

## Memorandum in Opposition to Mississippi House Bill 1

The members of Media Coalition believe that the existing Mississippi Code §97-5-27 likely violates the First Amendment and that H.B. 1 would add to the constitutional defect to the extent it applies to the distribution of material on the Internet. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Mississippi: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, home video and video games and their consumers.

Mississippi Code §97-5-27 makes it illegal to disseminate to a minor any “sexually oriented material.” “Sexually oriented material” is defined as any representations or descriptions of actual or simulated nudity or sexual activity. H.B. 1 would criminalize the dissemination of such material to a minor on an electronic device.

The Supreme Court has repeatedly held that a content-based restriction on speech is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). Speech is protected unless the Supreme Court tells us otherwise. As the Court said in *Free Speech Coalition v. Ashcroft*, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S.234, 241 (2002). Unless speech falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing a minor, there is no basis for the government to bar access to such material.

Mississippi Code §97-5-27 restricts minors’ access to sexual material but the definition of material that is illegal for minors lacks the safeguards required by the Supreme Court. 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. 205, 212-13 (1975). Governments may restrict minors’ access to some sexually explicit speech, often referred to as speech “harmful to minors,” but it is a narrow range of material determined by a specific test. In *Ginsberg v. New York*, the Supreme Court created a three-part test for determining whether material which 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. lack serious literary, artistic, political or scientific value.

The Supreme Court emphasized that material that is not harmful to minors per the *Miller/Ginsberg* test “cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik*, 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.

The definition used to determine what material is “sexually oriented material” in §97-5-27 lacks any of the prongs from the *Miller/Ginsberg* test. Two state laws were recently struck down for failing to follow 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 H.B. 1 limited the definition of “sexually oriented material” as material that met the three-prong test in *Miller/Ginsberg*, it would be unconstitutional if the law applied to 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 cyberspace 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 computer dissemination of material “harmful to minors” is to force a provider, whether a publisher or an on-line carrier, 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*, 117 S.Ct. 2329 (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. 129 Sup. Ct. 1032 (2009); *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342

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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 as violating the Commerce Clause of the Constitution. *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Many of these cases were brought by Media Coalition members and 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://www.mediacoalition.org/litigations.php>.

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. In past challenges to such legislation, states have paid plaintiffs as much as \$500,000 in legal fees.

We believe Mississippi 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 me at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

We ask you to please protect the First Amendment rights of all the people of Mississippi and amend existing section §97-5-27 and H.B. 1.

Respectfully submitted,



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January 23, 2014