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Entertainment Software Association

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Magazine Publishers of America, Inc.

Motion Picture Association of America, Inc.

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Publishers Marketing Association

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Video Software Dealers Association

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Memorandum in Opposition to House Bill 647

The members of The Media Coalition believe that House Bill 647 violates the First Amendment rights of retailers and producers of content and others. The members of The Media Coalition represent most of the publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording, video and video game retailers in Florida and the rest of the United States.

H.B. 647 would require that any "violent" video game distributed or imported in Florida have a label with a solid white "18" outlined in black and be no less than two inches by two inches. Retailers would be barred from the sale or rental to a minor of any video game labeled "18." A violation of either section of the bill would result in a fine of up to $1,000 for each violation.

This bill is clearly constitutionally suspect. 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.1382, 1389 (2002). None of the types of speech cited by the Supreme Court include speech with violent content alone. Violent content in otherwise constitutionally protected material is not a permissible subject of government regulation for adults or minors. Laws barring sale or rental of video games with violent content to minors were enacted in 2005 in California, Illinois and Michigan. The laws were all successfully challenged with U.S. District Court judges' granting injunctions barring the enforcement of these restrictions. *See VSDA v. Schwarzenegger*, No. C05-4188 RMW (N.D. Cal. Dec. 22, 2005) (granting preliminary injunction); *ESA v. Blagojevich*, 2005 WL 3447810 (E.D. Ill. Dec. 2, 2005)(granting a permanent injunction); *ESA v. Granholm*, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005) (granting preliminary injunction). Every prior 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. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors' access to violent arcade video games. *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) enjoined enforcement of a county ordinance that barred the sale or rental to minors of video games with violent content. *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 118 (W.D. Wash. 20004) barred enforcement of a state law that barred dissemination to minors of video games that included violence against "peace officers."

Bookfriends v. Taft, 233 F.Supp. 932 (S.D. Ohio, W. Div. 2002) 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."

The requirement that manufacturers place a "18" label on any video game with certain violent content is also likely unconstitutional. The laws passed last year in Illinois and California included nearly identical requirements that such video games carry a "18" label. In both cases the judge barred enforcement as unduly burdensome. *VSDA v. Schwarzenegger*, No. C05-4188 RMW (N.D. Cal. Dec. 22, 2005), *ESA v. Blagojevich*, 2005 WL 3447810 (E.D. Ill. Dec. 2, 2005). More generally, as noted, violent content is protected by the First Amendment but, even if it could be deemed illegal for minors, a government cannot mandate a label on material indicating that it is illegal prior to a judicial determination with appropriate procedural safeguards. Absent these safeguards, such a restriction is an unconstitutional prior restraint. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Further, voluntary ratings with suggested age restrictions are provided by the video game industry as a tool for parents and retailers, but they are just that: voluntary. Courts generally have been skeptical of government rating systems or linkage with existing voluntary rating systems. In nine different states courts have ruled it unconstitutional either to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% 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.B. Mich, S.D. 1983) (use of M.P.A.A. ratings was improper criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In several recent successful challenges to video game legislation, the state agreed to pay to the plaintiffs more than $300,000 in attorneys' fees in each litigation.

We ask you to please protect the First Amendment rights of all people of Florida and oppose H.B. 647.