AMERICAN CIVIL LIBERTIES UNION
Wisconsin

207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
aclu-wi.org

ACLU of Wisconsin Comments re: Assembly Bill 961

The ACLU of Wisconsin understands and shares the ultimate goal of protecting young people from harm and appreciates the opportunity to provide written comments highlighting the constitutional and practical concerns regarding this bill.

AB-961 requires anyone that provides, sells, or publishes "explicit content" for profit (or as part of a commercial service) to provide a prominent, clear, and conspicuous warning label on that content. The definition of "explicit content," however, runs afoul of the First Amendment by attempting to recite the standard for "obscene" sexually explicit content established by the U.S. Supreme Court in *Miller v. California*,[1] but leaves out several essential elements of *Miller*'s three-prong test.

As detailed in the chart on the following page, this definition falls short of the *Miller* standard in four ways. First, the phrase "intended for an adult audience" is overly vague in its application – what is included? Whose intent matters? How do we treat mixed audiences? Does "adult audience" necessarily mean sexually explicit? Would this encompass violence, political drama, or romcoms, all of which are (technically speaking) intended for adults if there is a scene or line of dialogue that describes sex in a way that *somebody* finds offensive, since the definition omits the first *Miller* prong altogether? Second, it does not require the lack of serious literary, artistic, political, or scientific value to apply to the work "taken as a whole." And finally, the bill does not specifically define "sexual conduct."

The fact that this bill does not outright ban speech does not cure the First Amendment issues. Even burdens like mandatory warning labels that carry penalties for noncompliance and create a private right of action are enough to trigger strict constitutional scrutiny.

---

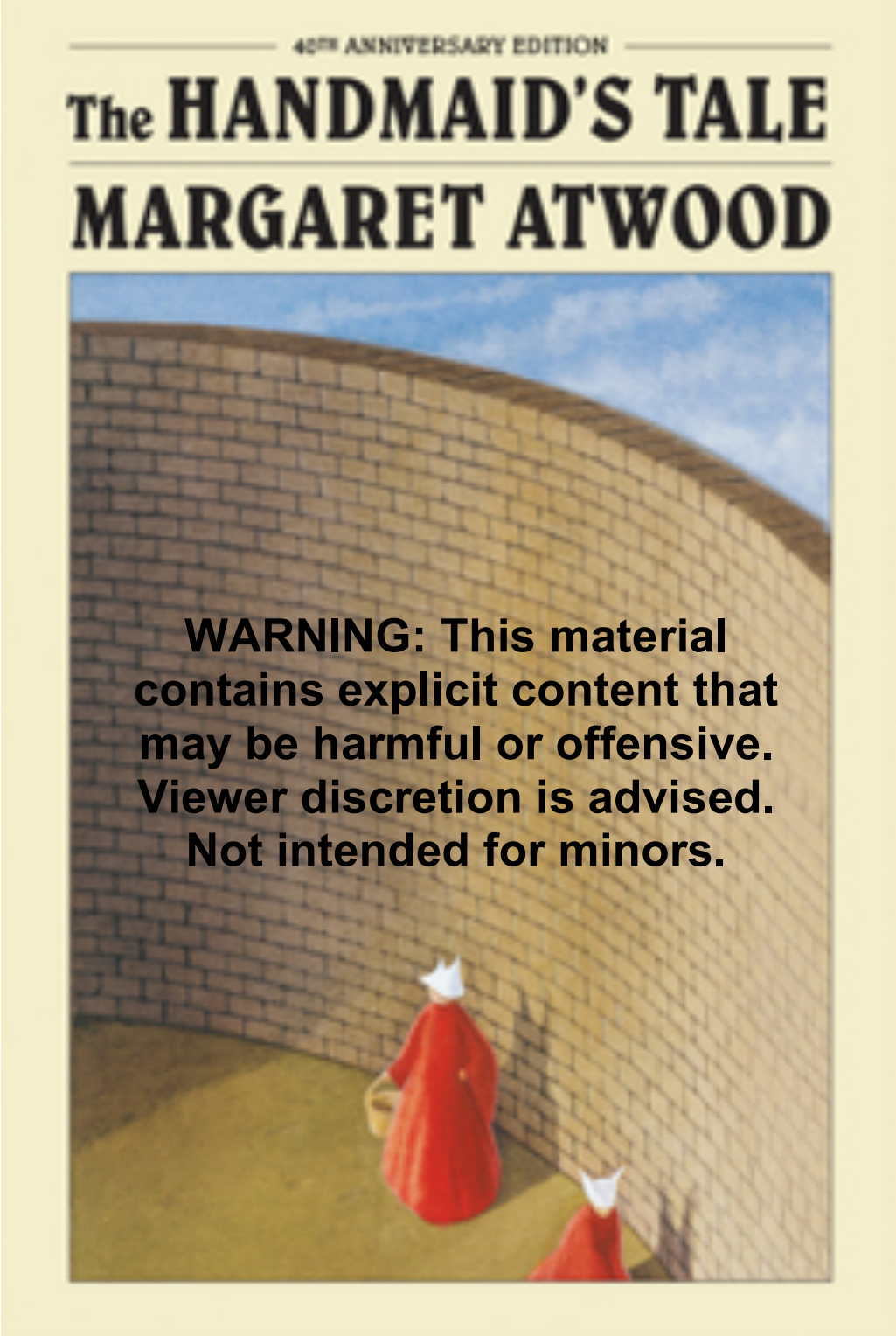
[1] *Miller v. California*, 413 U.S. 15, 24 (1973). Interestingly—because there is always a Wisconsin connection—the first prong of the *Miller* test cites to the case *Kois v. Wisconsin*, 408 U.S. 229 (1972). John Kois, the petitioner in the case, was the publisher of an underground Milwaukee newspaper called Kaleidoscope. Kois was convicted on two counts of violating a Wisconsin statute prohibiting the dissemination of "lewd, obscene or indecent written matter, picture, sound recording, or film" for publishing a story entitled "The One Hundred Thousand Dollar Photos" on an interior page in the May 1968 issue of his newspaper and, in an August 1968 issue, publishing "a two-page spread consisting of 11 poems, one of which was entitled 'Sex Poem'" which was "an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse." The Court detailed, "The story itself was an account of the arrest of one of Kaleidoscope's photographers on a charge of possession of obscene material. Two relatively small pictures, showing a nude man and nude woman embracing in a sitting position, accompanied the article and were described in the article as 'similar' to those seized from the photographer. The article said that the photographer, while waiting in the district attorney's office, had heard that bail might be set at $100,000. The article went on to say that bail had in fact been set originally at $100, then raised to $250, and that later the photographer had been released on his own recognizance." Ultimately, the Court reversed the convictions, finding that in the context in which they appeared, the photos were rationally related to a news article they accompanied and were entitled to Fourteenth Amendment protection. Further, the Court believed the poem "bears some of the earmarks of an attempt at serious art," so it did not have as its dominant theme an appear to the prurient interest.

"Explicit Content" as Defined in AB-961	The *Miller* Standard
1. Intended for an adult audience; 2. Lacks serious literary, artistic, political, or scientific value; and 3. Depicts or describes sexual conduct in a patently offensive way.	1. Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; 2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and 3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The warnings labels required by the bill apply to both print and digital material. For digital content, the warning must appear before access, occupy two thirds of the screen, and remain visible for at least 10 seconds or until the user actively clicks through. For books, magazines, pamphlets, and other physical publications, the warning label must be displayed in bold text and Arial font of at least 20 points. AB-961 presumably would not apply to librarians, as library books and materials are not provided "for profit or as part of a commercial service." But for illustration purposes, the following page depicts the required warning on a book (in paperback with dimensions 5.3 by 8 inches) frequently targeted for censorship in Wisconsin and across the country on the grounds of being "sexually explicit,"[2] which could also be targeted under the bill if placed on the shelves of a bookstore.

The bill's requirement that every piece of digital explicit content include a standardized metadata tag raises additional concerns. Metadata functions as a set of digital labels that make content easily searchable, sortable, and trackable. Mandating a specific tag effectively creates a mechanism for identifying, monitoring, and potentially censoring speech about sex. It also creates the risk of an intentional or unintentional registry of who publishes or accesses this content, opening the door to surveillance by the state or third parties.

[2] See "Menomonee Falls School District removing more than 30 book titles from high school library," WPR (Oct. 18, 2023), https://www.wpr.org/education/menomonee-falls-school-district-removing-more-30-book-titles-high-school-library; "Elmbrook Schools narrowly votes to keep 2 books from being removed," TMJ4 (Aug. 14, 2024), https://www.tmj4.com/news/waukesha-county/elmbrook-schools-narrowly-votes-to-keep-2-books-from-being-removed; "A parent challenged 444 books in Elkhorn. Here's how the district responded," Milwaukee Journal Sentinel (Feb. 27, 2024), https://www.jsonline.com/story/news/education/2024/02/27/a-parent-challenged-444-books-in-elkhorn-here-are-the-results/72684751007/.


40TH ANNIVERSARY EDITION
The HANDMAID'S TALE
MARGARET ATWOOD
WARNING: This material contains explicit content that may be harmful or offensive. Viewer discretion is advised. Not intended for minors.

These concerns are magnified by the bill's private enforcement mechanism. AB-961 allows private individuals to notify the Department of Justice of alleged violations and, if the state does not act within 60 days of receiving the notice form, to sue content distributors directly and recover damages and attorney fees. This structure invites ideological harassment and weaponized enforcement, particularly against authors, educators, and queer creators who are already frequent targets of coordinated complaints and lawsuits.

Ultimately, the AB-961's requirements are designed to deter access and stigmatize lawful expression. It compels speech by forcing creators and distributors to attach government mandated language to their own expression, effectively requiring them to characterize their content as harmful or dangerous. Compelled speech of this kind has long been viewed with suspicion under the First Amendment, particularly when it targets disfavored subject matter and encourages self-censorship.

Some may argue that similar labeling or rating systems already exist (ie. television parental guidelines, Motion Picture Association (MPA) ratings, Entertainment Software Rating Board (ESRB) ratings for video games, or music "parental advisory" stickers). But these rating systems are private and voluntary. Courts have repeatedly rejected attempts by the government to enforce or co-opt those systems.

It is important to emphasize that states may regulate obscene content and may protect minors within well-defined constitutional limits. What they may not do is impose sweeping, vague, and stigmatizing requirements on protected expression under the guise of consumer warnings.