



### Memorandum in Opposition to Alaska Senate Bill 222

The members of Media Coalition believe that both Section 8 of Senate Bill 222 and existing Alaska statute 11.61.128(a) violates 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 a 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 would broaden it to apply to any type of distribution rather than merely 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 bar access to make such material illegal.

The restriction on "indecent materials" in the present law and in 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 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. Merely containing sexual content is not enough to make a book, movie, magazine or sound recording illegal. In the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part 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 of the three prong test from *Ginsberg* and would criminalize a far broader range of material than is allowed under the First Amendment. A recent law enacted in Illinois barred the sale of video games with sexual content but without 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 (7<sup>th</sup> Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

The existing law's application of these restrictions to Internet communication is almost certainly unconstitutional 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. But cyberspace is not like a bookstore. 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 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*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009). Similar state laws banning sexual speech for minors on the Internet have been ruled unconstitutional. See, *PSINet v. Chapman*, 63 F.3d 227 (4<sup>th</sup> Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2<sup>nd</sup> Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6<sup>th</sup> Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10<sup>th</sup> 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 also 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](mailto:horowitz@mediacoalition.org).

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