

JOHN R. KROGER
Attorney General of Oregon
DAVID B. THOMPSON
Interim Solicitor General
MICHAEL A. CASPER
Assistant Attorney General
ERIN C. LAGESEN
Assistant Attorney General
1162 Court St.
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Counsel for Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC., et al,

Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,

Defendants-Appellees.

U.S.C.A. No. 09-35153

REPLY IN SUPPORT OF MOTION TO
CERTIFY

AMERICAN CIVIL LIBERTIES
UNION OF OREGON, et al.,

Plaintiffs-Appellants,

v.

JOHN KROGER, et al,

Defendants-Appellees.

U.S.C.A. No. 09-35154

REPLY IN SUPPORT OF MOTION TO
CERTIFY

At issue in this case is the constitutionality of two related Oregon
criminal statutes that regulate the provision of pornography to children and

minors: Or. Rev. Stat. §§ 167.054 and 057. The constitutionality of those statutes hinges on their meaning and scope. Neither the Oregon Supreme Court nor the Oregon Court of Appeals has construed them, the issue of their proper construction is an important one (because the Oregon legislature made a concentrated effort to craft them to comply with the Oregon Constitution's requirements for the regulation of speech), and the statutes certainly are subject to a plausible interpretation that renders them compatible with the First Amendment. Those circumstances are precisely the ones that the Supreme Court has held warrant certification because, under such circumstances, "the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997); *Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (2003) (recognizing that certification is appropriate for "significant" legal issues that have not been resolved by the state courts "because of deference to the state court on significant state law matters.").

Plaintiffs do not contend that the legal issue is not significant, or unworthy of review by the Oregon Supreme Court. Rather, they assert that certification is unwarranted because, in their view, a court could not possibly construe the statutes in a way that renders them consistent with the First

Amendment. (Bookseller Plaintiffs' Response at 4; ACLU Plaintiffs' Response

at 1-5). But if the statutes are construed in the way the Oregon Court of Appeals construed *former* Or. Rev. Stat. § 167.065 in *Maynard*, *i.e.*, as targeting hardcore pornography, then they are consistent with the First Amendment.

Plaintiffs also suggest that certification is unwarranted because, in their view, this court is capable of construing the statutes at issue itself. (ACLU Plaintiffs' Response at 3; Bookseller Plaintiffs' Response at 5). But the issue is not whether this court is *capable* of construing the statutes; this court certainly is. Rather, the issue is whether, to promote comity and federalism, this court should give the state courts the first opportunity to construe them. *Kremen*, 325 F.3d at 1037-1038 & 1037 n. 1 ("Although we are quite capable of resolving the issue presented, we should not reach out to grab the question in the first instance simply because the case involves a novel and 'sexy' issue.").

Bookseller plaintiffs suggest that the request to certify is too late. (Bookseller Plaintiffs' Response at 5). That the Supreme Court itself has certified important issues of state law to state high courts indicates that it is never too late for a federal court to seek the opinion of the state's highest court on a significant, unanswered question of state law. *Cf. Arizonaans for Official English*, 520 U.S. at 79-80 (directing lower federal courts to wait for Arizona

Supreme Court to construe amendment to Arizona Constitution before ruling on

federal constitutional questions, noting that this court and district court could have simplified case by certifying questions to Arizona Supreme Court earlier). Moreover, this court often certifies questions after a case has been argued and/or submitted. *See, e.g., Patton v. Target Corp.*, 580 F.3d 942 (9th Cir. 2009); *Farmer v. Baldwin*, 563 F.3d 1042 (9th Cir. 2009); *Paolini v. Albertson's, Inc.*, 418 F.3d 1023 (9th Cir. 2005); *Harrigfeld v. Hancock*, 317 F.3d 1094 (9th Cir. 2003).

ACLU plaintiffs argue that certification is inappropriate because it will prolong the alleged “chilling effect” of the challenged statutes. (ACLU Plaintiffs’ Response at 4). But it is speculative whether the certification process will cause significant delay in the resolution of the case. Moreover, in light of the district court’s narrow construction of the statutes, and *Maynard*’s similarly narrow construction of a prior related statute, any “chilling effect” is minimal.

Finally, plaintiffs argue that, if this court certifies the question of the construction of Or. Rev. Stat. §§ 167.054 and 057, it should certify different questions than those proposed by the state. The state believes that the questions it proposed, which were crafted based on the questions the Supreme Court certified to the Virginia Supreme Court in *Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 398 (1988), are the state law questions that must be answered in order for this court to evaluate whether the statutes, correctly

construed, comply with the First Amendment. Nonetheless, the state recognizes that both this court and the Oregon Supreme Court have the discretion to formulate the questions differently. *See Western Helicopter Services v. Rogerson Aircraft*, 311 Or. 361, 370-71, 811 P.2d 627 (1991) (recognizing that Oregon Supreme Court “has the discretion to reframe questions and is not bound to answer the questions as certified,” and noting that court will ordinarily work with certifying court to recast questions). The state further acknowledges that the questions proposed by plaintiffs, with some exceptions, are alternative ways of asking the Oregon Supreme Court to construe Or. Rev. Stat. §§ 167.054 and 057.

However, some of the questions proposed by plaintiffs should not be certified. The questions that ask for the Oregon Supreme Court’s opinion as to whether the statutes meet the requirements of the First Amendment as construed in *Miller v. California*, 413 U.S. 15 (1973), and *New York v. Ginsberg*, 390 U.S. 269 (1968), are not proper certified questions because they ask the state court to resolve an issue of federal law – a task for this court, once the Oregon Supreme Court has spoken on the scope and meaning of Or. Rev. Stat. §§ 167.054 and 057. In addition, Bookseller Plaintiffs’ proposed question regarding jury instructions will not assist this court in evaluating the question before it –

whether Or. Rev. Stat. §§ 167.054 and 057, correctly construed, comply with the First Amendment. As a result, it should not be certified.

In sum, the issue of the proper construction of Or. Rev. Stat. §§ 167.054 and 057 is an important legal issue for Oregon that its state appellate courts have not had the opportunity to resolve, and it is an issue that ultimately will be determinative of whether the statutes are consistent with the First Amendment. This court should give the Oregon Supreme Court the opportunity to rule on it before evaluating whether to invalidate Oregon's statutes on federal constitutional grounds.

Respectfully submitted,

JOHN R. KROGER
Attorney General
DAVID B. THOMPSON
Interim Solicitor General
MICHAEL A. CASPER
Assistant Attorney General

/s/ Erin C. Lagesen
ERIN C. LAGESEN
Assistant Attorney General

Attorneys for Appellees