

THE MEDIA COALITION INC

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Executive Director

Memorandum in Opposition to Assembly Bill 450 as Amended

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Software
Association

Freedom to Read
Foundation

Interactive Electronic
Merchants Association

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Publishers Marketing
Association

Recording Industry
Association of America,
Inc.

Video Software Dealers
Association

Chair
Judith Krug
Freedom to Read
Foundation

Immediate Past Chair
Chris Finan
American Booksellers
Foundation for
Free Expression

Treasurer
Gail Markels
Entertainment Software
Association

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

The members of The Media Coalition believe that Assembly Bill 450 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 California and the rest of the United States.

A.B. 450 would bar the sale or rental to a minor of any “violent video game.” A “violent video game” is defined as any game that would meet a three-prong test similar to the test for obscenity for minors or allows one character to inflict serious harm on another character and the characters have substantial human characteristics. A violation of this section would be a fine of up to \$1,000.

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 (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. den. 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent arcade video games. Video Software Dealers Association v. Maleng, 325 F. Supp. 2d 118 (W.D. Wash. 20004) 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

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.

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."

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. The Ginsberg test only applies to material with sexually explicit content. The mere creation of a three-part test to prescribe violent content that parallels the test in Ginsberg is not a constitutionally-acceptable basis for banning material to minors. Therefore, a law barring the sale or rental of material with violent content would inevitably prevent minors from getting material that they have a First Amendment right to possess.

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 several recent successful challenges to video game 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 California and defeat this legislation.