

# THE MEDIA COALITION INC

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## Memo in Opposition to Tennessee Senate Bill 1236 and House Bill 809

The members of Media Coalition believe that the Senate Bill 1236 and House Bill 809 imposing a 25% sales tax surcharge on advertising in certain periodicals threaten the distribution of First Amendment-protected material in Tennessee. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Tennessee: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. They neither produce nor sell works that are legally obscene. However they do disseminate a wide variety of material with sexual content, including art and photography books, mainstream movies and music, sex education material, and literary and artistic works.

S.B. 1236 and H.B. 809 would impose a 25% surcharge on advertising for sexually oriented material and such adult materials that are restricted for anyone less than 18 in periodicals printed on certain types of paper and distributed at least 25 times a year. Sexually oriented material is undefined but adult material is content that is illegal to display to minors.

These bills have several constitutional problems. The Supreme Court has struck down legislation to tax or otherwise financially punish First Amendment-protected speech based on its content. Here, the surcharge on advertising in certain periodicals is triggered when it is for sexually explicit content. Therefore the tax is based specifically on the content of an underlying book, movie, magazine or other media content that is the subject of the advertisement. To determine which advertisements would be taxed, the state would have no choice but to scrutinize the content of any ads for books, movies or other material. This content is constitutionally protected for adults and the state cannot punish a producer or retailer of such material by imposing a substantial additional cost on the marketing on the producers or retailers. In 1991, the Supreme Court held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech, *Simon and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. In 1987, the court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230.

The same rationale would bar the imposition of a tax solely on a specific type of publication. It would punish certain periodicals while favoring other types

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.

American Booksellers  
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

Magazine Publishers of  
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General Counsel  
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of speech. In this case the tax is only imposed on advertisements in periodicals published at least 25 times a year and printed newsprint or bond. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment, *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575.

Even if these bills were amended to apply to all media rather than just some periodicals, it would be constitutionally suspect. The courts have been very skeptical of the imposition of a business tax or regulation on the media generally that is not otherwise imposed. See, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press*, 297 U.S. 233 (1936).

Finally, if this tax only applied to material that is illegal under Tennessee law, it would still be constitutionally suspect. It is the job of the courts, not an owner of a book store or newsstand or a staff person in the Department of Revenue, to make this determination. This bill does not offer any court proceeding to determine the legal status of such books, magazines movies or other content that would then trigger the surcharge on advertisements. This means there are no due process safeguards in place for the determination of whether the material is prohibited for minors or any appeals process available to the retailer or distributor of the content. The Supreme Court has made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S. Supreme Court struck down a similar scheme of regulation as a form of “informal censorship.”

This tax is meant to raise revenue for Tennessee. However, if it is enacted, it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs’ attorneys’ fees. In a recent case brought by members of Media Coalition, plaintiffs received in excess of \$400,000 in attorneys’ fees and expenses. 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).

Please protect the First Amendment rights of all Tennesseans and defeat this tax on First Amendment protected material.