

Memorandum in Opposition to Massachusetts Senate Docket No. 528

The members of Media Coalition believe that Senate Docket 528 is unproductive, unnecessary and redundant. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Massachusetts: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They have asked me to explain their concerns.

S.D. 528 would create a commission to study many aspects of video games including: the benefits; the use by the military and for educational purposes; whether they are addictive; any connection between video games and actual violence; and an evaluation of the law with respect to First Amendment protection afforded to video games. The legislation also calls on the commission to consider policy proposals to regulate video games and to estimate the cost of those proposals.

The commission will take time and resources but any policy proposals to restrict video games based on their content are likely to violate the First Amendment regardless of what the commission concludes with respect to points (i)-(iv). In 2011, the Supreme Court issued a sweeping ruling in *Brown v. Entertainment Merchants Association*, striking down a California law that banned minors from buying or renting video games with certain violent imagery. 564 U.S. ___, 131 S. Ct. 2729 (2011). The Court ruled that video games are entitled to First Amendment protection the same as other types of media. Justice Scalia, writing for the majority, specifically acknowledged that, “[L]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.” *Id.* at 2733. He also dismissed the state’s argument that video games should be treated differently than books or movies because they are interactive. See, *Id.* at 2737-38.

The Court then went on to find that there is no historic exception to the First Amendment for content with violent depictions or descriptions even as to minors. Justice Antonin Scalia noted that “California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.” *Id.* at 2736. The opinion then discusses a number of books read by children that are filled with violent and gory themes.

Since the law imposed a restriction on speech based on its content and there was no historic exception to the First Amendment, the Court applied strict scrutiny analysis and found that the law violated the First Amendment. It ruled that California did not establish a compelling state interest to justify barring minors from buying or renting these video games because the social science studies relied on by the state “do not prove that violent video games cause minors to act

aggressively” *Id.* at 2739. The opinion went on to find that even if California could establish a compelling state interest, the law would fail strict scrutiny both as underinclusive since it only applied to video games but not to other media and as for not being the least restrictive means because there are parental control tools provided by the video game industry. Since the commission is to report on the cost of any policy proposals, we note that in *Brown v. EMA*, California paid the plaintiffs about \$1,000,000 in attorneys' fees and expenses.

Even if this proposed commission concludes that the research demonstrates a more certain connection between consumption of media with violent content and future antisocial behavior, it is unlikely to establish a compelling state interest. The Supreme Court is reluctant to accept some possible future harm as a justification for restricting speech. In *Ashcroft v. Free Speech Coalition*, Justice Kennedy writing for the majority said, “The Government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” 535 U.S. at 1397 (citing *Hess v. Indiana*, 414 U.S. 105, 108(1973)). The limited exceptions to this rule are the commission of a crime in creating the speech or that the speech is intended to cause an imminent commission of a crime and is likely to do so. Even where speech directly advocates actual violence or illegal activity, it may be banned only if intended to incite imminent unlawful activity and likely to do so. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Nor can the state give legal effect to voluntary rating systems. Courts have repeatedly struck down such laws. Voluntary ratings exist to help parents determine what is appropriate for their children, but a government body violates the First Amendment if it enforces these rating systems whether directly or indirectly. Most recently in *Entertainment Software Ass’n v. Hatch* 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff’d sub nom. Entertainment Software Ass’n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008) the court struck down a Minnesota law that barred anyone less than 17 years of age from buying or renting a video game carrying a “Mature” or “Adults Only” rating under the video game industry’s voluntary rating system. Courts in many other states have held it unconstitutional for the government to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. In *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970), the court threw out a Kenosha ordinance that used MPAA ratings to bar minors from accessing certain films. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20 percent on all admissions to view movies rated “X” or are unrated was an unconstitutional delegation of legislative power to a private trade association. See also *Swope v. Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) (use of motion picture rating system was improper as a basis for determination of constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

RESEARCH DOES NOT SUPPORT THE CONCLUSION THAT MEDIA CAUSES ACTUAL ANTISOCIAL BEHAVIOR

In addition to the First Amendment’s limitations on the state’s power to act, we believe it is unnecessary and redundant to form a committee to review the current research on video games or

other media. The President has called for further research by the federal government on the impact of violent images in the media so any review of the literature would be premature. The review of social science is also redundant as there have been numerous reviews of the social science by government bodies and the courts. Despite the often far-reaching claims of those who seek to blame the media for actual violence, these reviews have found that the science does not show that media with violent content causes actual violence let alone “rampage killings.”

Government reviews of the social science

Government bodies in Sweden and Australia did recent reviews of the literature as part of the process to consider restricting access to certain video games. In 2012, the Swedish Media Council released a report on its comprehensive survey of all available literature published in international research journals studies of video games with violent content and aggressive behavior during the period from 2000 to 2011. The Council reviewed 161 articles which altogether contained 106 empirical studies and 55 articles consisting of “meta studies,” research overviews, scientific debate articles, method critiques or comments on the articles of others. The Council concluded that “there was no evidence for VCG (violent computer games) causing aggressive behaviour [sic].” The report went on to state that much of the research suffers “from serious methodological deficiencies.” www.statensmedierad.se. A similar 2010 review by the Australian Attorney General’s Department found that the studies on video games effects on aggression are divided. <http://www.ag.gov.au/cca>. The report summary notes that “[O]verall, as illustrated in this review, research into the effects of VVGs [violent video games] on aggression is contested and inconclusive.” “Significant harmful effects from VVGs have not been persuasively proven or disproven.” There is a similar report by the British Government that reached similar conclusions.

Several domestic reviews were conducted following the tragic shootings at Columbine. The Surgeon General’s lengthy 2001 report *Youth Violence: A Report of the Surgeon General* extensively explored the causes of youth violence. The authors concluded that, despite a “diverse body” of research, it was not possible to come to a conclusion about the effect of media consumption on minors in either the short or long-term. In September 2000, the Federal Trade Commission released its report “Marketing Violent Entertainment to Children: A Review of the Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries” which included an appendix that reviewed media effects research. The report stated that “[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even the most important, factor in contributing to youth aggression, antisocial attitudes, and violence.” The National Research Council’s comprehensive 1993 report *Understanding and Preventing Violence* offered a matrix of the risk factors for violent behavior. Media with violent content is not cited as a factor.

Judicial reviews of the social science literature and testimony of experts

Courts have been more dismissive of the social science literature and testimony from well-known researchers. In addition to the law in California, there have been eight other successful challenges to state and local laws barring minors from buying or renting video games with

violent images. In most of these cases lawyers for the respective government bodies submitted social science research, public reports and statements from medical and psychology trade associations to justify the laws. In each case where the court examined social science research, it ultimately concluded that the social science failed to establish a causal link between content with violent images and real world anti-social behavior.

In *Brown*, Justice Scalia summarized the social science, “These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning)....[T]hey show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game. *Brown*, 131 S. Ct. at 2379.

The research of Dr. Craig Anderson, the leading academic proponent of the theory that media causes violence, is frequently offered to support the premise that there is a causal link between violent content and violent behavior. His research was most closely scrutinized in *Entertainment Software Ass’n v. Blagojevich* in which U.S. District Court Judge Kennelly heard testimony from Dr. Anderson regarding his research on media causing aggression in minors. The court also heard testimony from Dr. Jeffrey Goldstein and Dr. Dmitri Williams that challenged Dr. Anderson’s conclusions based on their own research and their review of his work. Judge Kennelly concluded, “we agree with Dr. Goldstein and Dr. Williams that neither Dr. Anderson’s testimony nor his research establish a solid causal link between violent video games exposure and aggressive thinking and behavior.” 404 F. Supp. 2d. at 1066 *aff’d* 469 F.3d 641 (7th Cir. 2006). The Ninth Circuit added in *Video Software Dealers Ass’n v. Schwarzenegger*, “We note that other courts have either rejected Dr. Anderson’s research or found it insufficient to establish a causal link between violence in video games and psychological harm. See *AAMA v. Kendrick*, 244 F.3d at 578; *Granholm*, 426 F. Supp. 2d at 653; *Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1069 & n.1 (D. Minn. 2006); *Blagojevich*, 404 F. Supp. 2d at 1063.” 556 F. 3d 950 at 963.

No statistical correlation between violent content and actual crime

Crime statistics disprove the claims that there is a correlation between violent or sexual content and the commission of crimes. Despite the explosive growth of media in the last 20 years, FBI crime statistics show that crime has dropped overall and youth crime in particular has declined steadily in much of the country. There is no correlation between media proliferation and incident of mass shootings:

http://boston.com/community/blogs/crime_punishment/2012/08/no_increase_in_mass_shootings.html. Nor do statistics show that there is a correlation between crime rates and media

consumption when comparing different countries based on their media consumption: <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/17/ten-country-comparison-suggests-theres-little-or-no-link-between-video-games-and-gun-murders/>

Michael Males, a Senior Researcher for the Center on Juvenile and Criminal Justice and Sociology Lecturer at University of California at Santa Cruz, demonstrated the lack of correlation between media deemed to have violent content and actual crime statistics in his comment submitted to the FCC in response to Notice of Inquiry MB Docket No. 04-261.

<http://apps.fcc.gov/ecfs/document/view.action?id=6516794018>. The Notice of Inquiry was seeking comment on violence on television and the impact on children and while the statistics are slightly dated, the trends remain the same even as media has become more common.

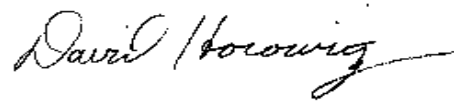
Finally, we have a general concern that the results of the commission could be used to blame the media for the recent violent tragedy. The commission is tasked with looking at video games in connection to violence but is not asked to consider any other causes of violence or crime. The commission is required to consider potential policy proposals to regulate certain video games before it has made any report on report on the social science. This suggests that the commission is to present policy options regardless of what the research shows. Also, the text of the bill includes many loaded terms such as rampage killings, killing games, addiction to video games and training consumers' brains. Much of this language is common among those who seek a justification to censor the media.

We would caution that there is a long history of blaming the media for antisocial behavior by minors and adults. At one time or another, books, movies, opera, jazz, blues, rock and roll, heavy metal and rap music, television, radio, comic books, video games, Internet, and social networking have all been accused of causing such behavior among minors (and adults). The fear of the impact of other media was no less palpable. In the '50s, the battle against comic books was championed by Dr. Frederic Wertham, a psychiatrist and advocate of the threat of comic books. He conducted extensive research that he claimed was proof that comic books turned kids into criminals. When the Senate held hearings to investigate how comic books were corrupting minors he told the Judiciary Committee "as long as the crime comic books industry exists in its present forms there are no secure homes." See, *Brown* at n. 5 Marjorie Heins' book, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* (Hill and Wang 2001), offers an overview of the recurring argument for censoring speech to "protect" children.

If you would like to discuss further our position on this bill, please contact me at 212-587-4025 x3 or at horowitz@mediacoalition.org.

We ask you to please protect the First Amendment rights of all the people of Massachusetts and reconsider S.D. 528.

Respectfully submitted,

A handwritten signature in black ink, reading "David Horowitz". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Horowitz
Executive Director
Media Coalition, Inc.
February 4, 2013