

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

**RESPONSE TO MOTION TO CERTIFY QUESTION
TO OREGON SUPREME COURT**

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This Court has discretion to decide whether a state court's opinion would be important to its determination of the issues, and it only certifies questions in exceptional circumstances. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1227 (9th Cir. 1994); *Lind v. Grimmer*, 30 F.3d 1115, 1121 (9th Cir. 1994). This Court does not need to exercise its discretion to certify questions to the Oregon Supreme Court because Oregon's method of statutory construction is clear enough for this Court to reach a conclusion without additional guidance. Furthermore, this court has historically declined to certify in cases like this, where saving the statute from a First Amendment violation would require the state court to rewrite the statute entirely.

A. Certification is Inappropriate Because Oregon Law is Clear.

An opinion from the Oregon Supreme Court is not necessary to decide the issues here. As the state points out, the key issue is what the statutes (ORS 167.054 and ORS 167.057) mean. Plaintiffs contend that the statutes mean what they say on their face; the state contends that they mean something else, in an argument largely based on the legislative history of the statute.¹ In effect, the state would gut ORS 167.054(2)(b) and ORS 167.057(2) (the primary exceptions to

¹ As plaintiffs argued in their opening brief, the state is also mistaken about what inferences this court could logically draw from that legislative history. (Opening Brief at 17-19.)

liability) and replace them with broad exceptions created out of whole cloth – based only on the state’s representation that the legislature did not mean what it said. *Cf. United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, ___ L.Ed. 3d (2010) (rejecting such an approach).

The state’s position directly contradicts controlling authority from the Oregon Supreme Court, which has made exceptionally clear that the text of the statute is the determinative factor of the statute’s meaning. In *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009), the Court recently responded to an invitation to give dispositive weight to legislative history by resoundingly reaffirming the primacy of the statutory text:

[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes. Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. The formal requirements of law-making produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law[.] . . . For those reasons, text and context remain primary, and must be given primary weight in the analysis. . . .

[A] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it. Legislative history may be used to confirm seemingly plain meaning and even to illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all — that is, that there is a kind of latent ambiguity in the statute. . . . We emphasize again that ORS 174.020 obligates the court to consider proffered legislative history only for whatever it is worth

— and what it is worth is for the court to decide. When the text of a statute is truly capable of having only one meaning, *no weight can be given to legislative history that suggests — or even confirms — that legislators intended something different.*

Id. at 171-72 (Emphasis added; internal citations and quotation marks omitted.)

Thus, certification is inappropriate because in *Gaines* (and its predecessor, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993),) the Oregon Supreme Court has already provided the controlling authority necessary for this Court to decide whether the statutes mean what they say, or whether they mean something else.

B. Certification Is Inappropriate Because the Only Possible Action is to Strike Down the Statute or Rewrite It Entirely.

The Supreme Court declines to defer questions of statutory interpretation to state courts when a plaintiff challenges a statute on facial overbreadth grounds and the statute would require “a complete rewrite” to save it from a First Amendment violation. *Houston v. Hill*, 482 U.S. 451, 467-68, 107 S. Ct. 2502, 96 L.Ed. 2d 398 (1987) (declining to certify to state courts under such circumstances); *accord Yniguez*, 42 F.3d at 1227-28, and *Lind*, 30 F.3d at 1121-22. “It is the duty of the federal court to exercise its properly invoked jurisdiction” in such cases, “even if the statute has never been interpreted by a state tribunal.” *Houston*, 482 U.S. at 468. “A federal court may not properly ask a state court if it would care in effect to rewrite a statute.” *Id.* at 471.

In First Amendment cases, federal courts should also decline to certify because of the continuing chilling effect that will occur while the matter is delayed in state courts. *Id.* at 467-68 (“[T]o force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.”).

Virginia v. American Booksellers, 484 U.S. 383, 395, 108 S. Ct. 636, 644, 98 L. Ed. 2d 782 (1988), which the state cites as justification for its motion, is distinguishable in light of *Houston* and its progeny. First, no chilling effect was possible in that case because enforcement of the statute was already enjoined and would remain enjoined throughout the certification process. *Id.* at 397. Second, the statute was more ambiguous than the statutes at issue here. The state was not seeking to impose its own narrowing construction on the statute to comport with its understanding of legislative intent; it was advancing its own interpretation of what those ambiguous words meant.²

In this case, the words of the statutes speak for themselves, and saving them from a First Amendment challenge would require a “complete rewrite.” These

² For example, a key issue in *Virginia* was what measures the statute required from booksellers when it forbade the “display” of materials “in a manner whereby juveniles may examine or peruse.” *Id.* at 387-88. The answer to that question was immediately apparent from the text of the statute, but it was key to determining how burdensome the statute was.

circumstances allow (and may require) this Court to decide the issue rather than deferring to a state court.

C. Should the Court Certify, the Appropriate Questions are Those That This Court Could Already Ask and Answer Itself.

The state proposes two questions for certification, which are largely based on the questions the court asked in *Virginia*. If this Court decides to certify, it should craft simpler questions that address each portion of the statute separately, and that seek to determine the relationship of both statutes to the *Miller/Ginsberg* criteria. Plaintiffs propose the following:

1. Does ORS 167.054(1) apply to plaintiffs and their activities? If so, does ORS 167.054(2)(b) exempt plaintiffs and their activities? Does any other exception apply?
2. Does ORS 167.054(1), when read together with ORS 167.054(2)(b), incorporate all the requirements of *Miller v. California*, 413 U.S. 15 (1973) and *New York v. Ginsberg*, 390 U.S. 629 (1968)?
3. Does ORS 167.057(1)(a) and (1)(b)(A) apply to plaintiffs and their activities? If so, does ORS 167.057(2) exempt plaintiffs and their activities? Does any other exception apply?
4. Does ORS 167.057(1)(a) and (1)(b)(A), when read together with ORS 167.057(2), incorporate all the requirements of *Miller* and *Ginsberg*?

Plaintiffs respectfully suggest that, when it considers these questions, this Court will be able to answer them itself based on the plain text of the statute.

Dated June 24, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

United States Court of Appeals Docket Number: No. 09-35154

I hereby certify that I electronically filed the foregoing RESPONSE TO MOTION TO CERTIFY QUESTION TO OREGON SUPREME COURT 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 June 24, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated June 24, 2010.

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