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Memo in Opposition to Tennessee Senate Bill 1235 and House Bill 810

The members of Media Coalition believe that Senate Bill 1235 and House Bill 810 that impose a 25% sales tax on content 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. 1235 and H.B. 810 would impose a 25% sales tax surcharge on books, magazines or other material that is harmful to minors. They would also impose the tax on movies with “sexually explicit” content viewed on cable television or in a hotel or motel. “Sexually explicit” is not defined for movies but the bills would specifically exempt any movie rated “R” or “NC-17” by the rating board of the Motion Picture Association of America. Finally, the bill would raise the sales tax on the sale or rental of “sexually oriented material” 3% annually for ten years. Again, “sexually oriented material” is not defined.

These bills have multiple constitutional defects. Given that they would apply to material based on its content, they are immediately constitutionally suspect. The U.S. Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826-7 (2000). To do so the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is narrowly tailored to achieve that interest. *See, e.g., R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). It is very unlikely that this legislation could satisfy any part of the strict scrutiny test let alone each part of the test.

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.

Further, the Supreme Court has repeatedly struck down legislation to tax or otherwise financially punish First Amendment-protected speech based on its content. Here, the surcharge applies specifically and solely to content that is sexually explicit either as material - harmful to minors with books, magazines, music or video games or as sexually explicit but not rated "R" or NC-17" for movies. To determine what material is taxed, the state would have no choice but to scrutinize the content of any material sold or rented. 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 it. 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. 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.

Also, Tennessee cannot use the Motion Picture Association of America's rating system to determine whether or not a tax applies to movies. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement or adoption of an existing rating system is constitutionally impermissible. Minnesota recently passed a law giving legal force to the video game industry's rating system. The law was struck down last year. *ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (upholding the District Court ruling granting summary judgment to the plaintiffs). Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also, *Swope v. Lubbers*, 560 F.Supp. 1328 (W.D. Mich. S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Lastly, 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 trigger the surcharge on that may not be displayed to minors. 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 may be 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.

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