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IN THE UNITED STATES DISTRICT COURT

FOR THE 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.

Case No. 08-501-MO

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION

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INTRODUCTION

Last year the Oregon Legislative Assembly enacted two new criminal statutes aimed at combating an insidious problem: sexual predators using pornography to groom and then to prey upon minors and young children. The first, Or. Rev. Stat. § 167.054, prohibits furnishing children under the age of thirteen with materials containing images of certain sexually explicit conduct that are intended to sexually arouse. The second, Or. Rev. Stat. § 167.057, prohibits using sexually explicit materials in order to sexually arouse minors and to lure them into engaging in sex.

Mindful of the special protections afforded the freedom of speech under the Oregon Constitution—and mindful of antiobscenity laws that Oregon's courts had struck down because of those special protections—the Legislative Assembly narrowly focused these new statutes. Among other things, the assembly deliberately included in both statutes specific language that had been interpreted by the Oregon courts, the effect of which is to limit the scope of both statutes to "hardcore pornography"—materials intended to sexually arouse, in which the explicit content is not merely incidental, but pervasive.

Despite the closely tailored scope and purpose of both statutes, plaintiffs urge the court to permanently enjoin them. Plaintiffs contend that both statutes are overbroad and vague, in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution. Plaintiffs' contentions, however, rest upon a construction of the statutes that is inconsistent with their plain text and that ignores controlling Oregon case law.

To prevail on their overbreadth claims, plaintiffs must establish that Or. Rev. Stat. § 167.054 and 167.057 prohibit a substantial amount of materials that lie outside the boundaries of what the United States Supreme Court has defined as obscene as to minors or young children. But plaintiffs can make no such showing.

Or. Rev. Stat. § 167.054 applies only to those who intentionally furnish certain explicit, sexually arousing images to children who are twelve years old or younger. At the hearing on

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their motion for a preliminary injunction, plaintiffs were unable even to conjure a single example of material within the scope of this statute that was protected under the First Amendment. In an effort to avoid the obvious conclusion that the statute is not substantially overbroad, plaintiffs now urge the court to interpret the statute in a manner that is inconsistent with its text and flatly contrary to its purpose. Plaintiffs' interpretation ignores the very case law on which the Oregon Legislature specifically relied in crafting this statute.

Or. Rev. Stat. § 167.057 prohibits "luring" a minor by giving the minor sexually explicit materials for the purpose of arousing the person or the minor, or inducing the minor into having sex. The element of specific sexual intent necessarily obviates any overbreadth concerns: the First Amendment does not protect the right to engage in the sexual predation of children. Indeed, in the face of constitutional challenges just like this one, state and federal courts across the county have uniformly upheld similar luring statutes designed to stop sexual predation. What those cases plainly demonstrate is that statutes like Or. Rev. Stat. § 167.057 restrict not speech, but sexual conduct—conduct that is manifestly within the state's police powers to prohibit in order to protect children. Plaintiffs' claim that this statute includes in its sweep ordinary commercial transactions involving mainstream books or movies relies on an interpretation of the statute that, like their interpretation of § 167.054, is demonstrably false. Under Oregon's basic rules of statutory construction, the statute prohibits only deliberate, sexual predation using pornographic materials. Plaintiffs' overbreadth challenge is simply inapposite.

Plaintiffs' vagueness claims fare no better. The very terms that plaintiffs contend are impermissibly vague have already been authoritatively and narrowly construed by Oregon's courts; indeed the legislature incorporated the language precisely *because* it already had been so construed. In light of that case law, the statutes are both clear and clearly permissible.

For all these reasons, plaintiffs' claims are without merit. In fact, both Or. Rev. Stat. §§ 167.054 and 167.057 are wholly consistent with federal law. Plaintiffs' motion for a permanent injunction should be denied.

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BACKGROUND

I. Obscenity, Minors and the First Amendment.

The United States Supreme Court has long recognized that obscene materials are not protected by the First Amendment. The Court has further recognized that what counts as obscene depends on the age of the person who is viewing the material. As the parties have explained in their earlier briefing,[1] federal courts have adopted a three-part test for determining whether speech is obscene *as to minors*, based on the Supreme Court's decisions in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) and *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1972). Under the *Ginsberg/Miller* test, the following criteria must be met for speech to be considered obscene as to minors:

> 1) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest of minors;
>
> 2) The work contains depictions or descriptions patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> 3) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[2]

II. Obscenity and the Oregon Constitution.

Oregon's courts have long held that the Oregon Constitution affords distinct and expansive protection to the right to free speech—protection that extends beyond that afforded under the First Amendment.[3] Oregon's distinctive protection of free speech is especially evident

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[1] *See Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction,* pp. 3-4. For the sake of clarity and efficiency, the State does not repeat all of the points and arguments already presented in its earlier *Memorandum.* The state hereby incorporates that brief in its entirety.

[2] *See, e.g., American Booksellers v. Webb*, 919 F.2d 1493, 1503 n. 18 (10th Cir. 1990).

[3] Article I, section 8 of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

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in state court decisions regarding the regulation of obscenity. In *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987), for example, the Oregon Supreme Court struck down an obscenity law on state constitutional grounds, despite the fact that the law in question expressly incorporated the federal *Miller* obscenity test. *See Henry*, 302 Or. at 527 ("Although the *Miller* test may pass federal constitutional muster and is recommended as a model for state legislatures * * * the test constitutes censorship forbidden by the Oregon Constitution. * * * In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered "obscene."). *See also*, *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988) (striking down zoning restrictions on "adult" bookstores and businesses); *State v. Ciancanelli*, 339 Or. 282, 121 P.3d 613 (2005) (masturbation and sexual intercourse in a live public show protected by Article I, section 8).

Antiobscenity laws aimed at protecting minors have similarly been struck down under Article I, section 8. Of particular relevance here is the Court of Appeals decision in *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), *rev den*, 332 Or 137 (2001).

III. *State v. Maynard.*

In *State v. Maynard*, the Oregon Court of Appeals struck down Or. Rev. Stat. § 165.065, which prohibited furnishing materials to minors depicting or describing, among other things, "sexual conduct" or "sexual excitement."[4] Enacted just three years after *Ginsberg,* Or. Rev. Stat. § 165.065 was based in part on the First Amendment standards established in that case.[5] Nevertheless, the *Maynard* court found the law violated Article I, section 8.

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[4] Or. Rev. Stat. § 167.065 prohibited furnishing to minors under 18 "Any picture, photograph, drawing, sculpture, motion picture, film or other visual representation or image of a person or portion of the human body that depicts nudity, sadomachistic abuse, sexual conduct or sexual excitement[.]"

[5] *See* Proposed Oregon Criminal Code 232, Commentary § 259 (1971) (attached as Exh. 3 to the Declaration of Michael A. Casper accompanying *Defendants' Memorandum in Opposition to a Preliminary Injunction*) (explaining that "the statute upon which [Or. Rev. Stat. § 167.065 was] based was recently under examination by the United States Supreme Court in [*Ginsberg*].)

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When *Maynard* first came to the Court of Appeals, the court concluded that Or. Rev. Stat. § 165.065 was a content-based restriction on speech that violated Article I, section 8. *State v. Maynard*, 138 Or. App 647, 669 (1996). But later that year, the Oregon Supreme Court vacated that decision and remanded the case for reconsideration in light of *State v. Stoneman*, 323 Or. 536, 920 P.2d 535 (1996). In *Stoneman*, the court had concluded that a child-pornography statute that expressly prohibited a certain form of expression was nonetheless content-neutral because the statute's target was not speech, but the harmful effects of child pornography on children.

On reconsideration, the Court of Appeals began its analysis of Or. Rev. Stat. § 167.065 by construing the language of Or. Rev. Stat. § 167.085(3), which provided an affirmative defense to prosecution under Or. Rev. Stat. § 167.065 if "[t]he defendant was charged with the sale, showing, exhibiting or displaying of an item, those portions of which might otherwise be contraband forming *merely an incidental part of an otherwise nonoffending whole, and serving some purpose therein other than titillation.*" Or. Rev. Stat. § 167.085(3) (2000)(Emphasis added). The court construed the exception this way:

> "The word "titillation" was not defined by the legislature in Or. Rev. Stat. § 167.085 or any related statute. In analyzing the text of the statute for definition, words of common usage are given their plain, natural and ordinary meanings. "Titillate" is defined in Webster's Third New Int'l Dictionary, 2400 (unabridged ed 1993) to mean "to excite pleasurably or agreeably: arouse by stimulation." In the context of Or. Rev. Stat. § 167.065(1)(a), which refers to depictions of sexual conduct and sexual excitement, *titillation logically refers to sexual excitement or arousal.* Although the defense provided by Or. Rev. Stat. § 167.085(3) does not expressly state that the person to be protected from titillation is the victim of the offense, that motive is obvious from the overall framework of Or. Rev. Stat. § 167.065 to Or. Rev. Stat. § 167.085. The victim of each offense in that group of statutes must be a minor. In light of that common theme, it 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. *Thus, the context of Or. Rev. Stat. § 167.085(3) plainly shows that the defense applies to those materials not primarily intended to titillate the victim.*"

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168 Or. App. at 124-25 (emphasis added). On this basis, and in light of *Stoneman*, the court concluded that the underlying statute, though it prohibited a certain form of expression, was a content neutral law, aimed not at speech but at "protecting children from the harmful effects of hardcore pornography." *Id.* The court then turned to the question whether the statute was narrowly tailored to achieve that purpose.

In addressing that question, the court explained that the affirmative defense in § 167.085(3) played an essential role in limiting the scope of the underlying statute. The court specifically concluded that *absent availability of the defense*, the furnishing statute at issue would be overbroad because it would apply to materials "regardless of the significance of [the sexually explicit] depictions in the context of the materials taken as a whole." *Id.* at 130. The court reasoned that minors are "regularly exposed to visual images, including television programs, movies, and videos that depict sexual conduct and sexual excitement in various levels of detail" and that *unless the exception applied*, the statute reached too far. *Id.*

The court went on to conclude, on that basis, that the statute as written *was* overbroad precisely because the affirmative defense that was so critical for limiting the statute's scope did *not* always apply. Due to some incongruous drafting, the affirmative defense applied only to the "sale, showing, exhibiting or displaying of an item," but not all instances of "furnishing." As a result, the court declared that Or. Rev. Stat. § 167.065 violated Article I, section 8 of the Oregon Constitution.[6]

> [W]hile the defense might apply to a movie theater's showing of an R-rated movie, it would not apply to a video store rental of the same movie to a 17-year old. Similarly, the showing of a music video depicting sexual conduct or excitement to a minor might not be prohibited, while giving a copy of the same

[6] Before *Maynard*, earlier cases had noted the same incongruity and, as a result, struck down some provisions of Or. Rev. Stat. § 167.065. *See State v. Frink*, 60 Or. App. 209, 653 P.2d 553 (1982) (finding statute's prohibition on furnishing materials depicting "nudity" was unconstitutionally overbroad and severing provision) and *State v. House*, 66 Or. App. 953, 676 P.2d 892, *mod* 68 Or. App. 360, 681 P.2d 173 (1984), *aff'd on other grounds* 299 Or. 78, 698 P.2d 951 (1985) (severing that part of definition of 'sexual conduct' which included "touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female.")

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video to a minor, regardless of purpose, would be a crime *because the qualified defense does not apply.*

Id. at 132 (emphasis added).

IV. HB 2843.

The Oregon Legislative Assembly enacted HB 2843 last year in an attempt to fill the gap created after the Court of Appeals declared Or. Rev. Stat. § 167.065 unconstitutional in *Maynard.* In addition, the assembly added a related law aimed at preventing predators from using sexually explicit materials to lure and then prey upon children.

A. The purpose of HB 2843.

The legislative history of HB 2843, and in particular the testimony of those who helped to draft the bill, shows that that the legislature's purpose in enacting these new laws was to protect children from sexual exploitation and abuse. Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Senator Kate Brown) ("Our objective here is to prevent child sexual abuse and predatory child sexual exploitation.")[7] The statutes are specifically intended to provide a tool for prosecutors to combat sexual predators who use pornography to "groom" or lure children. Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Deputy District Attorney Jodie Bureta) ("[HB2843] allow[s] us to stop this abuse in the grooming stage, hold people accountable while they are grooming the children while the harm is just starting to be done. We don't want to have to wait until abuse physically occurs in order to catch these people and hold them accountable and protect these kids.")[8]

The legislative history also demonstrates that the statutes were deliberately crafted in an effort to avoid the constitutional infirmities of Or. Rev. Stat. § 167.065 identified by the Court of Appeals in *Maynard. See* Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Senator Kate Brown) ("The problem is that Or. Rev. Stat. § 167.065 was held

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[7] Attached as Exh. 4 to the Declaration of Michael A. Casper accompanying *Defendants' Memorandum in Opposition to a Preliminary Injunction.*

[8] Attached as Exh. 4 to the Declaration of Michael A. Casper accompanying *Defendants' Memorandum in Opposition to a Preliminary Injunction.*

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unconstitutional by prior court rulings, so our goal is to craft a statute that is constitutional.");[9] Testimony, Joint Ways and Means Committee, HB 2843, June 15, 2007 (statement of Assistant Attorney General Michael Slauson) ("What this current legislation does is take that guidance that was given to us by the court and make sure that our statutes comply with that guidance.")[10]

HB 2843 was enacted on July 9, 2007 and signed into law on July 31, 2007. It created two new criminal offenses, furnishing sexually explicit materials to a child, and luring a minor. The law went into effect January 1, 2008; the offenses have been codified as Or. Rev. Stat. § 167.054 (furnishing), Or. Rev. Stat. § 167.057 (luring), and Or. Rev. Stat. § 167.051 (defining relevant terms).

B. Or. Rev. Stat. § 167.054.

Or. Rev. Stat. § 167.054 prohibits a person from intentionally furnishing to a child under the age of 13 materials that the person knows to be "sexually explicit." "Sexually explicit materials" are defined as materials containing images of "human masturbation or sexual intercourse"; "genital-genital, oral-genital, anal-genital or oral-anal contact"; or "penetration of the vagina or rectum by any object other than as part of a personal hygiene practice." The law does not apply to the furnishing of materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." In addition, employees of museums, schools, law enforcement agencies, medical treatment providers and public libraries who are acting within the scope of their employment are exempted from the law. Or. Rev. Stat. § 167.054(2)(a). It is an affirmative defense to prosecution if the material was furnished for legitimate educational or therapeutic purposes, Or. Rev. Stat. § 167.054(3)(a), or if the defendant reasonably believed that the victim was not a child, Or. Rev. Stat. § 167.054(3)(b), or if the defendant was less than three years older than the

[9] Attached as Exh. 4 to the Declaration of Michael A. Casper accompanying *Defendants' Memorandum in Opposition to a Preliminary Injunction.*

[10] Attached as Exh. 5 to the Declaration of Michael A. Casper accompanying *Defendants' Memorandum in Opposition to a Preliminary Injunction.*

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victim, Or. Rev. Stat. § 167.054(3)(c). Furnishing sexually explicit materials to a minor is a Class A misdemeanor.

C. Or. Rev. Stat. § 167.057.

Under Or. Rev. Stat. § 167.057, a person commits the crime of luring a minor if the person furnishes to, or uses with, a minor under age 18 depictions or descriptions of certain sexual conduct for the purpose of either "[a]rousing or satisfying the sexual desires of the person or the minor" or "[i]nducing the minor to engage in sexual conduct." Like the "furnishing" statute, the luring statute creates an exception for those materials in which such depictions or descriptions form "merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation." Or. Rev. Stat. § 167.057 also includes a set of affirmative defenses similar to those applicable to Or. Rev. Stat. § 167.054. *See* Or. Rev. Stat. § 167.057(3)(a) (material was furnished for legitimate educational or therapeutic purposes); Or. Rev. Stat. § 167.057(3)(b) (defendant reasonably believed victim was not a minor); Or. Rev. Stat. § 167.057(3)(c) (defendant less than three years older than the victim). Luring a minor is a Class C felony.

V. Plaintiffs' complaint and motion for permanent injunction.

Plaintiffs filed their complaint together with a motion for preliminary injunction on April 25, 2008. The complaint alleges that the Or. Rev. Stat. §§ 167.054 and 167.057 are "overly broad" and impermissibly vague, and, as a result, criminalize the dissemination to minors of constitutionally protected material, in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution. In particular, plaintiffs allege that the challenged statutes fail to meet the standards of the *Ginsberg/Miller* test.

At a hearing on June 23, 2008, the court denied plaintiffs motion for a preliminary injunction.

Plaintiffs filed their motion for permanent injunction on July 31, 2008. Plaintiffs ask the court to declare these laws unconstitutional, both facially and as applied to plaintiffs, and to

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permanently enjoin defendants from enforcing them. Plaintiffs contend that such an injunction is warranted because the threat of potential prosecution under these statutes chills their right to free speech.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

A. Plaintiffs lack standing to challenge either statute on its face.

Plaintiffs do not have standing to challenge either Or. Rev. Stat. § 167.054 or Or. Rev. Stat. § 167.057. Both statutes apply only to those who furnish explicit, sexually arousing to minors or young children. In their complaint, plaintiffs do not allege facts that actually give rise to a credible threat of prosecution under either statute or that otherwise support a concrete interest sufficient to support standing to prosecute these claims.[11]

B. Plaintiffs' as-applied claims are not justiciable.

In their complaint, plaintiffs ask the court to declare that Or. Rev. Stat. §§ 167.054 and 167.057 are unconstitutional "as applied to plaintiffs." However, the statutes have not been applied to plaintiffs, nor do plaintiffs face the sort of genuine and *imminent* threat of prosecution required to bring a pre-enforcement "as applied" challenge. As a result, plaintiffs' as-applied claims are not justiciable.

The overbreadth doctrine provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a credible belief that a statute is so broad as to chill the exercise of free speech. *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563 (6th. Cir. 1995). Thus, a pre-enforcement

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[11] In its earlier Memorandum, the State argued that plaintiffs lacked standing to challenge Or. Rev. Stat. § 163.054 and Or. Rev. Stat. § 167.057. *See Defendants' Memorandum in Opposition To Plaintiffs' Motion for a Preliminary Injunction,* pp. 11-13. At the hearing on the preliminary injunction, the court ruled that plaintiffs do have standing. In light of the court's decision, the State does not repeat its arguments here but, for preservation purposes, does hereby incorporate those arguments by reference.

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facial challenge for substantial overbreadth may be justiciable, if the person bringing the challenge faces a credible threat of prosecution for protected speech. *Id.*

By contrast, a pre-enforcement *as-applied* challenge to a criminal statute is not subject to the overbreadth exception; such a claim is justiciable only if a plaintiff can show a genuine threat of *imminent* prosecution under the challenged statute. *See id.; Washington Mercantile Ass'n v. Williams*, 733 F.2d 687, 688 (9th Cir. 1984) (emphasis added). Absent a genuine and imminent threat of prosecution, a pre-enforcement as-applied challenge is "too remote and speculative" to be justiciable. *Navegar, Inc. v. U.S.*, 103 F.3d 994, 1000 (D.C. Cir. 1997).

The Sixth Circuit's decision in *Adult Video Ass'n* illustrates this principle in the context of a First Amendment challenge to an obscenity statute. In that case, a trade association sought a declaratory judgment that a particular adult film, was not legally obscene. The court granted the defendant's motion to dismiss, explaining that the plaintiffs' pre-application, as-applied challenge did not fall within the "overbreadth" exception to normal standing requirements. Because the plaintiffs had failed to demonstrate a specific threat of imminent prosecution, the court concluded, they failed to allege a constitutionally adequate injury. The court further concluded that, even if the plaintiffs did have standing, their as-applied claims were not ripe for review. Obscenity determinations, the court reasoned, are necessarily fact-specific, requiring "analysis of the particular factual contexts in which the material at issue is created, promoted, and disseminated." 71 F.3d at 568.

The same analysis applies here. In order to having standing to challenge Or. Rev. Stat. § 167.054 or 167.057 "as applied," plaintiffs must establish that they face a specific, *imminent* threat of prosecution. They have not done so. Indeed, in rejecting plaintiffs' motion for a preliminary injunction, this Court specifically found that the likelihood of plaintiffs' imminent prosecution under either law was "almost nonexsistent." Tr. 57. In any event, even if plaintiffs did have standing to assert as-applied challenges, such claims would not be ripe for review. Whether someone has violated Or. Rev. Stat. § 167.054 or § 167.057 in a particular instance

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requires an analysis of, among other things, what materials were furnished and why they were furnished. No such factual record exists here. Plaintiffs' as-applied challenges are not justiciable.[12]

II. Plaintiffs' claims are without merit.

A. Plaintiffs' overbreadth claims are without merit.

1. Plaintiffs must show that Or. Rev. Stat. §§ 167.054 and 167.057 prohibit a *substantial* amount of materials outside the boundaries of what is obscene as to children.

The legal standards for a facial overbreadth challenge are well-established.[13] A statute may be invalidated on its face only if the overbreadth is "substantial." *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Courts have consistently recognized that application of the overbreadth doctrine is, "manifestly, strong medicine," *Broadrick*, 413 U.S. at 613, and that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections" in order for an overbreadth challenge to succeed. *City*

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[12] Nor do any of the cases cited by plaintiffs suggest otherwise. Instead those cases show that it may be possible for a plaintiff to challenge discrete categories of protected speech or conduct to which a statute indisputably applies and in which the plaintiff engages. *See American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003) (concluding that Vermont anti-obscenity law that expressly applied to internet, among other modes of dissemination, was unconstitutional under *Reno* to the extent that it applied to internet communications); *cf. Gonzalez v. Carhart*, 127 S. Ct. 1610, (2007) (suggesting pre-enforcement as-applied challenge to abortion statute would be appropriate where a woman could show a "discrete and well-defined" instance of a "particular condition" that endangers health absent banned procedure). That principle is of no relevance here. Plaintiffs provide no basis for concluding that their activities in particular have been targeted by the State for enforcement, nor do they identify a particular category of speech common to all plaintiffs that is targeted by the statutes.

[13] In their memorandum, plaintiffs begin by misstating the applicable standard of review for a facial overbreadth challenge. In purporting to set out that standard, plaintiffs note that a "content-based restriction on protected speech" is subject to strict scrutiny, and must be precisely drawn to serve a compelling state interest. Pls. Memo at 5-6. That is correct, as far as it goes, but to assume that the speech at issue is protected only begs the question. Speech that is obscene is not protected by the First Amendment at all. Therefore, the court does not begin by applying strict scrutiny. Properly analyzed, the first question is whether a regulation includes in its sweep a substantial amount of materials that are not obscene. If not, then the facial overbreadth challenge fails. If an obscenity statute is substantially overbroad, then—and only then—does the court apply strict scrutiny.

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Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). In its most recent opinion on the subject, the Supreme Court stressed that the burden to demonstrate *substantial* overbreadth is to be "vigorously enforced." *United States v. Williams*, 553 U. S.at ____ (May 19, 2008) (slip op. at 6). The Court also emphasized that, to be invalidated, a law must be substantially overbroad not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. *Id.* In addition, if a statute is readily susceptible to a narrowing construction that would make it constitutional, it will be upheld. *Virginia v. American Booksellers Association*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988).

The Supreme Court's decision in *Ferber* illustrates the proper application of the overbreadth doctrine. In that case, the Supreme Court upheld against an overbreadth challenge a N.Y. Penal Law § 263.15, criminalizing possession of child pornography. 458 U.S. at 773. The Court did so despite finding that the law could potentially reach some protected expression, such as medical textbooks and artistic works. *Id.* Because the statute's application was constitutional in the vast majority of situations, however, and because the Court assumed that the state courts would not give the law an expansive reading, the Court concluded that the law was not substantially overbroad:

> "How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd [exhibitions] of the genitals." Under these circumstances, § 263.15 is not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

Id. (internal quotation marks and citations omitted).

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2. Or. Rev. Stat. §§ 167.054 and 167.057 do not parrot the federal obscenity criteria because they are intended to meet an even narrower standard.

By simply parroting the language of the *Ginsberg/Miller* test, most states regulate the dissemination of sexually explicit materials to minors to the full extent of federal law. Some states have tried to push the envelope by ignoring the *Ginsberg/Miller* criteria and adopting laws with their own expansive definitions of what is obscene or harmful for minors. As plaintiffs correctly point out, such attempts have uniformly been struck down. Pls. Memo at 9. But plaintiffs erroneously conclude from this that state statutes must "contain" the federal criteria in order to comply with federal law. Plaintiffs are mistaken. The point that plaintiffs fail to appreciate is that it is permissible to adopt criteria that are *more* restrictive than the *Ginsberg/Miller* test. That is what the Oregon legislature has done here.[14]

Plaintiffs assert that §§167.054 and 167.057 do not meet the elements of the *Ginsberg/Miller* test, either "literally" or "functionally." In purporting to establish that proposition, however, plaintiffs merely insist that Oregon's statutes do not pass constitutional muster because they do not "contain" the *Ginsberg/Miller* "requirements." That argument is flawed as a logical matter. That the Oregon statutes do not "contain" the "requirements" of *Ginsberg/Miller* is beside the point.

The *Ginsberg/Miller* criteria (like any set of criteria) define a class—in this case, the class of material that is obscene as to minors. An antiobscenity statute does not need to use the same criteria in order to pass constitutional muster. Any statute that, by virtue of its criteria, limits the scope of its prohibitions solely to material that is within the federally defined class is constitutional. That is what it means to "functionally" meet the federal test. Because they

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[14] The United States Supreme Court itself has recognized Oregon's uniquely narrow approach to regulating obscenity, and has also recognized that Oregon's approach is compatible with its decisions in *Ginsberg* and *Miller*. *See Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction*, pp. 13-14.

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apparently misapprehend this point, plaintiffs fail to directly address the question of whether §§ 167.054 and 167.057 meet the federal test.

In the majority of states, state constitutional free-speech guarantees are coextensive with those of the First Amendment. That is not so in Oregon. Oregon's courts have consistently held that the category of speech that may permissibly be restricted under the Oregon Constitution is significantly smaller than that which may be regulated under the First Amendment, particularly in the area of obscenity regulation. The Oregon Supreme Court has expressly held that federal obscenity criteria are *not restrictive enough* to meet Oregon's constitutional standards.[15]

Or. Rev. Stat. §§ 167.054 and 167.057 do not "contain" the federal obscenity criteria because the Oregon legislature deliberately designed them to pass the state constitution's *stricter* standard.[16] To accomplish that goal, the legislature employed a different set of criteria. As the next sections explain, the effect of those criteria is to drastically limit the scope of both statutes—far beyond what is required under federal law.

3. Under *Maynard*, both Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 apply only to materials that are primarily intended to sexually arouse.

Both Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 incorporate an exception to liability the effect of which is to significantly restrict the scope of both statutes. Both statutes exclude materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." As noted above, in *Maynard*, the Oregon Court of Appeals expressly construed an almost identically worded exception to exclude materials that are not "primarily intended" to "sexual[ly] arouse" the child to whom they are furnished. That interpretation is authoritative here.

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[15] *See, e.g., Henry*, 302 Or. at 527.

[16] *See Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction*, pp. 16-18.

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a. *Maynard*'s interpretation is authoritative.

The *Maynard* court's construction of the exception is authoritative here for two distinct reasons. First, it is well-established that where a state's intermediate appellate court has construed statutory language, the state supreme court has denied discretionary review, and the law has been unchanged for several years, federal courts regard the intermediate court's construction as controlling. *See Kolender v. Lawson*, 461 U.S. 352, 356 n.4, 103 S. Ct. 1855. 75 L. Ed. 2d 903 (1982); *Lawson v. Kolender*, 658 F.2d 1362, 1364-1365, n.3 (9th Cir. 1981). That is the case here. The Oregon Supreme Court denied review of *Maynard* seven years ago. *State v. Maynard*, 332 Or. 137, 27 P.3d 1043 (2001). Under *Kolender*, the *Maynard* interpretation is controlling.

Second, and in any event, the *Maynard* interpretation is authoritative under Oregon's rules of statutory construction. Where a federal court must interpret a state law, the court must anticipate how the state's highest court would interpret it. To that end, the court applies the state's rules of statutory interpretation. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 930 (9th Cir. 2004), *cert. denied*, 544 U.S. 948, 125 S. Ct. 1694, 161 L. Ed. 2d 524 (2005).

Statutory construction in Oregon is governed by *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 859 P.2d 1143, 1145 (1993). Under that case, the court's goal in interpreting a statute is to determine the meaning that was intended by the legislature that adopted it. *Id.* at 612. In order to determine the legislature's intended meaning, the court begins by examining both the text and context of the statute. *Id.* If, after that examination, the language is at all ambiguous, the court then turns to the legislative history to determine the legislative intent. Importantly, when construing a statute, Oregon courts presume that it was enacted "in the light of such existing judicial decisions as have a direct bearing upon it." *Mastriano v. Bd. of Parole & Post-Prison Supervision*, 342 Or. 684, 693, 159 P.3d 1151 (2007).

Applying those rules to the exception in Or. Rev. Stat. § 167.054(2)(b) and Or. Rev. Stat. § 167.057(2), the result is plain. These provisions directly incorporate the language of the

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affirmative defense that the *Maynard* court construed. Under *Mastriano*, the legislature is *presumed* to have been aware of *Maynard*.

In any case, it is clear from the legislative history that when the legislature enacted the challenged statutes, it *was* aware of *Maynard*. Indeed, it was not simply aware of the *Maynard* decision, it adopted these statutes precisely because of the *Maynard* decision.[17] In *Maynard*, the Court of Appeals concluded that the exception performed the essential task of limiting the scope of the statute to pornographic materials primarily intended to sexually arouse, and that without the exception, the statute would be overbroad. By incorporating into Or. Rev. Stat. § 167.054(2)(b) and Or. Rev. Stat. § 167.057(2) the very same exception, the legislature thus relied on and adopted the *Maynard* court's construction.

b. Plaintiffs' misconstrue *Maynard*.

Plaintiffs contend that the *Maynard* court was concerned only with the meaning of "titillation" and with whose titillation the statute proscribed; plaintiffs contend *Maynard*'s conclusion that "the defense applies to those materials not *primarily intended* to titillate the victim" was "simply part of an aside." Pls. Memo at 19. According to plaintiffs, *Maynard* never reached the question whether material that was not primarily intended to titillate falls within the exception.

Plaintiffs are mistaken. The *Maynard* court was concerned not simply with the meaning of "titillation" but the meaning of the *entire* exception, and specifically the manner in which that exception—by excluding materials in which the titillating portions were not merely "incidental" but primary—limited the scope of the sexually explicit materials subject to prohibition. In concluding otherwise, plaintiffs simply ignore critical passages of the opinion.

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[17] *See, e.g.*, Testimony, Joint Ways and Means Committee, HB 2843, June 15, 2007 (statement of Assistant Attorney General Michael Slauson) (attached as Exh 5 to the Declaration of Michael A. Casper accompanying Defendants' Memorandum in Opposition to Preliminary Injunction)(discussing *Maynard* and related cases and explaining "[w]hat this current legislation does is take that guidance that was given to us by the court and make sure that our statutes comply with that guidance.").

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To begin with, plaintiffs ignore the fact that the *Maynard* court described the relevant exception as limiting the scope of the statute to materials "primarily intended" to sexually arouse not once, but twice:

> [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. Thus, the context of Or. Rev. Stat. § 167.085(3) plainly shows that the defense applies to those materials not *primarily intended* to titillate the victim."

Id. at 124 (emphasis added). In addition, plaintiffs also overlook the fact that the *Maynard* court went on to say that in light of the exception the statute's clear purpose was to protect children from the harmful effects of "hardcore pornography." *Id.* at 127.

More importantly, plaintiffs ignore the fact that later in the opinion, the court plainly examined—at length—the effect of the exception, and concluded that where it applied, its effect was to limit the scope of the statute to materials that are primarily intended to sexually arouse. Thus, the court specifically concluded that *absent application of the exception*, the furnishing statute at issue would be overbroad, because in that case it would apply to materials "regardless of the significance of [the sexually explicit] depictions in the context of the materials taken as a whole." *Id.* at 130. The court reasoned that minors are "regularly exposed to visual images, including television programs, movies, and videos that depict sexual conduct and sexual excitement in various levels of detail" and that *unless the exception applied*, the statute could reach such mainstream materials and thus would reach too far. *Id.* The *Maynard* court recognized that the exception's effect was to exclude such materials and to limit the scope of the statute to only "hardcore" materials, the primary purpose of which is sexual arousal and in which the sexually explicit portions were not incidental or occasional but pervasive. On that basis, the court concluded that the statute would be constitutional if the exception applied to every instance of furnishing. *See id.* at 132 (concluding that a movie theater's showing of an R-rated movie would not be prohibited, but a video store's rental of the same movie to a 17-year old would be a crime "because the qualified defense would not apply").

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In sum, plaintiffs' assertion that the *Maynard* court did not reach the question whether material that was not primarily intended to titillate falls within the exception is simply mistaken. The court did reach that question, and it answered it: Materials containing sexual explicit depictions but that are not primarily intended to titillate, *do* fall within the exception. Under *Maynard*, the court concluded that the effect of the exception is to limit a statute's scope to hardcore pornography.[18]

4. Properly construed, neither Or. Rev. Stat. § 167.054 nor Or. Rev. Stat. § 167.054 are substantially overbroad.

a. Or. Rev. Stat. § 167.054 is not substantially overbroad.

i. Or. Rev. Stat. §167.054 is narrowly tailored.

The Legislative Assembly's purpose in enacting Or. Rev. Stat. § 167.054 was to prohibit furnishing pornography to preadolescent children. To achieve that purpose without running afoul of the state or federal constitutions, the Assembly narrowly tailored Or. Rev. Stat. § 167.054 in several important respects.[19]

First, the statute regulates furnishing sexually explicit material only to very young children—those 12 years old and younger. Second, it prohibits furnishing only materials that contain images of specifically enumerated and objectively identifiable forms of "sexually explicit conduct." Third, the definition of "sexually explicit conduct" is very similar to (and is in fact narrower than) those the Supreme Court upheld against overbreadth challenges in both *Ferber* and *Williams*. *See Williams*, 553 U.S. at ___ (slip op. at 10) (noting that the term

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[18] Plaintiffs also argue that the challenged statutes are unconstitutional to the extent that the *Maynard* exception shifts the burden of proof to the defendant. But that argument has already been expressly rejected by Oregon courts. *See Film Follies, Inc. v. Haas*, 22 Or. App. 365; 539 P.2d 669 (1975). *Follies* held that even though it was labeled an "affirmative defense" Or. Rev. Stat. § 167.085(3) did not impermissibly shift the burden of proof to defendant. *A fortiori* the same "defense", now incorporated into §§ 167.054 and 167.057 as an exception to liability, does not impermissibly shift the burden of proof.

[19] The State set forth these arguments in greater detail in their opening Memorandum. *See Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction*, pp. 18-24. The State hereby incorporates those arguments.

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"sexually explicit conduct" connotes "actual depiction of the sex act rather than merely the suggestion that it is occurring" and that such a definition renders a law "more immune from facial attack."). Fourth, the statute specifically excludes materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." Under *Maynard*, the statute thus excludes all materials that are not "primarily intended" to "sexually arouse" the person to whom they are furnished. Fifth, the statute applies only to material containing *images* of sexually explicit conduct, not merely narrative descriptions of such conduct. Or. Rev. Stat. § 167.051(5). Sixth, the statute includes a *scienter* requirement: to violate the law, a person must *intentionally* furnish or permit a child to view material that the persons *knows* is "sexually explicit material." Thus, the law does not punish innocent mistakes—only calculated conduct. Seventh, the statute includes several significant exceptions and affirmative defenses.[20]

Construed as a whole and in light of these criteria, Or. Rev. Stat. § 167.054 succeeds in its goal of narrowly prohibiting the furnishing of pornography to very young children. Although it does not repeat the *Ginsberg/Miller* test, the statute clearly meets that test. Because the law is limited to materials containing pervasive images of specifically enumerated sexual conduct that are intended to sexually arouse, the law does not prohibit a substantial amount of materials that have "serious literary, artistic, political or scientific value" for twelve-year-olds, or which, taken as a whole, are not patently offensive as to preadolescent children. Because the materials must

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[20] Or. Rev. Stat. § 167.054(2)(a) (exempting employees of museums, schools, law enforcement agencies, medical treatment providers and public libraries); Or. Rev. Stat. § 167.054(3)(a) (providing affirmative defense where material was furnished for legitimate educational or therapeutic purposes); Or. Rev. Stat. § 167.054(3)(b)(no liability if defendant reasonably believed person to whom explicit material was furnished was not a child). Plaintiffs assert, without authority, that affirmative defenses are irrelevant to an overbreadth analysis. Plaintiffs are mistaken. In considering whether a statute is impermissibly vague or overbroad, the court considers the probability that the statute could lead to successful prosecution for protected activity. *See Williams*, 553 U.S. at ___ (slip op. at 19-20) (challenged statute was not overbroad where hypothetical prosecutions of those engaging in protected speech would be "thrown out at the threshold.")

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be "primarily intended to sexually arouse," the law prohibits only materials which appeals to the prurient interest (such as it is) of preadolescent children. Or. Rev. Stat. § 167.054 is far narrower than the statute that the Supreme Court upheld in *Ginsberg*, which prohibited the sale of harmful "nudity" as well as "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct." [21]

In all events, Or. Rev. Stat. § 167.054 is not *substantially* overbroad. Like the statute upheld in *Ferber*, Or. Rev. Stat. § 167.054 is a law whose legitimate reach dwarfs any potential impermissible applications. Even if it is possible to conjure hypothetical examples at the margins, that is not enough. *See Williams*, 553 U.S. at ___ (slip op. at 15). In those marginal cases, the affected party could and should raise the issue on an as-applied basis.

ii. Plaintiffs are unable to cite a single example of material within the scope of Or. Rev. Stat. § 167.054 that is protected under the First Amendment.

At the hearing on plaintiffs motion for a preliminary injunction, plaintiffs were unable to conjure even a *single* example of material that would be protected under *Ginsberg/Miller* but which are unprotected by Or. Rev. Stat. § 167.054. Nor are they legitimately able to do so in their most recent memorandum in support of a permanent injunction. Instead, in an effort to avoid the obvious conclusion that Or. Rev. Stat. § 167.054 is not substantially overbroad, plaintiffs now urge the court to ignore *Maynard's* plain holding.

Insisting that *Maynard* "does not apply," plaintiffs argue that the exception in Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 does not limit the scope of the statutes to materials that are primarily intended to sexually arouse. According to plaintiffs, "if the material has more than one purpose, and one of those purposes is titillation, then the exception is not available." Pls. Memo. at 23. On this basis, plaintiffs claim that the statutes would prohibit any films,

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[21] A copy of the law upheld by the Supreme Court in *Ginsberg*, New York Penal Law § 484-h, is attached as Exh. 2 to the Declaration of Michael A. Casper accompanying *Defendants' Memorandum in Opposition to Preliminary Injunction..*

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books, or other materials that contain any sex scenes that are "arguably intended to titillate." In addition, plaintiffs assert that the exception is not available where materials are not intended to titillate at all, but where the explicit content of the materials is pervasive, "such as virtually all sexual education materials." *Id.*

For all of the reasons explained above, plaintiffs' contention that *Maynard* does not apply is mistaken. In particular, *Maynard*'s conclusion that the effect of the exception is to exclude all but "hard core" materials is directly contrary to plaintiffs' position. As a result, the very premise on which plaintiffs' overbreadth arguments are founded—that these statutes extend beyond obscenity to "mainstream" materials—is simply false. None of the examples that plaintiffs have offered come within the scope of either statute as properly construed.

Further, in now urging this court to ignore *Maynard's* conclusion that the exception "applies to those materials not primarily intended to titillate the victim," plaintiffs are not merely asking this court to ignore the plainly stated holding of the Oregon Court of Appeals. The Oregon Legislature adopted the exception construed in *Maynard* precisely because the *Maynard* court had made clear that the exception was constitutionally required. Plaintiffs are thus also asking this court to ignore the clear intention of the Oregon Legislature that relied on that opinion.

b. Or. Rev. Stat. § 167.057 is not substantially overbroad.

Plaintiffs' overbreadth challenge to Or. Rev. Stat. § 167.057 fails for two distinct reasons. First, construed in light of *Maynard*, the materials that the statute restricts are obscene under *Miller/Ginsberg*. Second, and in any event, the statute is directed not at speech, but at conduct: luring minors using pornography. As state and federal courts around the country have recognized, such luring statutes do not violate the First Amendment.

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i. Under *Maynard*, Or. Rev. Stat. § 167.057 restricts the use of materials that are obscene as to minors.

Although it applies to a broader range of materials than its counterpart, Or. Rev. Stat. § 167.057 is nevertheless within the standards established by *Ginsberg/Miller*. Or. Rev. Stat. § 167.057 prohibits attempting to arouse or seduce a minor using a "visual representation, explicit verbal description, or narrative account" of particular sexual conduct.[22] Like Or. Rev. Stat. § 167.054, Or. Rev. Stat. § 167.057 specifically excludes materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation."

Under *Maynard*, Or. Rev. Stat. § 167.057 is limited to a specific set of explicit materials that are both (a) primarily intended to sexually arouse a minor and (b) are in fact used for that express purpose. Such materials are obscene under the *Ginsberg/Miller* test. There is certainly no danger, when used for such a purpose, that the law will squelch the exchange of a *substantial* amount of materials that have "serious literary, artistic, political or scientific value." In addition, by definition, such materials, when used by an adult attempting to arouse or seduce a minor, would appeal to the prurient interests of a minor. In this context, such materials would be patently offensive under any standard. Or. Rev. Stat. § 167.057 thus meets the *Ginsberg/Miller* test. Certainly plaintiffs make no showing that the law is substantially overbroad relative to the statute's plainly legitimate sweep. *Id.*

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[22] The enumerated conduct is as follows: human masturbation or sexual intercourse; genital-genital, oral-genital, anal-genital or oral-anal contact, whether between two persons of the same or opposite sex or between humans and animals; penetration 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 touching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female. Or. Rev. Stat. § 167.051(4).

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ii. In any case, Or. Rev. Stat. § 167.057 does not violate the First Amendment because it prohibits conduct, not speech.

The Supreme Court has explained that "[F]acial overbreadth adjudication * * * attenuates as the otherwise unprotected behavior that it forbids the state to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615. Plaintiffs' overbreadth challenge to Or. Rev. Stat. § 167.057 is meritless because the statute is directed not at speech, but at conduct: the sexual predation of children.

Indeed, state statutes prohibiting luring have been upheld in the face overbreadth challenges by courts around the country for this very reason. *See, e.g., State v. Colosimo*, 142 P.3d 352, 355 (Nev. 2006) (upholding Nevada statute prohibiting a person from communicating with a child 15 years of age or younger away from his or her parents for the purpose of engaging in sexual conduct with the child); *People v. Cervi*, 270 Mich. App. 603, 717 N.W.2d 356, 366-68 (Mich. Ct. App. 2006) (upholding luring statute and explaining that "[d]efendant is accountable not for his *words*, but for the *act of communicating* with a perceived minor *with intent* to make her the victim of a crime."); *State v. Snyder*, 155 Ohio App. 3d 453, 2003 Ohio 6399, 801 N.E.2d 876, 882-83 (Ohio Ct. App. 2003) (upholding a statute that criminalized the use of telecommunication devices to solicit minors to engage in sexual activity and concluding that the statute was "not aimed at the expression of ideas or beliefs," but was aimed instead at "prohibiting adults from taking advantage of minors"); *State v. Backlund*, 2003 ND 184, 672 N.W.2d 431, 442 (N.D. 2003)(upholding statute that prohibited an adult from sending sexual material to a minor to "importune, invite, or induce" the minor to engage in sexual conduct for the adult's "benefit, satisfaction, lust, passions, or sexual desires"); *People v. Foley*, 94 N.Y.2d 668, 731 N.E.2d 123, 128, 709 N.Y.S.2d 467 (N.Y. 2000) (same).

The court's reasoning in *Foley* is particularly instructive. At issue in that case was a

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statute that prohibited dissemination over the internet of sexual material harmful to minors if done with the intent to "importune, invite, or induce" a minor to engage in specified sexual acts with the person or for the person's benefit. 731 N.E.2d at 127. The New York Court of Appeals found that the statute regulated conduct, not speech. "An invitation or enticement is distinguishable from pure speech." *Id.* at 129. The court found that the words "importune, invite, or induce" are used to describe *acts* of communication, not simply the content of one's views. *Id.* at 129. The court concluded that the act was properly regarded as a "preemptive strike against sexual abuse of children by creating criminal liability for conduct directed toward the ultimate acts of abuse." *Id.* at 128-29.

Federal courts have reached the same conclusion with similar reasoning in rejecting overbreadth challenges to 18 U.S.C. § 2422(b), which criminalizes the use of interstate or foreign commerce to knowingly "persuade, induce, entice, or coerce" a minor to engage in illegal sexual conduct. *See, e.g., United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000); *United States v. Tykarsky*, 446 F.3d 458, 472-73 (3d Cir. 2006); *United States v. Thomas*, 410 F.3d 1235, 1243-44 (10th Cir. 2005); *United States v. Johnson*, 376 F.3d 689, 694-95 (7th Cir. 2004); *United States v. Dhingra*, 371 F.3d 557, 562-63 (9th Cir. 2004); *United States v. Meek*, 366 F.3d 705, 721-22 (9th Cir. 2004).[23]

The Ninth Circuit's opinions in *Meek* and *Dhingra* are illustrative. In *Meek*, the defendant challenged his conviction under 18 U.S.C. § 2422(b) after he attempted to solicit for sex a police officer posing officer posing in an internet chat room as a 14-year-old child. In upholding the conviction, the court reasoned that "there is no otherwise legitimate speech jeopardized by § 2422(b), because the statute only criminalizes *conduct*, namely "the targeted inducement of minors for illegal sexual activity." *Id.* at 721 (emphasis added). The court further

[23] Cases involving luring statutes uniformly distinguish luring statutes from dissemination statutes of the kind struck down by the United States Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) on the grounds that luring statutes do not infringe on adult-to-adult speech. *See, e.g., Meek*, 366 F.3d at 721.

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explained that "speech is merely the vehicle through which a pedophile ensnares the victim."

Similarly, in *Dhingra*, the Ninth Circuit turned aside a facial challenge to § 2422(b). Citing *Meek*, the court rejected the premise that § 2422(b) was a speech regulation. "The focus of the statute is on the actor and the *intent of his actions*, and thus liability depends on the audience for whom the communication is intended and the conduct the communication seeks to provoke." *Id.* at 562 (emphasis added).

The reasoning that those other courts have used in upholding other luring statutes is applicable to Or. Rev. Stat. § 167.057(b)(1)(A). Oregon's statute is not aimed at the expression of ideas or beliefs. Liability under § 167.057(b)(1)(A) "depends on the audience for whom the speech is intended" and the "conduct the communication seeks to provoke." As in *Meek*, the crime involves speech, but speech is merely the vehicle through which the pedophile ensnares the victim.

iii. The conduct that Or. Rev. Stat. § 167.057 prohibits is proscribable under the First Amendment.

Plaintiffs argue that Or. Rev. Stat. § 167.057(b)(1)(A) is overbroad because it prohibits using explicit materials merely for purpose of "arousing or satisfying the sexual desires" of a minor, and, plaintiffs note, "a minor's sexual arousal or satisfaction is not a crime." But that argument is unavailing. The First Amendment does not stand in the way of prohibiting adults from deliberately using explicit materials to sexually arouse minors.

Indeed, plaintiffs' argument proceeds from a premise that is not entirely accurate. Under Oregon law, "arousing or satisfying the sexual desires" of minor *is* in fact illegal, at least if done by an adult through physical contact.[24] The State is not powerless to prohibit the same result simply because it is accomplished by other means. The case law has consistently held that it is within a state's police powers to protect minors from the harmful physical *and psychological*

[24] *See* Or. Rev. Stat. § 163.415; 163.305(6) (defining third-degree sexual assault where one touches a minor's "sexual or intimate other parts" for the purpose of "arousing or gratifying the sexual desire" of either the person or the minor.)

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effects of sexual exploitation. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (recognizing state's compelling interest in protecting the physical and psychological well-being of minors). Moreover, it is well-settled that a statute that furthers such a compelling interest without targeting the content of speech—even if the statute may incidentally burden free speech—does not run afoul of the First Amendment.

Under the standard set out in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), a regulation of conduct that incidentally restricts First Amendment expression is sufficiently justified if (a) it is within the constitutional power of government; (b) it furthers an important or substantial governmental interest unrelated to the suppression of expression; and (c) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. *Id.* at 377.

Or. Rev. Stat. § 167.057(1)(b)(A) meets this standard. The statute's text and legislative history confirm that this is a content-neutral law that is aimed not at the expression of ideas but the harmful effects of particularly pernicious conduct: using pornography to arouse children and to lure them into engaging in sex. *See Ward*, 491 U.S. at 791 (whether an ordinance is content-neutral depends on whether the government has adopted a regulation of speech because of disagreement with the message it conveys); *see also Maynard*, 168 Or. App. at 125. (statute prohibiting furnishing sexually explicit materials to minors was aimed not at content of speech but effects of pornography on minors). It is within the the constitutional power of the government to prohibit that conduct. The state has a compelling interest in protecting minors from adults who would use sexually explicit materials to sexually arouse them. *City of Renton*, 475 U.S. at 47. Or. Rev. Stat. § 167.057 prohibits no more speech than is essential to further that interest. As long as the provider of the materials is not furnishing the materials with the specific sexual intent to arouse the minor or for self-arousal, then the statute places no limit whatsoever on the dissemination of expressive materials.

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iv. Properly construed, Or. Rev. Stat. § 167.057 applies only to instances of sexual predation and not ordinary commercial transactions.

Plaintiffs also argue that despite the fact that it is limited to those who furnish materials with "the purpose * * * to arouse," Or. Rev. Stat. § 167.057 is nevertheless overbroad because, they argue, it goes beyond sexual predation and would criminalize ordinary commercial transactions, such as a bookstore clerk who, knowing it contains arousing material, recommends a "sexy" book to a minor. But plaintiffs' strained reading of the statute flies in the face of the basic principles guiding statutory construction under Oregon law.

In construing a statute, Oregon courts seek to identify the meaning the legislature intended. *PGE,* 317 Or. at 610-11. The meaning of statutory text is ascertained by looking first at the text not in isolation, but in context. *Id.* The context includes other provisions of the same statute, and other related statutes. *Id.* If there is any ambiguity in a statute's meaning after such an examination, the court turns to the legislative history to determine the legislature's intent. *Id.*

Or. Rev. Stat. § 167.057(1)(b)(A) makes it a crime to "lure" a minor by giving the minor pornographic materials for the purpose of sexually arousing the minor. To "lure" means to "to draw into danger, evil, or difficulty by ruse or wiles." *Webster's Third New Int'l Dictionary 1347* (unabridged ed 2002). Or. Rev. Stat. § 167.057(1)(b)(B) makes it a crime to furnish explicit materials for the purpose of inducing a minor to have sex. The statute also includes affirmative defenses that relieve from liability those who act with nonsexual purposes. Read in the context of the statute as a whole, Or. Rev. Stat. § 167.057(1)(b)(A)'s prohibition on using pornography with "the purpose* * * to arouse" a minor applies when the person furnishing the materials does so to achieve one's own deviant *sexual* goal; liability depends on acting with a personal, *sexual* purpose of arousing.

Also relevant in that regard is the fact that the language, "for the purpose of arousing or satisfying the sexual desires of the person or the minor" is nearly identical to language that legislature has used to define the kind of unwanted physical contact that constitutes a sexual

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offense.[25] That is not a coincidence. *See PGE,* 317 Or. at 611 (legislature's use of the same term indicates that the term is intended to carry same meaning). The legislature's borrowing of that language reflects the fact that "luring" is, in essence, a form of *sexual* conduct. Although it does not necessarily target an adult's physical contact with a minor, the law criminalizes an adult's conduct that is designed to achieve exactly the same result—sexual arousal of the minor.

Examination of the text of the statute in context thus plainly demonstrates that the statute does *not* apply to a person, such as a store clerk, who acts with non-sexual purpose but merely furnishes material knowing that it contains explicit content. As the Supreme Court has repeatedly explained, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences. *Vacco v. Quill*, 521 U.S. 793, 803 (1997). In the context of the statute as a whole, the requisite deviant "purpose" is that of the person furnishing the material.

The legislative history confirms that conclusion. As explained above, the legislature's explicit intent was to protect children from sexual exploitation and abuse, and specifically to address the problem of grooming children for later sexual abuse.

In sum, Or. Rev. Stat. § 167.057 only applies when the person who furnishes material to minors does so with a specific *sexual* purpose; either sexually arousing the person or the child, Or. Rev. Stat. § 167.057(1)(b)(A), or inducing the minor to engage in sex, Or. Rev. Stat. § 167.057(1)(b)(B). Acting with such a purpose is not protected by the First Amendment.[26]

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[25] *See* Or. Rev. Stat. § 163.305 (defining "sexual contact" as "any touching of the sexual or intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor *for the purpose of arousing or gratifying the sexual desire of either party*." (Emphasis added.))

[26] Plaintiffs concedes that § 167.057(1)(b)(B) is constitutional; they argue that that provision sufficient to serve the state's needs. But that is not so. That provision applies only the person furnishes explicit materials for the immediate purpose of inducing a minor to engage in sex. By contrast, § 167.057(1)(b)(A) is aimed at stopping grooming before it is too late—where the perpetrators ultimate purpose may be to engage in sex at some later time, but their immediate purpose is to arouse.

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v. In all events, Or. Rev. Stat. § 167.057 is readily susceptible to a limiting construction.

The Supreme Court has frequently noted that striking down a statute as facially overbroad is to be done only as a "last resort"—and not where a limiting construction has been or could be placed on a challenged statute. *Broadrick*, 413 U.S. at 613. Although federal courts are careful not to rewrite a state law to conform it to constitutional requirements, if a challenged statute is "readily susceptible" to a saving construction by the state courts that would make it constitutional, it will be upheld. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). The proper scope of a statute is derived not from reading it in isolation, but from a careful consideration of the statute in context, including the complete regulatory scheme that forms the backdrop of its policies and objectives. *United States v. Stansell*, 847 F.2d 609, 614 (9th Cir. 1988).

Considering the text, context, and legislative history, Or. Rev. Stat. § 167.057 is plainly intended to prohibit predators from using pornographic materials to groom minors for sex. As noted, Or. Rev. Stat. § 167.057(1)(b)(A) directly effectuates that purpose by giving prosecutors a tool with which to stop sexual predation before actual physical abuse begins. For all the reasons stated above, the state maintains that properly construed this provision (a) does not infringe on protected expression under *Ginsberg/Miller* and, (b) even if it does so incidentally, the statute targets constitutionally proscribable conduct. In all events, the statute is certainly readily susceptible to such a reading.

Alternatively, in light of the fact that the statute criminalizes "luring" a minor, and in light of the statute's clear purpose to prevent grooming, Or. Rev. Stat. § 167.057(2)(a) is also susceptible to another limiting interpretation. Thus, while the person's immediate purpose is to arouse a minor, the statute may reasonably be construed to require that the person does so in order ultimately to lure the minor into sexual activity. It is well established that the First Amendment does not protect speech that is intended to "induce or commence illegal activities."

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Williams, 553 U.S. at ___ (slip op. at 2). Or. Rev. Stat. § 167.057(b)(1)(A) criminalizes sexually arousing a minor precisely because this is the first step in grooming them for later sex.[27]

B. Plaintiffs vagueness claims are without merit.

1. To prevail, plaintiffs must show that the statutes are substantially unclear and that a limiting construction is unavailable.

Even laws that regulate protected speech are not required to achieve perfect clarity. *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). In attempting to determine whether a statute is impermissibly vague, the court must consider the statute as a whole, in the light of the statute's purpose. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The courts will not strike down an ordinance that defines its scope using words of "common understanding," even if those words may exhibit less than mathematical precision. *Id.* "Uncertainty at a statute's margins will not warrant facial invalidity if it is clear what the statute proscribes in the 'vast majority of its intended applications.'" *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1154 (9th Cir. 2001) (quoting *Hill v. Colorado,* 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)).

It is also well settled that, in evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or enforcement agency has proffered. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). In determining whether a state statute is too vague and indefinite to constitute valid legislation, the court must take the statute as though it reads precisely as it has been authoritatively construed by state courts. *Kolender*, 461 U.S. at 357 n. 4.

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[27] Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of Deputy District Attorney Jodie Bureta) ("[HB2843] allow[s] us to stop this abuse in the grooming stage, hold people accountable while they are grooming the children while the harm is just starting to be done. We don't want to have to wait until abuse physically occurs in order to catch these people and hold them accountable and protect these kids.")

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2. The language that plaintiffs assert is vague has already been authoritatively construed by Oregon courts.

Plaintiffs' vagueness argument focuses exclusively on the fact that both statutes exclude materials "the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." Or. Rev. Stat. § 167.054(2)(b); Or. Rev. Stat. § 167.057(2). Plaintiffs argue that this exception is so ambiguous as to render the statute facially unconstitutional.

Plaintiffs' argument is without merit. The very terms that plaintiffs assert are unconstitutionally vague appear in other obscenity statutes and have already been construed by the Oregon courts. As explained above, Or. Rev. Stat. § 167.054 and 167.057 were enacted in response to the *Maynard* decision. The new statutes directly incorporate the language of the affirmative defense that the *Maynard* court construed. Or. Rev. Stat. § 167.054(2)(b); Or. Rev. Stat. § 167.057(2). For all of the reasons already given, that construction is controlling. Under Oregon law, the exceptions exclude materials "not primarily intended to sexually arouse the child victim." There is nothing vague about that standard.

3. What the statutes proscribe is clear in the vast majority of its intended applications.

Even in the absence of an existing state court construction, however, plaintiffs' vagueness claims would be unavailing. Plaintiffs complain that they cannot discern what constitutes an "incidental" part of a "nonoffending" whole, or what the meaning of "titillating" might be. But the Ninth Circuit and Supreme Court have routinely rejected vagueness challenges very similar to those raised by plaintiffs here.

"Titillate" means "to excite pleasurably or agreeably: arouse by stimulation." As the *Maynard* court correctly noted, in the context of the statute as a whole, this patently refers to "sexual arousal."[28]

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[28] Plaintiffs now concede that *Maynard*'s definition of "titillate" is controlling. Pls. Memo. at 19.

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Plaintiffs' challenge to the term "incidental" is also unavailing. In *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1154 (9th Cir. 2001), the plaintiffs challenged an initiative requiring teachers to present curriculum "overwhelmingly" or "nearly all" in English. The plaintiffs argued "overwhelmingly" and "nearly all" were too vague to provide notice of how much English they were required to speak to avoid liability. *Id.* at 1151. The court rejected that argument, however, citing *Grayned* and explaining that the terms 'overwhelmingly' and 'nearly all are terms of "common understanding" and that "[a]lthough they are not readily translated into a mathematical percentage, the First Amendment does not require them to be." *Id.* at 1152.

Similarly, exempting materials that, on the whole, are "nonoffending" does not render the statute unconstitutionally imprecise. In the context of a statute aimed at preventing the dissemination of "titillating" sexually explicit images to children 12 years old and younger, "offensive" is a word of common understanding and is sufficiently precise to limit the scope of the law in the vast majority of situations. *See Cal. Teachers Ass'n*, 271 F.3d at 1154 ("in analyzing whether a statute's vagueness impermissibly chills First Amendment expression, it is necessary to consider the context in which the statute operates.").

Or. Rev. Stat. §§ 167.054 and 167.057 are as clear as obscenity laws that have been upheld against other facial vagueness challenges. Indeed, the references to the "prurient interest" and "patently offensive" in the *Miller* obscenity test, incorporated in so many state statutes, do no more to put people of "ordinary intelligence" on notice than do the references in the Oregon statutes to sexually explicit material that is "[]offending" and "titillating." *See also Young v. American Mini-Theaters*, 427 U.S. 50, 53, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (rejecting vagueness challenge to ordinance applicable to films "characterized by an emphasis" on sexual activities).

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4. Any vagueness inherent in Or. Rev. Stat. §§ 167.054 and 167.057 is ameliorated by the scienter requirements.

The Supreme Court has recognized that a scienter requirement may "mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499. In the regulation of obscenity, the inclusion of a scienter requirement allows a statute to "avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Ginsberg*, 390 U.S. at 644 (rejecting vagueness challenge).

Or. Rev. Stat. § 167.054 applies only when a person "intentionally" furnishes a child with sexually explicit material and the person "knows" that material is sexually explicit material. Similarly, Or. Rev. Stat. § 167.057 focuses only on deliberate sexual predation; the law applies only when the perpetrator acts with the specific purpose of arousing their sexual desires or the sexual desires of the minor, or inducing the minor to engage in sex. The element of specific intent in these laws effectively removes any risk that the plaintiffs might inadvertently fall liable to the statute while engaging in protected speech, or that the plaintiffs might be deprived of notice that they were violating the law.[29]

CONCLUSION

Plaintiffs' claims are without merit. Oregon's Legislative Assembly deliberately and narrowly tailored the challenged statutes in a manner that succeeds in helping to prevent sexual predation while not infringing on the freedom of speech. Although the statutes do not repeat the federal *Ginsberg/Miller* test, they plainly meet the standard that test imposes. The terms that

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[29] Similar statutes that have been challenged on vagueness grounds have been upheld precisely because of such scienter requirements. *See, e.g., United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) (finding that scienter requirement narrowed the scope of challenged luring statute "as well as the ability of prosecutors and law enforcement officers to act based on their own preferences.") *See Williams*, 553 U.S. at ___ (May 19, 2008) (Stevens, J., concurring) (slip op. at 1-3) (child pornography statute is not vague or overbroad where examination of legislative history makes "abundantly clear" that Congress's aim was to target only materials with a "lascivious purpose").

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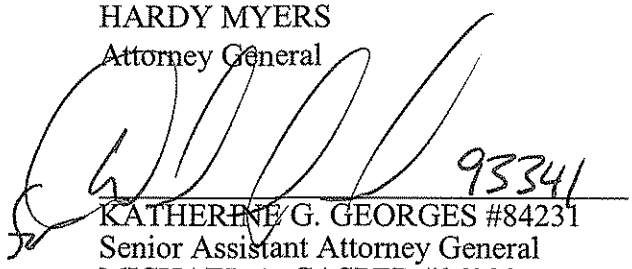
plaintiffs contend are vague have already been authoritatively construed by Oregon's appellate courts, and in any event their meaning is clear in the vast majority of applications. Plaintiffs' motion for a permanent injunction should be denied, and their complaint should be dismissed with prejudice.

DATED this 29 day of August, 2008.

Respectfully submitted,

HARDY MYERS
Attorney General



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CERTIFICATE OF SERVICE

I certify that on August 29, 2008, I served the foregoing Memorandum in Opposition to Plaintiffs' Motion for a Permanent Injunction upon the parties hereto by the method indicated below, and addressed to the following:

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