

Memo in Opposition to Wisconsin Assembly Bill 462 as amended

The members of Media Coalition believe that Assembly Bill 462 as amended may still violate the Constitution. We respectfully ask you to further amend this legislation so the concerns of the legislature are addressed without infringing on the right of free speech. The trade associations that comprise Media Coalition have many members throughout the country, including Wisconsin: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

A.B. 462 would make it a crime to disseminate a nude or partially nude depiction of a person when that person depicted intends that it not be disseminated to anyone else. “Nude” or “partially nude” is defined as less than opaque covering of the genitals, pubic area, buttocks or female breasts or male genitalia in a discernibly turgid state. The legislation allows anyone who publishes a picture on the Internet under such circumstances to be prosecuted under this law in Wisconsin. The bill does include an exception for images that are newsworthy or of public importance.

Despite the amendments, A.B. 462 is still a content based speech regulation that does not fit within an existing exception to the First Amendment. There is no exception for speech that offends or alarms. 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. 377, 382 (1992). Since A.B. 462 does 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). 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.

A.B. 462 likely fails strict scrutiny for several reasons. First, it is not narrowly tailored to meet a compelling state interest. There is no requirement in the bill that the person who distributes the picture intend to cause emotional harm to the person depicted nor that the person depicted suffer any emotional harm. Without this element, it is unclear what state interest the legislation is serving.

The legislation is also likely overbroad and vague. It is not limited to pictures taken where the person depicted has a reasonable expectation of privacy. Consequently, this could apply to a picture taken in public as long as the person depicted intends that it not be distributed.

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This element of intent does not include a commensurate understanding by the person taking the picture. The legislation does not make clear that the intent of the person depicted must be established at the time the picture was captured or given to the recipient. It does not make clear that the intention must be communicated to the person taking the picture in a manner that this person understands and acknowledges. It also does not make clear that the intent that the picture be private cannot be invoked at a later time by the person depicted. The bill may also be overly broad in that it applies to all depictions, rather than being limited to photographic images. It could apply to drawings or computer generated images too.

The legislation likely violates 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. A.B. 462 would give Wisconsin jurisdiction over any image posted on the Internet since there is no way for a publisher to prevent an image from being accessed in Wisconsin. Four U.S. Courts of Appeal have struck down state laws applying state obscenity for minors laws to the Internet for this reason. 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).

The legislature may intend A.B. 462 to apply to a narrower range of speech than the plain language of the bill 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 ask you to protect the First Amendment rights of all the people of Wisconsin and defeat or amend A.B. 462 as amended. If you would like to discuss our concerns further, I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.