Exhibit H

THE MEDIA COALITION INC

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April 12, 2010

The Honorable Mike Hawker
The Honorable Bill Stoltze
Co-Chairs, House Finance Committee
Alaska State House of Representatives
Juneau, AK 99801

Delivered by email

Re: Constitutional concerns regarding Section 8 of Senate Bill 222

Dear Representatives Hawker and Stoltze,

The members of Media Coalition believe that S.B. 222 is a substantial improvement on AS 11.61.128(a), which Section 8 would amend, and goes a long way toward curing the constitutional problems in the existing law. However, we still believe that Section 8's application to the Internet must be narrowed or it will violate 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 Alaska: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

Section 8 of S.B. 222 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult to anyone under 16 years old or someone the adult believes is under 16 years old, but it broadens the existing law to apply to non-electronic distribution. Presently, 11.61.128(a) applies only to electronic distribution but to a much broader range of sexually explicit content. "Harmful to minors" is defined in Section 11 as a three-prong test that adheres to Supreme Court decisions in this area.

Limiting the material subject to prosecution in 128(a) to speech "harmful to minors" is an essential change to 11.61.128(a). In *Ginsberg v. New York,* 390 U.S. 629 (1968) (as subsequently modified by *Miller v. California*, 413 U.S. 15 (1973)), the Supreme Court established a three-part test for determining whether material is "harmful to minors" and may therefore be banned for sale to minors. Material that does not meet that test is legal for minors and the government cannot ban it as to them.

Even if 128(a) is limited to material "harmful to minors," the application of the restriction to material generally available on the Internet and on listserves that allow open subscriptions is almost certainly unconstitutional. Imposing this restriction to speech generally available on the Internet treats this material as if there were no difference between a web site or blog and a book, video, or video game store. Cyberspace is not like a brick and mortar retailer. 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 content provider, whether a publisher or an on-line carrier, to risk prosecution or deny or restrict access to both minors and adults, depriving adults of their First Amendment rights.

There is a substantial body of case law that establishes this principle. A very similar federal law and seven state laws have been found unconstitutional. *See Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 129 Sup. Ct. 1032 (2009); *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); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). At issue in *Mukasey* was a federal law that barred dissemination to minors of material harmful to minors by commercial sites on the World Wide Web. The second time the case was before the Supreme Court (then *Ashcroft v. ACLU*), Justice Kennedy, writing for the majority, sent the case back to the U.S. District Court to determine if there were less restrictive means to protect minors from such material than a broad law that restricts the rights of adults. The district court ruled that the law was overbroad and that there are less restrictive and more effective means to protect minors from sexual content without infringing on adults. The Third Circuit upheld that ruling and the Supreme Court declined to hear the case a third time. We are happy to provide the opinions in these cases if they would be helpful.

We believe that small changes to the bill would cure the constitutional problems in Section 8 while still providing law enforcement with the means to protect minors from adults looking to prey on them. The present version of Section 8 can be amended to avoid these constitutional weaknesses by limiting the law to speech by an adult communicated directly to a specific person either known or believed to be a minor.

The present version of Section 8 (1) could be amended to read (changes are in bold):

> (1) the person, being 18 years of age or older, **knowing the character and content of the material**, knowingly **and intentionally** distributes to **a specific other** person any material that depicts the following actual or simulated conduct:

The first change tracks settled case law that a retailer or web site owner cannot be convicted if they are not aware of the nature of the content distributed to a minor. This is a concern both for a web site owner who may not be aware of everything on a site if others can post to the site and brick and mortar bookstore owners who stock hundred or thousands of new books each week and cannot peruse each book for potentially illegal contents. The content of some books is obvious,

but for many it is not. The second change protects web sites that intend to communicate with adults but are aware that minors can access the site because there is no way to keep them out. The third change limits the law to speech sent to a specific minor rather than speech posted generally on web sites, to an open listserve or a site like Twitter that is a hybrid of the two. Again, without these changes, Section 8 likely violates the First Amendment as overbroad.

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 challenges to other such state laws plaintiffs have received as much as $450,000 in legal fees.

We appreciate the opportunity to share our concerns with the Finance Committee. If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #11 or at horowitz@mediacoalition.org. We welcome the opportunity to work with the Committee to amend Section 8.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

cc: Representative Thomas, Vice-Chair
Representative Austerman
Representative Cheneault
Representative Crawford
Representative Fairclough
Representative Gara
Representative Joule
Representative Kelly
Representative Salmon