

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC., et al.,

Plaintiffs-Appellants,

No. 09-35153

*-against-*

JOHN KROGER, et al.,

Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION OF OREGON, et  
al.,

Plaintiffs-Appellants,

No. 09-35154

*-against-*

JOHN KROGER, et al.,

Defendants-Appellees.

On appeal from the  
United States District Court for the District of Oregon  
(3:08-cv-00501-MO)

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**PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO FILE  
A SINGLE EXCERPT OF RECORD AND FOR COMBINED ORAL ARGUMENT**

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These appeals arise out of the same proceedings and same decision rendered in the United States District Court for the District of Oregon. The district court's decision treated the claims of Powell's Books, Inc. et al. (Plaintiffs-Appellants in No. 09-35153) differently from the claims of American Civil Liberties Union of Oregon et al. (Plaintiffs-Appellants in No. 09-

35154), and the two sets of Plaintiffs-Appellants therefore filed separate notices of appeal, and are filing separate briefs on appeal, raising different issues. However, to promote judicial efficiency, Plaintiffs-Appellants in both cases respectfully request leave to file a single Excerpt of Record in these two appeals, and respectfully request that the two appeals be heard together at oral argument.

The Oregon Attorney General's office, which represents Defendants-Appellees in both appeals, has indicated that it has no objection to granting of this motion.

In support of their motion, Plaintiffs-Appellants state as follows:

1. In the proceedings before the District Court, Plaintiffs sought a declaration that Oregon statutes that criminalized providing sexually explicit materials to minors were unconstitutional. Plaintiffs included (a) booksellers and publishers and (b) providers of sex education information, an individual grandparent, and the ACLU of Oregon. In its decision upholding the statute, the District Court treated the legal interests of the booksellers and publishers differently from the other plaintiffs.

2. Counsel for the booksellers and publishers filed a Notice of Appeal (No. 09-35153). Counsel for the providers of sex education information, the individual grandparent, and the ACLU of Oregon filed a separate Notice of Appeal (No. 09-35154).

3. On their appeal in No. 09-35153, the booksellers and publishers, Plaintiffs-Appellants Powell's Books, Inc. et al., present three issues: (1) whether the district court erred by denying that plaintiffs' claim was "as applied" as well as "facial"; (2) whether the district court erred by finding the challenged statutes constitutional despite the fact that the statutes do not

even include the substance of the components of the *Ginsberg/Miller* test prescribed by the United States Supreme Court; and (3) whether the district court erred in finding that the challenged statutes were not unconstitutionally vague.

4. On their appeal in No. 09-35154, the providers of sex education information, American Civil Liberties Union of Oregon, Cascade AIDS Project, Candace Morgan and Planned Parenthood of the Columbia/Willamette, Inc., present similar issues in a distinctly different context because, as sex educators, individuals, and ACLU members, they have different interests than the commercial and trade booksellers and publishers.

5. Plaintiff-Appellants expect that the Oregon Attorney General will file separate briefs, addressing the separate issues raised by the Plaintiffs-Appellants in the two appeals.

6. However, because both appeals are taken from the same proceedings and the same decision of the district court, it would be procedurally convenient and would conserve resources of this Court if the Plaintiffs-Appellants filed a single Except of Record in the two appeals, and if oral argument were heard on the same day before the same panel. While the issues raised on the two appeals are different, the appeals involve the constitutionality of the same statutes, and thus having the appeals heard by the same panel would also avoid the risk of inconsistent decisions.

7. This procedure would serve the interest of judicial economy, and would not prejudice any party. This procedure would not necessitate any change in the briefing schedule that this Court set in these cases.

WHEREFORE, Plaintiffs-Appellants respectfully requests that this Court grant Plaintiffs-Appellants leave to file a single Excerpt of Record in these two appeals, and respectfully request that the appeals be heard on the same day before the same panel of this Court.

Respectfully submitted,

s/ Michael A. Bamberger

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May 7, 2009

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U.S. Court of Appeals Docket Number(s): 09-35153, 09-35154

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 7, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/Michael A. Bamberger