

March 14, 2011

Mississippi House of Representatives

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Memorandum in Opposition to Mississippi House Bill 195 as passed by the Senate

The members of Media Coalition believe that House Bill 195 violates the First Amendment for multiple reasons. The definition of material that is barred as “harmful to minors” is unconstitutionally vague. To the extent such speech is defined by §97-5-27, it is constitutionally inadequate. Even if the definition of “harmful to minors” was constitutionally correct, the application of such a law to the Internet would still likely be unconstitutional. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Mississippi: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

H.B. 195 would criminalize the intentional or knowing dissemination to anyone less than 16 years of age any communication that is “harmful to minors” by means of the Internet, with knowledge of the character of the communication or item, when the person believes that a person under the age of sixteen (16) years will receive the communication.

Speech is protected unless the Supreme Court tells us otherwise. As the 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.234, 241 (2002). Unless speech falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing a minor, there is no basis for the government to bar access to such material.

The lack of a definition of “harmful to minors” in the bill is almost certainly unconstitutionally vague. There is nothing in the bill or in existing state law that defines “harmful to minors” with respect to speech. A state may not impose a criminal sanction on speech without defining what speech is prohibited. When speakers have little guidance to determine what speech is protected and what is subject to prosecution, they must either risk a criminal prosecution or self-censor their speech. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

“Harmful to minors” is used at times to define sexual material that is illegal for minors but neither this bill nor any existing Mississippi statute defines the term as set out by the Supreme Court. §97-5-27 restricts minors’ access to sexual material but the definition lacks the safeguards required by the Supreme Court. 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). Governments may restrict minors’ access to some sexually explicit speech and that speech is often referred to as speech “harmful to minors,” but it is a narrow range of material determined by a specific test. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court created a three-part test for determining whether material which is First Amendment protected for adults but is unprotected as to minors. Under that test, in order for sexual material to be constitutionally unprotected as to a minor, it must, when taken as a whole,

- (i) predominantly appeal to the prurient, shameful or morbid interest of minors in sex;
- (ii) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) lack serious literary, artistic, political or scientific value.

Even material that meets this definition may be barred for minors only as long as the prohibition does not unduly burden the rights of adults to access it.

The definition used to determine what material is “sexually oriented material” in §97-5-27 lacks any of the prongs from the *Miller/Ginsberg* test. A recent law enacted in Oregon barring dissemination of sexual material to minors was struck down by the Ninth Circuit Court of Appeals as overbroad for making illegal material that was beyond the scope of the *Miller/Ginsberg* test. *Powell’s Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). Similarly, a recent Illinois law barred the sale to minors of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was vigorously affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff’d* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

Even if H.B. 195 defined “harmful to minors” as sexual material that met the three-prong test in *Miller/Ginsberg*, it would be unconstitutional if the restriction was applied to the Internet. To do so treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. There is no way to know whether the person receiving the sexual material is a minor or an adult. At the same time, anyone who makes material available on the Internet through a website, listserve or public chatroom knows that there likely is a minor accessing his or her content. That general knowledge satisfies the knowledge requirement in a criminal statute. 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 access to both minors and adults, depriving adults of their First Amendment rights. The U.S. Supreme Court has already declared unconstitutional two federal laws that restricted the availability of matter inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 534 F.2d 181

(3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009). New York Revised Penal Law §235.21, the law §712-1215 was based upon, was found unconstitutional when New York amended it to apply to content available on the Internet. *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Similar state laws banning sexual speech for minors on the Internet have been ruled unconstitutional. See, *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2d Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D.S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). Such laws were also enacted last year in Massachusetts and Alaska. Legal challenges were brought against both laws and in each case a preliminary injunction has been granted. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *American Booksellers Foundation for Free Expression v. Sullivan* (D. Alaska 3:10-CV-193 Oct. 20, 2010).

The only exceptions to these decisions have been laws that were limited to speech illegal for minors that was intended to be communicated to a specific person the speaker has actual, rather than general, knowledge is a minor or believes to be a minor. While this may be the intent of the statute, it is not the plain language of the text and it is not enough that the government tells us it will only be used in such a manner. As Justice Roberts wrote last year, “But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *U.S. v. Stevens*, 130 S. Ct. 1577 (2010).

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’ attorney’s fees. In past challenges to such legislation, states have paid to the plaintiffs as much as \$500,000 in legal fees.

We believe Mississippi can protect minors while also respecting the First Amendment. We are happy to work with the legislature to help it to do so. If you would like to discuss further our concerns about this bill, please contact me at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org). Again, we ask you to please protect the First Amendment rights of all the people of Mississippi and reconsider H.B. 195 and existing section §97-5-27.

Respectfully submitted,

/s/ David Horowitz

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