No. 09-35154

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF OREGON 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

APPELLANTS' REPLY BRIEF

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Unsurprisingly, there is a great deal of disagreement between plaintiffs and the State as to what the Statutes mean, whether they are unconstitutional facially or as applied, and whether they are unconstitutionally vague. Plaintiffs ACLU of Oregon ("ACLU"), Candace Morgan, Planned Parenthood of the Columbia Willamette, and Cascade AIDS Project's opening brief addressed most of the arguments the State raises in its responding brief. Therefore, rather than reiterating that analysis here, plaintiffs reply only to address a few discrete points.

A. "And" Means "And." The Exception Has Two Parts That Must Be Met to Remain Outside the Statutes' Reach.

As plaintiffs pointed out in their opening brief, the Statutes criminalize a broad range of material, with the primary exception occurring in the limited circumstances when the material forms "merely an incidental part of an otherwise nonoffending whole *and* serves some purpose other than titillation." ORS 167.054(2)(b), 167.057(2) (emphasis added). That exception is disjunctive; each part must be met to trigger the exception. Nothing could be more plain. Because the exception is narrow, the Statutes are broad.

The State cannot ignore the disjunctive exception. Therefore, it attempts to explain it away by arguing that "and" does not mean "and" – instead, it means "or." (Appellees' Brief at 30.) None of the cases the State cites show why that should be so in this case. In fact, in each of those cases, there was something

unusual about the *text* of the statutes at issue that required the court to read "and" as something else or left the statutes so ambiguous that the court had to turn to legislative history.

- In *Pendleton School Dist. v. State of Oregon*, 220 Or. App. 56, 185 P.3d 471 (2008), the court was construing a statute where "or" followed "and" in a command to the legislature to "do X and Y or Z."
- In *Ollilo v. Clatskanie P.U.D.*, 170 Or. 173, 180, 132 P.2d 416 (1942), the court construed the use of the phrase "and/or."
- In *U.S. v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003), this Court was forced to construe "and" to mean "or" because failing to do so would render another part of the statute meaningless.
- In *Slodov v. United States*, 436 U.S. 238, 246-47, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978), the word "and" could have reasonably meant "or" when read in context with another statute. The Supreme Court turned to legislative history to explain the statutory ambiguity.
- In *OfficeMax, Inc. v. U.S.*, 428 F.3d 583, 584 (6th Cir. 2005), by the court's own description, "the disputed 'and' appear[ed] in the context of several uses of the term that are alternately conjunctive and disjunctive." The court ultimately determined that "and" means "and," noting among other things

"the traditional presumption that Congress uses 'and' conjunctively" and "the awkwardness of construing the provision as the government does." *Id.*

The State does not point out anything about the text of the Statutes that is so unusual or ambiguous that it requires this Court to read the text differently than the legislature that enacted it. That is because there is nothing that compels that extraordinary step. "And" means "and."

B. The Statutes Are Unconstitutional on Their Face Because They Provide No Protection for Works of Serious Value.

The State raises a red herring when it repeatedly contends that plaintiffs are trying to require it to "parrot" the *Miller/Ginsberg* test. In fact, plaintiffs are doing nothing of the sort. Plaintiffs are simply pointing out that, in order to pass First Amendment muster, the Statutes must restrict only the speech that *Miller/Ginsberg* allows them to restrict.[1] In fact, the Statutes restrict much more. By making no protection for works of "serious value," the Statutes allow the restriction of many valuable works (including works used by plaintiffs) that focus on sex or have sex

[1] The State is mistaken when it contends that plaintiff ACLU supported the bill that enacted the Statutes. (Appellees' Brief at 42.) As plaintiffs already showed below, the ACLU opposed the bill and, when it came time for the state House of Representatives and Senate to consider the bill, submitted floor statements urging legislators to vote against it. (ER 133-36 (Declaration of Andrea Meyer).)

as a primary theme – even works that are age appropriate and are important to child development.

It is irrelevant whether the Statutes restrict too much because the legislature harbored some ill motive or because it was trying to craft a statute that met the standards of the Oregon Constitution. They still restrict substantially more than *Miller/Ginsberg* allows. Therefore, this Court should rule them unconstitutional on their face.

C. The State Ignores the Medical Evidence Raised Below.

The State urges this Court to determine that it is appropriate as a matter of law to restrict giving material deemed sexually explicit to preteens. As the basis of that argument, the State relies on assorted law review articles and the fact conclusions in dicta from a concurrence in one 1970s Supreme Court case. The State raises those arguments for the first time on appeal, and this Court should ignore them on that basis alone.

Even more crucially, the State overlooks the fact that the *only* evidence presented in this case regarding what is appropriate and healthy for children was presented by plaintiffs and supports plaintiffs' position that material that the Statutes restrict has important developmental and scientific value, even for preteens. Plaintiffs presented evidence from a physician, a psychologist, and a preteen sex educator explaining why that is so. (ER 110-12 (Declaration of

Dr. Richard S. Colman); ER 113-16 (Declaration of Camelia Hison); ER 117-20 (Declaration of Dr. Mark Nichols).) That evidence remains uncontradicted.

D. The Trial Court Properly Rejected the State's Argument That Plaintiffs' First-Amendment Protected Activity Is Illegal Conduct Rather Than Speech.

The State may not protect ORS 167.057(1)(b)(A) from First Amendment scrutiny by contending that it regulates conduct and not speech.[2] As the trial court appropriately pointed out, the cases the State cites show only that speech *integral to the commission of a crime* is unprotected under the First Amendment. (ER 1 (Opinion and Order) at 31-33.) Sexual arousal is not in and of itself a crime – in fact, the First Amendment protects material that creates normal, healthy sexual responses. *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989) (such material is not prurient for First Amendment purposes). In fact, even the crime of "sexual contact" in ORS 163.305, which the State cites as proof that ORS 167.057(1)(b)(A) forbids the commission of a crime, requires contact, not just the

[2] ORS 167.057(1)(b)(A) makes it a crime to "[f]urnish[] or use[] the representation, description or account [of sexual conduct] for the purpose of . . . [a]rousing or satisfying the sexual desires of the person or the minor."

provision of materials. Thus, ORS 167.057(1)(b)(A) is overbroad because it fails to forbid only speech that is integral to criminal conduct.

On the other hand, ORS 167.057(1)(b)(B),[3] which plaintiffs do not challenge, *does* forbid speech only when it is integral to committing the crime of inducing a minor to engage in sexual conduct. Plaintiffs respectfully submit that Section 1(b)(B) – not Section (1)(b)(A) – is the appropriate mechanism for addressing the criminal behaviors that the State laudably seeks to prevent.

[3] ORS 167.057(1)(b)(B) makes it a crime to furnish the same material for the purpose of "[i]nducing the minor to engage in sexual conduct."

Dated October 9, 2009.

Respectfully submitted,

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