MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

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

June 15, 2011

Governor Rick Scott
Florida

Memorandum Requesting Veto of House Bill 75

The members of Media Coalition believe that House Bill 75 likely violates the First Amendment rights of producers and retailers and their customers and is unnecessary under existing Florida law. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including in Florida: 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.

H.B. 75 would bar the distribution or transmission by a minor of any image that contains nudity and is harmful to minors by electronic means including the Internet. Existing Florida law §847.0138 makes illegal the dissemination by any person of such material by electronic means directly to a specific minor. H.B. 75 would enact a version of the existing law that calls for a lesser penalty when it is violated by a minor but is unconstitutionally overbroad.

Unlike §847.0138, H.B. 75 is not limited to direct communication with a specific individual known by the sender to be a minor. Rather, it restricts material harmful to minors that is generally available on the Internet, public listserves, or in public chat rooms, it is 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, the government may not 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 dissemination by the Internet 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 H.B. 75. 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 laws restricting content on the Internet that have not been struck down are similar to Florida's existing statute and are limited to speech illegal for minors that is intended to be communicated to a known 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

We believe Florida can protect minors while also respecting the First Amendment. One alternative available to the legislature is to amend the existing §847.0138 and provide reduced penalties if the crime is committed by a minor rather than an adult. 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 Florida and veto H.B. 75.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
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