



**Testimony of Kimberly McCullough, Legislative Director
In Opposition to HB 3365
House Committee on Judiciary
April 9, 2015**

Chair Barker and Members of the Committee:

Thank you for the opportunity to submit comments regarding HB 3365, which adds additional provisions to an already constitutionally overbroad obscenity statute, ORS 167.080.

Although ORS 167.080 has not been challenged in Oregon courts, it is *significantly broader* than numerous Oregon obscenity statutes that have been struck down as overbroad under the First Amendment.¹ Even without the amendments proposed by HB 3365, ORS 167.080 criminalizes a vast range of material—such as mere depictions of nudity and sexual conduct which are not intended to arouse the viewer—which are entitled to constitutional protection under the First Amendment and Article 1, section 8 of Oregon’s Constitution. These criminalized materials range from standard sexual education materials, to frequently-taught novels such as *The Handmaid’s Tale*, by Margaret Atwood, novels for children and young adults like Judy Bloom, and visual art. This material that is swept up by ORS 167.080 includes material that is simply not obscene to minors. It is for this reason that we are confident that ORS 167.080 would not withstand constitutional scrutiny if tested, just like its predecessor obscenity statutes, if challenged in a court of law.

Adding to ORS 167.080, as HB 3365 proposes to do, is like adding floors to a building that already sits atop an irrevocably damaged foundation. And we are convinced that, at the very least, HB 3365’s prohibition on the *visual display* of certain instruments and devices is constitutionally impermissible.

This is not to say that, under current constitutional standards, the state may not restrict the access of minors to obscene material. The key to whether a particular restriction is permissible, however, turns on whether the material is actually obscene. Under current constitutional law, material is obscene if (a) the dominant theme of the material taken as a whole *appeals to the prurient interest*, (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, taken as a whole, does not have serious literary, artistic, political, or scientific value.²

¹ See, e.g., *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *State v. Maynard*, 168 Or. App. 118, 5 P.3d 1142 (2000); *State v. Woodcock*, 75 Or. App. 659, 706 P.2d 1012 (1985); *State v. Frink*, 60 Or. App. 209, 653 P.2d

²*Miller v. California*, 413 U.S. 15 (1973).

ORS 167.080 and HB 3365 do not consider the serious value of a visual or written work as a whole or whether it has redeeming social value. This means that educational materials on display in a business which does not fall within ORS 167.080's narrow exceptions (schools, museums or public libraries) are not protected under ORS 167.080. As an example, the display of sexual devices at a health clinic that seeks to educate youth on the dangers of using such sexual devices would be criminal under HB 3365.

Similarly, artistic materials, such as a sculpture incorporating a sexual device into a larger whole, displayed in an art gallery open to the general public, would also be criminal under HB 3365. Neither of the visual representations in these examples qualifies as obscenity under current constitutional standards.

ORS 167.080 and HB 3365 do not limit criminalized material to those materials that appeal to the prurient interest. Prurient interest is that which is "over and beyond" normal sexual arousal. Prurient interest does not include material that merely appeals to regular sexual interest. As stated by the Ninth Circuit Court of Appeals, "[t]itillation and arousal are not synonymous with abnormal or prurient sexual response."³ Ultimately, the state may not restrict displaying materials that are not actually obscene to minors.

Although we understand and appreciate that the proponents intend to protect children, the truth is that this statute is facially unconstitutional even without amending it. Passing HB 3365 would exacerbate the unconstitutionality of ORS 167.080, reaching even more protected speech.

For all of these reasons, we urge you not to pass HB 3365. Please feel free to contact me with any questions or concerns.

³ *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010) (invalidating an Oregon statute related to furnishing obscenity minors).