

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  
SONNENSCH EIN 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.

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Civil No.

DECLARATION OF ALLAN R. ADLER

## DECLARATION OF ALLAN R. ADLER

Allan R. Adler declares under penalties of perjury:

### **Background**

1. I am Vice President for Legal and Government Affairs of the Association of American Publishers, Inc. (AAP), one of the plaintiffs in this action. I submit this declaration on behalf of AAP 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") as it is an unconstitutional speech restriction.

2. AAP, a not-for-profit New York corporation with offices in New York and Washington, is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly associations. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary, and professional markets.

3. AAP represents an industry whose very existence depends on the free exercise of the free-speech rights guaranteed by the First Amendment. The business of AAP's members is primarily based on print publishing, but AAP members make a wide range of material available online, including book excerpts.

4. Some of the content published by AAP members contains nudity or sexual conduct. In fact, 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 the access of Oregon residents to many important books or risk criminal liability.

### **Fear of Prosecution Under the Statute**

5. Under the Statute, AAP members apparently can be prosecuted for permitting minors to access constitutionally-protected material that could be deemed “sexually explicit” or to appeal to a person’s “sexual desires.” Many books or other materials published by AAP members include sexual narrative or pictorial content 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.” Well-known books such as Vladimir Nabokov’s *Lolita*, William Faulkner’s *Sanctuary*, and Philip Roth’s *Portnoy’s Complaint* are just a few familiar examples. In addition, some material that may fall under the Statute appropriately could be directed to minors, including, for example, books relating to a variety of sexual education and health topics, including homosexuality or sexuality in general and the prevention of, and risks associated with, STDs, AIDS, and teen pregnancy. AAP members reasonably fear prosecution under the Statute if they continue to publish such mainstream materials.

6. Under the Statute, it is a crime to “intentionally furnishe[] a child, or intentionally permit[] a child to view, sexually explicit material [if] the person knows that the material is sexually explicit material.” ORS 167.054. “[F]urnish” is defined broadly, including “to sell, give, rent, loan or otherwise provide.” ORS 167.051. My understanding is that, based on this extremely broad and vague statutory language, AAP members risk criminal prosecution for furnishing certain constitutionally-protected

material with sexual content to a person under the age of 13. The age requirement places yet another unconstitutional burden on AAP members.

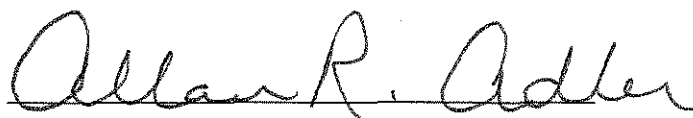
7. The two exemptions under ORS 167.054 do not adequately protect AAP members. Under this section, a person is not liable if the sexually explicit portions of the material furnished, or permitted to be viewed, “form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.” ORS 167.054. AAP members do not know how to determine what materials may fall within this vague provision. As a result, they will be forced to either self-censor in an overinclusive fashion or risk criminal prosecution.

8. Under ORS 167.057, it also is a crime of “luring” 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 believe the phrase “arousing or satisfying the sexual desires,” which is undefined in the Statute, not only is unrelated to luring but also is vague and improperly could impose criminal liability on AAP members for providing materials, or information relating to such materials, so that a person under 18 may undertake acts that are entirely legal.

9. The Statute not only violates the rights of AAP members but also the rights of adults and minors to freely access constitutionally-protected materials. AAP strongly believes that there should be unrestricted access to all First Amendment-protected material, including that which contains sexual activity, so long as it falls outside the narrow range of material the Supreme Court has held to be unlawful.

## Conclusion

10. As explained above, AAP members fear prosecution under the Statute. If the Statute is not invalidated, AAP members will be forced either to self-censor materials legally published and made available to adults and minors or risk criminal liability. This undue burden on free-speech rights is unconstitutional under the First Amendment. (I understand that AAP members have not self-censored to date as a result of the Statute because they believe the law to be unconstitutional.)

A handwritten signature in cursive script that reads "Allan R. Adler". The signature is written in black ink and is positioned above the printed name.

Allan R. Adler