

Memo in Opposition to Florida Senate Bill 1618

The members of Media Coalition believe that Florida Senate Bill 1618 threatens the distribution of First Amendment-protected material in Florida. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Florida: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They have asked me to express these concerns.

S.B. 1618 would expand the definition of child pornography in §775.0847 and §827.071 to include images to include any visual depiction that has been “created, adapted, or modified to appear that a minor is engaging in sexual conduct.” The existing law only criminalizes images of actual minors engaged in sexual conduct. The legislation is constitutionally suspect to the extent the legislation would apply to images of adults who appear to be minors or to images that appear to be minors but were created without the involvement of an actual minor, be they drawn, sculpted, created on a computer or otherwise.

While the members of Media Coalition are deeply concerned about the sexual exploitation of minors and support laws that attempt to eradicate it, they believe this bill could criminalize material that is fully protected by the First Amendment and that does not sexually exploit minors. In a clear and resounding decision, the Supreme Court in *Free Speech Coalition v. Reno*, 535 U.S. 1382 (2002) found unconstitutionally overbroad a similar statute, the Child Pornography Prevention Act (CPPA) passed by Congress in 1996. The CPPA criminalized both depictions of adults who appear to be minors and computer generated images that appear to be of a minor engaging in real or simulated sex or with genitals lasciviously displayed. The Supreme Court ruled that unless the material included actual minors engaged in prohibited sexual activity the material is protected by the First Amendment and could only be banned if it is first found to be obscene under the three prong tests enunciated in *Miller v. California*, 413 U.S. 15 (1973). *Free Speech Coalition* reaffirmed *Ferber v. New York*, 458 U.S. 747 (1982), the landmark case that upheld a ban on actual child pornography, but where the U.S. Supreme Court made clear that these laws should strike only at pictures of children being sexually abused, not at all representations of minors. The Court in *Ferber* specifically identified performers who appear to be minors and images of adults who appear to be minors as an appropriate alternative to using under age performers or images containing actual minor. *Id* at 763.

The changes in S.B. 1618 are constitutionally suspect in light of *Free Speech Coalition* and *Ferber*. These cases make very clear that it is impermissible to criminalize material that was created without using an actual minor in a sexual situation. This legislation could criminalize significant mainstream material including many art books that contain painting, drawings or sketches that have a sexual theme and popular recent movies such as *Traffic*, *The Reader* and

American Beauty that depict minors but do not involve an actual child. Since none of this material includes images of actual minors, it cannot be made illegal unless it is found to be obscene under the test in *Miller*. As the Court said in *Free Speech Coalition*, “Protected speech does not become unprotected merely because it resembles the latter.” 535 U.S. 1399 (2002).

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’ attorneys’ fees. In recent successful challenges to laws that are contrary to the First Amendment awards of legal fees have been in excess of \$300,000.

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 Floridians and amend or defeat S.B.1618.