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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 - MO

DECLARATION OF DAVID FIDANQUE

v.

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

Defendants.

I, DAVID FIDANQUE, certify and declare as follows:

1. I am the Executive Director of the American Civil Liberties Union of Oregon, Inc. (the “ACLU of Oregon”), a plaintiff in this action. I submit this declaration on behalf of the ACLU of Oregon in support of plaintiffs’ motion for a preliminary injunction to enjoin the State from enforcing ORS 167.051 to 167.057 (the “Statute”), an unconstitutional censorship statute that will restrict the civil liberties of the ACLU of Oregon’s members.

2. The ACLU of Oregon is an Oregon nonprofit corporation organized for the public benefit with a membership of over 17,000 people, all of whom live or work in Oregon. The ACLU of Oregon is a nonpartisan advocacy organization. Since 1955, it has been dedicated to the preservation and enhancement of civil liberties and civil rights. It believes that the freedoms of press, speech, assembly, and religion, and the rights to due process, equal protection, and privacy, are fundamental to a free people. The ACLU of Oregon lobbies to prevent the passage of laws that would undermine civil liberties and civil rights, and to encourage passage of laws that would enhance civil rights and civil liberties. The ACLU of Oregon also supports educational outreach designed to influence public opinion on civil liberties and civil rights issues.

Fear of Prosecution Under the Statute

3. The ACLU of Oregon fears that its members may be at risk of criminal prosecution under the Statute for permitting minors to access constitutionally protected material which could be deemed “sexually explicit” or to appeal to a person’s “sexual desires” under the meaning of the Statute.

4. Under ORS 167.054, it is a crime to “intentionally furnish” or “intentionally permit” anyone under the age of 13 to view “sexually explicit material” if the accused “knows

that the material is sexually explicit material.” ORS 167.054(1). Such material includes material containing visual images—including paintings and drawings—of masturbation, intercourse or genital/oral/anal contact between people and animals. *See* ORS 167.051(5). It could be interpreted to include materials used by the public at large, including the ACLU of Oregon’s members. “[F]urnish” is defined broadly, including “to sell, give, rent, loan or otherwise provide.” *See* ORS 167.051(2).

5. ORS 167.054 provides two exceptions to prosecution. First, under ORS 167.054(2)(a), certain persons, including employees of museums, schools, medical treatment providers, or public libraries, may not be prosecuted. In most circumstances, members of the ACLU of Oregon would not fall into that exception. Second, under ORS 167.054(2)(b), members of the ACLU of Oregon 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 that exception is inherently vague. It provides no clear standard that members of the ACLU of Oregon may use to determine what specific material qualifies for that exception.

6. I understand that ORS 167.054 and 167.057 contain a number of affirmative defenses that criminal defendants may assert to avoid liability under the Statute. In some instances, members of the ACLU of Oregon may be able to assert those defenses. However, asserting an affirmative defense would not guarantee members of the ACLU of Oregon immunity from prosecution or a successful defense to prosecution. Even if they were able to assert the defense successfully, the defense would not exempt them from the expense, inconvenience, and stigma of a criminal prosecution. Therefore, the availability of the

affirmative defense does not remove the chilling effect that the Statute has on the constitutionally protected activities of the members of the ACLU of Oregon.

7. Under ORS 167.057, it is a crime to disseminate to anyone under the age of 18 a “visual representation or explicit verbal description or narrative account of sexual conduct” for the purpose of “arousing or satisfying the sexual desires of the person or the minor . . .” I understand that is a very broad provision encompassing material with textual descriptions, as well as visual depictions. It could be interpreted to include many materials used by the general public, including members of the ACLU of Oregon. I also believe that ORS 167.057 is vague because the phrase “arousing or satisfying the sexual desires” is open to a wide variety of interpretations. ORS 167.057 is also vague because it contains the same undefined and vague “incidental part” exception contained in ORS 167.054.

8. Under ORS 167.057, furnishing a 17-year-old minor with prohibited materials is a crime if the material is furnished for the purpose of satisfying the sexual desire of the 17-year-old. As stated above, many materials used by the general public, including members of the ACLU of Oregon, contain sexually related content that may be sexually arousing to some teenagers. Under ORS 167.057, therefore, members of the ACLU of Oregon would be committing a felony if a 17-year-old obtained materials from them in order to satisfy the minor’s sexual desire or for the minor to become sexually aroused while reading those materials.

9. As stated above, many materials used by the general public, including members of the ACLU of Oregon, contain depictions or narrations of sexual activity. At least annually, staff and member volunteers of the ACLU of Oregon do educational outreach to the public regarding books and other material which have been banned, challenged or otherwise subjected to censorship or attempts at censorship in Oregon and elsewhere. Many of those works have been

subjected to challenge because they contain discussion or depictions of sexual activity. When the ACLU does such outreach, it often displays copies of particular books and other material which have been banned or challenged and its staff and volunteers allow members of the public, including minors, to review the material. The ACLU of Oregon believes that, under the Statute, such outreach activities may no longer be permissible or at the very least would subject staff and member volunteers of the ACLU of Oregon to a substantial risk of criminal prosecution under ORS 167.057.

10. As stated above, it is impossible to tell, given the vagueness of the statute, whether materials used and provided by the ACLU of Oregon and its members “serve some purpose other than titillation” or whether they “form merely an incidental part of an otherwise nonoffending whole.” I believe the only way for members of the ACLU of Oregon to ensure compliance under the Statute would be to stop using and disseminating those materials entirely.

11. In short, if the Statute is not enjoined, then members of the ACLU of Oregon will be forced to either risk criminal liability or to restrict their constitutionally protected expressive and associational activities.

12. For all the reasons stated above, the ACLU of Oregon fears that its staff and members will be prosecuted under the Statute. It requests that such prosecution be enjoined.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 15, 2008.

  
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David Fidanque