

# THE MEDIA COALITION INC

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## MEMO IN OPPOSITION TO NEBRASKA LEGISLATIVE BILL 443

American Booksellers  
Foundation for Free  
Expression

Association of American  
Publishers, Inc.

Comic Book Legal  
Defense Fund

Entertainment Consumers  
Association

Entertainment Merchants  
Association

Entertainment Software  
Association

Freedom to Read  
Foundation

Independent Book  
Publishers Association

Magazine Publishers of  
America, Inc.

Motion Picture  
Association of America,  
Inc.

National Association of  
Recording Merchandisers

Recording Industry  
Association of America,  
Inc.

Chair  
Chris Finan  
American Booksellers  
Foundation for Free  
Expression

Immediate Past Chair  
Sean Devlin Bersell  
Entertainment Merchants  
Association

Treasurer  
Sally Jefferson  
Entertainment Software  
Association

General Counsel  
Michael A. Bamberger  
Sonnenschein Nath &  
Rosenthal LLP

The members of Media Coalition believe that Nebraska Legislative Bill 443 may threaten the distribution of First Amendment-protected material in Nebraska. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Nebraska: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. They neither produce nor sell works that are legally obscene. However they do disseminate a wide variety of material with sexual content, including art and photography books, mainstream movies and music, sex education material, and literary and artistic works.

L.B. 443 would define a business as a "sexually oriented business" if a substantial portion of the goods offered by a business is "sexually oriented materials." Any business with as little as 10% of display space devoted to "sexually oriented material" is presumed to be a sexually oriented business. "Sexually oriented material" is defined as any verbal or visual depiction of nudity or sexual activity if it is patently offensive to the average adult with respect to what is suitable for a minor. If a business is deemed to be a "sexually oriented business" it cannot be open between 11 p.m. and 8 a.m. Also any new business that was deemed a "sexually oriented business" would be restricted in where they could be located.

The government has the power to regulate the "secondary effects" of sexually oriented businesses but the Supreme Court has established limits on this power. The regulation must be designed to further an important or substantial government interest; the governmental interest must be unrelated to the suppression of speech; and the regulation must be narrowly tailored to further the government interest in preventing the unwanted secondary effects. *City of Erie v. Pap's A.M.*, 529 U.S.277 (2000); *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

It is questionable if L.B. 443 would meet this test. Typically local ordinances designed to limit "secondary effects" define sexually oriented bookstores or video stores as those that offer sexually explicit visual material as a significant and substantial part of the stock and trade, floor space, or revenue. Significant and substantial part of stock and trade has generally been interpreted by courts to mean 30-40% of wares or revenue. Under this definition a retailer

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 and consumers in the United States.

has to be concerned if a mere 10% of his or her retail space is comprised of any material that describes or depicts nudity or sex that would be unsuitable for a child of any age less than 18. Stores carry large amounts of mainstream material with some sexual content that many adults would find unsuitable for a 10 or 6 year child old yet it would count toward determining if a store is a “sexually oriented business.” Given the broad amount of material and low threshold it is likely that some if not many mainstream bookstores, video stores and music stores could be at risk for being deemed a sexually oriented business.

With such a broad definition there is little reason to believe these restrictions on such businesses will prevent the unwanted secondary effects that the legislature is seeking to restrict. Conversely, L.B. 443 would have a serious chilling effect on many mainstream retailers. The broad definition of "sexually oriented material" includes films such as *Schindler's List*, *Short Cuts* or *Anchor Man* and many classic literature, romance novels, photography and health books and much popular music by such artists as Prince or Van Halen that describes nudity or sex in a manner that could be considered material inappropriate for some minors. This creates a difficult situation for mainstream retailers. Many would drastically limit their inventory rather than be classified as a “sexually-oriented business” and therefore, avoid the negative connotations that go with the label. Alternatively, they would likely lose customers unwilling to shop at a “sexually oriented business.”

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

Please protect the First Amendment rights of all Nebraskans and defeat L.B. 443.