

THE MEDIA COALITION INC

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Memorandum in Opposition to House Bills 254 and 421

The members of The Media Coalition believe that House Bills 254 and 421 likely violate 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, periodical distributors, recording, movie and video game manufacturers, and recording and video retailers in Louisiana and the rest of the United States.

H.B. 254 and 421 would bar the exhibition, sale or rental to a minor of any video game that contains any depictions of a character violating certain Louisiana criminal laws. Retailers would not be considered to have displayed such games if they are kept in a segregated “adults only” area. Both bills also would add video games to the existing law barring the commercial display or dissemination of material with sexual content that is deemed to be harmful to minors. A violation of either bill would be subject to up to a year in prison and a fine of up to \$1,000

These bills are 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. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. A series of recent court decisions has reaffirmed this legal doctrine. 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*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (granting preliminary injunction); *ESA v. Blagojevich*, 404 F. Supp 2d 1051 (N.D. Ill. 2005) (granting a permanent injunction); *ESA v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 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

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers in the United States.

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Software
Association

Freedom to Read
Foundation

Interactive Entertainment
Merchants Association

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Publishers Marketing
Association

Recording Industry
Association of America,
Inc.

Video Software Dealers
Association

Chair
Sean Devlin Bersell
Video Software Dealers
Association

Immediate Past Chair
Judith Krug
Freedom to Read
Foundation

Treasurer
Chris Finan
American Booksellers
Foundation for
Free Expression

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

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. 2004) 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."

There are also serious constitutional problems with the existing law restricting the exhibition, sale or rental of "sexually explicit" material is also likely unconstitutional. 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). Governments may restrict minors' access to some sexually explicit speech but it is a narrow range of material determined by a specific test. 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. The material deemed illegal for minors in the existing Louisiana "harmful to minors" law is much broader than what would meet the definition in *Ginsberg*.

Passage of either 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.

Again, we ask you to please protect the First Amendment rights of all people of Louisiana and defeat this legislation.