



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 27, 2015

The Honorable John Fernandes  
Co-Chair, Joint Judiciary Committee  
State House  
Boston, MA 02133

**Re: House Bill 1399: Opposed**

Dear Co-Chair Fernandes,

Media Coalition is opposed to H.B. 1399 because we believe it violates the First Amendment. We understand the desire to make whole the victims of crimes, but we think the bill's reporting requirement and onerous financial burden on book and music publishers, filmmakers, and other media is an overbroad restriction on speech and will have a substantial chilling effect on their constitutional right. The trade associations and other organizations that comprise Media Coalition have many members throughout the country; including Massachusetts publishers, booksellers and librarians as well as producers and retailers of recordings, films, home video and video games.

H.B. 1399 would require any person or entity that enters into a contract with a "defendant" for anything of value derived from a "unique knowledge or notoriety acquired by means and in consequence of commission of a crime" must submit the contract to the Attorney General's office and post a bond equal to the value of the contract. The Attorney General then determines if the contract was entered into for the unique knowledge of the crime or notoriety related to it. If the Attorney General deems that it is, the state keeps the bonded money to pay any civil damages related to the crime. After all claims are paid, the state is entitled to keep fifty percent of the balance of the bond for the victim compensation fund. The other half is to be returned to the contracting party. A "defendant" is defined as anyone charged with or convicted of a crime or has voluntarily admitted to having committed the crime. Failure to do so is subject to a civil penalty equal to the value of the contract. If the failure is willful, it is subject to a civil fine of up to three times the value of the contract.

This legislation violates the Constitutions of the United States and Massachusetts for the same reasons as Senate Bill 1939, introduced in 2001. S.B. 1939 was introduced in 1991 after the Supreme Court struck down New York's "Son of Sam" law. *Simon & Schuster Inc., v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991). In 2001, the Senate asked the Supreme Judicial Court of Massachusetts to give an advisory opinion on whether S.B. 1939 violated the First Amendment or Article XVI of the Declaration of Rights of the Commonwealth. In a 2002 opinion, the Court answered the question "yes." *In Re Opinion of the Justices to the Senate*, 436 Mass. 1201, 1213 (2002). In a discussion of the bill, the Court explained the key provisions of

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Letter to Co-Chair Fernandes  
Re: H.B. 1399 - Opposed  
July 27, 2015  
Page 2

the bill. The key provisions of H.B. 1399 are substantively the same as that bill. There are no elements of H.B. 1399 that would alter the analysis of the Court.

The Court held “that Senate No. 1939 is a content-based regulation of speech. It burdens only expression with a particular content, namely, works that describe, reenact, or otherwise are related to the commission of a crime. *Id.* at 1205-06 (internal citations omitted). The Court reached this conclusion for two reasons. First, the legislation would put a financial burden on a speaker based on the content of his or her speech. Second, the Attorney General’s office must review the content of the speech to determine if it derived from a unique knowledge of the commission of a crime or notoriety as a result of it. *Id.* at 1206.

The Court then applied strict scrutiny analysis to the bill because it is a content-based restriction. 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).

The legislation failed the strict scrutiny analysis as overbroad and not narrowly tailored to meet a compelling state interest for several reasons. It was significantly overinclusive because it was not limited only to those who have been convicted of a crime. *Opinion*, at 1208. The Court also found there was a substantial chilling effect on certain speech because the legislation creates a “financial disincentive” to speaking on both the author and the publisher. *Id.* While H.B. 1399 allows a publisher to post a bond rather than placing money due the author in escrow, it does not cure the chilling effect noted by the Court. A publisher either has to pay the author and then post an equal amount of money as bond or withhold the author’s money to use to pay the bond. Either way, the chilling effect remains for both parties.

The Court went on to find that there were less restrictive means to satisfy the state’s compelling interest. It noted “that there are other less cumbersome and more precise methods of compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety. Probation conditions, specifically designed to deal with a defendant’s future income and obligations, may be imposed.” *Id.* at 1209-10. The Court added that S.B. 1939 was not narrowly tailored to meet the stated compelling interest because it did not design a plan for reimbursement to the victim based on the “facts and circumstances of each case.” *Id.* at 1210.

The Court’s ruling left no doubt that it found S.B. 1939 is unconstitutional. Any of these holdings individually would be sufficient to find the bill violates the First Amendment and the Massachusetts Constitution.

Finally, H.B. 1399 is also very likely unconstitutional as a content-based tax on speech. While the Supreme Judicial Court did not need to reach this issue in their opinion, it is a de facto tax on speech to allow the state to retain fifty percent of the balance of any bond to be given to the state’s victim compensation fund after all civil claims have been satisfied. The U.S.

Letter to Co-Chair Fernandes  
Re: H.B. 1399 - Opposed  
July 27, 2015  
Page 3

Supreme Court has repeatedly held that it violates the First Amendment to impose a content based tax on speech. In 1987, the Supreme 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 (1987). The state cannot punish a producer or retailer of such material by imposing a substantial additional tax 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 (1983). In 1991, the Court held that New York's "Son of Sam" law 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 (1991).

We ask you to protect the First Amendment rights of all the people of Massachusetts and defeat H.B. 1399. 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](mailto:horowitz@mediacoalition.org).

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

David Horowitz  
Executive Director