offer or agreement. The terms "offer" and "agreement" are also "established terms of art" and well defined within the law. Now the State claims that it must go further, and impute an offer or agreement, even when there is not one. The acts selected as indicative of that agreement include "touching of a person's [including one's own] genitals, the buttocks, the anus, the pubic area, or the female breast". Defendant acknowledges that the Court struck down language which was virtually identical in Guinther: "any touching of any person's clothed or unclothed genitals, pubic area, buttocks . . . ." The difference, Defendant says, is the addition of a mens rea requirement. The police officer is now entrusted to decide whether such touching was innocent or an indication of a crime.

The precursor to the crime at issue includes "any other act of lewdness". Utah has a statute prohibiting "lewdness", a crime that occurs in the presence of an

unwilling observer:

> **Utah Code Ann. § 76-9-702**
>
> A person is guilty of lewdness if the person ... performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront of alarm to, on or in the presence of another who is 14 years of age or older:
>
> (a) an act of sexual intercourse of sodomy;
>
> (b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;
>
> (c) masturbates; or
>
> (d) any other act of lewdness.

The Utah Supreme Court, in State v. A.T, 34 P.3d 228, § 13, 2001 UT 82, (Utah 2001) held the following regarding the "catchall" phrase in subsection (d):

> Section 76-9-702's catchall phrase, "any other act of lewdness" must be interpreted to include acts of the same general kind, class, character, or nature as those enumerated beforehand; acts similar in kind, class, character, or nature to public intercourse, sodomy, exposure of the genitals or buttocks, or masturbation. (Emphasis added).

Obviously, lewdness is not the same crime as sex solicitation. Lewdness is, by its very nature, something done in public " or under circumstances which the person should know will likely cause affront of alarm"; and the same act, when done in

private before a person who consents, is not a crime. See Salt Lake City v. Roberts, 44 P.3d 767 (Utah 2002). Neither private touching of oneself or nudity is a crime, nor is it indicative of intent to commit a sex act for hire. Because lewdness is a crime that is offensive to public order, and is a form of disorderly conduct, reference to it as a precursor to sex solicitation is nonsensical. Lewdness is part of the same chapter that prohibits disorderly conduct. Prostitution, however, is in the chapter which includes morals offenses. The Attorney General states "lewdness is a specifically defined and easily understood term." Unfortunately, the Attorney General does not seem to understand the term. The nature of the acts at issue here are private.

The District Court did strike part of the statute, which was determined to be both vague and superfluous. Even without the stricken language, however, there is no set standard as to what is an indication of a person's willingness to engage in a sex act for a fee. A police officer, in the exercise of his discretion, may decide for himself what acts are an indication of unlawful activity. The same acts, by another person in another place, may not be indications of unlawful activity. This gives the officer an unlawful amount of discretion to decide when a crime has been committed. Such discretion was prohibited by the Supreme Court, in Houston v. Hill, 482 U.S.

451, 465 (1987):

> Laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them . . . [are] not narrowly tailored to prohibit only disorderly conduct or fighting words.

Defendant has pointed out that a jury must still be convinced beyond a reasonable doubt that the person intended to commit a sex act for a fee. However, otherwise innocent actions can now result in an arrest, humiliation, and the trial of someone who is merely acting like a "Sexually Oriented Business" employee is both expected and allowed to act. The law allows police officers to decide for themselves, based on a "suspicion" that someone is involved in prostitution activity, when an otherwise innocent act is indicative of criminal intent.

A Defendant is entitled to a criminal statute which has clear standards and guidelines, so the Defendant will know when he or she has violated it. As the U. S. Supreme Court stated in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards fo those who apply them. A vague law

> impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (Emphasis added).

This Court, citing Kolender v. Lawson, 461 U.S. 352, 357 (1983), held, in U.S. v. Apollo Energies, 611 F.3d 679, 687 (10th Cir. 2010):

> First, due process requires citizens be given fair notice of what conduct is criminal. A criminal statute cannot be so vague that "ordinary people" are uncertain of its meaning. See Kolender v. Lawson, 461 U.S. 352, 357 (1983). However, even when a statute is specific about what acts are criminal, our due process analysis is not complete. When, as here, predicate acts which result in criminal violations are commonly and ordinarily not criminal, we must ask the fair notice question yet again.

And see again Guinther v. Wilkinson, 679 F.Supp. 1066, 1071 (D.Utah 1988), which applies as clearly here as when it was written.

The Utah Supreme Court, in State v. Mooney, 2004 UT 49, 98 P. 3d 420 (Utah 2004), a case with First Amendment implications, also cited Kolender:

> Both the United States and Utah Constitutions protect citizens from deprivation of liberty or property absent due process of law. U.S. Const. Amends V & XIV, §1; Utah Const. art. I, §7. The Utah Controlled Substances Act imposes substantial criminal penalties on those found guilty of violating its provisions. Our constitutional guarantees of due process require that penal

> statutes define criminal offenses "with sufficient definiteness that ordinary people understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983);

The problem here is that the new statute was specifically aimed at adult entertainers, people who, as part of their expected entertainment, may expose certain parts of their bodies, and certainly may also touch themselves in provocative ways. It is only when they are under "suspicion" of being willing to agree to commercial sex, by a particular police officer, that these moves become an indication of criminal activity. There is no way that an adult entertainer can put herself in the position of an observing officer, and know when she has crossed the line; because the line is entirely in his mind.

The State claims that an officer certainly will not arrest someone on the stage in a strip club for the same activity that would be criminal under other circumstances, such as an undercover operation seeking prostitution. That may be; but both licensed performers have First Amendment protection. Plaintiff escort agencies send individual escorts to meet with customers, in a private setting. It is the standard supposition of Chief Burbank's full time "vice squad" that all such escorts are willing to engage in sexual activity for a fee. Thus, it is only a question of catching them. The

Attorney General states, without supporting Affidavits:

> The amendments provided by HB121 are necessary to prevent the prostitution industry from circumventing the law. Before the amendments were made, a change in prostitution practices was rendering police sting operations nearly ineffective. Aplt. App. 87.

That simply is not true. The burden surely must be on the government to produce SOME evidence that such draconian laws are necessary, and that enforcement efforts have become less successful to an increasingly sophisticated prostitutes. A simple Affidavit, perhaps showing some statistics or trends, might evidence this problem.

The Attorney General goes on, in his memorandum to say that

> a prostitute would ask him to engage in some of the conduct listed in § 76-10-1313(1)(c) such as exposing the officer's genitals or touching the prostitute's buttocks, knowing that the officer would not be willing to do so. Id.

First of all, Utah officers regularly take off their clothes in front of escorts; and there has been no court decision or rule prohibiting such conduct. But if the problem is that alleged prostitutes ask an officer to touch himself sexually (Aplt. App. 76), in order to "make a deal", a statute could be "narrowly tailored" to cover just that contingency. To add otherwise innocuous acts, such as the touching of an entertainer's own breast or buttocks to the list of prohibited acts, is to interfere with expression and to deny due process.

In Robinson v. California, 370 U.S. 660 (1962), the U.S. Supreme Court struck down a statute which created a "status offense" of being "addicted to the use of narcotics". The new statute shifts the focus of prosecution from the act of "offering or agreeing" to an unlawful sex act, to the officer's perception that someone "is" a prostitute. Thus, his perception of her behavior may be colored by his suspicion of her status; and it is that suspicion that creates the crime. A licensed escort is likely to do SOMETHING to convince an officer that she is willing, under this new law, if he goes into the undercover operation with that assumption. See again Aplt. App. 206-212, filed under seal. The previous requirement that an offer or agreement be made is clear; and it is easily determined. Making that agreement subjective to the police officer is a violation of due process. To illustrate, here is an excerpt from a recent police report:

> The Salt Lake City Police Vice Squad was conducting an escort compliance operation at this location. I acted in an undercover capacity as a "John" during this case. (John is a common term used to describe males who procure the services of prostitutes.)

If the undercover officer assumes that the customers of licensed escorts are "Johns", he is likely to use gestures that the entertainer makes as confirmation of that assumption. And yet, these gestures are something she is expected to do in the

context of her activities as a licensed "sexually oriented" entertainer. This is the essence of what makes the law intolerable.

Plaintiffs here do not dispute that offering or agreeing to a sex act for hire can be properly proscribed by a narrowly drawn statute. In fact, that statute has been on the books for many years in Utah. The modifications to the statute at issue here, however, go well beyond what is necessary to prohibit such an offer or agreement. The listed indications of willingness to agree are both overbroad and vague, and they are not valid indications of the intent. And, like begging on the street, the licensed adult entertainers who bring this action do indeed have federal constitutional protection. This Court implicitly so ruled in Guinther, at 1070 (and see note 4). The additions can be for no other purpose than to give a police officer who has already decided that the Defendant is "up to no good", the authority to arrest her for that mere supposition. The case law cited by Defendant Shurtleff does not serve to cure that fatal defect.

POINT II B

THIS LAW IS CLEARLY INVALID AS AN INFRINGEMENT OF FIRST AMENDMENT TO FREEDOM OF EXPRESSION.

Because the District Court found the predecessor law unconstitutionally vague

and a violation of due process, it did not reach the First Amendment issue. Both sides in Guinther, however, briefed the First Amendment issue; and the State conceded that a law which transformed a performance involving only one person into an act of prostitution would be overbroad in violation of the First Amendment. In Guinther, the State brushed off the concerns of Plaintiffs regarding the infringement of free speech:

> In the present case the plaintiffs have indicated that they are inhibited and believe that the State and South Salt Lake intend to use § 76-10-1301, Utah Code Annotated in an unconstitutional way. No reasons are given for that belief nor any explanation for the fear of prosecution under the situations they describe in the complaint. Dancers have expressed fear of prosecution for dancers touching themselves and actors touching themselves during a play. Aplt. App. 172.

That argument was not convincing then; and it surely is not convincing now, in light of the recent prosecution referred to in App. Vol II (App. 605-612). While, however, the previous law prohibited self-touching, the instant law adds to that the exposure of certain parts of the body as an indication of prostitution, or willingness to engage in that act. It is important to note that the District Court cited a nude dancing case, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), in its previous ruling. In doing so, the Court upheld standing by a person to challenge an overbroad and vague law, even if

that party's conduct might validly be regulated or prohibited by a narrowly drawn statute. See New York v. Ferber, 458 U.S. 747, 768-769 (1982). See also City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) and Schad v. Mount Ephraim, 452 U.S. 61 (1981) holding that nudity in entertainment has constitutional protection under the First Amendment. The Supreme Court has allowed regulation of adult entertainment involving nudity, not because of the nudity itself, but because of the perceived "secondary effects" of establishments featuring adult entertainment, including increased crime, decreasing property values, and general "urban blight". See Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). The Court has reasoned that, while the actual presentation of sexually oriented entertainment is protected by the First Amendment, the "time, place and manner" of the entertainment can be regulated if the regulation is aimed at the secondary effects, and not at the primary effects, such as the effect on the audience. See ACLU v. Reno, 521 U.S. 844 (1997). Here, the law is directed at the message, creating an invalid presumption that an adult entertainer is using nudity or certain touching to signal her willingness to engage in sex for hire.

The same arguments used to challenge the prohibited self-touching as a precursor to prostitution, are equally convincing as to the exposure. The new statute allows a police officer to use, as an indication of the intent to engage in prostitution: "exposure of a person's genitals, the buttocks, the anus, the pubic area, or the female breast below the top of the areola." This is substantially overbroad, and it adds a new dimension to the State's efforts to enact censorship. For an adult entertainer, the use of nudity and self-touching is legitimate within her occupation. Certainly, the fear of being arrested for an alleged sex act during the presentation of adult entertainment, is likely to "chill" much constitutionally protected expression. See Elrod v. Burns, 427 U.S. 347, 377, (1976): "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." See also New York v. Ferber, 458 U.S. 747, 768-69 (1982). A Defendant may indeed have a right "not to be tried", when that prosecution is tainted by an clear attempt to prevent a Defendant from the future exercise of First Amendment rights. United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992). Under this law, once the police officer has made this determination, the burden shifts to the accused performer to prove she was not intending to engage in sex for a fee. That is an intolerable burden on her

First Amendment rights.

A statute not directed primarily at abridging expression protected by the First Amendment, but which nevertheless may affect such expression, is subject to intermediate scrutiny. Such scrutiny is not the highest level; but it is elevated beyond the normal "rational basis" test, because of concerns over protecting free expression. The seminal authority for this scrutiny is United States. v. O'Brien, 391 U.S. 367 (1968). That case dealt with the illegal destruction of a draft card; and the Supreme Court determined that a general statute regulating behavior may incidentally burden expression if:

1. it is within the constitutional power of government to adopt;

2. it furthers an important or substantial governmental interest;

3. the interest is unrelated to the suppression of expression; and

4. the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 376-7.

The challenged provisions of the Utah statute fail to comport with these requirements in several respects. The substantial interest claimed by the State is that of suppressing prostitution, and the solicitation thereof. Without affidavits, the Attorney General claimed below that it has become impossible to enforce the

prohibition against offering or agreeing, because some suspects may ask an undercover police officer to prove he is not an officer, before they agree to sex for a fee. There was no attempt to show that this is true, and that it has substantially interfered with enforcement. The State of Texas made similar arguments in Lawrence v. Texas, 539 U.S. 558 (2003). The State here is not "suppressing illegal sexual conduct", but is attempting to change the nature of the conduct prohibited. As the U.S. Supreme Court held in Lawrence, there is a limit to what the State can prohibit by calling it "illegal sexual conduct". And as the District Court previously ruled, that does not include a person touching herself or engaging in mere nudity in a private session where she has no reason to believe there is anyone present who will be affronted or alarmed.

It is obvious that prohibiting licensed adult entertainers from the kinds of touching and exposure prohibited here will indeed suppress expression. The District Court alluded to that in Guinther. In citing to Doran v. Salem Inn, 422 U.S. 922 (1975), the Court pointed out that inhibiting expression would render the law overbroad, even if it could be "constitutionally applied to a particular defendant". 679 F.Supp. At 1070. In Doran, the Court invalidated a law directed at "bar room" nude

dancing but not, by its terms restricted to such. The Court found that it could be applied to nudity in legitimate theater, opera or ballet; and such a blanket prohibition on nudity violated the First Amendment. This statute is not really directed at those who offer or agree to sex acts for hire. It is directed to expressive activities which may tangentially be related to the offending conduct. And, while:

> the customary 'barroom" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. 422 U.S. at 932.

See Schultz v. City of Cumberland, 228 F.3d 831, 839 (7th Cir. 2000): "Although once furiously debated, it is now well-established that erotic dancing of the sort practiced at the Island Bar enjoys constitutional protection as expressive conduct." And see Peek-A-Boo Lounge of Bradenton v. Manatee County, 337 F.3d 1251 (11th Cir. 2003) for a review of decisions upholding nude dancing as protected expression.

The Ninth Circuit, in Tollis v. San Bernardino County, 827 F.2d 1329, 1332-1333 (9th Cir. 1987), outlined the application of an "intermediate scrutiny" test involving an adult entertainment establishment:

> We agree that the County has a substantial interest in preventing the deleterious secondary effects often associated with adult theaters. At a

> minimum, however, there must be a logical relationship between the evil feared and the method selected to combat it. (a regulation's "incidental restriction on . . . First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.") The County must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects. (Emphasis added).

The police say that it would be more convenient for them to have the power to arrest suspected prostitutes based on the behavior that, in their own minds, accompanies the willingness to agree to a sex act for money. But to allow such an arrest for the convenience of a suspicious officer, goes way beyond what is essential. The restriction here is neither essential nor is it actually linked to the achievement of the permitted goal. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (n. 20): "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." See also City of Cincinnati v. Discovery Networks, Inc., 507 U.S. 410, 113 S.Ct. 1792, 1800 (1993): "It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of news racks as the means chosen to serve those interests." See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 67 (1981):

> The First Amendment requires that there be sufficient justification for the

> exclusion of a broad category of protected expression as one of the permitted commercial uses in the Borough.

In 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996), the Court struck down a ban on liquor advertising because other methods of directly controlling the secondary effects of increased liquor consumption (such as education and market regulation) were plainly known. In just such fashion, if the alleged objective is that of controlling crime, it may be more surely served in substantial degree by traditional and well accepted enforcement of the existing criminal law. It is not sufficient to make an unsupported allegation that it has become more difficult to obtain arrests through undercover operations.

The Ninth Circuit Court of Appeals, acting en banc, in the case of Comite De Jornaleros v. City of Redondo Beach, 657 F.3d 938, 947 (9th Cir. 2011)(en banc) recently overruled previous case law, and applied the intermediate scrutiny test of O'Brien to a City ordinance prohibiting the solicitation of day labor on City streets.

> We cannot simply "presume the [City] will act in good faith and adhere to standards absent from the ordinance's face." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988); see also Stevens 130 S.Ct. At 1591 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

> We conclude that the Ordinance is not narrowly tailored because the Ordinance restricts significantly more speech than is necessary, and because the City could have employed various less restrictive alternatives to achieve its goals. Id. at 949.

Likewise, the effects of the instant statute are far reaching. Most people who, in the presence of an undercover officer, touch themselves or expose certain parts of their bodies, would get a pass. The Attorney General has stated that it is unlikely that a stage dancer in a strip club would be arrested for this behavior (unless of course the police were somehow offended by the conduct, and wanted to throw their weight around). See the District Court's decision, however, in Bevan v. Smartt, 316 F.Supp.2d 1153 (D.Utah 2004) where a police officer invaded a strip club dressing room and hauled a dancer off to jail, for no apparent purpose other than to show her power. The conduct which is the target of the amendments is not generally public. It is not claimed to be obscene under the guidelines of Miller v. California, 413 U.S. 15 (1973). Further, a survey of the 50 states found no similar statute on the books. The recently criminalized behavior does not protect the public from anything; and it clearly violates First Amendment rights to free expression.

CONCLUSION

The District erred in not granting Summary Judgment to Plaintiffs on both the

issue of unconstitutional vagueness in violation of Due Process, and of First Amendment law. The previous decision of the District Court in Guinther v. Wilkinson, 679 F.Supp. 1066 (D.Utah 1988) is controlling; but even if res judicata does not apply, the outcome should be the same. The State has unlawfully broadened the definition of prostitution to allow the arrest and prosecution of those who have not violated any criminal law.

REQUEST FOR ORAL ARGUMENTS

Plaintiff requests oral arguments. This matter involves serious legal issues, and is complex to the extent that the Court will likely be materially assisted by oral arguments on the issues.

RESPECTFULLY SUBMITTED this 25th day of August, 2012.

W. ANDREW MCCULLOUGH, LLC

/s/_____
W. Andrew McCullough
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellants, and one copy of the Appendix (Volume I and the sealed document of Volume II) to Thom D. Roberts, Attorney for Appellee, PO Box 140857, Salt Lake City, UT 84114.

This brief will also be filed electronically according to the Court's General Order of March 18, 2009; and a copy with thereafter be electronically supplied to the above-named counsel as well.

Counsel has reviewed the Brief for required privacy redactions. Redactions have been made; and documents which are restricted and filed under seal have been separately bound and filed under seal.

This brief will be scanned, prior to filing, for viruses by the most recent version of AVG Anti Virus updated as of August, 2012.

/s/ W. Andrew McCullough

ADDENDUM