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

FILED 08 APR 25 15:31 USD-CORP

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) 768-6800

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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

Plaintiffs,

v.

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

Defendants.

Civil No.

CV '08-0501-MO

DECLARATION OF CHRISTOPHER
FINAN

DECLARATION OF CHRISTOPHER FINAN

Christopher Finan declares under penalties of perjury:

Background

1. I am the President of the American Booksellers Foundation for Free Expression ("ABFFE"), a plaintiff in this action. I submit this affidavit on behalf of ABFFE in support of plaintiffs' motion for a preliminary injunction to enjoin the State from enforcing ORS 167.051 to 167.057 (collectively referred to as the "Statute"), a censorship law which is unconstitutional.
2. ABFFE is located in New York, New York, and is affiliated with the American Booksellers Association ("ABA"), the leading association of general interest bookstores in the United States, with approximately 1,700 bookstore members who do business in 1,900 locations.
3. ABFFE was formed in February 1990 to combat escalating threats to the First Amendment freedoms of booksellers, publishers, librarians, and other distributors of books, magazines, records, films, and videos. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, as well as to promote and protect the free expression of ideas, particularly in the choice of reading materials.
4. ABFFE has traditionally been a strong supporter of the First Amendment and has been at the forefront of insuring public access to information. Since its inception, ABFFE has been an active champion of First Amendment rights through its support of the National Endowment for the Arts and the Salmon Rushdie Defense

Committee USA, its service as *amici* in a number of Supreme Court cases involving First Amendment issues, its distribution of educational materials on current First Amendment issues, its production and distribution of materials to celebrate Banned Books Week each year, and various other efforts.

5. Many ABFFE members are bookstores and booksellers, approximately 36 of which are located in the state of Oregon, including, for example, co-plaintiff Powell's Books Inc. ABFFE's members are not "adult bookstores."

Fear Of Prosecution Under the Statute

6. ABFFE and its Oregon member bookstores and booksellers (hereinafter, "ABFFE's Oregon members") fear that they may be at risk of criminal prosecution under the Statute for permitting minors to access or purchase constitutionally protected material which could be deemed "sexually explicit" or to appeal to a person's "sexual desires" under the meaning of the Statute. ABFFE's Oregon members, however, do not know how to determine what books may cross the vague lines established under the Statute.

7. Under the Statute, it is a crime to furnish "sexually explicit material" to anyone under the age of 13 if the person "intentionally furnishes a child, or intentionally permits a child to view, sexually explicit material and the person knows that the material is sexually explicit material." ORS 167.054. Such material includes visual images -- including paintings and drawings -- of masturbation, intercourse or genital/oral/anal contact between people or animals. "[F]urnish" is defined broadly, including "to sell, give, rent, loan or otherwise provide." See ORS 167.051.

8. There are two exceptions under ORS 167.054. First, certain persons, including employees of museums, schools, or public libraries, are not liable. ABFFE's Oregon members do not fall into this exception. Second, under the Statute, ABFFE's Oregon members 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." The Statute, however, does not define the terms contained in this exception. Moreover, the terms are not readily understandable and are vague.

9. Under the Statute, it also is a crime of "luring" if a person disseminates 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 . . ." ORS 167.057. Based on the plain language of the Statute, I understand this to include both textual descriptions and visual depictions. I also believe that the phrase "arousing or satisfying the sexual desires," which is undefined under the Statute, is vague. In addition, this section contains the same undefined and vague "incidental part" exception.

10. Any general bookstore, including ABFFE's Oregon members, is likely to contain hundreds or even thousands of books or other materials with sexually-related narrative or pictorial content, including, in some instances, nudity, that could be considered "sexually explicit" or "visual representation[s] or explicit verbal description[s] or narrative account[s] of sexual conduct" that may appeal to a person's "sexual desires." Such literary greats as Nabokov's *Lolita*, William Faulkner's *Sanctuary*, and Philip Roth's *Portnoy's Complaint* come to mind. In addition, ABFFE's Oregon

members sell books relating to a variety of sexual education and health topics, including the prevention of, and risks associated with, STDs and AIDS and teenage pregnancy. Such books are appropriately directed to minors as well as to adults. Books addressing issues of homosexuality or sexuality in general also are sold at many bookstores and again, may be directed to minors as well as to adults as a means of providing desired information and education, e.g. Robie H. Harris' *It's Perfectly Normal* and *It's So Amazing* (Candlewick Press). ABFFE's Oregon members fear prosecution under the Statute if they continue to sell these and other mainstream materials containing sexually-related narrative or pictorial content in the same manner that some have done for decades.

11. For example, under the Statute, ABFFE's Oregon members risk criminal prosecution for furnishing the constitutionally protected materials described above to persons "under 13 years of age." ORS 167.054. It would be difficult, if not impossible, to "card" or determine whether a child is under 13 years of age. In addition, under ORS 167.057, furnishing a 17 year-old minor with such material is a crime if furnished for the purpose of satisfying the sexual desire of the 17-year old. As discussed above, ABFFE's Oregon members sell books or other materials containing sexually-related content that may be sexually arousing, depending on the individual. Some of these materials may even be directed to minors. While it of course is not a crime for a 17 year-old to satisfy his or her sexual desire by reading such a book, or to become sexually aroused while reading such a book, it is a felony for a bookstore to furnish that book.

12. Even if ABFFE's Oregon members had the time to review each book individually before they shelved it to engage in the sorts of subjective acts required under the Statute -- which they do not -- determining which books fall under the Statute's proscriptions is not possible and would lead to overinclusive and unconstitutional self-censorship. Given the vagueness and breadth of the Statute, to ensure full compliance, ABFFE's Oregon members likely will be forced to stop selling materials with sexually-related content, physically segregate such materials in the store or exclude minors from the store altogether. All of these options impermissibly infringe on a bookseller's constitutional rights. Moreover, the right of their patrons -- adults and minors alike -- to access and purchase such materials will be seriously infringed.

Conclusion

13. For all the reasons stated above, ABFFE's Oregon members fear prosecution under the Statute. If the Statute is not held unconstitutional, its members will be forced either to self-censor materials available in their stores to a great degree or to risk criminal liability. (I understand that ABFFE's members have not self-censored to date because they believe the law is unconstitutional.)

Dated: April 14, 2008


CHRISTOPHER FINAN