

February 27, 2012

Memo in Opposition to Tennessee Senate Bill 2860 and House Bill 3081

The members of Media Coalition believe that Senate Bill 2860 and House Bill 3081 threaten the distribution of First Amendment-protected material in Tennessee. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Tennessee: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They neither produce nor sell works that are legally obscene. However they do disseminate a wide variety of material with sexual content, including art and photography books, mainstream movies and music, sex education material, and literary and artistic works.

S.B. 2860 and H.B. 3081 would impose a 25% sales tax surcharge on a variety of books, magazines, movies and other material. Some parts of the bills impose tax on any content and other parts are limited to taxing material with sexual content. The legislation imposes a 25% tax on any material that is illegal to display to minors. It would impose a 25% sales tax on any product bought or rented in any store that has an “adults only” section whether the material was sexually frank or not. It would impose the tax on movies with “sexually explicit” content viewed on cable or satellite television or in a hotel or motel. “Sexually explicit” is not defined in the legislation or by reference other than specifically exempting any movie rated “R” or “NC-17” by the rating board of the Motion Picture Association of America from the tax. Enforcement of these provisions is to be determined by the Commissioner of Revenue. This legislation is very similar to legislation considered in 2009 and ultimately rejected by the Tennessee legislature.

These bills have multiple constitutional defects. Given that they would apply to material based on its content, they are 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). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826-7 (2000). To do so the government must (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 narrowly tailored to achieve that interest. *See, R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). It is very unlikely that this legislation could satisfy any part of the strict scrutiny test let alone each part of the test.

The tax regime in section 3, as it applies to speech, is likely unconstitutional as it singles out the press regardless of the nature of the content being taxed. The Court has held that the First Amendment is not limited to barring criminal sanctions against speakers. It bars the state from taxing the press whether as a whole or individual speakers unless the tax is generally imposed. *See, Grosjean v. American Press*, 297 U.S. 233 (1936). It also bars the state from placing a special burden on retailers or producers of First Amendment-protected material such as requiring a special license that is not otherwise imposed on businesses generally. *See, Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

Imposing a tax on speech based on its content is also unconstitutional. The 25% surcharge applies to speech because it contains sexually frank content or to speech generally if it is carried by a retailer that includes an “adults only” section. To determine what material is taxed, the state would have no choice but to scrutinize the content of material sold or rented. 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 Commission 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 and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. In a more recent case brought by members of Media Coalition, an Indiana law was struck down that imposed a special license on any business that carried any material that is obscene for minors. Judge Barker held that the law was an unacceptable license on speech and an unconstitutional tax. *Big Hat Books v. Prosecutors*. 565 F. Supp. 2d 981 (S.D. Ind. 2008).

Section 3(h) is also unconstitutional as it imposes the sales tax on a single medium. The Supreme Court has also condemned the selective imposition of a punishment on one medium but not others or specific portions of a media but not others. *See, United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812 (2000) (striking down a regulation that targeted “adult” cable channels, but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 659 (1994) (“Regulations that discriminate among media ... often present serious First Amendment concerns.”). “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.” *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 228 (1987).

Beyond being unconstitutional as a tax on content, section 3(h), the sales tax on “sexually explicit” programming on cable or satellite television, is unconstitutionally as vague. It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Winters v. New York*, 333 US 507, 509 (1948). “Sexually explicit” is not defined in the legislation or by reference. This is in contrast to other sections of this legislation that tie the sales tax to a specific definition of material harmful to minors in §39-17-914 or to anything purchased at a retailer that restricts

access to minors in some manner. The vagueness here will have a significant chilling effect on protected speech as customers will seek to avoid content that is subject to an expensive surcharge tax and will opt to not view anything that could conceivably be considered “sexually explicit.” Cable and satellite providers will likely avoid providing programming that is subject to the tax or is less likely to be purchased. Retailers and television providers have little guidance to determine what speech is protected and what is subject to prosecution and must either risk an onerous tax or self-censor the speech they make available to their customers. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

Section 3(h) is also unconstitutional as Tennessee cannot let the Motion Picture Association of America’s rating system determine whether or not a tax applies to movies. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement or adoption of an existing rating system is constitutionally impermissible. Minnesota recently passed a law giving legal force to the video game industry’s rating system which was struck down. *ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (upholding the District Court ruling granting summary judgment to the plaintiffs). Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% 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. S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

Section 3(i) is constitutionally suspect because it gives authority to the Department of Revenue to determine what material “harmful to minors” under §39-17-914 and may not be displayed to minors. It is the job of the courts to determine whether material meets this definition and establishes that such material is illegal for minors, not an owner of a book or video store or a staff person in the Department of Revenue. This bill does not allow for any court proceeding to determine whether particular books, magazines movies and other content would trigger the surcharge. This means there are no due process safeguards in place for the determination of whether the material is prohibited for minors or any appeals process available to the retailer or distributor of the content. The Supreme Court has made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S. Supreme Court struck down a non-judicial determination of whether material is illegal for minors as a form of “informal censorship.”

Finally, the definition of “adult business” in section 2 and as used in Section 3(f) is likely unconstitutional as well. The government has the power to regulate the “secondary effects” of sexually oriented businesses and may define such a business for that purpose but the Supreme Court has established limits on this power. The regulation must be designed to further an important or substantial government interest; the governmental interest must be unrelated to the

suppression of speech; and the regulation must be narrowly tailored to further the government interest in preventing the unwanted secondary effects. *City of Erie v. Pap's A.M.*, 529 U.S.277 (2000); *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The purpose of the designation in these bills is nothing more than a vehicle allowing the imposition of a 25% surcharge on any purchase or rental of any goods including books, magazines, movies, video games or sound recordings. There is not even the mere pretense that it is meant to regulate sexually oriented business. Even if the legislation was meant to control secondary effects, the threshold to designate a business as an "adult business" is so low that it would be deemed overbroad. Typically, courts require that a business can be deemed an "adult business" if it carries a substantial or significant portion of its stock and trade is sexually explicit material. Here, any retailer that has an "adults only" would be swept into this regulation even with only a small amount of adult material. This inevitably would result in many mainstream retailers being considered "adult businesses" even though they do not cause "secondary effects."

This tax may be meant to raise revenue for Tennessee. However, if it is enacted, it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs' attorneys' fees. In a recent case brought by members of Media Coalition, plaintiffs received in excess of \$300,000 in attorneys' fees and expenses. If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Please protect the First Amendment rights of all Tennesseans and defeat this tax on First Amendment protected material.

Respectfully submitted,

/s/ David Horowitz

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