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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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

Civil No. **CV '08-0501-MJ**
DECLARATION OF MICHAEL POWELL

v.

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

Defendants.

Michael Powell, declares under penalties of perjury:

Background

1. I am the owner of Powell's Book's, Inc. ("Powell's"), a plaintiff in this action. I submit this affidavit on behalf of Powell's in support of plaintiffs' motion for a preliminary injunction to enjoin the State from enforcing ORS 167.051 to 167.057 (collectively referred to as the "Statute"), an unconstitutional censorship law which will apply to mainstream book stores such as Powell's.

2. Powell's is one of the oldest and largest bookstores in Oregon, started in 1971. There are six locations in the Portland metropolitan area, four full-service bookstores (Powell's City of Books, Powell's at Cedar Hills Crossing, Powell's on Hawthorne, and Powell's at PDX) and two specialty stores (Powell's Technical Books and Powell's Books for Home and Garden). The four general retail bookstores primarily carry, and display for purchase, books and magazines and caters to persons of all ages. Powell's also has a website at www.powells.com, serving customers worldwide. The books are organized by category and in some instances, by further sub-categories, for ease of reference. For example, there is a "photography" category broken into several sub-categories, including "erotica." There also is a "graphic novels" category that includes, among others, an "erotica" sub-category containing hundreds of different books. In addition, the website includes a category entitled "gay & lesbian studies," that includes a "sexuality and wellness" sub-category.

Fear Of Prosecution Under the Statute

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

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

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

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

7. My understanding is that Powell’s risks criminal prosecution for furnishing constitutionally-protected materials described above to persons “under 13 years of age” under ORS 167.054. While we may from time to time suggest to a youthful customer that a desired purchase may be inappropriate, it would be difficult, if not impossible, to “card” or determine whether a child is under 13 years of age at our bookstores. Under ORS 167.057, furnishing a 17 year-old minor with such material is a crime if furnished for the purpose of satisfying the sexual desire of the 17-year old. As discussed above, Powell’s sells books and other materials containing sexually-related content that may be sexually arousing, depending on the individual. Under this section, Powell’s would be committing a felony if a 17 year-old purchased a book to satisfy his or her sexual desire or to become sexually aroused while reading such a book -- an act that individual has a right to do.

8. Powell's has in stock over two million volumes constituting over one million titles. We receive on an average over 5,000 new titles per week. Obviously we cannot

read each new title to determine whether there are any sexual explicit portions and if so whether such portions "serve some purpose other than titillation" (even if I knew what that meant). On Exhibit A are listed a few examples of the multitude of books, magazines or other material sold at Powell's likely to contain sexually-related narrative or pictorial content, including, in some instances, nudity, that could be considered by some "sexually explicit" or "visual representation[s] or explicit verbal description[s] or narrative account[s] of sexual conduct" that may appeal to a person's "sexual desires." I believe the only way for Powell's to ensure compliance under the Act at our stores would be to eliminate those materials entirely. Developing an alternative segregated shelving arrangement at our stores for books that may be covered under the Act -- if my staff and I could even determine that book by book, which I believe we could not without being extremely overinclusive -- is totally impractical, unduly burdensome and would consume an inordinate amount of time that we do not have. If forced to do so, we would have to cover up or rope off many sections in my stores to insure that minors would not have access. This would be extremely inconvenient to customers, would completely alter the ambience of the stores, and undoubtedly would have an adverse effect on sales.

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

Conclusion

10. For all the reasons stated above, I fear prosecution under the Statute. If the Statute is not enjoined, Powell's will be forced either to self-censor our books and magazines to a great degree or risk criminal liability. (The only reason we have not self-censored to date is that we have been advised that the Act is unconstitutional.)

Date: April 14, 2008


MICHAEL POWELL

Exhibit A

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

Steinbeck, *Of Mice and Men*

Romance novels, including those by Nan Ryan & Linda Howard

Graphic novels, including those by Laura Carboni

Books of Photography, including *Nude Photography: Masterpieces from the past 150 years*

Comfort, *Joy of Sex*

Blume, *Forever*

Sex education books for teenagers, including *Changing Bodies. Changing Lives*, by Ruth Bell

Nabokov, *Lolita*