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 House Bill 2549

The members of Media Coalition believe that House Bill 2549 has serious and significant constitutional infirmities. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Arizona: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

H.B. 2549 as passed would make it a crime to use any electronic or digital device to communicate using obscene, lewd or profane language or to suggest a lewd or lascivious act if done with intent to "annoy," "offend," "harass" or "terrify." The legislation offers no definitions for "annoy," "offend," "harass" or "terrify." "Electronic or digital device" is defined only as any wired or wireless communication device and multimedia storage device. This likely includes web sites, email, blogs and other Internet communication. Nothing limits the bill to one to one communications. There is no requirement that the recipient or subject of the speech actually feel offended, annoyed, harassed, or terrified. It is unclear if the communication must be intended to offend or annoy the viewer or listener.

While protecting people from harassment is an admirable goal, legislators cannot ignore First Amendment protection of speech to do so. All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V.,* 505 U.S. 377, 382; *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991). 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.1382, 1389 (2002).

There is no historic exception to First Amendment protection for speech simply because it annoys, offends or even terrifies. As the Court said in *Texas v. Johnson*, "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").

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In three recent First Amendment cases, the Court has made clear that it is reluctant, if not unwilling, to expand the categories of unprotected speech to include different kinds of offensive or distasteful communication beyond the historic exceptions. In *Brown v. Entertainment Merchs. Ass'n,* 131 S. Ct. 2729 (2011), the Court declined to craft 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 *US v. Stevens*, the Court declined to fashion a new First Amendment exception for depictions of actual animal cruelty.

Similarly, there is no historic exception to the First Amendment for speech that is profane or lewd or that suggests a lewd or lascivious act. Many would consider the speech of the Westboro Baptist Church at issue in *Snyder* to be profane but the Court found it to be protected. 131 S. Ct. 1207 (2011). There is a historic exception for obscene speech may be banned if it meets a specific narrow definition for obscenity enunciated by the Court in *Miller v. California.* 413 U.S. 15 (1973). In *Miller*, the Supreme Court created a three-part test which 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.

Lewd or lascivious speech may be banned to the extent it is also meets this definition of obscenity (or if it is broadcast on television or radio and meets the indecency standard). Otherwise such speech is fully protected.

To the extent that harassment can be considered an existing category of unprotected speech, the bill is still unconstitutionally vague. In certain narrow, well-defined instances, speech may rise to the level of coercion, threats, intimidation, or persistent harassment and amount to a crime. H.B. 2549 does not define many of its terms adequately to distinguish between protected speech and the traditional narrow crime of harassment. Much content available in the media uses racy or profane language and is intended to offend, annoy or terrify. Stephen King novels or the *Halloween* films, Bill Maher's stand up routines and Jon Stewart's nightly program, Ann Coulter's books and Christopher Hitchens' writing expressing his distaste for religion all could be subject to this legislation. Even common banter about sports online between rival fans frequently is meant to offend or annoy and often done using salty and profane language.

This vagueness in the legislation will have a significant chilling effect on protected speech as the bill provides criminal sanctions for a single violation. Speakers have little guidance to determine what speech is protected and what is subject to prosecution and must either risk a criminal prosecution or self-censor their speech. *See Baggett v. Bullitt*, 370 U.S. 360 (1964). It may be that H.B. 2549 is not intended to criminalize such speech; however an unconstitutional statute is not cured by narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. In *U.S. v. Stevens*, Chief Justice Roberts

wrote, “We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” 130 S.Ct. at 130 (2010).

Passage of this unconstitutionally overbroad and vague 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.

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.

We ask you to protect the First Amendment rights of all the people of Arizona and reject or amend H.B. 2549.