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.

The Honorable Michael Pence
Governor
Office of the Governor
Statehouse
Indianapolis, Indiana 46204-2797

Re: Request for veto of Senate Bill 313

Dear Governor Pence,

Media Coalition asks that you veto S.B. 313 because portions of Indiana IC 35-42-4-4 are unconstitutionally overbroad and this legislation will greatly expand the material that is covered by the law. While we share the legislature's deep concern about the sexual exploitation of minors and support efforts to eradicate it, we believe the bill should be returned to the legislature so that the constitutional infirmities in IC 35-42-4-4 can be addressed before enacting S.B. 313. 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. 313 amends IC 35-42-4-4(a) to add to the definition of sexual conduct "female breast with less than a fully opaque covering of any part of the nipple." Indiana's present law, IC 35-42-4-4, criminalizes the possession or dissemination of any material that contains depictions of minors engaged in "sexual conduct." However, several provisions of the statute go beyond photographic images of minors to bar material that is fully protected by the First Amendment. Subsections 4(b)(2) and (3) and (c) criminalize the dissemination of material that "describes" sexual conduct of minors, which is generally understood to be written or oral communication. Subsection 4(c) also bars the possession of images of adults who appear to be minors if the images "lack serious literary, artistic, political, or scientific value" and possession of drawings of minors engaging in sexual conduct. "Sexual conduct" is defined in Subsection 4(a) as sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5) and exhibition of the uncovered genitals.

These portions of 4(b)(2) and (3) and (c) are unconstitutional because they apply to speech that is fully protected by the First Amendment, and they must be repealed or amended before the state substantially broadens the content that is subject to prosecution. The present law's application to descriptions of minors engaged in proscribed conduct applies to a wide range of mainstream speech such as health information and teen literature like Judy Blume books that describe teenagers' early sexual experimentation. The part of 4(c) that criminalizes

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drawings and images of adults who appear to be minors could allow for the prosecution of art books that contain paintings, drawings or sketches that have a sexual theme and movies such as *Animal House* and *American Pie* that depict adults who appear to be minors but might be considered entertainment rather than having serious value. Since none of this material includes images of actual minors, it cannot be made illegal unless it is found to be obscene under the three-prong test established in *Miller v. California*. 413 U.S. 15 (1973).

Enactment of S.B. 313 will compound the constitutional problems with the existing law by broadening the content subject to the law and make it much more likely to be held unconstitutionally overbroad. Descriptions of the breasts of minors and depictions of adults portraying minors who appear topless are much more common in literature and movies than sexual conduct or display of the genitals. It means the Indiana law will apply to books such as *Romeo and Juliet* and many coming-of-age memoirs, many famous paintings and movies such as *Fast Times at Ridgemont High, Titanic, American Beauty* and *Traffic* that have adults portraying minors.

Subsections 4(b)(2) and (3) and 4(c) "descriptions" of sexual conduct by minors:

Only photographic images of actual minors engaged in sexual activity are outside the protection of the First Amendment and can be criminalized. In *New York v. Ferber*, the Supreme Court held that images of minors engaged in sexual conduct or with their genitals lasciviously displayed were outside the protection of the First Amendment regardless of whether it satisfied the test for obscenity. However, the Court specifically noted that the material that does not enjoy First Amendment protection is limited to images and does not extend to descriptions: "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).

There is no basis to read "describes" as referring to photographic images. These sections criminalize material that "depicts or describes" sexual activity by minors. "Describes" is generally defined as written or oral communication. The term is not otherwise defined in the statute to be limited to images. The words in the statute are written as a choice, "depicts *or* describes," so they should not to be considered collectively to refer only to images. The construction of the law further confirms that "describes" is read separately from "depicts" since subsections 4(b)(1) and (4) only criminalize material that includes visual portrayals of minors without using "describes" or "depicts or describes" to refer to the visual content.

Subsection 4(c) images of adults who appear to be minors:

In 2002, the Supreme Court struck down the Child Pornography Prevention Act (CPPA), in a resounding decision in *Ashcroft v. Free Speech Coalition*. 535 U.S. 234 (2002). Enacted 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 actual or simulated sexual activity or with his or her genitals lasciviously displayed. The Supreme Court ruled that unless the images depicted actual minors engaged in sexual activity or displaying lascivious nudity, the material is protected by the First Amendment and could only be banned if it is first found to be obscene. Justice Kennedy, writing for the Court, said, "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. at 255.

The exception to subsection 4(c) for material with "serious value":

This provision cannot be saved by limiting it to images of adults who appear to be minors that lack "serious literary, artistic, political, or scientific value." This saving clause is predicated on the value of the images. Speech that is protected by the First Amendment does not become unprotected because it lacks "serious value." In *United States v. Stevens,* the Court considered a federal law that criminalized images of animal cruelty. The law also included an exception for images that have "serious value." The government argued that speech that is otherwise protected by the First Amendment may be criminalized because it had little value and the exception would protect valuable discourse. The Supreme Court dismissed the notion that speech may be subjected to a test balancing "the value of the speech against its societal costs." 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." 559 U.S. 460, 468 (2010).

Subsection 4(c) drawings of minors engage in sexual conduct:

Again, the Supreme Court in *Ferber* emphasized that non-photographic visual depictions of minors 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 included drawings, which cannot be deemed to be child pornography since the image is not a photographic record of a minor. In *Free Speech Coalition*, Justice Kennedy explained that the Court in *Ferber* relied on these alternative means of storytelling that touch on themes of sexual activity by minors to support its ruling banning images of actual minors without totally censoring discussion of the matter. 535 U.S. at 251 (2002).

Indiana court ruling:

There has not been a facial challenge to either of these subsections in the existing Indiana law, but an Indiana appellate court considered these questions in an interlocutory appeal of a child pornography prosecution. In *Logan v. State*, the court conceded that these parts of the law are 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). However, it declined to find the law unconstitutional since the defendant had not been 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.*

It may not be the intent of the legislature that the law or S.B. 313 apply to the material cited in our memo, but the Supreme Court has repeatedly ruled that laws that restrict speech must be carefully drawn. "It is a basic principle of due process that an enactment is void for

vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'"). As Justice Roberts wrote in *United States v. 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." 559 U.S. at 574.

For all these reasons, we believe that Indiana's present law violates the First Amendment and S.B. 313 will make it worse by broadening it to apply to more mainstream media. 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. We believe we can help any efforts to resolve the problems with these sections, and are happy to do so.

Please protect the First Amendment rights of all Indianans and veto S.B. 313 so the legislature will have another chance to address the First Amendment deficiencies in subsections 4 (b) and (c) of IC 35-42-4-4.

Respectfully submitted,

David Horowitz
Executive Director