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 Tennessee House Bill 2294

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we firmly believe that H.B. 72294 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 Tennessee: 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:
H.B. 2294 requires internet service providers (ISPs) to block access for to "pornographic" material for all users. A failure to do so shall be treated as a deceptive or unfair act or practice is subject to penalties under the Tennessee Consumer Protection Act. The bill does not define the term "pornographic" in the text or by reference.

It is not clear from the bill's structure if the parental controls can be deactivated to allow anyone to access "pornographic" content but even if they can some users will not be able to do so because they do not have access to the parental controls. Also, speakers who have a right to disseminate such content will have their speech blocked for many users of the internet. At the same time, ISPs, using filtering software, will inevitably block valuable content like sexual health information, art and photography books and romance novels. However, since the material is deemed to be "pornographic," many users will decline to unblock the content because they assume it is either obscene for adults or for minors or is limited to the most explicit images and video.

I. Content-based regulation of speech
H.B. 2294 is a content-based regulation of speech because it forces ISPs to block access to sexual speech for all users. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *U.S. v. Playboy*, 529 U.S. 803, 811 (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). The Court went even further in *Reed v. Town of Gilbert, Arizona*, holding that even a law that may not be content based on its face is treated as such if it "cannot be justified without reference to the content" or was enacted "because of disagreement with the message [the speech] conveys[.]" 135 S. Ct. 2218, 2237 (2015).

II. Content-based regulation is presumed unconstitutional if not a historic exception
A content-based restriction on speech is presumed to be unconstitutional unless it fits in one of the few historic exceptions to the First Amendment. "[T]he Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *Playboy*, 529 U.S. at

817 (2000)." *Ashcroft v. ACLU,* 542 U.S. 656, 660 (2004). "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818.

Since this legislation is a content-based restriction on speech, the next step of the analysis is to determine whether it falls into a historic exception to the First Amendment. As the Court recently explained:

> "From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

Stevens, 559 U.S. at 467 (2010) (internal citations omitted). *See also*, *R.A.V.*, 505 U.S. at 382-83 (1992); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991).

This legislation does not fall into an existing exception to the First Amendment. There is no historic for pornographic speech that is not obscene under the *Miller v. California* standard or obscene for minors under the *Ginsberg v. New York* test. *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Playboy*, 529 U.S. at 814 (2000); *Ashcroft v. ACLU,* 542 U.S. at 670 (2004). The Supreme Court has rejected attempts to restrict access by adults and minors 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).

Nor can the government create a new category of unprotected speech by weighing the value of the speech against the harm of its publication. In *Brown v. Entertainment Merchants Ass'n*, the Court said, "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." 564 U.S. 786, 791 (2011).

III. Strict scrutiny analysis

If a content-based law does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 813. To meet the test for strict scrutiny, the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is "necessary" to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is the least restrictive means to achieve that interest. *See id.; R.A.V.*, 505 U.S. at

395-96; *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118; *Brown v. Entertainment Merchants Ass'n*, 564 U.S. at 799 ("The State must specifically identify an 'actual problem' in need of solving and the curtailment of free speech must be actually necessary to the solution,") (internal citations omitted).

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as "a government objective of surpassing importance." 458 U.S. 747, 757 (1982). This legislation cannot satisfy strict scrutiny. It requires private companies to block material that is neither illegal for adults as obscenity or for minors as obscenity for minors. As noted above, in *Reno* and *Sable Communications*, the Supreme Court has already rejected claims by the government that there is a compelling interest in restricting the access of minors to sexual speech beyond what is permissible under the *Miller/Ginsberg* test. 521 U.S. at 865.; 492 U.S. at 127.

The legislation also likely fails the least restrictive means test. The Supreme Court has cited voluntary filters that are activated and operated by parents as the best way to block unwanted speech online but has dismissed the idea of mandatory filters. Voluntary filters let users opt in at their discretion rather than forcing them to go through the process of opting out. In *U.S. v. Playboy*, the Court held that allowing individual households to opt into voluntary scrambling of adult cable channels was a less restrictive means for preventing signal bleed than system wide blocking. 529 U.S. at 822-26. The Court concluded that the government's fear that some or even many parents would not opt in to the blocking regime was not sufficient to establish a compelling state interest. *Id*., at 825; *see also*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 669 (2004) (voluntary use of filters were a less restrictive means for preventing access to harmful to minors content since each parent could decide what material is appropriate for themselves or their children without censoring the internet for the entire population).

Unconstitutional burden on the First Amendment rights of adults

Even if H.B. 2294 was limited to blocking minors' access to harmful to minors material on the internet, it would still be unconstitutional because it places an unreasonable burden on adults. The bill would require that all sexual speech be blocked by the ISP. Some adults might be able to access the parental controls and bypass the filters but many would not be able to and would either have no access to such material or would have to make the embarrassing request for permission to do so. 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. *Playboy*, 529 U.S. at 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).

H.B. 2294 is an unconstitutional prior restraint and violates due process protections for speakers

Leaving aside the question of whether this speech can be blocked at all, publishers, authors, filmmakers and other speakers have a First Amendment right to speak without interference by the government. Blocking their speech will inevitably reduce the size of their audience and the

bill provides no way to have their speech unblocked. It results in the speech disappearing from the internet in the state of Tennessee. This is unconstitutional. It is a prior restraint to silence speakers before providing full due process protections. This is true whether the state forces booksellers to keep certain books in the backroom to prevent all customers from seeing them or forces ISPs to block or impede access to content prior to a court ruling finding the material to be 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).

Even if the material is obscene, speech can only be impeded for adults after a court makes that determination. 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.").

The government cannot get around these constitutional requirements by outsourcing its censorship regime to ISPs 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).

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 H.B. 2294 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 or by phone at 212-587-4025 x3 . We ask you to protect the First Amendment rights of all the people of Tennessee and amend or defeat H.B. 2294.