

## Memorandum in Opposition to West Virginia Senate Bill 640

The members of Media Coalition believe that Senate Bill 640 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 manufacturers and retailers of recordings, films, videos and video games.

S.B. 640 would bar the dissemination or display to minors of depictions or descriptions of nudity or sexual conduct. 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. The legislation also creates an increased risk of conviction for a retailer who does not employ blinders or opaque bagging to restrict the display of such material.

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). 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.

The definition in S.B. 640 of what material is illegal to disseminate to a minor is unconstitutionally vague and overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the 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. The Supreme Court announced the three-part test in *Ginsberg v. New York*, 390 U.S. 629 (1968), modified by *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  
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aspect to what is suitable material for minors; and

3. lacks serious literary, artistic, political or scientific value.

The definition in the bill does not include any of the prongs from the *Miller/Ginsberg* test. It applies to all sexual material that is “harmful.” The Ninth Circuit Court of Appeals recently 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. *Powell’s Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). 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. *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff’d* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

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. To do so treats material disseminated in this manner as if there were no difference between a website or blog 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. 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.

There is 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 to what is acceptable 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). Most of these cases were brought by Media Coalition members and the cases 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://www.mediacoalition.org/litigations.php>.

Finally, we are concerned that S.B. 640 would punish retailers for choosing not to create an “adults only” area of a store or use “blinder racks” or opaque bagging to prevent sexual material from being displayed to minors. Although the courts have ruled that some limitation on the display of sexual material that is illegal for minors as defined in *Ginsberg* is permissible, they have also ruled that these limitations may not unreasonably hinder the access of adults. *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4<sup>th</sup> Cir. 1989). Retailers must make a reasonable effort to prevent minors from perusing such material but the government cannot penalize them for electing not to use segregate material or use blinders or opaque bagging. Government restriction on access to First Amendment protected material by adults or older minors in the interest of protecting younger minors would be “to burn down the house to roast the pig.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

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 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](mailto: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. 640.

Respectfully submitted,

A handwritten signature in dark ink, reading "David Horowitz" in a cursive script.

David Horowitz  
Executive Director  
Media Coalition, Inc.  
March 26, 2013