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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 REQUEST FOR DECLARATION OF UNCONSTITUTIONALITY AND PERMANENT INJUNCTION

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## I. INTRODUCTION

Plaintiffs, who include Oregonians, sex educators and 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 an order declaring Oregon Revised Statues ("ORS") 167.057 ("Section 057") and 167.054 ("Section 054") (collectively the "Statutes") unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution because they criminalize material that is protected as to both adults and minors, and under the Fifth and Fourteenth Amendments of the U.S. Constitution because they are unconstitutionally vague. Further, plaintiffs seek a permanent injunction against enforcing the Statutes either generally based on a facial challenge or as applied to plaintiffs and those on whose behalf they sue.

Under the First and Fourteenth Amendments and the well-established precedent of the U.S. Supreme Court, a state may restrict the distribution of sexually explicit material to minors only if that material is considered to be obscene for minors under a three-part test established by the Court in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968). As set forth herein, the Statutes do not meet this narrowly drawn test. They contain no requirement—either literally or functionally—that the restricted work be taken as a whole, appeal to the prurient interest of minors, be patently offensive, lack serious value to minors (whether it be literary, artistic, political or scientific) and be judged under contemporary community standards as to what is not acceptable for minors. The Statutes are not narrowly tailored to a compelling government interest. They prohibit constitutionally protected material and are unconstitutional.

The Statutes are unconstitutional under the Fifth and Fourteenth Amendments because they are unconstitutionally vague. The exception to both Sections 054 and 057, that a defendant is not subject to prosecution if the furnished material forms "merely an incidental part of an otherwise nonoffending whole and serve[s] some purpose other than titillation," is impossible to

decipher and subjects even potential defendants who would never be prosecuted to a constitutionally impermissible chilling effect on their free speech rights.

For the all of the reasons set forth herein, this Court should grant plaintiffs' request for declaratory and injunctive relief.

## II. FACTS

### A. The Statutes and Their Provisions.

On July 31, 2007, Governor Kulongoski signed into law House Bill 2843, effective January 1, 2008 as chapter 869 of Oregon Laws 2007, parts of which are codified as the Statutes. The Statutes are censorship laws that are unconstitutional in a multitude of ways. The Statutes are reproduced as Appendix A and are described below.

#### 1. Section 057: Furnishing for the Purpose of Sexual Arousal or Satisfaction.

Section 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[1] for the purpose of arousing or satisfying the sexual desires of the person or the minor.

##### a. Exceptions to Liability Under Section 057.

Section 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. Both parts of the exemption must be met to avoid liability.

[1] "Sexual conduct" means "(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; (c) [p]enetration of the vagina or rectum by any object other than as part of a medical diagnosis or as part of a personal hygiene practice; or (d) [t]ouching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female." ORS 167.051(4).

Section 057 provides no exception to liability for museum, school, law enforcement or medical treatment personnel, or sex educators or parents.

**b. Affirmative Defenses to Liability Under Section 057.**

Section 057 has three affirmative defenses: (1) "[t]hat 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 Section 057, unlike under Section 054, offer no defense for material used for educational purposes and do not protect parents or educators.

**2. Section 054: Furnishing Sexually Explicit Material.**

Section 054 provides that a person commits the crime of furnishing sexually explicit material to a child "if the person intentionally furnishes[2] a child,[3] or intentionally permits a child to view, sexually explicit material[4] and the person knows that the material is sexually explicit material." Thus the major differences between Section 054 and Section 057 are that Section 054 applies only to dissemination to children under 13 years of age, applies only to visual depictions; does not include "[t]ouching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female;" and, significantly, does not require that the person furnishing the material have any purpose of arousing or satisfying the sexual desires of the recipient.

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[2] "Furnishes" means "to sell, give, rent, loan or otherwise provide." ORS 167.051(2).

[3] A "child" is a person under 13 years of age. ORS 167.051(1).

[4] "Sexually explicit material" is "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(5).

**a. Exceptions to Liability Under Section 054.**

A person may not be prosecuted under Section 054 if (1) the person is an employee of a museum, school, law enforcement agency, medical treatment provider or public library, when acting within the scope of the person's regular employment or (2) the sexually explicit portions of the material furnished form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation. That second exception is materially identical to the exception in Section 057.

**b. Affirmative Defenses to Liability Under Section 054.**

Section 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. Significantly, a parent is not eligible for the affirmative defense if he or she furnishes the material to a child for any reason other than those specifically enumerated in the affirmative defense.

Though a sex or art educator may raise a defense after being charged with violation of Section 054, the educator is not exempt from prosecution in the same way a museum or school employee would be. The educator must still plead and prove his or her educator status as an affirmative defense. The Statutes do not define the terms "art education" and "sex education." 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 Statutes. Thus even

those who fall within the affirmative defenses will be subject to a chilling effect on their constitutionally protected activities.

**B. Effect of the Statutes on Plaintiffs.**

Plaintiffs are, or represent, Oregonians, sex educators, grandparents and 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 the State. Plaintiffs are individually and more fully described in Appendix B and in the declarations plaintiffs filed together with their motion for a preliminary injunction, which plaintiffs incorporate herein by reference. All of plaintiffs' activities arguably come within the reach of the Statutes. Although the bookstore and trade association plaintiffs are not and do not represent so-called "adult" retailers, they fear prosecution under Sections 054 and 057 for offering, distributing or selling material that might be deemed by some to be restricted by the Statutes ("Restricted Speech"). Planned Parenthood of the Columbia/Willamette and Cascade AIDS Project distribute Restricted Speech to the public at large and to individual children and minors to teach safe sexual behavior; they fear prosecution based on those activities. Candace Morgan and the members of the American Civil Liberties Union of Oregon, Inc. (the "ACLU of Oregon") are individuals resident in Oregon who fear prosecution for giving First Amendment-protected materials to children and minors who are friends and relatives.

If any plaintiffs are found to have violated Section 054, they risk penalties including up to one year of imprisonment and/or a fine of up to $6,250. If they are found to have violated Section 057, they risk up to five years of imprisonment and/or a fine of up to $125,000.

## III. THE STATUTES ARE UNCONSTITUTIONAL, BOTH FACIALLY AND AS APPLIED

**A. The Standard for a Facial Challenge.**

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 of N.Y.*, 447 U.S. 530, 540 (1980); *see also Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1059 (9th Cir. 2007) (stating proposition); *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (same). As plaintiffs demonstrate below, the Statutes are not narrowly and precisely drawn. When challenging a statute because it restricts more material than the First Amendment allows, the amount of constitutionally protected expression should be judged "in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

With respect to the challenge based on vagueness, "[i]n the First Amendment context, facial vagueness challenges are appropriate if the statute clearly implicates free speech rights," *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001), as the Statutes clearly do here.

**B. The Standard for a Pre-Enforcement As-Applied Challenge.**

In the Complaint, plaintiffs raised both a facial and an as-applied challenge to the Statutes. (Complaint v.A.) When this point was raised during oral argument on the preliminary injunction, the Court expressed doubts as to the viability of a pre-enforcement as-applied challenge. In fact, precedent supports such a challenge. In *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638 (2007), the Supreme Court specifically approved the use of pre-enforcement as-applied challenges. In that case, the Court stated, "[t]he considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge." *Id.* Pre-enforcement as-applied challenges are also appropriate in the vagueness context. *See Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007) (example of such challenge); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 105 (2d Cir. 2003) ("In this case, we do not need to determine whether the statute is substantially overbroad; we can simply determine whether the statute can be constitutionally applied to the internet speech upon

which plaintiffs base their suit."); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006) (example of such challenge).

Plaintiffs' as-applied challenges are appropriate and ripe for relief.

### C. *Miller/Ginsberg* Defines What Restrictions May Be Placed on Speech Given to Minors.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." That amendment has been applied to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Obscene material is unprotected by the First Amendment. *Miller*, 413 U.S. at 27. However, not all sexually explicit material is obscene. A state may only restrict works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. When evaluating whether a state may suppress First Amendment-protected materials, courts apply "strict scrutiny," which means the state's restriction must be narrowly tailored to achieve a compelling interest. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (describing principle). In *Ginsberg*, 390 U.S. at 639-40, the Supreme Court determined that the state's interest in the well-being of youth, and the provision of support for parents' authority to direct the rearing of their own children in their own household,[5] constituted a compelling interest that allowed the restriction of some materials not deemed obscene. *See also Reno v. ACLU*, 521 U.S. 844, 865 (1997). That interest, however, does not justify an unnecessarily broad suppression of speech addressed to adults. *Id.* at 875. It is the state's burden to show that laws that suppress speech are narrowly tailored and, that a less restrictive provision would not accomplish the same goals as the law being challenged. *Id.* at 879.

[5] As described below, the Statutes do not support a parent's authority to direct the rearing of their minor children. In fact, the Statutes would allow for a parent to be prosecuted for providing Restricted Material.

Taking together the holdings in *Miller* and in *Ginsberg*, the U.S. Supreme Court uses 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 (E.D. Pa. 2007). Material that falls outside the narrow Miller/Ginsberg test is protected by the First Amendment—whether the recipient be an adult or a child. Because the test determines what falls within the universe of what the state legitimately may regulate—and therefore is part of evaluating whether the state has met its burden to show that the statute is "narrowly tailored"—vagueness and uncertainty should be resolved in favor of a finding of unconstitutionality.

Plaintiffs do not argue that a statute has to state the *Miller/Ginsberg* test verbatim for the statute to comply with the First Amendment (though defendants have previously cited no case in which a statute containing a test substantially different from *Miller/Ginsberg* has been upheld, and counsel for plaintiffs know of no such case).[6] It is sufficient if—and, in fact, necessary that—the substantive requirements of the test are embodied in the statute.

[6] In fact, to plaintiffs' knowledge, no court has ever authorized the states to adopt a different standard that functionally had similar results; some U.S. Supreme Court precedent appears to urge the adoption of the *Miller/Ginsberg* test directly. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) ("[T]he applicable [state] law, as written or authoritatively interpreted by the [state] courts, [must] meet[] the First Amendment standards set forth in Miller v. California . . . .").

Although the *Miller/Ginsberg* test is generally referred to as a three-part test, there are actually five substantive components. 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. As demonstrated below, neither Section 057 nor Section 054 includes all of these requirements; therefore they are unconstitutional under the First Amendment.

*Miller/Ginsberg* is precisely about the sale of sexually explicit material to minors, and it expressly limits what material can be prohibited. 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 juveniles of 'objectionable' material." *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297, 1302 (7th Cir. 1973). More recently, the Seventh Circuit, after 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. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 647 (7th Cir. 2006).

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 are not enforced or have been struck down in lower courts, whose decisions are usually not appealed. *See, e.g., Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002) (Ohio definition of "harmful to juveniles" enjoined as not in compliance with *Miller/Ginsberg* test).

Each of the five substantive requirements is essential in upholding First Amendment rights. The omission of any one of them is sufficient to render the statute unconstitutional. *See Reno*, 521 U.S. at 873 & n.38 (explaining that each part of test provides important limiting principle that helps to isolate what is protected: "Even though the word 'trunk,' standing alone,

might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, its meaning is clear when it is one prong of a three-part description of a species of gray animals.").

**1. Community Standards.**

Relating the test (except for serious value) to community standards (whether state or local) permits the finders of fact (whether lay jury persons or judges), as well as those in commerce to whom the law applies, to base their determinations on measures that are presumably known to them. Community standards ensure that material is not judged by its effect on the most sensitive or insensitive person. *Hamling v. United States*, 418 U.S. 87, 107 (1974); *United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976). Further, it is a recognition of the diversity and size of the nation. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller*, 413 U.S. at 32.

**2. Considering the Work as a Whole.**

Considering the material as a whole prevents a work from being banned or restricted when it is primarily First Amendment-protected, but includes a portion that, if taken out of context, could appear to be nonprotected. *Kois v. Wisconsin*, 408 U.S. 229, 231-32 (1972). For example, in *Kois*, the Court held a "Sex Poem" was not obscene because "its placement amid a selection of poems in the interior of a newspaper" indicated its purpose was attempted creation of work with artistic value. *Id.* at 231. Examining offensive portions in context with the overall work allows the trier of fact to determine whether the work contains a purpose beyond just portraying "filth for its own sake." *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 707 (2d Cir. 1934).[7]

[7] The requirement that a work should be "taken as a whole" originated in that opinion by Judge Learned Hand. *See* Javier Romero, *Comment, Unconstitutional Vagueness and Restrictiveness in the Contextual Analysis of the Obscenity Standard: A Critical Reading of the Miller Test Genealogy*, 7 U. Pa. J. Const. L. 1207, 1214 (2005). Although James Joyce's *Ulysses* contained passages properly classified as obscene, the work was not obscene when taken as a

(continued . . .)

**3. Appeal to the Prurient Interest.**

"Sex . . . has indisputably been a subject of absorbing interest to mankind through the ages," and the ability to freely discuss ideas about sex is important to the "development and well-being of our free society." *Roth v. United States*, 354 U.S. 476, 487, 488 (1957). Therefore, appeal to the "prurient interest" does not refer to all matters dealing with sex or that engender normal sexual arousal, but only those that appeal to a shameful or morbid interest in sex. *Miller*, 413 U.S. at 16 n.1; *Roth*, 354 U.S. at 487 & n.20 (noting that "sex and obscenity are not synonymous" and that "prurient" refers to a "'shameful or morbid'" interest (citation omitted)); *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."). The "prurient interest" requirement differentiates a work that is "harmful to minors" from one that appeals to a "'good old fashioned . . .' interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985) (citation omitted). Thus this requirement protects material that has mainstream sexual appeal.

**4. Patent Offensiveness.**

The "patently offensive" element of the *Miller/Ginsberg* test is important because it sets limits on what kinds and what manner of sexual depictions constitute obscenity. This element of the obscenity test refers to *the extent* to which the material appeals to the prurient interest or the *manner* in which the sexual conduct is depicted. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992) ("A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.,* that which involves the most lascivious displays of sexual activity."). Only extensive, detailed or otherwise graphic depictions of ultimate sexual conduct fall outside the reach of the First Amendment.

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(. . . continued)
whole because the book's "dominant effect" was literary depiction of the struggles of humanity, not creation of lust. *One Book*, 72 F.2d at 706-08.

**5. Serious Value.**

Finally, the "serious value" prong of the *Miller/Ginsberg* test is a significant and necessary safety net for plaintiffs. A work that possesses one of the enumerated kinds of serious value is protected speech under the First Amendment. As one commentator explains: "[p]rurient interest and patent offensiveness define obscenity, but serious value identifies protected speech." Edward John Main, *The Neglected Prong of the* Miller *Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. Ill. U. L.J. 1159, 1161 (1987). Thus the "serious value" element inquires not whether a work appeals to the prurient interest or contains patently offensive sexual content; rather the inquiry is whether the work deserves First Amendment protection *even though* it possesses those qualities. 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 whether the material may appeal to the prurient interest of a teenager. Such clarity in an otherwise grey area is a societal benefit in and of itself.

Communications of serious value are and should be protected by the First Amendment. As Justice White stated in *Pope v. Illinois*, 481 U.S. 497, 500 (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."

And as Justice Stevens said, dissenting in the same case:

> 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 (Stevens, J., dissenting).

### D. Sections 054 and 057 Do Not Meet the *Miller/Ginsberg* Test, Either Literally or Functionally; That Failure Is Constitutionally Fatal.

Sections 057 and 054 simply do not contain, functionally or literally, the key requirements of the *Miller/Ginsberg* standard.

#### 1. Community Standards.

Sections 057 and 054 contain no requirement that prohibited material meet contemporary community standards as to what is not acceptable for minors. Although those sections undoubtedly restrict some material that contemporary community standards would also restrict, there is no requirement that the finder of fact be guided and limited by community standards. That is a clear violation of the *Miller/Ginsberg* standard.

#### 2. Considering the Work as a Whole.

There is no requirement that the work be taken as a whole. The exception in ORS 167.057(2) and 167.054(2)(b) for work that "forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation" might look as if it fulfills that requirement. However, even if it were read that way, the word "and" linking the two clauses of the defense means that a work will not be taken as a whole *unless it also* serves some purpose other than titillation. Thus if one item in the work is deemed to have the purpose of titillation, the work does not have to be taken as a whole. That is a clear violation of the *Miller/Ginsberg* standard, and it allows the restriction of nonobscene, constitutionally protected works.

#### 3. Appeal to the Prurient Interest.

There is no requirement that the restricted material appeal to the prurient interest of minors. The vast majority of "sexual conduct" (sexual intercourse, masturbation, touching of breasts or buttocks, etc.) is not "shameful or morbid" in any way. *Brockett*, 472 U.S. at 499. Section 057 prohibits material that depicts or describes sex and sexually related acts, and Section 054 restricts material that depicts the same sex or sexually related acts. That may in some instances be titillating (*i.e.*, sexually arousing), but it is not material that appeals per se to a shameful or morbid interest in sex. Instead, they may well appeal to what the Supreme Court

called "good old fashioned . . . interest in sex." *Brockett*, 472 U.S. at 499 (internal quotation marks and citation omitted). Thus restricting materials that titillate, that are intended to sexually arouse, or even that actually arouse the viewer does not meet the "prurient interest" prong of *Miller/Ginsberg*. Neither *Miller* nor *Ginsberg* describes "sexual arousal" as a prohibited effect of otherwise protected material, any more than being depressed, happy or angry as a result of reading material may cause the material to be criminalized. It has been said that the classic works of Henry Miller (*Tropic of Cancer* and *Tropic of Capricorn*), current romance novels and many mainstream movies were written or produced with an intent (not necessarily the sole intent) to sexually arouse. Thus, under defendants' interpretation, any book, magazine, motion picture, etc., that may sexually arouse a reader and thus can be presumed to have been created with an intent to arouse may fall within the scope of the Statutes, even though does not appeal to the prurient interest. This alone is a substantial amount of overbreadth.

**4. Patent Offensiveness.**

The Statutes contain no requirement that the restricted material be patently offensive. Sections 057 and 054 restrict viewing or reading material describing or depicting sexual acts. Certainly, those acts may sometimes be presented in a way that is patently offensive—but there is nothing in Section 057 or Section 054 that ensures that only patently offensive material is restricted. In its Memorandum opposing the motion for preliminary injunction, the State conceded that Sections 057 and 054 lack the patent offensiveness safeguard of *Miller/Ginsberg*. (Memorandum at 4-5.)

**5. Serious Value.**

Nothing in Section 057 or Section 054 provides an exemption for works that have serious value to minors. The exception in ORS 167.057(2) and 167.054(2)(b)—the logical place to include a provision for serious value—refers only to whether the material is titillating and the nature of the relation of the description or depiction of "sexual conduct" or the "sexually explicit material" to the whole work. Neither of those are sufficient to imbue the Statutes with a serious

value requirement; as described above, the entire purpose of the "serious value" element is to protect materials that have serious value *despite* the sexual nature of their content.[8] In its Memorandum opposing the motion for preliminary injunction, the State conceded that Sections 057 and 054 lack the serious value safeguard. (Memorandum at 4-5.)

**E. The Statutes Are Not Narrowly Drawn to Achieve a Compelling State Interest.**

*Miller/Ginsberg* defines what material the state may lawfully restrict as to minors to fulfill the compelling state interest of protecting minors. The Statutes are unconstitutional if they are not narrowly tailored to what *Miller/Ginsberg* allows them to restrict and if they restrict more than is necessary to fulfill that interest. As described below, the Statutes fail on both counts.

**1. The Statutes Are Unnecessary Because the Unchallenged Portion of ORS 167.057 Is Sufficient to Serve the State's Need to Protect Against "Grooming."**

As stated above, plaintiffs do not challenge ORS 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).

However, subsection (1)(b)(A), which is directed toward materials that arouse or satisfy the sexual desires of a minor, is not such a luring provision. A minor's sexual arousal or satisfaction is not a crime. In the preliminary injunction hearing, the State attempted to justify that provision on the basis that its purpose is to stop sexual predation caused by "grooming" or enticing child victims. The Second Circuit responded to a similar argument about "grooming" and 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*, 342 F.3d at 102.

[8] In addition, as discussed below, the "incidental part" and "nonoffending whole" provisions are unclear.

The same is true here; the State could vigorously enforce subsection (1)(b)(B) and prosecute violations of that subsection without impacting First Amendment rights. [6]

Further, 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.

**2. A Criminal Burden May Not Shift the Burden of Proof to the Defendant Regarding an Element of the Crime by Requiring the Defendant to Negate the Element.**

The law is clear that "[i]f a defense negates an element of the crime, rather than mitigates culpability once guilt is proven, it is unconstitutional to put the burden of proof on the defendant." *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1079 (9th Cir. 2004) (internal quotation marks and citation omitted).

The requirement by ORS 167.054(2) and 167.057(2) that a defendant may only be liable for furnishing material that has a titillating purpose does not form an incidental part of an otherwise nonoffending whole. Both of those subsections begin with the proviso, "[a] person is not liable to prosecution for violating [the statute] if." That proviso does not make clear whether the subsections constitute a defense (in which case the burden of proof is on the defendant) or whether they constitute elements of the crime (in which case the burden of proof on the prosecution). If it is a defense, both Sections 054 and 057 are unconstitutional and cannot stand.

[6] Oregon has a number of other statutes criminalizing luring of various kinds. ORS 163.355-.427 (various forms of sexual contact with minors of various ages), 163.431-.434 (luring minors over Internet), 163.435 (contributing to sexual delinquency of minor), 163.445 (sexual misconduct with minor), 163.479 (unlawful contact with minor by sex offender), 167.057(1)(b)(B) (furnishing sexual material for purpose of inducing minor to engage in sexual conduct).

ORS 167.054(3)(a) and 167.057(3)(a), which set forth categories of persons who are not subject to prosecution under Sections 054 and 057 are expressly labeled affirmative defenses. Thus the prosecution may use those affirmative defenses to force the defendant to prove why he or she is *not* culpable of a crime. That is unconstitutional. *See United States v. Davenport*, 519 F.3d 940, 945 at n.3 (9th Cir. 2008).

**3. The Statutes Do Not Only Restrict Speech Made for the Primary Purpose of Titillation; They Also Restrict Speech for Which Titillation Is One of Several Purposes.**

At the preliminary injunction hearing, a key question was the meaning of the defenses in ORS 167.057(2) and 167.054(2)(b). Neither Oregon case law nor Oregon principles of statutory construction support the State's argument that the Statutes only restrict speech made for the primary purpose of titillation.

**a. *Maynard* Does Not Apply; Therefore It Cannot Require the Statutes to Be Read to Require the Primary Purpose of Titillation.**

Oregon case law, if on point, would provide context and meaning when the bare words might not otherwise have meaning. Under both Sections 054 and 057, defendants are not liable to prosecution if the material at issue "forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation." Interpreting that exception is key to understanding how both portions of the Statutes—and especially that exception—actually operate.

Plaintiff is aware of only one case that even arguably provides a definitive state law interpretation of the statute at issue: *State v. Maynard* ("*Maynard III*"), 168 Or. App. 118, 5 P.3d 1142 (2000). Although *Maynard III* involved a statute with text that was similar in many ways to the Statutes in this case, the *Maynard III* court did not provide an interpretation that is useful to this case because that court was exclusively focused on an issue that does not require interpretation here: whether the minor's or the furnisher's titillation was the prohibited harmful effect against which the statute was directed.

Case law interpreting Article I, section 8, of the Oregon Constitution provides that a statute that restricts speech may nonetheless be found constitutional under the Oregon Constitution if the statute is directed at an otherwise illegitimate effect of an action related to speech, rather than the speech itself. *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992). In *Maynard I*, the Oregon Court of Appeals had determined in a previous proceeding that the statute at issue (a prohibition on furnishing certain visual materials to people under age 18) was unconstitutional because it did not spell out the forbidden effects it sought to prevent. *State v. Maynard* ("*Maynard I*"), 138 Or. App. 647, 910 P.2d 1115 (1996). The decision had been appealed to the Oregon Supreme Court, which remanded with instructions to reconsider that decision in light of another recent Oregon Supreme Court decision. *State v. Maynard* ("*Maynard II*"), 327 Or. 582, 964 P.2d 264 (1998). On remand, the Oregon Court of Appeals went beyond the text of the specific statutory provision at issue to seek meaning in the context of the entire statute: "We now examine the context of the statute to determine whether it sufficiently identified the harmful effects it sought to prevent." *Maynard III*, 168 Or. App. at 123.

As part of that inquiry, the Oregon Court of Appeals considered whether the statute's affirmative defense clarified the forbidden effects that the overall statute sought to prevent. That defense provided:

> "That the defendant was charged with the sale, showing, exhibition or display of an item, those portions of which might otherwise be contraband, forming merely an incidental part of an otherwise nonoffending whole and serving some legitimate purpose other than titillation."

*Maynard III*, 168 Or. App. at 124 (citation omitted). That is similar, though not the same as, the exemptions in Sections 057 and 054. ORS 167.057(2) and 167.054(2)(b).

The court of appeals was concerned with the meaning of "titillation" (which it defined using a dictionary definition) and, more importantly, *whose* titillation the statute was proscribing. Was it the defendant's or the victim's? *Maynard III*, 168 Or. App. at 124-25. The court concluded, based on the context of the statute, that the defense sought to prevent the *victim's*

titillation. *Id*. It noted that, as every other part of the statute sought to protect the victim, the defense would be nonsensical otherwise: "[I]t would make no sense to shield a defendant from criminal liability merely because that defendant did not primarily intend to titillate him or herself by engaging in the prohibited conduct . . . the defense applies to those materials not primarily intended to titillate the victim." *Id.* After that brief observation, the court considered the remainder of the statute without further interpretation of the affirmative defense. The court ultimately concluded that the statute was unconstitutionally overbroad and was not susceptible to any narrowing construction.

The State will probably argue that the brief passage in *Maynard III* interpreting the defense shows that, under Oregon case law, the Statutes prohibit only materials that are primarily intended to titillate, not materials that may be intended to titillate as well as (for example) educate, inform or entertain. That is a gross misreading of *Maynard III*. In fact, *Maynard III* was not concerned at all with whether the defendant might have had some purpose other than titillation. Instead, *Maynard II* was concerned with *who* was being titillated, and its reference to a "primary intent" was simply part of an aside that it would be silly, in light of the rest of the statute, to allow a defense because the defendant was not primarily trying to titillate himself. It is not surprising, therefore, that *Maynard III* offers absolutely no explanation about whether material with purposes in addition to titillation violates Sections 057 and 054. That question was not even on the table for the *Maynard III* court.

*Maynard III*'s sole relevance to this case is that it defined "titillation" as "sexual excitement or arousal." 168 Or. App. at 124.

**b. Applying Oregon Statutory Interpretation Principles, the Defense Does Not Require a "Primary Purpose" of Titillation.**

Because Oregon case law provides no guidance as to the meaning of the phrase "some purpose other than titillation" in the context of a work with multiple purposes, this Court should apply Oregon statutory interpretation principles to determine what that phrase means before ruling on the Statutes' constitutionality. In Oregon, statutory interpretation begins with the

principles outlined in *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 859 P.2d 1143 (1993). At the first level of analysis, courts consider the text and context of the statute to determine its meaning, without inserting what has been omitted or omitting what has been inserted, giving words of common usage their plain, natural and ordinary meaning, and giving meaning to each word and phrase of the statute. *Id.* at 611.[9]

Webster's Third New International Dictionary (2002) sheds light on the meaning of the phrase.[10] When "other" is used after a noun and before the word "than," it states that "other than" means "different" or "distinct" from the noun mentioned. *Id.* at 1598. Thus, the use of the phrase "other than" operates to exclude the word following the phrase. To us an example from the dictionary, in the phrase "all parts of the house other than the windows were in good condition," the "parts" to which the phrase refers do not include the windows. *Id.* (stating example). Similarly, in the phrase "some purpose other than titillation," the "purpose" to which the phrase refers does not include titillation. Therefore, the "purpose" portion of the exception only applies if the material's purpose does not include titillation. If the material has more than one purpose, and one of those purposes is titillation, then the exception is not available. For example, even if the primary purpose of the material is education or entertainment, if the material is deemed to also have a titillating purpose, it is subject to the Statutes.

[9] If (and only if) the statute remains ambiguous after the text and context inquiry, the court reviews legislative history. *Id.* at 612. And, finally, if the statute remains ambiguous after that step, the court will apply general maxims of construction, such as the rule that "the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue." *Id.* at 612.

[10] Oregon appellate courts use that dictionary as their source of choice for interpreting the common meaning of words used in statutes. *See, e.g., SAIF Corp. v. Walker*, 330 Or. 102, 109-10, 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.

### c. Reading the Statutes to Require a Primary Purpose of Titillation Would Rob Section 054 of Its Separate Meaning from Section 057.

A construction of the exception in Section 057 that requires the titillating purpose to be the defendant's primary purpose renders every instance of the verb "furnish" in the statute superfluous. Section 057 already prohibits the furnishing of visual images of sexually explicit material for the purpose of titillation[11] since it forbids the furnishing of such material "for the purpose of . . . [a]rousing or satisfying the sexual desires of the person or the minor." If a defendant could provide material for a variety of purposes, including titillation, and still invoke the exception, the offense itself would be swallowed in the exception and become meaningless. The only reasonable way to interpret the exception is that it may only be invoked when the purpose is exclusively something other than titillation.

### 4. Section 057 Prohibits a Substantial Amount of Material That *Miller/Ginsberg* Would Protect.

Section 057 restricts a vast array of material. It prohibits the furnishing of both text describing and visual materials showing sexual conduct, including intercourse, masturbation or touching of buttocks or female breasts, among other things, whenever the material depicting or describing sexual conduct may be deemed to have titillation as one of its purposes. Thus Section 057 restricts a work of serious value or a work that, taken as a whole, does not appeal to the prurient interest of minors, when one inconsequential paragraph is deemed sexually arousing. Literary works containing verbal descriptions of sexual conduct are common in any bookstore, and many of these works are neither patently offensive nor lacking in serious value as to 17-year olds.[12] The same is true of some graphic novels such as *Lady Snowblood* by Kazuo Koike and

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[11] "Titillation" means "to excite pleasurably or agreeably: arouse by stimulation." *Maynard III*, 168 Or. App. 124.

[12] Just a few examples include *The Handmaid's Tale* by Margaret Atwood, *Snow Falling on Cedars* by David Guterson, *The Color Purple* by Alice Walker, *Ricochet River* by Robin Cody, and *Slaughterhouse Five* by Kurt Vonnegut. The declarations submitted with plaintiffs' motion for preliminary injunction and with this motion contain many more.

Kazuo Kamimura and mainstream films, including, for instance, *Thelma & Louise* and *Titanic*. Virtually every sex education book or pamphlet in existence, including those in evidence in this case, would be prohibited. These materials have serious value, do not appeal to the prurient interest and are not patently offensive. They are constitutionally protected, and a statute that prohibits them is overbroad. The fact that Section 057 requires that the work is furnished for the purpose of arousing the sexual desires of the recipient does not protect plaintiffs. That purpose can be inferred all too easily from the sale or other furnishing of works that include portions deemed sexually arousing.[13] In addition, were a 17-year-old college student to ask a bookseller for a sexy or erotic book to read on a dateless Saturday night, making a recommendation could subject the bookseller under Section 057 to a felony conviction and up to five years in jail.[14] The same might even be true for sending a minor to the section of the store containing such books.

**5. Section 054 Prohibits a Substantial Amount of Material That *Miller*/*Ginsberg* Would Protect.**

In determining how much protected material could be restricted under Section 054, particularly regarding what has "serious value" for those under age 13, this Court should give particular weight to what real preteens actually experience. As described in the concurrently filed declarations of Camelia Hison, Dr. Richard Colman and Dr. Mark Nichols, "preteens" as young as age eight are reaching puberty. Preteens are engaging in sexual intercourse and other sexual behaviors, and they are experiencing associated psychological and physical changes. These preteens have a normal and healthy interest in information about sex and sexuality that they often do not receive from their parents or from other authority figures. They often seek information from older children or teenagers (siblings, cousins or friends) whom they trust and with whom they feel comfortable, and from media that are not limited to traditional "sex

[13] That is exactly the logical leap the State made in its argument on the preliminary injunction motion.

[14] For example, *Shanna* by Kathleen Woodiwiss, *Tall Tales and Wedding Veils* by Jane Graves, *Mine Till Midnight* by Lisa Kleypas, or *After the Night* by Linda Howard.

education" materials, including materials not originally designed for children. Accessing those materials educates preteens about sexual matters and gives them the courage to seek out assistance and information from more traditional sources such as sex educators. Ensuring that preteens are able to ask those questions and receive frank, honest and yes, sometimes explicit answers is crucial, because it prevents irresponsible sexual behaviors that lead to early pregnancy and sexually transmitted diseases. Whether or not those events are perceived as a positive development, those facts are material to what this court should consider in determining what has serious value for a preteen.

The plain language of Section 054 criminalizes the furnishing of a substantial amount of materials protected by *Miller/Ginsberg*. Because the exemption applies only to materials the sexually arousing portions of which must both be incidental *and* serve some purpose other than titillation, the statute unlawfully sweeps in any item that contains incidental portions and portions deemed titillating, but that, taken as a whole, has serious value, is not patently offensive or does not appeal to the prurient interest of preteens. Section 054 would prohibit any number of mainstream films that have artistic or educational value as a whole, but contain sex scenes that are arguably intended to titillate.[15] Section 054 would also ban a number of graphic novels. In addition, Section 054 covers nonoffensive items of serious value in which the sexually explicit content is not incidental but does serve some purpose other than titillation, such as virtually all sexual education materials.[16] *Miller/Ginsberg* forbids those results.

[15] For example, the films *Cold Mountain* (2003) and *Elizabeth* (1998) have historical or educational value, are not patently offensive and do not appeal to the prurient interest, but contain scenes of sexual conduct that could be deemed by some to be titillating.

[16] For example, *The Joy of Sex* by Alex Comfort, *How Sex Works* by Elizabeth Fenwick and Richard Walker, *Where Did I Come From?* by Peter Mayle, *It's Perfectly Normal* by Robie Harris, and *Mommy Laid an Egg, Or Where Do Babies Come From?* by Babette Cole.

**F. There Is No Appropriate Limiting Construction That Would Save the Statutes.**

A federal court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno*, 521 U.S. at 884 (*quoting Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988)). A court's obligation to consider a limiting construction "does not give [it] the unfettered prerogative to rewrite a statute in order to save it." *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (en banc). Thus a federal court is "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (internal quotation marks and citation omitted).

A court may not impose a construction that effectively adds a new term to the statute. *See, e.g., Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 913, 931 (9th Cir. 2004) (refusing to read statutory language "sudden and unexpected physical condition" as describing character of moment of diagnosis rather than of condition); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9th Cir. 2000) (refusing to insert requirement that prohibited activity be performed "under the direction or control" of foreign terrorist organization), *vacated and remanded on other grounds by* 393 F.3d 902 (9th Cir. 2004); *Foti*, 146 F.3d at 639 (refusing to narrow city ordinance prohibiting signs on parked vehicles to only temporary signs); *Ripplinger*, 868 F.2d at 1056 (9th Cir. 1989) (finding state obscenity statute not susceptible of limiting construction when court would need to insert requirement that defendant have knowledge of "overall character" of material to existing statutory requirement that defendant know item has specific sexual content).

Moreover, it is inappropriate for a court to narrow a statute without any direction from the legislature as to the choices necessary for that process. *Reno*, 521 U.S. at 884 ("The open-ended character of the [Communications Decency Act] provides no guidance what ever for limiting its coverage."); *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible

offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").

The fact that the legislature was or should have been aware of a constitutional requirement is insufficient justification for a court to rewrite a statute to conform to that requirement. *See, e.g., United States v. Manning*, 527 F.3d 828, 839 (9th Cir. 2008) (refusing to "impose an artificial, unreasonable definition" by limiting term "mixed waste" in state statute to nonradioactive waste, which would avoid federal preemption of nuclear safety field); *Wasden*, 376 F.3d at 931 (refusing to construe abortion statute so as to make it constitutional because state legislature, although aware of need for adequate medical emergency provision, had not enacted one). In particular, the Seventh Circuit struck down a 2005 statute criminalizing the sale or rental of sexually explicit video games to minors because "[i]nexplicably, the State of Illinois chose to ignore both *Ginsberg*'s and *Miller*'s third prongs in creating the [statute's] definition of 'sexually explicit.'" *Entm't Software*, 469 F.3d at 649. Rather than read in the requirement that the material taken as a whole must lack serious value to minors—of which the Illinois legislature must have been aware—the court concluded instead that the statute was unconstitutional.

As described above, both Sections 057 and 054 are utterly devoid of the functional constitutional safeguards that should ensure they only apply to what *Miller/Ginsberg* would place beyond First Amendment protection for minors. There is no "quick fix" for those multiple deficiencies. To provide a limiting construction, the Court would have to rewrite the Statutes entirely and/or insert multiple new terms. The Statutes are not susceptible to a limiting construction. The only recourse is to strike them down.

## IV. THE STATUTES ARE VAGUE

### A. Vagueness Standards.

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 U.S. 104, 108 (1972). "[W]here a statute imposes criminal penalties, the standard of

certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). Vagueness is intolerable in a statute affecting First Amendment freedoms:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.*

*Nat'l Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 432-33 (1963) (emphasis added; footnote and citation omitted); *see also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

**B. Both Sections 054 and 057 Are Vague Because the Exception Is Vague.**

The Statutes contain 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 Statutes allow 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 Statutes are clear in some cases, hundreds of transactions occur every day in Oregon about which ambiguities exist and that are not resolvable by the plain language of the Statutes. Only the whim of particular law enforcement officers stands between plaintiffs and criminal prosecution. For all plaintiffs, fear of publicity as to a charge of "luring" is almost as chilling as a conviction.

Vagueness is addressed with particular stringency when First Amendment freedoms are at stake and when criminal penalties may result. *Info. Providers' Coal. for Def. of the First Amendment v. Fed. Commc'ns Comm'n*, 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*, 408 U.S. at 109 (1972)). Statutes that regulate any speech protected under the First Amendment must operate with "narrow specificity." *Foti*, 146 F.3d at 638-39 (*quoting Button*, 371 U.S. at 433). 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 Statutes implicate all of those concerns.

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 1142 (2002). What is subordinate, nonessential or less significant is completely in the eye of the beholder (particularly as the Statutes contain 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.

Plaintiffs have argued for a particular interpretation of what it means for speech to "serve some purpose other than titillation." The State no doubt will offer an alternative interpretation. Should the Court find it difficult to resolve those competing interpretations, plaintiffs argue in the alternative that the meaning of that phrase is not resolved by *Maynard III* (as described above) and is unclear. 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,

since what sexually arouses one minor may not sexually arouse another? At the end of the inquiry, the phrase "some purpose other than titillation" could be bent to the judgment of the prosecutor, just as the "incidental part" requirement.[17]

Neither does any scienter requirement clarify the Statutes' meaning. Here, although Section 057 requires that the person furnish the material "for the purpose of" arousal, and Section 054 requires 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 or she is furnishing sexually explicit material, or furnishing material concerning sexual conduct for a particular purpose, he or she does not know if his or her actions are unlawful unless he or she 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 or she thinks those terms mean, those who enforce the law still may enforce it against him or her.

Finally, as described above, there is no natural interpretation of the Statutes that would make them 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*, 521 U.S. 844 at (*quoting Virginia*, 484 U.S. at 397). Otherwise, judicial rewriting of the Statutes 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. Even if this Court were willing to

[17] Nor is it clear whether the Statutes are talking about the purpose of the material or of the provider. If it is of the provider, then Section 054 is surplusage since it is subsumed in Section 057. If it is of the material, how is one to determine the purpose of a book or movie? While sometimes it is clear (*see, e.g., Best Womens' Erotica 2007*, whose cover asks, "All steamed up and nothing to read?" and promises "a Pandora's box of pleasures, with scorching encounters, dreamy partners, and heart-pounding thrills that won't put a run in your fishnets (and a few that will)" or *After the Night* by Linda Howard ("a real scorcher of a read")) usually whether material is sexually arousing depends on many variables including time, place and mood of the reader.

impose a limiting construction, plaintiffs are not aware of any construction that would serve the purpose.

## V. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF

### A. Plaintiffs Are Entitled to Declaratory Relief.

This Court has discretion to grant declaratory relief. In determining whether to grant declaratory relief, "[t]he guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings." *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992). The purpose of declaratory relief is not only to clarify the law for the parties in the case, but also to educate the public. *Id.* "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute," and a court may grant declaratory relief even if it denies an injunction. *Zwickler v. Koota*, 389 U.S. 241, 254 (1967); *accord Steffel v. Thompson*, 415 U.S. 452, 462 (1974) ("[T]he propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief.").

Here, a decision from this Court as to whether the Statutes are constitutional will fulfill the essential purposes of declaratory relief. As described above, the Statutes are both vague and unconstitutionally prohibit material protected by the First Amendment. Declaratory judgment on either ground will relieve plaintiffs from the fear of prosecution and delineate the reach of the Statutes for the public at large. Therefore this Court should exercise its discretionary authority to grant plaintiffs declaratory judgment.

### B. Plaintiffs Are Entitled to Injunctive Relief.

A permanent injunction is appropriate when a party demonstrates (1) that it will suffer an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that, considering the balance of hardships between plaintiffs and defendant, a remedy in

equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (*quoting eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

This Court should grant a permanent injunction. The challenged statutes infringe on plaintiffs' First Amendment rights, and "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)), *amended by* 160 F.3d 541 (9th Cir. 1998). In addition, when "the measure of that injury defies calculation," monetary damages will not suffice to provide an adequate remedy at law. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991). The balance of hardships tips in plaintiffs' favor here because in the absence of an injunction, plaintiffs will need to institute expansive and costly changes to their business activities, curtail their services or restrict the reading materials provided to customers, friends and relatives, thus losing their First Amendment rights. On the other hand, the State has many other prosecutorial tools besides the Statutes to protect children from sexual predators, including ORS 167.057(1)(b)(B) (furnishing sexual material for purpose of inducing minor to engage in sexual conduct). *See, supra*, footnote 6. Finally, the public interest would not be disserved by an injunction, because there is a "significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). This Court denied plaintiffs' motion for a preliminary injunction because (in part), it

did not believe that plaintiffs faced a real threat of prosecution in Multnomah County.[18] The circumstances of a permanent injunction require a different calculus from a preliminary injunction, and they require a different conclusion. At the preliminary injunction phase, the court was only weighing what might occur between June 2008 and the final relief in this case. This Court now must consider all of the hardship to plaintiffs in the foreseeable future, including the self-censoring measures that plaintiffs will be forced to take if they are unable to obtain relief now. (*See* Declarations in Support of Preliminary Injunction.)

It is worth noting that a prosecution for disseminating these materials would not be surprising. There are many examples of works that would offend the Statutes and that already have been challenged in other venues in Oregon as inappropriate for minors or children due to their sexual content.[19] For example, *Mommy Laid an Egg, Or Where Do Babies Come From?* by Babette Cole was challenged in the Corvallis-Benton County Library in 2004 and in Multnomah County Library in 1995. *Brighton Beach Memoirs* by Neil Simon (which contains a discussion of a wet dream and masturbation) was challenged in the Dallas school district in 1996. *The*

[18] Plaintiffs also respectfully urge the court to consider that not all plaintiffs and those on whose behalf they sue are located in Multnomah County. Plaintiff Colette's: Good Food + Hungry Minds, LLC, is located in Coos County. Plaintiff Bluejay, Inc. is located in Deschutes County. Plaintiff Association of American Publishers, Inc. has members in various Oregon locations and sues on behalf of publishers whose books are distributed or offered for sale at various locations in Oregon. Plaintiffs Freedom to Read Foundation Inc. and Comic Book Legal Defense Fund have members in various Oregon locations, including those outside Multnomah County and the greater Portland area. American Booksellers Foundation for Free Expression has members in many Oregon locations other than Portland, including Hood River, Pendleton, St. Helens, Salem, Bandon, North Bend, and Sisters. The ACLU of Oregon has members in every Oregon county.

[19] The information about the challenges in this paragraph is taken from the records of the Oregon Intellectual Freedom Clearinghouse, which is affiliated with Library Development Services at the Oregon State Library. It can be found at http://oregon.gov/OSL/LD/intellectual.shtml. This information is also taken from Challenged Materials in Oregon 1979-2007, http://www.aclu-or.org/site/DocServer/Challenged_Materials_in_Oregon_1979-2007.xls?docID=2441, which compiles information from the Oregon Intellectual Freedom Clearinghouse and the American Library Association.

*Color Purple* by Alice Walker was challenged in Junction City High School in 1995. *Ricochet River* by Robin Cody was challenged in the West Linn-Wilsonville School District in 2000. *The Chocolate War* by Robert Cormier was challenged in Lake Oswego Junior High in 2007. *Forever* by Judy Blume was challenged in the Hermiston Public Library in 1997. All of those works are constitutionally protected. It would be a fallacy to assume that everyone in Oregon supports the free dissemination of constitutionally protected materials. The risk to plaintiffs is real.

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## VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their request for injunctive and declaratory relief.

DATED: July 31, 2008.

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