

THE MEDIA COALITION INC

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DAVID HOROWITZ
Executive Director

July 18, 2007

American Booksellers
Foundation for Free
Expression

Governor Kulongoski
160 State Capitol
900 Court Street
Salem, Oregon 97301-4047

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Request for Veto of House Bill 2843

Entertainment Merchants
Association

Dear Governor Kulongoski,

Entertainment Software
Association

Freedom to Read
Foundation

The members of Media Coalition believe that House Bill 2843 likely violates the First Amendment rights of producers, 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.

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

H.B. 2843 has several unconstitutional provisions. The law 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 second provision would bar the dissemination of “sexually explicit material” to anyone less than 13. “Sexually explicit material” is defined as material containing visual images of actual or simulated masturbation or sex acts.

National Association of
Recording Merchandisers

Publishers Marketing
Association

Recording Industry
Association of America,
Inc.

Section 2's restriction on furnishing “sexually explicit material” is 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 images or depictions 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*.

Chair
Sean Devlin Bersell
*Entertainment Merchants
Association*

Immediate Past Chair
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*Freedom to Read
Foundation*

Treasurer
Chris Finan
*American Booksellers
Foundation for
Free Expression*

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

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.

It has been suggested that the Oregon Constitution offers greater protection than the U.S. Constitution. However the *Ginsberg* test provides that material is protected if it has serious value regardless of the amount of sexual content it contains. H.B. 2843 would only protect sexually explicit speech if it was an “incidental part of an otherwise nonoffending whole and serve[s] some purpose other than titillation.” This language is taken from Oregon court decisions but clearly offers less protection for speech than does the First Amendment. An art book or sexual health video might include a significant amount of proscribed sexual content and be subject to prosecution under this law but still be protected under the First Amendment as having serious value. A recent law enacted in Illinois barred the sale of video games with sexual content but without the serious value 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).

H.B. 2843 would also bar furnishing to a minor depictions, descriptions, or narrative accounts of “sexual conduct” if it is for the purpose of arousing the giver or recipient of the material. This includes material other than visual depictions and is clearly a broader range of speech than is illegal for minors under section 2. This material is clearly protected by both the US and Oregon Constitutions. Oregon cannot make furnishing this or any constitutionally protected material illegal unless it is tied to an otherwise illegal act. If H.B. 2843 barred furnishing such material in order to lure a minor to engage in illegal sex or participate in any crime, it would satisfy this criterion. However, Oregon law does not make it illegal to attempt to arouse oneself or another, therefore the furnishing of such material cannot be made illegal simply by adding such an intent.

Finally, to the extent “furnishing” such material includes electronic transmissions which apply these restrictions to the Internet, H.B. 2843 would likely be unconstitutional even if it was limited to material that could be made illegal for minors as “harmful to minors” under the three-prong test in *Ginsberg*. The prohibition would treat material on the Internet as if there was 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 that 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 significant 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.

Enactment 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.

We ask you to please protect the constitutional rights of all people of Oregon and veto this legislation.

A handwritten signature in black ink, reading "David Horowitz". The signature is written in a cursive, flowing style with a large, sweeping flourish at the end.

David Horowitz
Executive Director