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Nos. 09-35153

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.

RESPONSE TO DEFENDANTS-APPELLEES' MOTION TO CERTIFY QUESTIONS TO OREGON SUPREME COURT

In a motion after oral argument in this Court, Defendants-Appellees John Kroger, Attorney General of the State of Oregon, et. al. (the "State") argue that it is both "appropriate" and "essential" for this Court to certify questions to the Oregon Supreme Court. Plaintiffs-Appellants Powell's Books, Inc. et al. disagree. The State's motion for certification should be denied. If questions are to be certified, the questions posed by the State are inappropriate, and this Court should, instead, pose the questions set forth below.

I. CERTIFICATION IS NEITHER ESSENTIAL NOR APPROPRIATE.

The State contends that where, as here, the breadth of coverage of a state statute is at issue, and the contention of the challenger would cause the statute to be unconstitutional, this Court, should (or, it argues, must) certify the interpretative question to the state supreme court. That does not reflect the practice of this Circuit or the federal courts generally.

In *Brockett v. Spokane Arcades,* 472 U.S. 491, 506-507 (1985), even though appellants listed as "Questions Presented" two questions raising the issue of whether "a federal court should leave to state court the construction of a newly-enacted obscenity statute . . . ," the United States Supreme Court dealt with the Washington state law issues before it without certifying any question to the state supreme court, and without holding that the federal courts should abstain. (Three

justices concurred, but would have abstained so that the state courts could have considered the issues presented.)

Similarly, in *American Booksellers Foundation v. Dean,* 342 F.3d 96 (2d Cir. 2003), a challenge to a Vermont statute extending the state's harmful to minors provision to Internet communications, the District Circuit denied the State's request that that Court certify questions to the Vermont Supreme Court. On appeal, the State of Vermont argued that certification was required.[1] The Second Circuit affirmed the denial of certification, and interpreted the Vermont statute itself. *See also ACLU v. Johnson,* 194 F.3d 1149, 1162 n.10 (10th Cir. 1999). ("Given the obvious and facial overbreadth of the state statute at issue, and the fact that it is not reasonably susceptible to an appropriate limiting construction, abstention or certification are unnecessary.")

This Circuit has recently reaffirmed the standard to be applied.

> Even where state law is unclear, resort to the certification process is not obligatory. *See Lehman Bros. v. Schein,* 416 U.S. 386, 390, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974). Furthermore, "[m]ere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Id.*

Riordan v. State Farm Mutual, 589 F.3d 999, 1009 (9th Cir. 2009). The Second Circuit, applying the same standard, pointed out that

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[1] Brief for Defendants-Appellants, *American Booksellers Foundation v. Dean,* No. 02-7785 (2d Cir.) 2002 WL 32496197, at *3.

> "[i]n the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.' *Michelin Tires, etc. v. First National Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981).

Fischer v. Bar Harbor Banking and Trust Co., 857 F.2d 4, 7 (2d Cir. 1988). In another case, the Second Circuit noted that

> [t]he test for determining the appropriateness of employing the certification procedure is whether the statute in question is "readily susceptible" to the proffered narrowing construction that would render an otherwise unconstitutional statute constitutional. *See American Booksellers,* 108 Sup. Ct. at 645.

Dorman v. Satti, 862 F.2d 432, 435 (2d Cir. 1988).

Certification is not appropriate in this case for a number of reasons.

First, whatever these vague statutes mean, the State does not contend that they include the required *Miller/Ginsberg* elements of the crime, and the Court found that they did not. Thus, even if the Oregon Supreme Court resolved much of the vagueness and ambiguity, the statutes would remain unconstitutional under the First Amendment.

Second, a number of the components of the narrowing construction offered by the State—such as that the statutes only apply to "hardcore pornography"—find no support in the language of the statutes, which are not "readily susceptible" to such a reading.

Third, Oregon has a well-defined jurisprudence on statutory interpretation which this Court can apply.

Fourth, the State neither requested nor proposed certification in the trial Court or in this Court until after oral argument. *Cf. Thompson v. Paul,* 547 F.3d 1055, 1065 (9th Cir. 2008).

II. THE QUESTIONS PROPOSED BY THE STATE OMIT CRITICAL ISSUES, ASK THE OREGON SUPREME COURT TO ACT AS A FINDER OF FACT, AND ARE OTHERWISE INAPPROPRIATE.

The State proposes four questions (presented as two questions, each with two subparts). Not one of these questions is an appropriate question for certification.

> **State's Proposed Question 1[a]:** Which, if any, of the books introduced as plaintiffs' exhibits below fall within the scope of Or. Rev. Stat. §§ 167.054 and 057 as properly construed?

Plaintiffs-appellants introduced 26 books as exhibits in the District Court—including 17 text-only books, and nine books with pictures (ER 067-068). The State's Proposed Question 1[a] asks each member of the Oregon Supreme Court to read these books. That is not the certification of a "question of law" under Or. Rev. Stat. § 28.200. Further, it is not clear how the question, were the Oregon Supreme Court willing to answer it, could be "determinative of the cause then pending" in this Court. As the District Court recognized, these books were simply examples of Plaintiffs-Appellants' concerns. Judge Mosman read one of the

romance novels submitted (ER 044) and then correctly found the class of "romance novels" to be within the scope of Or. Rev. Stat. 167.057. (ER 029)

> **State's Proposed Question 1[b]**
> In particular, what meaning is to be given to Or. Rev. Stat. § 167.054(2)(b) and § 67.057(2) which exempt from liability 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?"

Questions 1[b] is too general -- basically "what does the statute mean"---and offers the Oregon Supreme Court no guidance as to which of the particular vague and ambiguous provisions this Court seeks guidance.

> **State's Proposed Question 2[a]**
> What meaning is to be given to Or. Rev. Stat. § 167.057(1)(a)(A), which makes it unlawful to furnish or use sexually explicit representations or descriptions "for the purpose of * * * [a]rousing or satisfying the sexual desires of the person or the minor?"

Question 2[a] is similarly general, giving no guidance to the Oregon Supreme Court as to the issue to be addressed.

> **State's Proposed Question 2[b]**
> Specifically, is the provision violated by a plaintiff bookseller who sells explicit representations, descriptions, or accounts to a minor knowing that the minor intends to use the materials for his or her own sexually gratification?

Question 2[b] seeks guidance as to a phrase—"sexual gratification"—which is found in neither statute challenged in this case.

More importantly, these questions do not address the *Miller/Ginsberg* issue. If the State's proposed questions were certified to the Oregon Supreme Court, and

if that Court answered those questions, whatever answers that Court gave would not come close to addressing a critical, threshold issue in this case: Do the Oregon statutes incorporate the *Miller/Ginsberg* standards?

III. IF THIS COURT IS TO CERTIFY QUESTIONS TO THE OREGON SUPREME COURT, IT SHOULD CERTIFY QUESTIONS OF LAW WHICH WOULD RESOLVE THE ISSUES RELATING TO THE CONSTRUCTION OF THE OREGON STATUTES.

If certification is to be resorted to, Plaintiffs-Appellants propose the following questions:

> 1. Are the standards set forth by *Miller v. California,* 413 U.S. 15 (1973) and *New York v. Ginsberg,* 390 U.S. 629 (1968) (namely that taken as a whole the material appeals to the prurient interest of minors, is patently offensive to contemporary adult community standards with respect to what is suitable for minors, and taken as a whole lacks serious literary, artistic, political or scientific value for minors) elements of the crimes set forth in Or. Rev. Stat., §§ 167.054 and 167.057, so that each of those standards must be found by a jury for a conviction under either of those statutes?
>
> 2. Or. Rev. Stat. §§ 167.054 and 167.057 each provide for an exception if the material is "an incidental part of an otherwise nonoffending whole *and* serve some purpose other than titillation." (emphasis added).
>
> (a) For that exception to apply, must the material at issue meet both of the provisions of the exemption, or merely one? For example, if a jury finds that the material is "an incidental part of an otherwise nonoffending whole," but that the sole purpose of the material was titillation, does the exception apply?
>
> (b) What is meant by the phrase, "an incidental part of an otherwise nonoffending whole?" Specifically, what makes something an "incidental" part? What is the "whole" to which the statute refers? What criteria apply to determine whether the "whole" is "nonoffending?"

3. One of the elements of the crime set forth in Or. Rev. Stat. § 167.057 is that the material be furnished "for the purpose of arousing or satisfying the sexual desires of the person [*i.e.,* the defendant] or the minor."

(a) To whose "purpose" does the statute make reference? Thus, *e.g.*, is it the purpose of the author of the material, or the purpose of the person furnishing the material [*i.e.,* the defendant], or the purpose of the minor?

(b) What is meant by "arousing ... the sexual desires?"

(c) Is there any other provision of Oregon law which prohibits "arousing ... the sexual desires of ... [a] minor" by any means other than providing material under Or. Rev. Stat. § 167.057?

4. (a) Is the Attorney General of Oregon correct that Or. Rev. Stat., §§ 167.054 and 167.057 are limited to "hardcore pornography," which is not defined in the statutes or the law?

(b) If so, what are the provisions which so limit the statutes, and what jury instructions are required to be given to ensure that no defendant can be convicted unless the jury finds that the material at issue is "hardcore pornography?"

CONCLUSION

Plaintiffs-appellants respectfully request that this Court deny the State's motion to certify questions to the Oregon Supreme Court, and respectfully suggest that, if questions are to be certified, the questions set forth above by Plaintiffs-Appellants be used in place of those proposed by the State.

Dated: June 24, 2010

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