



April 2, 2025

Education Administration Subcommittee
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Dear Representatives,

On behalf of the Foundation for Individual Rights and Expression (FIRE), a national nonpartisan nonprofit that defends free speech for all Americans, I write to express our opposition to HB 1539.¹ The bill's redefinition of "harmful to minors" in the criminal code would violate the First Amendment, and its broad restrictions on school library materials would likely lead to arbitrary book removals and constitutional problems.

Amendments to Section 847.001

Section 847.001(7) of Florida Statutes currently tracks the constitutional standard for material that is legally obscene as to minors.² It defines "harmful to minors" as material "depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to a prurient, shameful, or morbid interest;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and

¹ *HB 1539: Materials Harmful to Minors*, FLA. HOUSE OF REPRESENTATIVES, <https://flsenate.gov/Session/Bill/2025/1539/ByCategory>.

² *Miller v. California*, 413 U.S. 15 (1973).

(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.”

This definition applies to crimes such as transmission of material harmful to minors.³

HB 1539 would amend the definition by removing “and” from subsection (b) and by adding that subsection (c) “does not apply in an educational setting or to an employee of any kindergarten, elementary school, middle school, junior high school, or secondary school, whether public or nonpublic, if material that is harmful is possessed by a person with the intent to send, sell, distribute, exhibit, represent, or display the material to a minor and the material is not part of an approved instructional or library material.”

This amended definition would violate the First Amendment, which protects speech unless it falls in one of a “few historic and traditional categories.”⁴ Obscenity, properly defined, is one of those unprotected categories. But works that have serious value for minors—literary, artistic, political, or scientific—are not obscene as to minors and cannot serve as a basis for punishment.

In *Miller v. California*, the Supreme Court adopted a three-part test for determining whether expression is legally obscene. A work may be banned as “obscene” only if (1) the “average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) portrays “sexual conduct” in a “patently offensive” manner; and (3) “taken as a whole,” lacks “serious literary, artistic, political, or scientific value.”⁵ Speech must meet all three prongs of this test to fall outside the First Amendment’s protection. Each is critical to preventing censorship of art, literature, medical textbooks, history texts, and other speech that depicts or alludes to sex simply because someone finds it offensive.

Because some speech may be obscene for minors but not for adults,⁶ criminal laws that use a modified version of the *Miller* test by adding the words “for minors”—as Section 847.001 currently does—are constitutional. **But such laws must still preserve all three elements of the *Miller* standard to comply with the First Amendment.** HB 1539 would violate that principle by, in certain contexts, eliminating the requirement that material lack serious literary, artistic, political, or scientific value. Additionally, by deleting the word “and” from the statutory definition, the bill creates ambiguity as to whether both of the first two elements must be met, or if material can be deemed “harmful to minors” based on just one.

Courts have consistently recognized the “serious value” prong as essential to distinguishing constitutionally protected material from obscenity, including in the context of minors. In *Reno v. ACLU*, the Supreme Court struck down a ban on sending a minor any message that “depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs,” emphasizing that the law “omit[ted] any requirement that the ‘patently offensive’ material ... lack serious literary, artistic, political, or scientific

³ FLA STAT. § 847.0138.

⁴ *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (cleaned up).

⁵ 413 U.S. 15, 24 (1973) (internal quotation marks omitted).

⁶ 521 U.S. 844, 864–65 (1997).

value.”⁷ Similarly, the U.S. Court of Appeals for the Eleventh Circuit has made clear that a work cannot be obscene as to minors if a reasonable minor would find it has serious value in one of those domains.⁸

Whether expressive material is shared or displayed in an educational setting or by a school employee does not change the constitutional analysis of whether the work is obscene. When determining whether the government may punish distribution or display of certain material as obscene or harmful to minors, the only relevant question is whether the material meets all three prongs of the *Miller* test as adapted for minors.

Amendments to Section 1006.28

HB 1539 would also amend the process school districts must follow in reviewing formal objections by parents or county residents to instructional and library materials. If an objection alleges that the material “[d]epicts or describes sexual conduct as defined in s. 847.001(19),” with certain exceptions, the “material shall be removed within 5 school days,” it “shall remain unavailable during the objection review process,” and “the school board shall not consider potential literary, artistic, political, or scientific value as a basis for retaining the material.”

Library book removals can raise serious First Amendment issues. As a Supreme Court plurality explained in *Board of Education v. Pico*, students’ constitutional rights are “directly and sharply implicated by the removal of books from the shelves of a school library,” as the First Amendment protects not only self-expression but the “right to receive information and ideas.”⁹ While state and local officials have discretion to determine the content of school libraries, “that discretion may not be exercised in a narrowly partisan or political manner.”¹⁰ As the *Pico* Court emphasized, public schools must adhere to “established, regular, and facially unbiased procedures for the review of controversial materials.”¹¹

As discussed, obscenity—properly defined—is not protected by the First Amendment. But the standard HB 1539 would impose falls far short of the threshold for obscenity. It would require immediate removal of materials alleged to simply depict or describe “sexual conduct,” regardless of whether any *Miller* prongs are met. Districts would then need to evaluate the objection *without* considering the work’s literary, artistic, political or scientific value, and “discontinue use of the material for any grade level or age group for which such use is inappropriate or unsuitable.”

School districts surely have a responsibility to assess whether library materials are appropriate for students of different ages. However, HB 1539 imposes a broad and inflexible content mandate that will likely exclude many books with literary or educational value, including

⁷ *Id.* at 865.

⁸ *Am. Booksellers v. Webb*, 919 F.2d 1493, 1504–05 (11th Cir. 1990).

⁹ 457 U.S. 853, 866–67 (1982) (plurality op.); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (stating the “Constitution protects the right to receive information and ideas,” which is “fundamental to our free society”).

¹⁰ *Pico*, 457 U.S. at 870.

¹¹ *Id.* at 874.

classic works of literature that have long been taught in our nation’s classrooms. While the standard does not outright prohibit all depictions and descriptions of sexual conduct, the amendment is likely to result in removal of many educationally suitable books, for several reasons.

First, the bill requires districts to remove a book alleged to depict or describe “sexual conduct” within five days of the objection, *before* it is evaluated. This requirement creates a strong incentive for individuals to challenge any book they dislike or perceive as inappropriate, knowing it will be immediately pulled from all library shelves. With no deadline for resolving challenges, books of literary, cultural, or historical significance could remain unavailable for extended periods based on a single frivolous complaint—even if ultimately deemed suitable for certain grade levels. In some districts, the sheer volume of challenges makes timely resolution unlikely.

Second, as discussed above, HB 1539 would bar consideration of a work’s overall literary, artistic, political, or scientific value. This means that even works with significant educational value could be banned solely based on isolated passages taken out of context.

Third, HB 1539 would also direct the State Board of Education to monitor district compliance with the statutory requirements “through regular audits and reporting.” A finding that a district has failed to comply could result in loss of state funding and other sanctions. While oversight is not in itself an issue, the threat of such serious penalties—combined with the ban on consideration of books’ overall educational suitability—would pressure districts to permanently remove any books challenged as depicting or describing “sexual conduct,” including classic literature and other books with serious educational value.

The current statute incorporates the common-sense judgment that not every book containing sexual elements is inherently inappropriate for all K-12 students, including 18-year-old high school seniors. As currently written, Section 1006.28 already allows parents and residents to challenge library material that “depicts or describes sexual conduct” and requires districts to discontinue their use for any grade level for which they are inappropriate.

Even under the existing statute, however, Florida school districts have removed hundreds of books from libraries because they merely depict or describe sexual conduct. Collier County Public Schools, for example, removed *Brave New World*, *Atlas Shrugged*, *Catch-22*, *Dune*, *For Whom the Bell Tolls*, *Slaughterhouse-Five*, and *The Man in the Iron Mask*.¹² Orange County Public Schools proactively pulled nearly 700 books from classroom libraries, including *East of Eden*, *Madame Bovary*, and *The Color Purple*.¹³ If passed, HB 1539 will further discourage districts from carrying any library books—including history books and literary classics—that have any allusions to sexual conduct.

¹² *Media Services*, COLLIER CNTY. PUB. SCHS., <https://www.collierschools.com/Page/19308>.

¹³ Leslie Postal, *Orange school district pulls 673 books from teachers’ classroom shelves*, ORLANDO SENTINEL (Dec. 20, 2023), <https://www.orlandosentinel.com/2023/12/20/ocps-books>.

For these reasons, and to ensure Florida's students receive the highest-quality education, FIRE urges you to reject HB 1539.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Terr", with a long horizontal flourish extending to the right.

Aaron Terr
Director of Public Advocacy