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.

June 9, 2015

The Honorable Bobby Jindal
Governor
PO Box 94004
Baton Rouge, LA 70804-9004

Re: Request for Veto of Louisiana House Bill 153

Dear Governor Jindal,

Media Coalition respectfully asks you to veto House Bill 153 for two reasons. First, we believe that it violates the Constitution for several reasons. Second, it is difficult and burdensome for online publishers, booksellers and others to comply with the law because it imposes financial burdens and vague mandates on them. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Louisiana: publishers, booksellers and librarians, as well as manufacturers and retailers of recordings, films, home video and video games. Their members offer mainstream media fare.

H.B. 153 requires any person or entity in Louisiana who publishes material harmful to minors on the Internet to make every visitor to their site "electronically acknowledge and attest" to being 18 years of age or older prior to gaining access to such material. Failure to do so is a crime even if the person accessing the material is an adult. How a person or entity is to "electronically acknowledge and attest" to being an adult is not defined in the legislation. A violation is punishable by a fine of $10,000. The law does nothing to bar minors from accessing sexual material that is illegal for them, either by allowing prosecution of the retailer or the minor.

Our members represent publishers who distribute books online, booksellers with online stores, companies that offer home video online and librarians that make their collections available electronically. They are very concerned that the bill offers very little information on how to comply with it. We urge you to veto the bill so the legislature can address these problems. Among them are:

- "Electronically acknowledge and attest" is not defined in the bill. It is commonly understood to mean a legally binding statement. Here it is unclear if clicking a button in a pop-up window or screening page is sufficient.
- It is reasonable to assume that more is required because merely clicking a box is unlikely to prevent minors from accessing sexual material.
- Incorporating a click-through screen presents significant technical challenges for many smaller publishers or booksellers. Additional requirements make the burden more onerous.

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- Since the crime is failing to seek age verification from any visitor who seeks to access sexual content, sites must maintain some record of asking visitors to acknowledge and attest to their age. Are websites required to keep some record of this action until the statute of limitations expires, which can be years or decades?
- Maintaining these records would also be a substantial technical and financial burden for many websites that do not have the computer storage capacity, money or technical knowledge of how to set up a system to collect and maintain these records and keep them matched with visitors who attempt to access the sexual material.
- Determining what material is illegal for minors varies based on the age of the minor, but the law fails to explain what age to use to determine if the material is illegal for them.
- The bill gives no guidance on whether a site must have a screen for each item that is harmful to minors, a screen for a segregated section of the site or a single screen for the whole site.
- The law is not clear whether it applies only to material that can be viewed on the site or any sexual material that is available for sale. This is an important distinction for online booksellers.

H.B. 153 Imposes Unconstitutional Burden on Rights of Adults for No Benefit

In addition to these practical problems for retailers, H.B. 153 is clearly unconstitutional. It is an unacceptable burden on adults and businesses exercising their First Amendment rights without any basis for imposing the burden. Government restriction on access to First Amendment protected material for adults or older minors in the interest of protecting younger minors would be "to burn down the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). However, this legislation does nothing to protect any minors. It only impedes the rights of adults and online booksellers, publishers and providers of video and other speech, without doing anything to prevent minors from accessing sexual material online. The only crime is if a site fails to ask anyone attempting to access sexual material to "electronically acknowledge and attest" to being an adult. The bill does not bar minors from viewing sexual content online nor is it presently illegal for minors to do so online (see discussion of case law below).

It is a burden for online retailers to be subject to a crime for failing to "ID" adults that, in effect, forces them to act like adult bookstores or video stores. They must create a segregated area within their website and "ID" every adult before they enter the section. This is far beyond what courts have said "brick and mortar" retailers must do to prevent minors from perusing material harmful to minors. It places an unacceptable burden on adults' First Amendment rights in order to protect minors. Bookstores must take reasonable efforts to block minors from perusing sexual material that is illegal for them, but courts have also ruled that these limitations may not unreasonably hinder the access of adults. They cannot be forced to hide such material behind blinders or behind the counter or to segregate it in an adults-only area. *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d 125 (4th Cir. 1989). Also, in a prosecution for a violation of a law barring the display of such material to a minor, the business owner is only required to take reasonable steps to bar access to material that is illegal for the oldest minors. *See, Id*.

Unconstitutional to Bar General Access to Sexual Material Online

Even if the legislation criminalized minors viewing sexual content online, it would still violate the First Amendment. Courts have repeatedly ruled that laws that restrict non-obscene sexual speech online violate the First Amendment because they infringe on the speech rights of adults. A federal law, the Child Online Protection Act (COPA), and eight similar state laws that have imposed harmful to minors laws on material distributed on the Internet 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. 555 U.S. 1137 (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. McMaster* 282 F. Supp. 2d 1180 (D.S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. Feb. 21, 2002); *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. Oct. 26, 2010); *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011). A ninth state law was struck down solely as violating the Commerce Clause of the Constitution. *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Two other state laws were substantially narrowed as not to apply to general dissemination of speech on the Internet. *Florence v. Shurtleff*, No. 2:05cv000485 (D. Utah May 16, 2012); *American Booksellers Foundation for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010). Many of these cases were brought by Media Coalition members and the cases 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/category/litigation/litigation-internet/

The ruling in COPA repeatedly addressed the burden on adults of being asked to acknowledge and attest to their age. COPA barred commercial websites from allowing minors to access material harmful to minors. The law included an affirmative defense to avoid prosecution similar to the "ID" requirement in H.B. 153. It provided several ways that a website could "ID" a visitor seeking to access sexual material, including age verification services, use of a credit card, use of a digital certificate that verifies age, or by any other reasonable means available under existing technology. Courts repeatedly dismissed these options to verify a user's age and enjoined the law. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd sub nom. *Mukasey v. ACLU*, 534 F.3d 181 (3d Cir.2008). After the third time the Third Circuit Court of Appeals held the law unconstitutional, the Supreme Court denied the government's petition for certiorari. *ACLU v. Mukasey*, 555 U.S. 1137 (2009). Despite the "ID" provision, the law was found unconstitutional because it was not the least restrictive or most effective means for protecting adults' access to sexual speech while preventing minors from accessing sexual content. Filtering software and other user-empowerment tools were cited as a less restrictive means of protecting minors without limiting the speech of adults. *See, Ashcroft v. AC LU*, 542 U.S. 656, 666-669 (2004) (affirming findings of facts by the U.S. District Court that filtering software is a less restrictive and more effective means of preventing minors from accessing sexual material in the challenge to COPA).

Following the ruling, the Court then remanded the case to the U.S. District Court for further fact finding to determine if the state of age verification technology had changed since the District Court first considered it. Judge Lowell again considered different ways of screening of websites users for age. He found:

> "Many people wish to browse and access material privately and anonymously, especially if it is sexually explicit. Web users are especially unlikely to provide a credit card or personal information to gain access to sensitive, personal, controversial, or stigmatized content on the Web. As a result of this desire to remain anonymous, many users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners such as the plaintiffs will be deprived of the ability to provide this information to those users."

ACLU v. Gonzales, 478 F. Supp. 2d 775. 805-6 (E.D. Pa. 2007), aff'd sub nom. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 555 U.S. 1137 (2009). Judge Lowell then affirmed his earlier issuing of a permanent injunction. The Third Circuit Court of Appeals affirmed the granting of the injunction stating, "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. 555 U.S. 1137 (2009), aff'g sub nom. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

H.B. 153's requirement that adults "electronically acknowledge and attest" to their age suffers the same constitutional defect as COPA's affirmative defense for different types of age verification systems. As explained in the COPA case, asking adults to provide their electronic "ID" drives away traffic from websites, which causes a substantial chilling effect on their exercising their First Amendment right to access certain speech. The fear of losing visitors also imposes a chilling effect on the First Amendment rights of publishers who will be forced to risk losing visitors to their sites or not carrying material that they might be worried is harmful to minors. This chilling effect is compounded by the significant technical and financial burdens necessary to comply with the law that were discussed above.

<u>Forced Labeling of Speech is Unconstitutional Prior Restraint</u>

The legislation is also likely violates the First Amendment because it forces websites or publishers to pejoratively identify material as illegal. Speech is presumed legal for adults and minors until it is found to be illegal by a court. This determination can only be made by the judicial process with the full protections of due process. The Supreme Court has made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). This is true regardless of whether it does so itself or if it forces the publisher to do so under threat of criminal prosecution. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court struck down a similar scheme of regulation as a form of "informal censorship."

<u>Unconstitutional for Vagueness</u>

H.B. 153 also likely violates the Due Process Clause of the Constitution on vagueness grounds for some of the practical problems listed at the beginning of the letter. "An enactment is void for vagueness under the due process clause of the fourteenth amendment if it fails to draw reasonably clear lines between lawful and unlawful conduct. Vague statutes fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful

manner." *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir. 1983), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir. 1984) (Internal cites omitted), *see also*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.") 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 noted above, the bill does not define the term "acknowledge and attest." There is no guidance on what age is to be used to determine if the material meets the definition of harmful to minors and must be screened. The legislation does not explain whether information about each visitor must be retained to prove that he or she was "IDed" or if being able to show there is a screening page is enough.

Passage of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very 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.

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.

We ask you to please protect the First Amendment rights of all the people of Louisiana and veto H.B. 153.

Respectfully submitted,

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Executive Director

cc: Kyle Plotkin, Chief of Staff
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