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 7537

We believe that House Bill 7537 violates the First Amendment protections for free speech and we respectfully urge the committee to amend the bill. We appreciate your concern about the distribution of these 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.

H.B. 7537 bars the dissemination of an image of another person that contain 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. There is an exception to the legislation for the dissemination of such an image if "serves a lawful purpose" or the image "constitutes a matter of public concern." A violation is subject to up one year in prison.

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.

The Arizona legislature is expected to enact H.B. 2001 (http://www.cqstatetrack.com/texis/redir?id=564fcea34&rtype=text&original=y) to replace the law that enjoined in *Antigone Books*. We believe this bill is a model for prohibiting the distribution of images that are a malicious invasion of privacy without violating free speech guarantees. The key elements in the Arizona bill 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, extort or intimidate 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

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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. These elements are necessary to overcome the strong presumption that any content-based regulation violates the First Amendment.

Some believe that there is no "right" to 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 fit into a historic exception to the First Amendment or survive strict scrutiny analysis, even if the speech was meant to remain private. 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 we walk through the legal analysis triggered by the review of such a law.

Content-based Regulation of Speech

Any law that criminalizes images based on their content fits this category. 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

"[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).

There is no historic exception for criminalizing speech that is distributed without the consent of the subject of the speech, even if the speech is an image that is private, embarrassing or humiliating. 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 the exception for child pornography, but they are already illegal under federal laws that carry severe penalties. There are tort remedies that fit within a historic exception and 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 very unlikely that the Supreme Court will 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. 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 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 and 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.

The reaction of the general audience to the speech is also not enough to overcome the First Amendment. The Court in *Texas v. Johnson* said, "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." 491 U.S. 397, 414 (1989). *See also, R.A.V.*, 505 U.S. 377 (striking down a statute that limited speech that "arouses anger, alarm or resentment in others"); *Free Speech Coalition*, 535 U.S. at 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it").

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."). Since distribution of an image without consent of the person depicted without any harmful intent or result does not rise to the level of a compelling interest, the legislation must be carefully focused on the malicious invasions of privacy. 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 bar 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 potential overbreadth of the legislation may be compounded by failing to use a specific knowledge standard in determining if the defendant knew the distribution was without consent and whether the person in the image understood that the picture would remain private. Here a defendant is liable if a reasonable person should have known or understood an element of a law is being satisfied. This is a negligence standard. In *Smith v. California*, the Supreme Court ruled that laws restricting access to speech must include a scienter requirement. 361 U.S. 147 (1959). In a case seeking civil damages for an invasion of privacy, the Court held that the First Amendment requires more than a mere negligence standard. *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….").

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 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 they have none whether speech may be criminalized. They are inherently vague to a publisher and the lack of definition will inevitably lead to a chilling effect on speech.

A "Public Concern" Exemption Does Not Cure the Draft's Deficiencies

The exemption from liability for dissemination of images that "constitute a matter of public interest" (whatever that vague term means) cannot cure an otherwise unconstitutional law. This concept is imported from libel law but has no place in the analysis of a content-based regulation. A publisher's First Amendment rights cannot be limited to what a prosecutor, judge or jury may find to be "a matter of public concern." This suggests 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.

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We respectfully ask you to protect the First Amendment rights of all the people of Rhode Island and amend or defeat H.B. 7537. We would welcome the opportunity to assist in any way during this process. If we can be of assistance, please contact me, at 212-587-4025 #3 or horowitz@mediacoalition.org.