



MEDIA COALITION, INC.

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memo in Opposition to portions of IC 35-42-4-4 and Indiana Senate Bill 313

The members of Media Coalition believe that parts of Indiana IC 35-42-4-4 are unconstitutionally overbroad and that Senate Bill 313 will extend the reach of the statute to criminalize substantially more speech protected by the First Amendment. If the legislature is inclined to pass S.B. 313, it must first fix IC 35-42-4-4. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Indiana: publishers, booksellers and librarians as well as producers and retailers of recordings, films, home video and video games.

S.B. 313 would amend the IC 35-42-4-4(a) to add to the definition of sexual conduct “female breast with less than a fully opaque covering of any part of the nipple.” Opaque covering is generally defined as not transparent or translucent. The present law, IC 35-42-4-4, criminalizes the possession or dissemination of any material that contains depictions of minors engaged in “sexual conduct.” However, several provisions of the statute go beyond this content to bar material that is fully protected by the First Amendment. Subsection 4(b) and (c) criminalize the dissemination of material that contains descriptions of sexual conduct of minors. Descriptions are generally understood to refer to written or oral communication rather than images. Subsection 4(c) bars the possession of images of adults who appear to be minors if they lack serious literary, artistic, political, or scientific value. It also makes it a crime to possess drawings of minors engaging in sexual conduct. “Sexual conduct” is defined in Subsection 4(a) as sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5) and exhibition of the uncovered genitals.

While we share the legislature’s deep concern about the sexual exploitation of minors and support laws that attempt to eradicate it, we believe portions of Indiana’s existing law are unconstitutionally overbroad and they must be repealed or amended before the state broadens the content that is subject to prosecution. The present law’s application to descriptions of minors engaged in proscribed conduct and adults who appear to be minors could criminalize significant mainstream material, including many Judy Blume books that describe teenagers engaging in sexual conduct, art books that contain paintings, drawings or sketches that have a sexual theme and movies such as *Animal House*, *The Reader*, *Romeo and Juliet* and *American Beauty* that depict adults who appear to be minors. Since none of this material includes images of actual minors, it cannot be made illegal unless it is found to be obscene under the three-prong test established in *Miller v. California*. 413 U.S. 15 (1973). Justice Kennedy, writing for the Court, said in *Ashcroft v. Free Speech Coalition*, “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.” 535 U.S. 234 at 255 (2002).

Subsections 4(b) and 4(c) criminalize descriptions of sexual conduct by minors and are unconstitutionally overbroad. In *New York v. Ferber*, the Supreme Court held that images of

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minors engaged in sexual conduct or lasciviously displaying the genitals was outside the protection of the First Amendment regardless of whether it satisfied the test for obscenity. However, the Court specifically noted that the material that does not enjoy First Amendment protection is limited to images and does not extend to descriptions: “Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.” 458 U.S. 747 at 764 (1982) (*Italics in original*)(footnote omitted).

The language in subsection 4(c) that criminalizes images of adults that appear to be minors is also unconstitutionally overbroad. The Supreme Court has also addressed whether the government can criminalize depictions of adults who appear to be minors. In a resounding decision in *Ashcroft v. Free Speech Coalition*, the Court held that the Child Pornography Prevention Act (CPPA) was unconstitutionally overbroad. 535 U.S. 234 (2002). Enacted in 1996, the CPPA criminalized both depictions of adults who appear to be minors and computer-generated images that appear to be of a minor engaging in real or simulated sexual activity or with his or her genitals lasciviously displayed. The Supreme Court ruled that unless the material included actual minors engaged in prohibited sexual activity, the material is protected by the First Amendment and could only be banned if it is first found to be obscene. The Court in *Ferber* also explained that visual depictions such as drawings remain protected by the First Amendment: “We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.” *Ferber*, 458 U.S. at 764-5 (1982). The “other depictions” referred to by the Court include drawings, which cannot be deemed to be child pornography since the image is not photographic record of a minor. In *Free Speech Coalition*, Justice Kennedy explained that the Court in *Ferber* relied on these alternative means of telling stories that touch on themes of sexual activity by minors to support its ruling banning images of actual minors. 535 U.S. at 251 (2002).

There has not been a facial challenge to either of these subsections of the Indiana law. An Indiana appellate court considered these questions in an interlocutory appeal of a child pornography prosecution. In *Logan v. State*, the court conceded that the law is overbroad “on its face since Subsection 4(b) applies to not only visual child pornography, but also written descriptions of child pornography. Similarly, Subsection 4(c) applies to written descriptions of child pornography, virtual child pornography, and pornography showing youthful-looking adults.” 836 N.E.2d 467, 472 (Ind. Ct. App. 2005). However, it declined to find the law unconstitutional since the defendant had not been charged with possession of this material. Instead the court opted to “leave for another day consideration of specific abuses of the application of Indiana Code Section 35-42-4-4.” *Id.*

In addition to our concerns about the existing Indiana law, we believe that S.B. 313 substantially broadens the material covered by the law and may be unconstitutionally vague. This broadening of the law without clarity on an element of what constitutes a violation could cause a significant chilling effect on protected speech. The bill adds to the definition of sexual conduct the exhibition of the “female breast with less than a fully opaque covering of any part of the nipple.” Presently, the law is limited to the exhibition of “uncovered genitals.” “Uncovered

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genitals” is easily understood and are unlikely to be exhibited or photographed inadvertently. Exhibition or depiction of “breasts with less than opaquely covered nipples” is potentially a much larger amount of material. It could include a “wardrobe malfunction” in a Miley Cyrus dance performance, a scene from a beach movie or any picture of a teenager taking an ill-advised picture in a flimsy t-shirt.

The exhibition of the less than opaquely covered breasts is qualified in that it must be “intended to satisfy or arouse the sexual desires of any person.” However, this qualification is vague since it fails to indicate if it refers to the female exhibiting any part of her nipple, the person who captures the image or the person who publishes the image. In *Ferber*, the Supreme Court held “lewd exhibition” was acceptable as part of the definition of sexual conduct since it was understood “with sufficient precision.” 458 U.S. at 765. “Lewd exhibition” is determined by the posing of the person in the image not the intent of the person depicted, the photographer or publisher. The “lewd exhibition” formulation allows the publisher to decide whether the picture is a lewd exhibition without guessing at the intent of the person in the picture or the photographer.

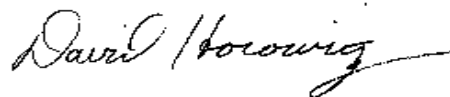
It may not be the intent of the legislature that the law or S.B. 313 apply to the material cited in our memo but the Supreme Court has held that laws that restrict speech must be carefully drawn. As Justice Roberts wrote in *U.S v. Stevens*, “But the First Amendment protects against the Government; it 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.” 130 S. Ct. 1577, 1591 (2010).

For all these reasons, we believe that Indiana’s present law violates the First Amendment. S.B. 313 may be unconstitutionally vague and exacerbates the constitutional infirmity in the law by broadening the content subject to it. A facial challenge to the law or the legislation could prove costly. If a court declares it unconstitutional, there is a strong possibility that the state will be ordered to pay the plaintiffs’ attorney’s fees.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Please protect the First Amendment rights of all Indianans and amend or repeal the portions of existing subsections 4(b) and 4(c) IC 35-42-4-4 that are overbroad and clarify S.B. 313 to limit its scope.

Respectfully submitted,



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