

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

Michael A. Bamberger
mbamberger@sonnenschein.com
Rachel G. Balaban
rbalaban@sonnenschein.com
SONNENSCHN NATH & ROSENTHAL LLP
1221 Avenue of the Americas, 24th Floor
New York, NY 10020
Telephone: (212) 768-6700
Facsimile: (212) 391-1247

FILED '08 APR 25 15:32 USDC-ORP

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

POWELL'S BOOKS, INC., et al.,

Civil No.

CV '08-0501-MO

Plaintiffs,

v.

DECLARATION OF
CANDACE MORGAN

HARDY MYERS, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF
OREGON, et al.,

Defendants.

I, CANDACE MORGAN, certify and declare as follows:

Background

1. I am a plaintiff in this action. I submit this declaration in support of plaintiffs' motion for a preliminary injunction to enjoin the State from enforcing ORS 167.051 to 167.057 (the "Statute") an unconstitutional censorship statute.

2. I am a resident of Multnomah County. I teach current and future librarians enrolled in the Oregon distance-learning cohort of the Emporia State University School of Library and Information Science. I am also a grandparent of a seven-year-old boy, for whom I provide care two afternoons a week. One of our regular activities is visiting the library together. In addition, I sometimes go to the bookstore with him to help him select books to purchase with gift certificates he receives. The Statute restricts the materials that I can provide to my grandson and presents the threat that I will be prosecuted if I provide materials that violate the Statute.

Fear of Prosecution Under the Statute

3. I fear that I may be at risk of criminal prosecution under the Statute for permitting minors to access constitutionally protected material which could be deemed "sexually explicit" or to appeal to a person's "sexual desires" under the meaning of the Statute.

4. Under ORS 167.054, it is a crime to "intentionally furnish" or "intentionally permit" anyone under the age of 13 to view "sexually explicit material" if the accused "knows that the material is sexually explicit material." ORS 167.054(1). Such material includes material containing visual images—including paintings and drawings—of masturbation, intercourse or genital/oral/anal contact between people and animals. *See* ORS 167.051(5). It could be interpreted to include materials that I might give to my grandson or materials he might use or

purchase while under my supervision at the library or bookstore. “[F]urnish” is defined broadly, including “to sell, give, rent, loan or otherwise provide.” *See* ORS 167.051(2).

5. ORS 167.054 provides two exceptions to prosecution. First, under ORS 167.054(2)(a), certain persons, including employees of museums, schools, medical treatment providers, or public libraries, may not be prosecuted. Although I have a background in library science, I would not fall under that exception when giving materials to my grandson in a nonprofessional capacity. Second, under ORS 167.054(2)(b), I would not be liable if the sexually explicit portions of the material furnished, or permitted to be viewed, “form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.” I believe that exception is vague. I have no way of knowing, and do not understand, what specific material qualifies for that exception.

6. I understand that, under ORS 167.054(3)(a), an affirmative defense exists for a criminal defendant who can prove that the material was furnished “solely for the purpose of sex education.” I may be able to assert that defense, depending on the material I chose to give my grandson. However, asserting that defense would not guarantee me immunity from prosecution or a successful defense to prosecution. In addition, even if I were able to assert the defense successfully, the defense would not exempt me from the expense, inconvenience, and stigma of a criminal prosecution. Therefore, the availability of the affirmative defense does not remove the chilling effect that the Statute has on my constitutionally protected activities.

7. Under ORS 167.057, it is a crime to disseminate to anyone under the age of 18 a “visual representation or explicit verbal description or narrative account of sexual conduct” for the purpose of “arousing or satisfying the sexual desires of the person or the minor . . .” I understand that is a very broad provision encompassing material with textual descriptions, as

well as visual depictions. It could be interpreted to include materials that I might give to my grandchild. I also believe that statute is vague because the phrase “arousing or satisfying the sexual desires” is open to a wide variety of interpretations. ORS 167.057 is also vague because it contains the same undefined and vague “incidental part” exception contained in ORS 167.054.

8. Under ORS 167.057, furnishing a minor with prohibited materials is a crime if the material is furnished for the purpose of satisfying the sexual desire of the minor. As described above, some materials that I might provide to my grandson might contain sexually related content that he might find sexually arousing. Under ORS 167.057, therefore, I would be committing a felony if my grandson obtained materials from me or while visiting the library or bookstore with me to satisfy his sexual desire or to become sexually aroused while reading those materials.

9. Two examples of materials might violate the Statute are the books "It's So Amazing" and "It's Perfectly Normal" by Robie H. Harris. These are both books that I have considered providing to my grandson. They contain candid, straightforward information about human sexuality, including drawings of uncovered female breasts and male and female genitalia (including erect penises), a boy masturbating, a man wearing a condom and naked people in bed together, descriptions of sexual intercourse and discussions of homosexuality. "It's So Amazing" is recommended for children aged seven and older. "It's Perfectly Normal" is for kids 10 and older. It is impossible to tell, given the vagueness of the statute, whether those materials "serve some purpose other than titillation" or whether they "form merely an incidental part of an otherwise nonoffending whole." I believe that there is truly no way for me to ensure compliance with the Statute. My best effort at complying would be to refrain from using any materials around my grandson – or even refraining from taking him to the library or bookstore – if I even

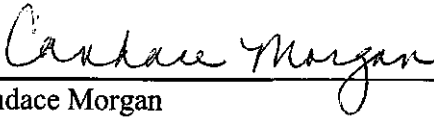
suspected that the materials he would encounter might be objectionable to some unknown third party. Doing that would certainly hamper my own right to use constitutionally protected materials, and my right to share those materials with my grandson.

10. In short, if the Statute is not enjoined, then I will be forced to either risk criminal liability or to self-censor any materials that I use or share.

11. For all the reasons stated above, I fear prosecution under the Statute and request that such prosecution be enjoined.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 22, 2008.


Candace Morgan