

February 10, 2017

Stephen D. Newman  
Chair, Senate Committee on Education and Health  
Members of the Virginia State Senate  
General Assembly Building  
Richmond, VA

**By Electronic Mail**

Re: H.B. 2191

Dear Senator Newman and Members of the Virginia State Senate:

Once again, Virginia legislators are confronted with a proposal to require parental notification and consent for curricular materials containing any “sexually explicit” content. A similar bill was vetoed by Governor McAuliffe last April and rejected by the Board of Education less than a month ago, yet, like a Phoenix, it continues to rise from the ashes.

The proposal requires that school districts have “procedures for notifying...the parent of any student enrolled in a course in which the instructional materials or related academic activities may include sexually explicit content of the potential for such sexually explicit content...and (ii) providing, as a replacement for instructional materials... nonexplicit instructional materials...” It has met with widespread opposition from educators, parents, and organizations concerned with education, intellectual freedom, and the First Amendment. It is educationally unsound, constitutionally suspect, and, if adopted, will undermine the quality of education in Virginia and place its students at a disadvantage in college admissions.

The proposal is the latest salvo in a three-year campaign waged primarily by one parent and a small number of determined allies. Proponents of the bill frame the measure as one that protects parents’ rights; they assume, without evidence, that the views they espouse are shared by all parents<sup>1</sup> and that public schools have an

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<sup>1</sup> For example, a spokesperson for Concerned Parents and Educators of Fairfax County stated in hearings before the Board of Education that the warning about sexual content affects “materials that people of any socio-economic level, or any political party or persuasion, *would find objectionable*.” (Emphasis added.) In fact, as statements from both parents and teachers to the Board of Education reveal, not everyone agrees. Indeed there are many who think that books like *Beloved* are not objectionable and should be taught without restriction, because they have educational value and prepare students for college.

**NCAC PARTICIPATING ORGANIZATIONS**  
Actors' Equity Association  
American Association of School Administrators  
American Association of University Professors  
American Association of University Women  
American Booksellers for Free Expression  
American Civil Liberties Union  
American Ethical Union  
American Federation of Teachers  
American Jewish Committee  
American Library Association  
American Literary Translators Association  
American Orthopsychiatric Association  
American Society of Journalists & Authors  
Americans United for Separation of Church & State  
Association of American Publishers  
Authors Guild  
Catholics for Choice  
Children's Literature Association  
College Art Association  
Comic Book Legal Defense Fund  
The Creative Coalition  
Directors Guild of America  
The Dramatists Guild of America  
Dramatists Legal Defense Fund  
Educational Book & Media Association  
First Amendment Lawyers Association  
Free Speech Coalition  
International Literacy Association  
Lambda Legal  
Modern Language Association  
National Center for Science Education  
National Communication Association  
National Council for the Social Studies  
National Council of the Churches  
National Council of Jewish Women  
National Council of Teachers of English  
National Education Association  
National Youth Rights Association  
The Newspaper Guild/CWA  
PEN American Center  
People For the American Way  
Planned Parenthood Federation of America  
Project Censored  
SAG-AFTRA  
Sexuality Information & Education Council of the U.S.  
Society of Children's Book Writers & Illustrators  
Student Press Law Center  
Union for Reform Judaism  
Union of Democratic Intellectuals  
Unitarian Universalist Association  
United Church of Christ  
Office of Communication  
United Methodist Church,  
United Methodist Communications  
Women's American ORT  
Woodhull Sexual Freedom Alliance  
Writers Guild of America, East  
Writers Guild of America, West

obligation to accommodate their views. Both assumptions are incorrect as a matter of fact and law.

### *Parents' Rights*

The proposal seeks to institutionalize a specific set of values about the propriety of educational materials that include sexual content. The approach ignores the fact that parents in Virginia, as elsewhere, hold widely divergent views on virtually all topics.<sup>2</sup> Some parents object to sexual content, others to violence, still others to religious or racial references. For every parent who objects to an assigned book, there will be others who favor it. In practice, the attempt to alter school curricula in response to individual objections means privileging the moral or religious beliefs of some individuals over others. It is precisely this form of viewpoint discrimination by government that our constitutional system is designed to prevent.

For this reason, every federal appeals court to consider the issue has concluded that, while parents have a general right to control their children's upbringing, they do not have a right to control what they are taught in the public schools: "while parents can choose between public and private schools, they do not have a constitutional right to 'direct how a public school teaches their child.'" *Parker v. Hurley*, 514 F. 3d 87, 102 (1<sup>st</sup> Cir.), *cert. denied*, 555 U.S. 815 (2008), quoting *Blau v. Fort Thomas Public School District, et al.*, 401 F.3d 381, 395 (6<sup>th</sup> Cir. 2005). See also *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (parents do not have the right "to tell a public school what his or her child will and will not be taught"). Accord, *Swanson v. Guthrie Indep. School Dist.* 135 F.3d 694 (10th Cir. 1998); *Herndon v. Chapel Hill-Carrboro*, 89 F. 3d 174 (4<sup>th</sup> Cir. 1996) (rejecting parents' challenge to school's community service requirement and upholding the school's "reasonable regulation").

Consistent with these rulings, federal appellate courts routinely accord school officials wide deference to determine the content of the educational program. See, e.g., *Fleischfresser v. Directors of School Dist.* 200, 15 F. 3d 680, 690 (7th Cir. 1994) (upholding the use of contested materials designed "to build and enhance students' reading skills and develop their senses of imagination and creativity"). See also *Smith v. Board of Commissioners*, 827 F. 2d 684, 694 (11th Cir. 1987) (upholding school board's choice of "particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs"); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9<sup>th</sup> Cir. 2005), as amended, 427 F. 3d 1187 (9<sup>th</sup> Cir. 2006) (school officials have the authority to decide "how it will provide information to its students [and] what information it will provide"); *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1070 (6th Cir. 1987) (courts should take care before interfering with the "educational program adopted by duly chosen local authorities.") As indeed should legislators.

Federal courts have also rejected the argument that parents have a right to be notified about specific types of content and to demand an alternative assignment. In *Parker v. Hurley, supra*, for example, the First Circuit rejected a free exercise claim brought by parents alleging that

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<sup>2</sup> In *Brown v. Entertainment Merchants Association*, 564 U.S. \_\_\_, 131 S. Ct. 2729, 2741 (2011), the Supreme Court explicitly rejected the notion that the sensitivities of some parents are shared by all, and held that a parental consent requirement at issue in that case reflects only "what the State thinks parents *ought* to want."

certain materials violated their religious beliefs who sought, not to remove the materials, but to receive advance notice and a right to opt out of assignments. The court denied the request, finding no precedent “which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools.” 514 F. 3d at 102.

The federal courts are unanimous in upholding the authority of school officials to select materials for their educational value, regardless of parental objections. They recognize that the effort “to eliminate everything that is objectionable ... will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result” *McCullum v. Board of Education*, 333 U.S. 201, 235 (1948) (Jackson, J., concurring). Parents who object to what is taught in the public schools have the right to send their children to private or religious schools or educate them at home. They can review their children’s assignments, file formal book challenges, and request an alternative assignment. However, they have no right to demand that schools notify parents about specific types of content or to demand any accommodation that would interfere with the education of other students.

### *First Amendment*

Singling out books with sexual content for special scrutiny constitutes constitutionally impermissible content and viewpoint discrimination. The First Amendment prohibits agents of the state, including public school officials, from restricting or burdening access to books or ideas based on their content or viewpoint or because they are controversial, unpopular, or offensive. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637-8, 642 (1943), the Supreme Court clearly articulated the basic premise underlying the First Amendment, “that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *id.* at 642, and its application in the public schools:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. ... That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

*Id.* at 637. The Court further anticipated and rejected the argument that First Amendment rights depend on popular support:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials.... One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

*Id.* at 638. By singling out one category of content for parental notification and consent, the state provides its official imprimatur for the views of some, but not all, parents. This contravenes the settled rule that “[g]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views” *Police Dept. of Chicago v. Mosley*, 408 US 92, 96 (1972). Just as the state could not give

parents who object to books like *Beloved* the right to picket schools if the book is assigned, while denying the same right to others who support the teaching of such books, it cannot legislatively embrace the views of some parents to the exclusion of opposing views of educators and other parents.

The bill not only identifies certain kinds of content as inherently suspect, it also would effectively create a parental consent requirement for all students, *including some who are not minors*, to access that content, a requirement that is not imposed on any other category of content. However, in *Brown v. Entertainment Merchants Association*, 564 U.S. \_\_\_, 131 S.Ct. 2729 (2011), the Supreme Court struck down a requirement that minors obtain parental permission to purchase violent video games. The Court characterized the requirement as a restriction on “expression because of its message, its ideas, its subject matter, or its content.” *Id.* at 2733 (citation omitted). The fact that the restriction only applied to minors did not significantly alter the constitutional inquiry, because “[m]inors are entitled to a significant measure of First Amendment protection,” *id.* at 2735 (citation omitted), including protection from a restrictive requirement for parental consent.

For the regulation of video games to survive constitutional scrutiny, it would have been necessary to show that there was “an ‘actual problem’ in need of solving,” and that the restriction on speech was “necessary to the solution.” *Id.* at 2738. The video game law failed on both grounds. Similarly, here there is absolutely no evidence of an “actual problem.” There is no suggestion that any student has in fact been harmed by reading *Beloved* or any other book assigned in school.<sup>3</sup> The proposal is justified solely on the ground that some parents have personal objections to books with sexual content, even if they have educational value.

The Court in *Brown* addressed the claim that the parental consent requirement could be “justified in aid of parental authority.” The Court rejected that argument because there was no evidence that the proposed requirement would “meet a substantial need of parents.” *Id.* at 2740. The Court noted that parents have other options if they wish to restrict their children’s access to video games, just as Virginia parents already have the right to review their children’s assignments, request an alternative or move their child to a less advanced class.

The requirement for parental notification and consent not only deters the teaching of important material, it also completely disregards the First Amendment rights of students to be taught books that have unquestioned educational value.<sup>4</sup> The proposal originated from a parent’s objection to

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<sup>3</sup> In statements to the Board of Education, the proponents of the rule argue that the sexual content in such books might “trigger unhealthy responses in some students.” This argument lacks any factual foundation and would be insufficient to overcome the First Amendment considerations in any event. Countless courts have rejected similar arguments seeking to ban or restrict access to constitutionally protected expression because it allegedly causes harm. See, e.g., *American Booksellers Association v. Hudnut*, 771 F. 2d 323 (7<sup>th</sup> Cir., 1985) (pornography causes harm to women) and *Brown v. Entertainment Merchants Association*, *supra* (violent video games allegedly cause harm to minors).

<sup>4</sup> “A student's First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed” in response to complaints. *Monteiro v. Tempe Union High School District*, 158 F.3d 1022, 1029 (9<sup>th</sup> Cir. 1998). Offering an alternative assignment on demand compounds the constitutional problem: “due to the practical burdens, schools would be unlikely to choose to teach alternate works

the teaching of *Beloved* in a 12<sup>th</sup> Grade Advanced Placement class, which is designed to provide college credit for advanced students, some of whom are eighteen years old and therefore not minors. The objection to an award-winning, iconic American novel, written by a Nobel Prize winner and studied by students all over the country, reveals how the proposal could place Virginia students at a competitive disadvantage by discouraging the teaching of significant works of literature. Furthermore, any parental consent requirement imposed on students over the age of eighteen plainly violates their rights, and even younger students have a constitutionally-recognized interest in access to important educational materials.

### *Virginia Constitution*

Finally, Article VIII, Section 7 of the Virginia Constitution requires that the day-to-day management of a school is a function vested in the local school boards: “The supervision of schools in each school division shall be vested in a school board.” Thus, this proposal is unconstitutional because it seeks to circumvent the local school board’s constitutionally-protected mandate to manage the day-to-day operations of schools.

*School Board v. Parham*, 218 Va. 950 (1978) further solidifies the point. There, the State Board attempted to delegate the application of the local school board’s policies, rules and regulations to an outside arbitration panel. The court found that the arbitration had the effect of “remov[ing] from a local school board and transfer[ring] to others a function essential and indispensable to the exercise of the power of supervision vested by Section 7 of Article VIII.” *Id.* at 957. The Court held that the day-to-day management (there, the management of a teaching staff) is a function vested in the local boards. *Id.* The court went further: “It would be wholly unrealistic to say that Article VIII was designed to inject the State Board directly into the daily management of a local teaching staff. Recognizing this proposition and implementing Section 7 of Article VIII, the General Assembly has placed the management of local teaching staffs in local school boards.” *Id.* at 958.

Similarly, determining whether to notify parents when a specific curriculum is to be taught in class is part of the “day-to-day management” of a school that constitutionally resides with the local school board. Notably, the *Parham* arbitration panel only sought to apply the rules set forth by the school board; yet, it was still found to be unconstitutional. Here, this proposal exceeds the attempt in *Parham* by creating and mandating a process for handling certain materials and notifying parents of the material in advance of it being taught. It divests the school board of its function and places that authority squarely outside of it. Thus, under the Virginia Constitution and as expressed in *Parham*, the proposal is unconstitutional.

### *Conclusion*

We strongly urge you to reject this bill. It would undermine high quality education, disadvantage students in the state, and hamper the ability of school divisions to meet the requisite “standards of quality.” It detracts from those objectives by threatening the ability of local school

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separately to students objecting to a portion of the curriculum. Instead, they would probably simply remove books that they believed to be educationally valuable, but that might be controversial, or offensive to some.” *Id.* at 1028, n.7.

divisions and teachers to include in the curriculum a wide range of educationally valuable materials. More significantly, it would potentially expose the state to liability for violating the constitutional rights of parents whose disagree with its underlying premises, and of students whose access to materials selected for their educational content is diminished.

Sincerely,



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National Coalition Against Censorship



Claire Gastaña, Executive Director  
American Civil Liberties Union of Virginia



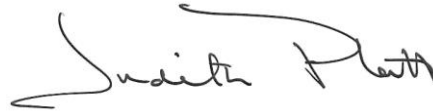
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