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Senate Bill 5: A Tale of Plausible Deniability

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Senate Bill 5: A Tale of Plausible Deniability

By: Kara West, Staff Editor, Vol. 111

Last month, the Kentucky legislature enacted Senate Bill 5, otherwise known as “An Act relating to education and declaring an emergency.”^[1] The new law empowers parents to challenge – and ideally remove – materials, programs, and events that are “harmful to minors” from their children’s schools.^[2] The best part about the bill-now-law, according to one of its primary sponsors, is its purposeful ambiguity.^[3] Every community can decide for itself what kind of content it considers “harmful to minors.”^[4] But ambiguity invites tyranny – a community’s attempt to remove “harm” from its schools may infringe on the First Amendment rights of its students.

Under Senate Bill 5, the phrase “harmful to minors” includes any program, material, or event that depicts or describes sexual acts or “is patently offensive to prevailing standards regarding what is suitable for minors.”^[5] Its definition borrows heavily from the legal definition of “obscenity” formulated by the Supreme Court in *Miller v. California*.^[6] Obscenity is necessarily sexual. It lacks any “literary, artistic, political, or scientific value.”^[7] And it is not protected by the First Amendment.^[8] Reasonable people agree that obscenity has no place in a child’s education. Senate Bill 5, however, diverges from the legal definition of obscenity in Section 1(c): “patently offensive to prevailing standards regarding what is suitable for minors.”^[9] The phrase “patently offensive” has no meaning in and of itself.^[10] The statutory chapter to which Senate Bill 5 is an addition contains no definition either.^[11] Parents are free to invent their own.

Generally, local school boards have broad discretion to establish a curriculum that reflects their community values.^[12] That discretion, however, narrows as soon as it meets the library door.^[13] Libraries represent the paramount purpose of the First Amendment: freedom of thought.^[14]

Senate Bill 5 makes no distinction between books required by the school curriculum and books available through the library. If a library book is deemed by just one parent to be “harmful to minors,” the school board can simply pluck it off the shelf, regardless of whether it falls under the legal definition of obscenity.[15] For example, the young adult novel *Out of Darkness* was recently removed from Campbell County Schools for its “sexually explicit content.”[16] The story is about a Mexican American girl who experiences sexual abuse and racism while grappling with the aftermath of one of the deadliest school disasters in U.S. history.[17] It deals with real aspects of the human experience. *Out of Darkness* won the prestigious Michael L. Printz Award based entirely on its literary merit.[18]

Intention is the deciding factor in cases involving the banning of school library books. If a school board intends to deny access to ideas with which it disagrees, and that intent is the decisive factor in a book’s removal, then the school board has violated the Constitution.[19] Senate Bill 5 attempts to work around this Constitutional violation by shifting school boards’ intentions onto parents. Senate Bill 5 invites local governments to deny children access to knowledge and ideas that may change their worldview for the better, using parental consternation for plausible deniability.

[1] S.B. 5, 231st Gen. Assemb., Reg. Sess. (Ky. 2023) [hereinafter Senate Bill 5].

[2] Sarah Phipps, *Senate Bill 5 moves to Governor’s desk; sponsor responds to anti-LGBT+ criticism*, WBKO News (Mar. 16, 2023), <https://www.wbko.com/2023/03/17/senate-bill-5-moves-governors-desk-sponsor-responds-anti-lgbt-criticism/>; Jess Clark & Ryland Barton, *Bill targeting “obscene” books in schools clears Kentucky Legislature*, WKU Public Radio (Mar. 15, 2023), <https://www.wkyufm.org/2023-03-15/bill-targeting-obscene-books-in-schools-clears-kentucky-legislature>.

[3] Liam Niemeyer, *Bill mandating process for parents to challenge books, programs in Kentucky public schools advances*, Kentucky Lantern (Mar. 13, 2023), <https://kentuckylantern.com/2023/03/13/bill-mandating-process-for-parents-to-challenge-books-programs-in-kentucky-public-schools-advances/>.

[4] *Id.*

[5] *Id.*; Senate Bill 5, *supra* note 1.

[6] *Miller v. California*, 413 U.S. 15 (1973).

[7] *Id.* at 24.

[8] *Id.* at 36.

[9] Senate Bill 5, *supra* note 1.

[10] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 873 (1997).

[11] Ky. Rev. Stat. Ann. § 158.007 (West 2023).

[12] *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982).

[13] *Id.* at 868-69.

[14] *Id.*

[15] Senate Bill 5, *supra* note 1.

[16] Pilar Galvan, et al., *Banned Books: Author Ashley Hope Pérez on finding humanity in the darkness*, NPR (Dec. 14, 2022), <https://www.npr.org/2022/12/14/1142246532/author-ashley-hope-perez-on-book-bans-out-of-darkness>.

[17] *Id.*

[18] *Id.*; Jack Brammer, *‘Moms for Liberty’ gets three books removed from Campbell County school libraries*, Kentucky Lantern (Feb. 16, 2023), <https://kentuckylantern.com/2023/02/16/moms-for-liberty-gets-three-books-removed-from-campbell-county-school-libraries/>.

[19] *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982).



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