



THE MEDIA COALITION

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 House Bill 30

We believe that H.B. 30 violates the First Amendment and we respectfully urge the committee to amend the bill. We think this bill can be easily amended to cure the constitutional infirmities without undermining the legislature's goal of protecting minors. The trade associations that comprise Media Coalition have many members throughout the country, including Maryland: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 30 bars the display for sale of any book, magazine or other printed material pamphlet with a cover or content that is harmful to minors unless it is behind blinders or in an opaque bag so that only the name, price and date can be seen. This is unconstitutional because it restricts the access of adults to material that is constitutionally protected as to them. It is also unconstitutionally burdensome on retailers.

Courts have allowed some limitations on the display of material "harmful to minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), but they have also ruled that these limitations may not unreasonably hinder the access of adults to such material. Any law that restricts display must have two elements. First, the determination for whether it is harmful to minors must be judged for older minors. Second, the law can only require that a retailer take reasonable steps to prevent minors from perusing harmful to minors material, but it cannot mandate blinders, bagging or segregation as the only way to do so. Absent these elements, the law would be overly burdensome on a bookseller who may have tens of thousands of titles in his or her store and an unreasonable hindrance on the right of adults to access such material. Without the first element, the bookseller would have the impossible task to guess the age of each minor in a store and assess whether he or she is browsing a book that is illegal based on the minor's age. Without the second element, a bookseller would have to keep all of the books that might be inappropriate behind the counter. This could include art books, romance novels, sexual health material and numerous other books that contain sexual content. This is an unreasonable burden on the bookseller and adults who have a First Amendment right to access this material.

The controlling case on regulation of display of material harmful to minors is *Virginia v. American Booksellers Assn., Inc.*, which was brought by members of Media Coalition. 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989). The Virginia legislature amended its law to prohibit display of harmful to minors material in a manner whereby minors could browse them. The law was struck down in the district court and the Fourth Circuit affirmed. *American Booksellers Ass'n v. Virginia*, 802 F.2d 691 (4th Cir.1986) affirming, *American Booksellers Ass'n v. Strobel*, 617 F.Supp. 699 (E.D.Va.1985). The case was taken by the Supreme Court, which then certified two questions to the Virginia Supreme Court on the breadth of the law. Upon

Executive Director: David Horowitz Chair: Chris Finan, American Booksellers Association
Immediate Past Chair: Tom Foulkes, Entertainment Software Association Treasurer: Sean Bersell, Entertainment Merchants Association
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

receiving the answers to those questions, the Court vacated the ruling of the Fourth Circuit and remanded the case for further consideration. *Virginia v. American Booksellers Ass'n*, 488 U.S. 905, (1988).

On remand, the Fourth Circuit reversed the district court and held the law was constitutional. The ruling was based on two key findings in the answers to the Virginia Supreme Court to the certified questions. First, booksellers must take reasonable steps to prevent a minor from perusing such material, but the state cannot require that the material be bagged or blindered. The court held that to be convicted the bookseller “must have knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles.” *Virginia v. American Booksellers*, 882 F. 2d. at 129 (4th Cir. 1989) (citing *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (1988)). The bookseller can prevent perusing without using blinders or opaque bags.

Second, the harmful to minors material is to be judged based on what is illegal for oldest minors. The court held that if material has serious value for “a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.” *Id.*, (citing *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 624 (1988)).

We respectfully ask you to protect the First Amendment rights of booksellers, retailers and the people of Maryland and amend or defeat H.B. 30. It would only take small changes so the determination of whether material is harmful to minors is based on older minors and to allow blinders or bagging as one way to comply with the law but not the only way to comply. We would welcome the opportunity to work with the legislature to address the issues raised in our memo. If you would like to discuss our concerns, please contact David Horowitz, executive director, at 212-587-4025 #3 or horowitz@mediacoalition.org.