

Memo in Opposition to Senate Bill 2756

The members of The Media Coalition believe that Mississippi Senate Bill 2756 threatens the distribution of First Amendment-protected material in Mississippi. The members of Media Coalition, who represent most of the producers, distributors and retailers of books, magazines, recordings, movies, videos and video games in Mississippi and the rest of the country, have asked me to explain their concern.

S.B. 2756 has clear constitutional defects. It changes the definition of child pornography in the Mississippi child pornography statute to include material fully protected by the First Amendment. Currently, to be considered child pornography, depictions must be of an actual child engaged in sexual conduct, contact or performance. S.B. 2756 extends the definition of child pornography to include “adults masquerading as children,” “computer generated images” of children and drawing and sketches “portraying” a child engaged in actual sexual activity or in simulated sexual activity that is suggested by less than lascivious display of the genitals. A violation of S.B. 2756 is punishable by a significant fine, a period of confinement or both.

While the members of Media Coalition are deeply concerned about the sexual exploitation of minors and support laws that attempt to eradicate it, they believe this law criminalizes material protected by the First Amendment and does not sexually exploit minors. In a clear and resounding decision from last year, the Supreme Court in *Free Speech Coalition v. Reno*, 122 S.Ct. 1389 (2002) found unconstitutionally overbroad a very similar statute, the Child Pornography Prevention Act of 1996 (CPPA). The CPPA criminalized depictions both of “adults that appear” to be a minor and computer generated images that appear to be of a minor engaging in real or simulated sex or with genitals lasciviously displayed. The Supreme Court ruled that unless the material included actual minors engaged in prohibited activity the material was protected by the First Amendment and could only be banned if found to be obscene under the three prong tests enunciated in *Miller v. California*, 413 U.S. 15 (1973). *Free Speech Coalition* reaffirmed *Ferber v. New York*, 458 U.S. 747 (1982), the landmark case that upheld a ban on actual child pornography, but where the U.S. Supreme Court made it clear that these laws should strike only at pictures of children being sexually abused, not at all depictions of nude children or representations of children.

S.B. 2756 is constitutionally dubious in light of *Free Speech Coalition* and *Ferber*. Clearly, each of the three changes in the law indicated above would criminalize significant

mainstream material including many art books that contain painting, drawings or sketches that have a sexual theme and popular movies such as *Romeo and Juliet*, *Midnight Cowboy* and *American Beauty* that depict minors but do not involve an actual child. Since none of this material is legally obscene under the *Miller* test, it cannot be banned under any of the provisions of this bill. As the court said in *Free Speech Coalition*, “Protected speech does not become unprotected merely because it resembles the latter.” 122 S.Ct. 1406 (2002).

Passage of S.B. 2756 could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the attorneys' fees of the parties who challenged the law. In a recent case, *A.A.M.A. v. Kendrick*, where the city of Indianapolis attempted to define speech as outside of the protection of the First Amendment protection the city agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees.

The members of Media Coalition urge you to protect the First Amendment rights of all the citizens of Mississippi and defeat S.B. 2756.