No. 09-35153

In the United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

PLAINTIFFS-APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

Under the First and Fourteenth Amendments and well-established precedent of the United States Supreme Court, a state may restrict the distribution to minors of sexually explicit material *only* if that material is considered to be obscene for minors under the test established by the Court in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968).

Forty-five states and the District of Columbia have laws restricting the sale of sexually explicit materials to minors. Virtually all comply with *Miller/Ginsberg*. Those which do not comply, when challenged, have been held unconstitutional. *See, e.g.*, *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (affirming permanent injunction of Illinois statute which failed to include *Miller/Ginsberg* exception for material having serious value); *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002) (Ohio definition of "harmful to juveniles" enjoined as not in compliance with the *Miller/Ginsberg* standard).

Oregon has chosen to deviate from this constitutional standard.

Oregon Revised Statutes ("ORS") 167.054 ("Section 054") and 167.057 ("Section 057") (collectively, the "Oregon Statutes" or the "Statutes") do not meet the narrowly drawn *Miller/Ginsberg* standard: that the material restricted be taken as a whole and evaluated under contemporary community standards as to what is not acceptable for minors, and that, when so evaluated, that the material can only be restricted if it appeals to the prurient interest of minors, is patently offensive, and lacks serious literary, artistic, political or scientific value for minors.

The court below found that the Statutes do not contain these components of the *Miller/Ginsberg* standard. (Excerpts of Record "ER" 017). No state or federal law has ever been upheld which failed to embody the *Miller/Ginsberg* standard.[1] Nevertheless, the court below upheld the Statutes as constitutional, holding that the reach of the Statutes "as they would be applied by prosecutors, judges and juries" is "functionally" equivalent to what their reach would be if the Statutes embodied the *Miller/Ginsberg* standard. (ER 017). The court thus concluded, as a

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[1] *See Blagojevich* at 649 ("we are aware of no criminal statutes that have been found to be narrowly tailored in this context that did not at least attempt to include some version of the third prong [lack of serious value]" of *Miller/Ginsberg*).

practical matter, that no material restricted under the Statutes would be protected under *Miller/Ginsberg*. This is an unconstitutional and inappropriate test under the First and Fourteenth Amendments and, in any event, there is no basis for that conclusion.

In addition, the Statutes are unconstitutionally vague. Vagueness in a statute affecting First Amendment freedoms goes beyond the absence of fair notice to a criminally accused or the unchanneled delegation of legislative powers. It relates to the chilling effect on constitutionally protected speech and speakers.

> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-433 (1963). *See also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

A core part of the Statutes—the provision that exempts speech that is "merely an incidental part of an otherwise nonoffending whole and serve[s] some purpose other than titillation"—is, on its face, replete with ambiguity and vagueness. The district court struggled to find specific meaning in the words and phrases "incidental," "nonoffending," "serve some purpose other than," and "titillation." The meanings given to these terms by the district court are not based

on the Statutes and some of the judicially-crafted definitions simply create new constitutional issues.

For these reasons, this Court should reverse the Order below, and hold that the Statutes are unconstitutional.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 because the complaint alleged violations of the First Amendment to the United States Constitution, and the Due Process clause of the Fourteenth Amendment to the Constitution.

The district court issued its opinion and order denying plaintiffs' motion for a declaration of unconstitutionality and a permanent injunction on December 12, 2008. The district court entered final judgment in favor of defendants on January 6, 2009. Appellants timely filed their notice of appeal on February 3, 2009, in compliance with Rule 4(a)(1) of the Federal Rules of Appellate Procedure. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

This appeal presents the Court with the following issues:

1. Are the Oregon Statutes unconstitutional 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. 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 state 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?

STATEMENT OF THE CASE

In this action, plaintiffs, which include bookstores, publishers, a non-profit literary organization, non-profit providers of health education information, and an individual, asked the district court to declare unconstitutional, as violative of the First Amendment and the Due Process clause of the Fourteenth Amendment, Oregon Revised Statutes 167.054 and 167.057, enacted by the Oregon Legislature as Chapter 869 of the Oregon Laws of 2007.

Section 054 makes it a crime to provide sexually explicit visual images to children (under 13 years old). Section 057 makes it a crime to provide images or verbal descriptions of sexual conduct to minors (under 18 years old) for the purpose of arousing either the person providing the material or the minor. Section 057 also contains a provision criminalizing the furnishing or use of material for the purpose of "inducing the minor to engage in sexual conduct." Plaintiffs do not contest that provision.

On December 12, 2008, the district court entered an Opinion and Order denying plaintiffs' motion for permanent injunction and declaration of unconstitutionality. (ER 001-036).

In the Opinion and Order, the district court dealt separately with the claims of (a) the bookstores and literary organizations, and (b) the health education providers. (*E,g.*, ER 029, 030).

On January 6, 2009l the district court entered final judgment for defendants, upholding the constitutionality of the Oregon Statutes. (ER 041-042).

The bookstores and literary organizations filed a notice of appeal on February 3, 2009. (ER 039-040) The health education providers filed a separate notice of appeal. (ER 037-038)

STANDARD OF REVIEW

The district court's determination that a statute is constitutional is a conclusion of law, which is reviewed *de novo;* the district court's findings of fact are reviewed for clear error; and the district court's decision to deny summary judgment is reviewed *de novo. Jones v. City of Los Angeles*, 444 F.3d 1118, 1125-26 (9th Cir. 2006), *vacated by reason of settlement*, 505 F.3d 1006 (9th Cir. 2007); *see also Wagner v. Professional Engineers in Calif. Government*, 354 F.3d 1036, 1040 (9th Cir. 2004) (decision on summary judgment and decision to grant or deny declaratory relief reviewed *de novo).*

THE STATUTES[2]

A. Section 054: Furnishing Sexually Explicit Material

Section 054 provides:

> A person commits the crime of furnishing sexually explicit material to a child if the person intentionally furnishes[3] a child, [4] or intentionally permits a child to view, sexually

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[2] The full Statutes are attached hereto as Attachment A.

[3] The Statutes define "furnishes" as "to sell, give, rent, loan or otherwise provide." Section 051(2).

[4] The Statutes define "child" as a person under 13 years of age. Section 051(1).

> explicit material and the person knows that the material is sexually explicit material.

ORS 167.054(1). "Sexually explicit material" is defined as visual images of sexual conduct.[5]

1. Exceptions to Liability Under Section 054

Two categories of persons are not subject to prosecution under Section 054:

> [An] employee of a bona fide museum, school, law enforcement agency, medical treatment provider or public library, acting within the scope of regular employment; …
>
> [A] person [who] furnishes, or permits the viewing of, material the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.

ORS 167.054(2).

Other persons who do the same kind of work as the employees listed in the first exemption, such as employees at private libraries, are not exempt; the

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[5] The Statutes define "sexually explicit material" as "material containing visual images of (a) [h]uman masturbation or sexual intercourse; (b) [g]enital-genital, oral-genital, anal- genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; or (c) [p]enetration of the vagina or rectum by any object other than as part of a personal hygiene practice." Section 051(4).

statutory language exempts only persons with the precise positions listed. Notably, the exempt group does not include parents or legal guardians.

In addition, the second exemption has two requirements, both of which must be met. To be exempt from the statute, the sexually explicit portion of material must form an incidental part of an otherwise nonoffending whole *and* the sexually explicit portion must serve some purpose other than titillation. For example, a retailer could be liable under Section 054 for selling, to a child, a grade-school textbook intended to educate children about reproduction because, although the textbook served a purpose other than titillation, the sexually explicit material was more than "an incidental part" of the work.

2. Affirmative Defenses to Liability Under Section 054

Section 054 provides three affirmative defenses to prosecution:

> That the sexually explicit material was furnished, or the viewing was permitted, solely for the purpose of sex education, art education or psychological treatment and was furnished or permitted by the child's parent or legal guardian, by an educator or treatment provider or by another person acting on behalf [of such party];
>
> That the defendant had reasonable cause to believe that the person [at issue] was not a child; or

> That the defendant was less than three years older than the child… .

ORS 167.054(3).

Though a sex educator or art educator (who is neither a museum nor school employee) may raise an affirmative defense after being charged with violation of Section 054, the educator is not exempt from prosecution in the same way a museum or school employee would be. The terms "sex education" and "art education" are not defined in the Statute. Therefore, sex educators and art educators cannot furnish material to minors with confidence that the affirmative defense would apply. Moreover, only "sex educators" and "art educators" may assert this affirmative defense. A history teacher (not employed by a museum or school, and thus not exempt from the statute) could not rely upon this affirmative defense if he or she used a photograph or a painting to illustrate the use of rape as a weapon during wartime.

In addition, even if a potential defendant believed that he or she could assert one of the affirmative defenses successfully, that defendant would still be subject to the expense, stigma and other burdens of being criminally prosecuted. Many people will naturally try to avoid those burdens by restricting their dissemination to

juveniles of materials that may violate the Statute. Thus even those who fall within the affirmative defenses will be subject to a chilling effect on their constitutionally protected activities.

B. Section 057: Furnishing for the Purpose of Sexual Arousal or Satisfaction

Section 057 provides that a person commits a crime if the person:

> (a) Furnishes to, or uses with, a minor a visual representation or explicit verbal description or narrative account of sexual conduct[6]; and
>
> (b) Furnishes or uses the representation, description or account for the purpose of: (A) Arousing or satisfying the sexual desires of the person or the minor; … .

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[6] The Statutes define "sexual conduct" as "(a) Human masturbation or sexual intercourse; (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; (c) Penetration of the vagina or rectum by any object other than as part of a medical diagnosis or as part of a personal hygiene practice; or (d) Touching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female." ORS 167.051(4).

ORS 167.057(1). Unlike Section 054, which covers only visual images, Section 057 criminalizes providing both "visual representation[s]" and "explicit verbal description[s] or narrative account[s]."[7]

1. Exception to Liability Under Section 057

Unlike Section 054, Section 057 provides only one exception to liability:

> if the person furnishes or uses a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation.

ORS 167.057(2). As with Section 054, both parts of this exception must be met to avoid liability. Section 057 provides no exception to liability for museum, school, law enforcement or medical treatment personnel.

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[7] Section 057 uses the term *"luring"* to refer to furnishing material to minors whether for the purpose of "[a]rousing or satisfying the sexual desires of the person [providing the material] or the minor" or for the purpose of "inducing the minor to engage in sexual conduct." ORS 167.057(1)(b)(A),(B). In contrast, in other jurisdictions, the word "luring" is used to refer only to the latter conduct, *i.e.*, enticing the minor to engage in sexual conduct, *e.g.* ARIZ. REV. STAT. § 13-3554 or enticing a minor away from the minor's home with the intent to avoid parental consent, *e.g.* Cal. Penal Code § 272. As noted above, plaintiffs do not challenge Section 057 to the extent that it prohibits providing material for the purpose of inducing a minor to engage in sexual conduct.

2. Affirmative Defenses to Liability Under Section 057

There are three affirmative defenses under Section 057:

> (a) That the representation, description or account was furnished or used for the purpose of psychological or medical treatment and was furnished by a treatment provider or by another person acting on behalf of the treatment provider;
>
> (b) That the defendant had reasonable cause to believe that the person [at issue] was not a minor;
>
> (c) That the defendant was less than three years older than the minor… .

ORS 167.057(3).

Unlike the affirmative defenses under Section 054, the affirmative defenses under Section 057 do not include an affirmative defense for sex education or art education. In the same manner as Section 054, the affirmative defenses under Section 057 do not protect parents or guardians.

ARGUMENT

I. *MILLER/GINSBERG* PROVIDES A STANDARD WHICH DEFINES AND IMPOSES MANDATORY LIMITS ON WHAT RESTRICTIONS MAY BE IMPOSED ON SPEECH ADDRESSED TO MINORS. THE OREGON STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY OMIT KEY ELEMENTS OF THE *MILLER/GINSBERG* STANDARD, AND CRIMINALIZE A SUBSTANTIAL AMOUNT OF SPEECH THAT *MILLER/GINSBERG* HOLDS IS ENTITLED TO FIRST AMENDMENT PROTECTION.

The U.S. Supreme Court has recognized the First Amendment implications of attempts to "protect" minors from exposure to sexually explicit materials. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as subsequently modified in *Miller v. California*, 413 U.S. 15 (1973), the Court created a standard for determining what material, First Amendment-protected as to adults, is unprotected as to minors. Under that standard, in order for sexual material to be constitutionally unprotected as to a minor, it must, taken as a whole,

> predominantly appeal to the prurient, shameful or morbid interest of minors;
>
> be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> lack serious literary, artistic, political or scientific value.

In *Ginsberg,* 390 U.S. at 649-50, the Supreme Court determined that the state's interest in the well-being of youth, and the provision of support for parents'

authority to direct the rearing of their own children in their own household,[8] constituted a compelling interest that allowed the restriction of some materials not deemed obscene. *See also Reno v. ACLU*, 521 U.S. 844, 865 (1997). That interest, however, does not justify an unnecessarily broad suppression of speech addressed to adults. *Id.* at 875. It is the state's burden to show that laws that suppress speech are narrowly tailored and, that a less restrictive provision would not accomplish the same goals as the law being challenged. *Id.* at 879.

Only material which meets the *Miller/Ginsburg* test can be barred from distribution to minors. If a statute goes beyond that, the state has not met its burden to show that the statute is "narrowly tailored". Material that fails to comply with the narrow *Miller/Ginsberg* standard has First Amendment protection — whether the recipient be adult or child. Because the test determines what falls within the universe of what the state legitimately may regulate, vagueness and uncertainty should be resolved in favor of a finding of unconstitutionality.

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[8] The Statutes do not support a parent's authority to direct the rearing of their minor children. In fact, the Statutes would allow for a parent to be prosecuted for providing material restricted under the Statutes.

While the *Miller/Ginsberg* standard does not have to be repeated verbatim for a statute to comply, the substantive requirements of the test must be embodied in any such statute. There is no case in which a statute failing to include all of the *Miller/Ginsberg* substantive requirement has been upheld. Neither appellees nor the court below cited any such case.[9] In *Miller*, Chief Justice Burger ruled at the end of his opinion that obscene "material can be regulated by the States, subject to the *specific* safeguards enunciated above," *i.e.* the *Miller* test. *Miller* at 36-37 (emphasis added). In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), decided the same day as *Miller,* the Supreme Court requires the incorporation of the *Miller* standard:[10]

> [T]he applicable [state] law, as written or authoritatively interpreted by the [state] courts, [must] meet[] the First Amendment standards set forth in *Miller v. California.*...

413 U.S. at 69.

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[9] *See Blagojevich,* at 649 ("we are aware of no criminal statutes that have been found to be narrowly tailored in this context that did not at least attempt to include some version of the third prong [lack of serious value]" of *Miller/Ginsberg*).

[10] While these cases involved adult obscenity and thus the pure *Miller* test, the language and the reasoning behind them apply equally to *Miller/Ginsberg* (obscenity as to minors) which is a subset of , or derivative of, *Miller.*

The *Miller/Ginsberg* standard is generally referred to as a three-part test; however there are actually five substantive components. In order for a restriction on access by minors not to violate the First Amendment, material must: 1) be taken as a whole, 2) appeal to the prurient interest of minors, 3) contain content which is patently offensive to the adult community as a whole as to what is suitable for minors, 4) apply contemporary community standards and 5) lack serious value for minors. As demonstrated below and acknowledged by the district court, neither Section 054 nor Section 057 includes all of these requirements. The Statutes do not even include most of them. Therefore both Section 054 and Section 057 are unconstitutional under the First Amendment.

Miller/Ginsberg is precisely about the sale or other dissemination of sexually explicit material to minors, and expressly limits what material can be restricted. As the Seventh Circuit held not long after the decision in *Ginsberg*, government

> may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity [set forth in *Ginsberg*] in regulating the dissemination to juveniles of 'objectionable' material.

Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1302 (7th Cir. 1973). More recently, the Seventh Circuit, after citing and quoting this excerpt from *Cinecom*, affirmed a finding that an Illinois statute is unconstitutional because, as here, it did not require the material to be considered as a whole and did not require that the material lack serious value. *Blagojevich*, 469 F.3d at 647.

Forty-five states and the District of Columbia have laws restricting the sale of sexually explicit materials to minors. Virtually all comply with *Miller/Ginsberg*. Those that do not and have been challenged have been struck down in lower courts, which decisions usually are not appealed. *See, e.g.*, *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002) (Ohio definition of "harmful to juveniles" enjoined as not in compliance with *Miller/Ginsberg* standard).

A. The *Miller/Ginsberg* Standard

Each of the five substantive requirements has a significant constitutional role in upholding First Amendments rights and values:

1. Community Standards

Relating the components of the *Miller/Ginsberg* standard (except for serious value) to community standards (whether state or local) permits the finders of fact

(whether judges or members of a jury), as well as those in commerce to whom the law applies, to base their determinations on standards of the community presumably known to them.

Community standards ensure that material is not judged by its effect on the most sensitive or insensitive person. *Hamling v. United States*, 418 U.S. 87, 107 (1974); *United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976). Further, it is a recognition of the diversity and size of the nation.

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.

Miller v. Calif., 413 U.S. at 32.

2. Considering the Work as a Whole

That the material must be considered as a whole prevents a work from being banned or restricted when it is primarily First Amendment-protected but includes a portion which, if taken alone, could appear to be non-protected. *Kois v. Wisconsin*, 408 U.S. 229, 231-32 (1972). For example, in *Kois*, the Court held a "Sex Poem" as not obscene because "its placement amid a selection of poems in the interior of a

newspaper" indicated its purpose was attempted creation of work with artistic value. *Id.* at 231.

Examining offensive portions as part of the overall work allows the trier of fact to determine whether the work contains a purpose beyond just portraying "filth for its own sake." *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 707 (2d Cir. 1934).

3. Appeal to the Prurient Interest

"Sex … has indisputably been a subject of absorbing interest to mankind through the ages," and the ability to freely discuss ideas about sex is important to the "development and well-being of our free society." *Roth v. United States*, 354 U.S. 476, 487-88 (1957). Therefore, appeal to the "prurient interest" does not refer to all matters dealing with sex or that engender normal sexual arousal, but only those that appeal to a shameful or morbid interest in sex. *Miller*, 413 U.S. at 16 n.1; *Roth*, 354 U.S. at 487 & n.20 (noting that "sex and obscenity are not synonymous" and that "prurient" refers to a "shameful or morbid" interest (citation omitted)); *Ripplinger v. Collins*, 868 F.2d 1043, 1054 (9th Cir. 1989) ("[T]he 'prurient interest' portion of the obscenity test is not satisfied if the jury merely finds that the materials would arouse normal sexual responses.").

The "prurient interest" requirement differentiates a work that is "harmful to minors" from one that appeals to a "'good old fashioned …' interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985) (citation omitted). Thus this requirement protects material that has sexual appeal, even though it may sexually arouse.

4. Patent Offensiveness

The "patent offensiveness" element of the *Miller/Ginsberg* standard refers to *the extent* to which the material appeals to the prurient interest or the *manner* in which the sexual conduct is depicted. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992) ("A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity.").

Only extensive, detailed or otherwise graphic depictions of ultimate sexual conduct fall outside the reach of the First Amendment.

5. Lacking Serious Value

Finally, the serious value prong of the *Miller/Ginsberg* standard is a significant and necessary safety net for all persons engaged in speech that might conceivably be viewed as subject to restrictions. A work that possesses one of the

enumerated kinds of serious value is protected speech under the First Amendment. As one commentator explains: "[p]rurient interest and patent offensiveness define obscenity, but serious value identifies protected speech." Edward John Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S.Ill.U.L.J. 1159 1161 (1987). Thus the "serious value" element inquires not whether a work appeals to the prurient interest or contains patently offensive sexual content; rather the inquiry is whether the work deserves First Amendment protection *even though* it possesses those qualities.

If a work has serious value—whether it be art, literature or even entertainment—the publisher, distributor, retailer or librarian does not have to struggle with whether the material may appeal to the prurient interest of a teenager. Such clarity in an otherwise grey area is a societal benefit in and of itself. More importantly, communications of value are and should be protected by the First Amendment. As Justice White stated in *Pope v. Illinois*, 481 U.S. 497, 500 (1987):

> In *Miller* itself, the Court was careful to point out that '[t]he First Amendment protects works, which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.'

And as Justice Stevens said, dissenting in the same case:

> Over 40 years ago, the Court recognized that "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.… From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-158 (1946).
>
> The purpose of the third element of the *Miller* test is to ensure that the obscenity laws not be allowed to "'level' the available reading matter to the majority or lowest common denominator of the population.… It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population." F. Schauer, The Law of Obscenity 144 (1976).

Id., at 512 (Stevens, J., dissenting)

And Justice Breyer, in his dissent in *Ashcroft v. ACLU*, 542 U.S. 656, 679 (2004), described the words "lacks serious literary, artistic, political or scientific value" in the *Miller/Ginsberg* standard as "critical terms."

B. Neither Section 054 Nor Section 057 Complies With *Miller/Ginsberg*, Because those Sections Do Not Contain Key Requirements of the *Miller/Ginsberg* Standard.

When one holds Section 054 and Section 057 up against the *Miller/Ginsberg* standard, it is readily apparent that each of the Oregon Statutes is missing key

elements of the *Miller/Ginsberg* standard, without which the Statutes cannot survive constitutional scrutiny.

1. Community Standards

Sections 054 and 057 contain no requirement that the material they prohibit comply with contemporary community standards as to what is not acceptable for minors. While these sections undoubtedly restrict some material that contemporary community standards would also restrict, there is no requirement that the finder of fact be guided and limited by contemporary community standards. That is a clear violation of the *Miller/Ginsberg* standard.

2. Considering the Work as a Whole

The Oregon Statutes lack a requirement that the work be taken as a whole.

The exception in Section 054(2)(b) and Section 057 for work that forms "merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation" might look as if it fulfills that requirement. It does not do so.

First, under *Miller/Ginsberg*, the work may be constitutionally protected when considered as a whole—even if an important part of the whole is sexually explicit material that might be subject to restriction if it were considered alone.

Under the Oregon Statutes, if the sexually explicit material is more than an incidental part of the whole, the entire work can be restricted, without considering the work as a whole.

Second, the word "and" linking the two clauses of the exception means that a work will not be taken as a whole unless the sexually explicit part of the work also serves some purpose other than titillation. Thus, under the Statutes, if one item in the work is deemed to have the purpose of titillation, the work does not have to be taken as a whole. That is a clear violation of the *Miller/Ginsberg* standard, and brings nonobscene, constitutionally protected works within the ambit of the Statutes.

3. Appeal to the Prurient Interest

The Oregon Statutes make material subject to restriction even if the material does not appeal to the prurient interest of minors. The vast majority of "sexual conduct" (sexual intercourse, masturbation, touching of breasts or buttocks, etc.) is not "shameful or morbid" in any way. *Brockett*, 472 U.S. at 499. Section 054 restricts material that depicts sex and sexually related acts, and Section 057 restricts material that depicts or describes the same sex or sexually related acts. Depictions or descriptions of sexual conduct may in some instances be titillating,

(*i.e.* sexually arousing), but that does not mean that they necessarily appeal to a "shameful or morbid interest in sex." Thus, restricting materials that titillate, materials that are intended to sexually arouse or even those that actually arouse the viewer/reader, does not meet the "prurient interest" prong of *Miller/Ginsberg*.

Instead, such materials may well appeal to what the Supreme Court called "good old fashioned … interest in sex." *Brockett*, 472 U.S. at 491. Neither *Miller* nor *Ginsberg* describes "sexual arousal" as a prohibited effect of otherwise First Amendment material, any more than being depressed, happy or angry as a result of reading material may cause the material to be criminalized. It has been said that the classic works of Henry Miller (*Tropic of Cancer* and *Tropic of Capricorn*), current romance novels and many mainstream movies were written or produced with an intent (not necessarily the sole intent) to sexually arouse. Thus, under the district court's interpretation, any book, magazine, motion picture, video, etc. which may sexually arouse a reader and thus can be presumed to have been created with a primary intent to arouse falls with the language of the Statutes, even though it has serious value. This alone constitutes substantial overbreadth.

4. Patent Offensiveness

The Statutes criminalize furnishing material that is not patently offensive. Sections 054 and 057 restrict viewing or reading material describing or depicting sexual acts. Certainly, those acts may sometimes be presented in a way that is patently offensive—but there is nothing in Section 054 or Section 057 that ensures that only patently offensive material will be the subject of criminal prosecutions.

5. Lacking Serious Value

Nothing in Section 054 or Section 057 provides an exemption for works that have serious value to minors. The exception in Section 054(2)(b) and Section 057(2)—the logical place to include a provision for serious value—refers only to whether the material is titillating and the nature of the relation of the description or depiction of "sexual conduct" to the whole work. Neither of those are sufficient to imbue the Statutes with a serious value requirement. As described above, the entire purpose of the serious value element is to protect materials that have serious value *despite* the sexual nature of their content.[11]

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[11] In addition, as discussed below, both "incidental part" and "nonoffending whole" are vague and unclear.

C. The *Miller/Ginsberg* Standard Cannot Be Satisfied By a Court's Prediction That "Prosecutors, Judges, and Juries" Would Follow That Standard, When That Standard Is Absent from the Statutes

The district court specifically found that the Statutes fail to meet the *Miller/Ginsberg* standard:

> Neither Section 054 nor Section 057 explicitly requires that the outlawed materials be patently offensive or appeal to the prurient interest. The Statutes do not necessitate that a judge or jury consider local community standards in evaluating the materials. And certainly there is no protection for materials that have serious literary, artistic, political, or scientific value.

(ER 248). However, the district court erroneously went on to state that:

> … that is not the end of the inquiry. Instead, I must apply a more functional test; I must determine whether the Statutes, as they would be applied by prosecutors, judges, and juries, are substantially overbroad.

Id. This novel approach is simply wrong. The district court cited no case in support of the approach.

In enacting criminal statutes, it is the job of the legislature to use statutory language that keeps the statute within constitutional bounds. When the legislature has failed to do so, an unconstitutional statute cannot be saved by a presumption that prosecutors will not bring cases that are permitted by the statute, on its face, but would offend the constitution; that judges will engraft the constitutional

requirements onto the statute; or that juries will have the good sense to apply the standards of the community, even if neither the statute nor the jury instructions tell them to do so.

The district court's approach has no support in precedent and inflicts harm on the First Amendment rights of appellants and the residents of Oregon.[12]

II. THE OREGON STATUTES UNCONSTITUTIONALLY PROHIBIT A SUBSTANTIAL AMOUNT OF MATERIAL THAT *MILLER/GINSBERG* WOULD PROTECT.

Both Section 054 and Section 057 violate the First Amendment by prohibiting a substantial amount of material that *Miller/Ginsberg* would protect.

The relationship of what is restricted by the Statutes and what may be restricted by *Miller/Ginsberg* is illustrated by the following:

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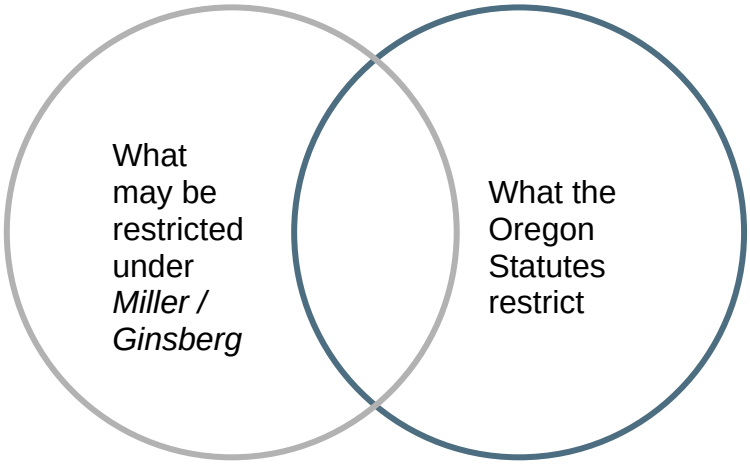
[12] In fn. 7 of its opinion (ER 017), the district court states that Oregon cannot comply with *Miller/Ginsberg* because the Oregon Supreme Court held in *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987) that the protections afforded by *Miller/Ginsberg* were not broad enough to protect all speech protected by the Oregon Constitution. That does not however permit Oregon to avoid the federal constitutional requirements embodied in *Miller/Ginsberg*. Nor is it correct. Had the Statutes provided that, notwithstanding any provision of the Statutes, they would not apply to any material protected by *Miller/Ginsberg*, the Statutes could be constitutional under both the Oregon and U.S. Constitutions.



A. Section 054

To fall outside the reach of Section 054, the material at issue must meet both of two requirements of the exception:

> that the material "serve some purpose other than titillation"; ***and***
>
> that the material form "merely an incidental part of a nonoffending whole."

ORS 167.054(2)(b).

Even if the work, or the sexually explicit part of the work, does not have a primary purpose to "titillate," the Statutes criminalize the distribution of the work if the sexually explicit part is more than "an incidental part of a nonoffending whole." This dual requirement unlawfully sweeps within Section 054 non-offensive items of serious value in which the sexually explicit content is not

incidental but does serve some purpose other than titillation, such as virtually all sexual education materials. In fact, the district court found that *How Sex Works*, *It's Perfectly Normal*, *Where Did I Come From*, and *Mommy Laid an Egg* (all materials directed at younger minors) as well as *Kama Sutra*, *The Joy of Sex*, *Black Hole*, and *Tanpenshu - Volume 2* all might be restricted by Section 054.

The Statutes also criminalize distribution of the work if an incidental part of the work is deemed to serve only the purpose of titillation—even if the work, taken as a whole has serious value, is not patently offensive, or does not appeal to the prurient interest of preteens. Any number of mainstream films have artistic or educational value as a whole, but contain sex scenes that are arguably intended to titillate, would be restricted under Section 054.[13] On the same basis, Section 054 would restrict a number of graphic novels.

Miller/Ginsberg forbids this result.

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[13] For example, the films *In Name of the Rose*, *Cold Mountain*, and *Elizabeth* have historical or educational value, are not patently offensive, and do not appeal to the prurient interest, but contain scenes of sexual conduct which could be deemed by some to be titillating.

B. Section 057

Section 057 restricts a vast array of material.[14]

Section 057 prohibits the furnishing of both text describing and visual materials showing sexual conduct, which includes intercourse, masturbation, or touching of buttocks or female breasts, among other things, whenever the material depicting or describing sexual conduct may be deemed to have as one of its purposes titillation. Thus Section 057 permits restricting a work of serious value or a work which taken as a whole does not appeal to the prurient interest of minors because one inconsequential paragraph is deemed sexually arousing. Literary works containing verbal descriptions of sexual conduct are common in any

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[14] The district court found that the furnishing of most of these materials would escape liability under one of the affirmative defenses or scienter. (ER 018, 024) However, contrary to the district court's holding, because of the danger of chilling effects in First Amendment cases, a limiting affirmative defense available to a defendant at trial should not cure a statute otherwise violating the First Amendment. *Ashcroft v. ACLU*, 542 U.S. at 671 ("potential for extraordinary harm and a serious chill upon protected speech"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.")

bookstore, and many of these works are neither patently offensive nor lacking in serious value as to 17-year olds. Just a few examples include *The Handmaid's Tale* by Margaret Atwood, *Snow Falling on Cedars* by David Guterson, *The Color Purple* by Alice Walker, *Ricochet River* by Robin Cody, and *Slaughterhouse Five* by Kurt Vonnegut.[15] The same is true of graphic novels such as *Lady Snowblood* by Kazuo Koike and Kazuo Kaminura, and mainstream films, including, for example *Thelma & Louise* and *Titanic*. Virtually every sex education book or pamphlet in existence, including those in evidence in this case, could be prohibited if one portion is deemed titillating/sexually arousing. The district court in fact found that Section 057's scope "appears to encompass romance novels, books like *The Joy of Sex* and the *Kama Sutra,* and other explicit but not obscene materials, written or created to arouse the reader/viewer." (ER 029). These materials have serious value, do not appeal to the prurient interest, and they are not patently

[15] The declarations submitted with plaintiffs' motions for preliminary and permanent injunctions contain many more examples. (*e.g.*, ER 063-109, ER 279-80, ER 282, ER 294, ER 296, ER 301, ER 303).

offensive. They are constitutionally protected, and a statute that prohibits them is overbroad.

Section 057 contains the same exception as Section 054—with the dual requirements that the material "serve some purpose other than titillation"; *and* that the material form "merely an incidental part of a nonoffending whole"—and the improperly narrow scope of that exception, reviewed above, also applies to Section 057. ORS 167.057(2).

The fact that an element of liability under Section 057 is that the work be furnished, in whole or in part, for the purpose of arousing the sexual desires of the recipient or the sender should not alter the equation. It is not illegal for a minor to be sexually aroused; it is not a crime to cause someone to be sexually aroused. Certainly giving someone protected speech for that purpose, without more, does not make it criminal.

Nor does the additional component protect booksellers, retailers, and others who may provide materials to minors.

A bookseller who sells *The Color Purple* to a 17-year old would be subject to prosecution under Section 057 if a prosecutor thought that the bookseller intended to sexually arouse the minor. A retailer who sells a DVD of the movie

Titanic to a 17-year old would similarly be subject to prosecution—and may well decide to refrain from the sale lest his or her fate turn on a prosecutor's and a jury's assessment of the retailer's purpose in doing so.

There is too great a risk that an improper purpose could all too easily—albeit improperly—be inferred from the sale or other furnishing of works which include portions deemed sexually arousing. Were a 17-year old college student to ask a bookseller for a sexy or erotic book or video to read on a dateless Saturday night, or were a 17-year old husband or wife seek such material for an evening with his or her spouse, making a recommendation could subject the bookseller under Section 057 to a felony conviction and up to 5 years in jail.[16] And if a 21-year old husband or wife gave the material to his or her 17-year old spouse, the 21-year old

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[16] While the district court found such hypotheticals to have a strained quality, the situations described are not uncommon both for persons seeking such material for casual use or for those with sexual difficulties who cannot visit a therapist. *See, e.g.*, Jacques van Lankveld, *Self-help Therapies for Sexual Dysfunction*, 46 J. OF SEX RESEARCH, March 2009, pp. 143-155 (discussing both "bibiliotherapy" - printed material - and video therapy). As the author points out, "[t]he enormous number of self-help texts available in bookstores and on the Internet to help people when bothered with their sexual functioning or when sexually dissatisfied makes clear the huge market for this approach." *Id.*

would be subject to a felony conviction and up to 5 years in jail. The same might even be true for sending a minor to the section of the store containing such books.

III. THE OREGON STATUTES ARE UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

A. Vagueness Standards

As the Supreme Court stated in *Grayned v. City of Rockford*, a law is void for vagueness under the Due Process Clause of the Fifth Amendment if its prohibitions are not clearly defined. 408 U.S. 104, 108, (1972). "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n 8, (1983). Vagueness is intolerable in a statute affecting First Amendment freedoms:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. (footnote and citation omitted). These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. (citations omitted). *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."* (emphasis added)

NAACP v. Button, 371 U.S. 415, 432-433 (1963). *See also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

B. Both Sections 054 and 057 are Unconstitutionally Vague Because the Exemption of Speech That Is "Merely An Incidental Part Of An Otherwise Nonoffending Whole And Serve[s] Some Purpose Other Than Titillation" Is Vague

The provision that exempts from the scope of the Statutes speech that is "merely an incidental part of an otherwise nonoffending whole and serve[s] some purpose other than titillation" is at the core of the Statutes. Without it, the Statutes would be patently unconstitutional. Yet, the provision, as recognized by the district course, is ambiguous and its scope is

> not readily ascertainable from the text itself. First the relative size or importance of an incidental part and the existence of a non-offending whole are difficult to determine without more information. Second, the identity of the person whose "purpose" is relevant to the exception is unclear. Third, the phrase "some purpose other than" is ambiguous, it is unclear whether the Statutes require that the only purpose be something other than titillation, or whether titillation may be one of several purposes. (ER 250-51).

The district court could also have added to the list the ambiguity of the word "nonoffending." Offending to whom? Offending in what manner? Offending by

what standard? Only the whim of individual law enforcement officers stands between plaintiffs and criminal prosecution.

Appellants are mainstream bookstores, publishers, librarians and retailers. For such businesses and their principals, fear of publicity as to a charge of "luring" is almost as chilling as a conviction. Because of that, vagueness is addressed with particular stringency when First Amendment freedoms are at stake and when criminal penalties may result. *Info. Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) ("The requirement of clarity is enhanced when criminal sanctions are at issue or when the statute 'abut[s] upon sensitive areas of basic First Amendment freedoms.'" (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Statutes that regulate any speech protected under the First Amendment must operate with "narrow specificity." *Foti v. City of Menlo Park*, 146 F.3d 629, 638-39 (9th Cir. 1998)(*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)). That particular stringency is necessary (1) because citizens should not be punished for behavior that they could not have known was illegal, (2) to avoid "arbitrary and discriminatory" enforcement by state officers and (3) to avoid the potential chilling effect on speech that is covered by

the First Amendment. *Id.* at 638. The Statute at issue implicates all of those concerns.

1. "… Merely an Incidental Part …"

It remains unclear what it means for speech to be "merely an incidental part of a nonoffending whole." "Incidental" means "subordinate, nonessential, or attendant in position or significance." *Webster's Third New International Dictionary* (2002). What is subordinate, nonessential or less significant is completely within the eye of the beholder (particularly as the Statutes contain no reference to contemporary community standards). What one citizen (or police officer or district attorney) considers "incidental" to a work, another might consider the most important point. That judgment is especially likely to vary if the beholder finds the speech (either visual or textual) constituting the incidental part to be offensive. Avoiding such arbitrary and discriminatory enforcement is at the very heart of the issues a court should consider when determining whether a statute is vague. The district court never resolved this uncertainty; thus the meaning of this portion of the exception remains "not readily ascertainable."

2. "… Of a Nonoffending Whole …"

The district court did not address the meaning of this curious phrase. Nonoffending presumably means not offensive. But the Supreme Court has already held that the fact that speech offends does not strip it of its protection under the First Amendment:

> It is also well-established that speech may not be prohibited because it concerns subjects offending to our sensibilities. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

Ashcroft v. Free Speech Coalition, 535 U.S. at 245.

3. "…[Which] Serve[s] Some Purpose Other Than Titillation"

In both Sections 054 and 057, "purpose" relates to whether the material "serve[s] some purpose other than titillation." The district court held that this phrase means that "the *primary* purpose of the furnished material be to sexually arouse the viewer." (emphasis in original) (ER 023). Even if the Statutes did not have to include the *Miller/Ginsberg* components, a test such as this is antithetical to the protection of First Amendment rights.

How is one to determine the purpose of a discrete part of a book or video? Is the question whether, when the author, publisher or producer included the challenged pictures or text, she or he had a substantial purpose other than sexual

arousal? And how is that fact determined? To state the phrase is to reveal how little meaning lies behind it. The answer is subjective, based on the cultural and other assumptions of the person answering, be it law enforcement officer, judge or juror. And how is a bookseller or other retailer to make that determination? If in the view of the law enforcement officer a particularly graphic piece of text or a particular set of graphic illustrations are not "necessary" to the entire work, does it support an assumption that the purpose is titillation? This is precisely the sort of subjective assessment potentially resulting in criminal liability that the U.S. Supreme Court case sought to end in the *Miller* case.

The district court relied on *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), for the proposition that the Statutes mean that the purpose to titillate must be the "primary" purpose. This reliance is misplaced. Although *Maynard* involved a statute with text that was similar in many ways to the statute, the *Maynard* court did not provide an interpretation that is useful to this case because that court was exclusively focused on an issue that does not require interpretation here: whether the minor's or the furnisher's titillation was the prohibited harmful effect against which the statute was enacted.

In that case, on remand from the Oregon Supreme Court, the Oregon Court of Appeals considered whether the *Maynard* statute's affirmative defense clarified the forbidden effects that the overall statute sought to prevent. (Case law interpreting Article I, section 8, of the Oregon Constitution provides that a statute that restricts speech may nonetheless be found constitutional under the Oregon Constitution if the statute is directed at preventing harmful effects of an action related speech rather than the speech itself. *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992).) That defense provided:

> That the defendant was charged with the sale, showing, exhibition or display of an item, those portions of which might otherwise be contraband, forming merely an incidental part of an otherwise nonoffending whole and serving some legitimate purpose other than titillation.

Maynard, 168 Or. App. at 124, 5 P.3d at 1146 (citation omitted). That is similar, though not the same as, exemptions provided in both Sections 054 and 057. Section 054(2)(b); Section 057.

The court of appeals was concerned with the meaning of "titillation" (which it defined using a dictionary definition) and, more importantly, *whose* titillation the statute was proscribing. Was it the defendant's, or the victim's? *Maynard*, 168 Or. App. at 124-25, 3 P.3d at 1146-47. The court concluded, based on the context

of the statute, that the defense sought to prevent the *victim's* titillation. *Id*. It noted that, as every other part of the statute sought to protect the victim, the defense would be nonsensical otherwise: "[I]t would make no sense to shield a defendant from criminal liability because that defendant did not primarily intend to titillate him or herself by engaging in the prohibited conduct . . . the defense applies to those materials not primarily intended to titillate the victim." *Id.* After that brief observation, the court considered the remainder of the statute without further interpretation of the affirmative defense. The court ultimately concluded that the statute was unconstitutionally overbroad and was not susceptible to any narrowing construction.

The district court found that the legislature intended, based on this brief passage in *Maynard* that , the Statutes prohibit only materials that are primarily intended to titillate, not materials that may be intended to titillate as well as (for example) educate, inform, or entertain. That reading is a misreading of *Maynard*. In fact, *Maynard* was not concerned at all with whether the defendant might have had some purpose other than titillation. Instead, *Maynard* was concerned with who was being titillated, and its reference to a "primary intent" was simply part of an aside that it would be silly, in light of the rest of the statute, to allow a defense

because the defendant was not primarily trying to titillate himself. It is not surprising, therefore, that *Maynard* offers absolutely no explanation about whether material with purposes in addition to titillation violate Sections 054 and 057. That question was not even on the table for the *Maynard* court. *Maynard's* relevance to this case is merely that it defined "titillation" as "sexual excitement or arousal," 168 Or. App. at 124, 5 P.3d at 1147.

There is no natural interpretation of the Statute that would make it less vague. In considering a challenge to a state law, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (*quoting Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1975)). Otherwise, judicial rewriting of the Statutes would invade the legislative domain and allow the courts, rather than the legislature, to decide which conduct should be prohibited. *Id.* at 884-85 & n.49.

As described above, Sections 054 and 057 are utterly devoid of the functional constitutional safeguards that should ensure they only apply to what *Miller*/*Ginsberg* places beyond First Amendment protection for minors. There is no "quick fix" for those multiple deficiencies and no saving construction short of rewriting the Statutes. 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's tortured interpretation of the Statutes does not address the missing *Miller/Ginsberg* requirements, is subject, as the district court recognized, to how they would be applied by prosecutors, judges and juries, and is unworkable. The only recourse is to strike the Statutes down.

IV. APPELLANTS VALIDLY CHALLENGED THE OREGON STATUTES BOTH FACIALLY AND AS APPLIED TO THEM.

A. The Facial Challenge

A content-based restriction on protected speech (such as that at issue here) is presumptively invalid and can be upheld only if defendants prove it is an effective and "precisely drawn means of serving a compelling state interest." *Con. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *see also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009); *Foti*, 146 F.3d at 635. As appellants demonstrate below, the Statutes are not narrowly and precisely drawn. When challenging a statute because it restricts more material than

the First Amendment allows, the amount of constitutionally protected expression should be judged "in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). The district court relied on language in *United States v. Williams*, 128 S.Ct. 1830 (2008) to support its conclusion that the Statutes are not overbroad. However, the defendant in *Williams* did not assert the statute at issue was overbroad as applied to him. Rather the claim was based on overbreadth in the sense of raising unconstitutional applications of the statute challenged there to persons other than the defendant-appellant. That is not the case here. Rather, in this case appellants assert that the Statutes are overbroad in that they restrict First Amendment-protected materials with which appellants themselves deal or may deal. Examples of such materials were submitted to the district court as exhibits, and the district court found many to be within the scope of the Statutes. (ER 255, 260).

With respect to the challenge based on vagueness, the Ninth Circuit precedents are that "[i]n the First Amendment context, facial vagueness challenges are appropriate if the statute clearly implicates free speech rights" (*Calif. Teachers Ass'n v. State Bd. of Educ*., 271 F.3d 1141, 1149 (9th Cir. 2001), as the Statutes clearly do here.

B. The Pre-Enforcement As-Applied Challenges

In the Complaint, appellants raised both a facial and an as-applied challenge to the Statute. (Complaint §VIA; ER 25). The precedents support such a challenge. In *Gonzales v. Carhart*, 127 S.Ct. 1610, 1638 (2007), the Supreme Court specifically approved such challenges, stating:

> The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The government has acknowledged that pre-enforcement, as-applied challenges to the Act can be maintained.

Even in an overbreadth context, it has been held that pre-enforcement as-applied challenges are appropriate. *See American Booksellers v. Dean*, 342 F.3d 96, 105 (2d Cir. 2003) ("In this case, we do not need to determine whether the statute is substantially overbroad; we can simply determine whether the statute can be constitutionally applied to the internet speech upon which plaintiffs base their suit. . . . Finally, we enjoin enforcement of Section 2802a only as applied to the internet speech upon which plaintiffs based their suit."). Finally, the Ninth Circuit has several times accepted pre-enforcement as-applied vagueness challenges. *See Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007); *see also*

Brooklyn Legal Services Corp. B v. Legal Services Corp., 462 F.3d 219 (2d Cir. 2006).

Thus appellants' as-applied challenges, both for violation of the First Amendment and based on vagueness, are appropriate and ripe for relief. The district court refused to consider appellant's as-applied challenge, giving two reasons:

> That appellants' have "not based … [their] challenge on a single book, pamphlet, or even a carefully defined genre against which to measure the statutes" (ER 241); and
>
> That "the variety of plaintiffs and the different types of speech in which they engage requires a facial approach." (*Id.*).

As to the first point, while each of the appellants alleged broad categories of materials to which they believed the Statutes applied,[17] they each named specific illustrative materials, and 26 of such materials were submitted to the district court as exhibits in support of the motion. (ER 067-109, ER 206, ER 212, ER 218, ER 233, ER 282, ER 289, ER 296, and ER 303.). In fact, the district court stated that it

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[17] *E.g.*, graphic novels; romance novels; gay, lesbian, bisexual, transgender and questioning related books. (ER 206, ER 212, ER 218, ER 233, ER 282, ER 289, ER 296, and ER 303.

had read one of the romance novels (ER 044) and found that *Kama Sutra, Joy of Sex, Black Hole, Tanpenshu-Volume 2, How Sex Works, It's Perfectly Normal, Where Did I Come From?* and *Mommy Laid an Egg*, all offered for sale and in some cases published by appellants, "might be restricted" under Section 054 of the Statutes. (ER 024). As to Section 057, the district court found that the statute's definition "appears encompass romance novels, books like *The Joy of Sex* and the *Kama Sutra*, and other explicit but not obscene materials, written or created to arouse the reader/viewer." (*Id.*). The district court then goes on to note that appellants "specifically argue that the sale of graphic novels like *Lady Snowblow*, mainstream films like *Thelma & Louise* and *Titanic*, sex education books and pamphlets, and novels like *The Handmaid's Tale, Snow Falling on Cedars, The Color Purple, Ricochet River,* and *Slaughterhouse Five*, could all be criminalized under the statute."

These unchallenged factual findings and allegations directly support appellants as-applied challenge.

CONCLUSION

For the foregoing reasons, appellants respectfully request that this Court reverse the order below, hold ORS 167.054 and ORS 167.057(1)(a) and (b)(A) unconstitutional, and direct the district court to grant appellant's request for a permanent injunction against their enforcement or, in the alternative, against enforcement of said sections against appellants and those on whose behalf they sue.

Dated: July 21, 2009

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CERTIFICATE OF COMPLIANCE
(FED. R. APP. P. 32(a)(7)(C))

1. This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because this brief contains 10,046 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2002 in 14-point Times New Roman font.

Dated July 21, 2009.

s/ Michael A. Bamberger
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STATEMENT OF RELATED CASES
(CIRCUIT RULE 28-2.6)

ACLU of Oregon v. Kroger, Ninth Circuit No. 09-35154, is an appeal by non-profit providers of health education information, an individual and the *ACLU of Oregon* from the same Order from which the appellants in this case are appealing. The appellants in *ACLU of Oregon* have distinct and independent interests from appellants in this appeal.

Dated July 21, 2009.

s/ Michael A. Bamberger
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CERTIFICATE OF SERVICE

United States Court of Appeals Docket Number: No. 09-35153

I hereby certify that I electronically filed the foregoing PLAINTIFF-APPELLANTS' BRIEF 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 July 22, 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.

Dated July 22, 2009.

s/ Michael A. Bamberger
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ATTACHMENT A

OBSCENITY AND RELATED OFFENSES

167.051 Definitions for ORS 167.054 and 167.057. As used in ORS 167.054 and 167.057:

(1) "Child" means a person under 13 years of age.

(2) "Furnishes" means to sell, give, rent, loan or otherwise provide.

(3) "Minor" means a person under 18 years of age.

(4) "Sexual conduct" means:

(a) Human masturbation or sexual intercourse;

(b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals;

(c) Penetration of the vagina or rectum by any object other than as part of a medical diagnosis or as part of a personal hygiene practice; or

(d) Touching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female.

(5) "Sexually explicit material" means material containing visual images of:

(a) Human masturbation or sexual intercourse;

(b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; or

(c) Penetration of the vagina or rectum by any object other than as part of a personal hygiene practice. [2007 c.869 §1]

167.054 Furnishing sexually explicit material to a child. (1) A person commits the crime of furnishing sexually explicit material to a child if the person intentionally furnishes a child, or intentionally permits a child to view, sexually explicit material and the person knows that the material is sexually explicit material.

(2) A person is not liable to prosecution for violating subsection (1) of this section if:

(a) The person is an employee of a bona fide museum, school, law enforcement agency, medical treatment provider or public library, acting within the scope of regular employment; or

(b) The person furnishes, or permits the viewing of, material the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.

(3) In a prosecution under subsection (1) of this section, it is an affirmative defense:

(a) That the sexually explicit material was furnished, or the viewing was permitted, solely for the purpose of sex education, art education or psychological treatment and was furnished or permitted by the child's parent or legal guardian, by an educator or treatment provider or by another person acting on behalf of the parent, legal guardian, educator or treatment provider;

(b) That the defendant had reasonable cause to believe that the person to whom the sexually explicit material was furnished, or who was permitted to view the material, was not a child; or

(c) That the defendant was less than three years older than the child at the time of the alleged offense.

(4) In a prosecution under subsection (1) of this section, it is not a defense that the person to whom the sexually explicit material was furnished or who was permitted to view the material was not a child but was a law enforcement officer posing as a child.

(5) Furnishing sexually explicit material to a child is a Class A misdemeanor. [2007 c.869 §2]

167.057 Luring a minor. (1) A person commits the crime of luring a minor if the person:

(a) Furnishes to, or uses with, a minor a visual representation or explicit verbal description or narrative account of sexual conduct; and

(b) Furnishes or uses the representation, description or account for the purpose of:

(A) Arousing or satisfying the sexual desires of the person or the minor; or

(B) Inducing the minor to engage in sexual conduct.

(2) A person is not liable to prosecution for violating subsection (1) of this section if the person furnishes or uses a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation.

(3) In a prosecution under subsection (1) of this section, it is an affirmative defense:

(a) That the representation, description or account was furnished or used for the purpose of psychological or medical treatment and was furnished by a treatment provider or by another person acting on behalf of the treatment provider;

(b) That the defendant had reasonable cause to believe that the person to whom the representation, description or account was furnished or with whom the representation, description or account was used was not a minor; or

(c) That the defendant was less than three years older than the minor at the time of the alleged offense.

(4) In a prosecution under subsection (1) of this section, it is not a defense that the person to whom the representation, description or account was furnished or with whom the representation, description or account was used was not a minor but was a law enforcement officer posing as a minor.

(5) Luring a minor is a Class C felony. [2007 c.869 §3]