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Freedom to Read
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Interactive Electronic
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Memorandum in Opposition to Maryland House Bill 698

The members of The Media Coalition believe that House Bill 698 likely violates the First Amendment rights of retailers 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 Maryland and the rest of the United States.

H.B. 698 would bar the sale or rental to a minor of any video game rated “Adults Only” or “Mature” by the Entertainment Software Ratings Board (ESRB). Violators would be subject to six months imprisonment, a \$1,000 fine, or both.

The bar on the sale or rental of video games based on the ESRB rating system is very likely unconstitutional. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement or adoption of an existing rating system is constitutionally impermissible. Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. MPAA v. Specter, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a 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, when these ratings are applied to speech with violent content the problem created by government enforcement of a ratings system is compounded. 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

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, periodical wholesalers and distributors, recording, motion picture and video games producers, and recording and video retailers in the United States.

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 court includes 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 Ass’n v. St. Louis County, 329 F.3d 954 (8th 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 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent video games. Video Software Dealers Ass’n 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.” 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 (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.”

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. The mere presence of an “adult” rating alerting parents that a video game might be inappropriate for minors is no basis for assuming that the material meets the Ginsberg test. In fact, it is likely that most rated material does not meet this legal threshold test for harmfulness. Therefore, a law barring the sale or rental of such material would inevitably prevent minors from getting 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 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.

We ask you to please protect the First Amendment rights of all people of Maryland and defeat this legislation.