

March 15, 2011

Judiciary Committee
Arkansas Senate

Memorandum in Opposition to Arkansas Senate Bills 668 and 741

The members of Media Coalition believe that Senate Bill 668 and 741 likely violate the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including in Arkansas: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. They have asked me to explain their concerns.

S.B. 668 and 741 are very similar in language and effect. S.B. 668 would apply, §5-68-502, Arkansas's existing law barring dissemination to minors of material harmful to minors, as defined in §5-68-501(2), to content distributed generally on the Internet. Presently, Arkansas law specifically excludes from the law matter displayed, transmitted, retrieved, or stored on the Internet or other network for the electronic dissemination of information. S.B. 741 would create a new section of the Arkansas code, §5-27-308, with a virtually identical definition of harmful to minors material, as in § 5-68-501(2) and would make it illegal to transmit such material to a minor using a wireless communication device.

To the extent that S.B. 668 or S.B. 741 restrict harmful to minors generally available on the Internet, public listserves, or public chat rooms, both bills are likely unconstitutional. Speech is protected unless the Supreme Court tells us otherwise. As the Court said in *Free Speech Coalition v. Ashcroft*, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.234, 241 (2002). Unless speech falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing a minor, there is no basis for the government to bar access to such material.

To apply restrictions to speech on the Internet is to act as if there was no difference between a computer transmission and a book or DVD purchased in a store. But cyberspace is not like a bookstore or video store. Absent personal knowledge about a specific person, there is no certain way to know whether the person receiving the sexually frank material is a minor or an adult. At the same time, anyone who makes material available on the Internet should know that there could be minors accessing their content. With hundreds or thousands of people accessing a website or chatroom, it is inevitable that a minor is among the visitors. As a result, the effect of banning the Internet dissemination of material "harmful to minors" is to force a provider, whether a publisher or an on-line carrier, to deny access to both minors and adults, depriving adults of their First Amendment rights. There is a substantial body of case law striking down

similar state and federal legislation that restricted such content on the Internet because of this unconstitutional burden on speech for adults. The U.S. Supreme Court has already declared unconstitutional two federal laws that restricted the availability of sexual material inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009). In addition to the ruling in the Third Circuit Court of Appeals, four other U.S. Courts of Appeal have struck down laws banning material harmful to minors on the Internet. See, *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). Three more state laws have been struck down by U.S. District Courts. See, *Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D. S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Last year, Massachusetts and Alaska each enacted a law very similar to S.B. 668. Legal challenges were brought against each law and in both cases a preliminary injunction has been granted barring the statute's enforcement. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *American Booksellers Foundation for Free Expression v. Sullivan*, 3:10-CV-193 (D. Alaska Oct. 20, 2010).

The only state laws that restrict access to content on the Internet that have not been struck down in court were laws limited to speech illegal for minors that was intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor and the speaker directed the speech to that person. States have also passed laws to outlaw such speech if it is tied to an otherwise illegal activity such as luring or enticing a minor

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorney's fees. In the successful challenge to the Virginia legislation, the state paid the plaintiffs almost \$500,000 in legal fees and expenses.

We believe Arkansas can protect minors while also respecting the First Amendment. We are happy to work with the legislature on these bills to help it to do so. If you would like to further discuss our concerns, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org. Again, we ask you to please protect the First Amendment rights of all the people of Arkansas and reconsider S.B. 668 and S.B. 741.

Respectfully submitted,

/s/ David Horowitz

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