

JOHN R. KROGER
Attorney General of Oregon
JEROME LIDZ
Solicitor General
MICHAEL A. CASPER
Assistant Attorney General
1162 Court Street N.E.
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Counsel for Appellees

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

MOTION TO CERTIFY QUESTION TO
OREGON SUPREME COURT

AMERICAN CIVIL LIBERTIES
UNION OF OREGON, et al.,

Plaintiffs-Appellants,

v.

JOHN KROGER, et al,

Defendants-Appellees.

U.S.C.A. No. 09-35154

MOTION TO CERTIFY QUESTION TO
OREGON SUPREME COURT

During last week's oral argument in this matter, the question arose whether this court should certify to the Oregon Supreme Court the issue of the proper construction of Or. Rev. Stat. §§ 167.054 and 167.057. Because resolution of the First Amendment issue presented by this case turns on the

meaning and scope of those statutes, the State submits that certification is appropriate. Indeed, under United States Supreme Court precedent, certification not only is appropriate, it is "essential." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395, 108 S.Ct. 636, 644, 98 L.Ed.2d 782 (1988). Thus, the State respectfully moves this Court to certify to the Oregon Supreme Court¹ the following questions:

1. Which, if any, of the books introduced as plaintiffs' exhibits below fall within the scope of Or. Rev. Stat. §§ 167.054 and 057 as properly construed? In particular, what meaning is to be given to Or. Rev. Stat. §167.054(2)(b) and §167.057(2) which exempt from liability 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?"
2. What meaning is to be given to Or. Rev. Stat. § 167.057(1)(a)(A), which makes it unlawful to furnish or use sexually explicit representations or descriptions "for the purpose of * * * [a]rousing or satisfying the sexual desires of the person or the minor?" Specifically, is the provision violated by a plaintiff bookseller who sells explicit representations, descriptions, or accounts to a minor

¹ Under Or. Rev. Stat. § 28.200, the Oregon Supreme Court "may answer questions of law certified to it by . . . a Court of Appeals of the United States" if the question may be determinative of the cause then pending in the certifying court and if the question appears to the certifying court to be one for which no controlling precedent in the decisions of the Supreme Court and the intermediate appellate courts exists. *See also Western Helicopter Services v. Rogerson Aircraft*, 311 Or. 361, 364-65, 811 P.2d 627 (1991) (discussing the statutory criteria).

Pursuant to Or. Rev. Stat. § 28.210, a certification order shall set forth:

- (1) The questions of law to be answered; and
- (2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

A copy of Or. Rev. Stat. §§ 28.200 and 28.210 is attached. (Att. 1).

knowing that the minor intends to use the materials for his or her own sexual gratification?

ARGUMENT

The central issue in this appeal is the scope of sexually explicit materials that are subject to regulation under Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057. The parties have sharply divergent views on this issue: Plaintiffs contend that the statutes are extremely broad in scope, and would criminalize furnishing to children or minors “almost all sexual education materials” and any books, films, or other materials containing any scenes that are “arguably intended to titillate.” (Powell’s Br. 31; ACLU Br. 33-39). Plaintiffs have offered as exhibits several books that they furnish to minors and that, they say, put them at risk of prosecution. (ER 63).

In contrast, the State has argued, and the District Court agreed, that the statutes apply only to materials that, when considered as a whole, are “primarily intended to sexually arouse.” (State’s Br. 20-25) (District Court’s *Opinion and Order*, ER-23). The State has taken the position that none of the materials that plaintiffs have offered as exhibits fall within the scope of either statute as properly construed. (State’s Br. 27). The State has further taken the position that, if the statutes are as broad as plaintiffs contend, then they are indeed unconstitutional. (State’s Br. 28).

Under circumstances nearly identical to those in this case, the United States Supreme Court has explained that certification to the state's highest court is "essential." At issue in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395, 108 S.Ct. 636, 644, 98 L.Ed.2d 782 (1988) was a Virginia statute that made it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is "harmful to juveniles." The plaintiffs filed a pre-enforcement challenge to the statute. Among other arguments, the plaintiffs argued that the law was facially overbroad in that it restricted access by mature juveniles to works that are "harmful" only to younger children. *Id.* Plaintiffs also argued that the statute was unconstitutionally vague because it failed describe what standard should be used in deciding whether a work is appropriate for juveniles of different ages and levels of maturity. *Id.* The plaintiffs offered as exhibits 16 books that, they contended, fell within the scope of the statute. *Id.*

The state defendants in *American Booksellers* took a very different view of the statute's reach. According to the defendants, the statute reached only "borderline obscenity" and did not apply to any of the materials that the plaintiffs had offered. The Virginia Attorney General further conceded that the challenged statute would be unconstitutional if construed as the plaintiffs

contended it should be and if it were so broad as to apply to the books that plaintiffs had offered as exhibits. *Id.* at 393 & n. 8, 108 S.Ct. at 643 & n. 8. No state court had definitively interpreted the statute. *Id.* at 395-97, 108 S.Ct. at 644-45. Under those circumstances, the Supreme Court held that certifying the issue to the Virginia Supreme Court was "essential":

Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court. * * * Consequently, we shall resort to its certification Rule 5:42 to ask the Virginia Supreme Court whether any of the books introduced by plaintiffs as exhibits below fall within the scope of the amended statute, and how such decisions should take into account juveniles' differing ages and levels of maturity.

Id. at 395. See also *Yniguez v. Arizonans for Official English* 42 F.3d 1217, 1227 -1228 (9th Cir. 1994) (citing *American Booksellers* but declining to certify state law question because state Attorney General had not conceded that law would be unconstitutional under plaintiffs interpretation); *Lind v. Grimmer*, 30 F.3d 1115, 1122 n. 7 (9th Cir 1994) (same).

This case is, in all material respects, identical to *American Booksellers*. In challenging the statutes as overbroad, plaintiffs here, like the plaintiffs in that case, have advanced an interpretation of those statutes that the State concedes, if accurate, would render the statutes blatantly unconstitutional. Just as in *American Booksellers*, plaintiffs here have offered a selection of books that it

believes are subject to the statutes. The State has argued that the challenged statutes are, as a matter of state law, drastically narrower than the plaintiffs allege, and that none of the books that plaintiffs have offered as exhibits fall within the scope of the statutes as properly construed.

This case is also like *American Booksellers* in that no controlling state precedent yet exists that directly decides this issue. The Oregon Supreme Court has not yet had occasion to interpret Or. Rev. Stat. §§ 167.054 and 057. In the State's view, and as recounted in its brief, an existing Oregon Court of Appeals decision, *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), *rev den*, 332 Or 137 (2001), interpreted the exemption that the legislature incorporated into Or. Rev. Stat. §167.054(2)(b) and §167.057(2). (State's Br. 11-14).

Admittedly, however, *Maynard* is not *directly* controlling because it was interpreting language in an earlier statute. The extent to which the *Maynard* opinion, and the Oregon legislature's subsequent reliance on it, determines the meaning of the challenged statutes is itself a state law question, and one that is appropriately directed in the first instance to Oregon's highest court.

Two additional circumstances make this case unique and also militate in favor of certification. The first is that this case occurs against the backdrop of Oregon's unique state constitutional approach to free speech and to obscenity—the Oregon legislature was mindful of both federal and state constitutional

constraints when it enacted these statutes. Article I, section 8 of the Oregon Constitution affords distinct and expansive protection to the right to free speech, and the Oregon Supreme Court has held that the federal obscenity test, which is incorporated into the statutes of most other states, constitutes “censorship” under the Article I, section 8, of the Oregon Constitution. *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987). Under the Oregon Supreme Court’s precedent, the legislature may never regulate material on the basis of its offensiveness or lack of value. *Id.* But the Oregon Supreme Court has nevertheless suggested that some narrower restrictions on furnishing pornography to minors may be possible under the State constitution. *Maynard*, 168 Or. App. at 124-25; *State v. Stoneman*, 323 Or. 536, 543-44, 920 P.2d 535 (1996).

When this Court asked plaintiffs whether certification was appropriate, plaintiffs acknowledged that certification to the Oregon Supreme Court was a possibility open to this Court, but contended that it was not necessary in this case. According to plaintiffs, no matter what the Oregon legislature may have intended the statutes to mean, the plain text that the legislature adopted cannot be interpreted in the manner suggested by the State and that the District Court. That argument disregards the fact that Oregon courts consider statutory text not in isolation, but *in context*—including the context of prior judicial opinions

such as *Maynard*. The import of both the *Maynard* opinion and the Oregon legislature's subsequent attempts to navigate a course that would meet the requirements of both the state and federal constitution is an issue best directed to the Oregon Supreme Court.

Another circumstance supporting certification in this case is Oregon's unique approach to statutory interpretation, which has very recently been altered by the Oregon Supreme Court. At the time that the District Court rendered its decision, statutory interpretation in Oregon was a three-part analysis governed by *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611, 859 P.2d 1143 (1993). The District Court carefully employed the *PGE* method in interpreting the statutes. (ER19-25). Last year, however, as explained in the State's brief, the Oregon Supreme Court altered the rules by combining the first two steps of *PGE*, and statutory interpretation is now a two-step analysis. *State v. Gaines*, 346 Or. 160, 171-72, 206 P.3d 1042 (2009). In light of the changes in state law since the District Court's opinion, certification is especially appropriate so that the Oregon Supreme Court can apply its recently adopted methodology.

/////

///// .

/////

CONCLUSION

For all of the above reasons, the State respectfully submits that this Court should certify the statutory interpretation questions to the Oregon Supreme Court.

Respectfully submitted,

JOHN R. KROGER #077207
Attorney General
JEROME LIDZ #772631
Solicitor General

/s/ Michael A. Casper
MICHAEL A. CASPER #062000
Assistant Attorney General

Attorneys for Appellees

Att-1

Or. Rev. Stat. § 28.200. Supreme Court authority to answer questions certified by other courts

The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a panel of the Bankruptcy Appellate Panel Service or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court and the intermediate appellate courts of this state.

Laws 1983, c. 103, § 1; Laws 1995, c. 197, § 1.

28.210. Certification order

A certification order shall set forth:

- (1) The questions of law to be answered; and
- (2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Laws 1983, c. 103, § 3.

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2010, I directed the Motion to Certify Question to Oregon Supreme Court 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:

Rachel G. Balaban
Sonnenschein & Rosenthal LLP
1221 Avenue of the Americas
24th Floor
New York, New York 10020

/s/ Michael A. Casper

MICHAEL A. CASPER
Assistant Attorney General

Attorney for Matt Shirtcliff,
John Haroldson; John Foote;
Joshua Marquis; Steve Atchison;
Paul Frasier; Gary Williams;
Everett Dial; Michael Dugan;
Jack Banta; Marion Weatherford;
Ryan Joslin; Tim Colahan;
John Sewell; Mark Huddleston;

Continued...

Peter L. Deuel; Stephen D. Campbell;
Edwin I. Caleb; David A. Schutt;
Douglass Harclerod;
Bernice Barnett; Jason Carlile;
Dan Norris; Walter M. Beglau;
Elizabeth Ballard;
Michael D. Schrunk; John Fisher;
Wade M. Mcleod;
William Bryan Porter; Dean Gushwa;
Tim Thompson; Daniel Ousley;
Eric J. Nisley; Robert Hermann;
Thomas W. Cutsforth; Brad Berry;
John Kroeger