March 14, 2005

Governor Jon Huntsman, Jr.
Utah State Capitol Complex
East Office Building, Suite E220
Salt Lake City, Utah 84114-2220

Re: Request for veto of Utah House Bill 260

Dear Governor Huntsman,

The members of The Media Coalition believe that Utah House Bill House Bill 260 has several serious and significant constitutional infirmities. Media Coalition members represent most of the publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording and video retailers in Utah and the rest of the United States.

Among other provisions, H.B. 260 requires the Attorney General to create and "Adult Content Registry" of all Internet content he believes to be harmful to minors. Internet Service Providers (ISPs) would be required to block access to sites in the "Adult Content Registry" either by blocking an Internet Protocol address or providing filtering software at the consumer's request. A content provider would be considered to be distributing material harmful to minors on the Internet if they negligently failed to determine the proper age of a minor visiting their website unless the site is rated for the content and includes triggers for filtering software.

H.B. 260 has significant constitutional defects. While material harmful to minors may be illegal for minors, it enjoys the full protection of the First Amendment with respect to adults. Courts have repeatedly made clear that such material cannot be made illegal for minors if it unduly burdens the right of adults to access such material.

H.B. 260 applies the Utah law barring the distribution to minors of material harmful to minors to content on the Internet unless a content provider opts to be included on the "Adult Content Registry" or uses age verification. This treats material on Internet as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. There is no way to know whether the person accessing "harmful" material is a minor or an adult. As a result, the effect of banning the computer dissemination of material "harmful to minors" 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. The U.S. Supreme Court has already declared unconstitutional two federal laws that restrict the availability of matter inappropriate for minors on the Internet. Reno v.

ACLU, 117 S.Ct. 2329 (1997); Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (Remanded, but preliminary injunction still in place). The Tenth Circuit Court of Appeals has also ruled a ban on dissemination of material harmful to minors on the Internet is unconstitutional. ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999). There is a growing body of law striking similar state laws attempting to restrict access to material harmful to minors. Each other court that has considered a state law that restricts dissemination by Internet of material harmful to minors has ultimately found it unconstitutional. *see*, Cyberspace Communications, Inc. v. Engler, 238 F.3d 420 (6th Cir. 2000); ABFFE v. Dean, 342 F. 3d 96 (2nd Cir 2003), PSINet v. Chapman, 63 F.3d 227 (4th Cir. 2004); American Libraries Ass'n v. Pataki 969 F. Supp. 160 (S.D. 1997); ACLU v. Goddard, Civ No. 00-0505TUC AM (D. Ariz. 2002). The second federal law and several of the state laws have allowed the use of age verification systems as an affirmative defense. The courts still found them unconstitutional infringements on the rights of adults and older minors. In addition to First Amendment deficiencies, the various courts have also ruled that these state laws violate the Commerce Clause of the U.S. Constitution, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

The defense of submitting to the site to "Adult Content Registry" would create a suspect requirement that a site be rated or labeled pejoratively. Courts generally have been skeptical of government rating systems for content. In nine different states courts 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.B. 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).

The mere creation of the "Adult Content Registry" to include material that the Attorney General deems harmful to minors and is not subject to age verification as a blacklist of web sites is likely suspect. As a blacklist it is an unconstitutional prior restraint of speech. Courts have been exceptionally reluctant to allow the government to restrain speech prior to a judicial determination. As the Supreme Court said in the Pentagon Papers case, "Any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

It is the job of the courts to determine if material is illegal for minors. H.B. 260 does not offer any legal proceeding to determine the illegality of the material. Nor are there any due process safeguards in the determination of the harmfulness of the material or any appeals process available to the speaker. In Bantam Books v. Sullivan, 372 U.S. 58 (1963), the U.S. Supreme Court struck down a similar scheme of regulation as a form of "informal censorship." The Rhode Island legislature had created a commission "to educate the public concerning any book or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of youth." The commission would notify a distributor that a majority of its members

had declared a particular work unsuitable for sale to minors and request his or her "cooperation" in withdrawing it from sale. Copies of the notice were then sent to local police departments with a recommendation that anyone selling the work would be prosecuted for obscenity.

The Supreme Court ruled that the Rhode Island commission was exercising a judicial power without any of the safeguards that are provided in a criminal trial. Justice Brennan wrote:

> Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law. What Rhode Island has done, in fact as been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determination that such publications may lawfully be banned.

Among other potential problems with H.B. 260, the option allowing ISPs to block web sites in the "Adult Content Registry" is likely grossly overbroad. The architecture of the Internet usually does not allow for the blocking of single sites by site name. Sites are generally blocked by Internet Protocol (IP). However, hundreds or thousands of web sites can share a single IP address. This means that an ISP attempting to block a single web site in the "Registry" will result in many, many non-adult web sites being blocked. A Pennsylvania law mandating a similar blocking scheme was ruled unconstitutional. CDT v. Pappert, 337 F. Supp. 2d 606 (E.D. Pa 2004).

Enactment of H.B. 260 could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In recent cases attorney's fees have ranged from $245,000 to $750,000. The members of The Media Coalition strongly urge you to defend the First Amendment rights of all the citizens of Utah and veto H.B. 260.

Sincerely,

David Horowitz,
Executive Director