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 2123

We oppose North Dakota Senate Bill 2123 because we believe it violates the First Amendment rights of retailers and other businesses that distribute mainstream content. 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.

Summary of the bill

S.B. 2123 amends North Dakota's existing display law to make it a crime for any business that permits minors to enter to display "any photograph, book, paperback book, pamphlet, or magazine, the exposed cover or available content of which exploits, is devoted to, or is principally that contains depictions or written descriptions of nude or partially denuded human figures" in a sexual context. The existing law is limited to materially that principally contains images of nudity in a sexual context.

The bill is unconstitutional because it bars display to minors of material that contains depictions or descriptions of nudity that is much broader than what the U.S. Supreme Court has said is illegal for minors. 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 could be barred for minors was established in *Ginsberg v. New York*, 390 U.S. 629 (1968), and subsequently modified by *Miller v. California*, 413 U.S. 15 (1973). In those cases, the Supreme Court created a three-part test for determining whether material is First Amendment protected 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.

The Supreme Court has repeatedly rejected attempts to restrict minors' access to sexual speech that was broader than what is allowed under the *Miller/Ginsberg* test. In *Reno v. American Civil Liberties Union*, the Supreme Court struck down a federal law that was very similar to the one proposed in S.B. 9. 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 it could bar this speech under 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 accessing 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 serious value prong of the *Miller/Ginsberg* test).

Even if the bill was limited to barring the display of material "harmful to minors," as defined by the Supreme Court, it would still be an unconstitutional violation of the rights of retailers. The bill imposes a total ban on the display of material. Courts have ruled that limitations on the display of material "harmful to minors," as defined by the *Miller*/*Ginsberg* standard, must have two elements. First, the determination for whether it is harmful to minors must be judged for older minors. Second, the law can only require that a retailer take reasonable steps to prevent minors from perusing harmful to minors material, but it cannot mandate blinders, bagging or segregation as the only way to do so. It certainly cannot bar any display of the material. Absent these elements, the law would be overly burdensome on a bookseller who may have tens of thousands of titles in his or her store and an unreasonable hindrance on the right of adults to access such material and would have the impossible task to guess the age of each minor in a store and assess whether he or she is browsing a book that is illegal based on the minor's age. Otherwise, a bookseller would have to keep all of the books that might be inappropriate behind the counter. This could include art books, romance novels, sexual health material and numerous other books that contain sexual content. These are unreasonable burdens on the rights of bookseller and adults who have a First Amendment right to access this material.

The controlling case on regulation of 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 Virginia legislature amended its law to prohibit display of harmful to minors material if a minor was able to browse them. The law was ultimately upheld but only after the court 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." *Virginia v. American Booksellers*, 882 F. 2d. at 129 (4th Cir. 1989) (citing *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (1988). Second, the harmful to minors material is to be judged based on what is illegal for oldest minors. 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., (citing *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 624 (1988).

Finally, S.B. 2123 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).

For these reasons we oppose S.B. 2123. 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 defeat S.B. 2123.