



American Civil Liberties Union of Indiana

January 22, 2008

House Committee on Family, Children,  
and Human Affairs  
200 West Washington Street  
Indianapolis, Indiana 46204

Re: House Bill 1042

Honorable Members of the House Committee on Family, Children, and Human Affairs:

The American Civil Liberties Union of Indiana (“ACLU of Indiana”) is a not-for-profit legal membership organization devoted to the protection of the constitutional freedoms encompassed by the Bill of Rights. Foremost among these freedoms is a broad understanding of the freedom of expression guaranteed by the First Amendment to the United States Constitution, regardless of the potential offensiveness of the content of the expressive activity. After all, even barriers to undesirable speech may not be governed simply by the General Assembly’s subjective determination of what is desirable, and such barriers will often prove a deterrent to other forms of political, educational, or artistic impression.

House Bill 1042, if enacted into law, would require individuals or businesses that sell so-called “sexually explicit materials” to register with the secretary of state prior to selling these materials. Failure to do so would constitute a criminal offense. In light of the fact that this legislation likely violates the well-established demands of the First Amendment, its enactment would prove both unwise and potentially unconstitutional.

In *Watchtower Bible and Tract Society of New York v. Village of Stratton*, the United States Supreme Court addressed the question of whether a municipal ordinance requiring individuals to register and obtain a permit prior to participating in door-to-door solicitation violated the First Amendment. As the Court noted before invalidating the ordinance, the sheer amount of constitutionally protected speech covered by the ordinance raises serious concerns, notwithstanding the fact that the ordinance simply required pre-registration.

Of course, a pre-requisite to the invalidation of an ordinance such as the one at issue in *Watchtower Bible*—or a bill such as HB 1042—is its effect on speech or activity protected under the First Amendment. In this regard, HB 1042 probably exceeds permissible constitutional bounds: although so-called “obscenity” does not qualify as constitutionally protected speech, this non-protected speech is already outlawed under

Indiana law.<sup>1</sup> Rather, HB 1042, by its terms, might apply equally to countless other forms of expressive activity, including:

- Materials whose overarching purpose is artistic, educational, literary, or scientific.
- Magazines or other literature that utilize attractive models as marketing ploys.
- Pamphlets or brochures that are designed to educate the public about sex or sexual activity.

For instance, it is possible that Sport's Illustrated Magazine might be required under HB 1042 to register with the Indiana Secretary of State prior to distributing its swimsuit edition in the state. However, the very uncertainty concerning which precise materials are governed by the bill leads necessarily to the conclusion that it is overly broad and excessive in its scope.

The survival of the First Amendment's guarantees finds its bulwark in the protection not of desirable speech but of undesirable speech. This speech, however, does not become jeopardized simply by its outright prohibition; rather, it becomes jeopardized also by obstacles placed in the way of its exercise. One of these obstacles is a requirement—as in HB 1042—that those wishing to exercise their constitutionally protected rights do so only upon pre-registration with government officials. Such a requirement not only decreases the likelihood that individuals will see fit to exercise their rights, but also completely jettisons their right to do so anonymously.

In this vein, it is the opinion of our office that HB 1042 represents an unnecessary intrusion into the liberties enjoyed by all citizens. While I regret that I will be unable to attend the committee's hearing on this bill, I did want to voice our opposition to its enactment. I would be more than happy to discuss these issues with any individual committee member, and may be reached at 317-635-4059, x231, or [grose@aclu-in.org](mailto:grose@aclu-in.org).

Thank you for your time and attention to this matter.

Very Truly Yours,

Gavin M. Rose  
Director of Legislation

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<sup>1</sup> See Indiana Code § 35-49-3-1, *et seq.*