

THE MEDIA COALITION INC

275 SEVENTH AVENUE • SUITE 1504 • NEW YORK, NEW YORK 10001
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ
Executive Director

Memo in Opposition to House Bill 1423

The members of Media Coalition are concerned about the possible implications of House Bill 1423 as it potentially could violate the First Amendment rights of retailers and their customers. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video and video game retailers in Massachusetts and the rest of the United States.

H.B. 1423 would add a fourth prong to the existing three-prong test to determine what material is harmful to minors and may be banned for minors. Disseminating or intending to disseminate such material to a minor would be punishable by up to five years in state prison, a fine of up to \$10,000 or both for a first offense.

The purpose of this bill is unclear. It appears to narrow the existing crime for dissemination of sexually explicit material that is harmful to a minor by applying it only to material that has sexually explicit content and violent content. However, if the intent of the bill is to criminalize material that contains sexual content or violent content, the latter part would be constitutionally suspect. It is constitutionally impermissible to punish speech with violent content alone.

Speech is 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. A series of recent decisions has reaffirmed this legal doctrine. Laws barring sale or rental of video games with violent content to minors were enacted in 2005-06 in California, Illinois, Louisiana, Michigan, Minnesota and Oklahoma, and each was successfully challenged in federal court. See *ESA v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), affirming 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *VSDA v. Schwarzenegger, No. C-05-04188*, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007) (granting permanent injunction); *ESA v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (granting a permanent injunction); *ESA v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006)

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

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(granting permanent injunction); *ESA v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) (granting permanent injunction (since re-captioned *ESA v. Swanson*)); *EMA v. Henry*, No. 06-675, 2006 WL 2927884 (W.D. Okla. Oct. 11, 2006) (granting a preliminary injunction). Other recent decisions that have addressed this issue have held that speech with violent content, without exception, is constitutionally protected. *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001), enjoined enforcement of an Indianapolis ordinance that limited minors' access to violent arcade video games. *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. *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004), barred enforcement of a state law that barred dissemination to minors of video games that included violence against "peace officers."

If this bill is meant to bar dissemination of violent content alone, it could prove costly. If a court declares it unconstitutional, there is a strong possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In a recent successful challenge to a similar video game law, the state agreed to pay to the plaintiffs more than \$550,000 in attorneys' 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.

Please protect the First Amendment rights of all the people of Massachusetts and defeat this legislation.