MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression 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.

Memo in Opposition to California Senate Bill 676

We believe that Senate Bill 676 violates the Constitution. We respectfully ask you to amend this legislation so that it addresses the concerns of the legislature without infringing on the right of free speech. The trade associations that comprise Media Coalition have many members throughout the country, including California: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 676 would make it a crime to publish a person's name, address or other personally identifying information "associated" with an "intimate body part" of that person without his or her consent. "Associated" is not defined in the legislation. "Intimate body part" is defined as any portion of the genitals, anus and if female, any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing. There is an exception if the distribution is a republication of "otherwise lawful public material." This term is also not defined in the legislation.

This legislation is unconstitutional for several reasons. It is shockingly overbroad. It applies to artistic, historical and newsworthy information. As a result, it criminalizes speech that lies at the very core of the First Amendment's protections. The law makes no distinction between a hacker who releases private photos and a publisher who prints a story about those images if it identifies anyone in the images. The legislation sweeps in not just malicious invaders of privacy, but also countless Internet users who innocently post information online.

There are far fewer elements to prove in a prosecution under S.B. 676 than under Penal Code 647(j)(4), California's existing law barring publication of nude images without consent. The present law requires a prosecutor to show that the image is of an identifiable person, was published without consent, under circumstances that the people agreed or understood that the picture was to remain private, that the person who distributes the image can foresee that the person depicted will suffer severe emotional distress and that it occurs. This legislation includes none of these elements. Without them, it would allow the prosecution of a newspaper that identifies Anthony Weiner as the person who sent unidentified pictures of his intimate body parts to another person with a link to the pictures, even though the woman who originally published his pictures could not be prosecuted.

In addition to these elements not being a part of S.B. 676, another reason it is overbroad is that it is not limited images of "intimate body parts" that were unidentified prior to the publication of personal information "associated" with the image. It applies even if the image of the "intimate body part" also shows the person's face. So a newspaper could be prosecuted for publishing a story about the stolen nude pictures of Jennifer Lawrence even though they did not publish the pictures or initially reveal that she was the person in a picture that was otherwise anonymous.

19 Fulton Street, Suite 407 | New York, NY 10038 | 212.587.4025 | mediacoalition.org

The legislation is also unconstitutionally vague on other important elements of the crime. The legislation does not define "associated," so it could mean publishing personal information along with an image. It could mean publishing personal information with a link to an image. It could mean publishing personal information with a reference to an image but no link. The broadest reading of "associated" could mean publishing a name without any reference to an image but simply one that is associated with a person whose "intimate body parts" have been published.

The vagueness of some definitions and the absence of other definitions likely violate the Due Process Clause of the Constitution. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").

Even if the legislation was not overbroad and vague, it would still be unconstitutional as a content-based restriction on speech. First, it is clearly a content-based regulation of speech. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. As the Court recently explained:

> From 1791 to the present, . . . [the First Amendment has] "permitted restrictions upon the content of speech in a few limited areas." [These] "historic and traditional categories long familiar to the bar[ ]"[ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

Stevens, 559 U.S. at 467. *See also*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991).

There is no exception to the First Amendment for speech that offends or embarrasses the subject of the speech, even if it is a photograph or information "associated" with one. The Supreme Court has made clear that the First Amendment protects speech even if it is intended to offend, annoy or embarrass. The Court in *Texas v. Johnson* said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989). *See also, Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *R.A.V.*, 505 U.S. 377 (struck down a statute which limited

speech which "arouses anger, alarm or resentment in others"); *Free Speech Coalition*, 535 U.S. at 245 ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *FCC v. Pacifica Foundation*, 438 U. S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Carey v. Population Services Int'l*, 431 U. S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

Nor has the Supreme Court indicated any willingness to create new categories of unprotected speech, even for speech that many find offensive or upsetting. In three recent cases the Court has struck down attempts to do so. In *Snyder v. Phelps*, the Court declined to create an exception for outrageous and upsetting speech in the vicinity of a private military funeral. 131 S. Ct. 1207 (2011). And in *U. S. v. Stevens*, the Court ruled that there is not a new First Amendment exception for depictions of actual animal cruelty. 559 U.S. 460. In *Brown v. Entertainment Merchs. Ass'n*, the Court found that there is no exception for the sale of "patently offensive" violent video games to minors. 131 S. Ct. 2729 (2011).

Since S.B. 676 does not fit into a historic exception, the speech must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 826-7. Given that it would apply to material based on its content and does not fit an exception, it is immediately constitutionally suspect. The Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V.*, 505 U.S. at 382. 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.*, 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.*, 502 U.S. at 118. It must also show that the legislation is not unconstitutionally overbroad. It is very unlikely that this legislation could satisfy any part of the strict scrutiny test, let alone each part of the test.

The legislation fails strict scrutiny analysis. The legislature may have a compelling interest in protecting individuals from being harassed or tormented, but this bill is not narrowly tailored to address that interest. The bill is not limited to criminalizing malicious invasion of privacy. There is no requirement that the person who publishes the personal information do so with an intent to harass, threaten or torment the person in the associated image. The lack of the intent element means the law treats bad actors who act with a malicious purpose the same as a publisher of newsworthy information. The legislation goes far beyond its compelling interest and criminalizes a substantial amount of First Amendment protected speech.

Also, privacy is an important right but the Supreme Court has held that it is not a sufficiently compelling interest to overcome the First Amendment right to free speech. The Court has often struck down laws and vacated court orders that barred speech about a criminal proceeding in order to protect a defendant's privacy. The Court found that the First Amendment right to publish outweighed privacy interests when it struck down a West Virginia law that

barred publishing the name of a minor being adjudicated in juvenile court. *Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979). *See also*, *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a statute allowing a rape victim to seek damages for the publishing of his or her name. Justice White wrote, "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S. 469, 496 (1975).

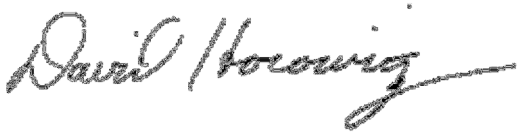
Nor is this legislation saved by exempting "otherwise lawful public material" since it is unclear what that term is referring to. Any image that is otherwise unidentified would be deemed "otherwise lawful public material" since it cannot be prosecuted under 647(j)(4), which is limited to images of an identifiable person. If that reading of the exemption is correct, then S.B. 676 could only be used to prosecute those who "associate" personally identifying information with an image that has previously been identified and was prosecuted under 647(j)(4). This would further undermine any argument that this legislation is narrowly tailored to address a compelling state interest.

The legislature may intend S.B. 676 to apply to a narrower range of speech than the plain language of this bill could criminalize; however, an unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. Chief Justice Roberts writing for the Court in *Stevens*, "[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 559 U.S. at 480.

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.

We ask you to protect the First Amendment rights of all the people of California and defeat or amend S.B. 676. If you would like to discuss our concerns further, I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,



David Horowitz
Executive Director