



Memorandum in Opposition to Rhode Island House Bill 7409

The members of Media Coalition believe that House Bill 7409 violates the First Amendment. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Rhode Island: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, home video and video games.

H.B. 7409 would have the Public Utility Commission create regulations to bar the display of material deemed “indecent.” It would have the PUC create regulations to determine what is reasonable for the display of “objectionable” materials. Finally it would mandate that the PUC provide “adequate warnings” for material deemed not suitable for viewing by minors. The legislation does not define “indecent” or “objectionable” nor does it give any information about who would be subject to the law or what type(s) of media could be barred if indecent.

H.B. 7409 is unconstitutional because it is vague and overbroad because it does not define the term “indecent” for the purpose of barring the display of such material to minors. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them.” *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). The government may restrict minors’ access to some sexually explicit speech, but it is a narrow range of material determined by a specific test. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court created a three-part test for determining whether material is First Amendment protected for adults but is unprotected for minors. Under the *Miller/Ginsberg* test, sexual material is not protected by the First Amendment for a minor when taken as a whole it,

1. predominantly appeal to the prurient, shameful or morbid interest of minors in sex;
2. be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
3. lack serious literary, artistic, political or scientific value.

Even if the speech meets this definition, it may be barred for minors only as long as the prohibition does not unduly burden the rights of adults to access it.

A recent law enacted in Oregon barring dissemination of sexual material to minors was struck down by the Ninth Circuit Court of Appeals as overbroad for making illegal material that

was beyond the scope of the *Miller/Ginsberg* test. *Powell's Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). Similarly, an Illinois law that barred the sale to minors of video games with sexual content, but omitted the third prong of the *Miller/Ginsberg* test was permanently enjoined by the U.S. District Court, and the ruling was vigorously affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff'd* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

It is possible that the legislation intends to import the definition of indecency from §11-31-10 of Rhode Island's criminal code. The definition of indecent in the section largely complies with the *Miller/Ginsberg* test. However, this would make the legislation unnecessary and redundant. §11-31-10 bars the sale or exhibition to minors of indecent material and restricts the display of such material to a minor. Alternatively, it is possible that the legislation intends to import the definition of "indecency" used by Federal Communication Commission for regulating television and radio broadcasts. However, the Supreme Court ruled that the F.C.C. standard for indecency is limited to over-the-air broadcasts on government-licensed airwaves. *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down application of federal indecency standard to Internet.)

H.B. 7409 could be unconstitutional because the state cannot completely bar the display of speech unless it is illegal as with obscenity. 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). The state can regulate the display to minors of material that meets the *Miller/Ginsberg* test, but the courts have ruled that these limitations may not unreasonably hinder the access of adults. *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989). This means a retailer must make a reasonable effort to prevent minors from perusing material with content that might be illegal, but the government cannot mandate the segregation of material or use blinders or opaque bagging.

The state is also barred from forcing speakers or retailers to include "adequate warnings" on their speech. Until speech is found to be illegal by a court, it is considered to be fully protected and cannot be forced to include any description of the speech. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). In 2005, laws were enacted in California and Illinois that required video games with "graphic violence" or sexually explicit content to carry a warning label reading "18" to advise parents of potential danger to kids if they played such games. Both laws were struck down as unconstitutional compelled speech. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F. 3d 950 (9th Cir. 2009) (now before the Supreme Court as *Brown v. Entertainment Merchants Association* but not on this aspect of the law), *Entertainment Software Association v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006).

Finally, it is for the courts to determine whether speech is legal or if it was appropriately displayed, not the Public Utility Commission. The Supreme Court has repeatedly emphasized

the importance of due process protections in a judicial proceeding in determining whether speech is obscene and outside of the First Amendment. In *Marcus v. Search Warrant*, the Court held, “It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.” 367 US 717, 731 (1961). In *Bantam Books, Inc. v. Sullivan*, the Court said:

“Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrant*, *supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, e. g., *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507; *NAACP v. Button*, 371 U. S. 415. “[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools” *Speiser v. Randall*, 357 U. S. 513, 525.”

372 US 58, 66 (1963).

While this legislation may be susceptible to narrowing interpretations, the Supreme Court is skeptical about courts rewriting laws to find them constitutionally sound. As Justice Roberts wrote last year, “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.” *U.S. v. Stevens*, 130 S. Ct. 1577 (2010).

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs’ attorney’s fees. In past challenges to such legislation, states have paid to the plaintiffs as much as \$500,000 in legal fees.

We believe Rhode Island can protect minors while also respecting the First Amendment. We are happy to work with the legislature to help it to do so. If you would like to further discuss our concerns about this bill, please contact me at 212-587-4025 #3 or by email at horowitz@mediacoalition.org.

We ask you to please protect the First Amendment rights of all the people of Rhode Island and reject H.B. 7409.