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 Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memo in Opposition to West Virginia House Bill 2119

We believe that House Bill 2119 is likely unconstitutional and would have a substantial chilling effect on speech protected by the Constitution. We appreciate the opportunity to explain our concerns. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including West Virginia: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games. They neither produce nor sell works that meet the Supreme Court's definition of obscenity. 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.

H.B. 2119 would impose a $1 tax on the sale or rental of any material deemed obscene based on a definition in the legislation. The determination of whether the material meets the definition for obscenity and is subject to the tax would be made by the retailer and self-reported to the state. Presently, West Virginia does not have a law criminalizing the distribution of obscene speech to adults but does allow county commissions to enact ordinances making it illegal to sell or display obscene material. It does have a law that bars dissemination of obscene material to minors.

Obscene speech, as defined by the Supreme Court in *Miller v. California* 413 US 15 (1973), is not protected by the First Amendment and may be criminalized or taxed but speech may only be deemed obscene by a court with the full array of due process protections guaranteed by the Fourteenth Amendment. H.B. 2119 does not provide any judicial procedure to determine whether is obscene and subject to the sales tax. Instead, it asks retailers to self-report what material they believe meets the test for obscenity. It is not the job of an owner of a book or video store or even a staff person in the Department of Revenue to make this determination. The Supreme Court has repeatedly emphasized the importance of due process protections in a judicial proceeding in determining whether speech is obscene and outside of the First Amendment. In *Marcus v. Search Warrant*, the Court held, "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." 367 US 717, 731 (1961). In *Bantam Books, Inc. v. Sullivan*, the Court said:

> "Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that

> regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith* v. *California,* 361 U. S. 147; *Marcus* v. *Search Warrant, supra,* is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, *e. g., Thornhill* v. *Alabama,* 310 U. S. 88; *Winters* v. *New York,* 333 U. S. 507; *NAACP* v. *Button,* 371 U. S. 415. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser* v. *Randall,* 357 U. S. 513, 525."

372 US 58, 66 (1963).

Absent a judicial determination that it speech is obscene, it is presumed to be protected by the First Amendment. Therefore, H.B. 2119 is a content-based tax on protected material since it does not provide any judicial process to make this judgment. It is generally unconstitutional to impose a tax on speech based on the content of 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 (1987). 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 (1983). 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 (1991). In a more recent case brought by members of Media Coalition, an Indiana law that imposed a special license on any business that carried any material that is obscene for minors was struck down. U.S. District Court Judge Barker held that the substantial fee on applicants for the license was an unconstitutional content-based tax. *Big Hat Books v. Prosecutors*. 565 F. Supp. 2d 981 (S.D. Ind. 2008).

H.B. 2119 is also likely unconstitutional since it will inevitably have a substantial chilling effect on retailers of material with sexual content that is not obscene. It means retailers will self-censor by declining to carry material that is protected by the First Amendment. The bill requires the retailer to make the judgment of whether a book or movie is subject to the tax at the risk of a fine or prison for tax evasion if the West Virginia Tax Commissioner disagrees. Some book sellers and video stores owners will err on the side of deeming any material obscene and voluntarily paying an unconstitutional tax on protected speech rather than risk any criminal or civil punishments for tax avoidance. The alternative is to decline to carry sexual material to avoid the risk of being wrong about whether the material is obscene. Other retailers will decline to carry content that is arguably subject to the tax to avoid the onerous burden of additional paperwork and reporting requirements imposed by the bill.

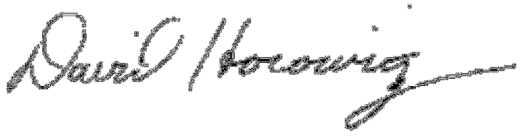
Finally, H.B. 2119 could violate a retailers Fifth Amendment right against self-incrimination. This bill would require a bookseller or video store owner to report each sale of

material that he or she believes is obscene. The retailer is being forced to report the he or she has likely committed a crime if the store is in a county that has a local ordinance banning the sale or rental of obscene material or if the sale was made to a minor. The right against self-incrimination prevents a government from forcing a person to testify against him or herself.

If you would like to discuss our concerns further, I would welcome that opportunity. I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.

We ask you to protect the First Amendment rights of retailers in West Virginia and defeat or amend H.B. 2119.

Respectfully submitted,



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