

January 20, 2004

Mr. John C. Dellagloria
City Attorney
City of North Miami
776 N.E. 125th Street
North Miami, FL 33161

Re: Proposed restriction on certain videogames

Dear Mr. Dellagloria,

The members of The Media Coalition believe that the proposed North Miami ordinance restricting dissemination of certain videogames violates First Amendment rights of adults and minors. 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 Florida and the rest of the United States. They have asked me to explain their concern.

The proposed ordinance would bar the sale or rental of any “violent video” to any minor without the consent of their parent or guardian. A “violent video” is defined as any video that contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures or otherwise causes violence to a human form, or any game rated as containing mature or violent content.

Speech is presumed to be protected by the First Amendment unless it falls into one of 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. 255 (2002). None of the types of speech outside the First Amendment cited by the court includes speech with violent content or mature themes by itself. To the contrary, every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. IDSA v. St. Louis County, 329 F.3d 954 (8th Cir 2003) enjoined enforcement of county ordinance barring dissemination of violent videogames. American Amusement

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Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), cert. den. 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors' access to violent video games. Bookfriends v. Taft, 233 F. Supp. 2d 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 (the state appealed the case to Sixth Circuit Court of Appeals but the case was rendered moot and remanded to litigate separate issues when a constitutionally correct definition of material "harmful to juveniles" was enacted.) 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."

Also, the city council may not adopt or give legal force to a private rating system. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement of an existing rating system is impermissible. Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America's rating system or financially punish a movie that carries specific rating designations. MPAA v. Specter, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In Eastern Federal Corporation v. Wasson, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also, Swope v. Lubbers, 560 F.Supp.1328 (W.B. Mich, S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), Drive-In Theater v. Huskey, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Further, 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). 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. There is no language in the opinion that could arguably suggest that material with violent content would be inappropriate for minors under the Ginsberg test. Therefore, a law barring sale or rental of such material absent parental permission would inevitably prevent minors

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from accessing works that they have a First Amendment right to possess.

Passage of this ordinance 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 above mentioned A.A.M.A. v. Kendrick case the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees.

Please advise the council to protect the First Amendment rights of all people of North Miami and reject this ordinance.

Sincerely,

David Horowitz
Executive Director