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 Oklahoma Senate Bill 864

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we believe that, for numerous reasons, Senate Bill 864's broad requirements for mandatory blocking of content on the internet violates First Amendment and due process protections for free speech. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Oklahoma: authors, publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games. They have asked me to explain their concerns.

Summary of the bill:
S.B. 864 bars anyone from manufacturing, distributing or selling (distributor) any product that makes content accessible on the internet from doing business in the state unless the product has active and operating "digital blocking capability" (filtering software) that blocks access to obscene material. The product must also make inaccessible "private sexual images published without consent" and any website that facilitates prostitution or human trafficking. It would require filters on computers, smart phones, tablets, game consoles, televisions, smart watches and presumably on web browsers and other software.

"Private sexual images published without consent" is not defined in the bill nor by reference to Oklahoma's existing law regulating publication of some images done without consent of the person depicted.

A violation is subject to not more than one year in jail, a fine of up to $1,000, or both. The attorney general may seek injunctive relief to bar any distributor in violation from operating in the state.

The distributor may (but is not required to) deactivate the filtering software only if the consumer specifically requests that it be turned off, presents proof that he or she is an adult, acknowledges receiving a written warning of the danger of turning off the filter and pays a $20 tax plus any additional charge imposed by the distributor.

In addition to these requirements, the manufacturer and each distributor must make reasonable and ongoing efforts to ensure that the filter is working properly. They must also create a website, call center or other reporting mechanism to allow a person to report blocking of non-obscene material or the failure to block obscene material. Once a report is made, the distributor has five days to assess the content and block material that is obscene and unblock speech that is not obscene. If the distributor declines to block material reported as obscene, the attorney general or any person may bring a civil suit to block unblocked content. If the attorney general or the person prevails, they may seek damages of $500 per unblocked depiction. If the distributor decides not to unblock material reported as not obscene, any person may sue to get

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the speech unblocked but the attorney general is not authorized to bring such a suit, nor is the person entitled to damages. In either case, the prevailing party is entitled to attorneys' fees.

Speech is presumed to be protected by the First Amendment:
This is an unconstitutional censorship regime that suppresses speech based on its content and violates due process protections. The Supreme Court has repeatedly made clear that all speech is protected by the First Amendment until a court rules otherwise. The burden is on the state to prove that speech does not enjoy protection under the Constitution in a judicial proceeding that provides full due process protections. "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based regulations are presumptively invalid,' *R.A.V. v. St. Paul,* 505 U. S. 377, 382 (1992), and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 817 (2000).

The legislation violates due process protections for speech:
The state is not free to ban speech at its whim. It must provide full due process protections before doing so. This is true whether the state is seizing all copies of a book from a bookstore or imposing mandatory filtering on the internet by forcing private actors to block access to content under the threat of prosecution for failing to do so. As the Supreme Court said in *Marcus v. Search Warrant*, "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." 367 U.S. 717, 731 (1961).

The Supreme Court has held that due process rights are essential in judging whether speech is obscene and outside of First Amendment protection. In *Bantam Books v. Sullivan*, the Court explained why these protections are so important:

> "Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrant*, supra, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, e. g., *Thornhill v. Alabama*, 310 U.S. 88; *Winters v. New York*, 333 U. S. 507; *NAACP v. Button*, 371 U.S. 415. '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .' *Speiser v. Randall*, 357 U.S. 513, 525.".

372 U.S. 58, 68 (1963).

Speech can only be suppressed after a court finds that is obscene. In *Fort Wayne Books, Inc. v. Indiana*, the Supreme Court held, "While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (internal cites omitted). Similarly, in *Heller v. New York*, the Court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." 413 U. S. 483, 492 (1973). Even probable cause is not sufficient to block access to a book, magazine or movie prior to a final judgment. *Fort Wayne Books, Inc.*, 489 U.S. at 66. ("…our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.")

If the state believes that material accessible on the internet in Oklahoma is obscene, the burden is on the government to gather evidence and bring charges in an adversarial judicial proceeding. S.B. 864 turns this principle on its head by blocking any content a computer program determines is illegal and then requiring the speaker or the person trying to access the material to vindicate their constitutional rights.

The state cannot put the burden on the speaker or the reader to prove that the material is not obscene. In *Southeastern Promotions, Ltd. v. Conrad*, the Supreme Court added that "a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor." 420 U.S. 546, 560 (1975)(emphasis in the original). Under S.B. 864, the speaker or recipient must discover they have been censored (possibly by multiple distributors with different filtering technology) and then they have to file a formal complaint with each distributor subject to a five day waiting period. If the speech remains blocked by any or all of the distributors, the speaker must file a lawsuit to get judicial relief. Even this limited remedy is only available for material blocked as obscene. The bill offers no process for unblocking speech blocked as "revenge pornography" or sites blocked for "facilitating prostitution."

The government cannot get around these constitutional requirements by outsourcing this censorship regime to device manufacturers and retailers to act as its agent to suppress speech that the state is prohibited from doing on its own. In *Bantam Books*, the U.S. Supreme Court struck down a non-judicial determination of whether material is illegal for minors as a form of "informal censorship." 372 U.S. 58 (1963). More recently, Judge Posner writing for the Seventh Circuit held that using "administrative methods" to censor speech "as distinct from punishing such dissemination… after it has occurred — is prohibited by the First Amendment as it has been understood by the courts." *Backpage. com, LLC v. Dart*, 807 F. 3d 229, 235 (7th Cir. 2015).

<u>Nude images published without consent protected by the Constitution</u>:
S.B. 864 is also overbroad because it requires blocking of speech that is fully protected by the Constitution. There is no exception to the First Amendment for nude images, even those distributed without consent. They are legal to publish and to view absent other narrowing elements such as an intent to harass. These images may be newsworthy, historic or educational like pictures of the prisoners at Abu Ghraib, the images of Janet Jackson's wardrobe

malfunction, the famous image of a Vietnamese girl running after a napalm attack on her village, snapshots Anthony Weiner sent of himself to women he met online or images of partially nude female slaves or victims of war. All of these images were published without the consent of the person in the image. The state cannot force a device maker to block access to them. See *Antigone Books v. Brnovich* 2:14cv2100 (D. Ariz. July 10, 2015) (challenge to an Arizona law with an almost identical definition of "revenge pornography" as S.B. 864. The state of Arizona agreed to a permanent bar on enforcement of the law without submitting any documents to defend it to the court.) In addition to violating the rights of the speakers and their audience, this non-judicial censorship scheme likely violates the due process rights of distributors by making it a crime to not block obscene material, which as a practical matter they cannot do without also blocking a large amount of non-obscene material.

Use of mandatory filters will inevitably be overbroad:
While the state may bar access to obscenity, filters will inevitably block a substantial amount of non-obscene speech and make the law unconstitutionally overbroad. Filtering software is not sophisticated enough to determine what are community standards, what appeals to prurient interest or what is patently offensive. Even if images published without consent could be regulated, filters cannot assess whether they are "private" or if a person has consented to their distribution. Research shows that filters block content based on certain kinds of nudity in images and the use of explicit language making them overbroad. Even in attempting to block categories of speech like sexual content, filters generally over block. See, American Library Policy Brief, Policy Brief No. 5, June 2014, pg. 16-18. Filters are a blunt instrument that are designed to block sexual material, hate speech or other types of content based on specific words or images of nudity or sex. They cannot make more nuanced determinations that require information beyond what is in the text or the image.

Voluntary filters are less restrictive means:
This is why the Supreme Court has cited voluntary filters as the best way to block unwanted speech online but has dismissed the idea of mandatory filters. In *Ashcroft v. American Civil Liberties Union*, the Court dismissed the argument that the government could impose mandatory filters on all internet users and held that the voluntary use of filters was a less restrictive means since the user could decide what material is appropriate for themselves or their children without censoring the internet for the entire population. 542 U.S. 656, 669 (2004). See also, *U.S. v. Playboy*, 529 U.S. at 822-26 (individual households opting into voluntary scrambling of adult cable channels was a less restrictive means for preventing signal bleed than system wide blocking).

Content-based tax on speech is unconstitutional:
S.B. 864 is also an unconstitutional tax on speech based on its content. The only way a consumer can access specific content is to pay a $20 tax to have the filters deactivated (and be subjected to a government-mandated lecture about the dangers of the internet). While a state may levy a general sales tax that includes the sale or rental of speech in any medium, the U.S. Supreme Court has repeatedly held that it the First Amendment bars the imposition of a specific tax on speech based on its content. In 1987, the Supreme Court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's Project, Inc. v. Ragland*,

481 U.S. 221, 230. In 1983, the Court held that the power to single out the press with special taxes 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. In 1991, the Court held that 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 and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. See also, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press*, 297 U.S. 233 (1936).

The bill may also be an unconstitutional tax on the internet as a medium. A person can access the same speech in books, magazines, movies or video games without paying the $20 tax. The Supreme Court has condemned this selective imposition of a punishment on one medium but not others or specific portions of a media. *See*, *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. 622, 659 (1994) ("Regulations that discriminate among media … often present serious First Amendment concerns."); *Arkansas Writers' Project*, 481 U.S. at 228. ("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.").

S.B. 864 is unconstitutionally vague:

It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Winters v. New York*, 333 U.S. 507, 509 (1948). S.B. 864 is internally inconsistent. It uses terms such as "digital blocking capability" and "filters" interchangeably and leaves many terms undefined. This lack of clarity will prompt distributors to overblock content rather than risking being barred from doing business in the state or facing criminal prosecution. Beyond the overbroad blocking of content, it will have a significant chilling effect on publishers. An online magazine might not publish an article about legal brothels in Nevada or Amsterdam because it could be deemed to facilitate prostitution and result in their entire website being blocked. Booksellers may choose not to sell sexual health, art and history books for fear their online store could be rendered inaccessible. For publishers and booksellers, the chilling effect is exacerbated because the reporting system to get one's site unblocked only applies to material blocked for being obscene and not to the other content that must be rendered inaccessible. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

If you would like to discuss our concerns further, we would welcome that 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 Oklahoma and amend or defeat S.B. 864.