Memo in opposition to Colorado House Bill 1334

We acknowledge the concern about suicide committed by minors but we believe that H.B. 1334 could violate the First Amendment and threaten news coverage of important events. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Colorado: authors, publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They have asked me to explain their views.

H.B. 1334 bars the posting or dissemination through any electronic means of an image of a minor committing suicide or attempting to do so. There are several problems with the bill. It could allow the news media to be prosecuted for showing images of a suicide or attempted suicide even if done unintentionally in the course of live coverage of a news event. Also, the bill treats online publishers differently from non-electronic publishers. If passed The Denver Post could publish an image of a suicide in the paper but could not publish the same image on its website.

The bill is likely unconstitutional. It is a content-based regulation on speech. Thus it is presumed to violate the First Amendment. To overcome free speech protections, it must either fit into one of the few historic exceptions to the First Amendment or satisfy strict scrutiny analysis, which would mean it must address a clear, articulable compelling state interest and must be narrowly tailored to meet that objective. Even if it meets this test, the restriction cannot be overbroad or under-inclusive. Below we explain why it is unlikely that this legislation can survive this exacting level of judicial review.

H.B. 1334 is a content-based regulation of speech because it only criminalizes images of suicide or attempted suicide by a minor. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). "[T]he Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *Playboy*, 529 U.S. at 817 (2000)." *Ashcroft v. ACLU,* 542 U.S. 656, 660 (2004). This is a very high bar to overcome. As the Supreme Court said in *Brown v. Entertainment Merchants Ass'n*, "It is rare that a regulation restricting speech because of its content will ever be permissible." 564 U.S. 786, 799 (2011) (internal citations omitted).

A content-based restriction on speech is only permissible if it falls into a historic exception to the First Amendment or satisfies strict scrutiny analysis. The historic exceptions to the First Amendment are "well-defined and narrowly limited classes of speech" such as obscenity, defamation, fraud and incitement that and the government does not have the discretion of

creating new historic exceptions. *U.S. v. Stevens,* 559 U.S. 460, 467 (internal citations omitted). *See also*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991).

This legislation does not fall into an existing exception to the First Amendment. There is no historic exception to the First Amendment for images of suicide nor is it arguable that those images could fit within the definition of any the recognized historic exceptions. Also, as the Supreme Court has explained, "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Entertainment Merchants Ass'n.*, 564 U.S. 786, 791 (2011). In *Brown*, the Court specifically rejected the government's argument that it "[c]ould create new categories of unprotected speech by applying a 'simple balancing test' that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. We emphatically rejected that 'startling and dangerous' proposition." *Id*., at 792.

If a content-based restriction on speech does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 813. 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 the least restrictive means to achieve that interest. *See id.; 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.*, 502 U.S. at 118.

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as "a government objective of surpassing importance." 458 U.S. 747, 757 (1982). H.B. 1344 offers no suggestion what the state interest is in preventing publication of images of a suicide but only of minors and only by electronic means. It is unlikely that the privacy of the person who has committed suicide or attempted to do so is sufficient to overcome the First Amendment. *See*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). The Supreme Court has also rejected attempts to prevent the mental suffering inflicted on victim's family and friends by seeing an image online rises to the level of a compelling state interest. *Simon & Schuster, Inc.*, 502 U.S. at 118. The Court has also held that the offensiveness of speech is not a compelling interest. *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"). Finally, speech causing possible future harm is not sufficient to overcome the First Amendment. *Free Speech Coalition,* 535 U.S. at 253. ("The Government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" (internal citation omitted)).

Even if the legislation is found to address a compelling state interest, it must still be narrowly drawn to meet that interest. *See*, *Sable Communications of Cal., Inc. v. FCC*, 492 US 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be

carefully tailored to achieve those ends."). Since we do not know what the compelling interest is, it is impossible to judge if the legislation is narrowly tailored.

Even if there is a compelling state interest that could satisfy strict scrutiny analysis, the legislation would still be unconstitutional if the regulation was underinclusive. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2232 (2015). H.B. 1344 would be underinclusive unless the state had an interest that could only be satisfied by restricting the electronic publication of an image of a suicide or attempted suicide by a minor. It is hard to imagine why the state would need to bar publication of images of a suicide by a 17 year old but not of an 18 year old. Similarly, what is the state interest in preventing an image from being published on DenverPost.com but not preventing it from being published in the paper version of the Post.

Finally, the legislation may also be unconstitutional for treating online media differently than traditional media. The Supreme Court has condemned the selective imposition of a punishment on one medium but not others. In 1983, the Court held that the power to single out the press with special taxes, but not other media, could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575 (1983). See also, *Playboy*, 529 U.S. at 812 (striking down a regulation that targeted "adult" cable channels but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC,* 512 U.S. at 659 ("Regulations that discriminate among media … often present serious First Amendment concerns."); *Arkansas Writers' Project*, 481 U.S. 221, 228 (1983). ("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.").

We urge you to protect the First Amendment rights of all the people of Colorado and reconsider H.B. 1344.

If you would like to discuss further our concerns about this bill, please contact David Horowitz, executive director of Media Coalition, at 212- 587-4025 #3 or at horowitz@mediacoalition.org.