Memo in Opposition to Maine Legislative Document 679/H.P. 460

Media Coalition strongly believes that L.D. 679/H.P. 460 violates the First Amendment. We appreciate the legislature’s concern with the malicious invasion of privacy but believe any legislation must be narrowly tailored to address that problem without infringing on First Amendment rights. We respectfully urge you to amend the bill so that it addresses their concerns without infringing on the right of free speech. If the legislature is not willing to amend the legislation, we suggest that it be held over until next year to allow a U.S. District Court judge to rule in a pending challenge to a nearly identical law passed last year in Arizona. The trade associations that comprise Media Coalition have many members throughout the country, including Maine: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

L.D. 679 makes it a crime for a person to disseminate, advertise or offer an image of another identifiable person who is nude or engaging in sexual conduct if he or she knows or should have known that the person in the image did not consent. It is punishable by up to 364 days of incarceration and a $2,000 fine.

Several members of Media Coalition challenged the law enacted last year in Arizona in Antigone Books v. Horne (the complaint and other documents are available here: http://mediacoalition.org/antigone-books-v-horne/). The plaintiffs in the case are four national trade associations representing publishers, news photographers, booksellers and librarians; five local booksellers; and the publisher of a local newspaper. They brought the challenge because they fear that they could be prosecuted for the publication of important newsworthy, historic and educational images. The photos from Abu Ghraib, the pictures Anthony Weiner sent of himself to women he met online and the documentary Woodstock all include images of nudity that were distributed without the consent of the people in the images.

U.S. District Court Judge Bolton granted a joint motion by the parties to stay the litigation and stay enforcement of the law to allow the legislature an opportunity to amend the law. The sponsor of the law also sponsored H.B. 2561 (http://www.azleg.gov/legtext/52leg/1r/bills/hb2561c.pdf) to amend it. The bill included important elements to narrow the law to the malicious invasion of privacy. The bill passed the House but failed to pass the Senate because it was “forgotten” on the final day of the session, much to the disappointment of the sponsor. See, http://azcapitoltimes.com/news/2015/04/17/mass-confusion-led-to-death-of-revised-revenge-porn-bill/. The case is now set for oral argument on August 31. There are no questions of fact in the case so the argument may resolve the matter.

L.D. 679 may be well-intentioned but it is clearly unconstitutional. Speech cannot be criminalized because we judge it to be low value and offensive, embarrassing or hurtful. In U.S.
v. Stevens, the Supreme Court dismissed the government’s notion that speech may subjected to a test balancing “the value of the speech against its societal costs.” As Chief Justice Roberts wrote, “As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.” 559 U.S. at 468 (2010).

L.D. 679 is a content-based regulation of speech. 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 . . .


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 two recent cases the Court has struck down attempts to do so. In Snyder v. Phelps, 131 S. Ct. 1207 (2011), the Court declined to create an exception for outrageous and emotionally distressing speech in the vicinity of a private funeral for an active duty soldier. And in Stevens, the Court ruled that there is not a new First Amendment exception for depictions of actual animal cruelty. 559 U.S. 460.

Since L.D. 679 does not fit into a historic exception, the speech must satisfy strict constitutional scrutiny. See, Playboy, 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., 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. 105, 118 (1991). Even if the test was satisfied, the state must also show that the legislation is not unconstitutionally overbroad.

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 meet that compelling state interest. The bill is not limited to criminalizing malicious
invasion of privacy. There is no requirement that the person who distributes the image do so with an intent to harass, threaten or torment the person depicted. Nor is there any requirement that the person depicted suffer serious harm. Without these elements, the legislation goes far beyond the compelling state interest and is not narrowly tailored.

Privacy is an important right but the Supreme Court has held that it by itself 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 intended to protect a defendant’s privacy. 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. 420 U.S. 469 (1975). See also, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *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).

The Supreme Court has also repeatedly dismissed the notion that offensive or embarrassing speech is a compelling interest to satisfy the strict scrutiny test. The Supreme Court has often held 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. See also, *R.A.V.*, 505 U.S. 377 (1992) (struck down a statute which limited speech which “arouses anger, alarm or resentment in others”); *Free Speech Coalition*, 535 U.S. at 245 (2002) (“It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.”).

Even if the bill did satisfy strict scrutiny, it is substantially overbroad. It applies to artistic, historical, and newsworthy images, both in print and online. As a result, it criminalizes speech that lies at the very core of the First Amendment’s protections. The legislation makes no distinction between a hacker who releases private photos and a publisher who prints images of torture at Abu Ghraib prison. It sweeps in not just those acting with an intent to torment or harass a former intimate partner, but also countless Internet users who innocently repost online images.

The legislation’s overbreadth is compounded by its criminalization of the disclosure of restricted images where the individual “should have known” he or she lacked the consent of a depicted person. This is a negligence standard. The First Amendment prohibits the use of negligence-based standards in regulating speech. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it…”); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (“[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.”).

If the legislature is inclined to pass legislation this year, we strongly urge it to amend the bill to replace the present language with the text of the bill that was nearly passed in Arizona. That bill was drafted to address the legal problems raised in the challenge to the Arizona law. It would have added two important elements to the law: first, an intent to harass, intimidate,
threaten, coerce or cause specific financial harm; second, an element to limit the law to instances when the person depicted has a reasonable expectation of privacy.

While the legislature may intend the legislation to apply to a narrower range of speech than the plain language of the bill, 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. Again as Chief Justice Roberts wrote 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. In a recent challenge brought by members of Media Coalition to a law that violated the First Amendment, Utah paid to the plaintiffs over $350,000 in legal fees for a case resolved in U.S. District Court.

We ask you to protect the First Amendment rights of all the people of Maine and amend or carryover L.D. 679 to the 2016 legislative session. If you would like to discuss our concerns further, I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,

[Signature]

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