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.

Memo in Opposition to Texas House Bills 101 and 603

The members of Media Coalition believe that House Bills 101 and 603 violate the Constitution. We respectfully ask you to amend this legislation so that it addresses the concerns of the legislature without infringing on the right of free speech. The trade associations that comprise Media Coalition have many members throughout the country, including Texas: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 101 and 603 would both make it a crime to disseminate, advertise or otherwise disclose in any manner an image of another person either nude or engaging in sexual conduct if one knows or should have known that the person in the image did not consent. There is no limit on the reach of the legislation so it would subject anyone who publishes such a picture on the Internet that is accessible in Texas to prosecution regardless of whether they have any other contact with the state.

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 booksellers; and the publisher of a local 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.

These bills may be well-intentioned but they are clearly unconstitutional. 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 . . .

United States v. Stevens, 130 S. Ct. 1577, 1584 (2010). *See also*, *R.A.V.*, 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).

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The historic exception for obscenity does include some nude and sexual images but this legislation goes far beyond the definition of such material. Obscenity is limited to speech which meets a specific definition enunciated by the Court in *Miller v. California.* 413 U.S. 15 (1973). In *Miller*, the Supreme Court created a three-part test that defined obscene material as descriptions or depictions of sexual conduct or lascivious nudity when, taken as a whole,

i. Predominantly appeals to the prurient, shameful or morbid interest in sex;
ii. Is patently offensive by prevailing community standards; and
iii. Lacks serious literary, artistic, political or scientific value.

This legislation is not limited to material that is obscene because it does not include any part of the *Miller* test. Sexual content that does not satisfy all parts of the *Miller* test is fully protected by the Constitution. Obscene images are defined in §43.21 of Texas criminal code and their promotion or distribution is illegal under §43.22 and 43.23.

There is no exception to the First Amendment for speech that offends or embarrasses a large group of people or just the subject of the speech, even it is a photograph. The Supreme Court has made clear that the First Amendment protects speech even if it is intended to offend, annoy or embarrass. 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. *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. v. City of St. Paul*, 505 U.S. 377 (1992) (struck down a statute which limited speech which "arouses anger, alarm or resentment in others"); *Ashcroft v. 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."); *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"); *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").

Nor has the Supreme Court indicated any willingness to create new categories of unprotected speech even for speech that many find offensive or upsetting. In three recent cases the Court has struck down attempts to do so. In *Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729 (2011), the Court found that there is not an exception for the sale of "patently offensive" violent video games to minors. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court declined to create an exception for outrageous and upsetting speech in the vicinity of a private military funeral. And in *United States v. Stevens*, the Court ruled that there is not a new First Amendment exception for depictions of actual animal cruelty. 130 S. Ct. 1577.

Since H.B. 101 and 603 do not fit into a historic exception, the speech must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-7 (2000). Given that they would apply to material based on its content, they are immediately

constitutionally suspect. The Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. at 382 (1992). 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. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). It must also show that the legislation is not unconstitutionally overbroad. It is very unlikely that this legislation could satisfy any part of the strict scrutiny test, let alone each part of the test.

The legislation also likely violates of the Commerce Clause of the Constitution as it applies to speech distributed on the Internet. The Commerce Clause reserves to Congress the regulation of interstate commerce and prevents a state from imposing its laws extraterritorially. This legislation would give Texas jurisdiction over any image posted on the Internet since there is no way for a publisher to prevent an image from being accessed in Texas. Four U.S. Courts of Appeal have struck down state laws applying state obscenity for minors laws to the Internet for this reasons. *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 v. Engler,* 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson,* 194 F. 3d 1149 (10th Cir. 1999).

Nor is this legislation saved by merely adding an exception for images that are newsworthy or of interest to the public. This exception is predicated on some images having greater value than others. In *United States v. Stevens,* the Supreme Court dismissed the notion that speech may subjected to a test balancing "the value of the speech against its societal costs." As Chief Justice Roberts wrote, "As 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." 130 S.Ct. at 1585.

The legislature may intend H.B. 101 and 603 to apply to a narrower range of speech than the plain language of these bills could 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. Again, Chief Justice Roberts writing for the Court in *Stevens*, "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 130 S.Ct. at 1591 (2010).

We believe that the legislature can pass a law that is narrowly tailored to address malicious invasions of privacy without impinging on free speech. The elements of such a law must be limited to (1) a person who was or is in an intimate relationship with another person and who, (2) during and as a result of that relationship, obtained a recognizable image of such other person in a state of nudity or engaged in sexual conduct, (3) where such other person had a reasonable expectation of privacy and an understanding that such image would remain private,

(4) to display such image (5) without the consent of such other person, (6) with the intent to harass, humiliate, embarrass, or otherwise harm such other person, and (7) where there is no public or newsworthy purpose for the display. If the Legislature incorporates these elements in the definition of the offense, it will be able to craft a statute that fully serves its important purpose, without infringing the free speech rights.

Passage of these bills could prove costly. If a court declares them unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In a recent case brought by members of Media Coalition the state agreed to pay fees of $350,000.

We ask you to protect the First Amendment rights of all the people of Texas and defeat or amend H.B. 101 and 603. 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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