

# THE MEDIA COALITION INC

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## Memo in Opposition to the Assembly Bill 8696

The members of Media Coalition believe that the Assembly Bill 8696 potentially violates the First Amendment rights of retailers and their customers. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers and film exhibitors in New York and the rest of the United States.

A.B. 8696 would bar the sale or rental of any video game that contains depictions of “depraved violence” and indecent images that are harmful to minors. A violation of the act would be a class E felony. The bill would also require all video game consoles sold in New York to have personal identification technology or password protection to allow the blocking of video games or portions of video games with certain undefined content. The Attorney General would be allowed to seek an injunction to bar future sales by a retailer and seek a fine if the retailer was in contempt.

The purpose of the proposed section 235.22 is unclear. It appears to create a crime for dissemination of certain content to a minor that is already illegal for minors with no additional penalties or punishment. Its only purpose would be to allow a prosecutor to charge a suspect twice for a single action as nothing that is criminal under proposed 235.22 would not already be a crime under section 235.21. In fact it does nothing more than create a second crime from a single act of disseminating certain video games. The only other possible reading of the act would be an attempt to punish material with violent images. However, it is constitutionally suspect to punish speech with violent content.

Speech is 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 decisions has reaffirmed this legal doctrine. Laws barring sale or rental of video games with violent content to minors were enacted in 2005-6 in California, Illinois, Louisiana,

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

American Booksellers  
Foundation for Free  
Expression

Association of American  
Publishers, Inc.

Comic Book Legal  
Defense Fund

Entertainment Merchants  
Association

Entertainment Software  
Association

Freedom to Read  
Foundation

Magazine Publishers of  
America, Inc.

Motion Picture  
Association of America,  
Inc.

National Association of  
Recording Merchandisers

National Association of  
Theatre Owners

Publishers Marketing  
Association

Recording Industry  
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*Treasurer*  
Chris Finan  
*American Booksellers*  
*Foundation for*  
*Free Expression*

*General Counsel*  
Michael A. Bamberger  
*Sonnenschein Nath &*  
*Rosenthal LLP*

Michigan, Minnesota and Oklahoma and each was successfully challenged in federal court. *See ESA v. Blagojevich*, 469 F.3d 641 (7<sup>th</sup> Cir. 2006) upholding 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *VSDA v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (granting preliminary injunction); *ESA v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (granting permanent injunction); *ESA v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2005) (granting permanent injunction); *ESA v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) (granting permanent injunction (since re-captioned *ESA v. Swanson*)); *EMA v. Henry*, No. 06-675, 2006 WL 2927884 (W.D. Okla. Oct. 11, 2006) (granting preliminary injunction). Other recent decisions that have addressed this issue have held that speech with violent content, without exception, is constitutionally protected. *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of an Indianapolis ordinance that limited minors' access to violent arcade video games. *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8<sup>th</sup> 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."

The requirement that all video game consoles include personal identification or password technology to block all or part of video games with "certain content" presents legal and practical problems. First, this provision is overly vague. A manufacturer or retailer has no guidance from A.B. 8969 as to what parts of video games or what content must be subject to the mandated password protection. It should be added that if the password protection was mandated for certain ratings, this would be close to giving the imprimatur of the government to a voluntary rating system. There are numerous cases that make clear that the government can neither enforce nor adapt a voluntary rating system for First Amendment-protected content. *See ESA v. Blagojevich*. Second, the provision is under-inclusive. If the password protection is meant to prohibit minors from certain content, there is no justification for applying it to console games but not to Internet, computer or handheld console games. Finally, it is unclear that the technology exists to allow console video games to be password protected for portions of video games or for certain types of content. Many existing consoles have password protection for allowing their use but there is no existing console that allows password protection for portions of video games.

Passage of this ordinance could prove costly. If a court declares it unconstitutional, there is a strong possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In a recent successful challenge to a similar video game law, the state agreed to pay the plaintiffs more than \$550,000 in attorneys' fees.

Please protect the First Amendment rights of all people of New York and defeat this legislation.