THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Authors Guild Comic Book Legal Defense Fund Entertainment Software Association
Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memo in Opposition to Proposed Legislation to Impose 10% Sales Tax
On Video Games with Violent Content

We believe that the proposed legislation to impose a 10 percent sales tax on video games with violent content is clearly an unconstitutional content-based punishment on speech. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Pennsylvania: publishers, booksellers, librarians and authors, as well as manufacturers and retailers of audio recordings, films, videos and video games.

The U.S. Supreme Court has ruled that video games are fully protected by the First Amendment. In *Brown v. Entertainment Merch. Ass'n and Entertainment Software Ass'n,* the Court struck down a California law that banned minors from buying or renting video games with certain violent imagery. 564 U.S. 786 (2011). The Court held that video games are entitled to full constitutional protection the same as books, newspapers, movies or music. Justice Scalia, writing for the majority, specifically stated 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 790. He added that the interactive nature of video games does not provide any support for treating them differently than other media. *Id*. at 792.

In addition to holding that video games are a fully protected medium of speech, the Court found that violent images or descriptions are not a historic exception to the First Amendment and can only be regulated if the government action satisfies strict scrutiny. Justice Scalia concluded that there was no long time practice of regulating speech with violent content and 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 795. The opinion then mentions a long list of books read by children that are filled with violent and gory themes.

The state may not levy a tax on video game (or other media) based on their content unless the tax satisfies strict scrutiny. While the state may include the sale or rental of speech in a general sales tax, the Supreme Court has firmly established that the First Amendment bars a tax based on the content of the speech. In 1987, the Supreme Court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230. The state cannot punish a producer or retailer of such material by imposing a substantial additional tax on it. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575. In 1991, the Court held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon & Schuster, Inc. v. Members of the*

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N.Y. State Crime Board, 502 U.S. 105. See also, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Similarly, the state may not impose a content-based tax on speech in one media while exempting others. The Supreme Court has condemned the selective imposition of a punishment on one medium but not others or specific portions of a media. *See*, *United States* v. *Playboy Entm't Grp, Inc.*, 529 U.S. 803, 812 (striking down a regulation that targeted "adult" cable channels, but permitted similar expression by speakers in other media); *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media … often present serious First Amendment concerns."); *Arkansas Writers'*, 481 U.S. at 228 ("Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State.").

To overcome this established precedent, the state must satisfy strict scrutiny analysis but the Supreme Court has already rejected the claim that violent content in video games is sufficient to do so. The strict scrutiny test requires the government to (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is "necessary" to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is the least restrictive means to achieve that interest. *See Playboy, 529 U.S. at 813; R.A.V. v. City of St. Paul,* 505 U.S. 377, 395-96; *Turner Broad. Sys.,* 512 U.S. at 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118.

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as "a government objective of surpassing importance." 458 U.S. 747, 757 (1982). Protecting individuals from criminal behavior such as being harassed, threatened or intimidated meets this high threshold. However, the Court has not found that shielding the privacy of the subject of speech or protecting them from emotional pain is sufficient to overcome the First Amendment protection for a generally applied criminal law that limits speech based on its content.

The Supreme Court has already rejected the argument that the social science warrants legislation to regulate video games with violent content. In *Brown*, California's cited this research to justified 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" 564 U.S. at 800. Justice Scalia summarized the social science by saying, "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. *Id*. Among the researchers whose work was reviewed and rejected in *Brown* was Craig Anderson, a prominent researcher in this field. His work is cited by the National Center for Health Research, the group referenced in the alert about this legislation.

Even if the media effects research demonstrated a stronger connection between consumption of media with violent content and future antisocial behavior, the Supreme Court has dismissed this reasoning as a justification for punishing 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. 234, 253 (2002) (citing *Hess v. Indiana,* 414 U.S. 105, 108 (1973) (per curium)). The limited exception to this rule is for speech that explicitly advocates actual violence or illegal activity, but only if it is intended to incite imminent unlawful activity and is likely to do so. *See*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Since the Supreme Court precedent strongly cautions against enacting a content-based sales tax on video games, the legislature should consider this legislation cautiously. While the sales tax may be meant to raise revenue, it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong likelihood that the state would be ordered to pay the plaintiffs' attorneys' fees. In *Brown v. EMA*, California paid the plaintiffs about $1,000,000 in attorneys' fees and expenses.

If you would like to discuss further our concerns about this bill, please contact David Horowitz at 212- 587-4025 #3 or at horowitz@mediacoalition.org.

We urge you to protect the First Amendment rights of all Pennsylvanians and decline to support this proposed legislation.