MEDIA COALITION, INC.
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memo in Opposition to Alabama House Bill 39

House Bill 39 is an unconstitutional sales tax on free speech based on the content of the speech. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Alabama: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They neither produce nor sell works that are legally obscene. However, they do disseminate a wide variety of material with sexual content, including art and photography books, mainstream movies and music, sex education material, and literary and artistic works.

H.B. 39 would impose a 40% sales tax on any book, magazine, movie, sound recording or other material that is harmful to minors. There is an exemption to this tax for any movie rated "R" or "NC-17" by the Motion Picture Association of America. There is a second sales tax of 10% on the sale or rental of "sexually-oriented material." This is defined as any material that contains nude images of breasts, genitals or sexual conduct. Any determination of what material is subject to the tax is to be determined by the person or business making the sale or rental and must be reported to the state monthly.

This bill is clearly unconstitutional. First, it is a content based penalty on speech since the imposition of the tax depends on the content. See, *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). To determine what material is taxed, the state would have no choice but to scrutinize the content of material sold or rented. Section 3(a) imposes a 40% tax on certain sexually frank material that is illegal for minors but is constitutionally protected for adults. It is not relevant to the legal analysis that the material may be illegal for minors since it is still protected for adults. Section 3(e) imposes a 10% tax on a broader range of material that includes nudity and sexual conduct but is constitutionally protected for adults and minors.

The state may apply a general sales tax to speech but the U.S. Supreme Court has repeatedly held that it violates the First Amendment to impose one based on the content of the speech. In 1987, the Supreme Court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230. The state cannot punish a producer or retailer of such material by imposing a substantial additional tax on it. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v.*

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Minnesota Commission of Revenue, 460 U.S. 575. In 1991, the Court held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon and Schuster, Inc. v. Members of the New York State Crime Board,* 502 U.S. 105. See also, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton,* 536 U.S. 150 (2002); *Grosjean v. American Press,* 297 U.S. 233 (1936).

In 1980, a similar tax scheme imposed by Mobile County was held to be unconstitutional in *Bay News Company v. Freda Johnson, Tax Collector of Mobile County, Alabama*. In a case brought by Media Coalition, Circuit Judge Perrill McCrae held that a Mobile ordinance that imposed a 50 cent sales tax on any magazine that contained images of naked genitals or female breasts violated the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Sections 1, 4, 6 and 22 of the Alabama Constitution. He issued a permanent injunction barring the defendant from collecting the tax imposed by the ordinance or otherwise enforcing it. Attached is a copy of the final order issued by Judge McRae.

Also, Alabama cannot use the Motion Picture Association of America's rating system to determine whether or not a tax applies to movies. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement or adoption of an existing rating system is constitutionally impermissible. Alabama certainly cannot outsource to a private organization the power to impose a financial penalty on a movie based on the review of its content. Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. S*ee also*, *Swope v. Lubbers,* 560 F.Supp. 1328 (W.D. Mich. S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating). More recently, a Minnesota law giving legal force to the video game industry's voluntary rating system was struck down. *ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (upholding the District Court ruling granting summary judgment to the plaintiffs).

Finally, H.B. 39 is constitutionally suspect because it asks retailers to determine what material is "harmful to minors" for the purpose of imposing the 40% tax. It is the job of the courts to determine whether material meets this definition and establishes that such material is illegal for minors, not an owner of a book or video store or a staff person in the Department of Revenue. This bill does not offer any court proceeding to determine the legal status of such books, magazines, movies or other content that would trigger the surcharge. This means there are no due process safeguards in place for the determination of whether the material is prohibited for minors or any appeals process available to the retailer or distributor of the content. The Supreme Court has held that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S.

Supreme Court struck down a similar scheme of regulation based on non-judicial determinations of what speech is legal and what is not as a form of "informal censorship."

This tax may be meant to raise revenue for Alabama. However, if it is enacted, it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs' attorneys' fees. In a recent case brought by members of Media Coalition, plaintiffs received in excess of $400,000 in attorneys' fees and expenses. If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Please protect the First Amendment rights of all Alabama and defeat this tax on First Amendment protected material.