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.

June 14, 2016

The Hon. Gina Raimondo
Governor
State House
Providence, RI 02903

Re: Request for veto of 16-H 7537 and 16-S 2540

Dear Governor Raimondo,

We believe that House Bill 7537 and Senate Bill 2540 violate the First Amendment protections for free speech and we respectfully urge you to veto this legislation. We appreciate the concern about the non-consensual distribution of certain images, but we caution that any legislation to restrict them must be carefully drawn to focus on the malicious invasion of privacy without infringing on constitutionally protected speech. 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.

The legislation bars the dissemination of an image of another person that contains nudity or sexual activity or sado-masochistic abuse, without the affirmative consent of the person depicted in the image, if the person received the image under circumstances in which a reasonable person would know or understand the image was to remain private. There is a second crime that bars a "third-party recipient" from distributing such an image if the person has actual knowledge of image violating the previous elements, but this crime is always going to be subsumed by the crime for the initial dissemination. There are exceptions to the legislation for the dissemination of such an image if it "serves a lawful purpose" or the image "constitutes a matter of public concern." A violation is subject to up one year in prison. There is no requirement that the distribution be done with a malicious intent, or that the person depicted in the image suffer any harm, or even be recognizable from the image or information published with it.

Last July, we successfully concluded our challenge to an unconstitutional Arizona law, which 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* (http://mediacoalition.org/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. They feared it could be used to prosecute them for selling or loaning a wide range of important newsworthy, historic, artistic, educational and other protected images.

In March, Arizona enacted a new law H.B. 2001 to replace the one that was enjoined in *Antigone Books*. The key elements in the Arizona law are: (1) display or distribution of an image of another person in a state of nudity or engaged in sexual conduct; (2) with knowledge that the person in the image has not consented to the display or distribution; (3) with the intent to harass, coerce, threaten, intimidate or cause financial harm to the person in the image; (4) the person in the image is recognizable either from the picture itself or information provided by the person who has displayed or distributed it (or a third party but only if acting in concert with the person who initially displayed or distributed it); and, (5) where the person depicted in the image had a reasonable expectation of privacy and an understanding that such image would remain private.

We believe Arizona's new law is a model for prohibiting the distribution of images that are a malicious invasion of privacy without violating free speech guarantees. Almost every other state that has enacted legislation this year has agreed. Six states have passed laws barring the non-consensual distribution of certain images and five of them are very similar to the Arizona law and include a malicious intent element. We urged the Rhode Island legislature to model this legislation on the new Arizona law, but it did not include an intent element or require that the person in the image be identifiable. Minnesota, the one state that did not include an intent element, still required that the person in the image be recognizable.

Constitutional Analysis

Some believe that there is no "right" to publish these images or that a publisher must get consent to publish such an image, but the Supreme Court begins with the opposite premise. The Court presumes that all content-based restrictions on speech are unconstitutional unless they either fit into a historic exception to the First Amendment or survive strict scrutiny analysis. This is a very high bar to overcome, and it is very rare that any content-based restriction on speech survives this legal framework. This may be unsatisfying for those to seeking regulate disfavored speech, but as the Court said, it is a "demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted). Below is the legal analysis triggered by the review of a criminal law that restricts speech.

Content-based Regulation of Speech

The first step is to determine if the law is a content-based regulation. Any law that criminalizes images based on their content fits this category. Since this legislation only applies to certain images, there is no doubt it is a content-based regulation. It is irrelevant that the images may have been intended to be private or their publication is injurious to the person who is depicted in the image. *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."). Even a law that may not be content based on its face is treated as such if it "cannot be justified without reference to the content" or was enacted "because of disagreement with the message [the speech] conveys[.]" *Reed v. Town of Gilbert, Arizona*, 576 U.S. __, ___ (2015).

Content-based Regulation of Speech is Presumed Unconstitutional

As a content-based restriction on speech, it is presumed to be unconstitutional unless it fits in one of the few historic exceptions to the First Amendment. "[T]he Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *United States v. Playboy Entertainment Group, Inc*., 529 U. S. 803, 817 (2000)." *Ashcroft v. ACLU,* 542 U.S. 656, 660 (2004). This is a bedrock principle of First Amendment doctrine. As a content-based regulation, the first step of the constitutional analysis is to determine whether it falls into a historic exception to the First Amendment. 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).

A small subset of these images may fit into the historic exceptions for obscene material under *Miller v. California*, 413 U.S. 15 (1973) or child pornography, but they are already illegal under federal and state laws that carry severe penalties. There is no historic exception to the First Amendment for a criminal law that punishes truthful "private" speech. It does not matter that the speech is distributed without the consent of the subject of the speech, even if the speech is an image that is private, embarrassing or humiliating. The news media frequently publishes private information without the consent of the subject of the speech. There are tort remedies that may be available to the victims of a non-consensual disclosure, but we have limited our analysis to criminal restrictions on speech.

Supreme Court Very Reluctant to Find New Exception to First Amendment

It is exceedingly unlikely that the Supreme Court will discover a new historic exception to the First Amendment. In recent years, the Supreme Court has repeatedly rejected arguments that it find a new categorical exception to the First Amendment, even for speech that many find offensive or upsetting. In *Ashcroft v. Free Speech Coalition*, the Court overturned a law that criminalized computer-generated images that appear to be of a minor engaging in sex and images of an adult that appears to be a minor engaging in sexual activity even though the government argued that it was necessary to prevent fueling the market for pornography created using actual minors. 535 U.S. 234 (2002). In *Stevens*, the Court ruled that a law criminalizing depictions of actual animal cruelty is an unconstitutional content-based restriction on speech. 559 U.S. 460. In *Brown*, the Justices found no historic exception to the First Amendment for the sale to minors of video games with violent content that is "patently offensive" and lacks "serious value." 131 S. Ct. 2729 (2011). In *U.S. v. Alvarez*, the Court struck down a law that barred lying about a

receiving a medal or commendation for military service. 132 S. Ct. 2537 (2012). *See also Sorrell v. IMS Health, Inc*., 131 S. Ct. 2653 (2011) (sale of pharmaceutical data for commercial purposes); *Citizens United v. FEC*, 558 U.S. 310 (2010) (independent electioneering by corporations and unions); *Reed*, 576 U.S. __ (2015) (regulation of commercial and non-commercial signs).

Strict Scrutiny Analysis

If a content-based law does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 813. Again, there is no separate test for "private" speech. 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 id.; 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 legislation very likely fails strict scrutiny analysis since it is not narrowly drawn to address a compelling state interest. As noted above, the bill is not limited to criminalizing a 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. Nor is there any requirement that the person depicted suffer any harm. Without these elements, the legislation goes beyond its compelling state interest and criminalizes a substantial amount of First Amendment protected speech.

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as "a government objective of surpassing importance." 458 U.S. 747, 757 (1982). So, the legislature may have a compelling interest in protecting individuals from being harassed, threatened or intimidated, but protecting them from embarrassment or even emotional distress is not sufficient to justify a content-based ban on speech. In *Simon & Schuster*, the Supreme Court considered whether New York's "Son of Sam" law was constitutional. The Court raised the question of whether the mental anguish suffered by the crime victim and his or her family outweighed First Amendment rights of speakers. It quickly dismissed that notion:

> "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."

503 at 118.

Privacy is an important right but the Supreme Court has held that by itself it is not a sufficiently compelling to justify a content-based criminal law that limits the First Amendment right to free speech. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a statute allowing a rape victim to seek damages for the publishing of his or her name. Justice White wrote, "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S. 469, 496. The Court has also overturned laws and vacated court orders that barred speech about a criminal proceeding intended to protect a defendant's privacy. *See Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

Even if the legislation is found to address a compelling state interest, it must still be narrowly drawn to meet that interest. *See*, *Sable Communications of Cal., Inc. v. FCC*, 492 US 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). The legislation must be carefully focused on the malicious invasions of privacy, since distribution of an image without consent of the person depicted without any harmful intent or resulting injury does not rise to the level of a compelling interest. Narrowing the legislation to distribution with an intent to harass, stalk, threaten or cause similar serious harm would target malicious acts without burdening protected speech.

Finally, even if the law is narrowly tailored, it must still be the least restrictive means to accomplish the compelling state interest. 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. 844, 874 (1997). The Court found that user-empowerment tools such as filters were less restrictive than a criminal law. So a court could strike down this kind of legislation if it finds that civil actions or copyright law could effectively prevent or punish distribution of non-consensual images with less impact on protected speech.

<u>Overbreadth and Vagueness</u>

Even if a law satisfies strict scrutiny, it must still be reviewed for overbreadth so it does not sweep in speech that is not the subject of the compelling state interest. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Here the lack of elements that would narrow the scope of the law makes it very likely that it would criminalize images beyond those that justified by the compelling state interest.

The last part of the review is to determine if the legislation is sufficiently clear to be understood by the common person. 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.'"). Here, the legislation provides an exception for an image distributed with a "lawful purpose." This term has no discernible meaning in this context. If it is legal to publish

an image, or any other speech, it does not need a specific purpose. The law also uses terms such as "legitimate purpose," "matter of public concern" and "reasonable expectation of privacy." These terms may have legal meanings in other contexts but have none in determining whether speech may be criminalized. All of these examples are inherently vague to a publisher and the lack of definition will inevitably lead to a chilling effect on speech.

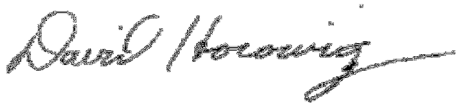
The "Public Concern" or "Lawful Purpose" Exceptions Do Not Cure the Bills' Deficiencies

The exemption from liability for dissemination of images that "constitute a matter of public interest" or for publication that serves a "lawful purpose" (whatever these vague terms mean) cannot cure an otherwise unconstitutional law. The first exception is imported from libel law but has no place in the analysis of a content-based regulation. The latter, as noted above, has no reasonable meaning in this context. Both exceptions suggest that some speech is less valuable than others, and thus gets less protection from the First Amendment, but the Supreme Court has dismissed this notion. Again in the *Stevens* case, the government argued that speech may be subjected to a test balancing "the value of the speech against its societal costs." Chief Justice Roberts dismissed this notion, "[a]s a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." 559 U.S. 460, 472. The law in *Stevens* included an exception for images that had "serious value," borrowed from the standard for obscenity. The Court specifically rejected the notion that a safe harbor for speech with value could save an unconstitutional law: "[w]e did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place." *Id*., at 477.

Finally, passage of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very good possibility that the state will be ordered to pay the plaintiffs' attorney's fees. In the challenge to the Arizona law, the state agreed to pay the plaintiffs $200,000 in legal fees, even though the case never proceeded past a very initial phase.

We respectfully ask you to protect the First Amendment rights of all the people of Rhode Island and veto H.B. 7537 and S.B. 2540. We would welcome the opportunity to discuss further our reasoning about why this legislation is unconstitutional. I'm available at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,



David Horowitz
Executive Director

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