



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America Recording Industry Association of America

Memo in Opposition to Florida House Bill 855 and Senate Bill 1454

We write to oppose H.B. 855 and S.B. 1454 because they unconstitutionally infringe on protected speech. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Florida: authors, publishers, booksellers, librarians and producers and retailers of recordings, films, home video and video games.

H.B. 855 and S.B. 1454 would make several changes to the definition of harmful to minors in section 847.001. It would delete the serious value prong and replace it with a second description of the type of content that would be subject to the law. It deletes the “taken as a whole” element of the definition. It also amends the definition of the crime of distribution of material harmful to minors in section 847.012 to allow the law to apply to any sexual material without requiring that it fit the definition of harmful to minors in 847.001. Finally, it amends the definition of child pornography in section 847.001 to include text that depicts a minor engaging in sexual conduct. The present law is limited to images that depict a minor engaging in sexual conduct.

This legislation is unconstitutional because it applies to material that goes beyond the sexual speech the Supreme Court has said may be restricted for minors. The government may bar minors from viewing, reading or hearing sexually explicit speech commonly referred to as material “harmful to minors” but this term is shorthand for a narrow range of speech determined by the three-prong *Miller/Ginsberg* test. The Supreme Court announced the three-part test in *Ginsberg v. New York*, 390 U.S. 629 (1968), and it is generally understood as having been modified by the Court’s subsequent reformulation of the test for adult obscenity in *Miller v. California*, 413 U.S. 15 (1973). The test establishes that speech that is otherwise legal for adults may be banned for minors only if it depicts or describes explicit sexual activity or nudity and, when taken as a whole:

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

The Supreme Court has rejected attempts to restrict minors’ access to sexual speech in a manner that was broader than what is allowed under the *Miller/Ginsberg* test. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 865 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989); *See also, Powell’s Books v. Kroger*, 622 F.3d 1202, 1213 (9th Cir. 2010)(blocking enforcement of an Oregon law barring sexual speech for minors that did not comply with the *Miller/Ginsberg* test); *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff’g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (permanently blocking an Illinois law that barred the sale of sexual material to minors but omitted the third prong of the *Miller/Ginsberg* test). The Supreme Court has directly addressed the importance of the “serious

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value” prong in the formulation of the *Miller/Ginsberg* test. It is meant to be a safe harbor for important speech even if it satisfies the first two prongs of the obscenity test. In *Pope v. Illinois*, Justice White wrote:

In *Miller* itself, the Court was careful to point out that '(t]he First Amendment protects works, which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.'

481 U.S. 497, 500 (1987).

The legislation is also unconstitutional because it adds “text” to the definition of child pornography. Generally, “text” refers to written rather than visual communication. The Supreme Court has held that non-obscene descriptions of sexual conduct by minors is fully protected by the First Amendment and cannot be made illegal by shoehorning them into a definition of child pornography. In *New York v. Ferber*, the Supreme Court held that photographic images of minors engaged in sexual conduct or lasciviously displaying the genitals are outside the protection of the First Amendment. 458 U.S. 747 (1982). The Court specifically considered whether written descriptions were not protected by the First Amendment and concluded: “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.” *Id.*, at 764 (Italics in original)(footnote omitted). If the legislature’s intent in adding the word “text” is meant to apply to drawings or non-photographic pictures, the legislation would still be unconstitutional. The Supreme Court has also held that drawings and other non-photographic images cannot be defined as child pornography. In *Ferber*, they 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.” *Id.*, at 764-5 (1982).

Nor can this legislation be saved by a promise of legislators or prosecutors that the statute will be construed only narrowly. In *U.S. v. Stevens* the Court said, “[T]he 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.” 559 U.S. 460, 480 (2010).

If you would like to discuss our concerns further, we would welcome the opportunity to do so. Please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025 x3. We ask you to protect the First Amendment rights of all the people of Florida and amend or defeat H.B. 855/S.B. 1454.