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 Proposed Legislation to Impose 10 Percent Sales Tax
On Video Games with Violent Content

We believe that the proposed legislation to impose a 10 percent sales tax on video games with violent content is clearly an unconstitutional content-based punishment on speech. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Pennsylvania: publishers, booksellers, librarians and authors, as well as manufacturers and retailers of audio recordings, films, videos and video games.

H.B. 109 imposes a 10 percent tax on the sale of any video game rated "Mature" or Adults Only" by the video game industry rating system. This tax is in addition to any other generally applied state or local sales tax. The "Mature" rating is designated for content that may contain intense violence, blood and gore, sexual content or strong language. The "Adults Only" rating is given to video games with content that may include prolonged scenes of intense violence, graphic sexual content or gambling with real currency.

The U.S. Supreme Court has ruled that video games are fully protected by the First Amendment. In *Brown v. Entertainment Merch. Ass'n and Entertainment Software Ass'n,* the Court struck down a California law that banned minors from buying or renting video games with certain violent imagery. 564 U.S. 786 (2011). The Court held that video games are entitled to full constitutional protection the same as traditional media. Justice Scalia, writing for the majority, specifically stated 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 790. He added that the interactive nature of video games does not provide any reason for treating them differently than other media. *Id*. at 792.

The Supreme Court has also held that the First Amendment fully protects content that fits the "Mature" or "Adults Only" rating and, therefore, is subject to the 10 percent sales tax surcharge. The speech that fits those ratings can be grouped as images and descriptions of violence and sex in varying degrees of explicitness. In *Brown*, the Court found that there is no historic exception to the First Amendment for violent images or descriptions in any medium. Justice Scalia found that there has never been a custom of regulating speech with violent content and noted that "California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none." *Id*., at 795. The opinion then mentions a long list of books read by children that are filled with violent and gory themes. Similarly, non-obscene sexual content is also protected by the First Amendment. *Sable Communications v. FCC*, 492 U.S. 115 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment…"); *Carey v. Population Services Int'l,* 431 U. S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"); see also, *Reno*

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v. American Civil Liberties Union, 521 U.S. 844 (1997) (striking down regulation of "indecent" speech online).

Since the sales tax would be imposed on speech fully protected by the First Amendment, it would unconstitutional as a content-based burden on speech. While the state may include the sale or rental of speech in a general sales tax, the Supreme Court has firmly established that the First Amendment bars a tax based on the content of the speech. In 1987, the Supreme Court 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 Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230. In 1983, the Court held 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 Comm'r of Revenue*, 460 U.S. 575. In 1991, the Court 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 & Schuster, Inc. v. Members of the N.Y. State Crime Board*, 502 U.S. 105. See also, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Further, the state cannot impose a content-based tax on speech in one media while exempting others. The Supreme Court has condemned the selective imposition of an unreasonable burden on one medium but not on other media. *See*, *United States* v. *Playboy Entm't Grp, Inc.*, 529 U.S. 803, 812 (2000) (striking down a regulation that targeted "adult" cable channels, but permitted similar expression by speakers in other media); *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media … often present serious First Amendment concerns."); *Arkansas Writers'*, 481 U.S. at 228 ("Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State.").

Even if the state could impose a tax based on the content of speech, courts have repeatedly rejected laws that would have given the force of law to a private rating system. Voluntary ratings exist to help parents determine what content is appropriate for *their* children, but a government body violates the First Amendment if it enforces these rating systems whether directly by enforcing them or indirectly by using them to impose burdens on content. In *Entertainment Software Ass'n v. Hatch*, the district court struck down a Minnesota law that barred anyone less than 17 years old from buying or renting a video game carrying a "Mature" or "Adults Only" rating under the video game industry's voluntary rating system. 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff'd sub nom. Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008). Similarly, courts in many states have held it unconstitutional for the government to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. In *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970), the court threw out a Kenosha ordinance that used MPAA ratings to bar minors from accessing certain films. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20 percent 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.D. Mich. 1983) (use of motion picture rating

system was improper as a basis 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).

Since the Supreme Court precedent strongly cautions against enacting a content-based sales tax on video games, the legislature should consider H.B. 109 very cautiously. While the sales tax may be meant to raise revenue, it will be extremely vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong likelihood that the state would be ordered to pay the plaintiffs' attorneys' fees. In *Brown*, California paid the plaintiffs about $1,000,000 in attorneys' fees and expenses.

If you would like to discuss further our concerns about this bill, please contact David Horowitz at 212- 587-4025 #3 or at horowitz@mediacoalition.org.

We urge you to protect the First Amendment rights of all Pennsylvanians and decline to support this proposed legislation.