

THE MEDIA COALITION INC.

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Memorandum in Opposition to Washington House Bill 1009 as Amended

The members of Media Coalition believe that Washington House Bill 1009 as amended still violates First Amendment rights of adults and minors. The members of The Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and recording and video retailers in Washington and the rest of the United States. They have asked me to explain their concern. The members of Media Coalition are

The American Booksellers Foundation for Free Expression
The Association of American Publishers
The Freedom to Read Foundation
The Interactive Digital Software Association
The International Periodical Distributors Association
The Magazine Publishers of America
The Motion Picture Association of America
The National Association of Recording Merchandisers
The Publishers Marketing Association
The Recording Industry Association of America
The Video Software Dealers Association.

H.B. 1009 as amended would make it a misdemeanor to sell or rent any “violent video” to anyone under 18 years old. A “violent video” is defined as any video that contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures or otherwise causes violence to a human form, depicted, by dress or other recognizable symbols, as a public law enforcement officer. The change from the bill as introduced is the deletion from the definition of “violent video” that it be rated as “Mature” or “Adult Only” in addition to above described depiction of violence.

Merely making certain types of violent content restricted, regardless of whether it is rated or not does not cure H.B. 1009's constitutional infirmities. Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow classes. As the Supreme Court said in *Free Speech Coalition v. Ashcroft*, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S. ___ (2002). None of the types of speech cited by the court includes speech with violent content by itself. To the contrary, every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), cert. den. 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited

minors' access to violent video games. Bookfriends v. Taft, 2002 U.S. Dist. Lexis 18373 deemed speech with violent content as fully protected by the First Amendment and enjoined enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content. Davis-Kidd Booksellers, Inc. v. McWherter, 886 S.W. 2d 705 (Tenn. 1993) struck down a restriction on the sale to minors of material containing "excess violence." Video Software Dealers Assn. v. Webster, 968 F.2d 684 (8th Cir. 1992) held that "unlike obscenity, violent expression is protected by the First Amendment." State v. Johnson, 343 So. 2d 705, 710 (La. 1977) declared that prohibiting the sale of violent materials to minors exceeded the limits placed on regulation of obscene materials by the U.S. Supreme Court. Sovereign News Co. v. Falke, 448 F. Supp. 306, 400 (N.D. Ohio 1977), while remanded on other grounds, overturned a statute defining as "harmful to minors" material describing or representing "extreme or bizarre violence."

Finally, 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). In the case of Ginsberg v. New York, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part test for determining whether material is "harmful to minors" and may, therefore, be banned for sale to minors. There is no language that could suggest that material with violent content would be inappropriate for minors under the Ginsberg test. Therefore, a law imposing a fine for the sale or rental of such material would inevitably prevent minors from purchasing works that they have a First Amendment right to possess.

Passage of H.B. 1009 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 the above mentioned A.A.M.A. v. Kendrick case the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees.

Please protect the First Amendment and reject H.B. 1009 as amended.