

# THE MEDIA COALITION INC

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## Memorandum in Opposition to Senate Bill 2

The members of The Media Coalition believe that Senate Bill 2 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.

S.B. 2 would bar the sale or rental to a minor of any “graphically violent videogame.” A “graphically violent videogame” is defined as one that includes the visual depiction of a serious violent injury to a real or virtual person, including aggravated assault, decapitation, dismemberment or death.” A violation of this section would be a class 1 misdemeanor. The bill would also require videogame retailers to post signs in a prominent place providing information about a videogame rating system or notifying consumers that a rating system is available. The retailer must also make information about the rating system available to the consumer upon request.

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

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.

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 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  
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Rosenthal LLP

(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 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 signage requirements in S.B. 2 are potentially unconstitutional as well. Voluntary ratings are provided by the videogame industry as a tool for parents and retailers, but they are just that: voluntary. A retailer may participate fully, partially or not at all in a rating program but the government cannot endorse any or all rating systems by mandating that retailers post signage explaining the system. The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," Wooley v. Maynard, 430 U.S. 705, 714 (1977). See also, Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists inserts in its monthly bills), Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials).

The posting requirement does not refer to a specific rating system but the practical effect is to require the posting of Entertainment Software Rating Board's system. Courts generally have been skeptical of government linkage with rating systems. In nine different states courts 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 (4<sup>th</sup> Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Also, the requirement that retailers provide ratings for videogames will have a chilling effect on consumers. A rating system pejoratively labels the content of a videogame in way that is outside the control of a retailer. The rating system may deem material as unsuitably violent, sexually explicit, blasphemous or otherwise unsuitable for some or all potential consumers. This will dissuade some people from buying or renting a game without having seen the content simply because an anonymous rating board has decided it may be inappropriate.

Finally, 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 would 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 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 North Carolina and defeat this legislation.