

THE MEDIA COALITION INC

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Memorandum in Opposition to Alaska House Bill 298 as Amended

The members of Media Coalition believe that House Bill 298 is significantly improved by the amendments to the bill adopted by the Judiciary Committee but two parts of the bill remain that likely violate the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations who comprise Media Coalition have many members throughout the country including Alaska: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

Section 9 of H.B. 298 would amend AS 11.61.128(a) to bar the distribution of material harmful to minors by any means by an adult to anyone under 16 years old or someone the adult believes is less than 16 years old. Presently, 11.61.128(a) applies only to electronic distribution but to a much broader amount of sexually explicit content. Section 6 of H.B. 298 would make illegal sexually explicit material that depicts adults or computer generated images that appear to be minors.

We believe the limiting of material subject to prosecution in 128(a) to material harmful to minors is a significant improvement. However, the application to material generally available on the Internet remains a concern. In *Ginsberg v. New York*, 390 U.S. 629 (1968) (as subsequently modified by *Miller v. California*, 413 U.S. 15 (1973)), the Supreme Court established a three-part test for determining whether material is “harmful to minors” and may therefore be banned for sale to minors. Limiting the prohibition in the amended version of S.B. 298 to material that meets this three-part test is appropriate in a “brick and mortar” store. However, the application to Internet communication in the bill, and in the present law, is almost certainly unconstitutional even if it is limited to material that could be restricted as harmful to minors. The application to the Internet treats material as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a book or video or video game store. There is no way to know whether the person receiving the “harmful” material is a minor or an adult. As a result, the effect of banning the computer dissemination of material “harmful to minors” is to force a provider, whether a publisher or an on-line carrier, to deny or restrict access to both minors and adults, depriving adults of their First Amendment rights.

Two federal laws that restrict the availability of matter inappropriate for minors on the Internet have been declared unconstitutional violations of the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), *cert. den.* 129 Sup. Ct. 1032 (2009). Similar state laws banning sexual speech for minors on the Internet have also been ruled unconstitutional as well. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2nd Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d

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

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Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Consumers
Association

Entertainment Merchants
Association

Entertainment Software
Association

Freedom to Read
Foundation

Independent Book
Publishers Association

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Recording Industry
Association of America,
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1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F.Supp 2d 1180 (D.S.C. 2003); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D. N.Y. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). In addition to First Amendment deficiencies, some courts have also ruled that these state laws violate the Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

While the members of Media Coalition are deeply concerned about the sexual exploitation of minors and support laws that attempt to eradicate it, section 6(a)(2) of the bill would criminalize material that is fully protected by the First Amendment and that does not exploit minors. In a clear and resounding decision, the Supreme Court in *Free Speech Coalition v. Reno*, 535 U.S. 234 (2002) found unconstitutionally overbroad a similar statute, the Child Pornography Prevention Act of 1996 (CPPA). The CPPA criminalized both sexually explicit images of adults that appear to be minors and computer generated images that appear to be of a minor engaging in real or simulated sex or with genitals lasciviously displayed. *Free Speech Coalition* reaffirmed the holding in *Ferber v. New York*, 458 U.S. 747 (1982), that a state may ban actual child pornography, but, at the same time, the Court made clear that these laws should strike only at pictures of actual children being sexually abused and not at images that only appear to be minors. The Supreme Court ruled that material which included only images that appear to be minors engaged in prohibited activity was fully protected by the First Amendment and could only be banned if found to be obscene under the three prong tests enunciated in *Miller v. California*, 413 U.S. 15 (1973).

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 the successful challenges to such state laws plaintiffs have received as much as \$450,000 in legal fees.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

Again, we ask you to please protect the First Amendment rights of all the people of Alaska and amend this legislation to address these concerns.