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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

POWELL'S BOOKS, INC, et al.,

Plaintiff,

v.

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

Defendant.

Civil No. CV08-0501-MO

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION.

The State's opposition urges the Court to read the Statute[1] as if it were more precisely drafted and less broad than it is. Based primarily on the State's wishful thinking and assurances about its good intentions, the State argues that the Statute is less restrictive than the *Miller/Ginsberg* standard, that the Statute is not substantially overbroad and that the Statute is clear enough to permit enforcement.

The State is misguided. The Statute is missing key protections of the *Miller/Ginsberg* standard and is substantially open to interpretation. Plaintiffs are entitled to more certainty about the safety of their constitutional freedoms than the State's assurances that it will do the right thing. This Court should grant a preliminary injunction to protect plaintiffs and those on whose behalf they sue until the constitutionality of the Statute is conclusively resolved.

II. PLAINTIFFS HAVE STANDING.

When seeking to deny relief for lack of standing, a court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the party claiming standing." *Bras v. Cal. Pub. Util. Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975). All plaintiffs have alleged fear of prosecution for offering or distributing materials (Complaint ¶¶ 41, 47, 49, 51, 54, 55, 56) and/or a chilling effect from the threat of prosecution under the Statute (*id.* ¶¶ 57-59). Here, in addition to the complaint, there are numerous affidavits and declarations spelling out the facts more extensively.[2] The chilling

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[1] As in plaintiffs' opening brief, the "Statute" is Or. Rev. Stat. §§ 167.051-167.057.

[2] *See also* Lizzi Decl. ¶¶ 9, 12; Peters Decl. ¶¶ 7, 10; Powell Decl. ¶¶ 7, 10; Lloyd-Rogers Decl. ¶¶ 8, 12; Harmon Decl. ¶¶ 3, 11; Greenberg Decl. ¶¶ 3, 12; Morgan Decl. ¶¶ 3, 11; Brownstein Decl. ¶¶ 7, 14; Krug Decl. ¶¶ 5, 7; Adler Decl. ¶ 10; Finan Decl. ¶¶ 6, 13; Griffin Decl. ¶¶ 3, 7, 10; Rawdah Decl. ¶¶ 3, 7, 10; Smith Decl. ¶ 3, 7, 10; Fidanque Decl. ¶¶ 3, 12.

effect on plaintiffs' constitutionally protected speech is an injury that is immediate and ongoing. And, absent an injunction from this Court, there is no meaningful protection against the imminent harm of prosecution.

The State's standing argument is not really about standing. Instead, it is an argument on the merits recast as a standing challenge. What the State is really saying is that the Statute is not unconstitutionally restricting speech and that plaintiffs are not being chilled from, or in fear of prosecution for, engaging in speech that is constitutionally protected. The meaning of the Statute should not be decided in the context of a standing challenge. The threat of an "injury in fact" is met here, as "the law is aimed directly at plaintiffs, who, *if their interpretation of the statute is correct*, will have to take significant and costly compliance measures or risk criminal prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (emphasis added).

Alternatively, the State argues that, even if the Statute restricts constitutionally protected speech, plaintiffs do not have a credible fear of prosecution—simply because of the State's assurances that it does not intend to prosecute. That kind of "trust us" argument is insufficient and has been repeatedly rejected by the courts. *See ACLU v. Reno*, 929 F. Supp. 824, 864 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997):

> The thrust of the Government's argument is that the court should trust prosecutors to prosecute only a small segment of those speakers subject to the CDA's restrictions, and whose works would reasonably be considered "patently offensive" in *every* community. Such unfettered discretion to prosecutors, however, is precisely what due process does not allow. "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains. . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."

(Citations omitted; alterations in original.)

III. THE STATUTE FAILS TO COMPLY WITH THE REQUIREMENTS OF *MILLER/GINSBERG.*

A. Any Restriction on the Access of Minors to Materials Constitutionally Protected as to Adults or Older Minors Must Include the Five Substantive Requirements of *Miller/Ginsberg.*

The State raises a straw man by stating that plaintiffs claim that the Statute must incorporate the language of *Miller/Ginsberg* verbatim. (Def. Mem. in Opp. at 16.) To the contrary, plaintiffs agree with the State that the appropriate test is whether the substance of the Statute complies with the requirements of *Miller/Ginsberg*. The Statute does not.[3]

B. The Statute Does Not Include the *Miller/Ginsberg* Requirements.

Broken down into its components, *Miller/Ginsberg* has five substantive requirements. For a restriction on access by minors not to violate the First Amendment, material must (1) be taken as a whole, (2) appeal to the prurient interest of minors, (3) contain content that is patently offensive to the adult community as a whole as to what is suitable for minors, (4) apply contemporary community standards and (5) lack serious value for minors. Neither Or. Rev. Stat. § 167.054 nor 167.057 includes all of these requirements; therefore the sections are unconstitutional under the First Amendment.

Simply stated, *the Statute does not require the basic elements of Miller/Ginsberg*, either by using those terms directly or by requiring the functional equivalent of those words. Those basic elements just do not exist in the Statute, and the State does not even attempt to point out

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[3] It is notable that defendants cite no case in which a statute containing a test substantially different from *Miller/Ginsberg* has been upheld; counsel for plaintiffs knows of no such case. The State suggests that Justice Brennan's statement in his dissent in *Paris Adult Theater I*, 413 U.S. 49, 96 n.13 (1973), that a former Oregon statute would "escape . . . wholesale invalidation" somehow validates the statute at issue here. (Def. Mem. in Opp. at 14.) To the contrary, both *Miller* and *Paris Adult Theater* dealt with adult obscenity. Wholesale invalidation of Oregon's statutes would not have been required because Oregon no longer had a law generally criminalizing adult obscenity.

where most of those requirements may be found. Nothing in the Statute limits prosecution to only materials that appeal to prurient interest. The Statute does not require the material to be patently offensive or to meet community standards, and the State does not contend that they do. And, most notably, neither section protects material of serious value, and the State does not contend that either section does. Those glaring deficiencies alone are sufficient evidence that the Statute allows the prohibition of constitutionally protected materials and thus that it is overbroad.

Defendants argue that the Statute is a "narrower approach" because of Oregon constitutional requirements. (Def. Mem. in Opp. at 17.) But an intent to have a "narrower" test does not make it so. Nor does the fact that a statute permits distribution to minors of material that could be restricted under *Miller/Ginsberg* suffice if, at the same time, the statute restricts material that is constitutionally protected under *Miller/Ginsberg*.

Although some of the *Miller/Ginsberg* requirements are simply absent and require no further comment, additional discussion regarding several of those requirements is helpful.

1. The Statute Does Not Contain a Serious Value Requirement.

Serious value is, in effect, the safety net of the *Miller/Ginsberg* test. It is the only portion of the test that is not based on community standards and thus protects the constitutional rights of those who hold a minority view. *Pope v. Illinois*, 481 U.S. 497, 500 (1987). "[E]ven a minority view [of serious value] among reasonable people . . . may protect [a] work from being judged 'obscene.'" *Id.* at 506 (Blackmun, J. concurring in part and dissenting in part). Under any reading of the Statute, one cannot find the requirement that material sought to be restricted must lack serious value. There is no mention of serious value in Or. Rev. Stat. § 167.054 or 167.052, nor is there any synonym for serious value. In fact, the State tacitly acknowledges the lack of a serious value requirement, stating only (without reference to any statutory requirement) that "it is inconceivable that the law might prohibit a substantial amount of materials which have 'serious

literary, artistic, political or scientific value.'" (Def. Mem. in Opp. at 21-22.) The State also appears to acknowledge that patent offensiveness also is not included. (*Id.*) For this reason alone, the Statute must fall.[4]

2. The Statute Does Not Require That the Restricted Material Appeal to the Prurient Interest.

The State argues that under *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), *rev. denied*, 332 Or. 137 (2001), the restricted materials are limited to those "that are . . . 'primarily intended' to 'sexually arouse' the person to whom they are furnished."[5] (Def. Mem. in Opp. at 20.) Therefore the State suggests that the Statute contains a requirement limiting the restricted materials to those that appeal to the prurient interest. (Def. Mem. in Opp. at 22.) The State misunderstands the nature of the "prurient interest" requirement. "Prurient interest" does not refer to all matters dealing with sex or to normal sexual arousal, but only to a *shameful or morbid* interest in sex. *Roth v. United States*, 354 U.S. 476, 487 & n.20 (1957) (noting that "sex and obscenity are not synonymous" and that "prurient" refers to a "shameful or morbid" interest); *Ripplinger v. Collins*, 868 F.2d 1043, 1054 (9th Cir. 1989) ("[T]he 'prurient interest' portion of the obscenity test is not satisfied if the jury merely finds that the materials would arouse normal sexual responses."). Thus restricting only materials that titillate, that are intended to arouse or that even actually arouse the viewer does not meet the "prurient interest" prong of

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[4] Defendants refer the Court to Judge Landau's reference to *Ginsberg* in his dissent in *Maynard* as having "concluded that Or. Rev. Stat. § 167.065 was 'virtually identical to the statute at issue *Ginsberg* in all material respects.'" (Def. Mem. in Opp. at 14, n.13.) That is not what Judge Landau said. He was talking only about subsection (1)(a) of section 167.065, the description of the restricted materials, which is similar.

[5] There is a problem with the argument that the Oregon legislature intended to import the *Maynard* court's definition of "titillation" into that word's use in the Statute. Or. Rev. Stat. § 167.057 requires that the material be furnished for purposes of sexual arousal, an apparent duplication of description of the material itself.

Miller/Ginsberg. Neither *Miller* nor *Ginsberg* (nor any other decision with which plaintiffs are familiar) describes "sexual arousal" as a prohibited effect of otherwise First Amendment-protected material, any more than feeling depressed, happy or angry as a result of reading material may cause the material to be criminalized. It has been said that classic works of Henry Miller (*Tropic of Cancer* and *Tropic of Capricorn*), modern romance novels, and mainstream movies were and are written or produced with an intent (not necessarily the sole intent) to sexually arouse. Thus, under defendants' interpretation, any book, magazine, motion picture, video, etc., that may sexually arouse a reader or viewer, and thus can be presumed to have been created with an intent to arouse, falls within the language of the Statute, regardless of whether it has serious value. This alone makes the Statute overbroad.

Even if mere sexual arousal met the prurient interest prong of *Miller/Ginsberg*, that requirement alone is insufficient. Material that is otherwise protected by the First Amendment cannot be criminalized simply because it appeals to the prurient interest, *unless it also meets the other Miller/Ginsberg standards*. As described below, the Statute omits most of those other requirements entirely.

3. None of the State's Other Arguments Explains How the Statute Might Meet the *Miller/Ginsberg* Standards.

Although the State failed entirely to explain how the Statute meets the clearly stated requirements of the U.S. Supreme Court for compliance with the First Amendment, it raised a host of arguments that, inexplicably, appear to be intended to show that this Court should find the Statute constitutional despite *Miller/Ginsberg*'s plain command. As described below, each of those arguments is irrelevant.

a. No Case Has Held That *Miller/Ginsberg* Requirements Do Not Apply to Younger Minors.

The State implicitly argues that *Miller/Ginsberg* somehow does not apply to the Statute because Or. Rev. Stat. § 167.054 applies only to minors under age 13. The State cites no post-*Miller* decision supporting that distinction, and there is none. The cases the State cites do not support its claim. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 738 (1970), was decided pre-*Miller*, and the quoted language (from dictum in a concurring opinion) only notes that the right of parents to prevent "political, religious, or other materials" being mailed to "all children under 19" was a question left open. *Id.* at 741. Justice Brennan's speculations in a footnote in his dissent in *FCC v. Pacifica Foundation*, 438 U.S. 726, 769 n.3 (1978), are just that—speculation. And defendants' reliance on language in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10 (1975), is equally misplaced. The quoted language from the *Erznoznik* footnote, part of a decision that found the challenged law violated the First Amendment, is preceded by a statement that the Supreme Court had not yet had the opportunity to mesh *Ginsberg* and *Miller*, although "[i]t is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed." *Id.* In no way does the opinion suggest that what became the *Miller/Ginsberg* test would not apply, even as to what the footnote describes as "erotic" nudity.

b. Oregon Constitutional Compliance Is Irrelevant to This Inquiry.

The State repeatedly falls back on the argument that if the Statute meets Oregon constitutional standards, then it must necessarily meet the standards of the First Amendment. (Def. Mem. in Opp. at 17.) That argument is irrelevant and incorrect. Plaintiffs have raised no claim under the Oregon Constitution. This Court, therefore, should review the Statute under the dictates of the First Amendment, not on an inference based on a not-yet-decided state law principle.

c. Plaintiffs' Legislative Statements Are Irrelevant and, at Any Rate, Plaintiffs Opposed the Final Version of the Statute.

The State suggests that plaintiff ACLU of Oregon previously "blessed" the constitutionality of the Statute. (Def. Mem. in Opp. at 24.) Although that fact is legally irrelevant to whether the Statute actually passes First Amendment muster, to the contrary, in the very testimony relied on by defendants, the Executive Director of the ACLU of Oregon stated that its position on House Bill 2843 was "in flux . . . until we can complete a thorough analysis for the First Amendment case law." (Exhibit 4 to Declaration of Michael Casper at 9.) Subsequently, the ACLU of Oregon, together with the Motion Picture Association of America and Media Coalition, Inc., sent a strong statement to legislators urging them "to vote 'No' on HB 2843." (Exhibits A and B to Affidavit of Andrea Meyer submitted herewith.)[6]

d. The Unchallenged Portion of Or. Rev. Stat. § 167.057 Is Sufficient to Serve the State's Needs.

As they stated in their memorandum of law, plaintiffs do not challenge Or. Rev. Stat. § 167.057(1)(b)(B), which is a genuine "luring" provision that criminalizes the furnishing of sexually explicit materials to minors for the purpose of inducing minors to engage in sexual activity (itself a crime). (Pl. Mem. of Law at 4, n.4.)

Subsection (1)(b)(A), which is directed toward materials that arouse or satisfy the sexual desires of a minor, is *not* a luring provision. A minor's sexual arousal or satisfaction is not a crime. Defendants justify the provision on the basis that it is a "form of sexual predation . . . to

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[6] Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Freedom to Read Foundation and Comic Book Legal Defense Fund are members of Media Coalition, Inc., which argued the unconstitutionality of the Statute from the outset.

'groom' or entice child victims." (*Id.* at 24.) The Second Circuit, responding to a similar argument as to "grooming," rejected it stating:

> Vermont's interest in preventing pedophiles from "grooming" minors for future sexual encounters can be effectively addressed through enforcement of Section 2828, which regulates electronic "luring."

Am. Booksellers Found. v. Dean, 342 F.3d 96, 102 (2d Cir. 2003).

The same is true here; the State could vigorously enforce Or. Rev. Stat. § 167.057(1)(b)(B) without impacting First Amendment rights.[7]

There is no language in subsection (1)(b)(A) that limits its scope to the practice of "grooming." The provision applies equally to a 17-year-old teenager giving a 14-year-old sibling a book and highlighting the "good parts," a bookseller recommending a romance novel to a 17-year-old college student who asks for a "sexy novel" to read on a dateless weekend or a 21-year-old husband giving his 17-year-old wife a book to sexually arouse her.[8]

C. The Statute Is Not Narrowly and Precisely Drawn and Covers a Substantial Amount of Material That Is First Amendment Protected.

A content-based restriction on protected speech (such as that at issue here) is presumptively invalid and can be upheld only if defendants prove it is an effective and "precisely drawn means of serving a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980); *see also Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1059 (9th

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[7] Oregon has statutes criminalizing luring on the Internet which predate the Statute. Or. Rev. Stat. §§ 163.431-163.443.

[8] Defendants state that "[h]aving sex with a minor is illegal." (Def. Mem. in Opp. at 25.) That is not correct. It is not illegal if participants are less than three years apart in age, whether married or not. Or. Rev. Stat. § 163.345(1).

Cir. 2007); *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The Statute is not narrowly and precisely drawn.

Defendants claim the Statute cannot be facially challenged because, in their view, the unconstitutional overbreadth is insubstantial.[9] The State cites no basis for this claim, but instead dismisses entirely the possibility that anyone could use the Statute for a purpose that was unintended by some legislators. Despite the fact that the Statute does not include most of the substantive requirements of *Miller/Ginsberg*, defendants dismiss the possibility that Or. Rev. Stat. § 167.054 could prohibit a substantial amount of materials as "inconceivable." (*Id.* at 21.) Similarly, they dismiss such a possibility as to Or. Rev. Stat. § 167.057 as "meritless." (*Id.* at 24.)

Regardless of the State's reassurances about what it intends the Statute to accomplish, the Statute's plain language allows the prosecution of ordinary people in daily life, acting in constitutionally protected ways, far removed from the conduct sought to be restricted by the its claimed purpose of "protect[ing] children from sexual exploitation and abuse." (Def. Mem. in Opp. at 7.) That result is unconstitutional.

By its terms, Or. Rev. Stat. § 167.054 has nothing to do with sexual exploitation and abuse. Under that provision, any person who knows that visual material meets the statutory definition and gives that material to a child is subject to prosecution—regardless of whether the work is considered as a whole, appeals to the prurient interest, is patently offensive, meets community standards and has serious value. Those materials include a wide variety of mainstream materials that do not meet the definition of obscenity and are therefore

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[9] This case raises both a facial and as applied challenge to the Statute. (Complaint V.A.) Even if the Statute were not substantially overbroad (which it is), the challenge as applied would continue and support the injunctive relief sought at this stage of the proceeding.

constitutionally protected, including the numerous comics referred to in the exhibits to Ken Lizzi's and Charles Brownstein's declarations and the sex education books and novels described in the exhibits to the declarations of the booksellers (Michael Powell, Williams Peters, Jessica L. Lloyd-Rogers, Stephanie Griffin, Solena Rawdah, Brad Smith and Christopher Finan) and educators (David Greenberg, Becky Harmon and Candace Morgan), as well as the educational materials distributed by plaintiffs Planned Parenthood of Columbia/Willamette, Inc. and Cascade AIDS Project.

Or. Rev. Stat. § 167.057 is equally not limited to exploitation and abuse, nor is it limited to "grooming." Under Or. Rev. Stat. § 167.057, any person who gives a minor a visual representation or narrative account that meets the statutory definition is subject to prosecution—whether or not the material meets any of the requirements described above. The only requirement is that the material is conveyed for the purpose of arousal. That provision also sweeps within its scope a host of mainstream, constitutionally protected materials, including the materials described above, as well as uncountable numbers of books without pictures that simply describe normal sexual activity.

IV. THE STATE'S OBJECTIONS DO NOT ADDRESS THE STATUTE'S INESCAPABLE VAGUENESS.

The State contends that the Statute is not vague because some of the terms have been construed by Oregon state courts in other contexts and because, in the State's view, it is clear in the "vast majority" of situations. Neither of those contentions resolves the Statute's essential vagueness. The Statute contains several core provisions, the meaning of which is not readily ascertainable, particularly the provision that exempts speech that is "merely an incidental part of an otherwise nonoffending whole and serve[s] some purpose other than titillation." The broad discretion the Statute allows evidences the fact that the scope of the materials deemed unlawful

is, in fact, not "clear in the vast majority of situations." (Def. Mem. in Opp. at 26.) Even if the State believes the Statute to be clear, hundreds of transactions occur every day in Oregon about which ambiguities exist and that are not resolvable by the plain language of the Statute. Only the whim of particular law enforcement officers stands between plaintiffs and criminal prosecution. For mainstream retailers, such as many of the plaintiffs, fear of publicity as to a charge of "luring" is almost as chilling as a conviction.

As an initial matter, the State's argument overlooks the fact that vagueness is addressed with particular stringency when First Amendment freedoms are at stake and when criminal penalties may result. *Info. Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) ("The requirement of clarity is enhanced when criminal sanctions are at issue or when the statute 'abut[s] upon sensitive areas of basic First Amendment freedoms.'" (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972))). Statutes that regulate any speech protected under the First Amendment must operate with "narrow specificity." *Foti*, 146 F.3d at 638-39 (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)). That particular stringency is necessary (1) because citizens should not be punished for behavior that they could not have known was illegal, (2) to avoid "arbitrary and discriminatory" enforcement by state officers and (3) to avoid the potential chilling effect on speech that is covered by the First Amendment. *Id.* at 638. The Statute at issue implicates all of those concerns.

Even considering the State's arguments, it remains unclear what it means for speech to be "merely an incidental part of a nonoffending whole." "Incidental" means "subordinate, nonessential, or attendant in position or significance." *Webster's Third New International*

Dictionary (2002).[10] What is subordinate, nonessential or less significant is completely within the eye of the beholder (particularly as the Statute contains no reference to contemporary community standards). What one citizen (or police officer or district attorney) considers "incidental" to a work, another might consider the most important point. That judgment is especially likely to vary if the beholder finds the speech at issue to be offensive. Avoiding such arbitrary and discriminatory enforcement is at the very heart of the issues a court should consider when determining whether a statute is vague.

The State cites *California Teachers Association v. Board of Education*, 271 F.3d 1141, 1154 (9th Cir. 2001), to argue that the word "incidental" is not vague. The State misses the point. That case does not even discuss the word "incidental." Moreover, the State provides a poor analogy for understanding the meaning of the word. *Teachers Association* concerned a challenge, on vagueness grounds, to an initiative requiring teachers to present curriculum "overwhelmingly" or "nearly all" in English. Those words require a determination of a *numerical* judgment, which may not be mathematically precise but which may be readily approximated. The word "incidental" functions differently because, as discussed above, it requires a *value* judgment about what is more or less important.

It also remains unclear what it means for speech to "serve some purpose other than titillation." The State focuses its argument on the word "titillation," arguing that the inquiry is over because the court in *Maynard*, 168 Or. App. at 118, provided a definition. Again, the State misses the point. Even ignoring the fact that the definition sheds no real light on the meaning of

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[10] Oregon appellate courts use *Webster's Third New International Dictionary* as their dictionary of choice for interpreting the common meaning of words used in statutes. *See, e.g.*, *SAIF v. Walker*, 330 Or. 102, 109-110, 996 P.2d 979 (2000); *Owens v. Maass*, 323 Or. 430, 435, 918 P.2d 808 (1996). The Oregon legislature is assumed to be aware of this interpretive device.

the term, the real question is the meaning of "*some purpose other than*" titillation—a question that the *Maynard* court did not address in a useful way for the Statute at issue.[11] Obviously the phrase is designed to spare from prosecution those who are providing the materials for a reason other than titillation. But to state the phrase is to reveal how little meaning lies behind it. Could the material serve a purpose other than titillation for a third party? What if the material is provided for more than one purpose? How much of the purpose (even a *general* approximated amount) must be unrelated to titillation? Close to all? Half? Whose titillation? How is a potential defendant to know whether the minor will be titillated (what sexually arouses one minor may not sexually arouse another). At the end of the inquiry, the phrase "some purpose other than titillation" requires the same kind of value judgment as the "incidental part" requirement. The phrase means whatever the prosecutor wants it to mean.

The Statute's scienter requirement does not alter the analysis. Here, although the initial provisions of Or. Rev. Stat. § 167.054 require that a person "know" the material is sexually explicit and "intend" to furnish it, the affirmative defense destroys any clarity that the initial scienter requirement might provide. Even if the actor knows he is furnishing sexually explicit

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[11] The *Maynard* court specifically based its construction of the defense in light of the fact that the former statute did not prohibit the titillation of the criminal defendant. The Statute at issue here *does* state that prohibition. Therefore the *Maynard* court's reasoning does not translate to the current Statute.

In addition, the text of the Statute is not identical to that construed in *Maynard*. The statute at issue in *Maynard* provided an affirmative defense for material "forming merely an incidental part of an otherwise nonoffending whole, and serving some *legitimate* purpose *therein* other than titillation." Or. Rev. Stat. § 167.085(3) (1999) (emphasis added), *amended by* Or. Laws 2001, ch. 607, § 1. The Statute challenged by plaintiffs in this case does not contain the words "legitimate" and "therein." Or. Rev. Stat. §§ 167.054(2)(b), 167.057(2). This omission makes it unclear whether the defense could be invoked if the material included images, verbal descriptions or narrative accounts that served a nontitillating purpose in some other setting, such as illustrations borrowed from a medical text or from classical Western art.

material, he does not know if his actions are unlawful unless he knows whether the sexually explicit portions are sexually arousing, are an "incidental part of an otherwise nonoffending whole" and serve "some purpose other than titillation." Even if the actor knows what he thinks those terms mean, those who enforce the law still may enforce it against him.

The analysis is no better for Or. Rev. Stat. § 167.057. Under that provision, a college-aged person may give his high-school-aged sibling a book with sexual passages (for example, *Snow Falling on Cedars*) for the express purpose of titillation, but he will not know whether that act is unlawful unless he understands whether a prosecutor would consider the sexual passages to "serve some purpose other than titillation" or to be an "incidental part of an otherwise nonoffending whole."

Finally, there is no natural interpretation of the Statute that would make it less vague. In considering a challenge to a state law, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (*quoting Virginia v. Am. Booksellers Ass'n*, 484 U.S. at 397). Otherwise, judicial rewriting of the Statute would invade the legislative domain and allow the courts, rather than the legislature, to decide which conduct should be prohibited. *Id.* at 884-85 & n.49. Here, the Statute in question has never been construed by an Oregon court. Even if this Court were willing to impose a limiting construction, plaintiffs are not aware of any construction that would serve the purpose, and the State has not proposed any.

It should not be surprising, then, that the primary theme of the State's response is that the law "manifestly is not aimed at the conduct of plaintiffs." (State Memo at 31.) At the end of the day, the State's response to the vagueness of the Statute is, "Trust us. We don't intend to prosecute you." The State's reassurances are cold comfort because the Statute allows

prosecution of plaintiffs in their everyday constitutionally protected activities. Plaintiffs are entitled to more assurances to protect them from the personal predilections of police officers, prosecutors and juries than the bare assertion that plaintiffs are not the law's intended targets. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *ACLU v. Reno*, 929 F. Supp. at 86 ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."). Well-meaning though those authorities might be, the fact that the Statute allows such wide discretion and such varying conclusions is evidence that the legislature did not accomplish its task to contain that discretion within predictable bounds.

V. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFFS.

As described in plaintiffs' initial memorandum in support of their motion for a preliminary injunction, the balance of hardships favors plaintiffs. It is plaintiffs, mainstream entities that do business in Oregon, that suffer the real harm of uncertainty when the Statute either chills their speech or makes them live with the knowledge that they might be prosecuted. If, as the State acknowledges, plaintiffs and those on whose behalf they sue are not within the class of persons whose activities the State sought to deter by enacting the Statute, then it will cause no harm to the State to be enjoined from prosecuting them. Thus the State's compelling interest in protecting the physical and psychological well-being of minors—although undeniably important—is not a weighty interest in the balance of hardships.

The State raises two more arguments that the balance of hardships weighs in its favor. First, it contends (without offering any precedent to support its position) that plaintiffs are less deserving of a preliminary injunction because they filed suit four months after the Statute took effect. A delay of several months is not the kind of significant delay that courts have deemed worthy of consideration in a preliminary injunction hearing. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417 (9th Cir. 1991) (plaintiff pursued case with "reasonable diligence" when he waited more

than six months to file suit); *Kettle Range Conservation Group v. U.S. Forest*, 971 F. Supp. 480, 484 (D. Or. 1997) (Panner, J.) (rejecting state's argument that conservation group's five-month delay in seeking preliminary injunction to stop timber sale was unreasonable); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp. (LSC)*, 961 F. Supp. 1404 (D. Haw. 1997) (nine-month delay was not unreasonable, especially because requested injunction involved protection of First Amendment freedoms); *cf. Lydo Enter., Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (holding *five-year* delay was significant delay to challenge municipal zoning ordinance).[12] Moreover, the short time delay in filing the papers is justifiable. The Statute is complex and unclear. Given the number of plaintiffs, appropriate coordination among them was essential. Plaintiffs wanted to present to this Court papers that thoughtfully presented the issues the Statute raises.

Second, the State argues that plaintiffs are trying to obtain a preliminary injunction to reverse the status quo. Defendants fundamentally misunderstand the definition of status quo. As the Ninth Circuit has recognized, the status quo for a preliminary injunction is "the last uncontested status [of the parties] which preceded the pending controversy." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963) (citation omitted); *accord* 11A Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d* § 2948, at 136 (1995). In this case, the last uncontested position of the parties before the dispute over the new statutes was that plaintiffs were free to sell books, educate teenagers and take a grandchild to the library without infringement of their First Amendment rights and without threat of prosecution. This state of affairs is the status quo. Thus a preliminary injunction would preserve the status quo—in which no plaintiff has been prosecuted for violating the statutes.

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[12] In fact, if any party has delayed, it is the State. One might just as easily ask why the State waited seven years to enact a new statute after the 2000 *Maynard* decision.

VI. CONCLUSION.

For the foregoing reasons, plaintiffs respectfully request that the Court grant their request for a preliminary injunction enjoining defendants and their agents, servants, employees and attorneys, and those persons in active concert or participation with those who receive actual notice of the injunction, from enforcing the Statute against plaintiffs and those on whose behalf they sue.

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