



April 2, 2010

Senator Hollis French, Chair
Senate Judiciary Committee
State Capitol, Room 417
Juneau, AK 99801

Re: Opposition to Section 8 and 9 of Senate Bill 222 and existing law 11.61.128

Dear Senator French,

The members of Media Coalition believe that Sections 8 of Senate Bill 222 and existing Alaska statute 11.61.128(a) violate the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations who comprise Media Coalition have many members throughout the country including Alaska: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

AS 11.61.128(a) bars the distribution by computer of any “indecent material” by an adult to anyone under 16 years old or someone the adult believes is under 16 years old. “Indecent material” is defined to include any depiction of actual or simulated sexual penetration; lewd touching or exhibition of the genitals, anus, or female breast; masturbation; sexual masochism or sadism. S.B. 222 would expand the existing law to apply to any type of distribution rather than solely distribution by computer.

Speech is protected unless the Supreme Court tells us otherwise. As the Court said 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 make dissemination of such material illegal.

The restriction on “indecent materials” in the present law and in Section 8 of this bill, without a connection to an otherwise illegal act such as luring or enticing a minor, is almost certainly unconstitutionally overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S.

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 test for determining whether material is “harmful to minors” and may therefore be banned for sale to minors. The material deemed illegal for minors by AS 11.61.128(a) and S.B. 222 does not include any part of the three prong test from *Ginsberg* and would criminalize a far broader range of material than is permissible under the First Amendment. A recent law enacted in Illinois barred the sale of video games with sexual content. The definition of sexual content omitted the third prong of the *Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was heartily 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).

The existing law’s application of these restrictions to Internet communication is very likely unconstitutional and would be even if it was limited to material that could be restricted as “harmful to minors” under the three-prong test in *Ginsberg*. This treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. However, cyberspace is not like a book or video or video game store. There is no way to know whether the person receiving the “harmful” material is a minor or an adult. As a result, the effect of a blanket ban on the electronic dissemination of material “harmful to minors” is to force a content provider, whether a publisher or an on-line carrier, to either risk prosecution or restrict access to both minors and adults, thus infringing the First Amendment rights of adults. Online bookstores, sexual health websites, movie streaming businesses, and personal blogs would all be at risk if a minor accessed such material.

The U.S. Supreme Court has already declared unconstitutional the Computer Decency Act (CDA), which restricted the availability to minors of “indecent” matter on the Internet. *Reno v. ACLU*, 521 U.S. 844 (1997). Congress passed a subsequent law that banned dissemination to minors of material “harmful to minors,” as defined by the three-prong test in *Ginsberg*, by commercial web sites on the World Wide Web. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 129 Sup. Ct. 1032 (2009). In *Mukasey*, the court struck down the law as overbroad. The court found that there are less restrictive means to protect minors from “harmful to minors” speech without unduly restricting the rights of adults to access speech to which they are legally entitled. Similar state laws that have banned the dissemination to minors of speech with sexual content on the Internet have repeatedly been ruled unconstitutional. See, *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); *American Libraries Ass’n v. Pataki* 969 F. Supp. 160 (S.D. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). The only exceptions to these decisions have been laws that were limited to speech illegal for minors that were intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor. However, such laws might still be unconstitutional as a violation of the Commerce Clause of the U.S. Constitution. In addition to First Amendment deficiencies, the courts have ruled that these state laws violate the

Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

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' attorneys' fees. In the successful challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than \$500,000.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org. We are happy to work with this Committee to rework Sections 8 and 11.61.128.

Again, we ask you to please protect the First Amendment rights of all the people of Alaska and reconsider the existing law and Sections 8 and 9 of S.B. 222.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director

cc: Sen. Bill Wielechowski, Vice Chair
Sen. Dennis Egan
Sen. Lesil McGuire
Sen. John Coghill