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09-35153

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL: See Attachment A	DISTRICT: Oregon	JUDGE: Mosman
	DISTRICT COURT NUMBER: 08-501-MO	
	DATE NOTICE OF APPEAL FILED: February 3, 2009	IS THIS A CROSS APPEAL? <input type="checkbox"/> YES
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): N/A	

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Constitutional challenge under the First, Fifth and Fourteenth Amendments to O.R.S. 167.051 through 167.057. The statutes were held constitutional as they were interpreted by the Court.

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

See Attachment B

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):

N/A

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

- Possibility of Settlement
- Likelihood that intervening precedent will control outcome of appeal
- Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) _____
- Any other information relevant to the inclusion of this case in the Mediation Program _____
- Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

LOWER COURT INFORMATION			
JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input checked="" type="checkbox"/> FEDERAL QUESTION <input type="checkbox"/> DIVERSITY <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 100px; width: 100%;"></div>	<input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT <input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%;"></div> <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%;"></div>	<input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL/JURISDICTION <input checked="" type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%;"></div>	<input type="checkbox"/> DAMAGES: SOUGHT \$ <input style="width: 50px;" type="text"/> AWARDED \$ <input style="width: 50px;" type="text"/> <input checked="" type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY <input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ <input style="width: 50px;" type="text"/> AWARDED \$ <input style="width: 50px;" type="text"/> <input type="checkbox"/> PENDING <input type="checkbox"/> COSTS: \$ <input style="width: 50px;" type="text"/>

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

Michael A. Bamberger

Signature

February 3, 2009

Date

COUNSEL WHO COMPLETED THIS FORM

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****THIS DOCUMENT SHOULD BE FILED IN DISTRICT COURT WITH THE NOTICE OF APPEAL. ****
****IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS.****

ATTACHMENT A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC.; OLD
MULTNOMAH BOOK STORE, LTD.
d/b/a ANNIE BLOOM'S BOOKS; DARK
HORSE COMICS, INC.; COLETTE'S;
GOOD FOOD + HUNGRY MINDS, LLC;
BLUEJAY, INC. d/b/a PAULINA SPRINGS
BOOKS; ST. JOHNS BOOKSELLERS, LLC;
AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION;
ASSOCIATION OF AMERICAN
PUBLISHERS, INC.; FREEDOM TO READ
FOUNDATION INC.; COMIC BOOK
LEGAL DEFENSE FUND;

Plaintiff-Appellants,

v.

HARDY MYERS, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
OREGON; MATT SHIRTCLIFF, Baker
County District Attorney; JOHN
HAROLDSON, Benton County District
Attorney; JOHN FOOTE, Clackamas County
District Attorney; JOSHUA MARQUIS,
Clatsop County District Attorney; STEVE
ATCHISON, Columbia County District
Attorney; PAUL FRASIER, Coos County
District Attorney; GARY WILLIAMS, Crook
County District Attorney; EVERETT DIAL,
Curry County District Attorney; MICHAEL
DUGAN, Deschutes County District Attorney;
JACK BANTA, Douglas County District
Attorney; MARION WEATHERFORD,
Gilliam County District Attorney; RYAN
JOSLIN, Grant County District Attorney; TIM
COLAHAN, Harney County District Attorney;
JOHN SEWELL, Hood River County District
Attorney; MARK HUDDLESTON, Jackson
County District Attorney; PETER L. DEUEL,
Jefferson County District Attorney;

STEPHEN D. CAMPBELL, Josephine County District Attorney; EDWIN I. CALEB, Klamath County District Attorney; DAVID A. SCHUTT, Lake County District Attorney; F. DOUGLASS HARCLEROAD, Lane County District Attorney; BERNICE BARNETT, Lincoln County District Attorney; JASON CARLILE, Linn County District Attorney; DAN NORRIS, Malheur County District Attorney; WALTER M. BEGLAU, Marion County District Attorney; ELIZABETH BALLARD, Morrow County District Attorney; MICHAEL D. SCHRUNK, Multnomah County District Attorney; JOHN FISHER, Polk County District Attorney; WADE M. MCLEOD, Sherman County District Attorney; WILLIAM BRYAN PORTER, Tillamook County District Attorney; DEAN GUSHWA, Umatilla County District Attorney; TIM THOMPSON, Union County District Attorney; DANIEL OUSLEY, Wallowa County District Attorney; ERIC J. NISLEY, Wasco County District Attorney; ROBERT HERMANN, Washington County District Attorney; THOMAS W. CUTSFORTH, Wheeler County District Attorney; BRAD BERRY, Yamhill County District Attorney, in their official capacities as DISTRICT ATTORNEYS,

Defendant-Appellees.

ATTACHMENT B

In *Miller v. California*, 413 U.S. 15, 24 (1973) and *Ginsberg v. New York*, 390 U.S. 629 (1968), the United States Supreme Court held that any statute prohibiting the distribution of sexually-frank material to minors violates the First Amendment unless the statute is limited to works (1) which “taken as a whole, appeal to the prurient interest” of minors in sex, (2) which “portray sexual conduct” in a manner that is “patently offensive” to prevailing standards in the adult community as to what is appropriate for minors, and (3) which, “taken as a whole, do not have serious literary, artistic, political, or scientific value” to minors. Under the Supreme Court’s decisions, any state statute which is not limited to works that violate the *Miller/Ginsberg* standard violates the First Amendment and is unconstitutional.

ORS 167.054 makes it a misdemeanor to distribute sexually-frank materials to minors, and ORS 167.057 makes it a felony to distribute such material to minors if the purpose is to arouse the minor or lure the minor. However, these criminal statutes (the “Oregon Statutes” or the “Statutes”), on their face, are not limited to those works that can be prohibited under the *Miller/Ginsberg* standard, and purport to encompass material which is not defined with the clarity required in a criminal statute.

To save ORS 167.054 and ORS 167.057 from a finding of unconstitutionality, the District Court made findings as to what the Legislature probably meant, and opined that prosecutors should limit their use of the Statutes in accordance with the District Court’s interpretation—even though defendant prosecutors argued in the District Court for a number of different meanings which would encompass conduct that the District Court held outside the Statutes. The District Court then found the Oregon Statutes constitutional “as interpreted by the court in its Opinion and Order” and dismissed the complaint.

The following questions are presented on this appeal:

1. Are the Oregon Statutes unconstitutionally overbroad, because they criminalize conduct that is protected by the First Amendment under the *Miller/Ginsberg* standard?
2. Are the Oregon Statutes unconstitutionally vague, because they purport to encompass material which is not defined with the clarity required in a criminal statute?
3. Are the Oregon Statutes unconstitutional in additional or other respects?
4. If the Oregon Statutes, on their face, are unconstitutional, can a federal court save the Statutes from a finding of unconstitutionality by opining on what the Legislature probably meant, and opining that prosecutors should refrain from bringing criminal cases that may be permissible under the Statutes, on their face, but would violate the federal court’s interpretation of the Statutes?
5. If a federal court can so save the Statutes from a finding of unconstitutionality, was it error for the District Court to dismiss the Complaint, and should the District Court have, instead, held the Statutes unconstitutional unless limited in accordance with the District Court’s Opinion and Order?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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

Plaintiffs,

v.

HARDY MYERS, in his official
capacity as Attorney General of the
State of Oregon, et al.,

Defendants.

No. CV 08-501-MO

JUDGMENT

MOSMAN, J.,

The court having issued its December 12, 2008 Opinion and Order (#48), in which the court denied plaintiffs' Motion for Permanent Injunction and Declaration of Unconstitutionality, and the court hereby incorporating that Opinion and Order in this judgment,

NOW, THEREFORE, IT IS HEREBY ADJUDGED as follows:

(1) ORS 167.054 and 167.057, as interpreted by the court in its Opinion and Order, are not substantially overbroad under the First and Fourteenth Amendments to the United States Constitution;

(2) ORS 167.054 and 167.057, as interpreted by the court in its Opinion and Order, are not unconstitutionally vague under the Fifth and Fourteenth Amendments to the United States Constitution;

(3) ORS 167.054 and 167.057, as interpreted by the court in its Opinion and Order, are not facially invalid;

(4) Plaintiffs' complaint is dismissed with prejudice, plaintiffs taking nothing thereby.

DATED this 6th day of January, 2009.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

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Attorneys for Plaintiffs Powell's Books,
Inc.; Old Multnomah Book Store, Ltd.
d/b/a Annie Bloom's Books; Dark Horse
Comics, Inc.; Colette's: Good Food +
Hungry Minds LLC; Bluejay, Inc. d/b/a
Paulina Springs Books; St. John's
Booksellers LLC; American Booksellers
Foundation for Free Expression;
Association of American Publishers, Inc.;
Freedom to Read Foundation Inc.; and
Comic Book Legal Defense Fund

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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

Plaintiffs,

v.

Case No. 08-501-MO

HARDY MYERS, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
OREGON, *et al.*

REPRESENTATION STATEMENT

Defendants.

Counsel for Plaintiff-Appellants Powell's Books, Inc.; Old Multnomah Book Store, Ltd.
d/b/a Annie Bloom's Books; Dark Horse Comics, Inc.; Colette's: Good Food + Hungry Minds
LLC; Bluejay, Inc. d/b/a Paulina Springs Books; St. John's Booksellers LLC; American

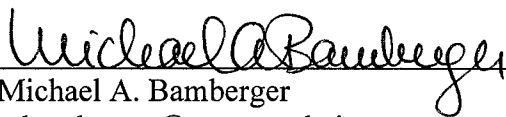
Booksellers Foundation for Free Expression; Association of American Publishers, Inc.; Freedom to Read Foundation Inc.; and Comic Book Legal Defense Fund on this appeal are:

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and
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Attorney for Plaintiffs Powell's
Books, Inc.; Old Multnomah Book
Store, Ltd. d/b/a Annie Bloom's
Books; Dark Horse Comics, Inc.;
Colette's: Good Food + Hungry
Minds LLC; Bluejay, Inc. d/b/a
Paulina Springs Books; St. John's
Booksellers LLC; American
Booksellers Foundation for Free
Expression; Association of American
Publishers, Inc.; Freedom to Read
Foundation Inc.; and Comic Book
Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPRESENTATION STATEMENT** on the following named person(s) on the date indicated below by mailing with postage prepaid via Federal Express to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at their last-known address indicated below:

Katherine Greene Georges

State of Oregon Department of Justice

1162 Court Street, N.E.

Salem , OR 97301-4096

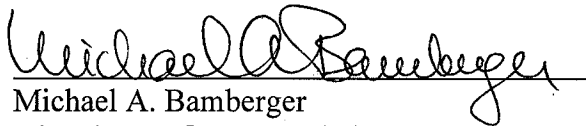
Michael A. Casper

Oregon Department of Justice

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DATED: February 3, 2009



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