THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America Recording Industry Association of America

Memo in Opposition to Alabama House Bill 180

We believe that Alabama House Bill 180 likely violates the First Amendment, and we respectfully urge the legislature to amend or defeat the bill. We understand the desire to provide restitution for victims of crimes, but the state cannot place a special burden on specific speech. The bill also imposes obligations on parties that have no contacts with the state of Alabama. The trade associations and other groups that comprise Media Coalition have many members throughout the country including Alabama: publishers, authors, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 180 deems to be profit from a crime any income generated from a movie, book or any other media that describes or depicts the crime and includes any thoughts, feelings, opinions, or emotions of "an individual" (presumably this is meant to be the person convicted of the crime). Any publisher, producer or other speaker who agrees to pay the person convicted of a crime any share of the profits from such speech, must give the board of adjustment (the board) written notice of the payment or obligation to pay. Failure to report is subject to a fine of $1,000 or 10 percent of the contract obligation, whichever is greater. There is no jurisdictional limitation on the reporting requirement.

The bill as drafted is likely unconstitutional because it explicitly burdens speech by a particular category of speaker on a particular subject. The burden would be two-fold: a burden on the publisher or producer to report the contract to the state adjustment board at the risk of a fine for failing to do so, which in itself could discourage the publisher or producer from pursuing sensitive projects and is compounded by the financial penalty for failing to do so; and a burden on the convicted person, whose payments in connection with expressive activity are singled out from other sources of income for restitution.

As a content-based burden on speech, H.B. 180 would be subject to strict scrutiny analysis. *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. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute).

A reporting requirement limited to income derived from telling the story of the crime is likely to fail the strict scrutiny analysis. While it may be a compelling interest to provide financial compensation to the victim of a crime, creating a financial disincentive to produce speech about certain topics or events does not serve that purpose. Rather, the limitation on income subject to the reporting requirement suggests that goal of the legislation is more likely to discourage speech about certain topics and diminishing the money available to compensate the victims of crime.

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Burdening protected expression in this manner violates the First Amendment, according to the Supreme Court. A statute is "presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the N. Y. State Crime Victims Bd.,* 502 U.S. 105, 115 (1991). This presumption is particularly strong in the context of financial regulation of speakers, as "the government's ability to impose content-based burdens on speech [through such regulations] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116. In order to overcome this presumption, a content-based statute must be narrowly drawn to achieve a compelling state interest.

Unlike the New York law at issue in *Simon & Schuster,* H.B. 180 would not require deposit of payments made under the contract into an escrow fund, but the burdens on speech that the bill would impose raise the same First Amendment concerns that the Supreme Court identified in *Simon & Schuster.* In that case, the Supreme Court found that New York's "Son of Sam" law was content-based because it "single[d] out income derived from expressive activity for a burden the state place[d] on no other income" and was "directed only at works with a specified content." 502 U.S. at 116. In striking the down the law, the Court explained that although the State had "a compelling interest in compensating victims from the fruits of crime," it had "little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime." 502 U.S. at 120-21.

Like the New York law at issue in *Simon & Schuster,* H.B. 180 is clearly content-based, as it applies to media that includes depictions or descriptions of the thoughts or views of the perpetrator. By requiring the reporting of contracts involving expressive works relating to specific criminal acts - apparently to facilitate payment restitution from the proceeds - the bill would "establish[] a financial disincentive to create or publish works with a particular content." *Simon & Schuster,* 502 U.S. at 118. This raises First Amendment concerns because lawmakers "may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653, 2664 (2011).

Denying speakers the financial incentive of compensation would unquestionably chill expression. The Supreme Court has noted that "[p]ublishers compensate authors because compensation provides a significant incentive toward more expression," and denying authors that incentive "induces them to *curtail their expression.*" *United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454, 469 (1995).

H.B. 180 similarly runs head-on into the First Amendment by creating financial disincentives to the creation of speech that lies at or near the core of First Amendment protection. Crime and criminal justice are among the most important subjects of public discourse, and "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps, 131* S. Ct. 1207, 1215 (2011) (citation omitted). First Amendment values are served by more speech, not less, on topics of public concern, even when that speech may be widely regarded as ignorant or offensive. *See, e.g., Snyder,* 131 S. Ct. at 1219 (speech on a matter of public concern "cannot be restricted simply because it is upsetting or arouses contempt").

It is a primary purpose of the First Amendment to enhance the public's knowledge on matters of public interest and concern. Few subjects are more worthy of public discourse than crime and criminal justice, which are fundamental to the self-definition and self-preservation of any civilized society. The perpetrators of crimes, no less than anyone else, have the right to participate in that dialogue; indeed, they may offer a particularly valuable perspective on the root causes of crime, its methods, and its consequences, and insight into more just and effective means of law enforcement.

Imposing a reporting requirement and restitution obligation specifically targeted at such speech conflicts with the basic free speech tenet that a speaker's rights "are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C.. Inc.,* 487 U.S. 781, 801 (1988). The U.S. Supreme Court has condemned laws that "impose[] a burden based on the content of speech and the identity of the speaker." *IMS,* 131 S. Ct. at 2665 (striking down Vermont law restricting use of pharmacy records that functioned as a "speaker- and content-based burden on protected expression"); *see also First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.").

By imposing a reporting and financial burden on the creation of expressive works that uses the thoughts or opinions of the person convicted of the crime, H.B. 180 would strike at the heart of the constitutional right of all persons to speak on all subjects.

Finally, H.B. 180 may also be unconstitutional because the bill contains no jurisdictional limitation on the reporting requirement. There no requirement that either the media company or the person convicted of the crime be a resident of Alabama. This means that H.B. 180 could be imposing its law on two parties that have no present contacts with the state of Alabama, and the publisher or producer might be subject to an additional fine for declining to submit to Alabama's jurisdiction.

If you would like to discuss our concerns further, we would welcome the opportunity to do so. Please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025 x3. We ask you to protect the First Amendment rights of all the people of Alabama and amend or defeat H.B. 180.