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 House Bill 1333

We oppose North Dakota House Bill 1333 because we believe it violates the First Amendment rights of retailers and other businesses. 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

H.B. 1333 would make it a crime to engage in a performance in a location other than an adult cabaret that features male or female impersonators who provide entertainment that appeals to a "prurient interest" if the performance is given in the presence of a minor or on public property. "Prurient interest" is not defined in the bill or by reference to an existing statute.

A first violation is a misdemeanor, and a second violation is a felony. Booksellers, theater owners and other businesses may be guilty of aiding and abetting a such a performance for hosting or organizing a drag performance.

The bill threatens booksellers and other retailers who host in-store events for notable authors such as RuPaul or who may invite entertainers to draw customers such as a female Elvis impersonator. It would also bar a theater from staging performances of many notable plays that have actors playing members of the opposite sex.

## Unconstitutional restriction on speech

The bill is unconstitutional because it makes it a crime to allow a minor to see a reading, monologue, play or other performance by a male or female impersonator if it appeals to a prurient interest. The performance certainly is not limited to sexual content that is illegal for minors. In fact, nothing in the bill limits it to a performance that has salacious elements or dialogue. Therefore, the bill criminalizes speech beyond what the U.S. Supreme Court has said can be deemed to be 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. 205, 212-13 (1975). See also, *Brown v. Entertainment Merch's. Ass'n,* 564 U.S. 786 (2011).

Even if the bill was limited to drag performances that appealed to a prurient interest in sex, it would still be unconstitutional because it is not limited to sexual speech that the Supreme Court says may be made illegal for minors. The contours for what speech could be barred for minors

were established in *Ginsberg v. New York*, 390 U.S. 629 (1968), and subsequently modified by *Miller v. California*, 413 U.S. 15 (1973). Chief Justice Berger wrote in *Miller*:

> "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Id., at 24. It is generally accepted that this test for obscenity for adults modified the existing test for material harmful 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 for minors.

Governments may restrict access to sexually explicit speech for minors up to what is permitted under the test, but they cannot go beyond this narrow range of material as defined in *Ginsberg* and modified by *Miller*. The Supreme Court has given states no leeway in altering the specific language in the tests for "obscenity" or 'harmful to minors." In *Miller*, Chief Justice Berger emphasized that any state law regulating obscenity "must be carefully limited" to avoid "the inherent dangers" of criminalizing speech. *Id*., at 23-24.

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 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." 521 U.S. 844 (1997). 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* 422 U.S. 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).

H.B. 1333 is also unconstitutionally vague. The lack of definition of "prurient interest" leaves the term open-ended with no guidance for how to comply with the law. There is not limitation as to what the prurient interest is in or who judges whether the interest is prurient. It is well established that any law must be sufficiently clear to be understood by the common person. In *Coates v. Cincinnati*, the Supreme Court struck down a law barring congregating on a public sidewalk if it would "annoy" others. 402 U.S. 611 (1971). The Court held, "[T]his ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id*., at 614. The requirement of clarity in the law is especially stringent when a law infringes on First Amendment rights. See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'"). The lack of a clear definition is especially worrying in the current climate when some believe that any performance by a male or female impersonator is prurient.

We understand that booksellers and similar retailers may not be the target for this legislation. However, the constitutional infirmities of the bill cannot be saved by a promise by legislators or prosecutors that the statute would be construed narrowly. As the Supreme Court wrote in *U.S. v. Stevens*, "[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 good possibility that the state will be ordered to pay the plaintiffs' attorney's fees. In *Powell's Books v. Kroger,* a challenge an Oregon law that did not comply with the *Miller/Ginsberg test* and brought by members of Media Coalition, the state of Oregon agreed to pay plaintiffs more than $200,000 in legal fees.

Again, we oppose H.B. 1333 because we believe it violates the constitutional rights of booksellers and other businesses that host or disseminate First Amendment protected material. We would welcome the opportunity 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 H.B. 1333.