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 to Senate Judiciary Committee in Opposition to Senate Bill 465

We believe that Senate Bill 465 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 New Hampshire: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 465 bars the dissemination of images of another person that contain nudity, sexual excitement, erotic fondling, sexual intercourse, sado-masochistic abuse or urination in a sexual context or bondage and "fetter" in any context, 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 an image for a "lawful public purpose." This term is not defined.

We urge this legislature 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. This legislation also lacks a malicious intent element and could be used to prosecute a publisher or distributor of an image even though there is no intent to harass, threaten, coerce or terrorize the person depicted. Absent the intent standard, many publishers will decide not to print any image that could invite prosecution

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

because of the risk of violating the law. They do not want to risk their freedom to a jury's decision on whether they should have known the person depicted in the image did not consent or intended the picture to remain private.

Content-Based Legislation Subject to Strict Scrutiny Analysis

This legislation is very likely unconstitutional since it does not fit an existing exception to the First Amendment for the content-based regulation of speech, even if they were intended to be private. S.B. 465 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. There is no requirement that the person depicted suffer any harm from the distribution of the image. Without both of these elements, the legislation goes far beyond its

compelling state interest and criminalizes a substantial amount of First Amendment protected speech.

Inadequate Knowledge Standard:
The legislation is also likely unconstitutional for failing to use a specific knowledge standard to determine if the defendant knew the distribution was without consent and whether the person in the image understood that the picture would remain private. S.B. 465 is satisfied if the defendant knew or should have known these elements. This is a negligence standard and is in adequate in a law that imposes a criminal penalty on speech. 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.").

Exception for "Lawful Public Purpose" Unconstitutionally Vague

The insertion of a vague exception to liability for dissemination of images for a "lawful public purpose" does not cure the constitutional defects; rather, it makes it more likely that S.B. 465 is unconstitutional. This term is undefined and, on its face, is circular. If dissemination satisfies the elements of the bill, it is not lawful. But, if it is lawful, then there is no need for the exception. The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").

Finally, while the legislature may intend that this bill 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 New Hampshire and amend or defeat S.B. 465. We would welcome the opportunity to work with the legislature 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.