



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.

The Honorable Dannel P. Malloy
Governor of the State of Connecticut
Office of the Governor
210 Capitol Avenue
Hartford, CT 06106

Re: House Bill 6921/Public Act No. 15-213 request for a veto

Dear Governor Malloy,

We believe that House Bill 6921/Public Act No. 15-213 violates the First Amendment protections for free speech and we respectfully ask you to veto the legislation. We appreciate the legislature's concern about the distribution of images that are a malicious invasion of privacy, but this legislation goes beyond those concerns to infringe on constitutionally 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.

H.B. 6921 bars the dissemination, advertising or offering of images that contain nudity or sexual activity without the consent of the person depicted in the image, knowing that the person understood that the picture would remain private and it causes "harm" to the person. 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. The bill was passed out of the House Judiciary Committee with an additional element: the intent to harass, annoy, alarm or terrorize. This element was removed from the bill by amendment on the floor of the House.

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/>), 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 without any limitation to those that maliciously violate the privacy of another person by being distributed with the intent to harass, threaten, coerce or terrorize. 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

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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."

Content-Based Legislation Subject to Strict Scrutiny

This legislation is very likely unconstitutional as there is no exception to the First Amendment for a regulation of speech based on its content even if it was intended to be private. H.B. 6921 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, 811 (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 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 (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 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.

Unconstitutionally Overbroad

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 bill 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.").

Void for Vagueness

The legislation is also unconstitutionally vague because "harm" is not defined. It is an essential element of the crime but the use of "harm" without any qualifying adjectives means a publisher has no guidance on whether the law applies to any negative emotional response or more serious emotional or physical injury. In *Kramer v. Price*, the Fifth Circuit struck down a Texas stalking law for vagueness because it failed to adequately define the term "annoy." The Court found the word to be inherently vague, even where the statute required the defendant to act with an intent to annoy. 712 F.2d 174 (5th Cir.1983). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996).

Content-Based Exception Compounds First Amendment Deficiency

Also, the insertion of a vague exception to liability 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.

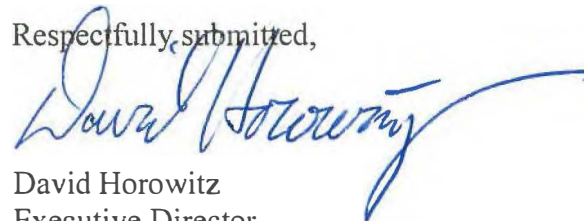
May Violate the Commerce Clause

The legislation may also violate the Commerce Clause of the Constitution to the extent it allows a prosecution solely because such an image can be accessed online 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 privacy but there is nothing in the bill that limits it 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.

We ask you to protect the First Amendment rights of all the people of Connecticut and veto H.B. 6921/Public Act No. 15-213. If you would like to discuss our concerns raised in this memo or in our previous memo, please contact me, at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,



David Horowitz
Executive Director

cc: Karen K. Buffkin, Esq., General Counsel to Governor Malloy