

# THE MEDIA COALITION INC

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## Memorandum in Opposition to House Bill 441

The members of The Media Coalition believe that House Bill 441 likely violates the First Amendment rights of retailers and producers of content and others. 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 North Carolina and the rest of the United States.

H.B. 441 would bar the sale, rental or other dissemination to a minor of any “sexually explicit” or “violent” videogame. A “sexually explicit videogame is defined as one containing depictions of nudity that predominately appeal to the prurient interest of the player. A “violent” videogame is defined as one that includes human on human violence in which a player causes physical harm to another player. A violation of this section would be a class C misdemeanor.

This bill is clearly constitutionally suspect. Speech is presumed to be 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. 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. American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (7<sup>th</sup> Cir. 2001), cert. den. 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent arcade videogames. Video Software Dealers Association v. Maleng, No. C03-1245L (D. Wash. July 15, 2004) barred enforcement of a state law that barred dissemination to minors of video games that included violence against “peace officers.” Bookfriends v. Taft, 233 F.Supp.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. 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 (8<sup>th</sup> Cir. 1992) held that “unlike obscenity, violent expression is protected

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Entertainment Software  
Association

Comic Book Legal  
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Interactive Entertainment  
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Freedom to Read  
Foundation

International Periodical  
Distributors Association,  
Inc.

Magazine Publishers of  
America, Inc.

Motion Picture  
Association of America,  
Inc.

National Association of  
Recording Merchandisers

Publishers Marketing  
Association

Recording Industry of  
America, Inc.

Video Software  
Dealers Association

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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."

The restriction on "sexually explicit" videogames is also very 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. 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. 441 is far broader than what would colorably meet the definition given in the Ginsberg decision.

Passage of these bills 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 several recent successful challenges to videogame legislation, the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees in each litigation.

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