Memo in Opposition to Oklahoma House Bill 2696

The members of Media Coalition believe that House Bill 2696 which imposes an excise tax on "violent video games" is likely violates the First Amendment for several reasons. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers in Oklahoma and the rest of the United States.

H.B. 2696 would impose a 1% excise tax on "violent video games." This tax is in addition to any existing general state or local sales tax imposed on goods and services that include video games. "Violent video games" are defined as any video game that received a "Teen," "Mature" or "Adult Only" rating from the Entertainment Software Rating Board (ESRB). ESRB is a private organization that rates most of the video games sold or rented in the United States.

It is now definitely established that video games are speech protected by the First Amendment. Last summer the Supreme Court ruled that video games are entitled to constitutional protection the same as books, newspapers, movies or music. In *Brown v. Entertainment Merchants Association,* the Court struck down a California law that banned minors from buying or renting video games with certain violent imagery. 131 S. Ct. 2729 (2011). Justice Scalia, writing for the majority, specifically acknowledged that, "[L]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection." *Id.* at 2733. After finding that the video games are fully protected speech, the Court applied strict scrutiny analysis and held the law unconstitutional.

Given that video games are protected speech, this tax would be imposed based on the content of the speech and, therefore, it is immediately constitutionally suspect. Here, the tax is triggered by the sale or rental of video games with specific types of content that merit certain ratings. The U.S. Supreme Court has repeatedly held that a content-based restriction or penalty on speech is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-7 (2000). More specifically, the Supreme Court has struck down legislation to tax or otherwise financially punish First Amendment-protected speech based on its content. In 1983, the Court ruled that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment, *Minneapolis Star v. Minnesota Commission of Revenue,* 460 U.S. 575. In 1991, it

held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech, *Simon and Schuster, Inc. v. Members of the New York State Crime Board,* 502 U.S. 105. In 1987, it ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

Further, the state cannot place special burdens on retailers of First Amendment-protected material. The Supreme Court has said the government can neither require a license of speakers of protected communication that is not generally imposed nor levy a business tax specifically on the dissemination of protected speech that is not generally levied. *See*, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton,* 536 U.S. 150 (2002); *Grosjean v. American Press,* 297 U.S. 233 (1936). *See also*, *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008) (court struck down Indiana's financially punitive licensing regime for retailers who sell "sexually oriented" material).

Finally, H.B. 2696 delegates to the ESRB the power to decide which video games will be subject to this excise tax and which video games will be exempt. This delegation of authority to a private entity also likely violates the First Amendment. It violates due process rights of those subject to the tax. There is a substantial body of case law that says a government cannot enforce nor adapt a voluntary rating system for First Amendment-protected content. It is especially so when the enforcement of the rating system is done to restrict or punish speech based on its content. *ESA v. Swanson*, 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff'd* 519 F. 3d. (8th Cir. 2008)(striking down a Minnesota law imposing a fine on a minor who rented or purchased a game rated "Mature" by ESRB). Courts in many states have struck down laws that would have enforced the motion picture rating system or financially punished a movie that carried a specific rating designation. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), (enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings); *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), (the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association.) *See also*, *Swope v. Lubbers,* 560 F.Supp.1328 (W.B. Mich. S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F. 2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

This tax is meant to raise revenue for Oklahoma. However, if it is enacted it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs' attorneys' fees. In our case *Big Hat Books,* the state of Indiana paid in excess of $150,000 in attorneys' fees and expenses.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org. Please protect the First Amendment rights of all the people of Oklahoma by rejecting this legislation.