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.

Memorandum in Opposition to Delaware S.B. 68

The members of Media Coalition believe that Senate Bill 68 is an unconstitutional restriction on First Amendment protected speech. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Delaware: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

S.B. 68 bars websites directed to minors from marketing or advertising a range of products and services that are illegal for minors. Also, any website that has actual knowledge that a minor is on the site is barred from advertising or marketing those goods and services to that minor. Among the goods and services that may not be advertised or marketed is material that "predominately appeals to the prurient, shameful, or morbid interest of minors, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and taken as a whole lacks serious literary, artistic, political, social, or scientific value for minors. This language mirrors the three prongs of the *Miller/Ginsberg* test for material that is harmful to minors but fails to limit it to material with sexual content.

The speech regulated by this legislation is unconstitutionally overbroad. It goes far beyond advertisements or marketing for what the Supreme Court has said can be proscribed for minors. Governments may restrict minors' access to some sexually explicit speech if it falls within the test announced in *Ginsberg v. New York*, 390 U.S. 629 (1968), and subsequently modified by *Miller v. California*, 413 U.S. 15 (1973). The *Miller/Ginsberg* test holds that speech that is otherwise legal for adults may be banned for minors only if it depicts or describes explicit sexual activity or nudity and, when taken as a whole:

1. predominantly appeals to the prurient, shameful or morbid interest of minors in sex;

2. is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

3. lacks serious literary, artistic, political or scientific value.

The Court has repeatedly affirmed the ruling in *Ginsberg* and cautioned that though minors do not enjoy the protection of the First Amendment to the same extent as adults, "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 212-13 (1975).

The Court has also emphasized that the *Miller/Ginsberg* test only applies to sexual content. In a recent case, the Supreme Court considered a California law that inserted violence

into the test in place of sexual content. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). Justice Scalia, writing for the Court concluded, "[i]t is of no consequence that California's statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York,* 390 U.S. 629, (1968)." *Brown*, at 2735. The opinion went on to make clear, "No doubt a State possesses legitimate power to protect children from harm, *Ginsberg, supra,* at 640-641; *Prince v. Massachusetts,* 321 U.S. 158, 165 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Erznoznik, supra,* at 213-214. *Brown*, at 2735 (2011).

Additionally, absent the limitation to sexual speech, speech cannot be criminalized because it is deemed to lack serious value. In *U.S. v. Stevens,* the Supreme Court dismissed the government's notion that speech may subjected to a test balancing "the value of the speech against its societal costs." 559 U.S. 460 at 468 (2010). As Chief Justice Roberts wrote, "As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.*

The legislature may intend the bill to apply only to sexual material that is illegal for minors but there is nothing in the bill that limits to that content. An unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. As the Supreme Court held in *Stevens*, "[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.*, at 480.

Generally, the government can regulate commercial speech if it satisfies an "intermediate scrutiny" test rather than the "strict scrutiny" standard that must be met by restrictions of noncommercial speech. Even under the "intermediate scrutiny" test, this legislation likely would be struck down. The Supreme Court created a four-part test for judging the constitutionality of commercial speech restrictions in *Central Hudson v. Public Service Commission of New York* which asks:

1. Whether the speech concerns lawful activity and is not misleading;
2. Whether the asserted government interest is substantial; and if so,
3. Whether the regulation directly advances the governmental interest asserted; and
4. Whether the regulation is no more extensive than necessary to serve that interest.

447 U.S. 557, 564 (1980). While "intermediate scrutiny" is not as exacting a standard as "strict scrutiny" the government still must identify a substantial government interest and demonstrate that the regulation is in proportion to the interest. Cases since *Central Hudson* have drawn the standard for restricting commercial speech closer to the standard for noncommercial speech. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

The limitation on advertising and marketing included in S.B. 68 would not survive the *Central Hudson* test. This is not a regulation of commercial speech for an unlawful activity nor is it misleading. Protecting minors from sexual material may be a substantial government interest, but there is no legitimate government interest in barring minors from constitutionally protected speech that the government thinks is unsuitable for them and lacks serious value. Since the government cannot assert a substantial interest to satisfy the second prong of the test, there is no need to consider the third and fourth prongs of the test. Finally, if the government cannot establish that the regulation directly advances the interested asserted, it is unnecessary to determine if the regulation is no more extensive than necessary.

It is also worth noting that the Court has acknowledged that advertisements for material protected by the First Amendment are treated differently than advertisements for general goods or services. *See*, *e.g. Bolger v. Young's Drug Products Corp*., 463 U.S. 60, 67 n. 14 (1983) ("Of course, a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment.")

Finally, this bill may still violate the First Amendment even if it is amended so that it only applies to marketing and advertising to minors of sexual speech that is illegal for minors because it will have a substantial chilling effect on websites. An online bookseller or home video provider is forced to pejoratively identify material as illegal for minors. They will err on the side of caution rather than risk prosecution under the law. This will impede minors from accessing some speech that they have a right to see or hear. Speech is presumed legal for adults and minors until it is found to be illegal by a court. This determination can only be made by the judicial process with the full protections of due process. The Supreme Court has made clear that a state cannot create a non-judicial process for determining if material is illegal for minors (or adults). This is true regardless of whether it does so itself or if it forces the publisher to do so under threat of criminal prosecution. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court struck down a similar scheme of regulation as a form of "informal censorship."

The Supreme Court has repeatedly emphasized the importance of due process protections in a judicial proceeding in determining whether speech is obscene and outside of the First Amendment. In *Marcus v. Search Warrant*, the Court held, "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." 367 U.S. 717, 731 (1961). In *Bantam Books,* the Court said:

> "Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith* v. *California,* 361 U. S. 147; *Marcus* v. *Search Warrant, supra,* is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, *e. g., Thornhill* v. *Alabama,* 310 U. S. 88; *Winters* v. *New York,*

> 333 U. S. 507; *NAACP* v. *Button,* 371 U. S. 415. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser* v. *Randall,* 357 U. S. 513, 525."

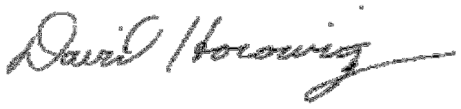
372 U.S. 58, 66 (1963).

Passage of this legislation 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.

We believe Delaware can protect minors while also respecting the First Amendment rights of adults and older minors. We are happy to work with the legislature to help it to do so. If you would like to discuss further our concerns about this bill, 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 Delaware and amend or defeat S.B. 68.

Respectfully submitted,



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