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May 21, 2010

Ms. Molly Dwyer  
Clerk of the Court  
United States Court of Appeals  
for the Ninth Circuit  
Post Office Box 193939  
San Francisco, CA 94119-3939

Re: *Powell's Books, Inc. v. Kroger*  
United States Court of Appeals for the Ninth Circuit  
Case No. 09-35153  
Argument Date: June 8, 2010

Dear Ms. Dwyer:

In accordance with Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28-6, this letter provides an additional citation to very recent U.S. Supreme Court authority relevant to one of the issues presented by Plaintiffs-Appellants on this appeal.

The Court's attention is directed to the opinion of the U.S. Supreme Court in *United States v. Stevens*, 130 S. Ct. 1577 (2010), which was issued last month after completion of briefing in this case.

Defendants argued before the district court that the state would never criminally charge under the challenged statutes the materials put forward by plaintiffs. And the court below found that, while the challenged statutes failed to meet the Supreme Court's *Miller/Ginsberg* standard, the statutes complied with that standard because they would be constitutionally applied by "prosecutors, judges and juries." Appellants contended that the constitutional standard cannot be satisfied on the basis of a prediction of the exercise of prosecutorial discretion. (Plaintiffs-Appellants' Brief, Point IC, pp. 28-29).

In *U.S. v. Stevens*, the Chief Justice, writing for the eight-judge majority, supports Plaintiffs-Appellants' contention:

Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution

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for anything less,” Reply Brief 6-7. The Government hits this theme hard, invoking its prosecutorial discretion several times ... But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 473, 121 S.Ct. 903, 149 L.Ed.2d (2001).

Rejecting the government’s defense of its prosecutorial discretion, the Court struck down the statute as facially overbroad.

We greatly appreciate the Court’s consideration of this letter and opinion.

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

By: s/ Michael A. Bamberger  
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Enclosure

cc: Michael A. Casper  
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