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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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs, which are mainstream disseminators, retailers, publishers, distributors, sellers, purchasers and recipients of periodicals, books, comics, newspapers, motion pictures, videos and sound recordings that are sold, rented or distributed in the state of Oregon (the "State"), seek a preliminary injunction to prevent the enforcement of ORS 167.051 to 167.057 (the "Statute"), a censorship law that is unlawful under the First and Fourteenth Amendments because it criminalizes material that is protected as to both adults and minors, and under the Fifth and Fourteenth Amendments because it is unconstitutionally vague. Under the Statute, the State can prosecute Plaintiffs, their members and their customers for the exercise of their constitutional rights, thus threatening them with irreparable harm. Plaintiffs seek to enjoin the State from enforcing the Statute pending a decision on its constitutionality.

II. FACTS

A. THE STATUTE AND ITS PROVISIONS

On July 31, 2007, Governor Kulongoski signed into law House Bill 2843, effective January 1, 2008 as chapter 869 of Oregon Laws 2007, part of which is codified as the Statute. The Statute is a censorship law that is unconstitutional in a multitude of ways.

1. ORS 167.054: Furnishing Sexually Explicit Material

ORS 167.054(1) provides that a person commits the crime of furnishing sexually explicit material to a child "if the person intentionally furnishes[1] a child,[2] or intentionally permits a

[1] The Statute defines "furnishes" as "to sell, give, rent, loan or otherwise provide." ORS 167.051(2).

[2] The Statute defines "child" as a person under 13 years of age. ORS 167.051(1).

child to view, sexually explicit material[3] and the person knows that the material is sexually explicit material."

a. Exceptions to Liability Under ORS 167.054

The following two categories of people are not subject to prosecution under ORS 167.054: (1) employees of museums, schools, law enforcement agencies, medical treatment providers or public libraries, when acting within the scope of regular employment, (2) and persons who furnish, or permit the viewing of, material the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.

Other people who do the same kind of work as the employees listed in the first exemption, such as employees at private libraries, are not exempt; only people with the precise positions listed are exempt. Notably, the exempt group does not include parents or legal guardians. In addition, the second exemption has two requirements, both of which must be met: The sexually explicit portion of material must form an incidental part of an otherwise nonoffending whole *and* it must serve some purpose other than titillation. A retailer selling a book about sex to a child would be liable under ORS 167.054, even if the book was a grade-school textbook intended to educate children about reproduction. Finally, there is no intent to harm required under ORS 167.054; the only intent required is the intent to furnish qualifying material.

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[3] The Statute defines "sexually explicit material" as "material containing visual images of: (a) [h]uman masturbation or sexual intercourse; (b) [g]enital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; or (c) [p]enetration of the vagina or rectum by any object other than as part of a personal hygiene practice." ORS 167.051(4).

b. Affirmative Defenses to Liability Under ORS 167.054

ORS 167.054 provides three affirmative defenses to prosecution:

(1) That the material was furnished, or the viewing permitted, solely for the purpose of sex education, art education or psychological treatment and was furnished or permitted by the child's parent or legal guardian, an educator or treatment provider, or another person acting on behalf of such party;

(2) That the defendant reasonably believed the person at issue was not a child; or

(3) That the parties are within three years of age.

Though a sex or art educator may raise a defense after being charged with violation of ORS 167.054, the educator is not exempt from prosecution in the same way a museum or school employee would be. The terms "art education" and "sex education" are not defined in the Statute. Therefore, people who wish to assert that defense must take the risk when providing material that they may not be able to assert the defense successfully.

In addition, even if a potential defendant believed that it could assert one of the affirmative defenses successfully, that defendant would still be subject to the expense, stigma and other burdens of being criminally prosecuted. Many people will naturally try to avoid those burdens by restricting their dissemination of materials that may violate the Statute. Thuseven those who fall within the affirmative defenses will be subject to a chilling effect on their constitutionally protected activities.

2. ORS 167.057: Furnishing for the Purpose of Sexual Arousal or Satisfaction

ORS 167.057 provides that it is a crime for a person to furnish or use with a minor (a person under 18 years old) 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.[4]

a. Exceptions to Liability Under ORS 167.057

Unlike ORS 167.054, ORS 167.057 provides only one exception to liability: A person is not subject to prosecution if the person furnishes or uses a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation. ORS 167.057 provides no exception to liability for museum, school, law enforcement or medical treatment personnel. In addition, as with ORS 167.054, both parts of the exemption must be met to avoid liability.

b. Affirmative Defenses to Liability Under ORS 167.057

The other two defenses are identical to those under ORS 167.054. The affirmative defenses are:

(1) That the representation, description or account was furnished or used for the purpose of psychological or medical treatment and was furnished by a treatment provider or by another person acting on behalf of the treatment provider;

(2) That the defendant reasonably believed the person at issue was not a minor; or

(3) That the parties are within three years of age.

The affirmative defenses to liability under ORS 167.057, unlike under ORS 167.054, offer no defense for material used for educational purposes and do not protect parents or educators.

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[4] ORS 167.057 also contains a provision criminalizing the furnishing or use of material for the purpose of inducing the minor to engage in sexual conduct. Plaintiffs do not contest that provision. Plaintiffs' objection to ORS 167.057 is targeted only at the provision criminalizing the furnishing or use of material for the purpose of arousing or satisfying the sexual desires of the person or the minor.

B. Effect of the Statute on Plaintiffs

Plaintiffs are, or represent, mainstream retailers, publishers, distributors, sellers, purchasers and recipients of periodicals, books, comics, newspapers, motion pictures, videos and sound recordings that are sold, rented or distributed in Multnomah County and other counties in Oregon. Although Plaintiffs are not and do not represent so-called "adult" retailers, they fear prosecution under the Statute for offering, distributing or selling material that might be deemed by some to be restricted by the Statute ("Restricted Speech"). If Plaintiffs are found to have violated ORS 167.054, they risk penalties including up to one year's imprisonment and/or a fine of up to $6,250. If they are found to have violated ORS 167.057, they risk up to five years' imprisonment and/or a fine of up to $125,000.

The Statute restricts the sale, gifting, rental, loan or other dissemination of certain constitutionally protected speech to persons under 18. By reason of its unconstitutional overbreadth and its vagueness, the Statute will chill the exercise by publishers, distributors and retailers of their right to sell or distribute, or have sold or distributed, constitutionally protected materials in Oregon.

Powell's Books, Inc. ("Powell's"): Powell's has several retail locations in Portland at which materials containing sexually explicit material or visual representations or narrative accounts of sexual conduct (as those terms are defined in the Statute) are offered for sale. Such materials include novels by Judy Blume, romance novels, graphic novels and sex education books for teenagers. Powell's fears that it is and will continue to be exposed to risk of prosecution for violation of the Statute. Should the Statute be upheld, Powell's will be forced to self-censor or risk such a prosecution. The full impact of the Statute on Powell's is described in the concurrently filed Declaration of Michael Powell.

Old Multnomah Book Store, Ltd. d/b/a Annie Bloom's Books ("Annie Bloom's"): Annie Bloom's is a locally owned full-service neighborhood bookstore offering a broad range of works, including children's materials, contemporary fiction, and books on art, current events, parenting and entertainment, some of which materials contain sexually explicit material or visual representations or narrative accounts of sexual conduct (as those terms are defined in the Statute). Annie Bloom's fears that it is and will continue to be exposed to risk of prosecution for violation of the Statute. Should the Statute be upheld, Annie Bloom's will be forced to self-censor or risk such a prosecution. The full impact of the Statute on Annie Bloom's is described in the concurrently filed Declaration of William Peters.

Dark Horse Comics, Inc. ("Dark Horse"): Dark Horse publishes a wide variety of comics and other materials at retail stores, including its flagship operation, Things From Another World. Some contain material that could be deemed "sexually explicit" or "arousing or satisfying [to] the sexual desires" of its customers. Dark Horse fears prosecution under the Statute if it continues to publish such material. The full impact of the Statute on Dark Horse is described in the concurrently filed Declaration of Ken Lizzi.

Colette's: Good Food + Hungry Minds, LLC ("Colette's"): Colette's sells a wide variety of books and other materials at its store and specializes in nonfiction, including photography and art books. It also has established a comprehensive Gay, Lesbian, Bisexual, Transgender, and Questioning section to better serve its patrons. Colette's fears prosecution under the Statute if it continues to maintain this section or if it carries other material containing sexually explicit material or visual representations or narrative accounts of sexual conduct as those terms are defined in the Statute. The full impact of the Statute on Colette's is described in the concurrently filed Declaration of Jessica Lloyd-Rogers.

Bluejay, Inc. d/b/a Paulina Springs Books ("Paulina's"): Paulina's is a mainstream bookstore that sells material it fears is Restricted Speech, including, for example, romance novels, such as those by Nan Ryan, Linda Howard and Cheyenne McCray; books of photography, including material with sexual content, such as *Joy of Sex*. Paulina's fears that it is at risk of criminal prosecution under the Statute for selling these and other constitutionally protected materials. The full impact of the Statute on Paulina's is described in the concurrently filed Declaration of Brad Smith.

St. Johns Booksellers, LLC ("St. Johns"): St. Johns is a mainstream bookstore with over 15,000 titles catering to a wide range of customer interests. It stocks, among other materials, romance novels, including those by Lisa Kleypas and Stephanie Laurens; graphic novels, including those by Neil Gaiman; and books of photography, including those by Jan Saudek. St. Johns fears that it is at risk of criminal prosecution under the Statute for selling these and other constitutionally protected materials. The full impact of the Statute on St. Johns Booksellers is described in the concurrently filed Declaration of Solena Rawdah.

Twenty-Third Avenue Books ("Twenty-Third Avenue"): Twenty-Third Avenue is a mainstream bookstore that sells material it fears is Restricted Speech, including graphic novels, erotica and books focusing on gay and lesbian studies. It fears that it is at risk of criminal prosecution under the Statute for selling these and other constitutionally protected materials. The full impact of the Statute on Twenty-Third Avenue is described in the concurrently filed Declaration of Stephanie Griffin.

American Booksellers Foundation for Free Expression ("ABFFE"): ABFFE has hundreds of bookseller members that are located coast to coast, including in Oregon, Multnomah County and other counties. Those located in Oregon, such as Powell's, sell and offer for sale

books and other materials that contain sexually explicit material or visual representations or explicit verbal descriptions or narrative accounts of sexual conduct, as defined in the Statute. ABFFE's members are not "adult bookstores." ABFFE members' right to offer and sell in Oregon a full range of mainstream materials, and to learn about, acquire and distribute material containing nudity and sexual conduct, and their patrons' right to purchase such materials, will be seriously infringed by the Statute if it is not enjoined, because ABFFE members and the publishers with which they transact business will be forced to self-censor or risk prosecution under the Statute. The full impact of the Statute on ABFFE is described in the concurrently filed Declaration of Christopher Finan.

Association of American Publishers, Inc. ("AAP"): AAP sues on behalf of its members that are providers of mainstream books and other materials to retailers in Oregon. Some of the content provided by AAP's members contains sexually explicit material or visual representations or explicit verbal descriptions or narrative accounts of sexual conduct, as defined in the Statute. Many of the efforts to ban books in various communities have been directed at books published by AAP's members. If the Statute is not enjoined, AAP members will be forced to limit Oregon residents from access to many important books. The full impact of the Statute on AAP is described in the concurrently filed Declaration of Allan R. Adler.

Freedom to Read Foundation Inc. ("FTRF"): FTRF and its library and librarian members serve as both access and content providers at public, private and academic libraries in Oregon. Some of the materials provided or made available by public, private and academic libraries in Oregon, or made available to FTRF members in bookstores in the State, are Restricted Speech. For example, FTRF member libraries include materials such as *Forever* by Judy Blume; *Women on Top* by Nancy Friday; *Changing Bodies, Changing Lives* by Ruth Bell; *Our Bodies, Ourselves*

by the Boston Women's Health Collective; and *It's Perfectly Normal* by Robie Harris. These materials also are available for purchase in Oregon to individual members of FTRF. Because the exemption for employees of public libraries does not apply to every provision of the Statute and does not apply to all libraries, Oregon libraries will be forced to limit Oregon residents' access to many important books and other materials if the Statute is not enjoined, or risk prosecution. Additionally, FTRF members will not have access to constitutionally protected materials that would otherwise be available for purchase in the state. The full impact of the Statute on FTRF is described in the concurrently filed Declaration of Judith Krug.

Comic Book Legal Defense Fund ("CBLDF"): CBLDF includes publishers and retailers in Oregon. Some of the materials published or distributed by such members are Restricted Speech under the Statute but, at the same time, are constitutionally protected, for example, *Watchmen*, a seminal graphic novel by Alan Moore and Dave Gibbons. If the Statute is not enjoined, CBLDF members will be forced to limit Oregon residents' access to some of its materials, or risk prosecution. The full impact of the Statute on CBLDF is described in the concurrently filed Declaration of Charles Brownstein.

Candace Morgan: Candace Morgan is a resident of Multnomah County. She teaches current and future librarians enrolled in the Oregon distance-learning cohort of the Emporia State University School of Library and Information Science. Morgan is also a grandparent who visits the library and the bookstore with her seven-year-old grandson. The Statute restricts the materials she can provide her grandson and threatens prosecution should she provide materials that violate the Statute, including books by Robie Harris. The full impact of the Statute on Morgan is described in the concurrently filed Declaration of Candace Morgan.

Planned Parenthood of the Columbia/Willamette ("PPCW"): Plaintiff PPCW provides comprehensive sex education to a diverse age range, including education targeted at minors as young as 10 years old. As part of that education, PPCW distributes educational pamphlets and other materials depicting or describing sexual behavior—materials that may constitute Restricted Speech under the Statute. PPCW also distributes materials to the public at large materials that may violate the Statute, and such materials may be distributed to minors. If the Statute is not enjoined, PPCW will be forced to limit the distribution of those constitutionally protected materials, severely impairing its mission to provide sex education. The full impact of the Statute on PPCW is described in the concurrently filed Declaration of David Greenberg.

Cascade AIDS Project ("CAP"): Plaintiff CAP provides comprehensive sex education to a diverse age range, including education targeted at minors. As part of that education, CAP distributes educational pamphlets and other materials depicting or describing sexual behavior—materials that may constitute Restricted Speech under the Statute. CAP also distributes to the public at large materials that may violate the Statute, and such materials may be distributed to minors. If the Statute is not enjoined, CAP will be forced to limit the distribution of those constitutionally protected materials, severely impairing its mission to provide sex education. The full impact of the Statute on CAP is described in the concurrently filed Declaration of Becky Harmon.

American Civil Liberties Union of Oregon, Inc. (the "ACLU of Oregon"): The ACLU of Oregon is an Oregon nonprofit advocacy corporation organized for public benefit, with a membership of over 17,000 people, all of whom live or work in Oregon. Since 1955, it has been dedicated to the preservation and enhancement of civil liberties and civil rights. It believes that the freedoms of press, speech, assembly and religion, and the rights to due process, equal

protection and privacy, are fundamental to a free people. The ACLU of Oregon lobbies to prevent the passage of laws that would undermine civil liberties and civil rights, and to encourage passage of laws that would enhance civil liberties and civil rights. The ACLU of Oregon also supports educational outreach designed to influence public opinion on civil liberties and civil rights issues. If the Statute is not enjoined, then members of the ACLU of Oregon will be forced to either risk criminal liability or to restrict their constitutionally protected expressive and associational activities. The full impact of the Statute on the ACLU of Oregon and its members is described in the concurrently filed Declaration of David Fidanque.

III. ARGUMENT

A. LEGAL STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

The grant or denial of a preliminary injunction motion lies within the equitable discretion of the district court. *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F2d 701, 704 (9th Cir 1988). "In deciding whether to grant temporary relief, the court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Save Our Summers v. Wash. State Dept. of Ecol.*, 132 F Supp 2d 896, 899 (ED Wash 1999).

The Ninth Circuit recognizes two standards for preliminary injunctions: a "traditional" standard and an "alternative" standard. *International Jensen v. Metrosound U.S.A.*, 4 F3d 819, 822 (9th Cir 1993) (citing *Cassim v. Bowen*, 824 F2d 791, 795 (9th Cir 1987)). An order properly issues under the traditional standard if the court determines that (1) the moving party will suffer irreparable injury if the relief is denied; (2) there is a strong likelihood that the moving party will prevail on the merits at trial; (3) the balance of potential harm favors the

moving party; and (4) the public interest favors granting relief. *Id.*; *Byron M. v. City of Whittier*, 46 F Supp 2d 1032, 1034 (CD Cal 1998).

Under the "alternative standard," an injunction properly issues when a party demonstrates either "(1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor." *International Jensen*, 4 F3d at 822. "Serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction." *Republic of the Philippines v. Marcos*, 862 F2d 1355, 1362 (9th Cir 1988), *cert den* 490 US 1035 (1989). Serious questions are "'substantial, difficult and doubtful'" enough to require more considered investigation. *Id.* (citation omitted). Such questions need not show a certainty of success, or even demonstrate a probability of success, but rather "must involve a 'fair chance of success on the merits.'" *Id.* (quoting *National Wildlife Federation v. Coston*, 773 F2d 1513, 1517 (9th Cir 1985)).

The requirement for showing a likelihood of irreparable harm before trial increases or decreases in inverse correlation to the probability of success on the merits at trial. *Diamontiney v. Borg*, 918 F2d 793, 795 (9th Cir 1990); *see also Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F3d 1115, 1119 (9th Cir 1999) (these factors represent two points on sliding scale, such that "'the greater the relative hardship to the moving party, the less probability of success must be shown'" (citation omitted)). The essence of the court's inquiry is whether the balance of equities favors granting preliminary relief. *International Jensen*, 4 F3d at 822.

This Court should grant a preliminary injunction because, as described below, Plaintiffs satisfy both the traditional and alternative standards for a preliminary injunction.

B. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS

As demonstrated below, Plaintiffs are likely to prevail on the merits of their claims that the Statute violates the First, Fifth and Fourteenth Amendments to the U.S. Constitution.

1. The *Miller/Ginsberg* Standard Limits the Sexual Material That May Be Banned from Minors; The Failure of the Statute to Meet That Standard Is Constitutionally Fatal

The U.S. Supreme Court has recognized that the First Amendment restricts attempts to "protect" minors from exposure to sexually explicit materials. In *Ginsberg v. State of New York*, 390 US 629, 88 S Ct 1274, 20 L Ed 2d 195 (1968), as modified in *Miller v. California*, 413 US 15, 93 S Ct 2607, 37 L Ed 2d 419 (1973), the Court created a three-part test for determining whether material that is First Amendment-protected as to adults is unprotected as to minors. Under that test, for sexual material to be constitutionally unprotected as to a minor, it must, taken as a whole:

(1) predominantly appeal to the prurient, shameful or morbid interest of minors;

(2) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(3) lack serious literary, artistic, political or scientific value.

Only material that meets this test can be barred from distribution to minors *and* only if such prohibition does not unduly infringe on adult access. *Cf. ACLU v. Gonzales*, 478 F Supp 2d 775, 809 (ED Pa 2007). Material that falls outside the narrow *Miller/Ginsberg* test has First Amendment protection—whether the recipient be adult or child. Most importantly, under the third prong of the test, material having serious value remains constitutionally protected as to minors, regardless of its sexually explicit content.

The Statute's definitions of "sexually explicit material" (ORS 167.051(5)) and "sexual conduct" (ORS 167.051(4)), even if one were to incorporate the affirmative defenses,[5] fail to meet the *Miller/Ginsberg* standard in four significant respects:

(1) They do not require that material be taken as a whole;

(2) They do not require the material to be patently offensive;

(3) They do not require the evaluation of the material to be based on community standards; and

(4) They eliminate the third prong relating to lack of serious value.

Miller/Ginsberg is precisely about the sale of sexually explicit material to minors and expressly limits what material can be prohibited. For instance, as the Seventh Circuit held not long after the decision in *Ginsberg*, government "may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity [set forth in *Ginsberg*] in regulating the dissemination to minors of 'objectionable' material." *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 473 F2d 1297, 1302 (7th Cir 1973). More recently, the Seventh Circuit, after citing and quoting this excerpt from *Cinecom*, affirmed a finding that an Illinois statute is unconstitutional because, as here, it did not require the material to be considered as a whole and did not require that the material lack serious value. *Entertainment Software Ass'n. v. Blagojevich*, 469 F3d 641, 647 (7th Cir 2006).

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[5] Even if the affirmative defenses provided the missing components of the *Miller/Ginsberg* standard, it would not constitute compliance with the Supreme Court's standard. Because affirmative defenses must be asserted and proven by defendants on trial, in such a case, a person could be charged with a crime for distributing constitutionally protected materials, which would certainly have a chilling effect on such person's exercise of constitutional rights.

Forty-five states and the District of Columbia have laws restricting the sale of sexually explicit materials to minors. Virtually all comply with *Miller/Ginsberg*. Those that do not comply have almost uniformly been struck down in lower courts, decisions that are not usually appealed. *See, e.g., Bookfriends, Inc. v. Taft*, 223 F Supp 2d 932 (SD Ohio 2002) (Ohio definition of "harmful to juveniles" enjoined as not in compliance with *Miller/Ginsberg* test).

The serious-value prong of the *Miller/Ginsberg* test is a significant and necessary safety net for mainstream disseminators, publishers, retailers, librarians and users of materials, such as Plaintiffs and their members. If a work has serious value—whether it be art, literature or even entertainment—the publisher, distributor, retailer or librarian does not have to struggle with deciding whether the material may appeal to the prurient interest of a minor. Such clarity, in an otherwise often less-than-clear context, is a societal benefit in and of itself. More important, communications of value are and should be protected by the First Amendment. As Justice White stated in *Pope v. Illinois*, 481 US 497, 500, 107 S Ct 1918, 95 L Ed 2d 439 (1987):

> "In *Miller* itself, the Court was careful to point out that '[t]he First Amendment protects works, which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.'"

(Citation omitted; brackets in original.) And as Justice Stevens said, dissenting in the same case:

> "Over 40 years ago, the Court recognized that
>
> "'Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another . . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.' *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-158 (1946).

> "The purpose of the third element of the *Miller* test is to ensure that the obscenity laws not be allowed to '"level"' the available reading matter to the majority or lowest common denominator of the population . . . . It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population.' F. Schauer, The Law of Obscenity 144 (1976)."

Id. at 512 (alterations in original; citation omitted).

In fact, Plaintiffs are aware of no criminal statutes in this context that have been found constitutional under the First Amendment that did not include some requirement with respect to lack of serious value. *Cf. Ashcroft v. American Civil Liberties Union*, 542 US 656, 679, 124 S Ct 2783, 159 L Ed 2d 690 (2004) (Breyer, J., dissenting) (describing words "lacks serious literary, artistic, political, or scientific value" as "critical terms").

The omission of the "taken as a whole" requirement constitutes another major deviation from the *Miller/Ginsberg* test. It unconstitutionally eliminates the consideration of the context of the whole. Similarly, the absence of the third prong eliminates the consideration of the context of value. The state's elimination of these requirements is of particular concern to Plaintiffs, as publishers, distributors and retailers of mainstream materials. And finally, the elimination of the limitation based on community standards and the requirement of patent offensiveness further removes the Statute from the standard mandated by the Supreme Court.

Simply put, the Supreme Court has drawn a bright line defining the statutory standard required to separate what is or is not obscene or harmful to minors. The Statute falls woefully short of meeting that standard and thus is unconstitutional.

2. The Act Is Unconstitutionally Vague

"[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 US 352, 358 n 8, 103 S Ct 1855, 75 L Ed 2d 903 (1983). As the

Supreme Court stated in *Grayned v. City of Rockford*, a law is void for vagueness under the Due Process Clause of the Fifth Amendment if its prohibitions are not clearly defined. 408 US 104, 108, 92 S Ct 2294, 33 L Ed 2d 222 (1972). The Court then provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone"' . . . than if the boundaries of the forbidden areas were clearly marked.'"

Id. at 108-09 (footnotes omitted; alterations in original); *see also Smith v. California*, 361 US 147, 151, 80 S Ct 215, 4 L Ed 2d 205 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

The Statute contains language purporting to describe prohibited acts or, in some instances, limiting them, which is vague, indefinite and subject to different meanings, resulting in a failure to provide adequate notice of an offense under the Statute, including the following:

Both ORS 167.054 and 167.057 except from their criminal restrictions material for which the sexual component forms "merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation." Those provisions are unquestionably vague and

ambiguous. For example, the Statute fails to answer any of the following questions and thus leaves the meaning of the Statute to the discretion of a prosecutor, who may use the Statute against any material he or she deems objectionable:

(1) What constitutes an "incidental part"? Is it a matter of intent or purpose, or is it a numerical spatial percentage? Is the prosecutor required to determine and prove whether the material is a "necessary" part of the book, periodical or other material? That would be a curious and probably unconstitutional role for a government official.

(2) What is a "nonoffending whole"? The major question is "offending" to whom? If there is testimony that segments of the community are offended by the work as a whole, does that mean it is criminal under the Statute? "[W]here [as here] obscenity is not involved, * * * the fact that protected speech may be offensive to some does not justify its suppression." *Carey v. Population Services, Inter.*, 431 US 678, 701, 97 S Ct 2010, 52 L Ed 2d 675 (1977).

(3) What does the Statute mean by "titillation"? The dictionary definition is of no assistance. The verb "titillate" is defined as "to act as a stimulant to pleasurable excitement." *Webster's Ninth New Collegiate Dictionary* (1984). And even if titillation were ascertainable and had a definite meaning, does the phrase "serves some purpose other than titillation" mean that if the material not only titillated but also informed, saddened, entertained or cheered it would not be covered by the Statute? Finally, whatever titillation means, the material presumably could titillate some and not others. Is that relevant if one looks at the *purpose*? And *whose* purpose?

As a direct result of this quintessentially vague language, the Statute has and will continue to have a chilling effect on retailers, librarians and other users and disseminators of valuable mainstream works. For example, both CAP and PPCW are concerned that their basic sex education materials may be considered to serve no other purpose than titillation. The

bookseller plaintiffs, who receive hundreds of new titles weekly, do not have time to read all the books. Even if they had the time, they are puzzled as to how to determine whether the sole purpose of a work is titillation. The Supreme Court has noted that "uncertain meanings" inevitably lead citizens to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 US 360, 372, 84 S Ct 1316, 12 L Ed 2d 377 (1964) (quoting *Speiser v. Randall*, 357 US 513, 526, 78 S Ct 1332, 2 L Ed 2d 1460 (1958)).

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS THE COURT GRANTS AN INJUNCTION

Plaintiffs will suffer irreparable harm unless prosecution under the Statute is enjoined. Plaintiffs will suffer two types of irreparable harm: the harm of losing their First Amendment freedoms and the harm of potential prosecution.

As the U.S. Supreme Court has recognized, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 US 347, 373, 96 S Ct 2673, 79 L Ed 2d 547 (1976); *accord Goldie's Bookstore v. Superior Court*, 739 F2d 466, 472 (9th Cir 1984) ("An alleged constitutional infringement will often alone constitute irreparable harm."); *Rohman v. City of Portland*, 909 F Supp 767 (D Or 1995) (citing *Elrod*). As the above discussion on the merits demonstrates, Plaintiffs are deprived of their First Amendment rights when they refrain from exercising those rights because of the chilling effect of potential prosecution. Therefore they are being irreparably injured. Only an injunction on prosecution can lift the chill and restore Plaintiffs' ability to exercise their rights.

Plaintiffs would also suffer because they will be prosecuted if they exercise their rights and violate the Statute. Potential harms are a proper basis for a showing of irreparable harm. *Diamontiney*, 918 F2d at 794 ("[T]he injury need not have been inflicted when application is

made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis. * * * Requiring a showing of actual injury would defeat the purpose of the preliminary injunction, which is to prevent an injury from occurring."). In addition, although the result of a prosecution under the Statute may be a monetary fine, the stigma of *being* prosecuted is exactly the kind of nonmonetary injury that the Ninth Circuit has considered, by definition, irreparable. *See Chalk*, 840 F2d at 709 (describing types of irreparable nonmonetary injury, including loss of personal satisfaction, being the victim of retaliation for an exercise of First Amendment rights, emotional stress, anxiety and fear); *cf. Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F2d 1197, 1202 (1980) (distinguishing between compensatory nature of monetary injury and noncompensatory nature of nonmonetary injury).

Finally, *Elrod* also makes clear that potential punishment for the exercise of First Amendment freedoms also constitutes irreparable injury. In *Elrod*, the defendant sheriff's office routinely fired employees who were associated with a political party different from the sheriff's party. The employees were faced with a choice: refrain from exercising their First Amendment right of association or be fired. The Court held that both the injury to the plaintiffs' First Amendment rights *and* the threatened firing constituted irreparable injury. *Elrod*, 427 US at 373.

D. THIS COURT SHOULD GRANT A PRELIMINARY INJUNCTION

Clearly, Plaintiffs are entitled to a preliminary injunction under either the traditional or the alternative standard.

Plaintiffs meet the traditional standard. Plaintiffs will suffer irreparable injury if the injunction is denied because the Statute either will strip them of their First Amendment rights or subject them to the risk of prosecution. Plaintiffs have also shown a strong likelihood that they will prevail on the merits at trial. The balance of potential harm also favors Plaintiffs. If the

injunction is denied, Plaintiffs stand to lose their constitutional rights or face criminal prosecution. If the injunction is granted, the State (which, to Plaintiffs' knowledge, has not yet prosecuted anyone under the Statute) will simply have to forgo prosecutions pending a final decision on the constitutionality of the Statute. Finally, public interest also favors Plaintiffs because an injunction protects the interest of every citizen in ensuring that criminal statutes are constitutional.

Plaintiffs also meet the alternative standard. As described above, they are likely to prevail on the merits at trial and will be irreparably injured if relief is not granted. At the very least, Plaintiffs have demonstrated serious questions about the constitutionality of the Statute and shown that the balance of hardships tips sharply in their favor.

IV. CONCLUSION

Plaintiffs do not contest the importance of protecting minors from harm. However, even if a statute aims to prevent such harm to minors, it cannot sweep over the protections of the First, Fifth and Fourteenth Amendments to do so. The Statute does this. Plaintiffs have a reasonable fear of prosecution for engaging in constitutionally protected speech. Thus they

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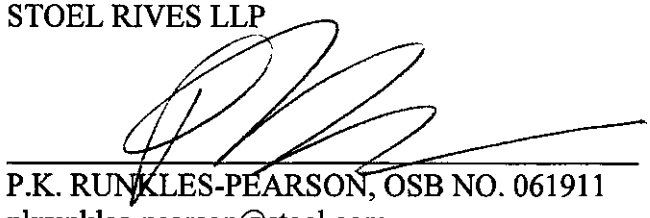
respectfully request that this Court grant their motion for a preliminary injunction against prosecution under the Statute.

DATED: April 25, 2008.

STOEL RIVES LLP



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