



MEDIA COALITION, INC.

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association 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.

Memorandum in Opposition to West Virginia Senate Bill 128

The members of Media Coalition believe that Senate Bill 128 violates the First Amendment for several reasons. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including West Virginia: publishers, booksellers and librarians as well as producers and retailers of recordings, films, home video and video games.

S.B. 128 is identical to S.B. 640, which failed to pass in the last legislative session. It would bar the dissemination or display to minors of depictions or descriptions of nudity or sexual conduct that is “harmful to minors.” The bill would criminalize the dissemination or display of such content by brick and mortar retailers and theaters and by Internet. A violation would be punishable by up to five years in prison, a fine of \$25,000 or both.

Content based restrictions on speech are presumptively unconstitutional

The bill would restrict material based on its content and, therefore, it is immediately constitutionally suspect. 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). It is presumptively invalid because “opinions and judgments, including esthetic and moral judgments . . . are . . . not for the Government to decree, even with the mandate or approval of a majority.” *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, at 818 (2000). Speech is protected unless the Supreme Court tells us otherwise. Justice Kennedy wrote 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.

Restrictions on dissemination of sexual material to minors

The material that is barred for minors in S.B. 128 does not fit one of these limited exceptions to the First Amendment and is, therefore, unconstitutionally overbroad and vague. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the Supreme Court has held 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.” *Erznoznik v. City of Jacksonville*, 422 U.S. 212-13 (1975). The government may restrict minors’ access to some sexually explicit speech commonly referred to as material “harmful to minors” but this term is shorthand for a narrow range of speech determined by the three-prong *Miller/Ginsberg* test.

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The Supreme Court announced the three-part test in *Ginsberg v. New York*, 390 U.S. 629 (1968), and it is generally deemed to have been modified by the Court's subsequent reformulation of the test for adult obscenity in *Miller v. California*, 413 U.S. 15 (1973). The test establishes that speech that is otherwise legal for adults may be banned for minors only if it depicts or describes explicit sexual activity or nudity and, when taken as a whole:

1. predominantly appeals to the prurient, shameful or morbid interest of minors in sex;
2. is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
3. lacks serious literary, artistic, political or scientific value.

See, Powell's Books v. Kroger, 622 F.3d 1202, 1213 (9th Cir. 2010); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 n. 2 (4th Cir. 1989).

The definition in the bill of material that may be banned refers to the term "harmful to minors," but uses it generically. It does not include any of the prongs from the *Miller/Ginsberg* test. It applies to all sexual material that is "harmful." In *Powell's Books v. Kroger*, a case brought by members of Media Coalition, the Ninth Circuit Court of Appeals struck down an Oregon law that barred dissemination of sexual material to minors as overbroad for criminalizing material that was beyond the scope of the *Miller/Ginsberg* test. 622 F.3d 1202 (9th Cir. 2010). In *Entertainment Software Ass'n v. Blagojevich*, 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. The ruling was vigorously affirmed by the Seventh Circuit Court of Appeals. 469 F.3d 642 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

Distribution of harmful to minors material on the Internet violates the First Amendment

Even if the 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, listserves, in public chatrooms and social networking sites. There is a substantial body of case law striking down laws that criminalize speech that is generally available on the Internet. Two federal laws, the Communications 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*, 521 U.S. 824 (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 S. Ct. 1032 (2009); *PSINet v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression 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. McMaster* 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 Library Ass'n v. Pataki* 969 F. Supp. 160 (N.Y.S.D. 1997). Most 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://mediacoalition.org/litigation>.

These courts have repeatedly ruled that such laws violate the First Amendment first because they overbroad. They limit the speech of adults on the Internet to what is acceptable for minors. 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 there is a reasonable likelihood that a minor is 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 that is generally available on the Internet is to force a speaker to deny access to both minors and adults, depriving adults of their First Amendment rights. *See, PSINet v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (The court reviewed numerous readings of the law suggested by Virginia but found it was overbroad under any reading).

Second, several of these courts have found the laws unconstitutional because they are not the least restrictive or most effective means for protecting adult speech while preventing minors from accessing sexual content. Several courts found that filtering software and other user-empowerment tools are a less restrictive means of preventing minors from accessing sexual material without limiting the speech of adults. *See, Ashcroft v. American Civil Liberties Union*, 542 US 656, 666-669 (2004) (affirming findings of facts by the District Court that filtering software is a less restrictive and more effective means of preventing minors from accessing sexual material in the challenge to COPA).

Passage of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very 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 \$450,000 in legal fees.

We believe West Virginia can protect minors and adults 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 West Virginia and amend or defeat S.B. 128.

Respectfully submitted,

A handwritten signature in black ink, reading "David Horowitz", with a stylized flourish at the end.

David Horowitz
Executive Director