

THE MEDIA COALITION INC.

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Memo in Opposition to Washington Senate Bill 5243

The members of The Media Coalition believe that Washington Senate Bill 5243 threatens the distribution of First Amendment-protected material in Washington and throughout the United States. The members of Media Coalition, who represent most of the producers, distributors and retailers of books, magazines, recordings, movies, videos and video games in Washington and the rest of the country, have asked me to explain their concern.

S.B. 5243 would broaden Washington's "harmful to minors" law to include dissemination of material by "electronic transmission." There is an affirmative defense that allows web page publishers, hosts or Internet service providers to avoid prosecution by including hidden codes or comments that trigger filtering software. We have no objection to changes that are merely extensions of constitutionally sound laws that are already on the books. However, regardless of the included defenses, making it a crime to use a computer to transmit material that is "harmful to minors" to a minor, has the result of creating an unconstitutional burden on adults seeking to access First Amendment-protected material.

While the members of Media Coalition understand the desire to prevent minors from gaining access to material that is "harmful to minors," it is important to remember that this material has serious literary, artistic, political and scientific value for adults, who therefore have a First Amendment right to obtain it. Book publishers are posting excerpts of their forthcoming fiction on computer bulletin boards. Magazine publishers are producing computer versions of their publications. Music and movie companies are making available an ever broader range of music and video is available to consumers and browsers. A law that attempts to restrict the availability of material that is lawful for adults but may be harmful to minors can have a "chilling effect" on these companies, prompting them to suppress constitutionally-protected material that may not be suitable for minors.

S.B. 5243 would have this effect. It amends the Washington "harmful to minors" law as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. There is no way to know whether the person accessing "harmful" material is a minor or an adult. As a result, the effect of banning the computer dissemination of material "harmful to minors" is to force a provider, whether a publisher or an on-line carrier, to deny access to both minors and adults, depriving adults of their First Amendment rights. The U.S. Supreme Court has already declared unconstitutional one federal law that restricts the availability of matter inappropriate for minors on the Internet, *Reno v. ACLU*, 117 S.Ct. 2329 (1997). A subsequent but narrower law also remains enjoined following Supreme Court review, *ACLU v. Reno II*, 535 U.S.____ (2002) (remanded for further argument). Also, each court that has considered a similar state law that restricts dissemination

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by Internet of material harmful to minors has enjoined it, either as contrary to the First Amendment, the Commerce Clause, or both, *see ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ABFFE v. Dean*, 202 F.Supp 2d (D. Vt. 2002); *PSINet v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997); *ACLU v. Napolitano*, No. CIV 00-0505TUC AM (2002).

Nor does the affirmative defense available in S.B. 5243 cure the constitutional infirmities. The Supreme Court addressed a similar provision in considering the Communications Decency Act. The government argued that adding hidden codes or “tags” to a web site would be a “good faith, reasonable, effective, and appropriate action” sufficient to satisfy the affirmative defense provision. The Court dismissed this argument as “not constituting the ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision,” *Reno v. ACLU*, 117 S.Ct. at 2322 (1997). Also, both state Internet harmful to minors laws with similar affirmative defenses were found unconstitutional, *see ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) *aff'g* 55 F. Supp 2d 737 (E.D. Mich 1999).

Passage of S.B. 5243 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 *ALA v. Pataki* and *ACLU v. Johnson* cases courts awarded \$450,000 and \$150,000 respectively.

Please protect the first amendment and defeat S. B. 5243.