

# THE MEDIA COALITION INC

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## Memorandum in Opposition to New Jersey Assembly Bill 3757

The members of Media Coalition believe that Assembly Bill 3757 likely violates 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 New Jersey: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

A.B. 3757 raises serious constitutional concerns. It would bar the transmission of “sexually offensive communication” via a “social networking website” to or about a person who is reasonably believed to be either under 13 or between 13 and 16 but four years younger than the speaker. “Sexually offensive communication” is defined by N.J.S.2C:34-3 which is the existing law banning sexually explicit speech illegal for minors. “Social networking website” is defined as any website accessible to third parties on which users under 18 may post personal information and third parties may then communicate with users. The bill would also require social networking sites to revoke access to speakers who use sexually offensive communication or set up an elaborate process to accept complaints about speakers and block their access to specific users.

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 on a social networking website falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing, there is no basis for the government to bar access absent a parent or guardian’s permission. If a social networking website is allowing communication that is legal for minors to receive, the government cannot make such sites exclude those speakers any more than it could force a mainstream bookstore, concert hall or museum to ban a speaker who used frank but legal language in a performance or discussion even if it is directed at a minor.

The restriction on “sexually offensive communications” without a connection to an otherwise illegal act is almost certainly unconstitutionally overbroad. 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

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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Entertainment Consumers  
Association

Entertainment Merchants  
Association

Entertainment Software  
Association

Freedom to Read  
Foundation

Independent Book  
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Magazine Publishers of  
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Michael A. Bamberger  
*Sonnenschein Nath &  
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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 but it is a narrow range of material determined by a specific test. Merely containing sexual content is not enough to make a book, movie, magazine or sound recording illegal. 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 material deemed illegal for minors by N.J.S.2C:34-3 does not include any of the three prong test from *Ginsberg* and would criminalize a far broader range of material than is allowed under the First Amendment. A recent law enacted in Illinois barred the sale of video games with sexual content but without the third prong of the *Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was heartily affirmed by the Seventh Circuit Court of Appeals. *ESA v. Blagojevich*, 469 F.3d 642 (7<sup>th</sup> Cir. 2006) affirming 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

The application of these restrictions to Internet communication which includes social networking sites is also likely unconstitutional even if A.B. 3757 was limited to material that could be restricted as “harmful to minors” under the three-prong test in *Ginsberg*. This 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 “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 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 restrict 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). Similar state laws banning sexual speech for minors on the Internet have been ruled unconstitutional. See, *ACLU v. Johnson*, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6<sup>th</sup> Cir. 2000); *ABFFE v. Dean*, 342 F. 3d 96 (2<sup>nd</sup> Cir 2003), *PSINet v. Chapman*, 63 F.3d 227 (4<sup>th</sup> Cir. 2004); *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. 1997); *ACLU v. Goddard*, Civ No. 00-0505TUC AM (D. Ariz. 2002). *The Kings English v. Shurtleff* No. 2:05CV00495DB (D. Ut. Aug. 25, 2006). The only exceptions to these decisions have been laws that were limited to speech illegal for minors that were intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor. However, such laws might still be unconstitutional as a violation of the Commerce Clause of the U.S. Constitution. In addition to First Amendment deficiencies, the 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.

Moreover, A.B. 3757 violates the First Amendment because there is no way to narrowly define “social networking website.” The bill’s definition of “social networking website” includes elements that easily apply to millions of web logs or “blogs,” discussion forums and Internet retailers of books, movies, music and video games who allow customers to critique their content. For example, A.B. 3757 merely considers whether a website 1) allows access to minors and permits them to post personal information; 2) allows access to adult users; 3) permits adult

users to communicate with non-adult users. Such overbroad definitions would include many sites that are not the cause of concerns cited by the legislature, and thus would apply to a large amount of protected speech (e.g., blogs) in violation of the First Amendment under, for example, *Ashcroft v. Free Speech Coalition*, and *Broadrick v. Oklahoma*, 413 U.S. 601 (1974).

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 challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than \$500,000 in attorneys' fees in each litigation.

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](mailto:horowitz@mediacoalition.org).

Again, we ask you to please protect the First Amendment rights of all the people of New Jersey and reconsider this legislation.