MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

May 16, 2011

Memorandum in Opposition to Section 16 of Massachusetts Senate Bill 636

The members of Media Coalition believe that Section 16 of Senate Bill 636 likely violates the First Amendment rights of producers and retailers of First Amendment protected material. 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.B. 636 Section 16 would require the video game industry, the software development industry, and the television programmers to post labels on their content declaring that it includes violent themes. It then requires parents to bar their minors from accessing such content. This legislation appears to be premised on the claim that violent images or themes in the media cause minors to commit actual violence and that they can be addictive.

The imposition on video game and software publishers and the television industry is likely unconstitutional as compelled speech. The state cannot require video game or software publishers or a program creators how they must describe their speech particularly as here the description is considered pejorative. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists' inserts in its monthly bills), *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials). Two recent Circuit Court decisions struck down laws similar to Section 16 of S.B. 636. In 2005, laws were enacted in California and Illinois that required video games with "graphic violence" or sexually explicit content to carry a warning label reading "18" to advise parents of potential danger to kids if they played such games. Both laws were struck down as unconstitutional compelled speech. *Video Software Dealers Ass'n v. Schwarzenegger,* 556 F. 3d 950 (9th Cir. 2009) (now before the Supreme Court as *Brown v. Entertainment Merchants Association* but not on this aspect of the law), *Entertainment Software Association v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006).

The requirement that parents remove material labeled as violent is also likely unconstitutional. It may be parents' prerogatives to determine what media is appropriate for their kids to watch, but the state cannot require parents to enforce the state's view of what is acceptable for minors. While minors do not enjoy the protection of the First Amendment to the

same extent as adults, the U.S. 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. 212-13 (1975). Over the past decade numerous court decisions have created a significant body of case law that firmly establishes that speech with violent themes or images is fully protected by the First Amendment and may not be banned for minors either directly or by requiring that parents remove or block such material. These cases include:

- *Video Software Dealers Ass'n v. Schwarzenegger,* 556 F. 3d 950 (9th Cir. 2009) found unconstitutional a law that limited distribution of video games with certain violent content and barred the requirement that they carry an "18" label on the cover.
- *Entertainment Software Ass'n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008), enjoined a law that barred anyone under 17 from buying or renting a video game rated "Mature" or "Adults Only."
- *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), enjoined enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), enjoined enforcement of a city ordinance that limited minors' access to video games with violent content.
- *Eclipse Enterprises Inc. v. Gulota*, 134 F.2d 63 (2d Cir. 1997), found unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992), held that "unlike obscenity, violent expression is protected by the First Amendment."

The constitutional infirmities of Section 16 would not be cured simply by using industry rating systems rather than a "violence" label. 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 by requiring parents to do so. Most recently in *Entertainment Software Ass'n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008) *aff'g* 443 F. Supp. 2d 1065 (D. Minn. 2006) the Eighth Circuit upheld the district court ruling that found unconstitutional a Minnesota law that barred anyone less than 17 years old 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 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 either "X" or 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).

Finally, the rationale for restricting access to media with violent content is the presumption that such media causes actual violence. The academic research does not support this conclusion. In *Entertainment Software Ass'n v. Blagojevich*, U.S. District Court Judge Kennelly heard live testimony from academic experts on both sides regarding research on media causing aggression in minors. Judge Kennelly concluded that that the testimony and research submitted by the state's expert failed to "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 expert 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. Crime statistics also demonstrate the lack of a correlation between violent content and the commission of crimes. Despite the explosive growth of media, crime statistics have not risen correspondingly. In the past decade the media has grown exponentially, but crime in general and youth crime in particular has declined steadily in much of the country.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

We ask you to please protect the First Amendment rights of all the people of Massachusetts and remove from Section 16 the requirement that First Amendment protected material be labeled as containing violence and that parents be required to bar their kids from viewing such material.

Respectfully submitted,

/s/ David Horowitz

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