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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

POWELL'S BOOKS, INC., et al.,	Case No. 08-501-MO
Plaintiffs,	DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION
v.	
HARDY MYERS, in his official capacity as ATTORNEY GENERAL OF THE STATE OF OREGON, et al.,	
Defendants.	

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INTRODUCTION

Plaintiffs challenge the constitutionality of two criminal statutes that the Oregon Legislative Assembly enacted last year and that have been in effect since January 1, 2008. The first, Or. Rev. Stat. § 167.054, prohibits furnishing children under the age of thirteen with materials containing images of certain sexually explicit conduct. The second, Or. Rev. Stat. § 167.057, prohibits using such materials to sexually arouse children or to lure them into engaging in sex.

Plaintiffs contend that these statutes, and the definitions on which they rely, are overbroad and vague, in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution. They have moved for preliminary relief, arguing that their threat of prosecution under these laws warrants an immediate injunction. The court should deny plaintiffs' motion, because plaintiffs have no likelihood of success on the merits.

As an initial matter, plaintiffs lack standing to bring these claims. Construed in light of authoritative Oregon case law, the challenged statutes apply only to those who furnish children with pornographic materials intended to sexually arouse those children. Based on their allegations, plaintiffs do not engage in such conduct and are therefore not among the class of offenders at whom these statutes are directed. Plaintiffs have thus failed to allege that they face a credible threat of prosecution under either law. Absent such a threat, plaintiffs do not have standing.

Even assuming that plaintiffs did have standing, their claims are without merit. Plaintiffs' first contention is that Or. Rev. Stat. §§ 167.054 and 167.057 violate the First Amendment because the materials they proscribe fail to meet the criteria for obscenity articulated by the Supreme Court 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 (1973). Plaintiffs are wrong. An examination of the text of the challenged statutes and the history of their adoption shows that the laws are narrowly tailored to meet a *more* restrictive free-speech

standard than that imposed by the First Amendment—specifically, the standard imposed by Article I, section 8 of the Oregon Constitution.

Or. Rev. Stat. § 167.054 was enacted to replace an earlier antiobscenity law that Oregon courts held was unconstitutional under Article I, section 8. In response to that state court decision, the legislature went back to the drawing board and drastically limited the scope of Or. Rev. Stat. § 167.054: it applies only to those who intentionally furnish explicit, sexually arousing material to children who are twelve years old or younger. Or. Rev. Stat. § 167.054 actually proscribes far less material than states are allowed to prohibit under the Supreme Court's obscenity cases; it easily passes the *Ginsberg/Miller* test.

Similarly, Oregon's Legislative Assembly narrowly tailored Or. Rev. Stat. § 167.057. That statute prohibits providing sexually explicit materials to a minor in order to sexually arouse the person or the minor, or to lure the minor into having sex. The element of specific intent necessarily obviates any overbreadth concerns. The First Amendment does not protect the right to engage in the sexual predation of children.

Plaintiffs' vagueness claims fare no better. In fact, the terms that plaintiffs contend are impermissibly vague appear in other obscenity statutes and have already been authoritatively and narrowly construed by Oregon's courts. In light of that case law, the statutes are both clear and clearly permissible.

Finally, the "balance of harms" also disfavors preliminary relief in this case. The state has a compelling interest in protecting the welfare of children. The gravity of that interest far outweighs plaintiffs' unfounded—and indeed, dubious—fear of prosecution. Plaintiffs' purported need for emergency injunctive relief is particularly difficult to reconcile with the fact that they waited months after the statutes were enacted before bringing this challenge.

Both plaintiffs' prospects for success on the merits and the balance of harms militate against preliminary relief. Plaintiffs' motion should be denied.

BACKGROUND

I. Obscenity, Minors and the First Amendment.

The Supreme Court has long recognized that obscene speech is not protected by the First Amendment. *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). In *Ginsberg*, however, the Supreme Court first recognized that what qualifies as "obscene" is partly a function of the age of person who is viewing the material.

Ginsberg involved a challenge to a New York criminal statute which prohibited "exposing minors to harmful materials." 390 U.S. at 645-46. Among other things, the statute prohibited selling to minors images "of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors." *Id.* The statute defined "harmful to minors" as material that "predominantly appealed to the prurient, shameful or morbid interest of minors," was patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and was utterly without redeeming social importance for minors. *Id.*

The defendant, convicted of selling "girlie" magazines to 16-year-old boys, argued that the law violated the First Amendment. *Id.* at 636. The Supreme Court upheld the law, concluding that the materials prohibited by the law were obscene as to youths and therefore were not protected by the First Amendment. *Id.* at 634-640.

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the challenged statute] simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of such minors. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.

Id. at 638 (internal citations and quotations omitted).

Four years later, in *Miller v. California*, the Supreme Court set forth the now familiar three-part test that material must meet to qualify as obscene as to adults.[1] Reading *Ginsberg* in light of *Miller*, federal courts have since adopted an amalgam of the two tests (hereafter, the *Ginsberg/Miller* test or variable obscenity test) for determining whether speech is obscene as to minors. *See, e.g., American Booksellers v. Webb*, 919 F.2d 1493, 1503 n.18 (10th Cir. 1990). 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.

See id.

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.[2] As a result, the Oregon Constitution tolerates much less speech regulation than would otherwise be allowed under federal law.

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[1] The *Miller* obscenity test is as follows:

> (1) the average person, applying contemporary community standards would find that the work appeals to the prurient interest;
> (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (3) the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24.

[2] 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."

Oregon's distinctive protection of free speech is especially evident 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. In *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000), *rev den*, 332 Or 137 (2001), 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."[3] Enacted just three years after *Ginsberg*, Or. Rev. Stat. § 165.065 was based in part on the Court's decision in that case.[4] Nevertheless, the *Maynard* court found the law violated Article I, section 8.

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[3] 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[.]"

[4] *See* Proposed Oregon Criminal Code 232, Commentary § 259 (1971) (Attached as Exh. 3 to the Declaration of Michael A. Casper) (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*].)

In *Maynard*, the court 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 ORS 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 ORS 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 ORS 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 ORS 167.065 to ORS 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 ORS 167.085(3) plainly shows that the defense applies to those materials not primarily intended to titillate the victim.*"

168 Or. App. at 124-25 (emphasis added). On this basis, the court concluded that the clear purpose of the underlying statute, though not expressly stated, was "protecting children from the harmful effects of hardcore pornography." *Id.* The court went on to conclude, however, the affirmative defense was underinclusive—it 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.[5]

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[5] 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

III. 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 offenders 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.")[6] 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.")[7]

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 unconstitutional by prior court rulings, so our goal is to craft a statute that is constitutional.");[8]

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.")

[6] Attached as Exh. 4 to the Declaration of Michael A. Casper.

[7] Attached as Exh. 4 to the Declaration of Michael A. Casper.

[8] Attached as Exh. 4 to the Declaration of Michael A. Casper.

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 [in *Maynard*] and make sure that our statutes comply with that guidance.")[9]

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).[10]

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

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[9] Attached as Exh. 5 to the Declaration of Michael A. Casper.

[10] For the Court's convenience, the full text of each of these statutes is attached as Exh. 1 to the Declaration of Michael Casper.

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

In seeking to address the constitutional infirmities of Or. Rev. Stat. § 167.065, the legislature thus drastically narrowed the scope of Or. Rev. Stat. § 167.054. Whereas its predecessor prohibited furnishing explicit materials to minors under age 18, Or. Rev. Stat. § 167.054 applies only to children under 13. The previous law regulated a much broader array of explicit content, including narrative descriptions; by contrast, Or. Rev. Stat. § 167.054 regulates only the narrow class of materials containing images of particular sexual conduct. In addition, what had been an affirmative defense to Or. Rev. Stat. § 167.065—that the explicit portions of the material form "merely an incidental part of an otherwise nonoffending whole" and "serve some purpose other than titillation"—was made an exception to liability in the first instance.

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." Or. Rev. Stat. § 167.057(1). Like Or. Rev. Stat. § 167.054, Or. Rev. Stat. § 167.057 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 the same set of affirmative defenses 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.

IV. Plaintiffs' complaint and motion for preliminary injunction.

Plaintiffs filed their complaint and 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. Plaintiffs ask the court to declare these laws unconstitutional, both facially and as applied to plaintiffs, and to permanently enjoin defendants from enforcing them.

In their motion for a preliminary injunction, plaintiffs ask the court to immediately enjoin defendants from prosecuting plaintiffs for violating Or. Rev. Stat. §§ 167.054 and 167.057. Plaintiffs argue that such an injunction is warranted because the threat of potential prosecution under these statutes chills their right to free speech. Accompanying their motion, plaintiffs filed a set of declarations purporting to describe materials that plaintiffs disseminate to minors and which they fear puts them at risk of prosecution.

V. Standards for issuance of preliminary relief.

In the Ninth Circuit, to obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. *See Roe v. Anderson,* 134 F.3d 1400, 1401-02 (9th Cir. 1998). These formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *See id; Rohman v. City of Portland*, 909 F. Supp. 767, 771 (D. Or. 1995). In addition, the effect upon the public interest will be prominently considered in actions implicating government policy or regulations, or other matters of public concern. *See Yakus v. United States,* 321 U.S. 414, 440-41, 64 S. Ct. 660. 88 L. Ed.

834 (1944) (where a preliminary injunction is requested that "will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a further determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.")

ARGUMENT

I. Plaintiffs have no likelihood of success on the merits.

A. Plaintiffs lack standing.

1. To have standing, plaintiffs must face a credible threat of prosecution.

A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974). One whose fear of prosecution is "imaginary or speculative" does not have standing to challenge a criminal statute. *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

Where a statute raises First Amendment concerns, the harm suffered by parties who censor their own speech in order to avoid civil sanction or criminal penalty "may warrant preenforcement review in some cases." *Alaska Right to Life v. Feldman, Alaska Right To Life Politi-Cal Action Committee*, 504 F.3d 840, 851 (9th Cir. 2007). In *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988), for example, the Court concluded that a preenforcement challenge was justiciable when the plaintiffs restricted their speech based on "an actual and well-founded fear that the law will be enforced against them." In the Ninth Circuit, "a court may adopt this somewhat relaxed approach to justiciability, however, only upon a showing that the plaintiff 'is immediately in danger of sustaining a direct injury as a result of [an executive or legislative] action.'" *Alaska Right to Life*, 504 F.3d at 851 (quoting *Laird v. Tatum*, 408 U.S. 1, 12-13, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). Thus, an alleged fear of prosecution gives rise to Article III standing only if the plaintiff's intended speech

"arguably falls within the statute's reach." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003).

2. Plaintiffs do not face a credible threat of prosecution under either Or. Rev. Stat. § 167.054 or Or. Rev. Stat. § 167.057.

Plaintiffs do not have standing to challenge either Or. Rev. Stat. § 167.054 or Or. Rev. Stat. § 167.057, because they do not allege facts giving rise to a credible threat of prosecution under either statute.

Or. Rev. Stat. § 167.054 prohibits knowingly furnishing materials containing images of sexually explicit conduct to children under the age of thirteen. The law creates an exception for 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 *Maynard*, the court expressly construed an almost identically worded exception to mean materials that are not "primarily intended" to "sexual[ly] arouse" the child to whom they are furnished. It is clear from the legislative history that when the legislature enacted the challenged statutes, it was aware of the *Maynard* decision; indeed, they adopted these statutes precisely because of the *Maynard* decision. The legislature's decision to use the same language construed in that case demonstrates its intention to adopt the *Maynard* construction. *See Mastriano v. Bd. of Parole & Post-Prison Supervision*, 342 Or. 684, 693, 159 P.3d 1151 (2007) (In 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.").[11] Not surprisingly, plaintiffs do not allege that they are in the business of supplying sexually explicit materials to preadolescent children in order to sexually

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[11] In addition, although *Maynard* is a decision from Oregon's intermediate appellate court, not the Oregon Supreme Court, its construction is nonetheless authoritative here. Where a state's intermediate appellate court has construed a statute, the state supreme court has refused review, *see State v. Maynard*, 332 Or. 137, 27 P.3d 1043 (2001), and the law has been unchanged for several years, the United States Supreme Court, as well as the Ninth Circuit Court of Appeals, regard the intermediate court's construction as authoritative in the context of a vagueness challenge. *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).

arouse them. Plaintiffs do not state a "well-founded fear" of prosecution under Or. Rev. Stat. § 167.054.

Plaintiffs' lack of standing to challenge Or. Rev. Stat. § 167.057 is even more apparent. On its face, that statute applies only to those who furnish certain explicit materials to minors "for the purpose of (A) arousing or satisfying the sexual desires of the person or minor; or (B) inducing the minor to engage in sexual conduct." Or. Rev. Stat. § 167.057(1)(b). Plaintiffs do not allege that they furnish or use explicit materials for either purpose. Plaintiffs do not allege a credible threat of imminent prosecution under Or. Rev. Stat. § 167.057.[12]

B. Even if they have standing, plaintiffs have no likelihood of success on the merits of their overbreadth claims.

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 is obscene as to children. But plaintiffs can make no such showing. In fact, both Or. Rev. Stat. §§ 167.054 and 167.057 are well within federal standards.

Indeed, the United States Supreme Court long ago recognized that, unlike other states, Oregon has taken a particularly narrow approach to regulating obscenity, and that this approach is compatible with its decisions in *Ginsberg* and *Miller*. In *Paris Adult Theater v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), a companion case that came down on the same day as *Miller*, Justice Brennan—who authored *Ginsberg*—opined in dissent that the effect of the

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[12] Plaintiffs ask the court to declare that Or. Rev. Stat. §§ 167.054 and 167.057 are unconstitutional on their face and "as applied to plaintiffs." Plaintiffs do not have standing to raise "as applied" challenge, however, because the challenged statutes have never been applied to plaintiffs. Although the imminent possibility of future prosecution and resulting self-censorship can, in some instances, give rise to standing to mount a facial challenge, the possibility of future prosecution does not give standing to challenge a statute "as applied." *See Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 565-66 (6th Cir. 1995) (fear of prosecution can warrant preenforcement facial overbreadth challenge but a plaintiff has no standing to seek a preenforcement declaration that antiobscenity law would be unconstitutional "as applied").

newly articulated *Miller* obscenity standards would be to invalidate every state obscenity statute in the country, *except those of Oregon.* Wrote Brennan,

> "While the Court's modification of the Memoirs test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For, under the Court's restatement, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements. * * * The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State, even under the Court's decision. See Oregon Laws 1971, c. 743, Art. 29, §§ 255-262."

413 U.S. at 96 n.13 (Brennan, dissenting). The majority in *Miller* responded to Justice Brennan's assessment of its obscenity standard by stating:

> "We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as *construed* heretofore or hereafter, may well be adequate."

413 U.S. at 24 n.6 (emphasis added). Thus, the majority implicitly recognized that Oregon's then-existing obscenity laws did not need to be construed to satisfy the newly-articulated *Miller* test. Oregon laws were already sufficient on their face.

This history is critically important here. Enacted in 1971, Or. Rev. Stat. § 167.065—the predecessor to Or. Rev. Stat. § 167.054—was among the "recently revised" statutes to which Justice Brennan and the *Miller* majority were referring. Plaintiffs thus challenge statutes that are far narrower in scope than a law that the Supreme Court, including the author of *Ginsberg*, already considered to be, for First Amendment purposes, "adequate" on its face.[13]

[13] No Oregon court ever directly confronted the question whether Or. Rev. Stat. § 167.065, when considered with the defenses in Or. Rev. Stat. § 167.085, passed muster under the First Amendment. Because the law was struck down under the state constitution in *Maynard*, the majority did not reach the question whether it comported with the First Amendment. Notably, however, Judge Landau, who dissented in *Maynard* and therefore did reach the federal question, concluded that Or. Rev. Stat. § 167.065 was "virtually identical to the statute at issue in *Ginsberg* in all material respects." Likewise, in his dissent in *State v. Woodcock*, 75 Or. App. 659, 663

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. A statute may be invalidated on its face only if the overbreadth is "substantial." *Houston v. Hill*, 482 U.S. 451, 458-59, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987); *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 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. ____ (May 19, 2008) (slip op. at 6).[14] 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 New York statute, § 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,

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(1985), Judge Van Hoomissen concluded that Or. Rev. Stat. § 167.065 passed federal constitutional muster. Judge Van Hoomissen reached that conclusion based on his view that the legislative history demonstrated that the defenses in Or. Rev. Stat. § 167.085 were intended to apply to Or. Rev. Stat. § 167.065. *Id.*

[14] For the Court's convenience, a copy of the majority's opinion in *Williams* is attached as Exh. 6 to the declaration of Michael A. Casper.

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).

2. State statutes are not required to incorporate the *Ginsberg/Miller* criteria in order to pass constitutional muster.

Plaintiffs argue that Or. Rev. Stat. §§ 167.054 and 167.057 violate the First Amendment because they restrict sexually explicit material but do not expressly require that material to meet the *Ginsberg/Miller* criteria. Plaintiffs observe that most statutes restricting the sale of sexually explicit material to minors incorporate verbatim the three-part test from *Ginsberg/Miller*, and "those that do not comply have almost uniformly been struck down." Pls. Memorandum at 15.

Plaintiffs improperly conflate *incorporating* the language of the *Ginsberg/Miller* test with *complying* with that test. State obscenity statutes are not required to parrot the *Ginsberg/Miller* test in order to "comply" with federal standards for regulating obscenity to minors. *See Miller*, 413 U.S. at 25 (a statute must pass the three-part test "as written *or construed*" (emphasis

added)).[15] Ultimately, the question is not whether state law *repeats* the federal criteria, but simply whether the law *meets* the criteria. *Id.* In this case, the challenged Oregon statutes do not incorporate the federal test, but, as explained below, there is no question that they meet that test.

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

The *Ginsberg/Miller* definition of obscenity establishes a federally recognized category of materials that states may restrict from minors without running afoul of the First Amendment. By simply adopting 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, by restricting all materials in the category. Because of the constraints imposed by its state constitution, however, Oregon has adopted a narrower approach to regulating obscenity.

In the majority of states, state constitutional free-speech guarantees are regarded as coextensive with those of the First Amendment. That is not so in Oregon. As explained above, 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. *See, e.g.*, *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987); *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988); *State v. Ciancanelli*, 339 Or. 282, 121 P.3d 613 (2005). Indeed, the Oregon Supreme Court has expressly held that parroting the *Miller* obscenity criteria is insufficient to comport with Article I, section 8. *See Henry*, 302 Or. at 527.

[15] In a separate opinion decided on the same day as *Miller*, the court emphasized that in construing federal statutes use of words such as "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" the Court was "prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California*." *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n.7, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

Or. Rev. Stat. §§ 167.054 and 167.057 do not parrot the federal obscenity criteria because they are intended to meet the state constitution's stricter standard. As explained in the next section, the statutes accomplish that goal by restricting only a small fraction of materials that may permissibly be regulated under the federal criteria.

When states attempt to prohibit materials at the outer boundaries of what is obscene for minors but do not adopt the language of *Ginsberg/Miller*, the risk that they will overstep those boundaries and run afoul of the First Amendment is high. But Oregon's statutes tread nowhere near the boundaries of what is obscene by federal standards. Because the challenged Oregon statutes do not attempt to prohibit speech at the outer boundaries of obscenity, but only materials at the core of what is obscene, the fact that they do not parrot the federal test does not present any such risk.

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

The Legislative Assembly's purpose in enacting Or. Rev. Stat. § 167.054 was to prohibit furnishing pornography to preadolescent children. *See* Testimony, House Judiciary Committee, HB 2843, April 6, 2007 (statement of District Attorney Jodie Bureta) (explaining that bill was drafted to address problem of "people giving pornography to children in order to groom them for later sexual abuse.")[16] 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.

First, Or. Rev. Stat. § 167.054 regulates furnishing sexually explicit material only to very young children—those 12 years old and younger. For First Amendment purposes, the difference between children in their late teens and 12-year-olds is fundamental. *See*, e.g., *Rowan v. Post Office Dept.*, 397 U.S. 728, 741, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970) (Brennan, J., concurring)(noting that law preventing certain speech to children would raise First Amendment

[16] Attached as Exh. 4 to the Declaration of Michael A. Casper.

concerns if applied to children "in their late teens"); Amitai Etzioni, "Do Children Have The Same First Amendment Rights As Adults?: On Protecting Children From Speech," 79 Chi.-Kent. L. Rev. 3, 47 (2004)("[T]hose who are somewhere between infancy and age thirteen have much lower capacities to contribute to and benefit from speech and are more vulnerable to harm from certain materials."); Michael S. Wald, "Children's Rights: A Framework for Analysis," 12 U.C. Davis L. Rev. 255, 274 (1979) ("[Y]ounger children, generally those under 10-12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives * * *. Younger children are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience."); Alan Garfield, Protecting Children From Speech, 57 Fla. L. Rev. 565, 603 (2005)("[T]o lump all minors together ignores the vast differences in emotional and intellectual maturity within the group of minors."). Defendants are unaware of any instance in which a court has struck down an obscenity law restricting the dissemination of sexually explicit materials to children younger than thirteen.[17]

Second, Or. Rev. Stat. § 167.054 prohibits furnishing only materials containing images of specifically enumerated and objectively identifiable forms of "sexually explicit conduct." Specifically, the law applies to materials containing images of "human masturbation or sexual

[17] Where the state is attempting to protect only very young children from sexually explicit material significantly, greater latitude must be afforded to the state in characterizing what is obscene. This is true for three reasons. First, the age group being protected is the most vulnerable part of the population, and deserving of special protection. *See United States v. X-Citement Video*, 982 F.2d 1285, 1288 (9th Cir. 1992), *rev'd on other grounds*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) ("We would not lightly hold that the Constitution disables our society from protecting those members it has traditionally considered to be entitled to special protections--minors.") Second, First Amendment concerns are significantly attenuated when dealing with young children who lack the "full capacity for individual choice" on which First Amendment guarantees are based. *See Ginsberg*, 390 U.S. at 649-650 (1968) (Stewart, J., concurring) And third, it is difficult to meaningfully adapt the prongs of the *Ginsberg/Miller* test to very young children. *FCC v. Pacifica Found.*, 438 U.S. 726, 769, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (Brennan, dissenting)(noting "difficulties inherent in adapting the *Miller* formulation to communications received by young children."); *see also* Marion D. Hefner, "'Roast Pigs' and Miller-Light: Variable Obscenity in the Nineties," 1996 U. Ill. L. Rev 843, 869-73 (questioning applicability of *Ginsberg/Miller* test to young children).

intercourse"; "genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals"; or "penetration of the vagina or rectum by any object other than as part of a personal hygiene practice." Or. Rev. Stat. § 167.051(5). In this respect, Or. Rev. Stat. § 167.054 actually meets one of the requirements for *adult* obscenity under *Miller*.[18] Laws prohibiting obscenity as to minors are not required to be tailored so narrowly. Indeed, the Supreme Court has allowed that mere nudity can be obscene with respect to minors—even minors as old as 17—as long as it is "in some significant way, erotic." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10, 95 S. Ct. 2268, 2275 n.10, 45 L. Ed. 2d 125 (1975). Moreover, the applicable definition of "sexually explicit conduct" is very similar to (and is in fact narrower than) those which the Supreme Court upheld against overbreadth challenges in both *Ferber* and *Williams*. *See Williams*, 553 U.S. ___ (Slip Op. at 10). In *Williams*, the court specifically noted that the term "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." *Id.*

Third, Or. Rev. Stat. § 167.054 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." As explained above, Oregon courts have construed that exception to exclude all materials that are not "primarily intended" to "sexually arouse" the person to whom they are furnished. *See Maynard* (construing nearly identical language in Or. Rev. Stat. § 167.085(3)).

Fourth, Or. Rev. Stat. § 167.054 applies only to material containing *images* of sexually explicit conduct, not merely narrative descriptions of such conduct. Or. Rev. Stat. § 167.051(5). In this regard, it is much narrower than other obscenity statutes—such as that upheld in

[18] In *Miller*, the court held that to avoid overbreadth, adult obscenity statutes must apply to materials that depict or describe sexual conduct, and that conduct must be specifically defined by the applicable state law. 413 U.S. at 24.

Ginsberg—which also prohibit explicit narrative descriptions. This effectively removes the possibility that the literary works cited in plaintiffs' declarations could fall within the statutes' sweep.

Fifth, Or. Rev. Stat. § 167.054 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." Or. Rev. Stat. § 167.054. The law does not punish innocent mistakes—only calculated conduct. *See Ginsberg*, 390 U.S. at 644. As a result, the risk of self-censorship of constitutionally protected material is significantly attenuated. *Id.*

Sixth, Or. Rev. Stat. § 167.054 includes several exceptions and affirmative defenses.[19] Employees of museums, schools, law enforcement agencies, medical treatment providers and public libraries are exempted from the law if they are acting within the scope of their employment. 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 the person to whom the sexually explicit material was furnished was not a child, Or. Rev. Stat. § 167.054(3)(b).

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 Or. Rev. Stat. § 167.054 does not repeat the *Ginsberg/Miller* test, it clearly meets that test. The law is limited to offensive materials containing images of specific sexual conduct, and only those images intended to sexually arouse. It is inconceivable that the law might prohibit a substantial amount of materials which have "serious literary, artistic, political or scientific value" for twelve-year-olds, or which, taken as a whole, were not patently offensive as to preadolescent

[19] 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, however, the court considers the probability that the statute could lead to successful prosecution for protected activity. *See Williams*, 553 U.S. ___ (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.")

children. Because the materials must be "primarily intended to sexually arouse," the law prohibits only materials which appeals to the prurient interest (such as it is) of preadolescent children.

Notably, Or. Rev. Stat. § 167.054 is far narrower than the statute that the Supreme Court upheld in *Ginsberg*.[20] The statute in *Ginsberg* prohibited the sale of "nudity" which was harmful to minors; it also prohibited selling to minors "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct." By contrast, Or. Rev. Stat. § 167.054 prohibits furnishing only offensive and explicit images of certain sexually explicit conduct to children under the age of 13. Or. Rev. Stat. § 167.054(1).

In all events, plaintiffs' overbreadth challenge fails because 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. ___ (slip op. at___). In those marginal cases, the affected party could and should raise the issue on an as-applied basis.

Finally, there is no risk that Oregon courts will interpret the statute broadly. Oregon courts adhere to the usual rule of construing statutes to avoid constitutional questions. *Westwood Homeowners Assn., Inc. v. Lane County*, 318 Or. 146, 160, 864 P.2d 350 (1993), *adh'd to as modified on recons*, 318 Or. 327, 866 P.2d 463 (1994) (avoidance canon is invoked when there is even a tenable argument of unconstitutionality). Moreover, the legislature's intent to craft a narrow law which would fix the state constitutional infirmities identified in *Maynard* is abundantly clear in the statute's legislative history. *See* Or. Rev. Stat. § 174.020(1)(a) ("In the construction of a statute, a court shall pursue the intention of the legislature if possible."); *PGE v.*

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[20] 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.

Bureau of Labor and Industries, 317 Or. 606, 610-12, 859 P.2d 1143 (1993) (in construing a statute, object is to ascertain the intention of legislature that adopted it).

In support of their argument that Or. Rev. Stat. § 167.054 is overbroad, plaintiffs cite cases striking down other state laws that have deviated from the *Ginsberg/Miller* criteria. But the cases that plaintiffs cite do nothing to advance their argument, because none of the laws in the cases that plaintiffs cite were even remotely as narrowly tailored as Or. Rev. Stat. § 167.054. For example, plaintiffs cite *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002), but the statute struck down in that case was extraordinarily broad. It prohibited disseminating to minors under the age of 18 materials containing nudity, extreme violence, "repeated use of foul language," or "display. . . of human bodily functions of elimination," or that glorified criminal activity. *Id.* at 936.

Plaintiffs also cite *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006) but that case, too, is inapposite. At issue in *Blagojevich* was an Illinois statute that prohibited renting or selling "sexually explicit" video games to children under the age of 18. *Id.* at 643. The statutory definition of "sexually explicit" consisted of the first two prongs of the *Ginsberg/Miller* test but, inexplicably, omitted the third prong. *Id.* at 649. The court noted that the law was so broadly applicable that it potentially criminalized the distribution of video games featuring "only brief flashes of nudity." The court concluded that, on its face the law failed the *Ginsberg/Miller* test and, thus, on its face the statute regulated materials that were not obscene as to minors. *Id.* at 650. As a result, the court applied strict scrutiny and struck down the law.[21] *Id.* at 651.

The statutes at issue in *Bookfriends* and *Blagojevich* are prime examples of legislative attempts to regulate materials at the outer limits of what is obscene for minors. Each, for

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[21] In overbreadth analysis, the court begins by determining whether the prohibition restricts only speech that is categorically excluded from First Amendment protection. Only if the court determines that the law reaches beyond such a category does it apply strict scrutiny. *Williams*, 553 U. S. ____ (2008) (slip op at 11-13) (strict scrutiny should be applied only if the court finds the speech in question is not categorically excluded from First Amendment protection.).

example, sought to regulate the dissemination of materials containing nudity to minors as old as 17. Unlike the broad statutes at issue in *Bookfriends* or *Blagojevich*, however, Or. Rev. Stat. § 167.054 targets only materials furnished to 12-year-old children, and it targets not mere nudity or obscenities, but only graphic images of specific sexual conduct, and only those images intended to sexually arouse. Neither *Bookfriends* or *Blagojevich* have any bearing here.

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

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. The law prohibits furnishing or using pornographic materials for the purpose of sexually enticing minors. *See* Or. Rev. Stat. § 167.057(1)(b). It thus reflects the legislature's attempt to combat a common form of sexual predation—the use of pornography in order to "groom" or entice child victims. *See* Testimony of District Attorney Jodie Bureta before House committee on the Judiciary April 6 (explaining that use of pornography to entice children is common problem).[22]

Indeed, at hearings before a joint legislative committee regarding HB 2843, the Legislative Director for the American Civil Liberties Union of Oregon—one of the plaintiffs in this case—acknowledged that Or. Rev. Stat. § 167.057 posed no constitutional problems because it involved a "clear" and "wholly inappropriate intent." *See* Testimony, Joint Ways and Means Committee, HB 2843, June 15, 2007 (statement of Andrea Meyer) (noting that ACLU was pleased to see that [Or. Rev. Stat. § 167.057] had been included in the bill).[23] Similarly, the Executive Director of the Oregon ACLU, David Fidanque, testified that Or. Rev. Stat. § 167.057 provided a "clear, bright line" and that 167.057 was unanimously regarded by those on the bill's working group as constitutionally sound. Testimony, House Judiciary Committee, HB 2843,

[22] Attached as Exh. 4 to the Declaration of Michael A. Casper.

[23] Attached as Exh. 5 to the Declaration of Michael A. Casper.

April 6, 2007 (statement of David Fidanque) ("I don't think there's anyone involved in the work group who had any qualms about [Or. Rev. Stat. § 167.057]").[24]

Or. Rev. Stat. § 167.057 only applies when the person who furnishes material to minors does so with the purpose of 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. The First Amendment does not stand in the way of the legislature's attempts to address that problem. Protecting children from exploitation and sexual predators is manifestly within the scope of the state's police powers. The fact that an offender uses tools that happen to be expressive when preying on children does not prevent the state from regulating this conduct. Plaintiffs' overbreadth challenge is thus simply inapposite. *See Broadrick*, 413 U.S. at 615 ("[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.")[25]

Having sex with a minor is illegal. *See* Or. Rev. Stat. § 163.435; Or. Rev. Stat. § 163.415; Or. Rev. Stat. § 163.345. It is well-established that the First Amendment does not protect speech that is "intended to induce or commence illegal activities." *Williams*, 553 U.S. at ___ (Slip Op. at 2). Moreover, the narrowly delineated set of sexually explicit materials, when used for the purpose of sexually arousing or seducing a minor, are necessarily obscene under the *Ginsberg/Miller* test. There is certainly no danger that the law will squelch the exchange of a *substantial* amount of materials that have "serious literary, artistic, political or scientific value."

[24] Attached as Exh. 4 to the Declaration of Michael A. Casper.

[25] A number of other courts have reached the same conclusion. *See, e.g.*, *New York v. Foley*, 731 N.E.2d 123, 132 (N.Y. 2000) ("speech used to further the sexual exploitation of children does not enjoy constitutional protection"); *State v. Robins*, 646 N.W.2d 287, 297 (Wis. 2002) ("[T]he fact that enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny).

In this context, any such material would be patently offensive and would, by definition appeal to prurient interest of the minor.

C. Plaintiffs have no likelihood of success on the merits of their vagueness claims.

Plaintiffs argue that in describing prohibited acts, the statutes use language that is impermissibly vague. In particular, plaintiffs focus on the fact that both statutes create an exception for furnishing sexually explicit 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 complain that this exception is so ambiguous as to render the statute facially unconstitutional.

Plaintiffs void-for-vagueness argument fails for two reasons. First and foremost, the very language that plaintiffs assert is impermissibly vague has already been construed by Oregon's state courts, and in a manner that is both unambiguous and plainly consistent with constitutional requirements. Second, and in any event, the scope of the materials subject to prohibition under these statutes is clear in the vast majority of situations. Under the controlling case law, that is all that is required.

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); *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.") 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*, 408 U.S. at 110. 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.

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

Plaintiffs' claim that Or. Rev. Stat. §§ 167.054 and 167.057 are unconstitutionally vague fails because 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). The Legislative Assembly, therefore, is presumed to have deliberately adopted the statutory language that was previously construed in *Maynard*. *Mastriano v. Bd. of Parole & Post-Prison Supervision*, 342 Or. 684, 693, 159 P.3d 1151 (2007) (construing a statute, court presumes that it was enacted "in the light of such existing judicial decisions as have a direct bearing upon it.")[26] Oregon courts

[26] As noted earlier, although *Maynard* is a decision from Oregon intermediate appellate court, not the Oregon Supreme Court, its construction is nonetheless authoritative here. *See Kolender*, 461 U.S. at 356 n.4 (where a state's intermediate appellate court has construed a statute, and State Supreme Court has refused review, the intermediate court's construction as authoritative in the context of a vagueness challenge.); *Lawson v. Kolender*, 658 F.2d 1362, 1364-1365, n. 3 (9th Cir. 1981) (same).

will construe the language that plaintiffs assert is vague in a manner consistent with the *Maynard* court's interpretation. Under Oregon law, the purportedly vague exceptions exempt materials "not primarily intended to sexually arouse the child victim." There is nothing vague about such a 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." *See PGE v. Bureau of Labor and Industries*, 317 Or. 606, 612, 859 P.2d 1143 (1993) (statutory language must be construed in context). "Titillate" is similar to terms such as "lascivious" and "lewd" which universally survive vagueness challenges. *See, e.g.*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir.)(1987) (rejecting vagueness challenge and concluding that "'lascivious," like the term, "lewd," was a "commonsensical term" and not impermissibly vague."). In *Roth*, the Court rejected the claim that such terms are susceptible to a vagueness challenge. 354 U.S. at 491-92 (terms of obscenity statutes such as "lewd," "indecent," "lascivious", while not precise, "give adequate warning of the conduct proscribed and mark * * * boundaries sufficiently distinct for judges and juries fairly to administer the law. * * * That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.").

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 Hoffman Estates*, 455 U.S. at 498 ("The degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment."); *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." By the same token, the terms in Or. Rev. Stat. § 167.054 and 167.057 are at least as well-defined as the zoning ordinance that the Supreme Court upheld against a vagueness attack in *Young v. American Mini-Theaters*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). The ordinance in that case applied to movie theaters presenting films "characterized by an emphasis" on specified sexual

activities. 427 U.S. at 53. The Supreme Court rejected the claim that the law was impermissibly vague by failing to detail how much sexual activity was too much. In most situations, the court concluded, whether film was subject to the act would be readily apparent.

4. Any vagueness inherent in Or. Rev. Stat. § 167.054 and 167.057 is ameliorated by the statutes' 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; *see also Hill*, 530 U.S. at 732 (potential vagueness ameliorated in part by scienter requirement). *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (concluding that "[a] scienter requirement . . . may suffice to provide adequate notice that given conduct is proscribed"). 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 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. 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.") Reading

Or. Rev. Stat. § 167.054 or Or. Rev. Stat. § 167.057 as a whole in light of the specific intent that is required to commit the offense, persons of common intelligence would not be forced to guess at its meaning or application. *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").

II. The balance of hardships and the public interest disfavors a preliminary injunction.

The balance of hardships and the public interest also militate strongly against plaintiffs' motion. The Oregon Legislative Assembly enacted these laws in order to achieve a compelling state interest—shielding young children from sexually explicit materials and protecting minors from sexual predators. The Supreme Court has consistently recognized that the states have "a compelling interest in protecting the physical and psychological well-being of minors" and that this "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). By enacting this legislation, the assembly gave prosecutors an important new tool to protect children. The laws that plaintiffs challenge have been in place since January. An injunction now would deprive prosecutors of a significant tool the legislature has given them to advance that compelling interest.

In contrast, if a preliminary injunction is denied, the only thing that will happen is that the *status quo* will continue. Plaintiffs purport to fear "imminent prosecution" under these statutes, chilling their speech. As explained, that fear is difficult to square with the text of the law, which manifestly is not aimed at the conduct of plaintiffs. Moreover, plaintiffs' purported fear of prosecution is difficult to square with their delay in filing this action. Rather than challenge HB 2843 after it was enacted or signed into law, plaintiffs waited more than four months after the law had gone into effect before filing a complaint. As a result, plaintiffs are in the unusual position of asking the court for a preliminary injunction to reverse the *status quo*. *See Chalk v.*

United States District Court, 840 F.2d 701, 704 (9th Cir. 1988) ("[the] basic function of a preliminary injunction is to preserve the *status quo* pending a determination of the action on the merits"). In light of the state's compelling interest in protecting children, the court should reject plaintiffs' dilatory request.

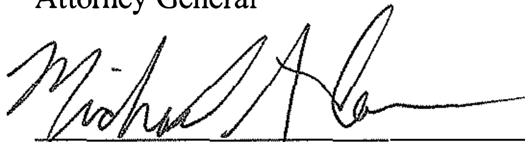
CONCLUSION

Plaintiffs' prospects for success on the merits and the balance of harms militate against preliminary relief in this case. Plaintiffs do not face a credible threat of imminent prosecution under either law and therefore lack standing. Even assuming that plaintiffs did have standing, their claims are without merit. The statutes are not overbroad. As the Supreme Court has recognized, Oregon has taken a narrow approach to regulating obscenity. Although the Oregon statutes do not repeat the *Ginsberg/Miller* criteria, they plainly meet that standard. The terms which 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 its intended applications." The state's compelling interest in protecting its children outweighs plaintiffs' unfounded fear of prosecution. Plaintiffs' motion should be denied.

DATED this 2 day of June, 2008.

Respectfully submitted,

HARDY MYERS
Attorney General



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