



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.

## Memorandum in Opposition to Maine S.P. 386/LD 1114 proposed §283-A

The members of Media Coalition believe that the proposed §283-A in S.P. 386/LD 1114 violates the First Amendment because it restricts speech on the Internet that is fully protected by the Constitution. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Maine: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, home video and video games and their consumers.

Proposed §283-A makes it a crime for an adult to “electronically transmit” an image or video of “sexually explicit conduct” or a link to a site that hosts such an image to a person he or she knows or believes to be less than 14 years old. “Electronically transmit” is defined as including, but not limited to, electronic mail or text messaging or through social media or a “community online forum.” “Sexually explicit conduct” is not defined.

The restriction on transmitting sexually explicit conduct without a connection to an otherwise illegal act is almost certainly unconstitutionally overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the Supreme Court has ruled that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them.” *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975).

Governments may restrict minors’ access to some sexually explicit speech but it is a narrow range of material determined by a specific test. Proposed §283-A lacks any part of the test required by the Supreme Court. In *Ginsberg v. New York*, the Supreme Court created a three-part test for determining whether material is First Amendment protected for adults but is unprotected as to minors. 390 U.S. 629 (1968). The test was later modified in *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller/Ginsberg* test, in order for sexual material to be constitutionally unprotected as to a minor, it must, when taken as a whole,

- i. predominantly appeal to the prurient, shameful or morbid interest of minors in sex;
- ii. be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- iii. lacks serious literary, artistic, political or scientific value.

The Supreme Court emphasized that material that is not “harmful to minors” under the *Miller/Ginsberg* test “cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznick*, supra, at 213-214. Even material that meets this definition may be barred for minors only as long as the prohibition does not unduly burden the rights of adults to access it.

Executive Director: David Horowitz Chair: Barbara Jones, Freedom to Read Foundation  
Immediate Past Chair: Tom Foulkes, Entertainment Software Association Treasurer: Sean Bersell, Entertainment Merchants Association  
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

This bill is immediately constitutionally suspect because “sexually explicit conduct” lacks any part of the *Miller/Ginsberg* test. Laws in two states were recently ruled unconstitutional for failing to include the test. In Oregon, a law barring dissemination of sexual material to minors was struck down by the Ninth Circuit Court of Appeals as overbroad for making illegal material that was beyond the scope of the *Miller/Ginsberg* test. *Powell’s Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). Similarly, an Illinois law that barred the sale to minors of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test was permanently enjoined by the U.S. District Court, and the ruling was vigorously affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff’d* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

Even if proposed §283-A defined “sexually explicit conduct” using the *Miller/Ginsberg* test, it still would likely be unconstitutional since it applies to generally available material on the Internet, specifically to social media and websites that contain sexual content, and presumably to any other distribution on the Internet. To do so treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. But online distribution is not like a bookstore. There is no way to know whether the person receiving the sexual material 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 that there likely is a minor accessing his or her content. That general knowledge satisfies the knowledge requirement in a criminal statute. As a result, the effect of banning the electronic dissemination of material “harmful to minors” is to force an online publisher to deny access to both minors and adults, depriving adults of their First Amendment rights.

There is a substantial body of case law striking down laws that criminalize 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. 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. Two federal laws, the Computer Decency Act (CDA) and the Child Online Protection Act (COPA), and eight similar state laws have been held unconstitutional as violating the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997); *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. 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). Many of these cases were brought by Media Coalition members and were litigated by our general counsel. The court opinions are available on the litigation page of our website at: <http://www.mediacoalition.org/litigation>.

Several of these cases also held that the regulation of speech on the Internet violates the Commerce Clause of the Constitution, which reserves to Congress the power to regulate

interstate commerce. This legislation would apply nationally since it is not limited to a person located in Maine communicating with a minor located in Maine, and websites, chatrooms and social media cannot keep themselves from being “transmitted” into Maine. Courts across the country have repeatedly struck down state laws that seek to regulate online content because they are an unconstitutional burden on interstate commerce. 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 Communications v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999).

The only exceptions to these decisions have been laws that limited speech in connection with an unlawful intent such as luring or grooming a minor to engage in illegal sexual activity. The other exception is laws that were limited to speech that meets the Supreme Court’s three-prong test for sexual material “harmful to minors” and that was intended to be communicated to a specific person that the speaker has actual, rather than general, knowledge is a minor or believes to be a minor. While this may be the intent of the statute, it is not the plain language of the text, and it is not enough that the government tells us it will only be used in such a manner. As Justice Roberts 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.” 559 U.S. 460 (2010).

Passage of this bill 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.

We believe Maine can protect minors while also respecting the First Amendment. 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 David Horowitz at 212-587-4025 #3 or [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

We ask you to please protect the First Amendment rights of all the people of Maine and amend or defeat proposed §283-A of S.P. 386/LD 1114.