



# 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 in Opposition to North Dakota Senate Bill 2357

We believe that Senate Bill 2357 may violate the First Amendment protections for free speech. We appreciate the legislature's concern about the distribution of images that are a malicious invasion of privacy, but we respectfully ask you to amend or reconsider this legislation so that this concern can be addressed without infringing on protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including North Dakota: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 2357 bars dissemination of an image depicting "nudity" or "sexually explicit conduct" if the person in the image did not consent to the distribution, had a reasonable expectation of privacy and suffered "emotional distress or harm" as a result of the distribution. A violation is a criminal offense, and the legislation also provides the person depicted in the image a private cause of action for damages, including punitive damages. "Nudity" is defined differently in several parts of the bill. "Emotional distress or harm" is not defined at all.

We are concerned about this legislation because we fear that if enacted, publishers, booksellers, librarians and others could be prosecuted for the publication or distribution of important newsworthy, historic and educational images. The photos from Abu Ghraib, the pictures Anthony Weiner sent of himself to women he met online and the documentary *Woodstock* all include images of nudity that were distributed without the consent of the people in the images and may have resulted in emotional or other harm. Some Media Coalition members are plaintiffs in a challenge to a similar law enacted last year in Arizona. In the Arizona case, *Antigone Books v. Horne* (<http://mediacoalition.org/antigone-books-v-horne/>), U.S. District Court Judge Bolton granted a stay of the litigation and a stay of enforcement of the law at the request of the parties to allow the legislature an opportunity to amend the law. The plaintiffs in the case are four national trade associations representing publishers, news photographers, booksellers and librarians; five Arizona booksellers; and the publisher of a Phoenix newspaper.

This legislation 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," 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,

Executive Director: David Horowitz Chair: Barbara Jones, Freedom to Read Foundation  
Immediate Past Chair: Tom Foulkes, Entertainment Software Association Treasurer: Sean Bersell, Entertainment Merchants Association  
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

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; *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 articulated by the Supreme Court. *Miller v. California*, 413 U.S. 15 (1973).

Since the bill does not apply to content that fits 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. The state must also show that the legislation is not substantially overbroad or unconstitutionally vague.

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. The bill is not limited to criminalizing malicious invasion of privacy. The person in the image does not have to be identifiable. There is no requirement that the person who distributes the image do so with an intent to harass, threaten or torment the person depicted. The "emotional distress" or harm suffered by the person depicted does not have to be serious or substantial. These missing elements mean the law treats bad actors who act with a malicious intent the same as a publisher of newsworthy images that may result in emotional distress for the person depicted in an image. Without these elements, the legislation goes far beyond its compelling interest and criminalizes a substantial amount of First Amendment protected speech.

S.B. 2357 is overbroad. It applies 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.

The legislation is also overly vague because some terms are either poorly defined or not defined at all. There are three similar but different definitions of nudity. The first definition in 12.1-17-07.2.1.c (1) and (2) defines nudity as genitals, pubic area and portions of the female breast if less than opaquely covered. The second definition in 1.e (5) defines it as actual or simulated "exhibition of the genitals, pubic region, buttocks" or portions of the female breast.

The third definition in l.e. (6) is actual or simulated “nudity or partial nudity” with no description of anatomy. The other vague term is “emotional distress or harm,” which is not defined at all. “Emotional distress” could range from being embarrassed to needing professional help. It isn’t clear if harm is modified by “emotional” or if it stands on its own as a separate injury. The vagueness in these definitions may violate the Due Process Clause. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *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.’”).

S.B. 2357 may also violate the Commerce Clause of the Constitution if it allows prosecution solely because an offending image is published online and can be accessed in North Dakota. There is nothing in the bill that limits jurisdiction to residents of North Dakota or publication in the state. The Commerce Clause reserves to Congress the regulation of interstate commerce and prevents a state from imposing its laws extraterritorially. Without a limitation on jurisdiction, the bill would give North Dakota authority over any image posted on the Internet since there is no way for a publisher to prevent an image from being accessed in North Dakota. Four U.S. Courts of Appeals have struck down laws applying state obscene 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).

The legislature may intend that this bill apply to a narrower range of speech than the plain language would criminalize; 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 for the Court in *U.S. v. 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 ask you to protect the First Amendment rights of all the people of North Dakota and defeat or substantially narrow the reach of S.B. 2357. If you would like to discuss our concerns further, please contact David Horowitz, Executive Director, at 212-587-4025 #3 or [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).