

Memo in Opposition to Kansas Senate Bill 401 as Amended

The members of Media Coalition believe that Senate Bill 401 as amended could threaten the distribution of First Amendment-protected material in Kansas. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Kansas: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They neither produce nor sell works that are legally obscene. However, they do disseminate a wide variety of mainstream material including art and photography books, mainstream movies and music, sex education material, and literary and artistic works. They have asked me to explain their concerns.

S.B.401 as amended would change the scienter requirement in Kansas' law that bars the display to minors of material harmful to minors. Present law makes it a crime to knowingly display such material to a minor. This legislation would lessen the standard to recklessly displaying such material to a minor. It would also broaden the law to apply to non-commercial establishments. This bill makes the same change to the scienter requirement as H.B. 2496 which is pending in the House and H.B. 2165 which was introduced last year but failed to pass out of Committee.

We are concerned that any lowering of the scienter requirement to be convicted of this crime will have a chilling effect on retailers and will inevitably lead to self-censorship. The Supreme Court has stated that government restriction on access to First Amendment protected material by adults or older minors in the interest of protecting younger minors would be "to burn down the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Although the courts have ruled that some limitation on the display of material "harmful to minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), is permissible, they have also ruled that these limitations may not unreasonably hinder the access of adults. *See also, Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989).

In *Smith v. California*, the Supreme Court ruled that laws restricting access to speech must include a scienter requirement. A bookseller could not be prosecuted if he or she had no knowledge of the contents of a book or magazine. 361 U.S. 147, 80 S.Ct. 215 (1959). The Court was very concerned that a lack of a knowledge requirement would lead to self-censorship by retailers. In his majority opinion, Justice Brennan stated, "For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. *Id.* at 153. The Court went on, "The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability,

thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Id.* at 153-4.

The Court in *Smith* did not mandate a specific knowledge standard but in numerous subsequent cases it has referred to knowingly as an appropriate standard. In *Hamling v. United States*, Justice Rehnquist wrote for the Court, "We think the "knowingly" language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. 87 at 124-125. See also, *United States v. X-Citement Video, Inc.*, 513 US 64 (1994); *Mishkin v. New York*, 383 US 502 (1966); *Manual Enterprises, Inc. v. Day*, 370 US 478 (1962). Knowingly was adopted as the standard for scienter in the model laws for barring the sale or display of materials that are obscene or harmful to minors and is the standard used in virtually every state that has such laws.

While there may not be a substantial difference between knowingly and recklessly, the members of Media Coalition are concerned with any lessening of the knowledge requirement. They are worried it will make it easier to pursue prosecutions against book and video store owners and other retailers. This will cause an inevitable chilling effect that will lead to self-censorship by retailers. If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.

As a result, the members of Media Coalition strongly urge you to protect the First Amendment rights of retailers and all the citizens of Kansas and reconsider S.B. 401 as amended.

Respectfully submitted,

A handwritten signature in cursive script that reads "David Horowitz". The signature is written in black ink and is positioned above the typed name and title.

David Horowitz
Executive Director
Media Coalition, Inc.