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MEMORANDUM (2)(H)¹

TO: Statutory Revision Committee

FROM: Jane M. Ritter, Office of Legislative Legal Services

DATE: August 11, 2017

SUBJECT: Unconstitutional provisions related to sexually explicit materials harmful to children, part 5 of article 7 of title 18, C.R.S.

Summary and Analysis

This matter was discovered through staff's search of the Colorado Revised Statutes for references to statutory provisions that have been found unconstitutional by the Colorado or United States Supreme Court. In this case, the Colorado Supreme Court ruled that the entire part 5 of article 7 of title 18, C.R.S., ("Sexually explicit materials harmful to children") was unconstitutional.

First, the court held that the display provision of section 18-7-502 (5), C.R.S., was overly broad and infringed on free speech rights of adults:

18-7-502. Unlawful acts. (5) It shall be unlawful for any person knowingly to **exhibit, expose, or display in public** at newsstands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public: **(Emphasis added)**

¹ This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS) in the course of its statutory duty to provide staff assistance to the Statutory Revision Committee (SRC). It does not represent an official legal position of the OLLS, SRC, General Assembly, or the state of Colorado, and is not binding on the members of the SRC. This memorandum is intended for use in the legislative process and as information to assist the SRC in the performance of its legislative duties.

Specifically, the Court found that a literal enforcement of the display provision as a criminal statute would have a chilling effect on and interfere with the "unfettered expression and interchange, *inter alia*, of literary, artistic, political and scientific ideas which are found in the human interest in sex".²

Second, the court held that the provision of section 18-7-503, C.R.S., granting an exemption to "accredited" museums, libraries, schools, and institutions of higher education was, in violation of the due process and equal protection clauses of the United States and Colorado constitutions, unconstitutionally vague:³

18-7-503. Applicability. (1) Nothing contained in this part 5 shall be construed to apply to:

(a) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any **accredited museum, library, school, or institution of higher education**;

(b) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum, school, or institution of higher education, either supported by public appropriation **or which is an accredited institution supported by private funds.** (Emphases added)

Although part 5 of article 7 of title 18, C.R.S., includes a severability clause,⁴ the court concluded that the offending provisions in sections 18-7-502 (5) and 18-7-503, C.R.S., could not be severed from the remainder of the act without impacting the validity of the remaining provisions of part 5.⁵ The court's reasoning for this was, essentially, that it was not persuaded that the General Assembly would not have adopted the entire part without the display and exemption provisions detailed above. To simply sever those pieces from the part would leave in statute a law without a clear exemption or a specific action that the legislature contemplated when it passed part 5. Therefore, the court held that the entire part 5 is unconstitutional and left it to the legislature, as a body, to correct.

² *Tattered Cover v. Tooley*, 696 P.2d 780 at 783 (Colo. 1985) (attached as **Addendum A**).

³ *Id.*

⁴ Section 18-7-504, C.R.S.

⁵ *Id.* at 787.

Addendum A

Tattered Cover, Inc. v. Tooley

Supreme Court of Colorado

February 25, 1985

No. 82SA85

Reporter

696 P.2d 780 *; 1985 Colo. LEXIS 395 **

TATTERED COVER, INC., a Colorado corporation, d/b/a Tattered Cover Bookstore; Joyce Knauer; Pioneer Ventures, Inc., a Colorado corporation, d/b/a Columbine Books and Records; Larry Hamilton; American Booksellers Association, Inc.; Association of American Publishers, Inc., a New York corporation, and Council For Periodical Distributors Associations, Plaintiffs-Appellees, Cross-Appellants, v. Dale TOOLEY, District Attorney, Second Judicial District; Arthur Dill, Chief of Police, Denver Police Department; and Jerry Kennedy, Captain, Vice Squad, Denver Police Department, Defendants-Appellants, Cross-Appellees

Subsequent History: **[**1]** Rehearing Denied April 1, 1985.

Prior History: Appeal from District Court, City and County of Denver, Honorable Henry E. Santo, Judge.

Disposition: Judgment Affirmed in Part and Reversed in Part.

Case Summary

Procedural Posture

Defendants, prosecutor and municipal police department, appealed a judgment from the District Court, City and County of Denver (Colorado), which declared that [Colo. Rev. Stat. §§ 18-7-502\(5\)](#), -503, (1984 Supp.) of the Sexually Explicit Materials Harmful to Children Act (Act), were unconstitutional. Plaintiffs, bookstores and publishers, appealed from the order severing the invalid provisions rather than declaring the entire Act invalid.

Overview

Commercial bookstores and publishers' associations sought a declaration that the Sexually Explicit Materials

Harmful to Children Act (Act), [Colo. Rev. Stat. § 18-7-501 et seq.](#) (1984 Supp.) was unconstitutional. The trial court concluded that [§ 18-7-502\(5\)](#), the display provision, and [§ 18-7-503](#), the exemption provisions, were unconstitutional but severed the invalid provisions rather than declaring the entire Act unconstitutional. On appeal, the court affirmed in part, holding that the display part of the statute could not be upheld because it infringed upon the booksellers' right to sell adult materials and an adult's ability to purchase them, thus violating both *U.S. Const. amend. I* and [Colo. Const. art. II, § 10](#). Further, the provision exempting of the Act's applicability to "accredited" institutions was too vague. However, the court reversed in part, and held the entire Act to be unconstitutional, concluding that if the unconstitutional provisions were severed as provided in [Colo. Rev. Stat. § 18-7-504](#), the Act would then violate the commercial bookstores' rights to equal protection under *U.S. Const. amend. XIV* and [Colo. Const. art. II, § 25](#).

Outcome

The court affirmed the trial court's decision that the challenged provisions were unconstitutional but reversed its ruling that the offending provisions were severable and held that the entire statute was unconstitutional.

Counsel: Peter H. Ney, Littleton, Colorado; Finley, Kumble, Wagner, Heine, Underberg and Casey, Jeffrey A. Mitchell, Michael A. Bamberger, New York, New York; Attorneys for Plaintiffs-Appellees, Cross-Appellants.

Norman S. Early, Jr., District Attorney, Brooke Wunnicke, Chief Appellate Deputy, David Purdy, Chief Deputy District Attorney, Donna Skinner Reed, Deputy District Attorney, Denver, Colorado; Attorneys for Defendants-Appellants, Cross-Appellees.

L. Duane Woodard, Attorney General, Charles B. Howe, Deputy Attorney General, Richard Forman, Solicitor General, John Milton Hutchins, Assistant Attorney

General, Denver, Colorado; Attorneys for Amicus Curiae, Colorado Attorney General.

Judges: En Banc. Justice Neighbors.

Opinion by: NEIGHBORS

Opinion

[*782] JUSTICE NEIGHBORS delivered the Opinion of the Court.

This is an appeal from the judgment of the Denver District Court declaring that [sections 18-7-502\(5\) and 18-7-503, 8 C.R.S.](#) (1984 Supp.), are unconstitutional and severing them from the remainder of the **[**2]** provisions governing "Sexually Explicit Materials Harmful to Children" (the Act), [sections 18-7-501 to -504, 8 C.R.S.](#) (1984 Supp.).¹ The plaintiffs² request reversal of the trial court's order severing the invalid provisions rather than declaring the entire Act unconstitutional. The defendants³ seek review of the declarations of unconstitutionality. We affirm the trial court's decision that the challenged provisions are unconstitutional but reverse its ruling that the offending provisions are severable from the Act. Accordingly, we hold the Act unconstitutional.

[3]** I.

In their complaint, the plaintiffs requested that the Act be declared unconstitutional because it violated their rights of free speech and expression and rights to due process and that the defendants be enjoined from enforcing the Act. At trial, the plaintiffs introduced testimony from booksellers and publishers to the effect that the Act is vague and difficult to apply and that any method of separating the books and magazines so that children would not be able to view sexually explicit materials

¹ The full text of the Act which was in effect when this case was filed in the district court is found in the 1981 Session Laws of Colorado at chapter 225 beginning on page 1004. The statutes contained in the 1984 Supplement to the 1978 Replacement Volume 8 are identical to the Act adopted in 1981. The 1981 Act is attached as Appendix A.

² The plaintiffs are two bookstores and their managers, and booksellers' and publishers' trade associations.

³ The defendants are the former District Attorney for the City and County of Denver, the Denver Police Department, and two of its officials.

would interfere with adults' exercise of their rights of free speech and expression.

[*783] The parties stipulated to several possible methods of complying with the Act: (1) prohibiting entry into the plaintiffs' stores of persons under the age of eighteen; (2) refusing to carry or display all sexually explicit material; (3) refusing to carry or display material proscribed by the Act; (4) restricting access to substantial portions of their material by segregating sections of their establishment with an "adults only" section; and (5) establishing an "adults only" section solely for material proscribed by the Act. The trial court found that "any of the foregoing alternatives would **[**4]** not be commercially feasible or sound." The trial court concluded that [section 18-7-502\(5\)](#), the display provision, is unconstitutional:

[A] literal enforcement of this statute would impinge upon the constitutional rights of adults. It is admitted that the adults would have the right under the laws that now exist to view the material that is set forth in the statute we are considering. The problem is the chilling effect that literal enforcement of a criminal statute such as this have [sic] on the channels of dissemination. The court specifically finds and concludes that the statute effectively closes the channels of dissemination. The court specifically would find that the application of this display part of the statute would interfere, diminish and severely curtail the unfettered expression and interchange, *inter alia*, of literary, artistic, political and scientific ideas which are found in the human interest in sex. Enforcing this provision would be a regulation to an unreasonable degree and unconstitutional in violation of the *First Amendment to the United States Constitution* and Article II, Section 10 of the Constitution of the State of Colorado.

[5]** The court also declared [section 18-7-503](#), the exemption provision, unconstitutional. The court stated:

[C.R.S. 1973, 18-7-503](#) provides for an exemption of the applicability of the remaining parts of the statute to so-called accredited museums, libraries, schools or institutions of higher learning. The court finds that such exemption is entirely too vague, too broad and overreaching. Applying the general statutory rules of interpretation including a strict scrutiny test the court hereby finds and determines that the section is likewise invalid and unconstitutional in violation of the due process and equal protection

clauses of the United States and Colorado Constitutions. The court therefore declares [C.R.S. 1973, 18-7-503](#) unconstitutional and invalid.

The district court then applied the qualified severability statute found in [section 18-7-504](#) of the Act to its determinations of unconstitutionality and concluded that the offending provisions were severable. The court upheld the remaining provisions in the Act and the defendants appealed. The plaintiffs then cross-appealed. Accordingly, four issues are presented for our consideration: (1) Whether the display provision in [section \[**6\] 18-7-502\(5\)](#) is constitutional; (2) whether the word "accredited" in [section 18-7-503](#) is unconstitutionally vague; (3) whether the exemption provision denies plaintiffs' equal protection guarantees; and (4) whether the exemption and display provisions can be severed from the Act.

II.

The state's interest in protecting the well-being of children permits the state greater latitude in adopting restrictions which limit children's access to sexually explicit materials than can be imposed on adults. [Ginsberg v. New York, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 \(1968\)](#). In *Ginsberg*, the Court upheld a statute regulating the sale, *not display*, of sexually explicit materials to persons under seventeen years of age. The Court stated:

Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable matter is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it [*784] [**7] can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

[Ginsberg, 390 U.S. at 636](#) (quoting [Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 218 N.E.2d 668, 671, 271 N.Y.S.2d 947 \(N.Y. 1966\)](#)). In [People v. Enea, 665 P.2d 1026 \(Colo. 1983\)](#), we upheld the constitutionality of the statute prohibiting the sexual exploitation of children, [section 18-6-403, 8 C.R.S.](#) (1984 Supp.). In that opinion, we noted the variable obscenity standard which permits "states to ban the sale to minors of materials deemed legally obscene as to children, but not to adults"

[Enea, 665 P.2d at 1028](#). See also [F.C.C. v. Pacifica Foundation, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 \(1978\)](#). The parties agree that the materials involved in this case are not obscene as defined in [section 18-7-101, 8 C.R.S.](#) (1984 Supp.); rather, they are protected under the *first amendment of the United States Constitution* and [article II, section 10 of the Colorado Constitution](#). Therefore, only reasonable regulations of the time, place, and manner of protected speech, where those [**8] regulations are necessary to further a compelling government interest, are permitted by the federal and state constitutions. [Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 \(1976\)](#); [Marco Lounge, Inc. v. City of Federal Heights, 625 P.2d 982 \(Colo. 1981\)](#).

It is within this analytical framework that the display provision in [section 18-7-502\(5\)](#) must be evaluated. [Section 18-7-502\(5\)](#) provides:

(5) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to children; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (5), or explicit verbal descriptions or narrative accounts of sexual excitement, [**9] sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.

The plaintiffs' principal contention is that this provision is objectionable, not because it prohibits sale or display of certain materials to children, but rather because in doing so it infringes upon the free speech rights of adults. This is so, they claim, because there is no reasonable way for a commercial establishment to prohibit children from being exposed to material "harmful to children" while allowing adults access to such material.

We conclude that this provision is overly broad. Statutes designed to restrict children's access to sexually explicit materials must be narrowly drawn. As we noted earlier, the Supreme Court in [Ginsberg v. New York, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 \(1968\)](#), upheld a

statute which prohibited the sale of such materials to minors. However, the state cannot prevent adults from reading or having access to these materials on the ground they would be objectionable if read or seen by children. In Butler v. Michigan, 352 U.S. 380, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957), the Court declared unconstitutional a statute which made it an offense **[**10]** to make available to the general public sexually explicit materials found to have a potentially harmful influence on minors. Thus, in American Booksellers Association v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981), the court declared unconstitutional a display provision similar to the one involved in this case.⁴ **[*785]** The court stated: "However, an examination of the Act reveals that it infringes on the protected rights of adults. The language includes a public display prohibition which necessarily prevents perusal by, and limits sale to, adults." McAuliffe, 533 F. Supp. at 56. The Supreme Court has never upheld the validity of a "display provision" as broad as the one involved in this litigation.

[11]** The evolving rule concerning the validity of display regulations is this: A display provision will be upheld if it is so narrowly drawn that it has only an incidental effect on the booksellers' right to sell adult materials and an adult's ability to purchase them. M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983); Dover News, Inc. v. City of Dover, 117 N.H. 1066, 381 A.2d 752 (N.H. 1977). See also Young v. American Mini Theatres, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976).

In the context of this case, the parties stipulated to five alternative ways which might have been available to the plaintiffs in order to comply with the statute. The trial

⁴The court summarized the display provision and identified the overbreadth problem:

Under the Act: "It shall be unlawful for any person knowingly . . . to display in public or . . . any . . . business establishment frequented by minors or where minors may be invited as part of the general public," certain defined materials "the cover or content of which" contains the proscribed "descriptions or depictions." Code § 26-3502 (emphasis added). If any of the proscribed descriptions or depictions are contained in the cover or in even an isolated part of a work, then the entire work may not be displayed where minors may frequent or be invited as part of the general public.

American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50, 55 (N.D. Ga. 1981).

court, however, found that none were commercially feasible. This factual determination is supported by ample evidence in the record. Accordingly, it is binding on appeal. People v. Fish, 660 P.2d 505 (Colo. 1983); Gebhardt v. Gebhardt, 198 Colo. 28, 595 P.2d 1048 (1979). Therefore, in light of the factual determinations made by the trial court, we conclude that section 18-7-502(5), 8 C.R.S. (1984 Supp.), is unconstitutional.

III.

We next review the trial court's ruling that the word "accredited" in section **[**12]** 18-7-503 is unconstitutional. Section 18-7-503 contains the following exemptions to the Act:

18-7-503. Applicability. (1) Nothing contained in this part 5 shall be construed to apply to:

- (a) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school, or institution of higher education;
- (b) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum, school, or institution of higher education, either supported by public appropriation or which is an accredited institution supported by private funds.

In People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 357 (Colo. 1985), we held that the word "accredited" was void for vagueness in the context of Colorado's obscenity statute. We reach the same result here for the identical reasons stated in our opinion in that case. Thus, we hold that the word "accredited" contained in section 18-7-503 is unconstitutionally vague.

IV.

The trial court held that the exemption provision provided by section 18-7-503 denied the plaintiffs equal protection of the law under **[**13]** both federal and state constitutions. We agree with its conclusion.

Our analysis begins with the recognition that the materials involved in this case are not obscene and are therefore protected by the freedom of speech guarantee embodied in the first amendment to the United States Constitution and article II, section 10 of the Colorado Constitution.

Freedom of speech is a fundamental constitutional right. E.g., Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. **[*786]** 532 (1931); Gitlow v. New York, 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925).

Since first amendment rights, including free speech, have been held to be fundamental, the classifications in terms of the ability to exercise those rights must be judged against the strict scrutiny standard. [Speiser v. Randall](#), 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958). Where a fundamental right is affected, the state has the burden of establishing that the act is necessarily related to a compelling governmental interest. [San Antonio Independent School District v. Rodriguez](#), 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); [Austin v. Litvak](#), 682 P.2d 41 (Colo. 1984); [Lujan v. Colorado](#) [**14] [State Board of Education](#), 649 P.2d 1005 (Colo. 1982).

The deletion of the word "accredited" from the exception provision creates a classification distinguishing, on the one hand, private, commercial bookstores, and, on the other, museums, libraries, and bookstores operated by schools, colleges and universities. Under the exception provision, the entities in the latter group may sell or loan materials proscribed by the statute but the former class may not.⁵ [**15] We conclude that there is no compelling or overriding justification shown by the state in this case which supports the classification. Therefore, the exception provision, [section 18-7-503](#), 8 C.R.S. (1984 Supp.), violates the plaintiffs' rights to equal protection under the United States⁶ and Colorado Constitutions⁷ and is unconstitutional. See [Seven Thirty-Five East Colfax, Inc.](#), 697 P.2d at 357 n.12.

V.

We now address the severability issues in light of our holdings that [section 18-7-502\(5\)](#) and [18-7-503](#) are unconstitutional. We conclude that the offending provisions are not severable from the remainder of the Act.

In [Seven Thirty-Five East Colfax, Inc.](#), 697 P.2d 348, slip op. at 39, we enunciated the principles applicable to our consideration of the effect of qualified severability statutes. The Act here contains such a provision. [Section 18-7-504](#) states:

⁵The record, through the testimony of a bookstore manager, reflects the following examples of books displayed and for sale at the Auraria Book Center, the college bookstore for the Auraria campus, which could not be sold by the plaintiffs in their establishments: *The Joy of Sex*, *The Joy of Lesbian Sex*, *The Joy of Gay Sex*, and *Where Did I Come From?*

⁶ *U.S. Const. amend. XIV.*

⁷ *Colo. Const. art. II, § 25.*

18-7-504. Severability. If any provision of this part 5 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this part 5 which may be given effect without the invalid provision or application, and, to this end, the provisions of this part 5 are declared to be severable.

Even though we held that the word "accredited" was unconstitutional, we declined to strike down the entire exception provision in *Seven Thirty-Five East Colfax, Inc.* In contrast, the entire exception statute here [**16] has been declared unconstitutional on equal protection grounds. Part of the rationale for our decision not to invalidate the exception statute in *Seven Thirty-Five East Colfax, Inc.* is equally applicable to this appeal. To sever the exemption provision from the Act would subject to criminal liability a class of facilities and institutions which the legislature sought to exclude from coverage and would be contrary to clearly expressed legislative intent. [Seven Thirty-Five East Colfax, Inc.](#), 697 P.2d 348, slip op. at 41. Accordingly, the qualified severability statute in the Act here does not provide a satisfactory basis upon which to uphold the validity of the remainder of its provisions. Moreover, we are persuaded that the General Assembly would not have adopted the Act if the display and exemption provisions had not been included in House Bill 1310.⁸ Therefore, we conclude that the Act is unconstitutional.

[**17] [*787] The judgment of the district court is affirmed in part and reversed in part. This case is remanded to the trial court for further proceedings consistent with this opinion.

APPENDIX A

⁸The evidence supporting this determination comes from two sources. We assume that the considerations which prompted the General Assembly to include the exemption provision in the obscenity statute as described in [People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.](#), 697 P.2d 348, 358 n.13 (Colo. 1985), are identical. With regard to the display provision, our review of the legislative history indicates that House Bill 1310 was disapproved and vetoed by the Governor on June 5, 1981. The Governor's veto message reflects his position that the display provision was unconstitutional. Colo. H.J., 53rd Gen. Ass'y. 1st Sess. 2263 (June 5, 1981). Rather than deleting the display provision, both the House and the Senate passed the bill over the Governor's veto on June 29, 1981. Colo. H.J., 53rd Gen. Ass'y. 1st Sess. 2328-29 (June 29, 1981); Colo. S.J., 53rd Gen. Ass'y. 1st Sess. 2597-98 (June 29, 1981).

PART 5

SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN

18-7-501. Definitions. As used in this part 5, unless the context otherwise requires:

(1) "Child" means a person under the age of eighteen years.

(2) "Harmful to children" means that quality of any description or representation, in whatever form, of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(a) Taken as a whole, predominantly appeals to the prurient interest in sex of children;

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for children; and

(c) Is, when taken as a whole, lacking in serious literary, artistic, political, and scientific value for children.

(3) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, or both, of:

(a) The character and content of any material described herein which is reasonably **[**18]** susceptible of examination; and

(b) The age of the child; however, an honest mistake shall constitute an excuse from liability hereunder if a reasonable bona fide attempt is made to ascertain the true age of such child.

(4) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(5) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, sodomy, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(6) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof **[**19]** below the top of the areola, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

18-7-502. Unlawful acts. (1) It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a child:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children; or

[*788] (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (1), or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.

(2) It shall be unlawful for any person knowingly to sell to a child an admission ticket or pass, or knowingly to admit a child to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or **[**20]** sadomasochistic abuse and which is harmful to children or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by children not admitted to any such premises.

(3) It shall be unlawful for any child falsely to represent to any person mentioned in subsection (1) or (2) of this section, or to his agent, that he is eighteen years of age or older, with the intent to procure any material set forth in subsection (1) of this section, or with the intent to procure his admission to any motion picture, show, or other presentation, as set forth in subsection (2) of this section.

(4) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (1) or (2) of this section, or to his agent, that he is the parent or guardian of any juvenile, or that any child is eighteen years of age or older, with the intent to procure any material set forth in subsection (1) of this

section, or with the intent to procure any child's admission to any motion picture, show, or other presentation, as set forth in subsection (2) of this section.

(5) It shall be unlawful for any **[**21]** person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to children; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (5), or explicit verbal description or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.

(6) A violation of any provision of this section is a class 2 misdemeanor.

18-7-503. Applicability. (1) Nothing contained in this part 5 shall be construed to apply to:

(a) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school, or institution of higher education;

[22]** (b) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum, school, or institution of higher education, either supported by public appropriation or which is an accredited institution supported by private funds.

18-7-504. Severability. If any provision of this part 5 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this part 5 which may be given effect without the invalid provision or application, and, to this end, the provisions of this part 5 are declared to be severable.

Addendum B
Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

BILL (2)(H)

Temporary storage location: S:\LLS\2018A\Bills\Pre-Draft\18-SRC-sexually explicit materials.wpd

LLS NO. 18-####.## Jane Ritter x4342

COMMITTEE BILL

Statutory Revision Committee

A BILL FOR AN ACT

101 **CONCERNING THE REPEAL OF STATUTORY PROVISIONS RELATING TO**
102 **SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN THAT**
103 **WERE RULED UNCONSTITUTIONAL BY THE COLORADO SUPREME**
104 **COURT.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

Statutory Revision Committee. The bill repeals part 5 of article 7 of title 18, Colorado Revised Statutes, concerning sexually explicit

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

materials harmful to children to reflect a 1985 decision made by the Colorado supreme court that held that the entire part was unconstitutional.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **repeal** part 5 of
3 article 7 of title 18 as follows:

4 **18-7-501. Definitions.** ~~As used in this part 5, unless the context~~
5 ~~otherwise requires:~~

6 (1) ~~"Child" means a person under the age of eighteen years.~~

7 (2) ~~"Harmful to children" means that quality of any description or~~
8 ~~representation, in whatever form, of sexually explicit nudity, sexual~~
9 ~~conduct, sexual excitement, or sadomasochistic abuse, when it:~~

10 (a) ~~Taken as a whole, predominantly appeals to the prurient~~
11 ~~interest in sex of children;~~

12 (b) ~~Is patently offensive to prevailing standards in the adult~~
13 ~~community as a whole with respect to what is suitable material for~~
14 ~~children; and~~

15 (c) ~~Is, when taken as a whole, lacking in serious literary, artistic,~~
16 ~~political, and scientific value for children.~~

17 (3) ~~"Knowingly" means having general knowledge of, or reason~~
18 ~~to know, or a belief or ground for belief which warrants further inspection~~
19 ~~or inquiry, or both, of:~~

20 (a) ~~The character and content of any material described herein~~
21 ~~which is reasonably susceptible of examination; and~~

22 (b) ~~The age of the child; however, an honest mistake shall~~
23 ~~constitute an excuse from liability hereunder if a reasonable bona fide~~
24 ~~attempt is made to ascertain the true age of such child.~~

25 (4) ~~"Sadomasochistic abuse" means actual or explicitly simulated~~

1 ~~flagellation or torture by or upon a person who is nude or clad in~~
2 ~~undergarments, a mask or bizarre costume, or the condition of being~~
3 ~~fettered, bound, or otherwise physically restrained on the part of one so~~
4 ~~clothed.~~

5 (5) ~~"Sexual conduct" means actual or explicitly simulated acts of~~
6 ~~masturbation, homosexuality, sexual intercourse, sodomy, or physical~~
7 ~~contact in an act of apparent sexual stimulation or gratification with a~~
8 ~~person's clothed or unclothed genitals, pubic area, buttocks, or, if such be~~
9 ~~female, breast.~~

10 (6) ~~"Sexual excitement" means the condition of human male or~~
11 ~~female genitals when in a state of sexual stimulation or arousal.~~

12 (7) ~~"Sexually explicit nudity" means a state of undress so as to~~
13 ~~expose the human male or female genitals, pubic area, or buttocks with~~
14 ~~less than a full opaque covering, or the showing of the female breast with~~
15 ~~less than a fully opaque covering of any portion thereof below the top of~~
16 ~~the areola, or the depiction of covered or uncovered male genitals in a~~
17 ~~discernibly turgid state.~~

18 **18-7-502. Unlawful acts.** (1) ~~It shall be unlawful for any person~~
19 ~~knowingly to sell or loan for monetary consideration to a child:~~

20 (a) ~~Any picture, photograph, drawing, sculpture, motion picture~~
21 ~~film, or similar visual representation or image of a person or portion of~~
22 ~~the human body which depicts sexually explicit nudity, sexual conduct,~~
23 ~~or sadomasochistic abuse and which, taken as a whole, is harmful to~~
24 ~~children; or~~

25 (b) ~~Any book, pamphlet, magazine, printed matter however~~
26 ~~reproduced, or sound recording which contains any matter enumerated in~~
27 ~~paragraph (a) of this subsection (1), or explicit and detailed verbal~~

1 ~~descriptions or narrative accounts of sexual excitement, sexual conduct,~~
2 ~~or sadomasochistic abuse and which, taken as a whole, is harmful to~~
3 ~~children.~~

4 (2) ~~It shall be unlawful for any person knowingly to sell to a child~~
5 ~~an admission ticket or pass, or knowingly to admit a child to premises~~
6 ~~whereon there is exhibited a motion picture, show, or other presentation~~
7 ~~which, in whole or in part, depicts sexually explicit nudity, sexual~~
8 ~~conduct, or sadomasochistic abuse and which is harmful to children or to~~
9 ~~exhibit any such motion picture at any such premises which are not~~
10 ~~designed to prevent viewing from any public way of such motion picture~~
11 ~~by children not admitted to any such premises.~~

12 (3) ~~It shall be unlawful for any child falsely to represent to any~~
13 ~~person mentioned in subsection (1) or (2) of this section, or to his agent,~~
14 ~~that he is eighteen years of age or older, with the intent to procure any~~
15 ~~material set forth in subsection (1) of this section, or with the intent to~~
16 ~~procure his admission to any motion picture, show, or other presentation,~~
17 ~~as set forth in subsection (2) of this section.~~

18 (4) ~~It shall be unlawful for any person knowingly to make a false~~
19 ~~representation to any person mentioned in subsection (1) or (2) of this~~
20 ~~section, or to his agent, that he is the parent or guardian of any juvenile,~~
21 ~~or that any child is eighteen years of age or older, with the intent to~~
22 ~~procure any material set forth in subsection (1) of this section, or with the~~
23 ~~intent to procure any child's admission to any motion picture, show, or~~
24 ~~other presentation, as set forth in subsection (2) of this section.~~

25 (5) ~~It shall be unlawful for any person knowingly to exhibit,~~
26 ~~expose, or display in public at newsstands or any other business or~~
27 ~~commercial establishment frequented by children or where children are~~

1 or may be invited as part of the general public:

2 (a) ~~Any picture, photograph, drawing, sculpture, motion picture~~
3 ~~film, or similar visual representation or image of a person or portion of~~
4 ~~the human body which depicts sexually explicit nudity, sexual conduct,~~
5 ~~or sadomasochistic abuse and which is harmful to children; or~~

6 (b) ~~Any book, pamphlet, magazine, printed matter however~~
7 ~~reproduced, or sound recording which contains any matter enumerated in~~
8 ~~paragraph (a) of this subsection (5), or explicit verbal descriptions or~~
9 ~~narrative accounts of sexual excitement, sexual conduct, or~~
10 ~~sadomasochistic abuse and which, taken as a whole, is harmful to~~
11 ~~children.~~

12 (6) ~~A violation of any provision of this section is a class 2~~
13 ~~misdemeanor.~~

14 **18-7-503. Applicability.** (1) ~~Nothing contained in this part 5~~
15 ~~shall be construed to apply to:~~

16 (a) ~~The purchase, distribution, exhibition, or loan of any work of~~
17 ~~art, book, magazine, or other printed or manuscript material by any~~
18 ~~accredited museum, library, school, or institution of higher education;~~

19 (b) ~~The exhibition or performance of any play, drama, tableau, or~~
20 ~~motion picture by any theatre, museum, school, or institution of higher~~
21 ~~education, either supported by public appropriation or which is an~~
22 ~~accredited institution supported by private funds.~~

23 **18-7-504. Severability.** ~~If any provision of this part 5 or the~~
24 ~~application thereof to any person or circumstances is held invalid, such~~
25 ~~invalidity shall not affect other provisions of this part 5 which may be~~
26 ~~given effect without the invalid provision or application, and, to this end,~~
27 ~~the provisions of this part 5 are declared to be severable.~~

1 **SECTION 2. Act subject to petition - effective date.** This act
2 takes effect at 12:01 a.m. on the day following the expiration of the
3 ninety-day period after final adjournment of the general assembly (August
4 ■, 2018, if adjournment sine die is on May ■, 2018); except that, if a
5 referendum petition is filed pursuant to section 1 (3) of article V of the
6 state constitution against this act or an item, section, or part of this act
7 within such period, then the act, item, section, or part will not take effect
8 unless approved by the people at the general election to be held in
9 November 2018 and, in such case, will take effect on the date of the
10 official declaration of the vote thereon by the governor.

