

Memorandum in Opposition to Louisiana House Bill 258

The members of Media Coalition believe that House Bill 258 violates the Constitution for several reasons. 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, videos and video games.

H.B. 258 would require anyone who publishes material harmful to minors on the Internet to require an “age verification system” to access the material. Failure to do so is a crime even if the material is not accessed by a minor. An “age verification system” is defined as technology used by a website to confirm that a user attempting to access the website is at least 18 years of age. A violation is punishable by a fine of \$10,000. It is unclear from the text of the bill if it is also the intent of the legislation to apply to the Internet Louisiana’s existing law barring dissemination to minors of material harmful to minors.

We assume that this legislation is not meant to apply the harmful to minors law to the Internet since there is a substantial body of case law striking down laws that criminalize speech that is generally available online. 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. Also, courts have held that there are less restrictive and more effective means for preventing minors from accessing such content that does not infringe on the speech of adults. A 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 solely 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*, 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/litigation/#internet>.

Even if the legislation only requires that websites use an age verification system, it still violates the First Amendment because it imposes a substantial chilling effect on protected speech

on the Internet. It imposes 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 US 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 have 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 arguing 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).

This legislation likely also violates the Commerce Clause of the Constitution which reserves to Congress the power to regulate interstate commerce. H.B. 258 would apply to any entity in Louisiana who publishes material to the website, but that entity may be using a server in California to publish to a website registered in Missouri and accessed by adults from all over the country. 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:

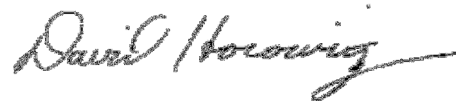
The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any 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).

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 defeat H.B. 258.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Horowitz
Executive Director
Media Coalition, Inc.