THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America Recording Industry Association of America

Memo in Opposition to Maryland Senate Bill 736

While Media Coalition is deeply concerned about the sexual exploitation of minors and support laws that attempt to eradicate it, we believe S.B. 736 violates the First Amendment because it would criminalize material that is produced without any involvement by a minor. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Maryland: authors, publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 736 would expand the definition of child pornography to include computer-generated images that are indistinguishable from an actual minor under the age of 16 years old. A violation would be subject to up to five years in prison for a first offense and 10 years for a second offense.

The Supreme Court has already specifically answered the question of whether the government can criminalize computer-generated images that appear to be minors either nude or engaged in sexual conduct but are produced without the use of an actual minor in creating the image. The Child Pornography Prevention Act (CPPA) criminalized computer-generated images or pictures that appeared to be a minor engaged in real or simulated sexual activity or with his or her genitals lasciviously displayed. In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down this part of the law as unconstitutionally overbroad. 535 U.S. 234 (2002). Unless the images were created using actual minors engaged in prohibited sexual activity or displaying lascivious nudity, the material is protected by the First Amendment and can only be banned if it is found to be obscene under the test in *Miller v. California*, 413 U.S. 15 (1973). *Id*., at 251. The decision in *Free Speech Coalition* reaffirmed the ruling in *Ferber v. New York*, 458 U.S. 747 (1982), the landmark case that upheld a ban on child pornography produced with actual minors, which emphasized that the exception to the First Amendment for child pornography was limited to pictures of actual children being sexually abused, not representations that appear to be of a minor. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter." 535 U.S. at 255.

The Court in *Free Speech Coalition* reached this conclusion even though the government argued that the CPPA could be upheld by reading the statute as only applying to images that are "virtually indistinguishable" from images created with actual minors. *Id*., at 249. The majority dismissed this argument, saying that virtual images are clearly distinct from images of actual minors. A virtual image "records no crime and creates no victims by its production." *Id*., at 250. The Court added that the *Ferber* decision relied on the use virtual images of minors as an "alternative and permissible means of expression" to justify its holding that images of actual minors could banned. *Id*., at 251("*Ferber,* then, not only referred to the distinction between

actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.")

Even if Maryland could regulate images that appear to be of a minor, the law is likely unconstitutionally vague. "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." *Winters v. New York*, 333 U.S. 507, 509 (1948). S.B. 736 makes it illegal to possess or retain computer-generated images that are indistinguishable from a minor less than 16 years of age. While it is possible to determine if a person in an image is pre-pubescent or post-pubescent, the legislation provides no guidelines for how determine if a computer-generated image is illegal because it is "indistinguishable" from someone 15 years and 364 days old, or appears to be a 16 years and therefore the image is legal.

The inability to distinguish whether the image is illegal will have a significant chilling effect on protected speech. Courts are especially skeptical of statutes that attempt to regulate speech but their lack of specificity results in self-censorship beyond any speech that may be proscribed. *See Baggett v. Bullitt*, 370 U.S. 360 (1964). Here, the problem of vagueness is compounded by the severe penalties that accompany a violation. Inevitably, content creators and distributors will likely avoid any computer-generated images if they do not appear to be well into adulthood for fear they will be deemed to be indistinguishable from an image of someone less than 16 years of age.

Nor can this legislation be saved by the promise of legislators or prosecutors that the statute will be construed only narrowly. In *U.S. v. Stevens* the Court said, "[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 559 U.S. 460, 480 (2010).

Finally, enactment of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very good possibility that the state will be ordered to pay the plaintiffs' attorney's fees.

If you would like to discuss our concerns further, we would welcome that opportunity to do so. Please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025 x3 . We ask you to protect the First Amendment rights of all the people of Maryland and amend or defeat S.B. 736.