IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

and

AMERICAN CIVIL LIBERTIES UNION OF OREGON *et. al.,*

Plaintiffs,

v.

JOHN KROGER, *et al.*,

Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION OF OREGON, *et al*.,

Plaintiffs-Appellants,

and

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

Plaintiffs,

v.

JOHN KROGER, *et al.,*

Defendants-Appellees.

Continued…..

PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Appeal from the United States District Court
for the District of Oregon

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PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Pursuant to Fed. R. App. P. 35 and 40, respondent moves for panel rehearing or, in the alternative, rehearing *en banc*.[1] Panel rehearing or rehearing *en banc* is warranted because the panel's refusal to certify the First Amendment question presented by this case—a question that turns on the meaning and scope of state statutes—conflicts with Supreme Court decisions requiring certification to state supreme courts. Panel rehearing or rehearing *en banc* is also warranted because the failure to certify presents a question of exceptional importance with respect to the principles of comity between federal and state courts in cases turning on the meaning of a state statute.

A. Background

The two state statutes at issue here—Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057—were enacted in response to an Oregon appellate court decision striking down similar statutes under the Oregon constitution. After the earlier versions were struck down, the Oregon legislature carefully crafted the Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 to overcome the overbreadth problems in the previous statutes. The panel nevertheless

[1] In accordance with Circuit Rule 40-1(c), respondent-appellee has attached a copy of the panel decision as an appendix. (App.-1)

concluded that the new statutes were also unconstitutionally overbroad. But because that question—which depends heavily upon unique state constitutional and statutory construction frameworks—is better answered by Oregon appellate courts, panel rehearing or rehearing *en banc* is warranted to order certification to the Oregon Supreme Court.

1. The Oregon legislature enacted Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 to combat against sexual predators who use pornography to target young children.

In 2007, Oregon's legislature enacted Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057 to combat an insidious problem: sexual predators using pornography to groom and then prey upon children. Or. Rev. Stat. § 167.054 prohibits furnishing children under the age of thirteen with materials containing images of certain sexually explicit conduct that are intended to sexually arouse. Or. Rev. Stat. § 167.057 prohibits a person from giving certain sexually explicit materials to a minor in order to sexually arouse the person or the minor, or to lure the minor into engaging in sex. Both statutes contain a similar exemption: neither applies 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."

The statutes replaced an earlier obscenity law that the Oregon Court of Appeals held was unconstitutional under the state constitution. *State v.*

Maynard, 168 Or. App. 118, 5 P.3d 1142 (2000), *rev den*, 332 Or. 137 (2001). At issue in *Maynard* was Or. Rev. Stat. § 167.065, which prohibited furnishing materials to minors depicting or describing, among other things, "sexual conduct" or "sexual excitement."[2] (App.-28). The Court of Appeals began its analysis of Or. Rev. Stat. § 167.065 by construing the language of Or. Rev. Stat. § 167.085(3), which provided an affirmative defense to prosecution under Or. Rev. Stat. § 167.065 if "[t]he defendant was charged with the sale, showing, exhibiting or displaying of an item, those portions of which might otherwise be contraband forming *merely an incidental part of an otherwise nonoffending whole, and serving some purpose therein other than titillation.*" Or. Rev. Stat. § 167.085(3) (2000) (emphasis added). Applying Oregon's rules for statutory interpretation, the court considered the text and context of the exception and concluded that the legislature intended "titillation" to mean "sexual excitement or arousal." 168 Or. App. at 124-25. The court further concluded that "the context of Or. Rev. Stat. § 167.085(3) plainly shows that the defense applies to those *materials not primarily intended to titillate the victim*." *Id*. (emphasis

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[2] 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[.]" (App.-28).

added). On this basis, the court concluded that the underlying statute, though it prohibited a certain form of expression, was actually aimed not at speech but at "protecting children from the harmful effects of hardcore pornography." *Id.*

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

As written, however, the affirmative defense did *not* apply in all cases; instead, the affirmative defense applied only to the "sale, showing, exhibiting or displaying of an item," but not all instances of "furnishing." On that basis, the court concluded that the statute as written was overbroad. *Id.* at 132. In short, the court concluded that the affirmative defense had the effect of limiting the application of the statute to "hardcore pornography," but that the statute was

nonetheless constitutionally defective because the defense did not apply to 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.

In 2007, in an attempt to fill the gap created after the Court of Appeals declared Or. Rev. Stat. § 167.065 unconstitutional in *Maynard*, the Oregon Legislative Assembly enacted Or. Rev. Stat. § 167.054 and Or. Rev. Stat. § 167.057. (App.-29). The new laws incorporate the *Maynard* exception—that is, they do 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." Or. Rev. Stat. § 167.085(3) (App.-30). Unlike the defective law struck down in *Maynard*, in the new laws the exception applies to *all* instances of furnishing—no longer an affirmative defense, it is an exception to liability in the first instance.

2. Plaintiffs filed a complaint alleging that Or. Rev. Stat. §§ 167.054 and 167.057 were unconstitutionally overbroad and vague, a complaint that the district court rejected in light of the text, context, and legislative history of the statutes.

In April 2008, plaintiffs[3] filed a complaint alleging that §§ 167.054 and 167.057 are overbroad and impermissibly vague in violation of the First, Fifth,

[3] At the proceedings below, all of the plaintiffs in these two consolidated appeals filed a single complaint and briefed the case together. On appeal, the plaintiffs broke into two sets, the American Civil Liberties Union of

Footnote continued…

and Fourteenth Amendments to the United States Constitution. Plaintiffs asked the court to declare the laws unconstitutional and to enjoin defendants from enforcing them. In support of their claims, plaintiffs argued that the challenged statutes fail to comply with federal obscenity standards because they did not include the obscenity criteria 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).

In response, the state argued that the case law and legislative history showed that the Oregon legislature, in order to meet the standards of the Oregon Constitution, had incorporated language that had previously been construed by Oregon's courts and that significantly limited the scope of the statutes. Properly construed, the state argued, the challenged statutes do not run afoul of *Ginsberg* and *Miller*.

The district court agreed with the state. Considering the text, context, and legislative history of the statutes, as well as prior case law, the court concluded that neither of the challenged statutes was substantially overbroad or

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(…continued)
Oregon, et al. and Powell's Books, Inc., et al., each of which challenge the district court's decision. This court issued a single opinion.

impermissibly vague. (*Opinion and Order*, ER-2). The court denied plaintiffs' motion for an injunction and declaratory relief. (*Judgment*, ER-41).

3. On appeal, this court reversed, without having ruled on the state's motion to certify the questions of statutory construction to Oregon's highest court.

In a consolidated appeal, the plaintiffs challenged the denial of their claims. Shortly after oral argument, the state asked the panel to certify to the Oregon Supreme Court the issue of the proper construction of Or. Rev. Stat. §§ 167.054 and 167.057. The state argued that because resolution of the First Amendment issue turns on the meaning and scope of those statutes, and because that question was one of first impression, certification was appropriate. Indeed, under United States Supreme Court precedent, the state asserted that certification not only was appropriate, it was "essential." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395, 108 S. Ct. 636, 644, 98 L.Ed. 2d 782 (1988).

This court—without having ruled on the motion to certify—reversed.[4] This court concluded that the statutes were overbroad because they reached the distribution of "far more material than hardcore pornography or material that is obscene to minors, and they implicate a substantial amount of constitutionally

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[4] On October 25, 2010, this court dismissed the motion to certify as moot.

protected speech." (Slip op 14461-14462). The court noted that the statutory text makes no mention of "hardcore pornography," but rather refers to "sexually explicit material" and a "visual representation or explicit verbal description or narrative account of sexual conduct." This court rejected the state's argument that the statutes' exemption— which prohibits liability when 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"—constrained the statutes' reach to hardcore pornography. Instead, according to this court, the exemption "considers whether the explicit portion of the material, and not the work as a whole, serves some purpose other than arousal." (Slip op 14465). That is, a work could still give rise to liability if its explicit portions "solely intend to titillate but are only an incidental part of the work as a whole" and the work could give rise to liability if its "sexually explicit portions are more than an incidental part of the work, but do not solely intend to titillate[.]" In this court's view, the exemptions thus fail to capture work that does not constitute hardcore pornography (*e.g.*, The Handmaid's Tale), and the exemptions could not save the statutes from being fatally overbroad.

This court also rejected the state's reliance on *State v. Maynard*, and declined to engage in an analysis of the legislative history. As noted above, in

Maynard, the court had narrowly construed identical language in a predecessor statute to limit the scope of the statute to "hardcore" materials the primary purpose of which was to sexually arouse. But the court ultimately struck down the statute because the defense did not apply to all instances of furnishing. In response, the Oregon legislature specifically drafted sections 054 and 057 to fill that gap.

The state thus argued that the legislative intent was clear: the Oregon legislature relied on the *Maynard* construction by incorporating the same language into the current statute. Stated another way, the legislative intent was to limit the scope of sections 054 and 057 only to hardcore pornography, and did so by using the same language as the statutes at issue in *Maynard* (language that the Oregon Court of Appeals had already agreed was limited to those "hardcore" materials, the primary purpose of which was to sexually arouse). However, this court rejected the state's argument, concluding that "when the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different." (Slip op 14468).

Having rejected the state's construction of the statute, this court concluded that the statutes applied to a substantial amount of material protected by the First Amendment. Finally, the court decline to impose a limiting

construction because it concluded that would require "rewriting" the statute. (Slip op 14473).

B. Rehearing is warranted because this court's failure to certify the questions to the Oregon Supreme Court conflicts with United States Supreme Court precedent requiring certification and presents an issue of exceptional importance.

Rehearing is warranted because this court's decision conflicts with Supreme Court precedent mandating certification to state high courts in cases in which (1) the state concedes that the statute would be overbroad if read one way but the constitutional challenge would fail if read another way, and (2) the construction of a state statute is one of first impression. Panel rehearing or rehearing *en banc* is also warranted because the failure to certify presents a question of exceptional importance as it raises significant comity concerns: this case arises against the backdrop of Oregon's unique state constitutional approach to free speech and to obscenity and unique approach to statutory interpretation, which has very recently been altered by the Oregon Supreme Court. Courts can now give weight to legislative history even when the text appears to be truly capable of having only one meaning, and legislative history can reveal an ambiguity that otherwise was not apparent. Absent certification—and in light of the unique approach that Oregon courts take to both statutory construction and questions of free speech—there is a real possibility that Oregon courts will construe the challenged statutes differently

from the Ninth Circuit. That, in turn, will create conflict between state and federal courts over the meaning of state statutes, a conflict that certification seeks to avoid.

1. Certification is essential where, as here, the state concedes that the statute would be unconstitutional if read one way and plaintiffs' constitutional challenge is drastically altered if read another way.

The United States Supreme Court has explained that certification to the state's highest court is "essential" in certain instances. *See American Booksellers Ass'n*, 484 U.S. at 395. In that case, a Virginia statute that made it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is "harmful to juveniles." *Id.* The plaintiffs filed a pre-enforcement challenge to the statute, arguing that the law was facially overbroad in that it restricted access by mature juveniles to works that are "harmful" only to younger children. *Id.* The plaintiffs offered as exhibits 16 books that, they contended, fell within the scope of the statute. *Id.*

The state defendants in *American Booksellers* argued that the statute reached only "borderline obscenity" and did not apply to any of the materials that the plaintiffs had offered. The Virginia Attorney General further conceded that the challenged statute would be unconstitutional if construed as the plaintiffs contended it should be and if it were so broad as to apply to the books

that plaintiffs had offered as exhibits. *Id*. at 393, n. 8, 108 S. Ct. at 643, n. 8. No state court had definitively interpreted the statute. *Id*. at 395-97, 108 S. Ct. at 644-45. Under those circumstances, the Supreme Court held that certifying the issue to the Virginia Supreme Court was "essential":

> Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court.

Id. at 395.

The same holds true here. In challenging Or. Rev. Stat. §§ 167.054 and .057 as overbroad, plaintiffs here, like the plaintiffs in *American Booksellers*, have advanced an interpretation of those statutes that the state concedes, if accurate, would render the statutes unconstitutional. Just as in *American Booksellers*, plaintiffs here have offered a selection of books that it believes are subject to the statutes. The state has argued that the challenged statutes are, as a matter of state law, drastically narrower than the plaintiffs allege, and that none of the books that plaintiffs have offered as exhibits fall within the scope of the statutes as properly construed.

Moreover, as in *American Booksellers*, no controlling state precedent yet exists that directly decides this issue. The Oregon Supreme Court has not yet had occasion to interpret Or. Rev. Stat. §§ 167.054 and 057. In the state's view, an existing Oregon Court of Appeals decision, *State v. Maynard*, interpreted the

exemption that the legislature incorporated into Or. Rev. Stat. §167.054(2)(b) and §167.057(2). (State's Br. 11-14). Admittedly, however, *Maynard* is not *directly* controlling because it was interpreting language in an earlier statute. The extent to which the *Maynard* opinion, and the Oregon legislature's subsequent reliance on it, determines the meaning of the challenged statutes is itself a state law question, and one that is appropriately directed in the first instance to Oregon's highest court.

2. This court should grant rehearing or rehearing *en banc* to certify the question to the Oregon Supreme Court to honor principles of comity.

This court should grant rehearing or rehearing *en banc* to permit certification to the Oregon Supreme Court for two additional reasons. The first is that this case occurs against the backdrop of Oregon's unique state constitutional approach to free speech and to obscenity. Article I, section 8 of the Oregon Constitution affords distinct and expansive protection to free speech, and the Oregon Supreme Court has held that the federal obscenity test, which is incorporated into the statutes of most other states, constitutes "censorship" under the Article I, section 8, of the Oregon Constitution. *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987). Under the Oregon Supreme Court's precedent, the legislature may never regulate material on the basis of its offensiveness or lack of value. *Id.* But the Oregon Supreme Court has

nevertheless suggested that some narrower restrictions on furnishing pornography to minors may be possible under the state constitution. *Maynard*, 168 Or. App. at 124-25; *State v. Stoneman*, 323 Or. 536, 543-44, 920 P.2d 535 (1996). The import of both the *Maynard* opinion and the Oregon legislature's subsequent attempts to navigate a course that would meet the requirements of both the state and federal constitution is an issue best directed to the Oregon Supreme Court.

Additionally, the Oregon Supreme Court very recently altered Oregon's unique approach to statutory interpretation. At the time that the district court rendered its decision, statutory interpretation in Oregon was a three-part analysis governed by *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611, 859 P.2d 1143 (1993). The district court carefully employed the *PGE* method in interpreting the statutes. (ER 19-25). In 2009, however, the Oregon Supreme Court altered the rules by combining the first two steps of *PGE*, and statutory interpretation is now a two-step analysis. *State v. Gaines*, 346 Or. 160, 171-72, 206 P.3d 1042 (2009). In light of the changes in state law since the district court's opinion, certification is particularly appropriate so that the Oregon Supreme Court can apply its recently adopted methodology. This court's failure to certify creates the very real risk that Oregon appellate courts, employing its unique approach to statutory construction and to freedom of

speech questions, will decide the issue in a different manner than this court. Principles of comity therefore require certification now, before any conflict between state and federal courts *See Emergy v. Clark*, 604 F. 3d. 1102, 1119 (2010).

C. Conclusion

The decision of the panel conflicts with the Supreme Court's decision in *American Booksellers*, and raises significant concerns about comity between state and federal courts. For those reasons, panel rehearing or rehearing *en banc* is warranted.

Respectfully submitted,

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AMJ:slc/2351285-v1

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC.; OLD MULTNOMAH BOOK STORE, LTD., DBA Annie Bloom's Books; DARK HORSE COMICS, INC.; COLETTE'S: GOOD FOOD + HUNGRY MINDS, LLC; BLUEJAY, INC., DBA Paulina Springs Books; ST. JOHN'S BOOKSELLERS, LLC; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; FREEDOM TO READ FOUNDATION, INC.; COMIC BOOK LEGAL DEFENSE FUND,

Plaintiffs-Appellants,

and

AMERICAN CIVIL LIBERTIES UNION OF OREGON; CANDACE MORGAN; PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; CASCADE AIDS PROJECT,

Plaintiffs,

v.

JOHN R. KROGER, in his official capacity as Attorney General of the State of Oregon; MATT SHIRTCLIFF, Baker County District Attorney, in his official capacity; JOHN HAROLDSON, Benton County District Attorney, in his official capacity; JOHN FOOTE, Clackamas County District Attorney, in his official capacity; JOSHUA MARQUIS, Clatsop County District Attorney, in his official capacity; STEVE ATCHISON, Columbia County District Attorney, in his official capacity; PAUL FRASIER, Coos County District Attorney, in his official capacity; GARY WILLIAMS, Crook County District Attorney, in his official capacity; EVERETT DIAL, Curry County District Attorney, in his official capacity; MICHAEL DUGAN, Deschutes County District Attorney, in his official capacity; JACK BANTA, Douglas County District Attorney, in his official capacity; MARION WEATHERFORD, Gilliam County District Attorney, in his official capacity; RYAN JOSLIN, Grant County District Attorney, in his official capacity;

TIM COLAHAN, Harney County District Attorney, in his official capacity; JOHN SEWELL, Hood River County District Attorney, in his official capacity; MARK HUDDLESTON, Jackson County District Attorney, in his official capacity; PETER L. DEUEL, Jefferson County District Attorney, in his official capacity; STEPHEN D. CAMPBELL, Josephine County District Attorney, in his official capacity; EDWIN I. CALEB, Klamath County District Attorney, in his official capacity; DAVID A. SCHUTT, Lake County District Attorney, in his official capacity; DOUGLASS HARCLEROAD, Lane County District Attorney, in his official capacity; BERNICE BARNETT, Lincoln County District Attorney, in her official capacity; JASON CARLILE, Linn County District Attorney, in his official capacity; DAN NORRIS, Malheur County District Attorney, in his official capacity; WALTER M. BEGLAU, Marion County District Attorney, in his official capacity; ELIZABETH BALLARD, Morrow County District Attorney, in her official capacity;

MICHAEL D. SCHRUNK, Multnomah County District Attorney, in his official capacity; JOHN FISHER, Polk County District Attorney, in his official capacity; WADE M. MCLEOD, Sherman County District Attorney, in his official capacity; WILLIAM BRYAN PORTER, Tillamook County District Attorney, in his official capacity; DEAN GUSHWA, Umatilla County District Attorney, in his official capacity; TIM THOMPSON, Union County District Attorney, in his official capacity; DANIEL OUSLEY, Wallowa County District Attorney, in his official capacity; ERIC J. NISLEY, Wasco County District Attorney, in his official capacity; ROBERT HERMANN, Washington County District Attorney, in his official capacity; THOMAS W. CUTSFORTH, Wheeler County District Attorney, in his official capacity; BRAD BERRY, Yamhill County District Attorney, in his official capacity,

Defendants-Appellees.

No. 09-35153

D.C. No.
3:08-cv-00501-MO

AMERICAN CIVIL LIBERTIES UNION OF OREGON; CANDACE MORGAN; PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; CASCADE AIDS PROJECT,
Plaintiffs-Appellants,

and

POWELL'S BOOKS, INC.; OLD MULTNOMAH BOOK STORE, LTD., DBA Annie Bloom's Books; DARK HORSE COMICS, INC.; COLETTE'S: GOOD FOOD + HUNGRY MINDS, LLC; BLUEJAY, INC., DBA Paulina Springs Books; ST. JOHN'S BOOKSELLERS, LLC; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; FREEDOM TO READ FOUNDATION, INC.; COMIC BOOK LEGAL DEFENSE FUND,
Plaintiffs,

v.

JOHN R. KROGER, in his official capacity as Attorney General of the State of Oregon; MATT SHIRTCLIFF, Baker County District Attorney, in his official capacity; JOHN HAROLDSON, Benton County District Attorney, in his official capacity; JOHN FOOTE, Clackamas County District Attorney, in his official capacity; JOSHUA MARQUIS, Clatsop County District Attorney, in his official capacity; STEVE ATCHISON, Columbia County District Attorney, in his official capacity; PAUL FRASIER, Coos County District Attorney, in his official capacity; GARY WILLIAMS, Crook County District Attorney, in his official capacity; EVERETT DIAL, Curry County District Attorney, in his official capacity; MICHAEL DUGAN, Deschutes County District Attorney, in his official capacity; JACK BANTA, Douglas County District Attorney, in his official capacity; MARION WEATHERFORD, Gilliam County District Attorney, in his official capacity; RYAN JOSLIN, Grant County District Attorney, in his official capacity;

TIM COLAHAN, Harney County District Attorney, in his official capacity; JOHN SEWELL, Hood River County District Attorney, in his official capacity; MARK HUDDLESTON, Jackson County District Attorney, in his official capacity; PETER L. DEUEL, Jefferson County District Attorney, in his official capacity; STEPHEN D. CAMPBELL, Josephine County District Attorney, in his official capacity; EDWIN I. CALEB, Klamath County District Attorney, in his official capacity; DAVID A. SCHUTT, Lake County District Attorney, in his official capacity; DOUGLASS HARCLEROAD, Lane County District Attorney, in his official capacity; BERNICE BARNETT, Lincoln County District Attorney, in her official capacity; JASON CARLILE, Linn County District Attorney, in his official capacity; DAN NORRIS, Malheur County District Attorney, in his official capacity; WALTER M. BEGLAU, Marion County District Attorney, in his official capacity; ELIZABETH BALLARD, Morrow County District Attorney, in her official capacity;

MICHAEL D. SCHRUNK, Multnomah County District Attorney, in his official capacity; JOHN FISHER, Polk County District Attorney, in his official capacity; WADE M. MCLEOD, Sherman County District Attorney, in his official capacity; WILLIAM BRYAN PORTER, Tillamook County District Attorney, in his official capacity; DEAN GUSHWA, Umatilla County District Attorney, in his official capacity; TIM THOMPSON, Union County District Attorney, in his official capacity; DANIEL OUSLEY, Wallowa County District Attorney, in his official capacity; ERIC J. NISLEY, Wasco County District Attorney, in his official capacity; ROBERT HERMANN, Washington County District Attorney, in his official capacity; THOMAS W. CUTSFORTH, Wheeler County District Attorney, in his official capacity; BRAD BERRY, Yamhill County District Attorney, in his official capacity,

Defendants-Appellees.

No. 09-35154

D.C. No. 3:08-cv-00501-MO

OPINION

Appeal from the United States District Court for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted
June 8, 2010—Portland, Oregon

Filed September 20, 2010

Before: Ferdinand F. Fernandez, M. Margaret McKeown, and Richard A. Paez, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

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LLP, Portland, Oregon; Chin See Ming, ACLU Foundation of Oregon, Inc., Portland, Oregon, for the plaintiffs-appellants.

Michael A. Casper, Oregon Department of Justice, Salem, Oregon, for the defendants-appellees.

J. Joshua Wheeler, The Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, Virginia, for amicus curiae.

OPINION

McKEOWN, Circuit Judge:

We consider here the constitutionality of a pair of Oregon statutes intended to stop child sexual abuse in its early stages. The statutes broadly take aim at practices of "luring" and "grooming" that expose minors to sexually explicit materials in the hopes of lowering their inhibitions against engaging in sexual conduct. The "furnishing" statute, Oregon Revised Statutes § 167.054 ("section 054"), criminalizes providing children under the age of thirteen with sexually explicit material. The "luring" statute, § 167.057 ("section 057"), criminalizes providing minors under the age of eighteen with visual, verbal, or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct.

Appellants, a broad cross-section of booksellers; non-profit literary, legal, and health organizations; and a concerned grandmother (together, "Powell's Books"), argue that these statutes violate the First Amendment. In particular, Powell's Books claims, among other things, that the statutes are facially overbroad and criminalize a substantial amount of constitutionally protected speech. We agree.

Although the state argues that the statutes may be construed to narrowly focus on the sharing of hardcore pornography or material that is obscene to minors alone, its position is contradicted by the statutory text. Repeated reliance on the legislature's efforts to combat hardcore pornography cannot change the text of the statute. The legislative goal does not match the text of the statutes; the statutes' undoing is their overbreadth. In their current form, the statutes sweep up a host of material entitled to constitutional protection, ranging from standard sexual education materials to novels for children and young adults by Judy Blume. Despite the legislature's laudable goals, we cannot rewrite the statute to conform to constitutional limitations.[1]

BACKGROUND

We begin with a review of the statutory scheme. The statutes follow a series of related anti-child abuse laws that the Oregon courts invalidated under the state constitution's speech clause in 2000. *See State v. Maynard*, 5 P.3d 1142, 1149-51 (Or. Ct. App. 2000) (discussing previous cases). In 2007, the legislature went back to the drawing board and enacted the current statutes in an effort to address the perceived gap in Oregon's child abuse prevention scheme.

Section 054, the "furnishing" statute, criminalizes the act of "intentionally furnish[ing] a child [under the age of thirteen], or intentionally permit[ting] a child to view, sexually explicit material" where the person "knows that the material is sexually explicit material." OR. REV. STAT. § 167.054(1).[2] Furnishing is a Class A misdemeanor. This section includes several

[1]Because the statutes are unconstitutionally overbroad, we do not address the challenge to the provisions as void for vagueness or the challenges to the statutes as applied to particular works.

[2]The Oregon statutes define "child" as "a person under 13 years of age." OR. REV. STAT. § 167.051(1). " 'Furnishes' means to sell, give, rent, loan or otherwise provide." *Id.* § 167.051(2).

exemptions, including immunity for acts of furnishing material whose "sexually explicit portions . . . form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." *Id.* § 167.054(2)(b).[3] Section 054 also includes a number of affirmative defenses.[4]

Section 057 criminalizes "luring," which is defined as "[f]urnish[ing] to, or us[ing] with, a minor" a "visual representation or explicit verbal description or narrative account of sexual conduct" for the purpose of "[a]rousing or satisfying the sexual desires of the person or the minor" or "[i]nducing the minor to engage in sexual conduct." *Id.* § 167.057(1).[5] Luring is a Class C felony. Like section 054, section 057 exempts the furnishing or use of "a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation." *Id.* § 167.057(2). The section also includes similar affirmative defenses.[6]

[3]Employees of museums, schools, law enforcement agencies, medical treatment providers, and public libraries acting within the scope of regular employment are also exempt from prosecution. OR. REV. STAT. § 167.054(2)(a)

[4]In particular, it is an affirmative defense that the material was furnished (or that viewing was permitted) "solely for the purpose of sex education, art education or psychological treatment" by a parent or legal guardian, an education or treatment provider, or their agent. OR. REV. STAT. § 167.054(3)(a). It is also an affirmative defense to have "reasonable cause to believe" that the person who received or viewed the material was not a child, or that the defendant was less than three years older than the child. *Id.* § 167.054(3)(b)-(c).

[5]Plaintiffs do not challenge the constitutionality of the inducing prong, and we do not address it here. *See* OR. REV. STAT. § 174.040 (noting that "if any part of a statute is held unconstitutional, the remaining parts shall remain in force unless" an enumerated exception applies).

[6]In particular, it is an affirmative defense to furnish or use the material for psychological or medical treatment by a treatment provider or her agent, but it is not a defense to provide the material for sex or art education by permission of a parent or legal guardian. OR. REV. STAT. § 167.057(3)(a). It is also an affirmative defense to have "reasonable cause to believe" the recipient of the material or person with whom the material was used was not a minor, *id.* § 167.057(3)(b), or that the defendant was less than three years older than the minor. *Id.* § 167.057(3)(c).

Powell's Books brought suit seeking a declaration of the unconstitutionality of, and injunction against enforcement of, sections 054 and 057 under the First, Fifth, and Fourteenth Amendments. The district court denied Powell's Books' motions for preliminary and permanent injunctions, finding the statutes neither unconstitutionally overbroad nor void for vagueness. *Powell's Books, Inc. v. Myers*, 599 F. Supp. 2d 1226, 1243-44, 1246-47, 1249-50 (D. Or. 2008). The district court also rejected Powell's Books' pre-enforcement, as-applied challenges on grounds that the plaintiffs were too diverse and that the works that allegedly fell within the reach of the statutes were too dissimilar. *Id.* at 1235-36.

ANALYSIS

We address Powell's Books' overbreadth challenge alone as it suffices to dispose of this case.[7] In examining an overbreadth challenge, we follow a familiar sequential analysis. First, we construe the reach of the statutory provisions. *United States v. Williams*, 553 U.S. 285, 293 (2008). Second, we inquire whether the statute criminalizes a "substantial amount" of expressive activity. *Id.* at 297. Finally, we consider whether the statute is "readily susceptible" to a limiting construction that would render it constitutional. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (internal quotation marks omitted).

The statutes cannot survive this inquiry. Contrary to the state's position, the statutes reach the distribution of far more material than hardcore pornography or material that is obscene to minors, and they implicate a substantial amount of

[7]We review de novo the denial of declaratory relief. *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1040 (9th Cir. 2004). We review denial of a permanent injunction for an abuse of discretion, but review the underlying determination of the statutes' constitutionality de novo and the underlying findings of fact for clear error. *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003).

constitutionally protected speech. In addition, the statutes are not subject to a limiting construction that would make them constitutional. For this reason, we conclude that Oregon Revised Statutes §§ 167.054 and 167.057 (except the "inducing" prong, which is not at issue here) are unconstitutionally overbroad and must be invalidated.

I. THE SCOPE OF SECTIONS 054 AND 057

We begin with the scope of the statutes. In construing the reach of sections 054 and 057, our role is to "interpret the law as would the [Oregon] Supreme Court." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004). This process is a different undertaking than construing a federal statute. Under Oregon rules of construction, we first consider text and context together. *State v. Gaines*, 206 P.3d 1042, 1050-51 (Or. 2009). We may also consider legislative history proffered by a party to the extent that it is useful. *Id.* If the scope of the statute remains ambiguous at that point in the analysis, we may then turn to "general maxims of statutory construction" to resolve our uncertainty. *Id.* The Oregon approach contrasts with the standard federal statutory construction, which looks first to the text and then, in the case of ambiguity, employs the canons of construction and, in light of the debate over its significance, may or may not involve a reference to legislative history. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

[1] On their face, the liability provisions of sections 054 and 057 cover a range of material. Section 054(1) criminalizes furnishing "sexually explicit material" to children. The definitions provision of the statute, § 167.051, specifically defines "sexually explicit material" as "material containing visual images" of:

(a) Human masturbation or sexual intercourse;

> (b) 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
>
> (c) Penetration of the vagina or rectum by any object other than as part of a personal hygiene practice.

Id. § 167.051(5).

[2] Section 057(1) criminalizes furnishing a minor or "us-[ing]" a "visual representation or explicit verbal description or narrative account of sexual conduct" with a minor.[8] "Sexual conduct" is defined as the same acts depicted in "sexually explicit material," except it adds the "[t]ouching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female." *Id.* § 167.051(4). The definition of "sexual conduct" is also narrower in that it excludes "[p]enetration of the vagina or rectum by any object" where "part of a medical diagnosis or as part of a personal hygiene practice," whereas the definition of "sexually explicit material" only excludes such penetration when part of a "personal hygiene practice." *Compare* OR. REV. STAT. § 167.051(4)(c) *with* OR. REV. STAT. § 167.051(5)(c).

The state chiefly seeks to limit the breadth of sections 054 and 057 based on the exemption from liability that appears in both provisions—that is, the exemption for materials whose sexual content "form[s] merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation." *See* OR. REV. STAT. § 167.054(2)(b); *see also id.* § 167.057(2). In the state's view, this exemption narrows the

[8]Because the statute does not define "explicit" as it is used in section 057, we refer to its ordinary, dictionary meaning—that is, as "fully revealed or expressed without vagueness, implication, or ambiguity" and "open in the depiction of nudity or sexuality." *Merriam-Webster Online Dictionary* (2010), http://www.merriam-webster.com/dictionary/explicit; *see Doe v. Medford Sch. Dist. 549C*, 221 P.3d 787, 792 (Or. Ct. App. 2009).

statutes to bar the dissemination only of "hardcore pornography" to children and minors.

[3] This argument is unavailing. The text and context show that the statutes cover far more than what might qualify as hardcore pornography. The statutory text makes no mention of "hardcore pornography," but rather refers to "sexually explicit material" and a "visual representation or explicit verbal description or narrative account of sexual conduct." OR. REV. STAT. §§ 167.054(1), 167.057(1)(a). As the materials in the record show, whatever the precise boundaries of hardcore pornography may be, the statutes clearly extend beyond them. Powell's Books submitted a wide array of books to illustrate its argument. Consider, for example, the well-known drawings of sex acts in *The Joy of Sex*; the cartoon depictions of sexual intercourse in the children's book, *Mommy Laid an Egg, or Where* Do *Babies Come From?* by Babette Cole; or the fantastical sex scene between Charlotte and Lord Griffin in Kentaro Miura's manga, *Berserk*. All are visual depictions of "sexual intercourse" under section 054, yet they hardly count as hardcore pornography.

[4] Similarly, the references to the "visual representation" and "explicit" verbal depictions of "sexual conduct" in section 057 are not synonymous with hardcore pornography. Section 057 reaches representations of activity, including the touching of breasts or buttocks, that are commonly seen or read outside of pornographic materials, hardcore or otherwise. Examples include the books listed above, along with the scenes of "sexual conduct" that appear in a work like Margaret Atwood's classic and frequently-taught novel, *The Handmaid's Tale*.

To be sure, the exemption constrains the statutes' reach to a certain extent. It does not, however, limit their application to materials that fall outside constitutional protection. Again the text and context make this clear. As a preliminary matter, we note that the requirement of a non-"titillating" purpose refers to the explicit portion of the materials, and not the work

as a whole. In section 054, the word "serve" agrees grammatically with "sexually explicit portions," not with the "nonoffending whole." *See* OR. REV. STAT. § 167.054(2)(b) (referring to "material the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation"). Similarly, in section 057, the word "serves" agrees with "representation, description or account of sexual conduct." *See id.* § 167.057(2) (referring to "a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation"). Thus, the exemption considers whether the explicit portion of the material, and not the work as such or as a whole, serves some purpose other than arousal.

The state bases its "hardcore pornography" argument on a disjunctive reading of the exemption. In the state's view, a work may provide the basis for prosecution unless its explicit portions form "merely an incidental part of an otherwise nonoffending whole" *or* "serve some purpose other than titillation." To put this the other way around, the exemption ostensibly protects a work from giving rise to liability unless its sexually explicit portions form more than an incidental portion of the work as a whole and solely intend to titillate. Thus, the state argues, the statutes only cover hardcore pornography.[9]

The problem, however, is that the statute does not say "or" —it says "*and*." The two conditions for exemption from prosecution are plainly written in the conjunctive: a defendant must satisfy both conditions in order to avoid prosecution. Thus, a work might still give rise to liability if its sexually explicit portions solely intend to titillate but are only an inci-

[9]Because we reject this line of analysis, we do not address whether the state's definition of hardcore pornography is a viable one. Indeed, our decision rests on the text of the statute as written, not on an undefined premise that it targets hardcore pornography.

dental part of the work as a whole (e.g., arguably, some of the sex scenes in *Berserk*). Likewise, a work might give rise to liability if its sexually explicit portions are more than an incidental part of the work, but do not solely intend to titillate (e.g., *The Handmaid's Tale*). Neither work, on the state's definition, constitutes hardcore pornography, yet they still potentially run afoul of the statutes.[10]

The state makes two related arguments that we decline to embrace. First, the state relies heavily on *State v. Maynard*, a decision by the Oregon Court of Appeals construing the predecessor provision to the exemption. In *Maynard*, the court addressed a statute that criminalized furnishing minors any visual representation of "a person or portion of the human body that depicts nudity, sadomasochistic abuse, sexual conduct or sexual excitement." OR. REV. STAT. § 167.065(1)(a) (repealed 2007). The statute provided an affirmative defense that is essentially identical to the exemption in sections 054 and 057: namely, a defense for so-called "contraband" that was "merely an incidental part of an otherwise nonoffending whole, and serving some purpose therein other than titillation[.]" OR. REV. STAT. § 167.085 (amended 2007).[11] Reading these provisions together, the court in *Maynard* construed the statute as "seek[ing] to prevent harm to children by prohibiting attempts to titillate them by means of sexually explicit

[10]Although the state cites several cases construing "and" to mean "or," they are all inapposite. *See Slodov v. United States*, 436 U.S. 238, 246-47 (1978) (same, where alternative reading would undermine the statute's purpose); *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1050-51 (9th Cir. 2003) (reading "and" disjunctively to avoid surplusage); *Ollilo v. Clatskanie People's Util. Dist.*, 132 P.2d 416, 419 (Or. 1942) (construing the term "and/or"); *Pendleton Sch. Dist. 16R v. State*, 185 P.3d 471, 479 (Or. Ct. App. 2008) (reading "and" disjunctively to avoid internal contradiction), *aff'd in part and rev'd in part on other grounds*, 200 P.3d 133 (Or. 2009).

[11]As the court explained, "titillate" in this context meant "to [sexually] excite pleasurably or agreeably" or to "arouse by stimulation." *Maynard*, 5 P.3d at 1147 (internal quotation marks omitted).

materials" and to "protect[ ] children from the harmful effects of viewing hardcore pornography." *Maynard*, 5 P.3d at 1147, 1148 (internal quotation marks omitted). The court especially based its interpretation on the defense in former § 167.085, which "plainly . . . applie[d] to those materials not primarily intended to titillate the victim." *Id.* at 1147.

The state argues that *Maynard* requires construing sections 054 and 057 as limited to hardcore materials. *Maynard*, however, is of limited relevance and does not authorize reading the exemption in the state's expansive manner. In holding that the statute was aimed at the effects of exposure to hardcore pornography, *Maynard* did not construe the *scope* of the statute, but rather addressed the threshold issue, under Oregon free speech doctrine, of whether the statute "sufficiently identified the harmful effects it sought to prevent." *Id.* at 1146.[12] Indeed, upon turning to the scope of the material covered, the court went on to strike down the statute as overbroad. *See id.* at 1150-51.[13] Thus, even assuming that, under *Maynard*, sections 054 and 057 similarly aim at effects the legislature deemed harmful, that does not determine what materials actually fall within their reach.

[5] As a second line of defense, the state cites legislative history that likewise reflects the legislature's concerns about minors' exposure to hardcore pornography. In the state's

[12]Under the Oregon framework, courts examine first whether the restriction aims at the content of speech or the harmful effects of speech. If the law targets content, it is unconstitutional unless the restraint is confined within some historical exception. If the law targets effects, courts scrutinize it for overbreadth. *State v. Robertson*, 649 P.2d 569, 576-77 (Or. 1982).

[13]Significantly, in *Maynard* the court specifically held the statute to be overbroad because the defense did not apply to all acts of "furnishing," but rather only to the acts of "display," "showing," and "exhibition." *Maynard*, 5 P.3d at 1150-51. Contrary to the state's argument, *Maynard* did not reach the issue of whether the defense was sufficient to save the statute from overbreadth with respect to the expressive activity it did cover.

view, the legislature was highly cognizant of state court decisions striking down previous laws on sharing explicit materials with minors as overbroad and endeavored to draft a statute focused narrowly on hardcore pornography.[14] However, "[w]hen the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different." *Gaines*, 206 P.3d at 1051. Regardless of any contrary suggestions in the legislative history, the statutory text is plainly not limited to offending pornographic materials that the state hoped to target. In short, good intentions cannot trump the language of the statute.

II. THE CRIMINALIZATION OF A SUBSTANTIAL AMOUNT OF EXPRESSIVE ACTIVITY

[6] Having delimited the reach of the statutes, we consider whether they criminalize a substantial amount of expressive activity.[15] States may restrict the access of minors to obscene

[14]*See, e.g.*, *Maynard*, 5 P.3d at 1150 (invalidating statute that criminalized visual images of sexual conduct and sexual excitement "regardless of the significance of such depictions in the context of the materials taken as a whole"); *State v. Woodcock*, 706 P.2d 1012, 1013 (Or. Ct. App. 1985) (deeming overbroad a statute that "essentially prohibits furnishing minors with *any* printed matter containing 'dirty words' no matter how incidental the objectionable language is in the context of the work as a whole"); *State v. Frink*, 653 P.2d 553, 555 (Or. Ct. App. 1982) (invalidating a ban on furnishing a minor with materials that depict nudity regardless of erotic content).

[15]The state argues that section 057 is directed at the conduct of "luring minors using pornography" and not speech, and thus falls outside First Amendment protections. However, the statute plainly applies to materials covered by the First Amendment. The statute does not proscribe speech that is integral or limited to criminal conduct—that is, speech that is "the vehicle" for a crime. *United States v. Dhingra*, 371 F.3d 557, 561 (9th Cir. 2004); *United States v. Meek*, 366 F.3d 705, 721 (9th Cir. 2004). Section 057 curbs speech used to induce prospective victims to engage in sexual activity but also criminalizes providing materials to arouse or satisfy sexual desires. OR. REV. STAT. § 167.057(1)(b). Whereas inducing a minor to engage in sexual activity is independently criminal, arousing oneself or a minor is not.

material so long as the legislature has a rational basis "to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg v. New York*, 390 U.S. 629, 641 (1968). A state may impose such restrictions even if the material at issue is not obscene to adults. *Am. Booksellers Found. v.* Dean, 342 F.3d 96, 101 (2d Cir. 2003). However, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975).

In *Ginsberg*, the Court upheld a New York statute that criminalized the sale of "girlie magazines" to persons under the age of seventeen. 390 U.S. at 631-33. This statute incorporated the obscenity test previously articulated in *Memoirs v. Massachusetts*, namely, that a work is obscene if

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

383 U.S. 413, 418 (1966).

Five years after *Ginsberg*, the Court revisited the question of the appropriate obscenity standard for adults in *Miller v. California*, 413 U.S. 15 (1973). The Court explicitly rejected the lack of "redeeming social value" prong set forth in *Memoirs*, holding that a state could criminalize the distribution of only those materials that "taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24.[16]

[16]The Court left the other two prongs substantially unchanged, holding that material was obscene if "the average person, applying contemporary

The Supreme Court has never explicitly extended the "serious value" standard to obscenity for minors. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 648 (7th Cir. 2006) (citing cases). The parties, however, argue that *Miller*'s amendment with respect to adults also applies to minors. A number of our sister circuits have approved of the adaptation of *Miller* to minors as well. *See, e.g., Am. Booksellers v. Webb*, 919 F.2d 1493, 1503 & n.18 (11th Cir. 1990); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 n. 2 (4th Cir. 1989); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1286-87 (10th Cir. 1983).

[7] Ultimately, we need not decide this issue as the statutes are overbroad under both frameworks. Sections 054 and 057 sweep up material that, when taken as a whole, has serious literary, artistic, political, or scientific value for minors and thus also has at least *some* "redeeming social value." Because the statutes sweep beyond *Miller*'s more lenient definition of obscenity, they necessarily extend beyond the *Ginsburg* formulation as well. In addition, sections 054 and 057 do not limit themselves to material that predominantly appeals to minors' prurient interest. As a result, the statutes reach a substantial amount of constitutionally protected speech. Because the statutes fail to satisfy the first two prongs of *Miller/Ginsberg*, we need not determine whether they also criminalize the furnishing of a significant amount of material that is not patently offensive.

A. SERIOUS VALUE

[8] Nothing in the language of the statutes, including the exemptions, takes the "serious value" of the work as a whole

community standards would find that the work, taken as a whole, appeals to the prurient interest" and "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller*, 413 U.S. at 24 (internal citation and quotation marks omitted).

into account, or, for that matter, whether the work possesses any "redeeming social value." A pair of examples from the record highlight the statutes' overbreadth in this regard. *It's Perfectly Normal* is a sexual education book containing simple line drawings that include non-obscene but unmistakable images of sexual intercourse and masturbation. As its subtitle indicates, the book provides frank information about "changing bodies, growing up, sex & sexual health," and thus does not lack serious scientific value even for children under the age of thirteen. The images of sexual intercourse and masturbation are "sexually explicit material" and, pursuant to section 054, they may not be furnished to children under the age of thirteen. OR. REV. STAT. §§ 167.054(1); 167.051(5)(a). While their primary purpose is education rather than titillation, the images of sexual intercourse and masturbation are not an "incidental" portion of the work as a whole, as they cannot be considered subordinate or nonessential in a sexual education manual. Thus, the exemption fails to shelter sexual education materials like *It's Perfectly Normal* from liability.

[9] Similarly, section 057 sweeps up works like *Forever*, a coming-of-age novel written by Judy Blume. *Forever* includes explicit narrative accounts of masturbation, sexual intercourse, and genital-genital contact, which are all depictions of sexual conduct that may not be shared with minors, if the furnisher intends to arouse the minor or the furnisher. *See* OR. REV. STAT. §§ 167.057(a)-(b); 167.051(4)(a)-(b). But *Forever* certainly contains serious artistic or literary value as to minors as a whole, and the explicit narrative accounts in *Forever* are not incidental to the coming of age story. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002) (explaining that inclusion of obscene portions that are part of the narrative of a non-obscene work do not cause "the work itself . . . [to] become obscene"). These examples are hardly exotic. They demonstrate that the statutes reach a substantial number of works that are not obscene to children or minors because they fail to take into account the value of the work as a whole.

B. PRURIENT INTEREST

[10] The statutes also do not limit themselves to material that predominantly appeals to prurient interest. Such material is understood to trigger responses "over and beyond" normal sexual arousal. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498-99 (1985). Section 054 defines sexually explicit material to consist of visual images of sexual intercourse as well as more specific subcategories. This definition is broad enough to reach a substantial amount of material that does not appeal to the prurient interest of a child under thirteen, but merely appeals to regular sexual interest.

[11] Section 057 reaches even farther than section 054, criminalizing the furnishing of written and visual depictions of sexual intercourse, along with depictions of the "[t]ouching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female," to minors as old as seventeen. OR. REV. STAT. §§ 167.051(4)(d); 167.057(1)(a). As the district court found, section 057 thus criminalizes fiction no more tawdry than a romance novel, "written or created to arouse the reader [or] viewer." *Powell's Books*, 599 F. Supp. 2d at 1246. In this respect, section 057 also reaches a substantial amount of expressive activity that does not appeal to the prurient interests of minors.

The exemption does not cure this overbreadth as it focuses on titillation, and not prurient interest. Titillation and arousal are not synonymous with an abnormal or prurient sexual response as described in *Brockett*. To criminalize furnishing material solely intended to titillate the reader will certainly sweep up some material that appeals to the prurient interest of children and minors, but it will also criminalize a broad swath of material that does not appeal to prurient interests.

[12] By restricting the dissemination and use of non-obscene material, the statutes trench on the First Amendment rights of minors and adults alike. On the one hand, the statutes

limit minors' access to expressive material that the state may not legitimately proscribe. *See Erznoznik*, 422 U.S. at 213-14. On the other, the statutes also restrict adults from providing minors with materials that are entirely anodyne for First Amendment purposes. The Supreme Court has repeatedly emphasized that the state may not prevent adults from circulating non-obscene materials amongst themselves. *See Ashcroft*, 535 U.S. at 252. Although we apply a "variable standard" for obscenity to minors, it is equally true that the state may not restrict adults from sharing material with minors that is not obscene for minors. The statutes' overbreadth impinges on the rights of all individuals to legitimately share and access non-obscene materials without the interference of the state.

III. LIMITING CONSTRUCTION

[13] In light of the statutes' facial overbreadth, the only question remaining is whether the statutes are susceptible to a reasonable limiting construction. In addressing this issue, we consider the limiting constructions proffered by the state, but do not "insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998); *see also Frink*, 653 P.2d at 557-58. We may not "rewrite a state law to conform it to constitutional requirements." *Am. Booksellers*, 484 U.S. at 397.

[14] The statutes sweep in the many works that include portions solely intended to titillate and arouse the reader but have serious value when taken as a whole. The statutes also exempt materials based on a non-titillating purpose, rather than a prurient one. To satisfy the *Miller/Ginsberg* requirements, we would have to insert language where we are not permitted to do so. *See* OR. REV. STAT. § 174.010 (providing that "[i]n the construction of a statute, the office of the judge is . . . not to insert what has been omitted, or to omit what has

been inserted."); *see also United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010).

Finally, although we appreciate the state's argument that it has not, and will not, bring prosecutions against individuals or businesses like Powell's Books, this stand down approach cannot overcome the flaws in the statute. "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Id.* at 1591. We may not uphold the statutes merely because the state promises to treat them as properly limited.

[15] In sum, we conclude that because sections 054 and 057 on their face reach a significant amount of material that is not obscene as to minors, the statutes are unconstitutionally overbroad.

REVERSED.

(5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and areola only are covered.

(6) "Obscene performance" means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sadomasochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

(7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

(8) "Public thoroughfare, depot or vehicle" means any street, highway, park, depot or transportation platform, or other place, whether indoors or out, or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation or authority, or owned or operated by any agency of public transportation that is designed for the use, enjoyment or transportation of the general public.

(9) "Sadomasochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(11) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity. [1971 c.743 §255]

167.062 Sadomasochistic abuse or sexual conduct in live show. (1) It is unlawful for any person to knowingly engage in sadomasochistic abuse or sexual conduct in a live public show.

(2) Violation of subsection (1) of this section is a Class A misdemeanor.

(3) It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sadomasochistic abuse or sexual conduct.

(4) Violation of subsection (3) of this section is a Class C felony.

(5) As used in ORS 167.002, 167.007, 167.087 and this section unless the context requires otherwise:

(a) "Live public show" means a public show in which human beings, animals, or both appear bodily before spectators or customers.

(b) "Public show" means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded. [1973 c.699 §§2,3]

167.065 Furnishing obscene materials to minors. (1) A person commits the crime of furnishing obscene materials to minors if, knowing or having good reason to know the character of the material furnished, the person furnishes to a minor:

(a) 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, sadomasochistic abuse, sexual conduct or sexual excitement; or

(b) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, or any sound recording which contains matter of the nature described in paragraph (a) of this subsection, or obscenities, or explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sadomasochistic abuse.

(2) Furnishing obscene materials to minors is a Class A misdemeanor. Notwithstanding ORS 161.635 and 161.655, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000. [1971 c.743 §256]

167.070 Sending obscene materials to minors. (1) A person commits the crime of sending obscene materials to minors if, within this state, the person knowingly arranges for or dispatches for delivery to a minor, whether the delivery is to be made within or outside this state, by mail, delivery service or any other means, any of the materials enumerated in ORS 167.065.

(5) "Sexually explicit material" means material containing visual images of:

(a) Human masturbation or sexual intercourse;

(b) 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

(c) Penetration of the vagina or rectum by any object other than as part of a personal hygiene practice. [2007 c.869 §1]

Note: 167.051, 167.054 and 167.057 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 167 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

167.054 Furnishing sexually explicit material to a child. (1) A person commits the crime of furnishing sexually explicit material to a child 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.

(2) A person is not liable to prosecution for violating subsection (1) of this section if:

(a) The person is an employee of a bona fide museum, school, law enforcement agency, medical treatment provider or public library, acting within the scope of regular employment; or

(b) The person furnishes, or permits the viewing of, material the sexually explicit portions of which form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.

(3) In a prosecution under subsection (1) of this section, it is an affirmative defense:

(a) That the sexually explicit material was furnished, or the viewing was permitted, solely for the purpose of sex education, art education or psychological treatment and was furnished or permitted by the child's parent or legal guardian, by an educator or treatment provider or by another person acting on behalf of the parent, legal guardian, educator or treatment provider;

(b) That the defendant had reasonable cause to believe that the person to whom the sexually explicit material was furnished, or who was permitted to view the material, was not a child; or

(c) That the defendant was less than three years older than the child at the time of the alleged offense.

(4) In a prosecution under subsection (1) of this section, it is not a defense that the person to whom the sexually explicit material was furnished or who was permitted to view the material was not a child but was a law enforcement officer posing as a child.

(5) Furnishing sexually explicit material to a child is a Class A misdemeanor. [2007 c.869 §2]

Note: See note under 167.051.

167.055 [1955 c.636 §9; 1963 c.513 §1; repealed by 1971 c.743 §432]

167.057 Luring a minor. (1) A person commits the crime of luring a minor if the person:

(a) Furnishes to, or uses with, a minor a visual representation or explicit verbal description or narrative account of sexual conduct; and

(b) Furnishes or uses the representation, description or account for the purpose of:

(A) Arousing or satisfying the sexual desires of the person or the minor; or

(B) Inducing the minor to engage in sexual conduct.

(2) A person is not liable to prosecution for violating subsection (1) of this section if the person furnishes or uses a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation.

(3) In a prosecution under subsection (1) of this section, it is an affirmative defense:

(a) That the representation, description or account was furnished or used for the purpose of psychological or medical treatment and was furnished by a treatment provider or by another person acting on behalf of the treatment provider;

(b) That the defendant had reasonable cause to believe that the person to whom the representation, description or account was furnished or with whom the representation, description or account was used was not a minor; or

(c) That the defendant was less than three years older than the minor at the time of the alleged offense.

(4) In a prosecution under subsection (1) of this section, it is not a defense that the person to whom the representation, description or account was furnished or with whom the representation, description or account was used was not a minor but was a law enforcement officer posing as a minor.

(5) Luring a minor is a Class C felony. [2007 c.869 §3]

Note: See note under 167.051.

167.060 Definitions for ORS 167.060 to 167.095. As used in ORS 167.060 to 167.095, unless the context requires otherwise:

(1) "Advertising purposes" means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service,

motion picture provided the employee is acting within the scope of regular employment at a showing open to the public.

(3) As used in this section, "employee" means any person regularly employed by the owner or operator of a motion picture theater if the person has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where the person is regularly employed, but does not include a manager of the motion picture theater.

(4) Exhibiting an obscene performance to a minor is a Class A misdemeanor. Notwithstanding ORS 161.635 and 161.655, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000. [1971 c.743 §258]

167.080 Displaying obscene materials to minors. (1) A person commits the crime of displaying obscene materials to minors if, being the owner, operator or manager of a business or acting in a managerial capacity, the person knowingly or recklessly permits a minor who is not accompanied by the parent or lawful guardian of the minor to enter or remain on the premises, if in that part of the premises where the minor is so permitted to be, there is visibly displayed:

(a) Any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sexual conduct, sexual excitement or sadomasochistic abuse; or

(b) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, that reveals a person or portion of the human body that depicts nudity, sexual conduct, sexual excitement or sadomasochistic abuse.

(2) Displaying obscene materials to minors is a Class A misdemeanor. Notwithstanding ORS 161.635 and 161.655, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000. [1971 c.743 §259]

167.085 Defenses in prosecutions under ORS 167.075 and 167.080. In any prosecution under ORS 167.075 and 167.080, it is an affirmative defense for the defendant to prove:

(1) That the defendant was in a parental or guardianship relationship with the minor;

(2) That the defendant was a bona fide school, museum or public library, or was acting in the course of employment as an employee of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization;

(3) That the defendant was charged with furnishing, showing, exhibiting or displaying 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

(4) That the defendant had reasonable cause to believe that the person involved was not a minor. [1971 c.743 §260; 1993 c.18 §27; 2001 c.607 §1]

167.087 [1973 c.699 §4; repealed by 2007 c.869 §11]

167.089 [1975 c.272 §2; repealed by 2007 c.869 §11]

167.090 Publicly displaying nudity or sex for advertising purposes. (1) A person commits the crime of publicly displaying nudity or sex for advertising purposes if, for advertising purposes, the person knowingly:

(a) Displays publicly or causes to be displayed publicly a picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sadomasochistic abuse, sexual conduct or sexual excitement, or any page, poster or other written or printed matter bearing such representation or a verbal description or narrative account of such items or activities, or any obscenities; or

(b) Permits any display described in this section on premises owned, rented or operated by the person.

(2) Publicly displaying nudity or sex for advertising purposes is a Class A misdemeanor. [1971 c.743 §261]

167.095 Defenses in prosecutions under ORS 167.090. In any prosecution for violation of ORS 167.090, it shall be an affirmative defense for the defendant to prove:

(1) That the public display, even though in connection with a commercial venture, was primarily for artistic purposes or as a public service; or

(2) That the public display was of nudity, exhibited by a bona fide art, antique or similar gallery or exhibition, and visible in a normal display setting. [1971 c.743 §262]

167.100 Application of ORS 167.060 to 167.100. ORS 167.060 to 167.100 shall be applicable and uniform throughout the state and all political subdivisions and municipalities therein, and no local authority shall enact any ordinances, rules or regulations in conflict with the provisions thereof. [1971 c.743 §262a]

167.105 [Repealed by 1971 c.743 §432]