



# MEDIA COALITION, INC.

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association 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 Connecticut House Bill 6921 as passed by the House

We believe that House Bill 6921 violates the First Amendment protections for free speech. We appreciate the legislature's concern about the distribution of images that are a malicious invasion of privacy, but we respectfully ask you to amend or reconsider this legislation so that this concern can be addressed without infringing on protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including Connecticut: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

The version of H.B. 6921 passed by the House bars the dissemination, advertising or offering of images that contain nudity or sexual activity without the consent of the person depicted in the image and knowing that the person understood that the picture would remain private. There is an exception to the legislation if the dissemination serves a public interest. A violation of the legislation would subject to a year in prison, a \$2,000 fine, or both.

We are concerned about this legislation because we fear it could allow publishers, booksellers, librarians and others to be prosecuted for the publication or distribution of important newsworthy, historic and educational images. Some Media Coalition members are plaintiffs in a challenge to a similar law enacted last year in Arizona. In the Arizona case, [Antigone Books v. Horne](http://mediacoalition.org/antigone-books-v-horne/) (<http://mediacoalition.org/antigone-books-v-horne/>), U.S. District Court Judge Bolton granted a stay of the litigation and a stay of enforcement of the law at the request of the parties to allow the legislature an opportunity to amend the law. The plaintiffs in the case are four national trade associations representing publishers, news photographers, booksellers and librarians; five Arizona booksellers; and the publisher of a Phoenix newspaper. Similarly, this legislation could be used to prosecute publishers or distributors of an image rather than being limited to only those who maliciously violate the privacy of another person with the intent to harass, threaten or cause serious emotional harm. A news publisher could be liable for printing the pictures Anthony Weiner or Brett Favre sent of themselves to women they communicated with online if a jury deemed that they understood that the pictures would remain private. Many publishers will decide not to print any image that could invite prosecution because of the threat of a prison term for violating the law. They do not want to risk their freedom to a jury's decision on what "serves a public interest."

This legislation is very likely unconstitutional. It is a content-based regulation of speech. *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 Entm't Group, Inc.*, 529 U.S. 803, (2000) ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based."). All speech is presumptively protected by the First

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Amendment against content-based regulation, subject only to specific historic exceptions. As the Court recently explained:

"From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

*Stevens*, 559 U.S. at 467 (internal citations omitted). *See also*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83; *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 speech does not fit any of the historic exceptions to the First Amendment. It goes far beyond speech that may be criminalized as obscene, which is limited to "hardcore" sexual material that meets a three-prong test. *Miller v. California*, 413 U.S. 15 (1973).

Since the bill does not apply to content that fits into a historic exception, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 826-7. 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.*, 502 U.S. at 118. It must also show that the legislation is not unconstitutionally overbroad.

The legislation fails strict scrutiny analysis. The legislature may have a compelling interest in protecting individuals from being harassed or tormented but this bill is not narrowly tailored to meet that compelling state interest. As noted above, the bill is not limited to criminalizing malicious invasion of privacy. There is no requirement that the person who distributes the image do so with an intent to harass, threaten or torment the person depicted. Nor is there any requirement that the person depicted suffer serious harm. Without these elements, the legislation goes far beyond its compelling state interest and criminalizes a substantial amount of First Amendment protected speech.

The lack of these limitations also makes the legislation overbroad. It applies to artistic, historical, and newsworthy images, both in print and online. As a result, it criminalizes speech that lies at the very core of the First Amendment's protections. The law makes no distinction between a hacker who releases private photos and a publisher who prints images of a politician or public figure engaged in unseemly behavior. The legislation sweeps in not just malicious invaders of privacy, but also publishers who print notable images the person depicted wants to remain private.

The overbreadth is potentially compounded by failing to use a specific knowledge standard in determining if the defendant knew the distribution was without consent and whether the person in the image understood that the picture would remain private. Absent language specifically applying an actual knowledge standard, criminal laws typically are satisfied by general knowledge. So a defendant is liable if he or she knew or reasonably should have known an element of a law is being satisfied. This is a negligence standard. The First Amendment prohibits the use of negligence-based standards in regulating speech. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it... .”); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (“[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.”).

Also, the insertion of a vague exception for dissemination of images in the “public interest” does not cure the constitutional defects; rather it makes it more likely H.B. 6921 is unconstitutional. As noted above, this legislation is a content-based restriction on speech. An exception for “public interest” material is creating a content-based exception to a content based law. It compounds the constitutional flaw of the underlying bill. Also, allowing prosecutors and grand juries to decide if an image is in the public interest is predicated on some images having greater value than others. In *Stevens*, the Supreme Court dismissed the notion that speech may be 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.” 559 U.S. 460, 472.

The legislation may also violate the Commerce Clause of the Constitution to the extent it applies to the Internet if it allows a prosecution solely because such an image can be accessed in Connecticut. The Commerce Clause reserves to Congress the regulation of interstate commerce and prevents a state from imposing its laws extraterritorially. Since nothing in the bill limits jurisdiction, it could give Connecticut jurisdiction over any image posted on the Internet since there is no way for a publisher to prevent an image from being accessed in the state. Four U.S. Courts of Appeals 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 Communications v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

The legislature may intend that this bill to apply only to malicious invasions of but there is nothing in the bill that limits to those targets. 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. As the Supreme Court held in *Stevens*, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” 559 U.S. at 480.

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We ask you to protect the First Amendment rights of all the people of Connecticut and defeat or further amend H.B. 6921. If you would like to discuss our concerns raised in this memo or in our previous memo, please contact David Horowitz, Executive Director, at 212-587-4025 #3 or [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).