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 Iowa S.F. 2039, to the extent applied to the Internet

The members of Media Coalition believe that Senate File 2039 is unconstitutional to the extent it is applied to the general distribution of speech on the Internet that is not obscene for adults. We believe it would not violate the First Amendment if it was limited either to adult obscenity or to electronic devices without applying to material on the Internet. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Iowa: publishers, booksellers and librarians as well as manufacturers and retailers of sound recordings, films, videos and video games.

Senate File 2039 would add "electronic communication devices" to Iowa's existing law barring dissemination of obscene for minors material to minors by telephone. "Electronic communication device" is defined to include any computer, tablet, smartphone or other device that allows one to access the Internet.

Governments can restrict access to adult obscenity on the internet since the speech is illegal for everyone. However, in section 728.1(5) "obscene material" is defined as material that is obscene for minors rather than material that is obscene for adults. This is a crucial distinction because it means that the material is still protected by the First Amendment for adults and cannot be made illegal on the Internet even if the intent is to protect minors.

Courts have repeatedly held that it violates the First Amendment to restrict general communication that is legal for adults on the Internet, websites, listservs and in public chatrooms and social networking sites. Such laws unduly burden the rights of adults to access it. Restricting speech on the Internet in order to protect minors is to treat material disseminated on the Internet as if there were no difference between a website or blog and a book or magazine. But cyberspace is not like a bookstore. When a person speaks generally through a website or in a chatroom, there is no way to know whether the person receiving sexual content is a minor or an adult. At the same time, anyone who makes material available on the Internet through a website, listserv or public chatroom knows or should know that a minor potentially could access his or her content. That general knowledge satisfies the scienter requirement in a criminal statute. As a result, the effect of banning the computer dissemination of material with sexual content is to deprive adults of their First Amendment rights by forcing a publisher to deny access to both minors and adults.

There is a substantial body of case law striking down laws that criminalize "obscene for minors" speech that is generally available on the Internet. Courts have repeatedly ruled that such laws violate the First Amendment because they restrict the speech of adults on the Internet to what is acceptable for minors. The courts have also held that there are less restrictive and more effective means for preventing minors from accessing such content that do not infringe on the

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speech of adults. In addition to striking down Computer Decency Act in *Reno v. ACLU*, a second federal law, the Child Online Protection Act (COPA) and eight similar state laws have been held unconstitutional as violating the First Amendment. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd sub nom. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009); *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)*; 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 Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011). A ninth state law was struck down as violating the Commerce Clause of the Constitution. *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Two other state laws were substantially narrowed as to not apply to general dissemination of speech on the Internet. *Florence v. Shurtleff,* U.S. District Court for the District of Utah (No. 2:05CV00495 DB); *American Booksellers Foundation for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010). Most of these cases were brought by Media Coalition members and were litigated by our general counsel. The court opinions in all of these cases are available on the litigation page of our website at: http://mediacoalition.org/litigation/#internet.

S.F. 2039 is not saved by the affirmative defense in Section 728.15 if the speaker uses access codes, age verification services or credit cards. It still violates the First Amendment because it imposes a substantial chilling effect on protected speech on the Internet. Such services create a financial penalty on websites while deterring adults from accessing material they have a First Amendment right to see. Age verification systems charge websites for each visitor. This cost is prohibitive for individuals who have blogs or personal websites that are free to visit and can be substantial even for sites that generate income. Age verification systems also deprive Internet browsers of their anonymity. Many browsers will decide not to view material rather than reveal their identity online. This deprives those readers access to sensitive material such as health information. In turn, this reduces traffic on websites. The loss of traffic can reduce the income of websites and limit the ability to communicate with a wider audience. This bill would be analogous to asking every bookseller to ask each customer for proof of age before permitting them to browse in the store because the store carries some material that is not suitable for minors. The store would then have to pay a fee for each time it carded the browser.

COPA included an affirmative defense for any website that used an age verification system. In considering whether to uphold a preliminary injunction barring enforcement of COPA, the Supreme Court concluded that age check systems, and several other affirmative defenses, were neither the least restrictive means nor the more effective means for preventing minors from accessing harmful to minors material. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666-668 (2004). The Supreme Court then remanded the case to the U.S. District Court for further fact finding. U.S. District Judge Lowell published an extensive finding of facts on the ineffectiveness of age verification systems. He found, "From the weight of the evidence, I find that there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor." *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775. 800 (E.D. Pa. 2007),

aff'd sub nom. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 129 Sup. Ct. 1032 (2009). Judge Lowell then issued a permanent injunction. "For the forgoing reasons, I conclude that COPA facially violates the First and Fifth Amendment rights of the plaintiffs because: (1) COPA is not narrowly tailored to the compelling interest of Congress; (2) defendant has failed to meet his burden of showing that COPA is the least restrictive and most effective alternative in achieving the compelling interest; and (3) COPA is impermissibly vague and overbroad. Therefore, I will enter a permanent injunction against the enforcement of COPA." *American Civil Liberties Union*, 478 F. Supp. 2d at 821 (footnote omitted). The Third Circuit Court of Appeals affirmed Judge Lowell's grant of a permanent injunction holding, "We conclude that the District Court correctly found that implementation of COPA's affirmative defenses by a Web publisher so as to avoid prosecution would involve high costs and also would deter users from visiting implicated Web sites. It is clear that these burdens would chill protected speech and thus that the affirmative defenses fail a strict scrutiny analysis." *Mukasey v. ACLU*, 534 F.2d 181, 197 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009), aff'g sub nom. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

Two U.S. Courts of Appeal reached the same conclusion. The Second Circuit struck down a Vermont law that barred dissemination of material harmful to minors to minors on the Internet but that exempted websites that use an age verification system. The court held, "Although technology exists that allows publishers to restrict website access by requiring credit card verification or registration with a commercial age-verification service, a significant number of adult web-users are unwilling or unable to use such verification systems". *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003) The Fourth Circuit struck down a law despite the government argument that the use of an age verification system would exempt a website from enforcement. The Court held, "The District Court was correct in its conclusion that requiring adult websites to utilize PIN numbers would unconstitutionally chill free speech" *PSINet v. Chapman*, 63 F.3d 227, 237 (4th Cir. 2004).

S.F. 2039 likely also violates the Commerce Clause of the Constitution, which reserves to Congress the power to regulate interstate commerce. It would apply to any publisher who allows a minor in Iowa to access sexual speech. Courts have cited the burden on interstate commerce as a basis for striking down laws that criminalized the dissemination on the Internet to minors of material harmful to minors. As a leading case applying the Commerce Clause to the Internet explained:

> The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.

American Library Association v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y. 1997); *See also, PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean,* 342 F.3d 96 (2d Cir. 2003); *Cyberspace v. Engler,* 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson,* 194 F. 3d 1149 (10th Cir. 1999).

Even if the intent of the legislature is that the bill would be limited solely to the electronic device and not to be applied to the Internet, it is not clear from text of the bill and it is not enough that the government tells us it will only be used in such a manner. 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).

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. In past challenges to such legislation, states have paid to the plaintiffs as much as $450,000 in legal fees.

We ask you to please protect the First Amendment rights of all the people of Iowa and amend or defeat S.F. 2039. We believe Iowa 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.

Respectfully submitted,

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