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.

Memo to Senate Judiciary Committee in Opposition to Senate Bill 508

We believe that Senate Bill 508 violates the First Amendment protections for free speech and we respectfully urge the committee to amend the bill. We appreciate the legislature's concern about the distribution of images that are a malicious invasion of privacy, but this legislation goes beyond those concerns to infringe on constitutionally protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including Michigan: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 508 bars the dissemination of images of another person that contain nudity, sexual excitement, erotic fondling, sexual intercourse or sado-masochistic abuse, without the consent of the person depicted in the image, if the person obtained the images under circumstances in which a reasonable person would know or understand the image was to remain private. There is an exception to the legislation for the dissemination of some speech if it is part of some media.

We urge this committee to amend the bill to address the malicious invasion of privacy without violating the First Amendment. This can be done by limiting the bill distribution of an image with an intent to harass, coerce, threaten or extort the person in the image. This will address the First Amendment deficiencies in the bill and protect mainstream media. Without those changes, we are concerned the legislation could allow publishers, booksellers, librarians and others to be prosecuted for the publication or distribution of important newsworthy, historic and educational images.

In July, we successfully concluded our challenge to an Arizona law that criminalized the distribution of nude images without the consent of the person so depicted. This was the first facial challenge to such a law. The state of Arizona agreed to a permanent bar on enforcing the law: *Antigone Books v. Brnovich*. Our general counsel was co-counsel in the case, and the plaintiff group consisted of many trade associations that are our members and their constituents. 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. Similarly, this legislation could be used to prosecute publishers or distributors of an image without being limited to those distributed with the intent to harass, threaten, coerce or terrorize the person depicted. Many publishers will decide not to print any image that could invite prosecution because of the threat of a criminal prosecution for violating the law. They do not want to risk their freedom to a jury's decision on the meaning of the "artistic or expressive work."

Content-Based Legislation Subject to Strict Scrutiny Analysis

This legislation is very likely unconstitutional as there is no exception to the First

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Amendment for a content-based regulation of speech even if it was intended to be private. S.B. 508 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, 811 (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," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

Stevens, 559 U.S. at 467 (internal citations omitted). *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). This speech does not fit any of the historic exceptions to the First Amendment. It goes far beyond speech that may be criminalized as obscene, which is limited to "hardcore" sexual material that meets a three-prong test. *Miller v. California*, 413 U.S. 15 (1973).

Since the bill does not apply to content that fits into a historic exception, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 826-7. 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.

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. As noted above, 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, coerce, stalk or otherwise torment the person depicted. Nor is there any requirement that the person depicted suffer any harm. Without both of these elements, the legislation goes far beyond its compelling state interest and criminalizes a substantial amount of First Amendment protected speech.

<u>Exception for Images in Some Instances Compounds First Amendment Deficiency</u>

The insertion of a vague exception to liability for dissemination of images for certain types of speech and certain media does not cure the constitutional defects; rather, it makes it

more likely that S.B. 508 is unconstitutional. As noted above, the Court presumes a law that criminalizes speech based on its content violates the First Amendment. The exception is a second content-based evaluation that compounds this constitutional flaw in the underlying bill.

The exception has a second constitutional defect. By including the exception, the legislature is making value judgements to criminalize certain nude images but exempt them in some media or a specific context. The First Amendment precludes the legislature from doing so. In *Stevens*, the Court held, "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. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment…." 559 U.S. 460, 472

Also, the exception is inadequate to protect the mainstream media. Again, in *Stevens*, the Court emphasized that plenty of speech that is protected by the First Amendment does not rise to the level of artistic or historical: "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" 559 U.S. 460, 478 (internal citations omitted)(emphasis in the original).

<u>May Violate the Commerce Clause</u>

The legislation may also violate the Commerce Clause of the Constitution to the extent it allows a prosecution solely because such an image can be accessed online in Michigan. The Commerce Clause reserves to Congress the regulation of interstate commerce and prevents a state from imposing its laws extraterritorially. Nothing in the bill limits its reach so it could give Michigan jurisdiction over any image posted on the Internet since there is a publisher cannot prevent an image from being accessed in the state. Four U.S. Courts of Appeals have struck down state laws applying state obscenity for minors laws to the Internet for this reason. *See, PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean,* 342 F.3d 96 (2d Cir. 2003); *Cyberspace Communications v. Engler,* 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson,* 194 F.3d 1149 (10th Cir. 1999).

Finally, while the legislature may intend that this bill to apply only to malicious invasions of privacy, there is nothing in the bill that limits it to those targets. 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. As the Supreme Court held 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.

We respectfully ask you to protect the First Amendment rights of all the people of Michigan and amend or defeat S.B. 508. We would welcome the opportunity to work with the committee to address the issues raised in our memo. If you would like to discuss our concerns, please contact David Horowitz, executive director, at 212-587-4025 #3 or horowitz@mediacoalition.org.