



# 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

## Memo in Opposition to Missouri Senate Bill 733

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we firmly believe that S.B. 733 violates the protections for free speech and due process provided by the Constitution for numerous reasons. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Missouri: authors, publishers, booksellers and librarians, producers and retailers of films, home video and video games. They have asked me to explain their concerns.

### Summary of the bill:

S.B. 733 requires internet service providers (ISP) to block their customers access to depictions — and possibly descriptions — of nudity and sexual activity. It would include clothed contact of the buttocks, sado-masochist abuse and simulated sexual conduct. Presumably, the ISPs would use filtering software to block this content. It must then redirect the subscriber to a page that explains that the site was blocked and allow the subscriber to enter a password to access the site.

Adult subscribers are allowed to create a password to gain access the website. The password could not be saved so the subscriber would have to manually enter the password each time he or she attempted to access a blocked website. Also, the password would have to be changed every three months. The procedure for creating, recovering or changing the password must have multi-factor authentication. The bill makes it a misdemeanor for an adult to give his or her password to a minor.

In addition to these requirements, each ISP must also create a website, call center or other reporting mechanism to allow a person to report blocking of non-obscene material or the failure to block obscene material. Once a report is made, the ISP has up to 10 days to assess the content and block material that must be blocked or unblock speech that should not have obscene. The attorney general must also create a reporting system to decide whether material should or should not have been blocked. Any decisions made by the attorney general must be reported the ISP of the person who reported the over or under blocking. The attorney general may seek injunctive and equitable relief if an ISP fails to comply with the bill.

### S.B. 733 is unconstitutionally overbroad because it goes beyond *Miller/Ginsberg*

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). S.B. 733 labels the speech that must be blocked as “obscene” but the definition in the bill does not follow the test established by the U.S. Supreme Court for adult obscenity or obscenity for minors, commonly referred to as harmful to minors,

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which is a narrow range of material determined by a specific test. The three-part test announced by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968) and is generally understood as having been modified by the Court's subsequent reformulation of the test for adult obscenity in *Miller v. California*, 413 U.S. 15 (1973). The test establishes that speech that is otherwise legal for adults may be banned for minors only if it depicts or describes explicit sexual activity or nudity and, when taken as a whole:

1. predominantly appeals to the prurient, shameful or morbid interest of minors in sex;
2. is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
3. lacks serious literary, artistic, political or scientific value.

The Supreme Court has rejected attempts to restrict minors' access to sexual speech in a manner that was broader than what is permitted under the *Miller/Ginsberg* test. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 865 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989); *See also, Powell's Books v. Kroger*, 622 F.3d 1202, 1213 (9th Cir. 2010)(blocking enforcement of an Oregon law barring sexual speech for minors that did not comply with the *Miller/Ginsberg* test); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (permanently blocking an Illinois law that barred the sale of sexual material to minors but omitted the third prong of the *Miller/Ginsberg* test).

#### Unconstitutional burden on the First Amendment rights of adults

Even if S.B. 733 was limited to blocking minors' access to harmful to minors material on the internet, it would still be unconstitutional because of the burden on adults. This bill would require adults to create a password with multi part authentication, that must be changed every three months and the ISP would be barred from remembering it. Non-obscene sexual speech is fully protected by the First Amendment for adults and, therefore, adults have the right to access such content and speakers have a right to disseminate it. *U.S. v. Playboy*, 529 U.S. 803, 811 (2000). Government restriction on access to First Amendment protected material for 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). The password must be entered for each website the adult sought to access. The Supreme Court twice blocked enforcement of the Child Online Protection Act (COPA) which barred minors from seeing material harmful to minors online. Similar to this bill's provision requiring a password with multipart authentication, it provided multiple ways for adults to verify their including any reasonable means available under existing technology. Despite the ID provision, the law was found unconstitutional because it was not the least restrictive or most effective means for protecting adults' access to sexual speech while preventing minors from accessing sexual content. *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.* 555 U.S. 1137 (2009). *See, Ashcroft v. AC LU*, 542 U.S. 656, 666-669 (2004) (affirming findings of facts by the U.S. District Court that voluntary filtering software is a less restrictive and more effective means of preventing minors from accessing sexual material without burdening adults).

Courts have ruled that nine state laws that have restricted access by minors to harmful to minors laws on material distributed on the Internet violate the First Amendment. *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. McMaster* 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); *Garden District Book Shop v. Stewart*, 2016 WL 1734093 (M.D. La., Apr. 29, 2016).

S.B. 733 is an Unconstitutional prior restraint and violates due process protections for speakers  
Decisions about whether speech will be blocked for minors and subject to the password regime will be made by computer programs. If one's speech is incorrectly blocked, the speakers can only appeal to the ISP or attorney general in a process that can take 10 days or longer and provides no due process protection. This is unconstitutional. Publishers, authors, filmmakers and other speakers have a First Amendment right to speak without interference by the government. It is a prior restraint to silence speakers before providing full due process protections. This is true whether the state is seizes all copies of a book from a bookstore or forces ISPs to block or impede access to content prior to the material be adjudicated as obscene. As the Supreme Court said in *Marcus v. Search Warrant*, "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." 367 U.S. 717, 731 (1961).

The Supreme Court has held that due process rights are essential in judging whether speech is obscene and outside of First Amendment protection. In *Bantam Books v. Sullivan*, the Court explained why these protections are so important:

"Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrant*, supra, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, e. g., *Thornhill v. Alabama*, 310 U.S. 88; *Winters v. New York*, 333 U. S. 507; *NAACP v. Button*, 371 U.S. 415. '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .' *Speiser v. Randall*, 357 U.S. 513, 525."

372 U.S. 58, 68 (1963).

Speech can only be suppressed after a court finds that is obscene. In *Fort Wayne Books, Inc. v. Indiana*, the Supreme Court held, “While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing.” *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (internal cites omitted). Similarly, in *Heller v. New York*, the Court noted that “seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding.” 413 U. S. 483, 492 (1973). Even probable cause is not sufficient to block access to a book, magazine or movie prior to a final judgment. *Fort Wayne Books, Inc.*, 489 U.S. at 66. (“...our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.”)

Also, the burden is on the state to prove that the material is obscene by gathering evidence and bringing charges in an adversarial judicial proceeding. S.B. 733 turns this principle on its head by blocking any content a computer program determines is illegal and then requiring the speaker (or the person trying to access the material) to vindicate their constitutional rights in a process that can take up to 10 days or more with the only appeal being to the attorney general not to a court. In *Southeastern Promotions, Ltd. v. Conrad*, the Supreme Court added that “a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor.” 420 U.S. 546, 560 (1975) (emphasis in the original). Even the limited appeals process provided in the bill offers speakers no opportunity to challenge a report that their speech should be blocked.

The government cannot get around these constitutional requirements by outsourcing this censorship regime to device manufacturers and retailers to act as its agent to suppress speech that the state is prohibited from doing on its own. In *Bantam Books*, the U.S. Supreme Court struck down a non-judicial determination of whether material is illegal for minors as a form of “informal censorship.” 372 U.S. 58 (1963). More recently, Judge Posner writing for the Seventh Circuit held that using “administrative methods” to censor speech “as distinct from punishing such dissemination... after it has occurred — is prohibited by the First Amendment as it has been understood by the courts.” *Backpage. com, LLC v. Dart*, 807 F. 3d 229, 235 (7th Cir. 2015).

#### Use of mandatory filters will inevitably be overbroad:

Even if S.B. 733 was limited to obscene material or material harmful to minors, the ISPs will inevitably block a substantial amount of speech that does not fit the *Miller/Ginsberg* definition. Filtering software is not sophisticated enough to determine what are community standards, what appeals to prurient interest or what is patently offensive. Research shows that filters block content based on certain kinds of nudity in images and the use of explicit language making them overbroad. Even in attempting to block categories of speech like sexual content, filters generally over block. See, [American Library Policy Brief](#), Policy Brief No. 5, June 2014, pg. 16-18. Filters are a blunt instrument that are designed to block sexual material, hate speech or other types of content based on specific words or images of nudity or sex. They cannot make more nuanced assessments that are necessary under the *Miller/Ginsberg* test that require information

beyond what is in the text or the image. Determinations such as whether material appeals to the prurient interest in sex, it is patently offensive or that it lacks serious value.

Voluntary filters are less restrictive means:

This is why the Supreme Court has cited voluntary filters as the best way to block unwanted speech online but has dismissed the idea of mandatory filters. In *Ashcroft v. American Civil Liberties Union*, the Court dismissed the argument that the government could impose mandatory filters on all internet users and held that the voluntary use of filters was a less restrictive means since the user could decide what material is appropriate for themselves or their children without censoring the internet for the entire population. 542 U.S. 656, 669 (2004). See also, *U.S. v. Playboy*, 529 U.S. at 822-26 (individual households opting into voluntary scrambling of adult cable channels was a less restrictive means for preventing signal bleed than system wide blocking).

Nor can this legislation be saved by a promise of legislators or prosecutors that the statute will be construed 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).

We believe that S.B. 733 is unconstitutional for these and other reasons. 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](mailto: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 Missouri and amend or defeat S.B. 733.