THE MEDIA COALITION
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 Indiana Senate Bill 14 and to portions of IC 35-42-4-4 (b) and (c)

As we communicated to the legislature last year, Media Coalition believes that parts of Indiana code 35-42-4-4 are unconstitutionally overbroad. Photographic images of actual minors who are nude or engaged in sexual activity are not protected by the First Amendment. However, the Supreme Court has been clear that descriptions of minors, images of adults who appear to be minors and drawings and sculptures are fully protected by the Constitution and cannot be criminalized by the state as child pornography. Senate Bill 14 adds to the unconstitutional reach of the law by adding more protected speech and adds harsher penalties on the existing protected speech. While we share the legislature's deep concern about the sexual exploitation of minors, Indiana's existing law and this bill violate the First Amendment and must be narrowed to images of actual minors. We believe the legislature can make small changes to the law and the legislation so they comply with the First Amendment without undermining its efforts to punish the exploitation of minors. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Indiana: publishers, booksellers and librarians as well as producers and retailers of recordings, films, home video and video games.

S.B. 14 would amend IC 35-42-4-4 to create two new sections and re-order the lettering of the existing sections. Subsection 4(b)(2) and (3) criminalizes the dissemination of material that describes sexual conduct of minors (subsection 4(b)(4) only applies to depictions). Subsection 4(c) applies to same material but is a higher level felony if other elements are met. Subsection 4(d) makes illegal depictions of adults that lack serious value and drawings that are, by, not photographic images. Subsection 4(e) criminalizes depictions of adults who appear to be minors regardless of whether the depiction has serious value. The law criminalizes a significant amount of mainstream material, including many Judy Blume and John Green coming-of-age books that describe teenagers engaging in sexual conduct, art books that contain paintings, drawings or sketches that have a sexual theme and movies such as *Animal House*, *Last Picture Show, Romeo and Juliet* and *American Beauty* that depict adults who appear to be minors.

The Supreme Court has ruled specifically that the speech identified above — descriptions, images of adults that appear to be minors and non-photographic images — is protected by the First Amendment and cannot be made illegal by shoehorning it into a definition of child pornography. Justice Kennedy, writing for the Court, said in *Ashcroft v. Free Speech Coalition*, "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter." 535 U.S. 234 at 255 (2002). Kennedy also explained that the Court in *New York v. Ferber* relied on these alternative means of telling stories that include themes of minors' sexuality to support its ruling banning photographic images of actual minors. *Id*. at 251 (2002).

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In *Ferber*, the Supreme Court held that photographic images of minors engaged in sexual conduct or lasciviously displaying the genitals was outside the protection of the First Amendment. 458 U.S. 747. The Court directly considered whether written descriptions were not protected by the First Amendment and concluded, "Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age." 458 U.S. 747 at 764 (1982) (Italics in original)(footnote omitted).

In *Free Speech Coalition*, the Supreme Court held that part of the Child Pornography Prevention Act (CPPA) was unconstitutionally overbroad. 535 U.S. 234 (2002). Enacted in 1996, the CPPA criminalized depictions of adults who appear to be minors and computer-generated images that appear to be of a minor engaging in real or simulated sexual activity or with his or her genitals lasciviously displayed. In the decision, Justice Kennedy explains that virtual images are clearly distinct from images of actual minors. A virtual image "records no crime and creates no victims by its production." *Id*., at 250. He added that the *Ferber* Court considered "virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression" in lieu of images of minors. *Id*., at 251.

The Court has also held that drawings and other non-photographic images cannot be defined as child pornography. In *Ferber* they explained that visual depictions such as drawings remain protected by the First Amendment: "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." 458 U.S. at 764-5 (1982). The "other depictions" referred to by the Court include drawings, which cannot be deemed to be child pornography since the image is not photographic record of a minor.

It may not be the intent of the legislature that the law or S.B. 14 apply to the movies, books and other media cited in our memo, but the Supreme Court has held that laws that restrict speech must be carefully drawn. As Justice Roberts wrote in *U.S v. Stevens*, "But the 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." 130 S. Ct. 1577, 1591 (2010).

As we noted last year, there has not been a facial challenge to the language in these subsections of the Indiana law. However, an Indiana appellate court considered these questions in an interlocutory appeal of a child pornography prosecution. In *Logan v. State*, the court conceded that the law is overbroad "on its face since Subsection 4(b) applies to not only visual child pornography, but also written descriptions of child pornography. Similarly, Subsection 4(c) applies to written descriptions of child pornography, virtual child pornography, and pornography showing youthful-looking adults." 836 N.E.2d 467, 472 (Ind. Ct. App. 2005). The court declined to strike down the law unconstitutional since the defendant was not charged with possession of this material. Instead the court opted to "leave for another day consideration of specific abuses of the application of Indiana Code Section 35-42-4-4." *Id*.

For all these reasons, we believe that Indiana's present law violates the First Amendment. S.B. 14 may be unconstitutionally vague and exacerbates the constitutional infirmity in the law by broadening the content subject to it. A facial challenge to the law or the legislation could prove costly. If a court declares it unconstitutional, there is a strong possibility that the state will be ordered to pay the plaintiffs' attorney's fees.

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 Indianans and amend or repeal the portions of subsections 4(b) and 4(c) of IC 35-42-4-4 and amend the new subsection in SB 14 that are overbroad rather than creating new crimes that the material is subject to.