THE MEDIA COALITION
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 to House Judiciary Committee in Opposition to House Bill 1243

We believe that House Bill 1243 violates the First Amendment protections for free speech and we respectfully urge the committee to amend the bill. We appreciate the legislature's concern about the distribution of images that are a malicious invasion of privacy, but this legislation goes beyond those concerns to infringe on constitutionally protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including South Dakota: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 1243 bars the dissemination of images of another person "without clothing or under or through the clothing of the person, or with the person depicted in a sexual manner" without the consent of the person depicted in the image. The bill does not define whether "without clothing" is limited to someone who is completely nude. It does not define whether certain body parts must be visible through or under clothing. Nor does it define "sexual manner."

It may be well intentioned but it is clearly unconstitutional. The present version is wildly overbroad in that it would criminalize the publication of the photos from Abu Ghraib, the pictures Anthony Weiner sent of himself to women he met online and the documentary *Woodstock*, which all include images of nudity that were distributed without the consent of the people in the images. We firmly believe that any legislation in this area must be narrowly tailored to address the malicious invasions of privacy without impinging on free speech.

We urge the committee to amend the bill to criminalize the malicious invasion of privacy without threatening publishers, librarians, news sources and documentary filmmakers. We strongly recommend that any proposed bill must include these elements: (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 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.

In July, we successfully concluded our challenge to an Arizona law very similar to H.B. 1243 that 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, without ever submitting any documents to the court making

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a legal defense of the law: *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. Rather, it applied to important newsworthy, historical, educational and artistic images. The sponsor of the Arizona law introduced H.B. 2001 to replace the one the state agreed was unconstitutional. It includes all of the elements we cited above as necessary to overcome the First Amendment.

This legislation also lacks a malicious intent element and could be used to prosecute a publisher or distributor of an image even though there is no intent to harass, threaten, coerce or terrorize the person depicted. Absent the intent standard, many publishers will decide not to print any image that could invite prosecution because of the risk of violating the law. They do not want to risk their freedom to a jury's decision on whether they should have known the person depicted in the image did not consent or intended the picture to remain private.

H.B. 1243 is unconstitutional because it does not fit an existing exception to the First Amendment and cannot survive strict scrutiny analysis. This bill 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."). 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).

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, . . . [the First Amendment has] "permitted restrictions upon the content of speech in a few limited areas." [These] "historic and traditional categories long familiar to the bar[ ]"[ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

Stevens, 559 U.S. 460, 468 (2010). *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). The images covered in this bill go far beyond what may be criminalized in any of the historic exceptions to the First Amendment. 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 this content is already illegal under state and federal laws that carry severe penalties.

Nor is the Court likely will find a new categorical exception to the First Amendment, even for speech that many find offensive or upsetting. The Justices have expressed great skepticism when asked to do so. 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 v. Entertainment Merchants Association*, 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).

Since H.B. 1243 does not fit into a historic exception and the Court will not create a new exception to the First Amendment, the speech must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. 803, 826-7 (2000). 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. 105, 118 (1991).

It is very unlikely that this legislation could satisfy any part of the strict scrutiny test, let alone each part of the test. There is no articulable compelling state interest to satisfy the broad reach of this bill. The bill is not limited to protecting individuals who have suffered harm from the publication of the image or punishing those who intend to cause harm to the person depicted. Privacy is an important right but the Supreme Court has held that by itself, it is not a sufficiently compelling interest for a content-based restriction to overcome the First Amendment. The Court has often struck down laws and vacated court orders that barred speech about a criminal proceeding in order to protect a defendant's privacy. The Court found that the First Amendment right to publish outweighed privacy interests when it struck down a West Virginia law that barred publishing the name of a minor being adjudicated in juvenile court. *Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979). *See also, 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).

Similarly, offensiveness or embarrassment, whether to a group or an individual, is also not sufficient compelling interest to overcome the First Amendment, even if the speech is a photograph. The Supreme Court has often held that the First Amendment protects speech even if it is intended to offend. 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, 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"); *R.A.V.*, 505 U.S. 377 (1992) (struck down a statute which limited speech which "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."); *Carey v. Population Services Int'l*, 431 U. S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

Even if the legislation is found to address a compelling state interest, it is not narrowly drawn to meet that interest. *See*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 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 bill is not limited to the malicious invasion of privacy, so it would apply 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. 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.

The bill must also 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.

If the legislation 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 well 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. As noted above, the legislation is vague about what "without clothes" means. It does not define "sexual manner." It also does not give guidance what it means to take a picture through someone's clothing. 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.'").

Finally, while the legislature may intend that this bill apply only to malicious invasions of privacy, there is nothing in the bill that limits it to those targets. 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 the Supreme Court held in *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 respectfully ask you to protect the First Amendment rights of all the people of South Dakota and amend or defeat H.B. 1243. We would welcome the opportunity to work with the legislature to address the issues raised in our memo. If you would like to discuss our concerns, please contact David Horowitz, executive director, at 212-587-4025 #3 or horowitz@mediacoalition.org.