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 Rhode Island House Bill 5770 and Senate Bills 625 and 630

The members of Media Coalition believe that House Bill 5770 and Senate Bills 625 and 630 (the legislation) likely violate the Constitution. We respectfully ask you to amend or reconsider this legislation so the concerns of the legislature are addressed without infringing on speech protected by the First Amendment. The trade associations that comprise Media Coalition have many members throughout the country, including Rhode Island: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 5770 and S.B. 625 and 630 bar dissemination of an image depicting nudity or sexual conduct if the person who does so knew or should have known that the person depicted in the image had a reasonable expectation of privacy and the picture is disseminated without the consent of the person depicted or all persons depicted in the image. A violation is subject to three years in prison, a fine of up to $3,000, or both. H.B. 5770 and S.B. 630 include a provision that re-publishers are not liable unless they have actual knowledge that the picture was initially disseminated illegally. However, since the primary crime includes anyone who receives such an image and subsequently disseminates it, anyone who republishes the image would still satisfy the elements of the crime as an original publisher. There is also a catchall to the legislation for "constitutionally protected material."

Members of Media Coalition challenged a very similar law enacted last year in Arizona. In that case, *Antigone Books v. Horne* (http://mediacoalition.org/antigone-books-v-horne/), U.S. District Court Judge Bolton granted a joint motion by the parties to stay the litigation and stay enforcement of the law 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. They brought the challenge because they fear that they could be prosecuted for the publication 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.

This legislation is a content-based regulation of speech. *United States 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, 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 & Shuster, 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 bills do not apply to content that fits into a historic exception, the speech 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 these bills are not narrowly tailored to meet that compelling state interest. The bills are 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 or torment the person depicted. Nor is there any requirement that the person depicted suffer serious harm. The person in the image does not even have to be identifiable. Without these elements, the legislation goes far beyond its compelling state interest and criminalizes a substantial amount of First Amendment protected speech.

The legislation is also 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's overbreadth is compounded by its criminalization of the disclosure of restricted images where the individual "should have known" he or she lacked the consent of a depicted person. This is a negligence standard. 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.").

The legislation may also violate the Commerce Clause of the Constitution if it allows a prosecution solely because such an image can be accessed in Rhode Island. The Commerce Clause reserves to Congress the regulation of interstate commerce and prevents a state from imposing its laws extraterritorially. The legislation would give Rhode Island jurisdiction over any image posted on the Internet since there is no way for a publisher to prevent an image from being accessed in Rhode Island. 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).

As to the catchall provision that "constitutionally protected material" is not subject to the legislation, this is inherent in all laws. It offers no additional protection to a publisher because it must be proven in court qualify for the protection of the provision. This catchall may suggest that the legislature intends these bills to apply to a narrower range of speech than the plain language of the bills 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 Rhode Island and defeat or substantially narrow the reach of H.B. 5770 and S.B. 625 and 630. If you would like to discuss our concerns further, I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,

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