MEDIA COALITION, INC.
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memorandum in Opposition to Louisiana House Bill 153

Media Coalition believes that House Bill 153 violates the Constitution for several reasons. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Louisiana: publishers, booksellers and librarians, as well as manufacturers and retailers of recordings, films, videos and video games.

H.B. 153 requires any person or entity in Louisiana who publishes material harmful to minors on the Internet to make every visitor to their site "electronically acknowledge and attest" to being 18 years old or older prior to gaining access to such material. Failure to do so is a crime even if the person accessing the material is an adult. How a person is to "electronically acknowledge and attest" to being an adult is not defined in the legislation. A violation is punishable by a fine of $10,000.

This bill is clearly unconstitutional. It makes it a crime if an online author or publisher does not "ID" adults who are attempting to access sexual material. It is not tied to preventing minors from perusing such content. It is a crime even if there are no minors on the site. Even if it was intended to prevent minors from viewing sexual content, it would still violate the First Amendment. H.B. 153 forces online publishers to act like adult bookstores. They must create a segregated area within their website and "ID" every adult before they enter the section. This is far beyond what courts have said "brick and mortar" retailers must do to prevent minors from perusing material harmful to minors. It places a substantial burden on adults in order to protect minors. Bookstores must take reasonable efforts to block minors from perusing sexual material that is illegal for them, but courts have also ruled that these limitations may not unreasonably hinder the access of adults. They cannot be forced to hide such material or to segregate it in an adults-only area. *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d 125 (4th Cir. 1989). 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).

Asking online publishers to do more to restrict access to speech on their websites is contrary to a substantial body of law that has offered greater protection for speech online. Courts have repeatedly ruled that laws that restrict non-obscene sexual speech online violate the First Amendment because they infringe on the speech rights of adults. A federal law, the Child Online Protection Act (COPA), and eight similar state laws have been held unconstitutional as violating the First Amendment. *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 S.Ct. 1032 (2009); *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression 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. Feb. 21, 2002); *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. Oct. 26, 2010); *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011). A ninth state law was struck down solely as violating the Commerce Clause of the Constitution. *American Library Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997). Two other state laws were substantially narrowed as not to apply to general dissemination of speech on the Internet. *Florence v. Shurtleff,* No. 2:05cv000485 (D. Utah May 16, 2012); *American Booksellers Foundation for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010). Many 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://mediacoalition.org/category/litigation/litigation-internet/

Several of these courts have found the laws unconstitutional because they are not the least restrictive or most effective means for protecting adults' access to sexual speech while preventing minors from accessing sexual content. Several courts found that filtering software and other user-empowerment tools are a less restrictive means of protecting minors without limiting the speech of adults. *See*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666-669 (2004) (affirming findings of facts by the U.S. District Court that filtering software is a less restrictive and more effective means of preventing minors from accessing sexual material in the challenge to COPA). Among the tools that the courts considered were age verification systems. COPA included an affirmative defense for a website that used different methods for ascertaining the age of a reader. In considering whether to uphold a preliminary injunction barring enforcement of COPA, the Supreme Court concluded that these methods were neither the least restrictive means nor more effective for preventing minors from accessing harmful to minors material. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666-668 (2004). The Court then remanded the case to the U.S. District Court for further fact finding. Judge Lowell considered different ways of screening users of websites for age. He found, "Many people wish to browse and access material privately and anonymously, especially if it is sexually explicit. Web users are especially unlikely to provide a credit card or personal information to gain access to sensitive, personal, controversial, or stigmatized content on the Web. As a result of this desire to remain anonymous, many users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners such as the plaintiffs will be deprived of the ability to provide this information to those users." *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775. 805-6 (E.D. Pa. 2007), aff'd sub nom. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 555 U.S. 1137 (2009). Judge Lowell then issued a permanent injunction. The Third Circuit Court of Appeals affirmed his granting of an injunction, "We conclude that the District Court correctly found that implementation of COPA's affirmative defenses by a Web publisher so as to avoid prosecution would involve high costs and also would deter users from visiting implicated Web sites. It is clear that these burdens would chill protected speech and thus that the affirmative defenses fail a strict scrutiny analysis." *Mukasey v. ACLU*, 534 F.2d 181, 197 (3d Cir. 2008), cert. den. 555 U.S. 1137 (2009), aff'g sub nom. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

The requirement that adults "acknowledge and attest" to their age suffers the same constitutional defects as laws that require websites to use age verification systems. It causes a substantial chilling effect by imposing a serious burden on websites while deterring adults from

accessing protected speech. Online publishers must create a system for online users to "acknowledge and attest" their age. They must also create a system to archive and catalog the information from each user to avoid a potential prosecution for failing to "ID" their visitors. There are costs for websites, many of them run by individuals or available for free. There also may be technological limitations to implementing a system to capture information about web browsers. The requirement also deprives Internet browsers of their anonymity. Many browsers will decide not to view material rather than reveal their identity online. This deprives those readers access to sensitive material such as health information. In turn, this reduces traffic on websites. The loss of traffic can reduce an online speaker's ability to communicate with a wider audience, and a website can lose income from a reduction in visitors.

Nor can the state force a website or publisher to pejoratively identify content as illegal for minors. Speech is presumed legal for adults and minors until it is found to be illegal by a court. This determination can only be made by a court with the full protections of due process. The Supreme Court has made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). This is true regardless of whether it does so itself or if it forces the publisher to do so under threat of criminal prosecution. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court struck down a similar scheme of regulation as a form of "informal censorship."

H.B. 153 may also be unconstitutional for vagueness because the term "acknowledge and attest" is not defined or explained. This term is central to complying with the law, but it is not clear if it means simply to click a button claiming to be at least 18 years old or if it means providing a more meaningful and credible statement of having reached the age of majority. The legislation does not explain what information must be gathered, i.e., a name, date of birth, address, any form of official identification, etc. Nor does it say how long the information must be retained or in what fashion. This vagueness likely violates the Due Process Clause of the Constitution. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").

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.

We ask you to please protect the First Amendment rights of all the people of Louisiana and withdraw or defeat H.B. 153.