Powell's Books, Inc., et al v. John Kroeger, et al Doc. 36

No. 09-35153

In the United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-08-501-MO

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Plaintiffs-appellants respectfully submit this brief in reply to Appellees' Brief ("State's Br."). Appellants will only address a few matters raised in Appellees' Brief, and respectfully refer the Court to Appellants' initial brief for discussion of the remaining issues before the Court.

ARGUMENT

I. WHETHER OR NOT SECTION 054 AND SECTION 057(1)(b)(A) COMPLY WITH THE OREGON CONSTITUTION'S FREE SPEECH REQUIREMENTS DOES NOT EXEMPT THOSE STATUTES FROM THE *MILLER/GINSBERG* STANDARDS UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

By asserting that the Oregon Constitution's free speech protection goes "beyond that afforded by the First Amendment" to the U.S. Constitution, the State argues that, as long as Oregon statutes comply with the Oregon Constitution, the statutes need not need meet the First Amendment's *Miller/Ginsberg* standards. State's Br. 9 – 11. That makes no sense.

The free speech protections of the Oregon Constitution are *not broader than* the First Amendment; they are *different from* the First Amendment. Some speech protected by the Oregon Constitution is not protected by the First Amendment. But the converse is also true: Some speech protected by the First Amendment is not protected by the Oregon Constitution, which permits restrictions on speech in the name of regulating "the harmful effects of speech". State's Br. 10. Therefore, compliance with Art. I, section 8, of the Oregon Constitution does not exempt an

Oregon statute from compliance with the First Amendment to the U.S. Constitution.

Here, the District Court found that, in imposing criminal sanctions for providing sexually explicit material to minors, Section 054 and Section 057(1)(b)(A) did not include *Miller/Ginsberg* standards:

- The statutes do not require that a work be considered as a whole.
- The statutes permit a finding of guilt without a determination that the work, considered as a whole, lacks serious value.
- The statutes permit a finding of guilt without a determination that the work is patently offensive.
- The statutes permit a finding of guilt without a determination that the work appeals to prurient interest.
- The statutes permit a finding of guilt without a determination that the work be considered in light of local community standards

(ER 017). Because Section 054 and Section 057(1)(b)(A) do not include these critical components of the *Miller/Ginsberg* standards, the statutes impose criminal liability for providing material protected by the First Amendment, and thus violate the First Amendment.

This fact was recognized by the District Court, which found that health education books, literature, romance novels, and other "explicit but not obscene"

works come within the language of what is prohibited by the statutes. (ER 024, 029). The District Court suggested such overbreadth would be solved by how prosecutors, judges and juries would apply the statutes. (ER 17) That is a wholly inappropriate approach and violates the First Amendment. A criminal statute, as written, must comply with the First Amendment. It is not enough to suggest that prosecutors would not bring cases permitted by the statute's language but prohibited by the First Amendment; that judges would give jury instructions based on the *Miller/Ginsberg* standards rather than the statute's text; and that, whether or not so instructed, juries would nevertheless ensure that the *Miller/Ginsberg* standards were applied.

Nor would it have been difficult for the Oregon legislature to have written statutes complying with both state and federal constitutions. A simple addition to the challenged statutes to the effect that Sections 167.054 and 167.057(1)(b)(A) do not apply to material that would be protected under the First Amendment under the *Miller/Ginsberg* test would have mitigated the constitutional infirmity.

The State also makes the remarkable contention that the U.S. Supreme Court "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*." State's Br. 54. This statement is plainly incorrect:

- The language relied upon by the State appears not in a decision of the U.S. Supreme Court, but in a footnote in a dissent by Justice Brennan. *Paris Adult Theater v. Slaton*, 413 U.S. 49, 96 n. 13 (1973) (Brennan, J., *dissenting*).
- Justice Brennan's dissent was authored in 1973, nine years before the divergence of Oregon free speech jurisprudence from First Amendment jurisprudence began to be developed by the Oregon Supreme Court in *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982), and fourteen years before that jurisprudence was first applied to obscenity legislation in *State v. Henry*, 302 Or. 510, 732 P.2d (1987).
- In 1973—the time of the decisions in *Miller* and *Paris Adult Theater*, both of which dealt with the concept of obscenity as applied to adults—Oregon had no obscenity statute.[1] Thus, as Justice Brennan noted, no amendment was required in Oregon because *there was no statute to amend.* In fact, however, the Oregon legislature enacted a

[1] The Oregon Criminal Code of 1971 did not impose any restriction on the distribution or exchange of obscene materials between willing adults. Meyer and Seifer, "Censorship in Oregon: New Development in an Old Enterprise," 51 Or. L. Rev. 537, 543 (1971-72); see also *State v. Brooks*, 275 Or. 171, 177, 550 P.2d 440, 442 (Or. 1976).

statute immediately after the *Miller* decision precisely following the language of the decision.[2]

II. CONTRARY TO THE STATE'S CONTENTION, THE CHALLENGED STATUTES ARE NOT LIMITED TO THE USE OF "HARDCORE PORNOGRAPHY" OR "PORNOGRAPHY" TO "GROOM OR LURE CHILDREN"

The State contends that the challenged statutes "are to provide a tool for prosecutors to combat sexual predators who use pornography to 'groom' or lure children." State's Br. 17; *see also* State's Br. 26-27 ("hardcore pornography").

In fact, the challenged statutes are not limited to "hardcore pornography" or "pornography." And it is not an element of the offense of either of the challenged statutes that the person have an intent to "groom or lure" children into sexual conduct.

A. The Statutes Impose Criminal Liability On Providing Health Education Materials, Literature, Romance Novels, and Other Protected Materials—and Are Not Limited To "Hardcore Pornography" or "Pornography"

Repeatedly, the State's brief refers to "hardcore pornography" or "pornography". Neither of these terms has a prescribed meaning, but, however they are defined, the challenged statutes are not so limited. The court below found that

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[2] Act of July 25, 1973, ch. 699, § 4(2), 1973 Or. Laws 1593.

- Kama Sutra,
- The Joy of Sex,
- How Sex Works,
- It's Perfectly Normal,
- Where Did I Come From?,
- Mommy Laid An Egg, *and possibly*
- Cascade AIDS Project or Planned Parenthood pamphlets

might be restricted under § 167.054 (ER 024). The District Court also held that the statute's definition as to § 167.057 appears to encompass;

- romance novels,
- The Joy of Sex, and
- Kama Sutra,

(ER 029). These, as well as other books which Appellants identified as coming within the scope of the statutes (*id.*), are not pornography, hardcore or other.

B. Section 057(1)(b)(A) Is *Not* a Luring Statute, and Imposes Criminal Liability Whether or Not Defendant Intended To "Lure" a Minor Into Sexual Activity.

The State devotes pages of its brief to a description of cases which hold that the First Amendment does not protect those who use First Amendment-protected materials to lure a minor into illicit sexual relations. State's Br. 43-46. Appellants

agree with those holdings. That is why Appellants did not challenge the portion of Section 057 which makes such conduct a crime.

While Section 057 is entitled "Luring a minor," Section 057(1)(b) sets forth two distinct offenses:

- Subsection (1)(b)(A) makes it a crime for a defendant to furnish visual or verbal descriptions of sexual conduct to a minor for the purpose of "Arousing or satisfying the sexual desires of the person or the minor." It is not an element of the offense under subsection (1)(b)(A) that the defendant intended to "lure" the minor into sexual activity, or "groom" the minor as a prelude to "luring."
- Subsection (1)(b)(B) makes it a crime for a defendant to furnish visual or verbal descriptions of sexual conduct for the purpose of "inducing the minor to engage in sexual conduct."

By repeatedly referring to "luring" or "enticement", the State improperly suggests that § 167.057(1)(b)(A) is a luring statute similar to those which have been upheld. In fact, at one point in its brief, the State declares (without any basis in the statutory language) that "[t]he statute prohibits only deliberate, sexual predation using pornographic materials." State's Br. 3. Elsewhere, in arguing that the challenged portion of § 167.057 prohibits conduct, not speech, the State states that § 167.057 "prohibits furnishing or using pornographic materials for the

purpose of sexually enticing minors," citing § 167.057(1)(b),[3] which includes both the challenged provision (which imposes criminal liability without a finding that the material was furnished for the purpose of sexually enticing minors), and the provision not challenged by Appellants (the actual luring provision).[4] At best that statement is misleading.

The State's reliance on *New York v. Foley*, 94 N.Y.2d 668, 731 N.E.2d 123 (2000) (State's Br. 44) compounds the confusion as to what Section 057(1)(b)(A) actually prohibits. *Foley* upheld a statute which prohibited the dissemination over the Internet of harmful to minors material (as defined under *Miller/Ginsberg*) with the specific intent to "importune, invite or induce" a minor unlawfully to engage in specified sex acts with the person or for the person's benefit. The *Foley* court found such an invitation or enticement distinguishable from pure speech. (*Id.* at 129).

The New York statute upheld in *Foley* is totally different from the statute before the Court. Section 167.057(1)(b)(A) does not require an intent by a predator to importune, invite or induce (*i.e.*, lure) a minor to participate in an illegal sexual activity. That subsection makes it criminal for a person to provide

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[3] State Br. 41-42.

[4] In addition, it is not an element of the offense, under Section 054 or Section 057, that the material be "pornographic." *See* point 2 above.

material with an intent to "arouse" the person or the minor, even if the person has no intent whatsoever to have any sexual contact—or any in-person contact at all—with the minor. For a 17-year-old to be sexually aroused by something he or she reads is not illegal (and, presumably, not unusual) in Oregon.

In an attempt to bring § 167.057 (1)(b)(A) closer to the cases which upheld luring statutes, the State offers two suggestions:

- calling the simple furnishing of the delineated materials "grooming", an attempt to move toward criminal child abuse; and
- suggesting that the Court can rewrite the statute so that the provision 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." State's Br. 48 (emphasis in original).

A statute which imposed criminal liability upon a person who furnished material with the specific intent to groom the recipient for unlawful sexual abuse might well survive constitutional scrutiny. But that is not what § 167.057(1)(b)(A) says. And Oregon's "interest in preventing pedophiles from 'grooming' minors for future sexual encounters can be effectively addressed through enforcement of" § 167.057(1)(b)(B), which regulates luring. *Cf. American Booksellers v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003).

As to the State's proposed reinterpretation of the statute including vague and undefined concepts such as "deviant sexual goal" and "personal, sexual purpose of arousing", the simple answer is that the proposed reinterpretation has no support in the language of the statute.[5] Nor does the fact that language in the statute is similar to language in a different Oregon statute defining "sexual contact" support this argument by the State, particularly when the key "touching" element of the definition is not found in § 167.057(1)(b)(A). Finally, this interpretation would undermine the State's reliance on *Maynard* (as adopted by the trial court) that the requisite intent to sexually arouse is the intent of the author of the material, not the person who provides it. (*E.g.* ER 21, ER 23, ER 25).

CONCLUSION

For the reasons set forth in Plaintiffs-Appellants' Brief and this reply brief, appellants respectfully request that this Court reverse the order below, hold § 167.054 and § 167.057(1)(a) and (b)(A) unconstitutional, and direct the district court to grant Appellants' request for a permanent injunction against their

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[5] If the Court were inclined to rewrite the statute (which appellants do not endorse), a more appropriate interpretation would be to read into both § 167.054 and § 167.057(1)(b)(A) an underlying requirement that those sections would not apply to any material protected by the First Amendment under the *Miller/Ginsberg* standard, so that a judge would be required to charge a jury on the basis of *Miller/Ginsberg*. Such an approach would not interfere with the legislative statutory scheme while, at the same time protecting the First Amendment rights of appellants and other citizens.

enforcement or, in the alternative, against enforcement of said sections against Appellants and those on whose behalf they sue.

Dated: October 8, 2009

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

1. This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because this brief contains 2,239 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

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

Dated: October 8, 2009.

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CERTIFICATE OF SERVICE

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

I hereby certify that I electronically filed the foregoing APPELLANTS' REPLY BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 8, 2009.

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