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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

POWELL'S BOOKS, INC, et al.,

Plaintiffs,

v.

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

Defendants.

Civil No. CV08-0501-MO

PLAINTIFFS' REPLY IN SUPPORT OF THEIR REQUEST FOR DECLARATION OF UNCONSTITUTIONALITY AND PERMANENT INJUNCTION

I. INTRODUCTION

This is not the usual free speech case. In the typical case, the parties generally agree on the meaning of the statutes at issue and battle over whether those statutes comply with the First Amendment. This case is unusual because the parties radically disagree on the meaning of the

statutes. Plaintiffs Powell's Books et al. believe the plain language of the statutes would punish their usual activities, and thus the statutes are unconstitutionally overbroad and vague.

On the other hand, in their Memorandum in Opposition, defendants—the Attorney General of Oregon and the district attorneys of all the Oregon counties (collectively, the "State")—propose an interpretation of the challenged statutes that is substantially different from that which is readily apparent to Plaintiffs from the plain text and the legislative history of the statutes. The State's proposed interpretation of Or. Rev. Stat. § 167.054 ("Section 054") and § 167.057(1)(b)(A) ("Section 057") (collectively, the "Statutes") is that:

- Section 054 applies only to material that, taken as a whole, is primarily intended to sexually arouse the child (State's Response at 15-19) and does not apply to material that would be protected under the First Amendment under the *Miller-Ginsberg* test (State's Response at 3, 14).

- Section 057 applies only to material that, taken as a whole, is primarily intended to sexually arouse the minor (State's Response at 15-19) and only when the transferor's immediate purpose is to sexually arouse the minor with the present intent ultimately to lure the minor into sexual activity (State's Response at 30). Thus Section 057 does not apply to sales by retailers and the other Plaintiffs (State's Response at 28-29).

If this Court interprets the Statutes in that way and makes a declaration to that effect, then the Statutes would not violate the First Amendment to the U.S. Constitution. However, if the Court accepts Plaintiffs' reading or otherwise interprets the Statutes in a manner that does not comply with the First Amendment, then plaintiffs are entitled to the relief they seek as set forth in their moving papers and below.

The briefing in this matter, both on this motion and on the preliminary injunction motion, has been extensive. In the interest of judicial economy, Plaintiffs do not repeat all the arguments made before, but simply incorporate them by reference. This brief reply is intended to address only the key issues that may determine the Court's decision on the motion.

II. PLAINTIFFS HAVE STANDING

The State again argues that Plaintiffs lack standing, even though the Court rejected that argument at the preliminary injunction stage. The State provides nothing new to bolster that argument: It simply argues again, without the benefit of supporting case law, that Plaintiffs lack standing because, *according to the State's interpretation*, the Statutes do not apply to Plaintiffs. As Plaintiffs explained in their Reply in Support of Motion for a Preliminary Injunction, their standing does not depend on the State's interpretation of the Statutes or even on this Court's ultimate determination of the Statutes' meaning. In evaluating standing, a court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the party claiming standing." *Bras v. Cal. Pub. Util. Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiffs have standing because the allegations of the Complaint, accepted as true, reasonably raise a claim that the Statutes, based on their plain language, will curtail their First Amendment freedoms.

III. PLAINTIFFS' PRE-ENFORCEMENT AS-APPLIED CLAIMS ARE JUSTICIABLE

Plaintiffs cited in their Memorandum of Law in Support of Request for Declaration of Unconstitutionality and Permanent Injunction strong precedent for the appropriateness of relief as an as-applied claim in this case. Not only has the U.S. Supreme Court deemed such an approach proper, *Gonzales v. Carhart*, ___ U.S. ___, 127 S. Ct. 1610, 1638 (2007), but the Ninth Circuit accepted such a challenge, *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

Most significantly, the Second Circuit, in *American Booksellers Foundation v. Dean*, 342 F.3d 96, 105 (2d Cir. 2003), granted relief on an as-applied basis in a pre-enforcement challenge similar in many respects to the challenge here. In that case, the state of Vermont argued, as the

State does here, that the plaintiffs lacked standing because the plaintiffs' material was not within the scope of the statute. If that were true, then the plaintiffs could have had no "genuine or imminent threat of prosecution." Despite that fact, the Second Circuit held that the trial court properly granted relief to the plaintiffs on an as-applied basis because the plaintiffs had a reasonable belief about whether the statute applied to them that put them in fear that their rights would be abridged. As the Second Circuit put it, the statute presented "the plaintiffs with the choice of risking prosecution or censoring." *American Booksellers*, 342 F.3d at 101. The same is true here.

The cases cited by the State are inapposite. *Adult Video Association v. U.S. Dep't of Justice*, 71 F.3d 563 (6th Cir. 1995) was an attempt to obtain an advisory opinion as to the obscenity of a single video couched in terms of a constitutional declaratory judgment. *Washington Mercantile Association v. Williams*, 733 F.2d 687, 688 (9th Cir. 1984), is a facial challenge, not an as-applied challenge. And *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), is not even a First Amendment challenge.

When challenging statutes for violation of the First Amendment, imminent threat of prosecution is not required. It is enough that there be an "actual and well-founded fear" of enforcement. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). Unless and until this Court finds the challenged Statutes unconstitutional or narrows them, Plaintiffs' fear is well-founded.

IV. THE STATE HAS MISCONSTRUED THE STATUTES; AS PROPERLY CONSTRUED, THE STATUTES ARE UNCONSTITUTIONAL

A. *Maynard* Does Not Provide a Conclusive Interpretation of the Statutes.

The State contends that the Oregon Court of Appeals' decision in *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), provides a conclusive interpretation of the Statutes' meaning.

However, the State provides little explanation or support for that assumption. Instead, the State engages in a lengthy recitation of statutory interpretation principles that Plaintiffs do not dispute. Plaintiffs do not deny that if *Maynard* authoritatively interpreted the meaning of the Statutes, the legislature would be presumed to understand what that meaning was when it enacted the Statutes.

Plaintiffs contend, however, that *Maynard* did not provide a conclusive interpretation that solves the dispute in this case about the exception for materials that form "merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." As described in plaintiffs' opening brief, *Maynard* provides little guidance here because it never even considered what materials the exception intended to ban. It was focused, not on what material that language prohibited, but on "whether [the statute] sufficiently identified the harmful effects it sought to prevent." *Id.* at 123. (That question is crucial to Article I, section 8, of the Oregon Constitution but is irrelevant to the First Amendment. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").)

The state attempts to use *Maynard*'s discussion of the exception to support its interpretation of what the Statutes mean, but that argument presents a logical fallacy because its discussion of the exception's effect (including the reference to "primary intent") presents no background or exposition that might clarify its nature. To explain by analogy, it is like hearing a friend describe the experience of eating a delicious apple, and concluding from the description that the apple was green and not red. The listener knows the "effect" of the fruit (its taste) but is just guessing about what it actually is (its color). A guess is no guidance at all, and it should not

direct the Court in its important determination of the Statutes' meaning and, by implication, their constitutionality.

The State presents yet another logical fallacy when it relies on the court's conclusion that the statute was unconstitutional "unless the exception applied." The fact that the statute was *un*constitutional under the Oregon Constitution without the exception does not mean that the statute would be held *constitutional* under the First Amendment with the exception in place, nor does it shed any light on what materials the exception is meant to exclude or include.[1]

In short, the State is attempting to take a case that simply has no bearing on the constitutional questions at issue here and read into it a meaning that would dispose of the issues in its favor. The Court should reject that attempt.[2]

[1] The Court of Appeals' use of the term "hardcore pornography" to describe material prohibited by the statute at issue in *Maynard* is similarly unhelpful. *Maynard*, 168 Or. App. at 125, 127, 5 P.2d at 1147, 1148. Not only does the use of that term not arise in the context of any discussion of the meaning of the exception, but that term is a nonspecific, "loaded" term, having no legal meaning, whose application plainly varies depending on who uses it. The sheer variation in the materials that Plaintiffs submitted with their earlier briefing shows how meaningless the term really is.

[2] The State also contends that the legislative history makes clear that the "legislature *was* aware of *Maynard*," and that, therefore, the State's interpretation of the Statutes must be correct. Plaintiffs do not deny that the legislature understood that the *Maynard* opinion existed. However, the State has presented no evidence showing that the legislature understood *Maynard* to mean what the State now argues that it means. If the legislature did not have that understanding, its knowledge of *Maynard*'s existence sheds little light on its intent in enacting the Statutes. The legislature was also aware of the First Amendment, which knowledge does not necessarily result in compliance.

B. The State's Reading of the Statutes Should Be Rejected Because It Does Not Comply with Oregon Statutory Interpretation Principles.

As the State acknowledges, Oregon courts would interpret the Statutes under the principles of statutory construction stated in *Portland General Electric Co. v. Bureau of Labor & Industries*, 317 Or. 606, 859 P.2d 1143 (1993). At the first level of construction, Oregon courts consider the text of the statute itself as the "best evidence of the legislature's intent." One of those principles of construction is that "'where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.'" *Portland General*, 317 Or. at 611, 859 P.2d at 1146 (*quoting* Or. Rev. Stat. § 174.010). Another is that the same phrase, used in two different places, should mean the same thing. *Id.*

1. The State's Reading Renders Section 054 Redundant.

As Plaintiffs explained in their initial brief in support of this motion (and as the State never addressed), the State's interpretation of the Statutes simply reads out of existence key portions of the Statutes. If, as the State claims, the exception (which appears in both Section 054 and Section 057, and must have the same meaning in both) means that material must have the primary purpose of titillating the minor, then Section 057, which prohibits the furnishing of such material "for the purpose of . . . [a]rousing or satisfying the sexual desires of the person or the minor," completely includes within its scope all of the conduct prohibited in Section 054 and punishes such conduct as a Class C felony, rather than as a Class A misdemeanor. Under the State's reading, therefore, Section 054 has no logical reason to exist. Such a result would make it impossible to follow the Oregon Supreme Court's mandate to give effect, if possible, to all provisions.

2. The State's Reading Ignores the Word "and" in the Exception.

The plain text of the exception itself contains two conditions: that the material "forms merely an incidental part of an otherwise nonoffending whole" *and* that the material "serves some purpose other than titillation." Because those phrases are separated by the word "and," the plain meaning of that exception is that it applies only when both conditions are satisfied. As Plaintiffs explained in their opening brief (Plaintiffs' Brief at 21-22), the logical impact of that construction is that the exception is quite narrow. The State's response failed to address that common-sense argument head on and instead fell back on *Maynard* as an authoritative construction of the Statutes. (State's Response at 22.) If this Court decides that *Maynard* fails to provide an authoritative construction, it must apply the plain language of the exception and conclude that the Statutes are broader than the State contends.

C. The State Improperly Bases Its Contention That the Statutes Pass Federal Constitutional Muster on Its Supposition That the Statutes Would Be Constitutional Under Article I, Section 8.

Next, the State appears to argue that the Oregon legislature's attempt to meet the unique requirements of the Oregon Constitution should exempt it from providing the safeguards of the First Amendment. The State's faulty syllogism would require this Court to adopt a number of leaps of logic: (1) that the Statutes comply with the Oregon Constitution, (2) that because of that compliance, they are necessarily "more restrictive" than *Miller-Ginsberg* in every important way, and (3) that because they are "more restrictive," they comply with the First Amendment. That is a circuitous and misleading way of avoiding the question that this case straightforwardly presents: Do the Statutes meet the criteria set forth in *Miller-Ginsberg* for determining compliance with the First Amendment?

Each stage of the state's logic is flawed. First, Plaintiffs have not raised any challenge under the Oregon Constitution and do not necessarily concede that the Statutes would pass muster under that constitution. Those issues have not been raised or briefed here, and the Court thus has no basis for assuming that the Statutes are perfectly compliant in every respect with the Oregon Constitution. Second, the State's argument that the Statutes therefore meet the Oregon Constitution's conditions, which are "more restrictive" conditions than the First Amendment would require at a minimum, is a reductionist tactic that obscures the fact that the First Amendment and the Oregon Constitution approach questions of free speech in fundamentally different ways. That the Statutes are narrow in some respects (such as the definition of "sexually explicit material") does not mean that they are narrowly restrictive in others (such as requiring community standards to be applied or protecting materials that have serious value). Because there are many ways of measuring how restrictive a statute is, asking whether the statute is "more restrictive" is unhelpful and distracting to the ultimate question at hand: Do the Statutes meet the First Amendment criteria that the U.S. Supreme Court has announced?

D. If the Statutes Are Interpreted Correctly, They Are Unconstitutionally Overbroad Because They Are Actually and Functionally Void of Key *Miller-Ginsberg* Criteria.

The fact is that the Statutes, as Plaintiffs contend, simply do not meet the *Miller-Ginsberg* criteria. Rather than addressing or admitting that contention, the State simply breezes by it by focusing on yet another straw man: its argument that Plaintiffs are attempting to require the specific adoption of the *Miller-Ginsberg* language verbatim. Contrary to the State's misrepresentation of their position, Plaintiffs agree that it is theoretically possible for the Statutes to meet the *Miller-Ginsberg* criteria in a functional way without parroting the words exactly. However, when the Oregon legislature attempted to meet the requirements of the Oregon Constitution, they did not escape the duty to also draft a statute that complies with the First

Amendment and meets those criteria. This case requires this Court to determine whether they fulfilled that duty. The problem is not that the Statutes fail to include the specific words of *Miller-Ginsberg*—it is that the Statutes also do not meet the *Miller-Ginsberg* criteria.

Plaintiffs have explained the Statutes' failings in detail in their opening brief and will not repeat them wholesale here. However, it is worth emphasizing their most egregious problem—the failure to protect works of serious value to minors or preteens. The State plainly admits that nothing in the Statutes provides that protection and relies only on its assertion that the Statutes are generally narrow to argue that the Statutes do not prohibit a "substantial amount" of material that has serious value. As Plaintiffs have demonstrated, however, principles of Oregon statutory construction forbid a narrow reading of the Statutes. And without any mechanism, in word or in effect, to preserve that protection, the Statutes will apply to many works of serious value, including the works Plaintiffs submitted with the Supplemental Declaration of Christopher Finan. The First Amendment's protection for works of "serious value" applies regardless of whether the works are considered "prurient," whether they are "patently offensive," or whether they meet any of the other *Miller-Ginsberg* criteria. And, as described in the declarations Plaintiffs submitted from professionals who work with children, even works that contain sexual content have serious value to the development of minors and preteens. That fact alone is sufficient to find the Statutes unconstitutional.

E. Section 057 Is Not a True "Luring" Statute.

Finally, the State contends that Section 057 should be upheld because it prohibits the use of explicit materials to lure a minor into having sex with a person. (*See* State's Response at 30 ("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.").) Plaintiffs do not challenge Or. Rev. Stat. § 167.057(1)(b)(B), which explicitly

prohibits the distribution of material for that purpose. If Section 057 had the same meaning as Or. Rev. Stat. § 167.057(1)(b)(B), then Plaintiffs would not challenge its constitutionality. In fact, every authority that the State cites as upholding a so-called "luring" law upholds a law that prevents the act of sexual abuse itself. Those authorities are consistent with Plaintiffs' understanding of Or. Rev. Stat. § 167.057(1)(b)(B).

However, under the principles of Oregon statutory construction described above, Section 057 must mean something different than Or. Rev. Stat. § 167.057(1)(b)(B) or it would have no independent meaning at all. *See Portland General*, 317 Or. at 611, 859 P.2d at 1146. And indeed, the plain language of Section 057 shows that it does not prevent the act of sexual abuse. Instead, it prevents the distribution of materials for the sexual arousal or satisfaction of a minor.

The State argues that it is entitled to prevent the sexual arousal of a minor for the purpose of preventing sexual abuse. But, as the State admits, it has many tools to prevent sexual abuse, such as Oregon statutes forbidding physical contact to arouse a minor and Or. Rev. Stat. § 167.057(1)(b)(B) itself, which already prevents abusive behaviors that could lead to abuse. Preventing the abuse of minors is indeed a compelling need. But the State has not demonstrated a compelling need for a broader law like Section 057, which simply allows the State to intrude on constitutionally protected expression without adding anything to the State's ability to punish attempted sexual abuse.

V. CONCLUSION

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

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