



Memo in Opposition to Massachusetts House Bill 1513

Media Coalition believes that House Bill 1513 violates the First Amendment. We appreciate the legislature's desire to prevent the malicious invasion of privacy but any proposal to address the problem must be narrowly tailored so it does not criminalize constitutionally protected speech. We respectfully ask you to either defeat this legislation or amend it so it is narrowly focused on the concerns of the legislature without infringing on First Amendment rights. The trade associations that comprise Media Coalition have many members throughout the country, including Massachusetts: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 1513 makes it a crime to disseminate or copy an image of another person nude or engaging in sexual conduct if one knows or should have known that the person in the image did not consent. There is an exception for disclosure for "any bona fide and lawful public purpose." A violation is subject to imprisonment in the house of corrections for no more than two and a half years or in the state prison for no more than 5 years, or by a fine of up to \$10,000, or by both a fine and imprisonment.

Several members of Media Coalition successfully challenged a law enacted last year in Arizona that is very similar to H.B. 1513. In that case, *Antigone Books v. Brnovich* (<http://mediacoalition.org/antigone-books-v-brnovich/>), U.S. District Court Judge Bolton granted a joint motion by the parties to permanently bar the enforcement of the law. The order deemed the plaintiffs to be the prevailing party and entitled to legal fees. The plaintiffs in the case were four national trade associations representing publishers, news photographers, booksellers and librarians; five Arizona booksellers; and the publisher of a Phoenix newspaper. They challenged the law because it was not limited to the publication of images that were a malicious invasion of privacy. They feared it could be used to prosecute them for selling or loaning a wide range of important newsworthy, historic, artistic, educational and other protected images.

This bill may be well-intentioned but it is clearly unconstitutional. We firmly believe that any legislation in this area must be narrowly tailored to address the malicious invasions of privacy without impinging on free speech. We strongly recommend that any proposed bill must include these elements: (1) display or distribution of an image of another person in a state of nudity or engaged in sexual conduct; (2) with knowledge that the person in the image has not consented to the display or distribution; (3) with the intent to harass, coerce, threaten, extort or intimidate the person in the image; (4) the person in the image is recognizable either from the picture itself or information provided by the person who has displayed or distributed it (or a third party but only if acting in concert with the person who initially displayed or distributed it); and, (5) where the person depicted in the image had a reasonable expectation of privacy and an understanding that such image would remain private. These elements are necessary to overcome the strong presumption that any content-based regulation violates the First Amendment.

Executive Director: David Horowitz Chair: Tom Foulkes, Entertainment Software Association
Immediate past Chair: Judith Platt, Association of American Publishers Treasurer: Barbara Jones, Freedom to Read Foundation
General Counsel: Michael A. Bamberger, Dentons US LLP

H.B. 1513 is 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. 460, 468 (2010). *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 & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The images covered in this bill go far beyond what may be criminalized in any of the historic exceptions to the First Amendment. It is very unlikely that the Supreme Court will find a new categorical exception to the First Amendment, even for speech that many find offensive or upsetting. In *Ashcroft v. Free Speech Coalition*, the Court overturned a law that criminalized computer-generated images that appear to be of a minor engaging in sex and images of an adult that appears to be a minor engaging in sexual activity even though the government argued that it was necessary to prevent fueling the market for pornography created using actual minors. 535 U.S. 234 (2002). In *Stevens*, the Court ruled that a law criminalizing depictions of actual animal cruelty is an unconstitutional content-based restriction on speech. 559 U.S. 460. In *Brown v. Entertainment Merchants Association*, the Justices found no historic exception to the First Amendment for the sale to minors of video games with violent content that is “patently offensive” and lacks “serious value.” 131 S. Ct. 2729 (2011). In *U.S. v. Alvarez*, the Court struck down a law that barred lying about a receiving a medal or commendation for military service. 132 S. Ct. 2537 (2012).

Since H.B. 1513 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).

It is very unlikely that this legislation could satisfy any part of the strict scrutiny test, let alone each part of the test. It is unlikely that there is a compelling state interest to satisfy the broad reach of this bill. Privacy is an important right but the Supreme Court has held that by itself, it is not a sufficiently compelling interest for a content-based restriction to overcome the First Amendment. 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).

Again, offensiveness or embarrassment, whether to a group or an individual, is not sufficient to overcome the First Amendment, even if the speech is a photograph. The Supreme Court has often held that the First Amendment protects speech even if it is intended to offend. 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*, *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 (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."); *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").

Even if the legislation is found to address a compelling state interest, it is not narrowly drawn to meet that interest. *See*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). The bill is not limited to the malicious invasion of privacy, so it would apply 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 law makes no distinction between a hacker who releases private photos and a publisher who prints images of torture at Abu Ghraib prison. The legislation sweeps in not just malicious invaders of privacy, but also countless Internet users who innocently repost online images. Narrowing the legislation to distribution with an intent to harass, stalk, threaten or cause similar serious harm would target malicious acts without burdening protected speech.

Nor is the legislation's constitutional infirmities cured by the exemption for dissemination of images for a "bona fide and lawful public purpose" (whatever that vague term means). This suggests that some speech is less valuable than others and thus gets less protection from the First Amendment, but the Supreme Court has held the opposite. In *U.S. v. Stevens*, the government argued that speech may be subjected to a test balancing "the value of the speech against its societal costs." Chief Justice Roberts dismissed this notion, "[a]s 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. 460, 472. The law in *Stevens* included an exception for images that had "serious value," borrowed from the standard for obscenity. The Court specifically rejected the notion that a safe harbor for speech with value

could save an unconstitutional law: “We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place.” *Id.*, at 477 (emphasis in the original).

Finally, while the legislature may intend H.B. 1513 to apply to a narrower range of speech than the plain language of the bill; 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. 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 *Antigone Books v. Brnovich*, the state of Arizona agreed to pay \$200,000 in legal fees and costs. Also, in *American Booksellers Foundation for Free Expression v. Coakley*, Civil Action No. 10-11165-RWZ (D. Mass. Oct. 26, 2010), a case brought in Massachusetts by Media Coalition members, plaintiffs received \$67,000 in legal fees and costs in a case that was limited to a successful motion for a preliminary injunction.

We ask you to protect the First Amendment rights of all the people of Massachusetts and defeat or amend H.B. 1513. If you would like to discuss our concerns further, please contact David Horowitz at 212-587-4025 #3 or horowitz@mediacoalition.org.