

No. 09-35153, 09-35154

**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.

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

**PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION OF
THE ORDER ON THEIR MOTION TO FILE A SINGLE EXCERPT OF
RECORD AND FOR COMBINED ORAL ARGUMENT, AND
PLAINTIFFS-APPELLANTS' MOTION FOR AN EXTENSION OF TIME**

P.K. Runkles-Pearson, OSB No. 061911
pkrunkles-pearson@stoel.com
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Cooperating Attorney
ACLU Foundation of Oregon

*Attorney for Plaintiffs-Appellants
ACLU of Oregon, et al.*

Michael A. Bamberger
mbamberger@sonnenschein.com
Richard M. Zuckerman
rzuckerman@sonnenschein.com
SONNENSCHN NATH &
ROSENTHAL LLP
1221 Avenue of the Americas
24th Floor
New York, NY 10020
Telephone: (212) 768-6700
Facsimile: (212) 768-6800

*Attorney for Plaintiffs-Appellants
Powell's Books, Inc., et al.*

Denise Fjordbeck, OSB No. 822578
denise.fjordbeck@doj.state.or.us
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 947-4700
Facsimile: (503) 947-4793

*Attorney for Defendants-Appellees
John Kroger, et al.*

Plaintiffs-Appellants Powell's Books, Inc., et al. in 09-35153 and Plaintiffs-Appellants ACLU of Oregon, et al. *in 09-35154* respectfully move for reconsideration of the Order entered on June 3, 2009 (the "June 3 Order"), which consolidated these appeals and directed that a consolidated opening brief be filed by June 5, 2009. Plaintiffs-Appellants respectfully request that the Court, upon reconsideration, modify the June 3 Order to direct that a single excerpts of record be filed on the two appeals, and that the two appeals be argued together, but that the cases not be consolidated, so that separate briefs will filed in the two appeals. Alternatively, Plaintiffs-Appellants request that this Court grant Plaintiffs-Appellants an extension of time to file a consolidated brief until two weeks after entry of an Order on this motion.

On May 7 and 8, Plaintiffs-Appellants in these two cases filed separate motions requesting that this Court hear argument on the cases on the same day and allow them to file a single excerpt of record.

These appeals arise out of the same proceedings and same decision rendered in the United States District Court for the District of Oregon. The district court's decision treated the claims of Powell's Books, Inc., et al. (Plaintiffs-Appellants in No. 09-35153) very differently from the claims of American Civil Liberties Union of Oregon, et al. (Plaintiffs-Appellants in No. 09-35154). Therefore, the two sets of Plaintiffs-Appellants filed separate notices of appeal, represented by separate

counsel, and are prepared to file separate briefs on appeal, raising different issues. The motion for a combined excerpt of record and for combined argument was made to promote judicial efficiency in the hearing of two different appeals.

On June 3, 2009, this Court construed Plaintiffs-Appellants' motions as requesting consolidation of the cases for all purposes and granted the motions as construed. It ordered Plaintiffs-Appellants to file a joint brief on June 5, 2009—two days after entry of the June 3 Order.

Plaintiffs-Appellants respectfully request that this Court reconsider its June 3 Order. To clarify, Plaintiffs-Appellants did not intend to request consolidation for all purposes, but only to file a joint excerpt of record and a joint oral argument. Plaintiffs-Appellants in 09-35153 have different interests and, therefore, different approaches to this appeal, from Plaintiffs-Appellants in 09-35154. The two sets of Plaintiffs-Appellants believe that the separate briefs that they have written are the best mechanism to clarify those different interests and approaches for the Court. Because no party had sought consolidation, the two sets of Plaintiffs-Appellants had been proceeding with the expectation that they would file their separate opening briefs on the schedule previously set by this Court— in 09-35153 on June 4, 2009, and in 09-35154 on June 5, 2009. Each of those opening briefs is substantially complete, and would have been filed by that deadline but for the Court's entry of the June 3 Order.

Plaintiffs-Appellants respectfully request that the Court modify the June 3 Order to grant the relief originally sought, so that there is a combined excerpt of record, and combined oral argument, and that the Court direct that the separate briefs on the two appeals be filed within three business days after entry of the Order.

If the Court declines to reconsider its June 3 Order, Plaintiffs-Appellants respectfully request that the Court extend the time to file a consolidated brief to two weeks after the entry of the Court's Order on this motion for reconsideration. Plaintiffs-Appellants' briefs are substantially completed. However, combining two very different briefs into one, and coordinating regarding the substance of that consolidated brief, would require counsel to devote significant additional time. In addition, counsel request the extension of time to allow the many Plaintiffs-Appellants in this matter to review the final document before filing.

WHEREFORE, Plaintiffs-Appellants respectfully request that this Court reconsider its June 3, 2009 order and that, in the alternative, the Court extend the time to file a joint opening brief to a date two weeks after the entry of the Court's order on this motion for reconsideration.

Dated June 4, 2009.

STOEL RIVES LLP

s/ P. K. Runkles-Pearson

P. K. Runkles-Pearson, OSB No. 061911
Attorney for Plaintiffs-Appellants
ACLU of Oregon, et al. in 09-35154

SONNENSCHN NATH &
ROSENTHAL LLP

s/ Michael A. Bamberger (with permission)

Michael A. Bamberger
Richard M. Zuckerman
rzuckerman@sonnenschein.com
Attorney for Plaintiffs-Appellants
Powell's Books, Inc., et al. in 09-35153

CERTIFICATE OF SERVICE

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

I hereby certify that I electronically filed the foregoing PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION OF THE ORDER ON THEIR MOTION TO FILE A SINGLE EXCERPT OF RECORD AND FOR COMBINED ORAL ARGUMENT, AND PLAINTIFFS-APPELLANTS' MOTION FOR AN EXTENSION OF TIME 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 4, 2009.

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 4, 2009.

STOEL RIVES LLP

s/ P. K. Runkles-Pearson

P. K. Runkles-Pearson, OSB No. 061911

Attorney for Plaintiffs-Appellants

ACLU of Oregon, et al. in 09-35154