March 14, 2023
Memorandum in Opposition to Senate Bill 2360
House Judiciary Committee
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Chairman Klemin and members of the House Judiciary Committee, thank you for considering our testimony regarding Senate Bill 2360. All of us at the Comic Book Legal Defense Fund share your commitment to protecting the youth of North Dakota, whatever our differences may be as to the wisdom of enacting this specific legislation.

Many of our legal objections to S.B. 2360 have already been expressed in others' testimony, most notably that of the Media Coalition, of which the CBLDF is a member. Rather than repeat these arguments in full, this memo incorporates by reference document number 24274 (appended), the Media Coalition's testimony submitted by David Horowitz on March 13, 2023, and instead focuses on concerns of particular relevance to graphic novels and the North Dakota retailers, librarians, educators, creators, and readers whom this bill would harm.

Reframing the question

First, I want to consider the ostensible problem that S.B. 2360 is designed to address. As the testimony in favor of this bill illustrates, an oft-repeated justification for imprisoning anyone who makes sexually-themed graphic novels publicly accessible is that such books are hard-core pornography that corrupts children's minds. Since the spread of graphic novels seems to be resistant to arguments against them, the only way to keep these allegedly pernicious works away from an innocent child is supposedly to criminalize them.

But why have these books suddenly become mainstream? How did North Dakota's librarians, teachers, and small-business booksellers go from being pillars of society to alleged radical pornographers? It may be, as some have claimed, that our institutions have been infiltrated by a radical cabal, but a closer look at what is happening points to a distinctly legal explanation.

In brief, the explosion of graphic novels such as *Gender Queer* and *Flamer* over the past decade can be traced back to a series of landmark decisions by the Supreme Court. Starting with *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and *U.S. v. Windsor*, 570 U.S. 744 (2013), the Court has issued a series of opinions establishing that various forms of sexual expression are protected civil rights. The most iconic example of this is the Court's 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015)*;* this ruling recognized a fundamental right to marry grounded in the Due Process Clause of the Fourteenth Amendment, which "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." Five years later, the Court similarly found sexual orientation and gender identity to be protected classes under Title VII of the Civil Rights Act of 1964.

These Supreme Court rulings changed the American civic landscape. Sexuality was legally no longer just a private matter; instead it became an integral component of our defining ideals. In quintessentially American fashion, the democratization of sexual orientation and gender identity as a civic value became a topic of national conversation. At the same time, the digital revolution had helped make the integration of words and images a standard part of our communications landscape. In this communications environment it was inevitable that graphic novels depicting sexual expression as a civic value would start appearing in schools, libraries, bookstores, and comic shops alongside explorations of race, women's rights, disabilities, and other protected classes in civil rights law.

What distinguished graphic novel memoirs and coming-of-age stories about sexual expression from their text-based counterparts was, of course, the amount of visual information that a single image could contain. Seeing a visual depiction of the human body and reading a textual description do not have the same immediate impact; at the CBLDF, for example, we started to encounter schools and libraries that prohibited graphic novel adaptations of certain literary works (*e.g.,* Miles Hyman, *Shirley Jackson's "The Lottery": The Authorized Graphic Adaptation* (2016); Anne Frank, Ari Folman, and David Polonsky, *Anne Frank's Diary: The Graphic Adaptation* (2018)) but retained the text originals. Equally significant, critics soon learned they could go viral on Twitter and YouTube by showing select images from Maia Kobabe's award-winning graphic novel memoir *Gender Queer* (2019) and other works dealing with sexual expression.

This gets to what is really at the heart of the current debate: not so much a never-ending battle between pornographers and book banners, but the difficult question of how to depict sexuality in a culture where it is both a civil right and a subject of debate. One especially complicated aspect of this is the conflict between public ideals and personal values; another, given the nature of the topic, is differing notions as to the appropriate time, place, and manner of conveying sexual information to minors. These are the very sort of issues that the Founders' protections for free speech and freedom of the press were designed to help us discuss.

It is undeniable that some people object to the sexual imagery in certain graphic novels; the testimony in favor of S.B. 2360 makes this more than clear. However, as I noted in a recent case in Virginia in which the court found an attempt to have *Gender Queer* deemed harmful to minors to be unconstitutional, there is no graphic novel exception to the First Amendment. Laws that effectively criminalize artistic depictions of sexual expression protected as a civil right will not

stand up to judicial scrutiny. Likewise, despite the repeated accusations by S.B. 2360 advocates against selected excerpts from the educational graphic novel *Let's Talk About It: The Teen's Guide to Sex, Relationships, and Being a Human* (Erika Moen and Matthew Nolan (2020)), the literary, artistic, political, and scientific significance of the work taken as a whole protects it from being classified as harmful to minors. Deciding how best to display these books in a library or store is a matter for negotiation, not arrest.

Protecting the community

As multiple concerned citizens have noted in their testimony in opposition to S.B. 2360, this legislation would cover far more than the few books from which a few selected images have gone viral on Twitter. In fact, by eliminating the reference to "commercial gain" in N.D.C.C. § 12.1-27.1-03.1, the bill would make it illegal to have books, magazines, or photographs with sexually alluring nudity or partial nudity accessible any place "where minors are." Thus, enacting S.B. 2360 would arguably make it illegal for a parent to bring home the *Sports Illustrated* swimsuit issue and even to have an electronic device with access to the internet, which is, after all, host to countless digital books, magazines, and photographs with sexually explicit content.

What I hear from librarians and retailers in North Dakota is that they are afraid. S.B. 2360 is so broad and ambiguous that no one can be sure whether a particular book will get them arrested. Even comics that one might otherwise assume to be outside the reach of this bill – *Wonder Woman*, *The Adventures of Superman, The Amazing Spider-Man*, *Fantastic Four, Red Sonja*, *Sandman* – could have characters wearing provocative costumes, engaging in a same-sex kiss, or identifying as transgender, thus leaving retailers with the Hobson's choice between banning minors from their stores or removing popular books. There are also concerns about the potential for this bill to sever connections among retailers, schools, and community libraries – for example, it is not uncommon for a libraries and schools to order graphic novels from a local comic shop.

Criminalizing the public display of graphic novels and other books simply for containing sexually suggestive material would be a clear unconstitutional overreach. From the standpoint of civics education, showing children that the way to deal with diverse perspectives is to vote for a law that would send the people with whom you disagree to jail would be nothing short of obscene.

If the Committee has any questions about any of the graphic novels mentioned in the testimony regarding S.B. 2360, please let me know. More importantly, before you vote on this legislation, I would recommend visiting the schools, libraries, and small businesses this bill would put at risk. The people there are not pornographers or groomers – they are your neighbors and friends, and like you, they are trying their best to serve the varied interests of their communities while honoring their own sense of what is right.

I respectfully recommend that the House Judiciary Committee not pass S.B. 2360.

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.