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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CV '08-0501-MD

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

Civil No.

Plaintiffs,

DECLARATION OF JESSICA L.
LLOYD-ROGERS

v.

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

Defendants.

DECLARATION OF JESSICA L. LLOYD-ROGERS

Jessica L. Lloyd-Rogers declares under penalties of perjury:

Background

1. I am the co-owner, with Jerry J. Schneider, of Colette's: Good Food + Hungry Minds, LLC ("Colette's"), a plaintiff in this action. I submit this declaration on behalf of Colette's in support of plaintiffs' motion for a preliminary injunction to enjoin the State from enforcing ORS 167.051 to 167.057 (collectively referred to as the "Statute"), an unconstitutional censorship law which will apply to mainstream book stores such as Colette's.

2. Colette's was set up with the explicit mission of being a First Amendment bookstore and café. Both owners are voracious readers and have journalistic and writing backgrounds. I spent thirty years as an investigative journalist. We strongly believe in the freedom of expression and the right to read, view and listen to the expressions of others. Colette's has been in existence since November, 2007 with one location (2,156 sq. ft.) currently open and plans to open another location (1,000 sq. ft.) by June, 2008. In that short time, we have come to serve as a community place for activists of all stripes, book groups, social change organizations and others who hold fast to, and believe in, the protections of the First Amendment.

3. We currently list our inventory on-line and plan to sell on-line from our own website. We have 125,000 volumes (with fewer than 200 repeat titles) at the current time with plans to add magazines by July, 2008. We specialize in non-fiction including photography and art books and also have a wide variety of fiction including bestsellers. We anticipate carrying magazines including Hot Rod, Sports Illustrated,

National Geographic and Scientific American. In order to serve our community better, we have established a good-sized Gay, Lesbian, Bisexual, Transgender, and Questioning (GLBTQ) section. Each of these above described sections contain sexually explicit material and visual representations or narrative accounts of sexual conduct as those terms are defined in the Statute.

Fear of Prosecution Under the Statute

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

5. Under the Statute, it is a crime to furnish "sexually explicit material" to anyone under the age of 13 if the person "intentionally furnishes a child, or intentionally permits a child to view, sexually explicit material and the person knows that the material is sexually explicit material." ORS 167.054. Such material includes that which contains visual images—including paintings and drawings—of masturbation, intercourse or genital/oral/anal contact between people and animals. See ORS 167.051. "[F]urnish" is defined broadly, including to "sell, give, rent, loan or otherwise provide." ORS 167.051.

6. There are two exceptions under ORS 167.054. First, certain persons, including employees of museums, schools, or public libraries, are not liable. Colette's does not fall into this exception. Second, I understand that Colette's would not be liable if the sexually explicit portions of the material furnished, or permitted to be viewed, "form merely an incidental part of an otherwise non-offending whole and serve some purpose other than titillation." I believe this exception is vague and do not understand what specific material would fit under this exception.

7. Under ORS 167.057, it is a crime if a person disseminates to anyone under the age of 18 a "visual representation or explicit verbal description or narrative account of sexual conduct" for the purpose of "arousing or satisfying the sexual desires of the person or the minor. . . ." I understand this to be very broad encompassing material with textual description, as well as visual depictions. I also believe that the phrase "arousing or satisfying the sexual desires," which is undefined under the Statute, is vague. In addition, it contains the same undefined and vague "incidental part" exception.

8. My understanding is that under ORS 167.054, Colette's risks criminal prosecution for furnishing constitutionally-protected materials described above to persons "under 13 years of age." Colette's does not, unless there are extremely unusual circumstances, "card" its customers. While we may from time to time suggest to a youthful customer that a desired purchase may be inappropriate, it would be difficult, if not impossible, to "card" or determine whether a child is under 13 years of age at our bookstore.

9. Under ORS 167.057, furnishing a 17-year-old minor with such material is

a crime if furnished for the purpose of satisfying the sexual desire of the 17-year-old. Again, determining whether a user is 17 with any accuracy is not feasible. In addition, as discussed herein, Colette's sells books and other materials containing sexually-related content that may be sexually arousing, depending on the individual. Moreover, since we are, by nature of being, individuals, the case may be made for the sale and purchase of visibly innocuous materials that a given individual may find sexually arousing, for example, *True Crime Stories* or *The History of High Heels*. Under this section, Colette's would be committing a felony if a 17-year-old purchased a book to satisfy his or her sexual desire or to become sexually aroused while reading such a book – an act that individual has a right to do.

10. Colette's has approximately 125,000 volumes in stock constituting roughly 124,800 titles. We receive on average more than 50 new titles per week. We cannot read each new title to determine whether there are any sexually explicit portions and, if so, whether such portions “serve some purpose other than titillation” (even if I knew what that meant in light of the Statute). The list on Exhibit A contains just a few examples of the multitude of books, magazines or other material sold at Colette's likely to contain sexually-related narrative or pictorial content, including, in some instances, nudity, that could be considered by some “sexually explicit” or “visual representation(s) or explicit verbal descriptions) or narrative account(s) of sexual conduct” that may appeal to a person's “sexual desires.” I believe the only way for Colette's to ensure compliance under the Statute would be to eliminate those materials. Developing an alternative segregated shelving arrangement at our store for books that may be covered under the Statute, if my staff and I could even determine that book by book, which I believe we could not

without being extremely over inclusive — is absolutely impractical, unduly burdensome and would consume an inordinate amount of time that we do not have. If forced to do so, we would have to cover up or rope off many sections in my store to insure that minors would not have access. This would be extremely inconvenient to customers, would completely alter the ambience of the stores, and undoubtedly would have an adverse effect on sales.

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

Conclusion

12. For all the reasons stated above, I fear prosecution under the Statute. If the Statute is not enjoined, Colette's will be forced to either self censor our books and other material to a great degree or risk criminal liability. (The only reason we have not self censored to date is our strong belief in the First Amendment and we have been advised that the Statute is unconstitutional.)

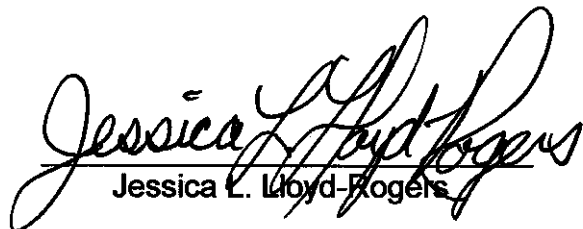

Jessica L. Lloyd-Rogers

Exhibit A

Alexie, Sherman, *The Absolutely True Diary of a Part-Time Indian*

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

Tibol, Raquel, ed., *Frida by Frida*

Nobokov, *Lolita*

McGuire, Gregory, *Wicked; Mirror, Mirror, Confessions of an Ugly Stepsister*

Westerns (Series) including *Longarm*, by Tabor Evans; *Slocum*, by Jake Logan; *Head Hunter*, by E.J. Hunter; *The Gunsmith*, by J.R. Roberts

Kozinski, Jerzy, *Birds*

Holleran, Andrew, *Dancer from the Dance*

Salinger, J.D., *Catcher in the Rye*

Kama Sutra

Loulan, JoAnn, *Lesbian Sex; Lesbian Passion; Loving Ourselves and Others, The Lesbian Erotic Dance*

West, Celeste, *Lesbian Love Advisors*

Books of Photography including those by Mapplethorpe

Multiple books from the GLBTQ section

Multiple books from the Anthropology, Medical, (Sex, Human Reproduction), Self Help sections

Textbooks such as *Human Sperm Competition: Copulation, Masturbation, and Infidelity*