IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC., *et al*., No. 09-35153

Plaintiffs-Appellants,

v.

JOHN KROGER, *et al.*,

Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION OF OREGON, *et al*., No. 09-35154

Plaintiffs-Appellants,

v.

JOHN KROGER, *et al.*,

Defendants-Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

APPELLEES' BRIEF

STATEMENT OF JURISDICTION

Appellees agree with appellants' statements of jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. In rejecting plaintiffs' overbreadth and vagueness challenges to Or. Rev. Stat. §§ 167.054 and 167.057, did the district court interpret the statutes consistently with Oregon's rules of statutory construction and with existing Oregon case law?
2. Did the district court correctly conclude that Or. Rev. Stat. § 167.054, which, subject to several defenses, prohibits a person from giving certain sexually explicit materials to children under the age of 13, is not substantially overbroad?
3. Did the district court correctly conclude that Or. Rev. Stat. § 167.057, which, subject to several defenses, prohibits a person from giving certain sexually explicit materials to a minor for the purpose of arousing the person or the minor, or luring the minor into having sex, is not substantially overbroad?
4. Did the district court correctly conclude that neither Or. Rev. Stat. § 167.054 nor § 167.057 is unconstitutionally vague?

5. Did the district court correctly reject plaintiffs' "as-applied" challenges to the statutes?

SUMMARY OF ARGUMENT

Neither Or. Rev. Stat. §§ 167.054 nor 167.057 is substantially overbroad or impermissibly vague under the First Amendment. In fact, the Oregon legislature carefully limited the scope of both laws to meet free-speech standards that are considerably more demanding than those imposed by the First Amendment—namely, those standards imposed by the Oregon Constitution. To avoid infringing on Oregonians' free-speech rights, the legislature incorporated language that had previously been construed by Oregon's courts and that significantly limits the scope of the statutes. Properly construed, neither statute reaches speech that is protected by the federal constitution.

Plaintiffs' claims to the contrary depend upon a sweeping interpretation of the statutes. But plaintiffs' broad reading of the statutes is contrary to the intent of the Oregon legislature and inconsistent with established principles of Oregon law.

Oregon's legislature enacted Or. Rev. Stat. § 167.054 to replace an earlier obscenity law that the Oregon Court of Appeals held was unconstitutional under the state constitution. In response to that decision, and relying on its guidance, the legislature drastically narrowed the scope of Or.

Rev. Stat. § 167.054: it applies only to those who intentionally furnish a narrowly defined set of sexually explicit materials to children who are twelve years old or younger. All of the materials to which Or. Rev. Stat. § 167.054 applies fall well within the boundaries of what states are allowed to prohibit under the United States Supreme Court's obscenity cases; it passes the federal constitutional test.

Or. Rev. Stat. § 167.057 prohibits a person from "luring" a minor by giving the minor certain sexually explicit materials for the purpose of arousing the person or the minor, or inducing the minor into having sex. The element of specific sexual intent obviates any overbreadth concerns: the First Amendment does not protect the right to engage in the sexual predation of children. The statute prohibits only deliberate, sexual predation using pornographic materials.

Plaintiffs' vagueness claims fare no better. The very terms that plaintiffs contend are impermissibly vague have already been authoritatively and narrowly construed by Oregon's courts; indeed the legislature incorporated the language precisely *because* it already had been so construed. In light of that case law, and in light of the legislature's intentions, the statutes are both clear and clearly permissible.

The district court correctly concluded that Or. Rev. Stat. §§ 167.054 and 167.057 are consistent with the federal constitution.

ARGUMENT

"Once the Statutes are properly defined, Powell's Books's arguments disappear."[1]

A. Introduction and Standard of Review

In 2007, the Oregon legislature enacted two criminal statutes aimed at combating an insidious problem: sexual predators using pornography to groom and then to prey upon minors and young children. The first, Or. Rev. Stat. § 167.054, prohibits furnishing children under the age of thirteen with materials containing images of certain sexually explicit conduct that are intended to sexually arouse. The second, Or. Rev. Stat. § 167.057, prohibits a person from giving certain sexually explicit materials to a minor in order to sexually arouse the person or the minor, or to lure the minor into engaging in sex.

In April 2008, plaintiffs[2] filed a complaint alleging that §§ 167.054 and 167.057 are overbroad and impermissibly vague in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution. Plaintiffs asked

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[1] District Court's *Opinion and Order*, December 12, 2008. (ER-35).

[2] At the proceedings below, all of the plaintiffs in these two consolidated appeals filed a single complaint and briefed the case together. On appeal, the plaintiffs have broken into two sets, the American Civil Liberties Union of Oregon, et al. ("ACLU") and Powell's Books, Inc., et al. ("Powell's Books"), each of which challenge the district court's decision. Where appropriate and for the sake of efficiency, the state refers collectively to the two sets simply as "plaintiffs."

the court to declare the laws unconstitutional and to enjoin defendants from enforcing them. In support of their claims, plaintiffs argued that the challenged statutes fail to comply with federal obscenity standards because they did not include the obscenity criteria articulated by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) and *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

In response, the state argued that the challenged statutes were neither overbroad nor vague. In particular, the state argued that the case law and legislative history showed that the Oregon legislature, in order to meet the standards of the Oregon Constitution, had incorporated language that had previously been construed by Oregon's courts and that significantly limited the scope of the statutes. Properly construed, the state argued, the challenged statutes do not run afoul of *Ginsberg* and *Miller*.

The district court agreed with the state. Considering the text, context, and legislative history of the statutes, as well prior case law, the court concluded that neither of the challenged statutes was substantially overbroad or impermissibly vague. (*Opinion and Order*, ER-2). The court denied plaintiffs' motion for an injunction and declaratory relief. (*Judgment*, ER-41). These consolidated appeals followed.

This court's review of the district court's decision denying declaratory relief is *de novo*. *See Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1040 (9th Cir. 2004). The denial of a request for a permanent injunction is reviewed for an abuse of discretion. *See Cummings v. Connell*, 316 F.3d 886, 897 (9th Cir.), *cert. denied*, 539 U.S. 927 (2003). When the court's decision to grant or to deny injunctive relief rests on an interpretation of a state statute, review is *de novo*. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 335 (9th Cir. 1996).

B. Background and Legal Framework

1. Obscenity, Minors and the First Amendment.

The United States Supreme Court has long recognized a category of "obscene" speech that is unprotected by the First Amendment. *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). The definition of obscenity is exceedingly narrow, including only "patently offensive," "prurient" materials that are devoid of any "serious value." *Miller*, 413 U.S. at 24. In *Ginsberg*, the Supreme Court recognized that what qualifies as "obscene" also depends in part on age of person who is viewing the material.

Ginsberg involved a challenge to a New York criminal statute which prohibited "exposing minors to harmful materials." 390 U.S. at 645-46. Among other things, the statute prohibited selling to minors images "of a person

or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors." *Id.* The statute defined "harmful to minors" as material that "predominantly appealed to the prurient, shameful or morbid interest of minors," was patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and was utterly without redeeming social importance for minors. *Id.*

The defendant, convicted of selling "girlie" magazines to 16-year-old boys, argued that the law violated the First Amendment. *Id.* at 636. The Supreme Court upheld the law, concluding that the materials prohibited by the law were obscene as to youths and therefore were not protected by the First Amendment. *Id.* at 634-640.

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the challenged statute] simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of such minors. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.

Id. at 638 (internal citations and quotations omitted).

Four years later, in *Miller*, the Supreme Court set forth the now-familiar three-part definition of obscenity.[3] Reading *Ginsberg* in light of *Miller*, federal courts have since adopted an amalgam of the two tests (hereafter, the *Ginsberg/Miller* test or variable obscenity test) for determining whether speech is obscene as to minors. *See, e.g.*, *American Booksellers v. Webb*, 919 F.2d 1493, 1503 n.18 (10th Cir. 1990). Under the *Ginsberg/Miller* test, material is obscene as to minors if it meets the following conditions:

> 1) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest of minors;
>
> 2) The work contains depictions or descriptions patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> 3) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

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[3] The *Miller* obscenity test is as follows:

(1) the average person, applying contemporary community standards would find that the work appeals to the prurient interest;

(2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24.

See id.

2. Obscenity and the Oregon Constitution.

Oregon's courts have consistently recognized that the Oregon Constitution affords distinct and expansive protection to the right to free speech—protection that extends beyond that afforded under the First Amendment.[4] Oregon's distinctive protection of free speech is especially evident in state court decisions regarding the regulation of obscenity. In *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987), for example, the Oregon Supreme Court struck down an obscenity law on state constitutional grounds, despite the fact that the law in question expressly incorporated the federal *Miller* obscenity test. *See Henry*, 302 Or. at 525. In striking down the law, the Oregon Supreme Court explained that the three-part *Miller* test was inadequate by state constitutional standards:

> "Although the *Miller* test may pass federal constitutional muster and is recommended as a model for state legislatures * * * *the test constitutes censorship forbidden by the Oregon Constitution** * *. In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered "obscene."

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[4] Article I, section 8 of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Id (emphasis added).

Under Oregon law, in other words, there simply is no "obscenity" exception comparable to that recognized in federal law, no class of materials lying outside the free-speech protection of the state's constitution. As a result, regulating obscenity *per se*, at least with respect to adults, is essentially precluded under Oregon law. *See State v. Ciancanelli*, 339 Or. 282, 121 P.3d 613 (2005) (masturbation and sexual intercourse in a live public show protected by Article I, section 8).

Regulating obscenity even with respect to children is similarly problematic in Oregon, and antiobscenity laws aimed at protecting minors and children have therefore been struck down under the state constitution. *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), *rev den*, 332 Or 137 (2001). Nevertheless, while the Oregon Constitution does not allow the state to regulate speech *per se*, it does allow for narrowly tailored regulations targeting the harmful *effects* of speech. *See State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) (setting forth the analytical framework for Article I, section 8 challenges).[5] Recognizing that principle, and recognizing that a narrow class of

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[5] Under the *Robertson* framework, Oregon courts first asks whether a statute is directed at the content of speech. If it is, then it is unconstitutional unless the restraint is wholly confined within some historical exception.

Footnote continued…

very explicit materials—"hardcore pornography"—have harmful psychological effects on children, Oregon courts have concluded that statutes that prohibit furnishing such materials to minors can pass state constitutional muster. *Maynard*, 168 Or. App. at 124-25. To meet state constitutional constraints, however, the scope of such statutes must be tailored to proscribe only that class of explicit materials that have the deleterious effect. *Id; State v. Stoneman*, 323 Or. 536, 543-44, 920 P.2d 535 (1996) (explaining and applying the *Robertson* framework).

3. *State v. Maynard*.

At issue in *Maynard* was Or. Rev. Stat. § 165.065, which prohibited furnishing materials to minors depicting or describing, among other things, "sexual conduct" or "sexual excitement."[6] Enacted just three years after *Ginsberg*, § 165.065 was based in part on the statute upheld by the Supreme

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(…continued)
Robertson, 293 Or. at 412. But if a law is directed at the harmful effects of speech, it must be scrutinized for overbreadth. *See id*. at 412-13 (discussing overbreadth analysis). If a statute reaches protected speech "more than rarely," then the court will consider "whether a narrowing construction is possible to save it from overbreadth," *State v. Rangel*, 328 Or. 294, 299, 977 P.2d 379 (1999).

[6] Or. Rev. Stat. § 167.065 prohibited furnishing to minors under 18 "Any picture, photograph, drawing, sculpture, motion picture, film or other visual representation or image of a person or portion of the human body that depicts nudity, sadomachistic abuse, sexual conduct or sexual excitement[.]"

Court in that case.[7] Nevertheless, the *Maynard* court found the law violated the right to free speech protected by the Oregon Constitution because its targeted speech. *State v. Maynard*, 138 Or. App 647, 669, 910 P2d 1115 (1996) (*Maynard I).*

Later that year, however, the Oregon Supreme Court vacated the Court of Appeals decision in *Maynard I* and remanded the case for reconsideration in light of *State v. Stoneman*, 323 Or. 536, 920 P.2d 535 (1996). In *Stoneman*, the Oregon Supreme Court had concluded that a child-pornography statute that expressly prohibited a certain form of expression was nonetheless constitutionally permissible because—although it was ostensibly directed at speech—the statute's *actual* target was not speech *per se*, but the harmful effects of a certain kind of speech, child pornography, on children.

On remand, the Court of Appeals began its analysis of Or. Rev. Stat. § 167.065 by construing the language of Or. Rev. Stat. § 167.085(3), which provided an affirmative defense to prosecution under Or. Rev. Stat. § 167.065 if "[t]he defendant was charged with the sale, showing, exhibiting or displaying of an item, those portions of which might otherwise be contraband forming *merely*

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[7] *See* C.R. 30, *Proposed Oregon Criminal Code 232, Commentary § 259 (1971),* E.R. 152 (explaining that "the statute upon which [Or. Rev. Stat. § 167.065 was] based was recently under examination by the United States Supreme Court in [*Ginsberg*]."

an incidental part of an otherwise nonoffending whole, and serving some purpose therein other than titillation." Or. Rev. Stat. § 167.085(3) (2000)(Emphasis added). Applying Oregon's rules for statutory interpretation, the court considered the text and context of the exception and concluded that the legislature intended "titillation" to mean "sexual excitement or arousal." 168 Or. App. at 124-25. The court further concluded that "the context of Or. Rev. Stat. § 167.085(3) plainly shows that the defense applies to those *materials not primarily intended to titillate the victim*." *Id*. (emphasis added).

On this basis, and in light of *Stoneman*, the court concluded that the underlying statute, though it prohibited a certain form of expression, was actually aimed not at speech but at "protecting children from the harmful effects of hardcore pornography." *Id.* The court then turned to the scope of the statute, and specifically to the question whether the statute was narrowly tailored to achieve its legitimate purpose or whether it was overbroad.

In addressing the question of overbreadth, the court explained that the affirmative defense in § 167.085(3) played an essential role in limiting the scope of the underlying statute. The court specifically concluded that *absent availability of the defense*, the furnishing statute at issue would be overbroad because it would apply to materials "regardless of the significance of [the sexually explicit] depictions in the context of the materials taken as a whole."

Id. at 130. The court reasoned that minors are "regularly exposed to visual images, including television programs, movies, and videos that depict sexual conduct and sexual excitement in various levels of detail" and that *unless the exception applied* in all cases, the statute reached too far. *Id.*

As written, however, the affirmative defense did *not* apply in all cases. Due to some incongruous drafting, the affirmative defense applied only to the "sale, showing, exhibiting or displaying of an item," but not all instances of "furnishing." On that basis, the court concluded that the statute as written *was* overbroad:

> [W]hile the defense might apply to a movie theater's showing of an R-rated movie, it would not apply to a video store rental of the same movie to a 17-year old. Similarly, the showing of a music video depicting sexual conduct or excitement to a minor might not be prohibited, while giving a copy of the same video to a minor, regardless of purpose, would be a crime *because the qualified defense does not apply.*

Id. at 132 (emphasis added). In sum, the court concluded that the affirmative defense had the effect of limiting the application of the statute to "hardcore pornography," but that the statute was nonetheless constitutionally defective because the defense did not apply to all instances of furnishing. As a result, the court declared that Or. Rev. Stat. § 167.065 violated Article I, section 8 of the Oregon Constitution.

4. House Bill 2843 (2007).

In 2007, in an attempt to fill the gap created after the Court of Appeals declared Or. Rev. Stat. § 167.065 unconstitutional in *Maynard*, the Oregon Legislative Assembly enacted HB 2843. That law, which was enacted on July 9, 2007 and signed into law on July 31, 2007, created two new criminal offenses, furnishing sexually explicit materials to a child, and luring a minor.

a. Or. Rev. Stat. § 167.054: Furnishing sexually explicit materials to a child.

Or. Rev. Stat. § 167.054 prohibits a person from intentionally furnishing to a child materials that the person knows to be "sexually explicit." "Sexually explicit materials" are defined as materials containing images of "human masturbation or sexual intercourse"; "genital-genital, oral-genital, anal-genital or oral-anal contact"; or "penetration of the vagina or rectum by any object other than as part of a personal hygiene practice." In seeking to address the constitutional infirmities of Or. Rev. Stat. § 167.065, the legislature narrowed the scope of Or. Rev. Stat. § 167.054. Whereas its predecessor prohibited furnishing explicit materials to minors under age 18, Or. Rev. Stat. § 167.054 applies only to children under 13. The previous law regulated a much broader array of explicit content, including narrative descriptions; by contrast, Or. Rev. Stat. § 167.054 regulates only the narrow class of materials containing images of particular sexual conduct.

The new law incorporates the *Maynard* exception—that is, it does not apply to the furnishing of materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." Unlike the defective law struck down in *Maynard*, in the new law the exception applies to *all* instances of furnishing—no longer an affirmative defense, it is an exception to liability in the first instance.

In addition, employees of museums, schools, law enforcement agencies, medical treatment providers and public libraries who are acting within the scope of their employment are exempted from the law. Or. Rev. Stat. § 167.054(2)(a). It is an affirmative defense to prosecution if the material was furnished for legitimate educational or therapeutic purposes, Or. Rev. Stat. § 167.054(3)(a), or if the defendant reasonably believed that the victim was not a child, Or. Rev. Stat. § 167.054(3)(b), or if the defendant was less than three years older than the victim, Or. Rev. Stat. § 167.054(3)(c). Furnishing sexually explicit materials to a minor is a Class A misdemeanor.

b. Or. Rev. Stat. § 167.057: Luring a Minor.

Under Or. Rev. Stat. § 167.057, a person commits the crime of luring a minor if the person furnishes to, or uses with, a minor under age 18 depictions or descriptions of certain sexual conduct for the purpose of either "[a]rousing or

satisfying the sexual desires of the person or the minor" or "[i]nducing the minor to engage in sexual conduct." Like the "furnishing" statute, the luring statute incorporates the *Maynard* exception for those materials in which such depictions or descriptions form "merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation." Or. Rev. Stat. § 167.057 also includes a set of affirmative defenses similar to those applicable to Or. Rev. Stat. § 167.054. *See* Or. Rev. Stat. § 167.057(3)(a) (material was furnished for legitimate educational or therapeutic purposes); Or. Rev. Stat. § 167.057(3)(b) (defendant reasonably believed victim was not a minor); Or. Rev. Stat. § 167.057(3)(c) (defendant less than three years older than the victim). Luring a minor is a Class C felony.

c. The legislature's purpose in enacting Or. Rev. Stat. § 167.054 and 057.

The legislative history of HB 2843, and in particular the testimony of those who helped to draft the bill, shows that that the legislature's purpose in enacting these two new criminal laws was to protect children from sexual exploitation and abuse. (C.R. 30, *Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Senator Kate Brown*), E.R. 157) ("Our objective here is to prevent child sexual abuse and predatory child sexual exploitation.") The statutes are specifically intended to provide a tool for prosecutors to combat sexual predators who use pornography to "groom" or

lure children. (C.R. 30, *Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Deputy District Attorney Jodie Bureta)*, E.R. 160-62) ("[HB2843] allow[s] us to stop this abuse in the grooming stage, hold people accountable while they are grooming the children while the harm is just starting to be done. We don't want to have to wait until abuse physically occurs in order to catch these people and hold them accountable and protect these kids.")

The legislative history also demonstrates that the statutes were deliberately crafted in an effort to avoid the constitutional infirmities of Or. Rev. Stat. § 167.065 identified by the Court of Appeals in *Maynard*. (C.R. 30, *Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Senator Kate Brown)*, E.R. 157) ("The problem is that Or. Rev. Stat. § 167.065 was held unconstitutional by prior court rulings, so our goal is to craft a statute that is constitutional."); (C.R. 30, *Testimony, Joint Ways and Means Committee, HB 2843, June 15, 2007 (statement of Assistant Attorney General Michael Slauson)*, E.R. 170) ("What this current legislation does is take that guidance that was given to us by the court and make sure that our statutes comply with that guidance.")

C. The District Court Correctly Interpreted the Statutes

After considering the text, context and legislative history of the challenged laws, the district court agreed with the state that, as properly construed, the statutes apply only to a subset of sexually explicit materials – those that are primarily intended to sexually arouse the viewer. On appeal, plaintiffs argue that the district court erred by interpreting the statutes too narrowly. According to plaintiffs, the statutes are virtually unlimited in scope and would criminalize the distribution of "a wealth of materials" related to sex—not just pornography but "virtually all sexual educational materials," romance novels, and any films, books, or other materials that contain any scenes that are "arguably intended to titillate." Plaintiffs are mistaken. As explained below, their expansive interpretation is contrary to the rules of Oregon statutory construction, contrary to settled case law, and contrary to the legislature's intent. The district court correctly interpreted the statutes.

1. When interpreting a state law, federal courts defer to existing state court interpretations and to the state rules of statutory interpretation

When a federal court must interpret a state law that has not already been interpreted by the state's highest court, the federal court must anticipate how the state's highest court would interpret it. To that end, the court applies the state's rules of statutory interpretation. *Planned Parenthood of Idaho, Inc. v. Wasden*,

376 F.3d 908, 930 (9th Cir. 2004), *cert. denied*, 544 U.S. 948, 125 S. Ct. 1694, 161 L. Ed. 2d 524 (2005).

2. Under Oregon Law, the statutes apply only to materials that are primarily intended to sexually arouse.

Both Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 incorporate an exception to liability the effect of which is to significantly restrict the scope of the materials to which they apply. Both statutes thus exclude prosecution for the furnishing of sexually explicit materials

> "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation."

§ 167.054(2)(b); § 167.057(2). As noted above, in *Maynard*, the Oregon Court of Appeals, sitting *en banc*, expressly construed an almost identically worded exception[8] to exclude all sexually explicit materials except those that primarily intended to sexually arouse the viewer. The Oregon legislature relied on that interpretation when it incorporated that language into the new statutes. Under the Oregon's rules of statutory construction, the *Maynard* court's interpretation is controlling.

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[8] The *Maynard* court construed Or. Rev. Stat. § 167.085(3) (2000), which excluded materials "those portions of which might otherwise be contraband forming *merely an incidental part of an otherwise nonoffending whole, and serving some purpose therein other than titillation.*" (Emphasis added).

Statutory interpretation in Oregon is a two-step analysis. The court begins by examining the statutory text in its context, as well as any relevant legislative history. *State v. Gaines*, 346 Or. 160, 171-72, 206 P.3d 1042 (2009) (modifying the test set forth in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611, 859 P.2d 1143 (1993)).[9] If the statute remains ambiguous after the first level of analysis, the courts will at the second step turn to relevant canons of construction. *Id.*

In analyzing the meaning of a statute under *PGE* and *Gaines*, Oregon's courts rely on several fundamental principles. First and foremost, in construing a statute, the court's goal is to ascertain the meaning that was intended by the

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[9] At the time that the district court's decision, statutory interpretation in Oregon was a three part analysis, as set forth in *PGE*. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611, 859 P.2d 1143 (1993). Under *PGE*, Oregon courts first considered the statutory text in context to determine whether it unambiguously expressed the legislature's intentions. If it did, then the task of interpretation ended, and the court would not consider legislative history. If--but only if--the statute's text in context was ambiguous, the court would, at the second step, consider the legislative history. If resort to the legislative history did not clarify the legislature's intent, the court turned, at the third and final step, to maxims of construction. *Id.*

Gaines altered the rules by combining the first two steps of *PGE*. 346 Or. 160, 171-72, 206 P.3d 1042 (2009). Under *State v. Gaines*, statutory interpretation is now a two-step analysis. At the first step, consider the text, context, *and legislative history* to determine the legislature's intended meaning. The court will turn to maxims of construction if the statute remains ambiguous. *Id.*

legislature that enacted the statute. *PGE*, 317 Or. at 611. The best evidence of that intent is the text itself, and courts presume that terms that are undefined in the statute carry their plain and ordinary meanings. *Id*. Oregon courts routinely emphasize, however, that statutory text must be considered not in isolation, but in context. *See, e.g.*, *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004) ("Viewed in isolation, that text provides support for employer's position. Ordinarily, however, text should not be read in isolation but must be considered in context.").

Oregon courts consider any prior judicial construction of statutory text at the first level of analysis. *See State v. Murray*, 343 Or. 48, 52, 162 P.3d 255 (2007) ("At the first level of analysis of a statute, this court also considers case law interpreting that statute."); *Martin v. Board of Parole*, 327 Or 147, 156, 957 P2d 1210 (1998); *Gaston v. Parsons*, 318 Or 247, 252, 864 P2d 1319 (1994). Relevant context also includes prior construction of other, related statutes. *Keller v. Armstrong World Industries, Inc.*, 342 Or 23, 35, 147 P3d 1154 (2006).

Oregon courts presume that the state legislature enacts statutes in light of existing judicial decisions that have a bearing on the statutes. *Comcast of Oregon II, Inc. v. City of Eugene*, 346 Or 238, 209 P3d 800 (2009) ("we must be mindful of * * * settled law as part of our analysis of statutory context");

Mastriano v. Board of Parole, 342 Or 684, 693, 159 P3d 1151 (2007) ("we generally presume that the legislature enacts statutes in light of existing judicial decisions that have a bearing on those statutes"); *Joshi v. Providence Health System of Oregon*, 342 Or 152, 158, 149 P3d 1164 (2006) ("We assume that, in using the term 'caused,' the legislature intended to incorporate the legal meaning of that term that this court has developed in its cases."). In addition, the legislature's underlying policy in adopting a statute also provides context for understanding a particular provision's meaning. *See, e.g.*, *Havi Group, LP v. Fyock*, 204 Or App 558, 564, 131 P3d 793 (2006); *State v. McBroom*, 179 Or App 120, 124 n 2, 39 P3d 226 (2002).

Applying those principles to the exception in Or. Rev. Stat. § 167.054(2)(b) and Or. Rev. Stat. § 167.057(2), the result is plain. Under Oregon law, the meaning of those statutes is that which was intended by the Oregon legislature. Here, the legislature's intent is not difficult to discern. These provisions directly incorporate the language of the affirmative defense that the *Maynard* court construed. Under Oregon law, and the legislature is *presumed* to have been aware of *Maynard*.

In any case, it is clear from the legislative history that when the legislature enacted the challenged statutes, it *was* aware of *Maynard*. Indeed, it was not simply aware of the *Maynard* decision, it adopted these statutes

precisely because of the *Maynard* decision.[10] In *Maynard*, the Court of Appeals expressly concluded that the exception performed the essential task of limiting the scope of the statute to pornographic materials primarily intended to sexually arouse, and that without the exception, the statute would be overbroad. By incorporating into Or. Rev. Stat. § 167.054(2)(b) and Or. Rev. Stat. § 167.057(2) the very same exception, the legislature thus relied on and adopted the *Maynard* court's construction. In addition, the legislative history also shows that the legislature's purpose was to prevent the use of "hardcore pornography" by sexual predators. For all these reasons, the text, context, and legislative history support the district court's conclusion that the exception limits the scope of materials to those which are primarily intended to arouse the viewer.

Because the intended meaning of the exception is clear at the first level of statutory analysis, it is not necessary to turn to the canons of constructions for further guidance. But even if the court were to consider those canons, they only serve to buttress the same conclusion. The maxims to which Oregon

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[10] *See, e.g.*, C.R. 30, *Testimony, Joint Ways and Means Committee, HB 2843, June 15, 2007 (statement of Assistant Attorney General Michael Slauson)*, E.R. 170 (discussing *Maynard* and related cases and explaining "[w]hat this current legislation does is take that guidance that was given to us by the court and make sure that our statutes comply with that guidance.").

courts perhaps most frequently resort is to assume that the legislature did not intend an unreasonable result, s*ee, e.g., State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996), and to assume that the legislature intended the construction that would avoid possible constitutional problems, s*ee, e.g., State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996); *State v. Bordeaux*, 220 Or App 165, 175, 185 P3d 524 (2008); *Vokoun v. City of Lake Oswego*, 189 Or App 499, 511, 76 P3d 677 (2003), *rev den*, 336 Or 406 (2004); *State v. Lanig*, 154 Or App 665, 674, 963 P2d 58 (1998).

3. Plaintiffs mischaracterize *Maynard*.

Plaintiffs attempt to minimize the importance of the *Maynard* decision, but they mischaracterize the case's holding. Plaintiffs contend that the *Maynard* court was concerned only with the meaning of "titillation" and with whose titillation the statute proscribed. (Powell's Br. 42; ACLU Br 16). Plaintiffs further contend *Maynard*'s conclusion that "the defense applies to those materials not *primarily intended* to titillate the victim" was "simply part of an aside." *Id.* According to plaintiffs, *Maynard* never reached the question whether material that was not primarily intended to titillate falls within the exception. *Id.* But that contention is impossible to square with the opinion.

The *Maynard* court was concerned not simply with the meaning of "titillation" but the meaning of the *entire* exception, and specifically the manner

in which that exception—by excluding materials in which the titillating portions were not merely "incidental" but primary—limited the scope of the sexually explicit materials subject to prohibition to those materials that were truly harmful to children. Indeed, as explained above,[11] the court *had* to construe the meaning of the exception in order to evaluate its constitutionality under state law. Consistently with the Oregon Supreme Courts analytical framework, once the court had determined that the statute actually targeted the *effects* of a class of sexually explicit materials—"hardcore pornography"—on children, the court's next analytical step was an overbreadth inquiry—*i.e.* whether the statute was sufficiently tailored to reach only those materials, or whether it reached beyond that class. To answer that question, the court had to analyze the extent to which the defense limited its scope. *Maynard*, 168 Or. App. at 130-32.

In concluding otherwise, plaintiffs simply ignore considerable portions of the opinion. To begin with, plaintiffs ignore the bald fact that the *Maynard* court expressly described the scope of the exception. After explaining that "to titillate" meant to sexually arouse, the court held that:

> Thus, the context of Or. Rev. Stat. § 167.085(3) plainly shows that the defense applies to those materials not *primarily intended* to titillate the victim."

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[11] The *Maynard* decision is discussed in section B(3), above.

Id. at 124 (emphasis added). The *Maynard* court went on to say that in light of the exception the statute's clear purpose was to protect children from the harmful effects of "hardcore pornography." *Id.* at 127.

More importantly, as explained above, the court went on to examine—at length—the effect of the exception, and concluded that where it applied, its effect was to exclude mainstream materials and to limit the scope of the statute to materials that are primarily intended to sexually arouse the viewer. On that basis, the court concluded that the statute would be constitutional if the exception applied to every instance of furnishing. *See id.* at 132.

The Oregon legislature relied on *Maynard*'s interpretation by then incorporating the exception into the present statutes. As a result, the very premise on which plaintiffs' overbreadth arguments are founded—that these statutes extend beyond obscenity to "mainstream" materials—is simply false. None of the examples that plaintiffs have offered come within the scope of either statute as properly construed.

4. Plaintiffs alternative interpretation is inconsistent with Oregon law.

Plaintiffs claim that the statutes would prohibit furnishing any films, books, or other materials that contain any sex scenes that are "arguably intended to titillate." (Powell's Br. 31). In addition, plaintiffs assert that the exception is not available where materials are not intended to titillate at all, but where the

explicit content of the materials is pervasive, "such as virtually all sexual education materials." (Powell's Br. 31; *See also* ACLU Br.33-39). But such a broad interpretation ignores the basic principles of statutory construction in Oregon.

As plaintiffs would construe the statutes they are manifestly unconstitutional and totally disconnected from the legislature's stated purpose of combating the use of pornography to facilitate sexual abuse.[12] Such an interpretation is obviously not what the legislature intended. Moreover, to arrive that interpretation, plaintiffs ignore the relevant context, the legislative history, the existing case law, and the relevant canons of construction.

Indeed plaintiffs make no attempt even to apply Oregon's rules of statutory construction in construing the scope of the statutes. Plaintiffs go only so far as to contend that the district court's interpretation cannot possibly be correct because, they say, it is inconsistent with the text. In that regard, plaintiffs contend that because the exception has "two parts" conjoined by the word "and," to fall within it material must necessarily meet two criteria – its

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[12] Powell's asserts that the district court agreed with this interpretation, and found that educational books like "How Sex Works" or other examples offered by plaintiffs might be restricted by 167.054. (Powell's Br. 31). That is incorrect. The district court concluded that none of plaintiffs' examples could give rise to liability under 167.054. (E.R. 24).

sexually explicit portions must (1) be merely incidental and (2) must serve some purpose other then sexual arousal. (Powell's Br. 30; ACLU Br. 15). But plaintiffs argument is unconvincing, for four reasons.

First, notwithstanding plaintiffs assertion to the contrary, the *Maynard* interpretation—that the defense applies to materials not "primarily intended to titillate" the viewer—is a reasonable one that is consistent with the statutory text. It recognizes and incorporates both "parts" of the exception noted by plaintiffs—material must be (1) intended to "titillate" and (2) not just incidentally, but "primarily" so. Under Oregon law, a reasonable interpretation of the text is one that, when considered in context, is "not wholly implausible." *State v. Owens*, 319 Or 259, 268, 875 P2d 463 (1994) (court; *State v. Rodriguez*, 217 Or App 24, 28, 175 P3d 471 (2007). The *Maynard* interpretation meets that standard.

Second, by focusing on text in isolation and ignoring the relevant context, plaintiffs' argument violates a fundamental precept of Oregon statutory construction. *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004). The relevant context here includes prior judicial constructions of the statutory text, of which the court presumes the legislature is aware. Under *Gaines*, the court must at the first level of analysis also look to the legislative history.

Third, plaintiffs' contention that because the exception *must* be read in as establishing two independent criteria proceeds from a false premise. Oregon courts—like other courts around the country, including this one— recognize that, while "and" is ordinarily conjunctive, legislatures also sometimes use "and" in a *disjunctive* sense, and the courts will read statutes accordingly to avoid an absurd result. *Pendleton School Dist. 16R v. State,* 220 Or.App. 56, 70, 185 P.3d 471, 479 (2008), *aff'd in part and rev'd in part on other grounds*, 345 Or. 96(2008) (reading "and" in the disjunctive in order to comport with legislature's intended meaning and noting, "It is not that unusual to read the word "and" in [a disjunctive sense]"). *See also Ollilo v. Clatskanie P. U. D.,* 170 Or. 173, 180, 132 P.2d 416 (1942) (court will recognize "and" to mean "or" if to do so is consistent with the legislative intent). This court has taken the same approach, explaining that "a statute's use of disjunctive or conjunctive language is not always determinative" and that the court must "strive to give effect to the plain, common-sense meaning of the enactment without resorting to an interpretation that "def[ies] common sense." *U.S. v. Bonilla-Montenegro* 331 F.3d 1047, 1051 (9th Cir. 2003) (quoting *Cook Inlet Native Ass'n v. Bowen,* 810 F.2d 1471, 1473-74 (9th Cir. 1987)). *See also Slodov v. United States,* 436 U.S. 238, 246-47, 98 S. Ct. 1778, 56 L.Ed. 2d 251 (1978) (interpreting a statute disjunctively that limited personal liability to "any person required to collect,

truthfully account for *and* pay over any tax imposed by this title" because a conjunctive reading would lead to an absurd result)(quotations and brackets omitted). *See generally OfficeMax, Inc. v. U.S.*, 428 F.3d 583, 588 (6th Cir. 2005) (reviewing cases and explaining that courts interpret "and" disjunctively to avoid an absurd reading of a statute.)

Fourth, plaintiffs argument violates settled principles of comity. Where a state's intermediate appellate court has already construed statutory language, the state's highest court has denied discretionary review, and the law has been unchanged for several years, federal courts regard the intermediate court's construction as controlling. *See Kolender v. Lawson*, 461 U.S. 352, 356 n.4, 103 S. Ct. 1855. 75 L. Ed. 2d 903 (1982); *Lawson v. Kolender*, 658 F.2d 1362, 1364-1365, n.3 (9th Cir. 1981). *See also West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237-238, 61 S. Ct. 179, 183-184, 85 L.Ed. 139 (1940). That is the case here. *Maynard* was decided by the Court of Appeals, *en banc*, and the Supreme Court denied review. The case has remained settled law for nearly a decade.

D. The District court Correctly Rejected Plaintiffs' substantial overbreadth claims.

1. Substantial Overbreadth Analysis

To prevail on a facial overbreadth claim, a plaintiff must demonstrate a "realistic danger that the statute itself will significantly compromise recognized

First Amendment protections". *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). The Supreme Court has frequently emphasized that application of the overbreadth doctrine is "manifestly, strong medicine," to be applied sparingly; a statute is invalid on its face only if the law's overbreadth is "substantial." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). Last year, the Supreme Court again stressed that a plaintiff's burden to demonstrate *substantial* overbreadth is to be "vigorously enforced." *United States v. Williams*, 553 U. S. ___, 128 S. Ct. 1830, 1838 (2008). The Court also emphasized that courts should not invalidate a law unless it is substantially overbroad not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. *Id.* In addition, if a statute is readily susceptible to a narrowing construction that would make it constitutional, it will be upheld. *Virginia v. American Booksellers Association*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988).

The Supreme Court's decision in *Ferber* illustrates the proper application of the overbreadth doctrine. In that case, the Supreme Court upheld against an overbreadth challenge a New York law criminalizing possession of child pornography. 458 U.S. at 773. The Court did so despite finding that the law

could potentially reach some protected expression, such as medical textbooks and artistic works. *Id.* Because the statute's application was constitutional in the vast majority of situations, however, and because the Court assumed that the state courts would not give the law an expansive reading, the Court concluded that the law was not substantially overbroad:

> "How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd [exhibitions] of the genitals." Under these circumstances, § 263.15 is not substantially overbroad and * * * whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

Id. (internal quotation marks and citations omitted).

2. 167.054 is not substantially overbroad.

The Oregon legislature's purpose in enacting Or. Rev. Stat. § 167.054 was to prohibit furnishing pornography to preadolescent children. *See* C.R. 30, *Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of District Attorney Jodie Bureta),* E.R. 160 (explaining that bill was drafted to address problem of "people giving pornography to children in order to groom them for later sexual abuse."). To achieve that purpose without running afoul

of the state or federal constitutions, the legislature narrowly tailored Or. Rev. Stat. § 167.054 in several important respects.

First, Or. Rev. Stat. § 167.054 regulates furnishing sexually explicit material only to very young children—those 12 years old and younger. For First Amendment purposes, the difference between children in their late teens and 12-year-olds is fundamental. *See*, e.g., *Rowan v. Post Office Dept.*, 397 U.S. 728, 741, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970) (Brennan, J., concurring)(noting that law preventing certain speech to children would raise First Amendment concerns if applied to children "in their late teens"); Amitai Etzioni, "Do Children Have The Same First Amendment Rights As Adults?: On Protecting Children From Speech," 79 Chi.-Kent. L. Rev. 3, 47 (2004)("[T]hose who are somewhere between infancy and age thirteen have much lower capacities to contribute to and benefit from speech and are more vulnerable to harm from certain materials."); Michael S. Wald, "Children's Rights: A Framework for Analysis," 12 U.C. Davis L. Rev. 255, 274 (1979) ("[Y]ounger children, generally those under 10-12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives * * *. Younger children are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience."); Alan Garfield,

Protecting Children From Speech, 57 Fla. L. Rev. 565, 603 (2005)("[T]o lump all minors together ignores the vast differences in emotional and intellectual maturity within the group of minors."). Defendants are unaware of any instance in which a court has struck down an obscenity law restricting the dissemination of sexually explicit materials to children younger than thirteen.[13]

Second, Or. Rev. Stat. § 167.054 prohibits furnishing only materials containing images of specifically enumerated and objectively identifiable forms of "sexually explicit conduct." Specifically, the law applies to materials containing images of "human masturbation or sexual intercourse"; "genital-

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[13] Where the state is attempting to protect only very young children from sexually explicit material significantly, greater latitude must be afforded to the state in characterizing what is obscene. This is true for three reasons. First, the age group being protected is the most vulnerable part of the population, and deserving of special protection. *See United States v. X-Citement Video*, 982 F.2d 1285, 1288 (9th Cir. 1992), *rev'd on other grounds*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) ("We would not lightly hold that the Constitution disables our society from protecting those members it has traditionally considered to be entitled to special protections--minors.") Second, First Amendment concerns are significantly attenuated when dealing with young children who lack the "full capacity for individual choice" on which First Amendment guarantees are based. *See Ginsberg*, 390 U.S. at 649-650 (1968) (Stewart, J., concurring) And third, it is difficult to meaningfully adapt the prongs of the *Ginsberg/Miller* test to very young children. *FCC v. Pacifica Found*., 438 U.S. 726, 769, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (Brennan, dissenting)(noting "difficulties inherent in adapting the *Miller* formulation to communications received by young children."); *see also* Marion D. Hefner, "'Roast Pigs' and Miller-Light: Variable Obscenity in the Nineties," 1996 U. Ill. L. Rev 843, 869-73 (questioning applicability of *Ginsberg/Miller* test to young children).

genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals"; or "penetration of the vagina or rectum by any object other than as part of a personal hygiene practice." Or. Rev. Stat. § 167.051(5). In this respect, Or. Rev. Stat. § 167.054 actually meets one of the requirements for *adult* obscenity under *Miller*.[14] Laws prohibiting obscenity as to minors are not required to be tailored so narrowly. Indeed, the Supreme Court has allowed that mere nudity can be obscene with respect to minors—even minors as old as 17—as long as it is "in some significant way, erotic." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10, 95 S. Ct. 2268, 2275 n.10, 45 L. Ed. 2d 125 (1975). Moreover, the applicable definition of "sexually explicit conduct" is very similar to (and is in fact narrower than) those which the Supreme Court upheld against overbreadth challenges in both *Ferber* and *Williams*. *See Williams*, 128 S. Ct. at 1840-41. In *Williams*, the court specifically noted that the term "sexually explicit conduct" connotes "actual depiction of the sex act rather than merely the suggestion that it is occurring" and that such a definition renders a law "more immune from facial attack." *Id*.

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[14] In *Miller*, the court held that to avoid overbreadth, adult obscenity statutes must apply to materials that depict or describe sexual conduct, and that conduct must be specifically defined by the applicable state law. 413 U.S. at 24.

Third, Or. Rev. Stat. § 167.054 specifically excludes materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." As explained above, Oregon courts have construed that exception to exclude all materials that are not "primarily intended" to "sexually arouse" the person. *See Maynard* (construing nearly identical language in Or. Rev. Stat. § 167.085(3)). As thus construed, the statute does not apply to *any* of the examples proferred by plaintiffs.

Fourth, Or. Rev. Stat. § 167.054 applies only to material containing *images* of sexually explicit conduct, not merely narrative descriptions of such conduct. Or. Rev. Stat. § 167.051(5). In this regard, it is much narrower than other obscenity statutes—such as that upheld in *Ginsberg*—which also prohibit explicit narrative descriptions. This effectively removes the possibility that the literary works cited in plaintiffs' declarations could fall within the statute's sweep.

Fifth, Or. Rev. Stat. § 167.054 includes a scienter requirement. To violate the law, a person must *intentionally* furnish or permit a child to view material that the persons *knows* is "sexually explicit material." Or. Rev. Stat. § 167.054. The law does not punish innocent mistakes—only calculated conduct.

See Ginsberg, 390 U.S. at 644. As a result, the risk of self-censorship of constitutionally protected material is significantly attenuated. *Id.*

Sixth, Or. Rev. Stat. § 167.054 includes several exceptions and affirmative defenses. Employees of museums, schools, law enforcement agencies, medical treatment providers and public libraries are exempted from the law if they are acting within the scope of their employment. Or. Rev. Stat. § 167.054(2)(a). It is an affirmative defense to prosecution if the material was furnished for legitimate educational or therapeutic purposes, Or. Rev. Stat. § 167.054(3)(a), or if the defendant reasonably believed the person to whom the sexually explicit material was furnished was not a child, Or. Rev. Stat. § 167.054(3)(b).

Construed as a whole and in light of these criteria, Or. Rev. Stat. § 167.054 succeeds in its goal of narrowly prohibiting the furnishing of pornography to very young children. Although Or. Rev. Stat. § 167.054 does not repeat the *Ginsberg/Miller* test, it clearly meets that test. The law is limited to offensive materials containing images of specific sexual conduct, and only those images intended to sexually arouse. It is inconceivable that the law might prohibit a substantial amount of materials which have "serious literary, artistic, political or scientific value" for twelve-year-olds, or which, taken as a whole, were not patently offensive as to preadolescent children. Because the materials

must be "primarily intended to sexually arouse," the law prohibits only materials which appeals to the prurient interest (such as it is) of preadolescent children.

In all events, plaintiffs' overbreadth challenge fails because Or. Rev. Stat. § 167.054 is not *substantially* overbroad. Like the statute upheld in *Ferber*, Or. Rev. Stat. § 167.054 is a law whose legitimate reach dwarfs any potential impermissible applications. Even if it is possible to conjure hypothetical examples at the margins, that is not enough. *See Williams*,128 S. Ct. at 1843. In those marginal cases, the affected party could and should raise the issue on an as-applied basis.

Finally, there is no risk that Oregon courts will interpret the statute broadly. Oregon courts adhere to the usual rule of construing statutes to avoid constitutional questions. *Westwood Homeowners Assn., Inc. v. Lane County*, 318 Or. 146, 160, 864 P.2d 350 (1993), *adh'd to as modified on recons*, 318 Or. 327, 866 P.2d 463 (1994) (avoidance canon is invoked when there is even a tenable argument of unconstitutionality). Moreover, the legislature's intent to craft a narrow law which would fix the state constitutional infirmities identified in *Maynard* is abundantly clear in the statute's legislative history. *See* Or. Rev. Stat. § 174.020(1)(a) ("In the construction of a statute, a court shall pursue the

intention of the legislature if possible."); *PGE*, 317 Or. at 610-12 (in construing a statute, object is to ascertain the intention of legislature that adopted it).

3. 167.057 is not substantially overbroad.

Plaintiffs' overbreadth challenge to Or. Rev. Stat. § 167.057 fails for two distinct reasons. First, construed in light of *Maynard*, the materials that the statute restricts are obscene as to minors under *Ginsberg/Miller*. Second, and in any event, the statute is directed not at speech, but at conduct: luring minors using pornography. As state and federal courts around the country have recognized, such luring statutes do not violate the First Amendment.

a. Under *Maynard*, Or. Rev. Stat. § 167.057 restricts the use of materials that are obscene as to minors.

Although it applies to a broader range of materials than its counterpart, Or. Rev. Stat. § 167.057 is nevertheless within the standards established by *Ginsberg/Miller*. Or. Rev. Stat. § 167.057 prohibits attempting to arouse or seduce a minor using a "visual representation, explicit verbal description, or narrative account" of particular sexual conduct.[15] Like Or. Rev. Stat.

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[15] The enumerated conduct is as follows: human masturbation or sexual intercourse; genital-genital, oral-genital, anal-genital or oral-anal contact, whether between two persons of the same or opposite sex or between humans and animals; 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 touching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female. Or. Rev. Stat. § 167.051(4).

§ 167.054, Or. Rev. Stat. § 167.057 specifically excludes materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation."

Under *Maynard*, Or. Rev. Stat. § 167.057 is limited to a specific set of explicit materials that are both (a) primarily intended to sexually arouse a minor and (b) are in fact used for that express purpose. Such materials are obscene under the *Ginsberg*/*Miller* test. There is certainly no danger, when used for such a purpose, that the law will squelch the exchange of a *substantial* amount of materials that have "serious literary, artistic, political or scientific value." In addition, by definition, such materials, when used by an adult attempting to arouse or seduce a minor, would appeal to the prurient interests of a minor. In this context, such materials would be patently offensive under any standard. Or. Rev. Stat. § 167.057 thus meets the *Ginsberg/Miller* test. Certainly plaintiffs make no showing that the law is substantially overbroad relative to the statute's plainly legitimate sweep. *Id.*

b. In any case, Or. Rev. Stat. § 167.057 does not violate the First Amendment because it prohibits conduct, not speech.

Plaintiffs' overbreadth challenge to Or. Rev. Stat. § 167.057 also fails because the statute is directed not at speech, but at conduct: the sexual predation of children. The law prohibits furnishing or using pornographic

materials for the purpose of sexually enticing minors. *See* Or. Rev. Stat. § 167.057(1)(b). It thus reflects the legislature's attempt to combat a common form of sexual predation—the use of pornography in order to "groom" or entice child victims. *See* C. R. 30, *Testimony of Deputy District Attorney Jodie Bureta before House committee on the Judiciary April 6*, E.R. 160 (explaining that use of pornography to entice children is common problem).

Indeed, at hearings before a joint legislative committee regarding HB 2843, the Legislative Director for the American Civil Liberties Union of Oregon—one of the plaintiffs in this case—acknowledged that Or. Rev. Stat. § 167.057 posed no constitutional problems because it involved a "clear" and "wholly inappropriate intent." *See* C. R. 30, *Testimony, Joint Ways and Means Committee, HB 2843, June 15, 2007 (statement of Andrea Meyer),* E.R. 170) (noting that ACLU was pleased to see that [Or. Rev. Stat. § 167.057] had been included in the bill). Similarly, the Executive Director of the Oregon ACLU, David Fidanque, testified that Or. Rev. Stat. § 167.057 provided a "clear, bright line" and that 167.057 was unanimously regarded by those on the bill's working group as constitutionally sound. C.R. 30, *Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of David Fidanque),* E.R. 163 ("I don't think there's anyone involved in the work group who had any qualms about [Or. Rev. Stat. § 167.057]").

Or. Rev. Stat. § 167.057 applies only when the person who furnishes material to minors does so with the purpose of either sexually arousing the person or the child, Or. Rev. Stat. § 167.057(1)(b)(A), or inducing the minor to engage in sex, Or. Rev. Stat. § 167.057(1)(b)(B). Acting with such a purpose is not protected by the First Amendment. The fact that an offender uses tools that happen to be expressive when preying on children does not prevent the state from regulating this conduct. Plaintiffs' overbreadth challenge is thus simply inapposite. *See Broadrick*, 413 U.S. at 615 ("[F]acial overbreadth adjudication * * * attenuates as the otherwise unprotected behavior that it forbids the state to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.")[16]

State statutes prohibiting luring have been upheld in the face overbreadth challenges by courts around the country for this very reason. *See, e.g., State v. Colosimo*, 142 P.3d 352, 355 (Nev. 2006) (upholding Nevada statute

[16] A number of other courts have reached the same conclusion. *See, e.g., New York v. Foley*, 731 N.E.2d 123, 132 (N.Y. 2000) ("speech used to further the sexual exploitation of children does not enjoy constitutional protection"); *State v. Robins*, 646 N.W.2d 287, 297 (Wis. 2002) ("[T]he fact that enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny).

prohibiting a person from communicating with a child 15 years of age or younger away from his or her parents for the purpose of engaging in sexual conduct with the child); *People v. Cervi*, 270 Mich. App. 603, 717 N.W.2d 356, 366-68 (Mich. Ct. App. 2006) (upholding luring statute and explaining that "[d]efendant is accountable not for his *words*, but for the *act of communicating* with a perceived minor *with intent* to make her the victim of a crime."); *State v. Snyder*, 155 Ohio App. 3d 453, 2003 Ohio 6399, 801 N.E.2d 876, 882-83 (Ohio Ct. App. 2003) (upholding a statute that criminalized the use of telecommunication devices to solicit minors to engage in sexual activity and concluding that the statute was "not aimed at the expression of ideas or beliefs," but was aimed instead at "prohibiting adults from taking advantage of minors"); *State v. Backlund*, 2003 ND 184, 672 N.W.2d 431, 442 (N.D. 2003) (upholding statute that prohibited an adult from sending sexual material to a minor to "importune, invite, or induce" the minor to engage in sexual conduct for the adult's "benefit, satisfaction, lust, passions, or sexual desires"); *People v. Foley*, 94 N.Y.2d 668, 731 N.E.2d 123, 128, 709 N.Y.S.2d 467 (N.Y. 2000) (same).

The court's reasoning in *Foley* is particularly instructive. At issue in that case was a statute that prohibited dissemination over the internet of sexual material harmful to minors if done with the intent to "importune, invite, or induce" a minor to engage in specified sexual acts with the person or for the

person's benefit. 731 N.E.2d at 127. The New York Court of Appeals found that the statute regulated conduct, not speech. "An invitation or enticement is distinguishable from pure speech." *Id.* at 129. The court found that the words "importune, invite, or induce" are used to describe *acts* of communication, not simply the content of one's views. *Id.* at 129. The court concluded that the act was properly regarded as a "preemptive strike against sexual abuse of children by creating criminal liability for conduct directed toward the ultimate acts of abuse." *Id.* at 128-29.

Federal courts have reached the same conclusion with similar reasoning in rejecting overbreadth challenges to 18 U.S.C. § 2422(b), which criminalizes the use of interstate or foreign commerce to knowingly "persuade, induce, entice, or coerce" a minor to engage in illegal sexual conduct. *See, e.g., United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000); *United States v. Tykarsky*, 446 F.3d 458, 472-73 (3d Cir. 2006); *United States v. Thomas*, 410 F.3d 1235, 1243-44 (10th Cir. 2005); *United States v. Johnson*, 376 F.3d 689, 694-95 (7th Cir. 2004); *United States v. Dhingra*, 371 F.3d 557, 562-63 (9th Cir. 2004); *United States v. Meek*, 366 F.3d 705, 721-22 (9th Cir. 2004).[17]

[17] Cases involving luring statutes uniformly distinguish luring statutes from dissemination statutes of the kind struck down by the United States Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844,

Footnote continued…

This court's opinions in *Meek* and *Dhingra* are illustrative. In *Meek*, the defendant challenged his conviction under 18 U.S.C. § 2422(b) after he attempted to solicit for sex a police officer posing officer posing in an internet chat room as a 14-year-old child. In upholding the conviction, the court reasoned that "there is no otherwise legitimate speech jeopardized by § 2422(b), because the statute only criminalizes *conduct*, namely "the targeted inducement of minors for illegal sexual activity." *Id.* at 721 (emphasis added). The court further explained that "speech is merely the vehicle through which a pedophile ensnares the victim."

Similarly, in *Dhingra*, the Ninth Circuit turned aside a facial challenge to § 2422(b). Citing *Meek*, the court rejected the premise that § 2422(b) was a speech regulation. "The focus of the statute is on the actor and the *intent of his actions*, and thus liability depends on the audience for whom the communication is intended and the conduct the communication seeks to provoke." *Id.* at 562 (emphasis added).

The reasoning that those other courts have used in upholding other luring statutes is applicable to Or. Rev. Stat. § 167.057(b)(1)(A). Oregon's statute is

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(…continued)
874 (1997) on the grounds that luring statutes do not infringe on adult-to-adult speech. *See, e.g., Meek*, 366 F.3d at 721.

not aimed at the expression of ideas or beliefs. Liability under § 167.057(b)(1)(A) "depends on the audience for whom the speech is intended" and the "conduct the communication seeks to provoke." As in *Meek*, the crime involves speech, but speech is merely the vehicle through which the pedophile ensnares the victim.

Plaintiffs also argue that despite the fact that it is limited to those who furnish materials with "the purpose * * * of arousing," Or. Rev. Stat. § 167.057 is nevertheless overbroad because, they argue, it goes beyond sexual predation and would criminalize ordinary commercial transactions, such as a bookstore clerk who, knowing it contains arousing material, recommends a "sexy" book to a minor. (Powell's Br. 35). But plaintiffs' strained reading of the statute again flies in the face of the basic principles guiding statutory construction under Oregon law.

In construing a statute, Oregon courts seek to identify the meaning the legislature intended. *PGE,* 317 Or. at 610-11. The meaning of statutory text is ascertained by looking first at the text not in isolation, but in context. *Id.* The context includes other provisions of the same statute, and other related statutes. *Id.* In addition, the court turns to the legislative history to determine the legislature's intent. *Gaines*, 346 Or. At 171-72.

Or. Rev. Stat. § 167.057(1)(b)(A) makes it a crime to "lure" a minor by giving the minor pornographic materials for the purpose of sexually arousing the minor. To "lure" means to "to draw into danger, evil, or difficulty by ruse or wiles." *Webster's Third New Int'l Dictionary 1347* (unabridged ed 2002). Or. Rev. Stat. § 167.057(1)(b)(B) makes it a crime to furnish explicit materials for the purpose of inducing a minor to have sex. The statute also includes affirmative defenses that relieve from liability those who act with nonsexual purposes. Read in the context of the statute as a whole, Or. Rev. Stat. § 167.057(1)(b)(A)'s prohibition on using pornography with "the purpose* * * of arousing" a minor applies when the person furnishing the materials does so to achieve one's own deviant *sexual* goal; liability depends on acting with a personal, *sexual* purpose of arousing.

Also relevant in that regard is the fact that the language, "for the purpose of arousing or satisfying the sexual desires of the person or the minor" is nearly identical to language that legislature has used to define the kind of unwanted physical contact that constitutes a sexual offense.[18] That is not a coincidence. *See PGE*, 317 Or. at 611 (legislature's use of the same term indicates that the

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[18] *See* Or. Rev. Stat. § 163.305 (defining "sexual contact" as "any touching of the sexual or intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor *for the purpose of arousing or gratifying the sexual desire of either party*." (Emphasis added.))

term is intended to carry same meaning). The legislature's borrowing of that language reflects the fact that "luring" is, in essence, a form of *sexual* conduct. Although it does not necessarily target an adult's physical contact with a minor, the law criminalizes an adult's conduct that is designed to achieve the same result.

Examination of the text of the statute in context thus demonstrates that the statute does *not* apply to a person, such as a store clerk, who acts with non-sexual purpose but merely furnishes material knowing that it contains explicit content. As the Supreme Court has repeatedly explained, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences. *Vacco v. Quill*, 521 U.S. 793, 803 (1997). In the context of the statute as a whole, the requisite deviant "purpose" is that of the person furnishing the material.

The legislative history confirms that conclusion. As explained above, the legislature's explicit intent was to protect children from sexual exploitation and abuse, and specifically to address the problem of grooming children for later sexual abuse.

In sum, Or. Rev. Stat. § 167.057 applies only when the person who furnishes material to minors does so with a specific *sexual* purpose; either sexually arousing the person or the child, Or. Rev. Stat. § 167.057(1)(b)(A), or

inducing the minor to engage in sex, Or. Rev. Stat. § 167.057(1)(b)(B). Acting with such a purpose is not protected by the First Amendment.[19] Consistent with the first amendment, the state may protect minors from the harmful physical *and psychological* effects of sexual exploitation. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (recognizing state's compelling interest in protecting the physical and psychological well-being of minors).

4. The statutes meet the *Ginsberg/Miller* test.

Plaintiffs assert that §§167.054 and 167.057 do not meet the elements of the *Ginsberg/Miller* test, either "literally" or "functionally." In purporting to establish that proposition, however, plaintiffs merely insist that Oregon's statutes do not pass constitutional muster because they do not "include" the *Ginsberg/Miller* "requirements." (Powells Br.at 17). For the reasons described below, that argument is flawed as a logical matter.

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[19] Plaintiffs concede that § 167.057(1)(b)(B) is constitutional; they argue that that provision sufficient to serve the state's needs. But that is not so. That provision applies only when the person furnishes explicit materials for the immediate purpose of inducing a minor to engage in sex. By contrast, § 167.057(1)(b)(A) is aimed at stopping grooming before it is too late—where the perpetrators ultimate purpose may be to engage in sex at some later time, but their immediate purpose is to arouse.

a. State statutes are not required to parrot the federal criteria to pass constitutional muster.

State obscenity statutes are not required to parrot the *Ginsberg/Miller* test in order to comply with federal standards for regulating obscenity to minors. *See Miller*, 413 U.S. at 25 (a statute must pass the three-part test "as written *or construed*" (emphasis added)).[20] The *Ginsberg/Miller* criteria (like any set of criteria) define a class—the class of material that is obscene as to minors. An anti-obscenity statute does not need to use the same criteria in order to pass constitutional muster, as long as it does not prohibit material that the First Amendment protects. Ultimately, the question is not whether state law *repeats* the federal criteria, but simply whether materials restricted by the state law *meet* the criteria for obscenity. *Id.* In this case, the challenged Oregon statutes do not incorporate the federal test, but there is no question that they meet that test.

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[20] In a separate opinion decided on the same day as *Miller*, the court emphasized that in construing federal statutes use of words such as "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" the Court was "prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California*." *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n.7, 93 S. Ct. 2665, 37 L.Ed. 2d 500 (1973).

b. Or. Rev. Stat. §§ 167.054 and 167.057 do not parrot the federal obscenity criteria because they are intended to meet the state constitution's stricter standard.

The *Ginsberg*/*Miller* definition of obscenity establishes a federally recognized category of materials that states may restrict from minors without running afoul of the First Amendment. In the majority of states, state constitutional free-speech guarantees are regarded as coextensive with those of the First Amendment. That is not so in Oregon. As explained above, Oregon's courts have consistently held Oregon recognizes no "obscenity" exception. *See, e.g.*, *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987); *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988); *State v. Ciancanelli*, 339 Or. 282, 121 P.3d 613 (2005). Indeed, the Oregon Supreme Court has expressly held that parroting the *Miller* obscenity criteria is insufficient to comport with Article I, section 8. *See Henry*, 302 Or. at 527.

Or. Rev. Stat. §§ 167.054 and 167.057 do not parrot the federal obscenity criteria because they are intended to meet the state constitution's stricter standard. The statutes accomplish that goal by restricting only a small subset of materials that may permissibly be regulated under the federal criteria.

When states attempt to prohibit materials at the outer boundaries of what is obscene for minors but do not adopt the language of *Ginsberg/Miller*, the risk that they will overstep those boundaries and run afoul of the First Amendment

is high. But Oregon's statutes tread nowhere near the boundaries of what is obscene by federal standards. Because the challenged Oregon statutes do not attempt to prohibit speech at the outer boundaries of obscenity, but only materials clearly obscene under federal law, the fact that they do not parrot the federal test does not present any such risk.

By simply parroting the language of the *Ginsberg*/*Miller* test, most states regulate the dissemination of sexually explicit materials to minors to the full extent of federal law. Some states have tried to push the envelope by ignoring the *Ginsberg/Miller* criteria and adopting laws with their own expansive definitions of what is obscene or harmful for minors. As plaintiffs correctly point out, such attempts have uniformly been struck down. (Powell's Br. 18) But plaintiffs erroneously conclude from this that state statutes must "contain" the federal criteria in order to comply with federal law. *Id.* That is logically incorrect, and it finds no support in the case law. The point that plaintiffs fail to appreciate is that it is permissible to adopt criteria that are *more* restrictive than the *Ginsberg*/*Miller* test, as long as the criteria adopted do not prohibit what the federal test protects. That is what the Oregon legislature has done here.

c. The United States Supreme Court has already recognized Oregon's distinct approach to regulating obscenity.

The United States Supreme Court long ago recognized that, unlike other states, Oregon has taken a particularly narrow approach to regulating obscenity, and that this approach is compatible with its decisions in *Ginsberg* and *Miller*. In *Paris Adult Theater v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), a companion case that came down on the same day as *Miller*, Justice Brennan—who authored *Ginsberg*—opined in dissent that the effect of the newly articulated *Miller* obscenity standards would be to invalidate every state obscenity statute in the country, *except those of Oregon*. Wrote Brennan,

> "While the Court's modification of the Memoirs test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For, under the Court's restatement, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements* * * . The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State, even under the Court's decision. See Oregon Laws 1971, c. 743, Art. 29, §§ 255-262."

413 U.S. at 96 n.13 (Brennan, dissenting). The majority in *Miller* responded to Justice Brennan's assessment of the new obscenity standard by stating:

> "We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as *construed* heretofore or hereafter, may well be adequate."

413 U.S. at 24 n.6 (emphasis added). Thus, the majority implicitly recognized that Oregon's then-existing obscenity laws did not need to be construed to satisfy the newly-articulated *Miller* test. Oregon laws were already sufficient on their face.

This history is important here, for two reasons. First, as a general matter, the Supreme Court recognized—contrary to plaintiffs' present contentions—that states like Oregon do *not* need to "contain" the *Miller* criteria to conform to federal law. Second, the Court sanctioned Oregon's narrow approach in particular. Enacted in 1971, Or. Rev. Stat. § 167.065—the predecessor to Or. Rev. Stat. § 167.054—was among the "recently revised" statutes to which Justice Brennan and the *Miller* majority were referring. Plaintiffs thus challenge statutes that are far narrower in scope than a law that the Supreme

Court, including the author of *Ginsberg*, already considered to be, for First Amendment purposes, "adequate" on its face.[21]

d. Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 are far narrower in scope than the child obscenity law upheld by the Supreme Court in *Ginsberg*.

The scope of materials restricted by Or. Rev. Stat. § 167.054 is far narrower than the statute that the Supreme Court upheld in *Ginsberg*. The statute in *Ginsberg* prohibited the sale of "nudity" which was harmful to minors; it also prohibited selling to minors "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct." By contrast, Or. Rev. Stat. § 167.054 prohibits furnishing only offensive and explicit images of certain specified sexually explicit conduct to children under the age of 13. Or. Rev. Stat. § 167.054(1).

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[21] No Oregon appellate court ever directly confronted the question whether Or. Rev. Stat. § 167.065, when considered with the defenses in Or. Rev. Stat. § 167.085, passed muster under the First Amendment. Because the law was struck down under the state constitution in *Maynard*, the majority did not reach the question whether it comported with the First Amendment. Notably, however, Judge Landau, who dissented in *Maynard* and therefore did reach the federal question, concluded that Or. Rev. Stat. § 167.065 was "virtually identical to the statute at issue in *Ginsberg* in all material respects." Likewise, in his dissent in *State v. Woodcock*, 75 Or. App. 659, 663 (1985), Judge Van Hoomissen concluded that Or. Rev. Stat. § 167.065 passed federal constitutional muster. Judge Van Hoomissen reached that conclusion based on his view that the legislative history demonstrated that the defenses in Or. Rev. Stat. § 167.085 were intended to apply to Or. Rev. Stat. § 167.065. *Id.*

The scope of materials subject to 167.057 is similar to that restricted by the statute at issue in *Ginsberg*. But the scope of *conduct* that 167.057 restricts is drastically narrower. The statute at issue in *Ginsberg* applied to all instances of furnishing the materials. Or. Rev. Stat. 167.057, by contrast, applies only when a person furnishes such materials for the purpose of sexually arousing themselves or the minor.

E. The district court correctly rejected plaintiffs' vagueness claims.

1. A statute is not unconstitutionally vague if, considered as a whole and in light of its purpose, it is clear what the statute proscribes in the vast majority of its intended applications.

Even laws that regulate protected speech are not required to achieve perfect clarity. *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). In attempting to determine whether a statute is impermissibly vague, the court must consider the statute as a whole, in the light of the statute's purpose. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The courts will not strike down an ordinance that defines its scope using words of "common understanding," even if those words may exhibit less than mathematical precision. *Id*. "Uncertainty at a statute's margins will not warrant facial invalidity if it is clear what the statute proscribes in the 'vast majority of its intended applications.'" *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1154 (9th Cir. 2001) (quoting

Hill v. Colorado, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)).

It is also well settled that, in evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or enforcement agency has proffered. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). In determining whether a state statute is too vague and indefinite to constitute valid legislation, the court must take the statute as though it reads precisely as it has been authoritatively construed by state courts. *Kolender*, 461 U.S. at 357 n. 4.

2. What Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 proscribe is sufficiently clear.

a. The language that plaintiffs assert is vague has already been authoritatively construed by Oregon courts.

Plaintiffs' vagueness argument focuses exclusively on the fact that both statutes exclude materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." Or. Rev. Stat. § 167.054(2)(b); Or. Rev. Stat. § 167.057(2). Plaintiffs argue that this exception is so ambiguous as to render the statute facially unconstitutional. (Powells Br. 37, ACLU Br. 25).

Plaintiffs' argument is without merit. The very terms that plaintiffs assert are unconstitutionally vague appear in other obscenity statutes and have already been construed by the Oregon courts. As explained above, Or. Rev. Stat. §§ 167.054 and 167.057 were enacted in response to the *Maynard* decision. The new statutes directly incorporate the language of the affirmative defense that the *Maynard* court construed. Or. Rev. Stat. § 167.054(2)(b); Or. Rev. Stat. § 167.057(2). For all of the reasons already given, that construction is controlling. Under Oregon law, the statutes apply to materials "primarily intended to sexually arouse" the viewer. That is not an impermissibly vague standard. As the district court correctly noted, once the statutes are interpreted correctly, plaintiffs' claims disappear.

b. The challenged statutes are as clear as laws upheld by this Court

Even in the absence of an existing state court construction, however, plaintiffs' vagueness claims would be unavailing. Plaintiffs complain that they cannot discern what constitutes an "incidental" part of a "nonoffending" whole, or what the meaning of "titillating" might be. But the Ninth Circuit and Supreme Court have routinely rejected vagueness challenges very similar to those raised by plaintiffs here.

"Titillate" means "to excite pleasurably or agreeably: arouse by stimulation." *See Maynard*, 168 Or App at 124. As the *Maynard* court

correctly noted, in the context of the statute as a whole, this patently refers to "sexual arousal." *Id.*

Plaintiffs' challenge to the term "incidental" is also unavailing. In *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1154 (9th Cir. 2001), the plaintiffs challenged an initiative requiring teachers to present curriculum "overwhelmingly" or "nearly all" in English. The plaintiffs argued "overwhelmingly" and "nearly all" were too vague to provide notice of how much English they were required to speak to avoid liability. *Id.* at 1151. The court rejected that argument, however, citing *Grayned* and explaining that the terms 'overwhelmingly' and 'nearly all' are terms of "common understanding" and that "[a]lthough they are not readily translated into a mathematical percentage, the First Amendment does not require them to be." *Id.* at 1152.

Similarly, exempting materials that, on the whole, are "nonoffending" does not render the statute unconstitutionally imprecise. In the context of a statute aimed at preventing the dissemination of "titillating" sexually explicit images to children 12 years old and younger, "offensive" is a word of common understanding and is sufficiently precise to limit the scope of the law in the vast majority of situations. *See Cal. Teachers Ass'n*, 271 F.3d at 1154 ("in analyzing whether a statute's vagueness impermissibly chills First Amendment

expression, it is necessary to consider the context in which the statute operates.").

Or. Rev. Stat. §§ 167.054 and 167.057 are as clear as obscenity laws that have been upheld against other facial vagueness challenges. Indeed, the references to the "prurient interest" and "patently offensive" in the *Miller* obscenity test, incorporated in so many state statutes, do no more to put people of "ordinary intelligence" on notice than do the references in the Oregon statutes to sexually explicit material that is "[]offending" and "titillating." *See also Young v. American Mini-Theaters*, 427 U.S. 50, 53, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (rejecting vagueness challenge to ordinance applicable to films "characterized by an emphasis" on sexual activities).

Plaintiff ironically argue that the *Maynard* exception is more vague than the *Miller* obscenity test because the *Miller* test had been construed by prior state court opinions. Plaintiffs ignore the *Maynard* exception has been construed by Oregon's courts.

c. Any vagueness inherent in Or. Rev. Stat. §§ 167.054 and 167.057 is ameliorated by the scienter requirements.

The Supreme Court has recognized that a scienter requirement may "mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499. In the regulation of obscenity, the inclusion of a scienter requirement

allows a statute to "avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Ginsberg*, 390 U.S. at 644 (rejecting vagueness challenge).

Or. Rev. Stat. § 167.054 applies only when a person "intentionally" furnishes a child with sexually explicit material and the person "knows" that material is sexually explicit material. Similarly, Or. Rev. Stat. § 167.057 focuses only on deliberate sexual predation; the law applies only when the perpetrator acts with the specific purpose of arousing their sexual desires or the sexual desires of the minor, or inducing the minor to engage in sex. The element of specific intent in these laws effectively removes any risk that the plaintiffs might inadvertently fall liable to the statute while engaging in protected speech, or that the plaintiffs might be deprived of notice that they were violating the law.[22]

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[22] Similar statutes that have been challenged on vagueness grounds have been upheld precisely because of such scienter requirements. *See, e.g.*, *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) (finding that scienter requirement narrowed the scope of challenged luring statute "as well as the ability of prosecutors and law enforcement officers to act based on their own preferences.") *See Williams*, 553 U.S. at ___ (May 19, 2008) (Stevens, J., concurring) (slip op. at 1-3) (child pornography statute is not vague or overbroad where examination of legislative history makes "abundantly clear" that Congress's aim was to target only materials with a "lascivious purpose").

F. The district court correctly concluded that plaintiffs had not brought a cognizable pre-enforcement, "as-applied" challenge.

In the context of a First Amendment claim, courts will avoid declaring a statute void *in toto* if a partial facial invalidation will suffice to render the statute constitutional. *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L.Ed. 2d 394 (1985) ("[W]here the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish ... [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact."). A court may thus declare a statute partially invalid to the extent that it reaches a discrete category of speech. Such a partial facial challenge is sometimes referred to as pre-enforcement, "as-applied" challenge when the plaintiffs argue that the particular kind of speech in which they engage is unconstitutionally restricted. *See, e.g.*, *American Booksellers Foundation v. Dean*, 342 F.3d 96, 105 (2d Cir.2003) ("as-applied" challenge by website providers was appropriate because "the speech at issue [was] discrete, [and] it [was] feasible to consider only the internet speech upon which plaintiffs based their suit.")

In this case, plaintiffs' complaint asked the court to declare that Or. Rev. Stat. §§ 167.054 and 167.057 are unconstitutional "as applied to plaintiffs and those on whose behalf they sue." (E.R. 25). Relying on *Dean*, plaintiffs argue that they have thus raised an "as applied" challenge. (Powell's Br 45; ACLU

Br. 28-29). But the statutes have not been applied to plaintiffs. In addition, as the district court correctly concluded, plaintiffs do not identify a discrete class of protected speech in which they engage to which the statutes apply. (E.R. 10). As a result, plaintiffs failed to bring cognizable pre-enforcement as-applied claims.

On appeal, plaintiffs contend that each of the plaintiffs is separately asserting a claim that the statutes are unconstitutional as applied to them, and that it was therefore incumbent on the District court to evaluate each of their claims separately. They ask this court to direct the district court to issue a permanent injunction barring the enforcement of the statutes against "appellants and those on behalf they sue."

This court should reject that argument for two reasons. First, it is not the argument that the plaintiffs made below. In their complaint and in the proceedings below, plaintiffs asserted that the statutes were unconstitutional both facially and as-applied to them *collectively*—that is, plaintiffs, as a group and in a single pleading, purported to assert a collective "as-applied" challenge.

Second, even considered separately, none of the plaintiffs states a cognizable as-applied challenge. None of the plaintiffs has attempted to identify a discrete category of protected speech in which they engage and to which the statutes apply that would feasibly allow the court to consider the

statute's constitutionality on a partial rather than facial basis.[23] Plaintiffs' arguments depend on an interpretation of the statutes that is so broad that, if accepted by this court, would render the statutes blatantly unconstitutional—if that argument is valid for one it is valid for all of them. Theirs is a facial challenge.

CONCLUSION

For the reasons given above, this court should affirm. The district court correctly denied plaintiffs' motion for a permanent injunction and declaratory relief, and correctly dismissed plaintiffs' claims.

Respectfully submitted,

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MC2:slc/1654060-v1

[23] In addition, even assuming that each of the plaintiffs had standing to assert as-applied challenges, none of the claims would be ripe for review. Whether someone has violated Or. Rev. Stat. § 167.054 or § 167.057 in a particular instance requires an analysis of, among other things, what materials were furnished and why they were furnished. No such factual record exists here.

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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.	U.S.C.A. No. 09-35153 STATEMENT OF RELATED CASES
AMERICAN CIVIL LIBERTIES UNION OF OREGON, *et al.*, Plaintiffs-Appellants, v. JOHN KROGER, et al. Defendants-Appellees.	U.S.C.A. No. 09-35154 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for appellees,

certifies that Ninth Circuit numbers 09-35153 and 09-35154 are both appeals from the same District Court Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellees' Brief is proportionately spaced, has a typeface of 14 points or more and contains 15,084 words.

DATED: September 25, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, I directed the Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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