MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression 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.

October 17, 2014

The Honorable Thomas Corbett
Governor, Commonwealth of Pennsylvania
225 Main Capital Building
Harrisburg, PA 17120

Request for veto of Senate Bill 508, printers number 2354

Dear Governor Corbett,

The members of Media Coalition ask that you veto S.B. 508 because it clearly violates the First Amendment rights of producers and retailers of constitutionally protected materials. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including in Pennsylvania: book and magazine publishers, booksellers and librarians, as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

This bill allows a victim of a personal injury crime to bring a civil action against any offender to obtain injunctive relief for "conduct which perpetuates the continuing effect of the crime on the victim." "Conduct which perpetuates the continuing effect of the crime on the victim" is defined as anything that causes a temporary or permanent state of mental anguish. It also allows the Attorney General or a district attorney to sue on behalf of the crime victim. The cause of action is not limited to the term of incarceration.

We acknowledge Pennsylvania's desire to protect the victims of personal injury crimes, but it cannot violate the First Amendment in doing so. This legislation could have a substantial chilling effect on the creation and dissemination of First Amendment-protected works. It would, for example, allow a crime victim to seek injunctive relief barring a person convicted of a personal injury crime to talk to a journalist, author or film director. This would significantly inhibit the ability of writers and directors to produce books, movies and works in other media. *In Cold Blood, The Executioner's Song* and *Helter Skelter* all relied on the author's ability to speak with the perpetrator of the crime. The law also could be used to block the distribution of books such as *The Autobiography of Malcolm X* and *The Sixteenth Round*, the autobiography of Rubin "Hurricane" Carter. Similarly, movies such as *Thin Blue Line*, *Paradise Lost*, about the West Memphis Three, *Hurricane*, based on *The Sixteenth Round* and *Goodfellas*, based on *Wiseguy: Life in a Mafia Family*, could be barred from distribution because they included interviews with convicted felons or were made in cooperation with them.

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This legislation would almost certainly be held unconstitutional for several reasons. First, it is a prior restraint in that it allows speech to be barred prior to publication. Preventing speech before it is published is considered the most intolerable intrusion on First Amendment rights. "Any prior restraint on speech comes with "'a heavy presumption' against its constitutional validity," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citation omitted), and may be imposed only in the most "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931)." *See also Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); *New York Times Co. v. United States*, 403 US 713, 714 (1971).

Second, as a content-based restriction on speech, the state bears the very heavy burden of demonstrating that it survives strict scrutiny – the most searching standard of judicial review under the First Amendment. In 1991, the Supreme Court, applying this standard, struck down New York's "Son of Sam" law. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991). The New York law sought to ensure that any income derived by a person convicted of a crime be set aside to compensate the victim of that crime. The State Crime Board attempted to enforce the law against Simon and Schuster for publishing *Wiseguy: Life in a Mafia Family*. The Court held that the statute was invalid because it singled out speech on a specific topic and imposed a financial burden on that speech that was not placed on speech generally or on other income of the convicted person. This legislation is more vulnerable because it imposes a prior restraint on the speech rather than a financial penalty.

Among the reasons the law would not withstand strict scrutiny is that preventing emotional harm to a crime victim does not outweigh First Amendment rights. The Supreme Court made clear in *Simon & Schuster* that the state cannot suppress speech to protect the sensitivities of crime victims: "The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers… As we have often had occasion to repeat: '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' [citation omitted] . . . .The Board thus does not assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization." *Id*. at 118.

More recently, the Supreme Court rejected an attempt to punish public speech on the ground that it inflicted emotional or mental harm on a particular viewer or listener. Specifically, in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court rejected a civil ruling imposing liability for intentional infliction of emotional distress in a case brought by the father of a deceased serviceman based on outrageous and offensive speech by protesters near the private military funeral of the plaintiff's son. The Supreme Court held that because the speech occurred in a public place and involved a matter of public concern, under the First Amendment it could not be restricted "simply because it is upsetting or arouses contempt." *Id.* at 1219. The Court cited for this proposition *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989), a flag-burning case, in which the Court declared: "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." The Court applied the same principle in *R.A.V. v. St. Paul*, 505

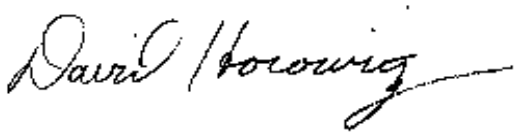
U.S. 377 (1992), where it struck down a hate crime ordinance that limited speech that "arouses anger, alarm or resentment in others," dismissing the notion that the "emotive impact of speech on its audience" was a sufficient basis to uphold the ordinance In short, the Supreme Court has repeatedly addressed the interest the bill before you seeks to protect and has squarely rejected it as a basis for restricting speech.

Because of these serious constitutional flaws, enactment of S.B. 508 could prove costly to the state. A First Amendment challenge is likely to be filed, and if a court declares the law unconstitutional, there is a strong possibility the state will be ordered to pay the plaintiffs' attorneys' fees. In past First Amendment suits brought by Media Coalition members, states have been ordered to pay the plaintiffs as much as $1,000,000 in legal fees.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Please protect the First Amendment rights of all producers and retailers of content in Pennsylvania and veto S.B. 508.

Respectfully submitted,



David Horowitz
Executive Director

cc: Katie True, Secretary of Legislation
James Shultz, General Counsel