

THE MEDIA COALITION INC

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Memorandum in Opposition to House Bill 2843

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The members of Media Coalition believe that House Bill 2843 likely 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 Oregon and the rest of the United States.

H.B. 2843 has several unconstitutional provisions. It would bar the mailing or electronic dissemination of “sexually explicit material” to anyone under 18. It is a defense to prosecution if the sender does not have reason to know the recipient’s age and labels the outside of the package, “This package contains material, that by Oregon law, cannot be furnished to a minor.” The law also bans dissemination of any visual depiction or verbal description or narrative account of sexual conduct to a minor for the purpose of arousing the sexual desires of the person or another. A third provision would bar the dissemination of “sexually explicit material” to anyone under 13. “Sexually explicit material” is defined as material containing visual images of actual or simulated masturbation or sex acts.

This bill is clearly constitutionally suspect. The restrictions on “sexually explicit material” and depictions, descriptions, or narrative accounts of sexual conduct are 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. Merely containing sexual content is not enough to make a book, movie, magazine or sound recording illegal. 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 H.B. 2843 clearly does not include all three prongs and would criminalize a far broader range of material than is allowed under the definition in *Ginsberg*. A recent law enacted in Illinois barred the sale of video games with sexual content but without the third prong of the *Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was heartily affirmed by the Seventh Circuit Court of Appeals. *ESA v. Blagojevich*, 2006 WL 3392078 (7th Cir. Nov. 27, 2006) upholding 404 F. Supp 2d 1051 (N.D. Ill. 2005).

The application of these restrictions to electronic transmissions, which includes the Internet, is likely unconstitutional even if H.B. 2843 was limited to material that could be restricted as “harmful to minors” under the three-prong test in *Ginsberg*. This

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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treats material on the Internet 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 the “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 online 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 two federal laws that restrict the availability of matter inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (Remanded, but preliminary injunction still in place). The Tenth Circuit Court of Appeals has also ruled a ban on dissemination of material harmful to minors on the Internet is unconstitutional. *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). There is a growing body of law striking similar state laws attempting to restrict access to material harmful to minors. Each other court that has considered a state law that restricts dissemination by Internet of material harmful to minors has ultimately found it unconstitutional. See, *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ABFFE v. Dean*, 342 F. 3d 96 (2nd Cir 2003), *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *Southeast Booksellers v. McMasters* 282 F. Supp 2d. 1180 (D. S.C. 2003); *American Libraries Ass’n v. Pataki* 969 F. Supp. 160 (S.D. 1997); *ACLU v. Goddard*, Civ No. 00-0505TUC AM (D. Ariz. 2002). *The Kings English v. Shurtleff* No. 2:05CV00495DB (D. Ut. Aug. 25, 2006). In addition to First Amendment deficiencies, the courts have also ruled that these state laws violate the Commerce Clause of the U.S. Constitution, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

The requirement that any material with sexual content that is mailed, otherwise delivered, or sent electronically be labeled as illegal for minors on the packaging is again likely unconstitutional. First Amendment protected material may not be deemed illegal for minors absent a judicial determination with appropriate procedural safeguards. Absent these safeguards, the requirement that the material be labeled to avoid prosecution is an unconstitutional prior restraint. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Given that this is a pejorative label, courts might also consider the labeling requirement unconstitutional compelled speech. The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right “to refrain from speaking at all,” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm’n*, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists’ inserts in its monthly bills), *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials).

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 the successful challenge to the Illinois law, the state agreed to pay to the plaintiffs more than \$550,000 in attorneys’ fees.

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