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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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

Civil No. **CV '08 - 0501 MO**
DECLARATION OF BRAD SMITH

v.

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

Defendants.

DECLARATION OF BRAD SMITH

Brad Smith declares under penalties of perjury:

Background

1. I am the owner of Bluejay, Inc. d/b/a Paulina Springs Books (“Paulina’s”), a plaintiff in this action. I submit this affidavit on behalf of Paulina’s 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”), an unconstitutional censorship law which will apply to mainstream book stores such as Paulina’s.

2. Paulina’s is a retailer of predominantly new books, with a broad range of book genre including, but not limited to, general fiction, history, outdoor recreation, children and adolescents, travel, self-help, education, parenting, Christian, and inspirational. We operate two stores. Our store in Sisters, OR has been in operation since 1992. We opened a store in Redmond, OR on December 1, 2007.

Fear Of Prosecution Under the Statute

3. Paulina’s fears that it may be at risk of criminal prosecution under the Statute for permitting minors to access or purchase constitutionally-protected material at our bookstores, which could be deemed “sexually explicit” or to appeal to a person’s “sexual desires” under the meaning of the Statute. Paulina’s, however, does not know how to determine what books may cross the vague lines established under the Statute.

4. I understand that 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 that which contains visual images -- including paintings and drawings -- of masturbation, intercourse or genital/oral/anal contact between people and animals. “[F]urnish” is defined broadly, including “to sell, give, rent, loan or otherwise provide.” See ORS 167.051.

5. There are two exceptions under ORS 167.054. First, certain persons, including employees of museums, schools, or public libraries, are not liable. Paulina’s does not fall into this exception. Second, I understand that Paulina’s 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 this exception is vague and do not understand what specific material would fit under this exception.

6. Under the Statute, it also is a crime 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. I understand this to be very broad encompassing material with textual descriptions, as well as visual depictions. I also believe that the phrase “arousing or satisfying the sexual desires,” which is undefined under the Act, is vague. In addition, this section contains the same undefined and vague “incidental part” exception.

7. My understanding is that under ORS 167.054, Paulina’s risks criminal prosecution for furnishing constitutionally-protected materials to persons “under 13 years of age.” While we may from time to time suggest to a youthful customer that a

desired purchase may be inappropriate, it would be difficult, if not impossible, to “card” or determine whether a child is under 13 years of age at our bookstores. 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. Again, determining whether a user is 17 with any accuracy is not feasible. In addition, Paulina’s sells books and other materials containing sexually-related content that may be sexually arousing, depending on the individual. Under this section, Paulina’s would be committing a felony if a 17 year-old purchased a book to satisfy his or her sexual desire or to become sexually aroused while reading such a book -- an act that individual has a right to do.

8. Paulina’s has in stock over 11,000 volumes constituting over 9,000 titles. We receive on average over 50 to 150 new titles per week. Obviously we cannot read each new title to determine whether there are any sexual explicit portions and if so whether such portions “serve some purpose other than titillation” (even if I knew what that meant). On Exhibit A are listed just a few examples of the multitude of books, magazines or other material sold at Paulina’s likely to contain sexually-related narrative or pictorial content, including, in some instances, nudity, that could be considered by some “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.” I believe the only way for Paulina’s to ensure compliance under the Statute at our stores would be to eliminate those materials entirely. Developing an alternative segregated shelving arrangement at our stores for books that may be covered under the Statute -- if my staff and I could even determine that book by book, which I believe we could not without being extremely overinclusive -- is totally impractical, unduly burdensome and

would consume an inordinate amount of time that we do not have. If forced to do so, we would have to cover up or rope off many sections in my stores to ensure that minors would not have access. This would be extremely inconvenient to customers, would completely alter the ambience of the stores, and undoubtedly would have an adverse effect on sales.

9. In short, if the Statute is not enjoined and Paulina's must self-censor books, it will lose the profits from the sale of those books, and lose even more business because it will appear that the bookstore has an incomplete or inadequate listing of books in our inventory. As importantly, adults and older teenagers will be impeded from access to constitutionally-protected materials.

Conclusion

10. For all the reasons stated above, I fear prosecution under the Statute. If it is not enjoined, Paulina's will be forced either to self-censor our books and magazines to a great degree or risk criminal liability. (The only reason we have not self-censored to date is that we have been advised that the Statute is unconstitutional.)

Dated: April 16, 2008



BRAD SMITH

Exhibit A

Maya Angelou, *I Know Why the Caged Bird Sings*

Steinbeck, *Of Mice and Men*

Romance novels, including those by Nan Ryan, Linda Howard, & Cheyenne McCray

Books of Photography, including *The Full Body Project*

Comfort, *Joy of Sex*

Niffenegger, *Time Traveler's Wife*

Blume, *Forever*

Sex education books for teenagers, including *Body Drama*, *Sex for Guys*, *It's Perfectly Normal*

Nabokov, *Lolita*