THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association

Memo in Opposition to North Dakota Senate Bill 2360 as passed by the Senate

We oppose North Dakota Senate Bill 2360 as amended to incorporate Senate Bill 2123 and passed by the Senate (S.B. 2360) because we believe it violates the First Amendment rights of retailers and other businesses that distribute mainstream content in North Dakota. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including North Dakota: authors, publishers, booksellers and librarians, producers and retailers of films, home video and video games. They have asked me to explain their concerns.

S.B. 2360 would amend North Dakota's existing display law to make it a crime for any business that permits minors to enter the premises to display "any photograph, book, paperback book, pamphlet, or magazine, the exposed cover or available content of which exploits, is devoted to, or contains depictions or written descriptions of nude or partially denuded human figures" in a sexual context. The existing law is limited to material that principally contains images of nudity in a sexual context. The bill would also amend the existing definitions of obscenity and harmful to minors to delete the word "political" from the test for what material is illegal.

Under the bill a bookseller, and other retailers, who admit minors can be prosecuted for displaying romance novels, health books, novels, dramas, memoirs, biographies, photo and art books, dramas, graphic novels, magazines and any other content that includes descriptions or images of nudity. The content does not have to be on the cover or visible to the general public browsing the media.

The bill is unconstitutional for several reasons. First, it goes far beyond material that the U.S. Supreme Court says cannot be displayed to minors. S.B. 2360 would bar the display of descriptions or images containing nudity in a sexual context, but the Supreme Court has been clear that content can only be restricted for minors if it meets a specific test established by the Court. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 212-13 (1975). The contours for what speech can be barred for minors were established in *Ginsberg v. New York*, 390 U.S. 629 (1968), and subsequently modified by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). In those cases, the Supreme Court created a three-part test for determining whether material is protected by the First Amendment for adults but is unprotected as to minors. Under that test, in order for sexually explicit material to fall outside the First Amendment as to a minor, it must, when taken as a whole:

1. predominantly appeal to the prurient, shameful or morbid interest of minors in sex;

2. be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
3. lack serious literary, artistic, political or scientific value.

Governments may restrict minors' access to sexually explicit speech under this test, often referred to as speech "harmful to minors," but it cannot go beyond this narrow range of material as determined by the *Miller/Ginsberg* test. In *Miller*, Chief Justice Berger emphasized that any state law regulating obscenity "must be carefully limited" to avoid "the inherent dangers" of criminalizing speech. *Miller*, 413 U.S. at 23-24.

The Supreme Court has repeatedly rejected attempts to restrict minors' access to sexual speech beyond what may be barred under the *Miller/Ginsberg* test. In *Reno v. American Civil Liberties Union*, the Supreme Court struck down a federal law that barred dissemination of content that did not meet the *Miller/Ginsberg* test. 521 U.S. 844 (1997). It barred dissemination of "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication." The Court dismissed the government's argument that this speech satisfied the *Ginsberg* precedent. *Id*., at 865. See also, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989) (struck down a law barring indecent content rather than content that is harmful to minors under the *Miller/Ginsberg* test); *Erznoznik* at 213-14 (striking down a law barring minors from viewing material containing nudity without any of the prongs from the *Miller/Ginsberg* test); *Powell's Books v. Kroger*, 622 F.3d 1202, 1213 (9th Cir. 2010)(blocking enforcement of an Oregon law barring sexual speech for minors that did not comply with the *Miller/Ginsberg* test); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (permanently blocking an Illinois law that barred the sale of sexual material to minors but omitted the third prong of the *Miller/Ginsberg* test).

Laws restricting display not only must be limited to material harmful to minors, but courts have insisted that such laws may only restrict material that is harmful to oldest minors. The controlling case on regulation of the display of material harmful to minors is *Virginia v. American Booksellers Assn., Inc*., which was brought by members of Media Coalition. 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989). The court held that if material has serious value for "'a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.'" Id., at 129 (citing *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 624 (1988); see also *American Booksellers Ass'n v. Webb*, 919 F.2d 1493 (11th Cir. 1990), rev'g 643 F. Supp. 1546 (N.D. Ga. 1986); *Davis-Kidd Booksellers v. McWhorter*, 866 S.W.2d 520 (Tenn. 1993). This means that a restriction on the display of material with descriptions or depictions of nudity or sexual conduct must be limited to the narrow band of material that is legal for an 18-year-old but illegal for a minor who is almost 18 years old.

Even if the bill was limited to barring the display of material harmful to minors, as defined by the Supreme Court and applied to oldest minors, S.B. 2360 would still be an unconstitutional violation of the rights of retailers because the only way to comply with the law is to bar minors

from entering or purging the store of books that include descriptions or depictions of nudity. The Virginia legislature amended its law to prohibit the display of harmful to minors material if a minor was able to browse it. In *Virginia v. American Booksellers*, the court ruled that limitations on the display can only require that a retailer take reasonable steps to prevent minors from perusing harmful to minors material. On remand from the Supreme Court, the Fourth Circuit held that to be convicted, the bookseller "must have knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles." 882 F. 2d. at 129 (4th Cir. 1989) (citing *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (1988)). The court declined to allow the state to mandate blinders, bagging or segregation as the only way to prevent minors from perusing the material.

Absent these elements, any restriction on display is an unconstitutional burden on a bookseller and an unreasonable hindrance on the right of adults to access such material. Booksellers have tens of thousands of titles in their stores and they would have to inspect every one for any mention of nudity or sex. The task of browsing every page of thousands of new books and magazines received by a store each month to determine what cannot be displayed is difficult, time consuming for staff, and expensive for management. The staff would also have to ask for an ID from everyone who entered the store to determine their age to assess what material is acceptable for each person, then monitor every minor's browsing to make sure they were not looking at anything inappropriate for them. The alternative would be barring minors from entering the store or driving away adult customers by removing all books from the store that could be illegal for younger kids. Even if a store owner wanted to comply with the bill by creating a segregated "adults only" area for these titles, this would have a chilling effect on adult customers. Many would avoid entering an "adults only" section of the store to avoid being stigmatized for perception they were looking at "pornographic" material. Others would avoid the "adults only" section for fear that the material was illegal. These are unreasonable burdens on the First Amendment rights of bookseller and adults.

S.B. 2360 cannot be saved by a promise of legislators or prosecutors that the statute will be construed narrowly or be benignly enforced. In *U.S. v. Stevens* the Court said, "[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 559 U.S. 460, 480 (2010).

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a strong likelihood that the state will be ordered to pay the plaintiffs' attorney's fees. In *Powell's Books v. Kroger,* a case brought by members of Media Coalition, the state of Oregon paid the plaintiffs more than $200,000.

For these reasons we oppose S.B. 2360. We would welcome the opportunity to do so to discuss these concerns further. If you would like to do so, please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025. We ask you to protect the First Amendment rights of retailers and all the people of North Dakota and amend or reject S.B. 2360.