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 Wisconsin Assembly Bill 462 and Senate Bill 367

The members of Media Coalition believe that Assembly Bill 462 and Senate Bill 367 violate the Constitution. We respectfully ask you to 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 and S.B. 367 would make it a crime to disseminate in any manner a nude or partially nude image of an adult person without his or her consent even if the person had consented to the image being taken or if the image was initially distributed by the subject of the image. "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.

This legislation could criminalize the re-publication of pictures Anthony Weiner sent of himself to women he met online. It could make it illegal to show the documentary film "Woodstock" about the music festival that contains images of partially nude concert attendees. It could bar re-publication of a picture that recently appeared on the cover of the New York Times to illustrate a story about breast cancer. The publication or republication of any of these images without the consent of the person depicted would violate this law.

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. St. Paul*, 505 U.S. 377 (1992) (struck down a statute which limited speech which "arouses anger, alarm or resentment in others"); *Free Speech Coalition v. Ashcroft*, 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").

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. at 382-83; *Free Speech Coalition v. Ashcroft*, 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).

While the historic exception for obscenity includes some nude or sexual images, this legislation applies to a much broader range of 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 outside the obscenity exception as it does not include any of the parts 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 illegal in Wisconsin under § 942.11 of the criminal code.

Nor has the Supreme Court shown any inclination to create a new category of unprotected speech even for content some 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 A.B. 462 and S.B. 367 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. 377, 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 is also likely a violation 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 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 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).

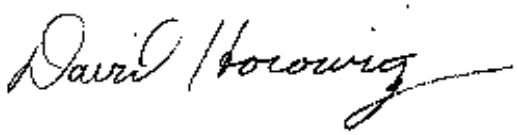
Nor is this legislation saved by creating an exception for images that are newsworthy or of interest to the public. This exception is predicated on some images having greater value than others. In *US v. Stevens*, the Supreme Court dismissed the notion that speech may subjected to a test balancing "the 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 A.B. 462 and S.B. 367 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).

Passage of this overbroad bill could prove costly. If a court declares it 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 Wisconsin and defeat or amend A.B. 462 and 367. If you would like to discuss our concerns further, I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,



David Horowitz
Executive Director