

09-35153, 09-35154

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

JOHN R. KROGER
Attorney General
MARY H. WILLIAMS
Solicitor General
ANNA M. JOYCE
Deputy Solicitor General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Attorneys for Appellees

TABLE OF CONTENTS

A.	Background.....	1
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.....	2
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.	5
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.	7
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.	10
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.....	11
2.	This court should grant rehearing or rehearing <i>en banc</i> to certify the question to the Oregon Supreme Court to honor principles of comity.....	13
C.	Conclusion.....	15
Appendix		
	United States Court of Appeals for the Ninth Circuit Decision, <i>Powell’s Books, Inc. et. al. v. Kroger et. al.</i> , 09-35153, 09-35154...App.-1	
	Or. Rev. Stat. § 167.065.....	App.-28
	Or. Rev. Stat. § 167.054 through 167.057.....	App.-29
	Or. Rev. Stat. § 167.085.....	App.-30

TABLE OF AUTHORITIES
Cases Cited

Emergy v. Clark,
604 F. 3d. 1102 (2010)15

Ginsberg v. New York,
390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)6

Miller v. California,
413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)6

PGE v. Bureau of Labor and Industries,
317 Or. 606, 859 P.2d 1143 (1993)14

State v. Gaines,
346 Or. 160, 206 P.3d 1042 (2009)14

State v. Henry,
302 Or. 510, 732 P.2d 9 (1987)13

State v. Maynard,
168 Or. App. 118, 5 P.3d 1142 (2000),
rev den, 332 Or. 137 (2001) 3, 5, 8, 9, 12, 13, 14

State v. Stoneman,
323 Or. 536, 920 P.2d 535 (1996)14

Virginia v. American Booksellers Ass’n,
484 U.S. 383, 108 S. Ct. 636, 98 L.Ed. 2d 782 (1988) 7, 11, 12, 15

Constitutional & Statutory Provisions

Or. Const. Art. I, § 8 5, 13

Or. Rev. Stat. § 167.054 1, 2, 5, 7, 12

Or. Rev. Stat. § 167.057 1, 2, 5, 7, 12

Or. Rev. Stat. § 167.057(2)13

Or. Rev. Stat. § 167.0653, 5

Or. Rev. Stat. § 167.085(3) 3, 4, 5

Or. Rev. Stat. §167.054(2)(b)13

U.S. Const. Amend. I 1, 5, 7, 9

U.S. Const. Amend. V5

U.S. Const. Amend. XIV6

Other Authorities

Fed. R. App. P. 35.....1
Fed. R. App. P. 40.....1

**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

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, plaintiffs³ 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

(...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

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 Emery 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,

JOHN R. KROGER
Attorney General
MARY H. WILLIAMS
Solicitor General

/s/ Anna M. Joyce

ANNA M. JOYCE #013112
Deputy Solicitor General

Attorneys for Defendants-Appellees
John Kroger *et. al.*

AMJ:slc/2351285-v1