MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense 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.

March 13, 2012

Memorandum in Opposition to Mississippi Senate Bill 2360

The members of Media Coalition believe that Senate Bill 2360 violates the First Amendment for multiple reasons. 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, videos and video games.

S.B. 2360 would criminalize the knowing and intentional dissemination of descriptions or depictions of simulated or actual sexually explicit nudity or conduct by means of the Internet, listserves and public chatrooms to a person known or believed to be a minor.

Given that the legislation would apply to material based on its content, it is immediately constitutionally suspect. The Supreme Court has repeatedly held that a content-based restriction 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.

The definition of what material is illegal to disseminate to a minor in the legislation is unconstitutionally overbroad. 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). Governments may restrict minors' access to some sexually explicit speech but it is a narrow range of material determined by a specific test. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*, 413 U.S. 15 (1973), 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. Under that 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 definition used to determine what content is illegal to disseminate to minors lacks any of the prongs from the *Miller*/*Ginsberg* test. A recent law enacted in Oregon 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, a recent Illinois law barred the sale to minors of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test. The law 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'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005). Even material that meets this definition may be barred for minors only to the extent that the prohibition does not unduly burden the rights of adults to access it.

Even if the bill's definition of what material is illegal for minors incorporated the three-prong test in *Miller*/*Ginsberg*, it would be unconstitutional if the restriction was applied to general communication on the Internet, on listserves and in public chatrooms and on social networking sites. To do so treats material disseminated in this manner as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. When a person speaks generally through a website or in a chatroom, 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, listserve or public chatroom knows that there is a minor accessing his or her content. That general knowledge satisfies the scienter requirement in a criminal statute. As a result, the effect of banning the computer dissemination of material with sexual content 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 now 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. Laws cannot reduce the speech of adults to only what is appropriate 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 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). The law at issue in *Coakley* was the most similar to this legislation. It also added electronic dissemination to the definition of "material" for the purpose of their "obscene for minors" law. After U.S District Judge Zobel granted a preliminary injunction barring enforcement of the law as likely unconstitutional, Attorney General Coakley asked the legislature to amend it rather than go forward with the litigation. Many of these cases, including *ABFFE v. Coakley*, were brought by Media Coalition members who were represented 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.

The only exceptions to these decisions have been 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 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 wrote last year, "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." *U.S. v. Stevens*, 130 S. Ct. 1577 (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. In past challenges to such legislation, states have paid to the 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.

Again, we ask you to please protect the First Amendment rights of all the people of Mississippi and amend or defeat S.B. 2360.

Respectfully submitted,

/s/ David Horowitz

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