THE MEDIA COALITION
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 in Opposition to Nebraska Legislative Bill 892

The members of Media Coalition believe that Legislative Bill 892 is overbroad and violates the First Amendment. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Nebraska: publishers, booksellers and librarians as well as manufacturers and retailers of sound recordings, films, videos and video games.

Section 1(b) of L.B. 892 would make it a crime to use an "electronic communication device" to contact another person using indecent, lewd or lascivious language or to suggest a lewd or lascivious act with the intent to "annoy," "offend," "harass" or "terrify." The bill deems the use of indecent or lewd language or the making of a lewd suggestion as prima facia evidence of an intent to annoy, offend or harass. The legislation offers no definitions for "annoy," "offend," "harass" or "terrify" either in the statute or by reference. "Indecent," "lewd" and "lascivious" are not defined in the bill. "Electronic communication device" is defined broadly to include computers, tablets, cell phones, television, radio and any other electronic medium.

Section 1(b) would likely be unconstitutional because it is a content-based regulation on speech that cannot satisfy strict scrutiny, it is overbroad and it is unconstitutionally vague. Government may criminalize speech that rises to the level of harassment, intimidation or serious threat, and many states have laws that do so. L.B. 892 is not restricted to this conduct. Under this bill, the communication does not have to be one to one. It applies to listserves, Twitter accounts and chat rooms and could apply to web sites, blogs, and other Internet communication a person can subscribe to for updates or new content. Nor must the speech be repetitive or unwanted. There is no requirement that the recipient or subject of the speech actually feel offended, annoyed or scared. It is unclear if the communication must be intended to offend or annoy a specific person or if a general intent to do so is sufficient. Even if it were limited to direct communication by email, L.B. 892 is likely unconstitutional.

There are numerous recent examples of speech that was intended to be provocative and could be criminal under L.B. 892. Some Nebraska residents may consider Donald Trump's numerous comments about Megyn Kelly of Fox News to be lewd and indecent. He could be prosecuted if he intended his comments to offend or annoy her. Similarly, much general content available in the media uses racy or profane language and is intended to offend, annoy or even terrify. Bill Maher's standup routines and Jon Stewart's rants on his cable show often use indecent language in critiquing politicians, often with an intent to annoy them. Ann Coulter uses such language in her books, television appearances and Twitter feed when discussing liberals with a clear intent to offend them. Stephen King's novels and the *Halloween* films could be prosecuted because they are intended to terrify the viewer or reader and include indecent language. The risk of prosecution is compounded because the mere use of indecent language can

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

be assumed as an intent to annoy, offend or terrify. This means every email, web post, online video or e-book that contains any cursing is presumed to violate this legislation. Even if the bill was limited to direct communication between two people, it would apply to common banter online about sports between rival fans frequently meant to offend or annoy and often done using salty or indecent language that is punctuated by suggestions of lewd or lascivious acts.

While protecting people from harassment is a worthy goal, legislators cannot do so by criminalizing speech protected by the Constitution. All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991). 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 . . .

United States v. Stevens, 130 S. Ct. 1577, 1584 (2010). *See also R.A.V.*, 505 U.S. at 382-83; *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 245-46 (2002).

There is no historic exception to First Amendment protection for speech simply because it annoys, offends or even terrifies regardless of whether it is lewd or lascivious. *See 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. v. St. Paul*, 505 U.S. 377 (1992) (struck down a statute which limited speech which "arouses anger, alarm or resentment in others"); *Free Speech Coalition v. Ashcroft*, 535 U.S. at 245 (2002) ("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 is there is an exception to the First Amendment for speech that is indecent or lewd speech that suggests a lewd or lascivious act that is not obscene. (There is an indecency standard created by the FCC, but it is limited to material broadcast at certain times on television or radio.) In *Sable Communications of California v. FCC,* the Court struck down a restriction on indecent but not obscene speech on commercial telephone communication, stating, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." 492 U.S. 119, 126 (1989). In *Reno v. ACLU*, the Supreme Court held that restrictions on indecent speech may not be applied to the Internet. 521 U.S. 844 (1997).

Lewd or lascivious speech may be banned to the extent it meets the definition of obscenity, but this is a very narrow specific class of speech defined by the Supreme Court in *Miller v. California.* 413 U.S. 15 (1973). In *Miller*, the Supreme Court created a three-part test that defined obscene material as descriptions or depictions of sexual conduct or lascivious nudity when, taken as a whole,

i. Predominantly appeals to the prurient, shameful or morbid interest in sex;

ii. Is patently offensive by prevailing community standards; and
iii. Lacks serious literary artistic, political or scientific value.

In three recent First Amendment cases, the Court has emphasized that it is reluctant, if not unwilling, to expand the categories of unprotected speech to include different kinds of offensive or distasteful communication beyond the historic exceptions. In *Brown v. Entertainment Merchs. Ass'n,* 131 S. Ct. 2729 (2011), the Court declined to craft an exception for the sale of patently offensive violent video games to minors. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court declined to create an exception for outrageous and upsetting speech in the vicinity of a private military funeral. And in *United States v. Stevens*, the Court declined to fashion a new First Amendment exception for depictions of actual animal cruelty.

Since indecent or lewd speech does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 813. 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 the least restrictive means 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).

The legislature may have a compelling interest in protecting individuals from being harassed, threatened or intimidated, but there's no compelling interest in protecting them from hearing off-color or explicit language. The First Amendment specifically protects the right to use such language. The use of such language cannot be made illegal even if it is done with an intent to annoy or offend the audience. In *Texas v. Johnson*, the Supreme Court considered whether a law to punish the burning of the American flag violated the First Amendment. The defendant burned the flag at the Republican national convention with the clear intent to offend those who witnessed it. In its opinion, the Court wrote, "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, Snyder v. Phelps*, 131 S. Ct. 1207 (2011), (held no exception to the First Amendment for outrageous and upsetting speech in the vicinity of a private military funeral).

Even if the law addresses a compelling interest and it is narrowly tailored, it must still be the least restrictive means to accomplish the purpose of the statute. In striking down the Communications Decency Act, the Court held a burden on speech is too great, "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. American Civil Liberties Union*, 521 U.S. at 874. In *Ashcroft v. ACLU*. the Court went on to find that user-empowerment tools such as filters were less restrictive than a criminal law. 542 U.S. 656 (2004) (Challenge to a federal law banning sexual speech on the Internet). Nebraska's present law governing annoying or offensive telephone calls may be appropriate for traditional residential phones but modern electronic devices provides an array of options to avoid such annoying contacts. Modern devices allow individuals to know who is attempting to contact them, to block the individual and to turn off a device or receive a special

signal for select contacts. These technologies can prevent most of the behavior that the law addresses without threatening protected speech.

The bill is also very likely unconstitutionally vague because it offers no definition of the term "annoy," which leaves the average person with no way to know what speech would be illegal. In *Coates v. Cincinnati*, the Supreme Court struck down a law using the word "annoy" to determine if conduct was illegal. 402 U.S. 611 (1971). The Court held, "[T]his ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id*., at 614. In *Kramer v. Price*, the Fifth Circuit ruled that a Texas law very similar to the existing Nebraska law was unconstitutionally vague because it failed to define "annoy" or "alarm." 712 F.2d 174 (5th Cir. 1983). The Texas law barred communication, "by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient." *Id*., at 176. The Court found that even though "annoy" was used as an intent, it still gave the government "unfettered discretion" to enforce the law. *Id*.

It may be that L.B. 892 is not intended to criminalize speech in the media but only what legitimately rises to the level of harassment, intimidation or threats; 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. As Chief Justice Roberts wrote, in *United States v. Stevens*, "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 130 S.Ct. at 1591 (2010).

If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org. We would welcome the opportunity to work with the legislature to address the concerns raised in ours memo.

We ask you to protect the First Amendment rights of all the people of Nebraska and reject or amend L.B. 892.