

Statement on Indiana House Bill 1042 (as Amended)
by American Booksellers Foundation for Free Expression
Borders ®
Great Lakes Booksellers Association

The American Booksellers Foundation for Free Expression, Borders ®, and Great Lakes Booksellers Association believe that Indiana House 1042 violates the First Amendment and would force bookstores to suppress the sale of books, magazines and other works that are constitutionally-protected for both adults and older minors.

H. B. 1042 (as amended) would require any bookstore that intends to sell “sexually explicit materials” to register with the Secretary of State and provide a statement detailing the type of material to be sold. The Secretary of State must then report to local government officials and zoning boards the name of the store that has registered in their jurisdiction. “Sexually explicit materials” is defined as any product that is “harmful to minors” under existing law. There is a \$250 registration fee. Failure to register can be punished as a misdemeanor.

Booksellers in the United States are in a fierce competition to serve the needs of American readers. Despite our differences, however, we all believe that it is a critical part of our role as booksellers to defend the right of our customers to have access to all books, magazines, recordings and other materials that are protected by the First Amendment. We believe that requiring bookstores to register with the state and include a list of books that may be carried will have a substantial chilling effect on the sale of books and magazines that are protected by the First Amendment, violating the rights of both the retailers and their customers. Demanding that bookstores register for selling constitutionally protected material is antithetical to the First Amendment.

We believe H.B. 1042 is unconstitutional. This restriction requires registration based on the content of the books that we sell. 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 be found constitutional, 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). Here the state offers no apparent compelling state interest. Even assuming the purpose of the bill is to identify adult bookstores, this bill would apply to virtually any general interest bookstore that carries art, health, sexual information or many other

mainstream books. This means H.B. 1042 is plainly ineffective in serving this purpose and wildly overbroad at the same time.

Further, the state cannot place special burdens on retailers of First Amendment-protected material. This bill is essentially a licensing scheme for bookstores. 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. But 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).

Finally, the legislation would have a serious chilling effect on many retailers. This bill would require a store to register if it carried even a single book that could “sexually explicit materials.” This means virtually every mainstream bookstore would have to decide whether to remove all sexual content from the store and pledge to not carrying any such content in the future or register with the state. Some stores would be reluctant to be identified as sellers of “sexually explicit” material and would be forced to get rid of “harmful” works altogether, depriving adults and older minors of books and magazines they have a First Amendment right to purchase.

The regulation of bookstores that primarily disseminate sexually explicit material is a legitimate government function. But it must not be allowed to infringe on the constitutional rights of mainstream booksellers and their customers. Passage of this law could bring a court challenge. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs’ attorneys’ fees.

We ask you to please protect the First Amendment rights of mainstream bookstores in Indiana and reconsider this legislation.

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