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Memo in Opposition to Colorado Senate Bill 125

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

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
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I am writing to express the serious concerns of the members of The Media Coalition about Senate Bill 125. The members of The Media Coalition appreciate the legislature's desire to enact reasonable measures to protect children. However, we believe that this legislation would have a severe chilling effect on access of adults and older minors to First Amendment protected material and is potentially unconstitutional. Media Coalition members represent most of the publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording, video and video game retailers in Colorado and the rest of the United States.

S.B. 125 would create a "harmful to minors" law for Colorado that would bar both dissemination to and access by minors of material that is illegal for minors under the Ginsburg v. New York decision.

This legislation would still significantly limit the access by adults and older minors to material that they have a First Amendment right to browse, borrow or buy. While bookstores and libraries are sensitive to creating an environment appropriate for patrons of all ages, including minors, they feel a strong responsibility to ensure adults' access to the widest range of constitutionally protected material as possible. Bookstores and libraries ideally are places where patrons feel comfortable browsing through a variety of books on various topics. Often customers enter bookstores looking for a single book or merely to browse but ultimately buy or borrow books on different subjects or themes. Restricting adults' ability to browse books that have themes that are inappropriate for younger minors would change the nature and atmosphere of bookstores and libraries. This change would be felt both in the mission of the store to make available a broad range of material and the business of allowing browsers to find books on a variety of subjects.

Colorado's previous harmful to minors law was found to violate the First Amendment and Article II, section 10 of the Colorado constitution by the Colorado Supreme Court in 1985, *Tattered Cover v. Tooley*, 696 P.2d 780 (1985). In reaching its conclusion, the Court in *Tattered Cover* focused closely on the "commercial" impact on stores of restricting access by adults of material they are entitled to browse. Courts generally have made it clear that 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). Although the courts have

Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, and librarians, recording, motion picture and video games producers, recording, video, and video game retailers, and motion picture exhibitors in the United States.

ruled that some limitation on the display of material "harmful to minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), is permissible, they have also ruled that these limitations may not unreasonably hinder the access of adults. See, *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989).

Our other concern is that this bill would apply the harmful to minors language to Internet communication. If so, it would make no distinction 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 online carrier, to either risk prosecution or deny access to both minors and adults and thus depriving adults of their First Amendment rights. The Tenth Circuit Court has already ruled unconstitutional a New Mexico law applying their harmful to minors law to the Internet, *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). There is a significant body of law striking similar state laws attempting to restrict access to Internet material harmful to minors, see; *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ABFFE v. Dean*, 342 F.2d 96 (2d. 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. Napolitano*, No. CIV 00-0505TUC AM (2002), *Southeast Booksellers v. McMasters*, 282 F. Supp. 2d 1180 (D.S.C. 2003), *The King's English v. Shurtleff*, Case No. 2:05-cv-00485DB (D. Utah August 25, 2006), *ABFFE v. Strickland*, 512 F. Supp. 2d 1082 (S.D. Ohio 2007). In addition, the U.S. Supreme Court has declared unconstitutional two federal laws that restricted the availability of matter inappropriate for minors on the Internet, *Reno v. ACLU*, 117 S.Ct. 2329 (1997), *ACLU v. Gonzalez*, 478 F. Supp. 2d 775 (E.D. Pa. 2007) (on remand from *Ashcroft v. ACLU*, 542 U.S. 656 (2004)).

Passage of S.B. 125 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.

The members of Media Coalition strongly urge you to defend the First Amendment and Article II Section 10 rights of retailers, librarians and all the citizens of Colorado by defeating S.B. 125.