ACLU New Hampshire

Statement by Gilles Bissonnette, ACLU-NH Legal Director
House Education and Policy Committee
ACLU-NH Opposition to SB33
Hearing: April 23, 2025

We submit this testimony on behalf of the American Civil Liberties Union of New Hampshire ("ACLU-NH")—a non-partisan, non-profit organization working to protect civil liberties for over 50 years. Because SB33 is vague and would chill the availability of books and curriculum course material in public schools, we ask that this Committee deem this bill *inexpedient to legislate*.[1]

I. Constitutional Background:

In *Miller v. California*, 413 U.S. 15 (1973), the United States Supreme Court recognized the government's "legitimate interest" in prohibiting obscenity as, in part, arising from the government's interest in preventing such material's "exposure to juveniles." *Id.* at 19. And, with that interest in mind, the Court defined obscenity as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24.

Nevertheless, the definition for what constitutes obscenity for minors generally comes from *Ginsberg v. New York*, 390 U.S. 629 (1968)—which predates *Miller*—and considered what a state could proscribe as obscenity specifically with respect to people aged 17 and younger. The Court held that obscenity vis-à-vis minors can be defined "on the basis of its appeal to minors." *Id.* at 638. It upheld a New York statute prohibiting the distribution of materials to minors that:

- (i) "predominantly appeal[] to the prurient, shameful, or morbid interests of minors,"
- (ii) are "patently offensive to prevailing standards in the adult community ***as a whole*** with respect to what is suitable material for minors," and
- (iii) are "utterly without redeeming social importance for minors." *Id.* at 646.

II. NH Law Already Prevents Giving Minors "Harmful Materials": SB33 is unnecessary given existing laws.

First, effective in 1976, New Hampshire already prevents giving to minors "harmful materials." *See* RSA 571-B. Given the existence of this law, SB33 raises the prospect that its scope may ban texts in public schools that go beyond this statute. But what texts are the proponents of this bill hoping to have removed beyond what would be prohibited under existing law? This is far from clear, with the likely result being that this bill will become a tool that will be wielded by some to scare teachers and librarians out of recommending or even offering books that others dislike. For reference, this statute reads as follows:

> RSA 571-B:2:
> I. It shall be unlawful for any person knowingly to give, sell, loan or otherwise provide, with or without monetary consideration, to a minor:

[1] This bill is identical to SB523 from last year as amended by the Senate, and then subsequently failed in the House. *See* https://gc.nh.gov/bill_status/legacy/bs2016/bill_docket.aspx?lsr=2869&sy=2024&sortoption=billnumber&txtsessionyear=2024&txtbillnumber=sb523.

ACLU New Hampshire

(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 sexual conduct and which is **harmful to minors**, or

(b) Any book, pamphlet, magazine, printed matter, however reproduced, or sound recording which contains any matter enumerated in RSA 571-B:2, I(a), or explicit and detailed verbal descriptions or narrative accounts of sexual conduct and which, **taken as a whole**, is **harmful to minors**.

II. It shall be unlawful for any person knowingly to exhibit, for or without monetary consideration, to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor, for or without monetary consideration, to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts or describes sexual conduct and which is **harmful to minors**.

RSA 571-B:1:
As used in this chapter:
I. "Harmful to minors" means that quality of any description or representation, in whatever form of sexual conduct, when it:

(a) Predominantly appeals to the prurient interest of minors in sex, that is, an interest in lewdness or lascivious thoughts;

(b) Depicts or describes sexual conduct in a manner so explicit as to be patently offensive to contemporary adult standards, in the county within which any offense set forth in this chapter was committed, with respect to what is suitable material for minors; and

(c) Lacks serious literary, artistic, political or scientific value.

II. "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, as to:

(a) The character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(b) The age of the minor; provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonably bona fide attempt to ascertain the true age of such minor.

III. "Minor" means any person under the age of 18 years.
IV. "Sexual conduct" means human masturbation, sexual intercourse, actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts sexual intercourse which give the appearance of the consummation of sexual intercourse, normal or perverted.

Second, school districts also, as required by law, have "Objectionable Material Policies" under RSA 186:11, IX-c requiring 14 days of notice for curriculum course material used for the instruction of human sexuality or human sexual education. School boards are also required to require that their schools "[p]rovide[] a developmentally appropriate collection of instructional resources." *See* Ed 306.08(a)(1).

III. SB33 is Vague and Uses Undefined Terms That Are Likely to Lead to Viewpoint Discrimination: Vagueness permeates SB33 given the lack of definitions around the standards to be used in determining what is "harmful to minors, age-inappropriate, or otherwise offensive or inappropriate for use in the child's school."

ACLU New Hampshire

Indeed, given this lack of definition, school librarians and members of local governmental bodies—and the public at large—will have no meaningful way to discern what sorts of materials are "harmful," "age-inappropriate," "offensive," or "inappropriate." As a result of this lack of definition—and as one court similarly concluded in the public library context[2]—these terms are susceptible to multiple interpretations and all but guarantee that the challenge process will result in the removal of materials in schools (including in school libraries) based on the mere dislike of the ideas in those materials without regard to students' First Amendment right to receive information.[3]

Indeed, with respect to public school library books, SB33 does ***not*** even contain language making clear that materials cannot be removed simply because of the materials' viewpoint.

Further, challenges under SB33 may be appealed to elected officials on school boards with discretion to decide whether a book is "appropriate" without the benefit of procedural requirements or standards. These officials don't even have to read the books first.[4]

IV. SB33 May Be Even Broader Than New Hampshire's "Harmful to Minors" Statute:

SB33 amorphous criteria—namely, that the material be "harmful to minors, age-inappropriate, or otherwise offensive or inappropriate for use in the child's school" (Page 1, Lines 15-16, 27-28; Page 2, Lines 6-7)—may be broader than New Hampshire's "harmful to minors" statute under RSA 571-B, which conforms to constitutional standards. Thus, the breadth and scope of SB33 suggests that this bill may be intended to target and censor books and curriculum course material that would ***not*** otherwise currently be improper to disseminate under RSA 571-B:1. We recommend that the standard in SB33 conform to the standard in RSA 571-B to minimize the prospect of viewpoint discrimination.

For example, SB33 may regulate public school library books without the requirement under RSA 571-B:1 that the books be "taken as a whole." While SB33 does state elsewhere that the principal or designee should look at "the context in which the material is being used" (*see* Page 1, Line 28), we recommend that the bill should use the "taken as a whole" language from constitutional principles—as well as the other criteria listed in RSA 571-B—to ensure that students' access to information is not unduly restricted.

For these reasons, the ACLU-NH opposes SB33.

---

[2] *See also Fayetteville Pub. Libr. v. Crawford Cty.*, No. 5:23-CV-5086, __ F.Supp.3d __, 2024 U.S. Dist. LEXIS 231472, at *42-48 (W.D. Ark. Dec. 23, 2024) (in context of challenge process imposed on public libraries, stating the following: "Section 5's pivotal term, 'appropriateness,' is susceptible to multiple interpretations and all but guarantees that the challenge process will result in the withdrawal or relocation of books based on their content or viewpoint. As stated, any book, even one written for an adult reader, could be deemed 'inappropriate' and subject to challenge under Section 5."; "The Court therefore concludes that Plaintiffs have established as a matter of law that Section 5 would permit, if not encourage, library committees and local governmental bodies to make censorship decisions based on content or viewpoint, which would violate the First Amendment.") (Appeal filed, Jan. 27, 2025).

[3] *See Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (holding that students had a First Amendment right to receive ideas and information as a necessary predicate to their meaningful exercise of the rights of speech, press, and political freedom; "we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books") (plurality).

[4] There is an additional, practical vagueness issue concerning what is "age inappropriate." For example, would this mean that a book viewed as "age inappropriate" to anyone under the age of 17 cannot be available for a 17 year-old to check out of the public school library?