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Opinion No. 03-056

Constitutionality of Act Restricting the Sale or Trafficking of Pornographic, X-rated Materials

QUESTION

Whether legislation that would prohibit the sale or trafficking of pornographic, X-rated materials within Bradley County would be constitutional?

OPINION

No. The sale of obscene materials is already banned statewide. Tenn. Code Ann. § 39-17-902. Sexually explicit materials that do not rise to the level of obscenity are protected by the First Amendment to the Constitution of the United States.

ANALYSIS

Tenn. Code Ann. § 39-17-902 already makes it a criminal offense to sell or distribute any obscene matter within the State of Tennessee. "Obscene" is defined in Tenn. Code Ann. § 39-17-901 (10) as follows:

> (A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
> (B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and
> (C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

To the extent that sexually explicit materials are not obscene, the First Amendment clearly prohibits laws that ban the distribution of such materials.[1] *See Reno v. ACLU*, 521 U.S. 844, 874 (1997)*;*

[1]The Adult-Oriented Establishment Registration Act, however, does allow counties to establish a regulatory system applicable to adult-oriented establishments upon a two-thirds vote of the county legislative body. *See* Tenn. Code Ann. § 7-51-1101 et seq.

Alexander v. United States, 509 U.S. 544, 549-550 (1993); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Miller v. California*, 413 U.S. 15 (1973).

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