MEDIA COALITION, INC.
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

July 7, 2015

The Honorable Hannah Beth Jackson
Chair, Senate Judiciary Committee
State Capitol, Room 2032
Sacramento, CA 95814

Re: A.B. 538 (Campos): Opposed Unless Amended

Dear Chairwoman Jackson,

Media Coalition is opposed to A.B. 538 unless it is amended to remove Section 2 or place the burden for reporting contracts on the "criminal offender" rather than the publisher or producer of First Amendment protected speech. We understand the desire to provide restitution for victims of crimes, but we believe the bill's narrow focus on contracts for the story of the crime will have a chilling effect on Constitutional rights of the producers of free speech. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including California: publishers, booksellers and librarians as well as producers and retailers of recordings, films, home video and video games.

Section 2 of the bill would require any person or entity that enters into a contract for "the sale of the story of a crime for which the offender was convicted" with a person convicted of specified crimes to report it to the Office of Survivor Rights and Services.

We adopt the legal arguments made in the letter from Jonathan Bloom on behalf of the Association of American Publishers, a member of Media Coalition (see attached). His letter cites the relevant case law to demonstrate why A.B. 538 is unconstitutional. However, we want to add to his explanation why this legislation is likely unconstitutional.

The reporting requirement is likely unconstitutional as a content-based restriction that fails strict scrutiny analysis. As the Supreme Court made clear in *Simon & Schuster, Inc. v. Members of NY State Crime Victims Bd.*, "The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content… the statute plainly imposes a financial disincentive only on speech of a particular content." 502 U.S. 105, 116. While the California legislation only requires that the terms of the contract be reported to a state office, it is still a significant impediment for both parties seeking to enter into a contract. The convicted offender will have a great disincentive for a speaker to take time to tell his or her story if the state must be notified about this potential source of income but not about any others. The speaker has a strong incentive to earn income from other sources that are much less likely to trigger a lawsuit for damages. The publisher or producer of the speech has a disincentive to enter into a contract if they have reservations about the offender's incentive to complete the project.

As a content-based regulation on speech, A.B. 538 must satisfy strict scrutiny. *See, U.S. v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 826-7 (2000). To meet the test for strict scrutiny, 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, R.A.V. v. City of St. Paul,* 505 U.S. 377, 395-96 (1992); *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute).

A reporting requirement limited to income derived from telling the story of the crime is likely to fail the strict scrutiny analysis. While it is a compelling interest to provide financial compensation to the victim of a crime, the interest is undermined by the limitation on the reporting requirement to the story of the crime. There is no rationale for excluding other sources of income from the reporting requirement.

Rather, the narrow focus on income from telling the story of the crime could be construed as punishment for this speech rather than an effort to compensate the victim. Preventing emotional harm to a crime victim is not sufficient to overcome strict scrutiny and does not outweigh First Amendment rights of speakers. The Supreme Court said in *Simon & Schuster* that the state cannot suppress speech to protect the sensitivities of crime victims:

> "The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers… As we have often had occasion to repeat: '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' [citation omitted] . . . .The Board thus does not assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization."

Simon and Schuster, 503 at 118.

We ask you to protect the First Amendment rights of all the people of California and remove Section 2 of this bill or defeat it. If you would like to discuss our concerns raised in this memo or in our previous memo, please contact me, at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,

David Horowitz
Executive Director

cc: Assemblywoman Nora Campos
Members, Senate Judiciary Committee
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