**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

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| BIG HAT BOOKS, *et al.*, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | CASE NUMBER: 1:08-cv-0596-SEB-TAB |
| | ) | |
| PROSECUTORS: ADAMS, *et al.* | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Defendant Prosecutors urge the Court to deny the plaintiff's motion for summary judgment.[1] The statute at issue requires only that certain persons who intend to sell sexually explicit materials register with the Secretary of State and pay a registration fee. No sales are prohibited or restricted. The materials that cause the business to register may still be sold 24 hours a day in any location where the business is located.

Plaintiffs are retailers who sell or whose members sell literature, books, magazines, DVD videos, computer and console video games, music, art and merchandise related to art. They are not "adult bookstores" by their own descriptions. (See memorandum in support of motion for summary judgment or preliminary injunction, docket no. 22 (hereafter "memorandum"), p. 13.)

[1] Plaintiffs alternatively ask the Court for a preliminary injunction. The defendants concede that it is appropriate for the Court to rule on the merits; no augmentation of the record is necessary.

They challenge Indiana House Enrolled Act 1042 ("HEA 1042") of 2008 as unconstitutional.

HEA 1042 is intended to give local communities a "heads up" if an adult bookstore is attempting to move into that community. (*See* feature and audio on National Public Radio, May 27, 2008, http://www.npr.org/templates/story/story.php?storyId=90864859 (reviewed June 5, 2008).) Senator Brent Steele, a co-sponsor of the legislation, has stated that the bill was aimed at helping counties without zoning ordinances track businesses selling sexually explicit material, in particular, adult stores that have been opening up with increasing frequency along highways in rural areas. Tim Evans, *Booksellers Incensed Over Sexual Content Law*, Indianapolis Star, Mar. 26, 2008. The bill's author, Representative Terry Goodin, said that he wrote the bill as a way to identify potentially objectionable businesses before they open, stating, "This bill is in response to a situation in my district where a[n adult] store gave residents the impression it would be selling books, movies and snacks." Jessica Reaves, *Indiana Law Focuses on 'Sexually Explicit' Materials*, Chicago Tribune, Apr. 10, 2008. With that background and purpose, the Indiana General Assembly required registration of businesses that sell matter defined in the criminal code as harmful to minors or devices that are used in, marketed primarily for, or provide for the stimulation of the human genital organs; or masochism or a masochistic experience, sadism or a sadistic experience, sexual bondage, or sexual domination. The registration is communicated to local governmental bodies, including the county and municipal executive and zoning boards.

Reading the statute as written rather than as described by the plaintiffs, it is nothing more than a requirement of being truthful and not covering up the true nature of a business. No sale or offer to sell is prohibited or limited in any way. Although sales of obscene matter can be prohibited, R*oth v. United States*, 354 U. S. 476, 484–485 (1957), there is no attempt in this statute to do so. The registration statute simply requires that any store offering sexually explicit materials for sale advise the local government officials (by way of the Secretary of State) of the true nature of the business. Full disclosure is required and nothing is prohibited in the law except sales without first registering with the Indiana Secretary of State. There is no First Amendment violation in requiring full disclosure of true facts and notice to the local government of that truth.

## I. Standard for Summary Judgment

Defendants do not dispute the standard for summary judgment as laid out by the plaintiffs.

## II. Statement of Material Facts in Dispute

None.

However, several of the purported facts, where plaintiffs state that being labeled as a purveyor of materials harmful to minors might hurt their businesses, are merely speculative. No studies or historical facts are cited or recited. Nothing within the personal knowledge (as opposed to a personal guess) is presented. Affidavits offered on summary judgment "shall be made on personal knowledge [and] shall set forth such facts as shall be admissible in

evidence." *See* F.R.C.P. 56(e)(1). They must also "cite specific concrete facts establishing the existence of the truth of the matter asserted." *Arnold v. Morton Int'l Inc.*, 2000 WL 1007176, *4 (S.D. Ind. 2000) (quoting *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998)). These affidavits are conclusory on this point. S*ee Toro Co. v. Krouse, Kern & Co.*, 827 F.2d 155, 162-63 (7th Cir. 1987) ("[S]tatements based merely on information and belief do not satisfy the standards of Rule 56(e)."). Courts are to disregard "conclusory allegations" in affidavits, as opposed to "substantiating facts." "Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted." *Drake*, 134 F.3d at 887 (quotation omitted); s*ee also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) ("[S]tatements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or [are] merely conclusory do not meet this requirement.").

Statements of opinion contained in a summary judgment affidavit are inadmissible. *See, e.g., Haskins v. New Venture Gear*, 2002 WL 425023, *3 (S.D. Ind. 2002); *Arnold*, 2000 WL 1007176 at *4.

The plaintiffs do no more than speculate about the consequences of registering with the Secretary of State. Those speculations are inadmissible and should be disregarded by the Court. S.D. Ind. L.R. 56.1(e).

## III. Statutory Background

HEA 1042 provides that "[a] person . . . that intends to offer for sale or sell sexually explicit materials shall register with the secretary of state the intent to offer for sale or sell sexually explicit materials and provide a statement detailing the types of materials that the person intends to offer for sale or sell." HEA No. 1042 (to be codified at Ind. Code § 23-1-55-2). Upon registration, "the secretary of state shall notify the local officials of the county in which [the] person . . . intends to offer for sale or sell sexually explicit materials of the registration." *Id.* (to be codified at Ind. Code § 23-1-55-3(b)). The Secretary of State is also required to collect a $250 fee from the registrant. *Id.* (to be codified at Ind. Code § 23-18-12-3(a)(24)). The registration and fee requirements "do[] not apply to a person who sells sexually explicit materials on June 30, 2008, unless the person changes the person's business location after June 30, 2008." *Id.* (to be codified at Ind. Code § 23-1-55-1). A person or an employee of a person who knowingly and intentionally offers for sale or sells sexually explicit materials in violation of this statute commits unregistered sale of sexually explicit materials, a Class B misdemeanor, which is punishable by a fine of up to $1,000 and up to 180 days in jail. *Id.* (to be codified at Ind. Code § 24-4-16.4-4); Ind. Code § 35-50-3-3.

As used in this new law, "sexually explicit materials" means a product or service:

> (1) that is harmful to minors (as described in Ind. Code § 35-49-2-2), even if the product or service is not intended to be used by or offered to a minor; or
>
> (2) that is designed for use in, marketed primarily for, or provides for:
>
> (A) the stimulation of the human genital organs; or
>
> (B) masochism or a masochistic experience, sadism or a sadistic experience, sexual bondage, or sexual domination.

HEA 1042 (to be codified at Ind. Code § 24-4-16.4-2).

A product or service is harmful to minors if: "(1) it describes or represents in any form, nudity, sexual conduct, sexual excitement or sado-masochistic abuse; (2) considered as a whole, it appeals to the prurient interest in sex of minors; (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and (4) considered as a whole, it lacks serious literary, artistic, political or scientific value for minors." Ind. Code § 35-49-2-2.

## IV. This is not a Proper Facial Challenge

Because there is an application of the statute that does not implicate the First Amendment, this facial challenge cannot succeed.

> Under *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in all of its applications. *Id.*, at 745, 107 S.Ct. 2095. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail

> where the statute has a " 'plainly legitimate sweep.' " *Washington v. Glucksberg*, 521 U.S. 702, 739-740, and n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (STEVENS, J., concurring in judgments).

*Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008). *Accord Crawford v. Marion County Election Board*, 128 S.Ct. 1610, 1623 (2008).

HEA 1042 defines two different categories of sexually explicit materials: (1) materials that are harmful to minors; and (2) products used for the stimulation of the human genital organs or for masochism, sadism, sexual bondage or sexual domination (hereinafter "sexual devices"). Although the plaintiffs appear to challenge the statute as a whole, their memorandum addresses only the "materials harmful to minors" aspect of the law. There is no evidence presented in the affidavits in support of summary judgment stating or even hinting that any of the plaintiffs owns or represents adult stores or any other establishments that sell sexual devices. The plaintiffs instead focus on how this statute will impact their ability to sell mainstream books, magazines, DVDs, video games, art and other forms of entertainment media.

**A. Sexual Devices**

Notwithstanding any rights to commercial speech that may exist regarding the advertisement of sexual devices, *see, e.g., This That and The Other Gift and Tobacco, Inc. v. Cobb County*, 285 F.3d 1319, 1323 (11th Cir. 2002), the ***sale*** of such devices does not itself implicate any First Amendment right. Thus, challenges to laws restricting the sale of sexual devices have been brought under the Fourteenth Amendment, with plaintiffs in those cases

arguing that such laws violate sexual-device users' rights to privacy and personal autonomy. *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

The Eleventh Circuit upheld an Alabama statute that prohibited the distribution of sexual devices. In *Williams*, the Court applied rational basis review to the challenged statute and ultimately found that "the State's interest in preserving and promoting public morality provides a rational basis for the challenged statute." 478 F.3d at 1320. Rational basis review was appropriate, the Court stated, because *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas's sodomy ban), declined to recognize a *fundamental* right to sexual privacy.[2] *Id.* The Court noted that while public morality was an insufficient government interest to sustain the Texas sodomy statute, which regulated strictly private behavior, the sexual device restriction targeted public commercial activity and thus could be sustained by the State's interest in promoting and preserving public morality. *Id.* at 1322.

Under this analysis, even if HEA 1042 were to ban the sale of sexual devices, it would be a valid application of the statute and the facial challenge would have to fail. But the registration statute does not ban sales of sexual devices and only requires registration of a business that sells or intends to sell

[2] The Court in *Reliable Consultants*, on the other hand, did not specify what standard of review it was applying. While acknowledging that *Lawrence* had not recognized a fundamental right, the Court nonetheless declined to specifically apply a rational basis standard, stating that it would "[i]nstead . . . simply follow the precise instructions from *Lawrence* and hold that the statute violates the right to sexual privacy, however it is otherwise described." *Reliable Consultants*, 517 F.3d at 745 n.32.

sexual devices, or which sells sexually explicit materials. Plaintiffs are not seeking a construction of the statute or a declaration that it does not apply to them but seek an injunction against the statute in its entirety. They bring only a facial challenge, but that challenge is not proper and should be rejected because even if the statute were seen as prohibiting or limiting the sale of sexual devices, it would be valid and not subject to a challenge under the First Amendment. Therefore, summary judgment should be denied because this action is not a proper facial challenge to a statute that has a plainly legitimate scope.

In fact, the plaintiffs do not even challenge that portion of the statute that requires registration of persons who intend to sell sexual devices. There is no mention in their affidavits or their motion of devices, except when quoting or discussing the statute. But, there is no argument that the sexual device provision applies to them or is invalid.

Therefore, although plaintiffs present a facial challenge to the statute on the face of the complaint and in their motion for summary judgment, they are not even attacking half of the statute. A facial challenge is not available to them and their attempt to do so in the motion for summary judgment should be rejected.

**B. Standing**

These plaintiffs may not challenge the sexual device part of the statute—they do not claim to sell sexual devices and, therefore, lack standing to bring such a challenge.

At the core of the standing doctrine—which is constitutional in nature, grounded in Article III—is the requirement that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, there is no such injury alleged as to the challenge to that part of the statute requiring registration of businesses that sell sexual devices. As the plaintiffs do not claim to sell sexual devices, they cannot complain about the requirement of registering their intent to sell such devices with the Secretary of State or the notice of registration given to local governmental authorities. These plaintiffs lack standing to complain about registering intent to sell sexual devices. And because they lack standing to challenge a part of the statute, there cannot be a facial challenge or an injunction against the entire statute. Even were there a proper facial challenge, the requirement of registering with the Secretary of State the intent to sell sexual devices is a valid requirement and would be valid even were there a ban on such sales.

Because part of the statute is not and cannot be challenged by these plaintiffs and because that part of the statute would be constitutional even were there a challenge made by a person with standing, summary judgment should be denied. The statute cannot be invalidated in its entirety because part of the statute is not and cannot be challenged by these plaintiffs and has a plainly legitimate scope. Therefore, summary judgment should be denied as an improper and ineffective facial challenge to the registration statute.

## V. Summary Judgment should be Denied

"[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U. S. 648, 657 (1895); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (collecting cases). Plaintiffs seek instead to point to possible applications of the statute that they feel are questionable under the First Amendment. By failing to follow the maxim that statutes are presumed to be constitutional and should be construed so as to save them against challenges, plaintiffs come to an unreasonable and unsupported conclusion that the statute has constitutional flaws.

### A. Standard of Review

Plaintiffs assert that HEA 1042 is unconstitutional as a content-based regulation that is not narrowly tailored to meet a compelling government interest. Implicit in this allegation is the argument that the appropriate standard of review for HEA 1042 is strict scrutiny, requiring that the statute further a compelling governmental interest and be narrowly tailored to satisfy that interest. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

Generally, content-based regulations of speech are subject to strict scrutiny. However, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), Justice Kennedy stated in his concurring opinion that content-based zoning regulations can be exceptions to that rule. *Id.* at 448 (Kennedy, J., concurring). Thus, the principle is sound that "[a] zoning restriction that is designed to decrease secondary effects and not speech should be subject to

intermediate rather than strict scrutiny." *Id.* (Kennedy, J., concurring).

Accordingly, HEA 1042, which does not regulate speech at all but only requires registration and notification to local authorities of the intent to sell sexually explicit materials or sexual devices, is comparable to a zoning ordinance designed to reduce the secondary effects of adult businesses and intermediate scrutiny applies, not strict scrutiny.

**B. Zoning Laws**

Plaintiffs concede that the governmental interest of protecting minors from indecent material is a compelling one. (Memorandum, p. 19.) The definition of sexually explicit materials, aside from the sexual device part that the plaintiffs do not challenge, is limited to materials that are "harmful to minors." Therefore, plaintiffs concede that there is a compelling governmental interest being served by the statute, which requires registration of businesses so that local government officials will be advised of the true nature of the business. Again, no sales are restricted and the statute requires only that businesses selling or intending to sell materials that are harmful to minors state their intent by registering with the Secretary of State so that the Secretary of State can notify local authorities.

Although HEA 1042 is not a zoning statute or ordinance *per se*, the bill's author and sponsors intended that it perform the same function in areas of the state without zoning ordinances. Therefore, the statute should be analyzed under the same terms as the zoning ordinances it is designed to supplement.

Typically, the secondary effects associated with adult businesses and at which zoning ordinances are aimed are crime and neighborhood blight that result from adult businesses. *See, e.g., Alameda Books*, 535 U.S. at 445-46; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 220-21 (1990). Under intermediate scrutiny, a law will be found constitutional "so long as [it is] designed to serve a substantial government interest and do[es] not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986). Courts must ask whether the legislative body can demonstrate a connection between the speech regulated by the law and the secondary effects that motivated its adoption. *Alameda Books*, 535 U.S. at 441. In evaluating the sufficiency of this connection, courts "examine evidence concerning regulated speech and secondary effects." *Id.* The evidentiary requirement will be met if the evidence upon which the legislative body relied in enacting the regulation "is reasonably believed to be relevant for demonstrating a connection between [secondary effects of] speech and a substantial, independent government interest." *Id.* at 438. The Indiana General Assembly relied on the fact that businesses were sometimes less than forthright about their true nature and enacted a statute that simply requires registration if the intent is to sell sexual devices or materials that are harmful to minors. Again—because this cannot be emphasized enough—the statute does not prohibit or limit sales but merely requires registration so local authorities can be advised. To the extent that content is regulated, it is regulated not by the registration statute but by the obscenity statutes found at

Indiana Code Chapter 35-49-3, which are not at issue in this case. The purpose of the statute is to fill a gap left by the absence of zoning codes in some areas of the state. Were it feasible, all areas of the state could be zoned and officials would be then be notified of the nature of the businesses being located in their communities through the zoning process. Zoning the entire state would be a considerable burden, perhaps impossible to do in rural areas, so the registration requirements were enacted and are directly related to the same governmental interest in limiting or avoiding crime and the neighborhood blight that result from adult businesses, interests that are independent of regulating content.

Because the registration statute is closely analogous to zoning provisions, which have been upheld against challenges similar to those raised by these plaintiffs, summary judgment and a preliminary injunction to consider summary judgment should be denied.

**C. Fee or Tax**

The plaintiffs also allege that HEA 1042 is an unconstitutional content-based tax or fee on the dissemination of information protected by the First Amendment.

The $250 registration fee is indeed higher than other fees charged for registering with the Secretary of State. But those other fees are for the filing of documents or providing a copy or a certification of a filed document. In contrast, the fee for registration as a seller of sexually explicit materials covers the costs of Secretary of State in not only filing the documents, maintaining the

documents, making the documents accessible to public inquiry but also the added steps of determining and notifying the local officials of the county or city in which the business is or will be located. This is the only fee that covers the Secretary of State doing anything more or other than filing and maintaining the files. The Secretary of State is required to take affirmative actions on receipt of the registration, by determining the appropriate local officials and giving notice to those officials. Viewed as a user fee, the statutory fee just makes sense and resembles a fee to petition for a zoning approval or variance. Those causing the Secretary of State to act cover the cost of the actions. There is nothing in the record to suggest that the fee is greater than necessary to cover the activities that the Secretary of State is mandated to undertake once a registration statement is filed. Accordingly, summary judgment on the basis of a improper fee or tax should be denied.

"A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of *their* speech." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (emphasis added). Moreover, government may not regulate the secondary effects of speech by imposing a content-based fee or tax. *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring) (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)). However, the registration fee only covers the Secretary of State's actions in giving the required notice and it is, therefore, not imposing a burden due to the content of the speech and is not a content-based fee or tax but a measure whereby the businesses pay for

the services that are rendered in notifying local government officials. Moreover, the record does not establish a connection between the speakers and those would remit payment. Summary judgment should be denied.

**D. Permit to Engage in Protected Activity**

The plaintiffs argue that HEA 1042 unconstitutionally requires a permit to engage in activity protected by the First Amendment and incorrectly contend that permits may never constitutionally be required to engage in speech that is protected by the First Amendment.

The United States Supreme Court held that permit or license requirements to engage in First Amendment activity are valid if procedural safeguards are implemented to prevent censorship based on the content of speech. Decisions on permits must be made by an identified decision-maker, with limited discretion, based on published criteria, and subject to speedy appeal. *Freedman v. State of Maryland*, 380 U.S. 51, 58-59 (1965).

The United States Supreme Court is especially concerned with the ability of public officials to censor speech as a result of being vested with unfettered discretion to grant or deny permits to engage in First Amendment activity. *See*, *e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (holding that government may not condition speech on obtaining a license or permit from a government official if that official's discretion is boundless).

HEA 1042 is not a permitting provision at all, but even if it were it is a permissible permitting provision because it creates no risk of censorship and does not place unfettered discretion in any public official. Every business

owner who pays the fee is permitted to sell sexually explicit materials. No official has the power to deny a "permit" or to otherwise prevent the sale of sexually explicit materials if the registration is filed and the registration fee is paid. The "permit" is "issued" upon registration. No one may deny a "permit" to a business that registers. Although there is no provision for appeal of a permit that is denied, because none can be denied no appeal will ever be necessary. As stated above, this is merely a registration requirement and there is no effort to stop, restrict or limit sales.

Therefore, there is no permit being required that can be denied to any applicant and no basis for summary judgment on the claim that the registration requirement is an unconstitutional permit requirement.

**E. Vagueness and Overbreadth**

Regulations must be narrowly tailored to serve a significant government interest unrelated to the suppression of free expression and leave alternative channels for communication. *Schultz v. City of Cumberland*, 228 F.3d 831, 851 (7th Cir., 2000). The businesses that must register under the statute must only register. There is no limit to the materials that can be sold, or even on the customers to whom it can be sold, merely a registration requirement so that local government officials can be advised of the nature of businesses that are in their county. The statute merely asks for truth in advertising.

The plaintiffs allege that HEA 1042 is unconstitutionally vague in its lack of detail in the reporting requirement, in its definition of "persons," and in its use of cross-references to various sections of the Indiana Code. These

arguments are better as illustrations of poor drafting than as illustrations of unconstitutional vagueness. They do not argue that the phrase "harmful to minors" is vague.

"[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Therefore, a law must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Id.* at 108. Explaining that "we can never expect mathematical certainty from our language," the United States Supreme Court in *Grayned* found no unconstitutional vagueness in the ordinance in question. That statute was "marked by flexibility and reasonable breadth, rather than meticulous specificity." *Id.* at 110 (internal cites omitted).

A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado*, 530 U. S. 703, 732 (2000); *see also Grayned*, 408 U. S. at 108–09. However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U. S. 781, 794 (1989).

Applying these standards to the statute at issue, the drafting complaints the plaintiffs point to are not so severe as to render a person of ordinary intelligence completely unable to ascertain what the statute means by "person" or what must be included in the business's statement to the Secretary of State.

It is logical that sections 3 and 4 of the statute ("a person or an employee or an agent of a person …") would lead a person of ordinary intelligence to assume that each employee of a business selling sexually explicit material would not need to register and pay the $250 fee as plaintiffs hypothesize. There is one fee per business per location because there is one "person" as defined in the statutes who is offering the materials for sale. The sales associates are merely assistants and are not "selling" the materials but assisting the owner to sell them. They cannot sell what they do not own; only the owned can sell (*i.e.*, transfer title to) property.

It is also logical to assume that any material subjecting a business to the registration requirement in the first place should be included in its statement to the Secretary of State. Several things are important to note about the statement. First, the statement is not forwarded to the local government officials by statute, although it would be available. Second, there is no provision for rejecting a registration that inadequately details the sexually explicit materials, although at some point an attempt to frustrate the statute by refusing to provide a good faith statement could render the registration invalid. Third, the plaintiffs have provided a sufficiently detailed statement of the types of materials they offer or intend to offer for sale in their affidavits submitted in support of their motion for summary judgment. Having done so when it suits them, they can hardly claim that they cannot or do not know how to provide a statement of the types of materials they sell. They have already done it. Summary judgment should be denied on this point.

The plaintiffs' third vagueness contention—that the presence of cross-references make HEA 1042 unconstitutionally vague—avails them nothing. Indeed, the claim is unsupported by looking at the statute. HEA 1042 is hardly the "regulatory maze" found unconstitutionally vague in *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 358 U.S. 589, 604 (1967), cited by the plaintiffs. In plaintiffs' own brief, *Keyishian* is quoted as holding "[v]agueness of wording is *aggravated* by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules." *Id.* (emphasis added). It does not follow that cross-referencing on its own, absent a complicated statutory, regulatory and administrative framework, would render a statute unconstitutional. Vagueness is "aggravated" by prolixity and profusion of cross-references, it is not created in that manner.

The plaintiffs do not specifically attack as vague the definition of "products or services harmful to minors," which was held to be not unconstitutionally vague in the recent Indiana Court of Appeals decision of *Zitlaw v. State*, 880 N.E.2d 724 (Ind. Ct. App. 2008). But the plaintiffs do implicitly make a vagueness argument with respect to this phrase in that portion of their memorandum addressing their overbreadth claim when they assert that store owners and clerks will not know what material is covered by the statute and what is not. (Memorandum, p. 32.)

That the merchandise sold by these businesses may have some literary or artistic value makes no difference. The statute defines "sexually explicit

materials" by reference to what is harmful ***to minors***. Thus, we are dealing with more here than just the *Miller* definition of obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973) (A work is obscene if "taken as a whole, [it] appeal[s] to the prurient interest in sex, [it] portray[s] sexual conduct in a patently offensive way, and [], taken as a whole, [it] do[es] not have serious literary, artistic, political, or scientific value."); *cf* Ind. Code § 35-49-2-1 (using the *Miller* factors to define "obscene matter or performance"). Merchandise that has literary or artistic value with respect to an adult consumer does not have that same value with respect to minors. But sale is not being prohibited, disclosure is being required.

In *Zitlaw*, the defendant was charged under Indiana Code § 35-49-3-3 of conducting a performance harmful to minors, a class D felony. *Id.* at 726. On appeal, the defendant argued that the definition of "performance harmful to minors" is unconstitutionally vague and posed a number of hypothetical situations purporting to demonstrate this vagueness. The court held, however, that "[d]espite the hypotheticals posed by Zitlaw, we conclude that individuals of ordinary intelligence would comprehend the performance harmful to minors statute adequately enough to inform them of the proscribed conduct." *Id.* at 732. A review of the phrase shows this to be true, especially in light of the recent decision upholding its constitutionality.

The statute defining "harmful to minors" is I.C. § 35-49-2-2:

> A matter or performance is harmful to minors for purposes of this article if:
>
> (1) it describes or represents, in any form, nudity, sexual

> conduct, sexual excitement, or sado-masochistic abuse;
>
> (2) considered as a whole, it appeals to the prurient interest in sex of minors;
>
> (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
>
> (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

This statute is easily understood. The plaintiffs even give examples in their affidavits of materials that come within this definition. Again, their claims of inability to understand the statute are belied by their own actions in this case.

As a final aside on the drafting of the statute, plaintiffs claim that the real purpose of the statute cannot be notice to local officials because there is no requirement of providing the address. However, "registration" implies including an address. There is no First Amendment right implicated in failing to spell out the precise terms of registration.

The plaintiffs also contend that HEA 1042 is unconstitutionally overbroad because it regulates speech that is protected by the First Amendment in addition to speech that is not. A vague definition of material that comes within the scope of the statute could subject a broad array of material protected by the First Amendment to the registration requirement. However, the statute is not overbroad. It does nothing to remove speech from the marketplace of ideas and only requires that the business register with the Secretary of State.

Plaintiffs argue that "(w)hile it is permissible for the General Assembly to regulate material available to minors…the mode of regulation (here)…is

unconstitutional because it has the effect…of chilling the distribution of…material that is perfectly legal for adults." (Memorandum, pp. 29-30.)

The United States Supreme Court has had multiple occasions to address the contention that statutes regulating material "harmful to minors" will cause a "chilling effect." *See*, *e.g.*, *Reno*, 521 U.S. 844; *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002). As in those cases, the plaintiffs here argue the uncertainty that speakers will experience in determining what materials are "harmful" will cause them to self-censor, eliminating some constitutionally protected speech from the marketplace of ideas.

The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800 (1984).

Content-based regulations such as this one "raise special First Amendment concerns because of [the] obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72. Nonetheless, the United States Supreme Court has held that even if an obscenity regulation means that "some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. . .deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Fort Wayne*

*Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989) (quoting *Smith v. California*, 361 U.S. 147, 154-44 (1959)). Thus, possible self-censorship is not enough to render a law unconstitutional on First Amendment grounds. *Id.* And, yet again, no material is being prohibited by the registration requirement. Even the most patently obscene materials are not prohibited under the registration statute, as long as the store registers. There are, of course, other statutes that regulate the sale of materials not protected by the First Amendment.

The United States Supreme Court has held that is it permissible for states to limit indecent, non-obscene material when it comes to protecting minors. *Ginsberg v. State of New York*, 390 U.S. 629, 643 (1968). As long as statutes defining and limiting "material harmful to minors" are structured to parallel the *Miller* test for obscenity—including an exception for material with serious value and a community standards-based definition of indecency—they will not be considered unconstitutionally overbroad. *Reno*, 521 U.S. at 865, 873.

In *Ashcroft v. ACLU*, the Court specifically addressed the statute's definition of "material harmful to minors," holding that its reference to contemporary community standards did not render the statute unconstitutional on its own. The Court rejected assertions that a community standards-based definition of "material harmful to minors" in the context of the Internet would present too much uncertainty about what material actually falls into that category. 535 U.S. at 583. Thus, a community standards-based definition is not unconstitutionally broad when the community to which the

standard would be applied is clear, as it is under HEA 1042. Because HEA 1042 defines "material harmful to minors" in terms that parallel the *Miller* test, it is not unconstitutionally overbroad.

Plaintiffs point out that "speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002). While this is true, HEA 1042 does not attempt to "silence completely" any protected speech, but merely seeks to provide notice to communities of where material not suitable for minors as defined in the statute is sold. The fact that no speech is completely removed from the marketplace of ideas by HEA 1042 distinguishes it from cases like *Ashcroft v. Free Speech Coal.*, 535 U.S. at 252 and *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), in which statutes limiting indecent, non-obscene speech have been invalidated for overbreadth.

HEA 1042 is also distinguishable from other statutes that have been deemed unconstitutional on overbreadth grounds. For example, in *Reno*, the United States Supreme Court struck down provisions of the Communications Decency Act that prohibited the transmission of obscene or indecent communications to minors on overbreadth grounds. In distinguishing the CDA from the statute upheld in *Ginsberg* (holding states may prohibit distribution or sale to minors of sexually explicit material that is harmful or obscene to them, but not obscene to adults), the Court pointed to the fact that the CDA did not have any requirement that the material in question lack serious literary,

artistic, political, or scientific value. *Reno*, 521 U.S. at 865. Unlike the CDA, HEA 1042 includes an exception for works of serious value.

The registration requirement is neither vague nor overbroad. Therefore, the plaintiffs' motion for summary judgment should be denied.

**CONCLUSION**

For the foregoing reasons, it is respectfully urged that the plaintiffs' motion for summary judgment (and the motion for preliminary injunction, if the Court addresses it) be denied.

Respectfully submitted,

STEVE CARTER
Indiana Attorney General

By: s/*David A. Arthur*
David A. Arthur
Deputy Attorney General
Atty. No. 2461-48

**CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2008, a copy of the foregoing memorandum was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Kenneth J. Falk
ACLU of Indiana
kfalk@aclu-in.org

Jon Laramore
BAKER & DANIELS
jon.laramore@bakerd.com

Matthew Thomas Albaugh
BAKER & DANIELS
matthew.albaugh@bakerd.com

Michael A. Bamberger
SONNENSCHEIN NATH & ROSENTHAL LLP
mbamberger@sonnenschein.com

s/*David A. Arthur*
David A. Arthur
Deputy Attorney General

Office of Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204-2770
Telephone: (317) 232-6286
Fax: (317) 232-7979
E-Mail: David.Arthur@atg.in.gov
daa:483636s1