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.

The Honorable Greg Abbott
Governor
Office of the Governor
P.O. Box 12428
Austin, Texas 78711-2428

Re: **Request for Veto of Senate Bill 1135**

Dear Governor Abbott,

We believe that Senate Bill 1135 is unconstitutional for numerous reasons and respectfully ask you to veto it. We appreciate the legislature's concern about the distribution of images that is a malicious invasion of privacy, but this bill goes far beyond this concern to threaten the First Amendment right to distribute images that are newsworthy, educational, historical and artistic. The bill must be returned to the legislature so that it can be narrowed to address their concerns without infringing on free speech and other important constitutional rights. The trade associations that comprise Media Coalition have many members throughout the country, including Texas: publishers, booksellers and librarians, producers and retailers of home video home video, recordings and video games.

We read S.B. 1135 broadly because it includes specific language the states that it should be given a "liberal construction and application." The bill bars distribution or promotion of an image depicting nudity or sexually explicit conduct if the person in the image did not consent to the distribution, the image was obtained or created under circumstances that the person depicted had a reasonable expectation that it would remain private, the person identifiable by the image or accompanying information even if the identifying information is added by a third party separate from the publication and the dissemination caused harm to the person in the image. There is no requirement that the law be violated knowingly or intentionally. A violation is a criminal offense, and the legislation also provides a private cause of action to the person depicted in the image to sue for a wide array of damages, including punitive damages. "Harm" is not defined in the bill.

We are deeply concerned about this legislation because we fear that if enacted, publishers, booksellers, librarians and others could be prosecuted for the publication or distribution of important newsworthy, historic, artistic and educational images. The photos from Abu Ghraib, the pictures Anthony Weiner and Brett Favre sent of themselves to women they knew and the documentary *Woodstock* all include images of nudity that were distributed without the consent of the people in the images, created with a reasonable expectation they would remain private and resulted in some kind of harm. Some Media Coalition members are plaintiffs in a challenge to a similar law enacted last year in Arizona. In the Arizona case, *Antigone Books v.*

Horne (http://mediacoalition.org/antigone-books-v-horne/), U.S. District Court Judge Bolton granted a stay of the litigation and a stay of enforcement of the law at the request of the parties 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. The First Amendment arguments made in the Arizona litigation are exacerbated under this legislation because it lacks a requirement that the publisher knowingly violated it and a publisher can be prosecuted based on the actions of an a third party with whom he or she has no connection.

Content-based restriction on speech subject to strict scrutiny

This legislation 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."). 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 & Schuster, 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 articulated by the Supreme Court. *Miller v. California*, 413 U.S. 15 (1973).

Since the bill does not apply to content that fits a historic exception, it 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. The state must also show that the legislation is not substantially overbroad or unconstitutionally vague.

Fails Strict Scrutiny Analysis

The legislation fails strict scrutiny analysis. The legislature may have a compelling interest in protecting individuals from being harassed or tormented, but this bill is not narrowly tailored to meet that compelling state interest. The bill is 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, torment or even cause serious harm to the person depicted. The bill does not even require that the images be published knowing they will an undefined and amorphous "harm," let alone an intent to cause it. The missing element of intent means S.B. 1135 treats bad actors who post pictures with a malicious intent the same as a publisher of newsworthy images that may result in "harm" for the person depicted in an image. Without these elements, the legislation goes far beyond its compelling interest and criminalizes a substantial amount of First Amendment protected speech.

S.B. 1135 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 politicians in compromising positions. The legislation sweeps in not just malicious invaders of privacy, but also countless Internet users who innocently repost online images.

<u>Void for Vagueness</u>

The legislation is also unconstitutionally vague because "harm" is not defined. It is an essential element of the crime but the use of "harm" without any qualifying adjectives means a publisher has no guidance on whether the law applies to any negative emotional response or more serious emotional or physical injury. In *Kramer v. Price*, the Fifth Circuit struck down a Texas stalking law for vagueness because it failed to adequately define the term "annoy." The Court found the word to be inherently vague, even where the statute required the defendant to act with an intent to annoy. 712 F.2d 174 (5th Cir.1983). 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.'"); *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996).

<u>Lacks a Knowledge Standard</u>

Another fatal flaw in the bill is the lack of a knowledge standard in the bill. The Supreme Court has held that violations of laws that restrict speech must be done knowingly or the person cannot be held liable. If this bill becomes law, a person can be prosecuted without having any knowledge that he or she has violated any of the elements of the crime, let alone all of them. Here, a person is liable if he or she publishes a nude image without knowing he or she lacked consent or even believing there was consent because the images was previously published, without any knowledge that the picture was created under circumstances that the person depicted have a reasonable expectation that it would remain private, that the publication caused harm and without knowing who the person in the picture is. In *Smith v. California*, the Supreme Court ruled that laws restricting access to speech must include a scienter requirement. A bookseller could not be prosecuted if he or she had no knowledge of the contents of a book or magazine. 361 U.S. 147, 80 S.Ct. 215 (1959). In his majority opinion, Justice Brennan stated, "For if the

bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. *Id*. at 153. In *Hamling v. United States*, Justice Rehnquist wrote for the Court, "We think the 'knowingly' language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. 87 at 124-125. See also, *United States v. X-Citement Video, Inc*., 513 US 64 (1994); *Mishkin v. New York*, 383 US 502 (1966); *Manual Enterprises, Inc. v. Day*, 370 US 478 (1962).

Cannot Impose Criminal Liability on a Publisher for Speech of Third Party

The problem of the absence of a knowledge standard is compounded because the law allows a publisher to be prosecuted for the actions taken by another person. Under S.B. 1135, a person can innocently re-post a picture without any idea who the person is in image is or the circumstances of the creation of the image. If a third party identifies the person in the image, the re-poster becomes liable for prosecution.

Alternatively, a news site can be prosecuted for publishing a newsworthy image of a prominent figure engaged in sexual conduct with someone who is not his or her spouse if a third party "outs" the other person in the image. The news site would violate the law even if it had obscured the identity of the second person in the image to protect his or her identity. The First Amendment and the Due Process clause of the Constitution bar the imposition of criminal liability on a publisher as a result of the actions of another person. This liability is even more suspect when the action of the other person is speech that is independent of the original publisher. Courts have repeatedly struck down lawsuits seeking to impose civil liability on the media for actions allegedly taken in response to speech. *See Herceg v. Hustler Magazine*, Inc. 814 F.2d 1017 (5th Cir. 1987) (court reversed jury verdict in wrongful death action brought by parents against publisher for adolescent's death allegedly caused by article that described autoerotic asphyxia).

Violates the Commerce Clause

S.B. 1135 likely also violates the Commerce Clause of the Constitution. Since it does not limit its reach to either the plaintiff or the defendant being present in the state, it should be read as allowing prosecution solely because an offending image is published online and can be accessed in Texas. The Commerce Clause reserves to Congress the regulation of interstate commerce and prevents a state from imposing its laws extraterritorially. Our federal system necessarily forbids one state from directly regulating commercial activity occurring entirely outside its borders or regulating in-state conduct with the "practical effect of exporting that state's domestic policies" to every other state. *Am. Libraries Ass'n. v.Pataki*, 969 F. Supp. 160, 174 (S.D.N.Y. 1997); *see also Healy v. Beer Inst*., 491 U.S. 324, 336 (1989) ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."). The legislation falls within this proscription. Booksellers both inside and outside of Texas offer, to readers across the nation, millions of books for sale online, including books containing images that could violate this bill. Without a limitation on

jurisdiction, the bill would give Texas authority over any image posted on the Internet since there is no way for a publisher to prevent an image from being accessed in Texas.

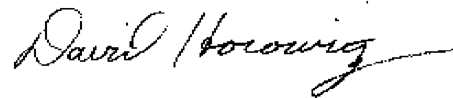
Conclusion

Finally, the legislature may intend that this bill apply to a narrower range of speech than the plain language 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.

Enactment of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In a recent challenge brought by members of Media Coalition to a law that violated the First Amendment, Utah paid to the plaintiffs over $350,000 in legal fees for a case resolved in U.S. District Court without any appeals.

We ask you to protect the Constitutional rights of all the people of Texas and veto S.B. 1135. If you would like to discuss our concerns further, please contact me at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,



David Horowitz
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