

THE MEDIA COALITION INC

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Memorandum in Opposition to Indiana House Bill 1042

The members of The Media Coalition believe that House Bill 1042 violates the First Amendment rights of retailers and others. The members of The Media Coalition represent most of the book and magazine publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording video, and video game retailers in Indiana and the rest of the United States.

H.B. 1042 would bar any business or individual from selling any material that contains “sexually explicit” content unless they have registered with the Secretary of State. To register, one must inform the Secretary of the intent to sell such material and provide a statement detailing the type of material to be sold. “Sexually explicit” is defined as any content that taken as a whole the average person would find it appeals to the prurient interest in sex or depicts or describes sexual conduct in a patently offensive way. A violation is a misdemeanor offense.

This bill would clearly impact the dissemination of First Amendment protected material because it is not limited to obscene material. Under the Supreme Court’s decision in *Miller v. California*, 413 U.S. 15 (1973), material can only be found obscene where three factors are met: the material taken as a whole must (1) predominantly appeal to ones prurient, shameful or morbid interest in sex; (2) depicts or describes sexual conduct in a manner that is patently offensive to contemporary community standards; and (3) lacks serious literary, artistic, political, or scientific value. *See Miller* 413 U.S. at 24-25. H.B. 1042 would essentially apply to any material that satisfied the first or second prong rather than the constitutional requirement that it meet all three.

Given that this restriction would apply to material based on its content, it is immediately constitutionally suspect. The U.S. Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826-7 (2000). To do so the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is narrowly tailored to achieve that interest. *See, e.g., R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers in the United States.

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
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Entertainment Software
Association

Entertainment Merchants
Association

Freedom to Read
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Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
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National Association of
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Publishers Marketing
Association

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Treasurer

Chris Finan
American Booksellers
Foundation for
Free Expression

General Counsel

Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

Further, the state cannot place special burdens on retailers of First Amendment-protected material. As the Supreme Court has said, the government can neither require a license of speakers of protected communication not generally imposed nor impose a business tax specific on the dissemination of protected speech not generally imposed. See, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press*, 297 U.S. 233 (1936). This bill is essentially a licensing scheme. Retailers would be required to submit a letter of intent and a list of material that would be sold to get permission from the Secretary of State to sell certain types of content.

Also, the legislation would have a serious chilling effect on many retailers. They would have the added burden of reviewing their inventory to determine if material they sold or rented included “sexually explicit” material. If such material was in the store or came into the store, the retailer would have to decide if they would lose customers if they were registered with the Secretary of State as a store that intended to sell “sexually explicit” material.

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’ attorneys’ fees. In several recent successful challenges, the state agreed to pay to the plaintiffs more than \$300,000 in attorneys’ fees in each litigation.

We ask you to please protect the First Amendment rights of all people of Indiana and defeat this legislation.