

# THE MEDIA COALITION INC

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## Memo in Opposition to the “Safe Games Act”

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The members of Media Coalition believe that the “Safe Games Act” 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.

“The Safe Games Act” 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 purpose of this bill 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. It would allow a prosecutor to charge a retailer twice for a single action as nothing that would be criminal under the “Safe Game Act” is not already a crime under section 235.21. In essence it does nothing more than create a second crime from a single act of disseminating certain video games to a minor. The only other possible reading of the act would be an attempt to punish material with violent images. However, it is constitutionally impermissible 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, 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 a permanent injunction); *ESA v. Granholm*, 426 F.

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.

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Foundation for Free  
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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 a 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."

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 to 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.