



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 Senate Bill 1512

The members of Media Coalition believe that Senate Bill 1512 may threaten the distribution of First Amendment-protected material in Texas. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Texas: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

S.B. 1512 would deem “sensitive crime scene” photos as not subject to public disclosure under Texas’s Public Information Act. The “news media” can obtain access to the photos by seeking a court order but only if one is a “bona fide member of the news media who is engaging in news-gathering activity.” “News media” is narrowly defined as a television or radio station that is licensed by the Federal Communications Commission; certain newspapers; and magazines that publish at regular intervals and are of interest to the general public in connection with the dissemination of news or public affairs. This definition excludes book authors or publishers, documentary filmmakers, cable news shows, online publishers who publish frequently but not at regular intervals and trade journals or other publications that do not appeal to the general interest. There is no definition of a “bona fide member of the news media.”

This bill is constitutionally suspect for several reasons. First, it treats different media differently by allowing access to the images to some segments of the media but not others. This is, in essence, a punishment for book authors or filmmakers. The Supreme Court has condemned the selective imposition of a penalty imposed on one medium but not others or specific portions of a media but not others. *See, United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812 (2000) (striking down a regulation that targeted “adult” cable channels, but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 659 (1994) (“Regulations that discriminate among media ... often present serious First Amendment concerns.”) “Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State.” *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 228 (1987).

Given these rulings by the Supreme Court it is likely that S.B. 1512 would have to satisfy strict scrutiny to survive a legal challenge. To do so 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 is very unlikely that this legislation could satisfy any of the parts of the strict scrutiny test.

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S.B. 1512 offers no articulable rationale for providing access to the pictures to reporters or broadcasters but denying it to other members of the media. In *Brown v. Entertainment Merchants Association*, California failed to satisfy strict scrutiny in banning minors from buying or renting video games with certain violent imagery but not applying the ban to other media. 564 U.S. \_\_\_, 131 S. Ct. 2729 (2011). Justice Scalia wrote for the Court, “California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.” *Id.*, at \_\_\_, 131 S.Ct. at 2740. If the legislation is motivated by an intent to protect the privacy of the survivors of those depicted in the crime photo, it clearly does not serve that rationale when the photos are otherwise available to newspapers and broadcasters.

The bill is also likely unconstitutionally vague. It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Winters v. New York*, 333 US 507, 509 (1948). S.B. 1512 includes numerous terms that are not adequately defined to meet this standard. It does not define what is a “bona fide” member of the news media. It does not offer a clear distinction between a “general interest” to the public and narrow or specific interest to the public. The definition of “sensitive crime scene image” is not limited to photos of a crime scene. This lack of specificity can only be resolved through litigation which creates a burden on speakers and causes a significant chilling effect.

Further, the legislation cannot be cured by promising to interpret in a manner that will not inhibit free speech. As Justice Roberts wrote in *U.S. v. Stevens*, “But the 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.” 595 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1577, 1591 (2010).

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

Please protect the First Amendment rights of all Texans and amend or defeat this restriction on speech of certain media.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

David Horowitz  
Executive Director  
Media Coalition, Inc.  
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