



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 South Dakota House Bill 1154

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we believe that, for numerous reasons, House Bill 1154'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 South Dakota: authors, publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games. Below, we explain the most glaring reasons this legislation is unconstitutional.

Summary of the bill:

In section 2 of H.B. 1154, it bars a distributor from manufacturing or distributing a product that makes content available on the internet unless it contains filtering software (filters) that prohibits access to a website that displays obscene material or facilitates prostitution or human trafficking all by default. It also must block access to a website that displays "nonconsensual pornography" but not by default. Section 15 makes it a class 2 misdemeanor to knowingly sell a product that makes content accessible on the internet without filters that attempt to render inaccessible websites that display obscene material or "revenge pornography" or websites "known" to facilitate prostitution or human trafficking. This would apply to hardware such as computers, smart phones, tablets, game consoles, televisions, smart watches, and presumably to software such as Google Chrome and Adobe Flash.

"Nonconsensual pornography" is defined as a nude image of a person published without the person's consent if the image contains personal identification information of the depicted person. "Revenge pornography" is not defined.

Section 4 bars filtering of websites that serve primarily as search engines; websites that display complete movies rated "R" or less by the motion picture industries voluntary rating system; and, "social media websites" that allow reporting by users of obscene material and have procedures for evaluating those reports. "Social media websites" is not defined.

The distributor must deactivate the filtering software if the consumer requests that it be turned off, presents a government document proving that he or she is an adult, acknowledges receiving a written warning of the danger of turning off the filter (the attorney general will prepare a form with the content that must be in the warning) 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 the blocking of prohibited material or the failure to block prohibited material. Once a report is made, the distributor has five days to assess the content and block the material that is prohibited and unblock speech that is not prohibited. If the distributor declines to block material reported as

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prohibited, 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 website that displays prohibited content but was unblocked. If the distributor decides not to unblock material reported as prohibited, any person may sue to get 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 is not protected by the Constitution. “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.” *U.S. 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 block access to speech because it might be illegal. It may do so only if a court concludes that the material is not protected by the First Amendment, after the speaker or distributor has been afforded full due process protections in a court of law. 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).

If the state believes that material accessible on the internet in South Dakota is obscene, the burden is on the government to gather evidence and bring charges in an adversarial judicial proceeding. 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 citations 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.”)

H.B. 1154 turns this principle on its head by blocking any content a filtering software program decides 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 H.B. 1154, 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.

The government cannot get around these constitutional barriers by forcing product distributors to act as its agent to suppress speech in a way that state is prohibited from doing so itself. 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).

Nude images published without consent protected by the First Amendment:

Non-obscene nude images are fully protected by the First Amendment. *Playboy*, 529 U.S. at 811; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). They are legal to publish and to view even it is done without the consent of the person in the image, absent other narrowing elements such as an intent to harass. See [Antigone Books v. Brnovich](#) 2:14cv2100 (D. Ariz. July 10, 2015) (challenge to an [Arizona law](#) with an almost identical definition of “nonconsensual pornography” as H.B. 1154. The state of Arizona agreed to a permanent bar on enforcement of the law without submitting any documents to defend it to the court.) H.B. 1154 would block important historic, newsworthy or educational images like pictures of the prisoners at Abu Ghraib, 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, the images of Janet

Jackson's wardrobe malfunction 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 and distributors would be required to block them.

Use of mandatory filters will inevitably be overbroad:

The Supreme Court has already ruled that the government cannot mandate filtering software to block access to sexual content on the internet because they are both overbroad and under inclusive. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 669 (2004). While obscene speech may be barred, filters will inevitably block a substantial amount of non-obscene speech, which will cause the law to be 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.

This is why the Supreme Court has found voluntary filters as the best way to block unwanted speech online but has dismissed mandatory filters as unconstitutional. In *Ashcroft v. American Civil Liberties Union*, the Court dismissed the argument that the government could impose mandatory filters on all internet users. It 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. *Id.* See also, *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:

H.B. 1154 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 lesson 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 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 Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230. 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. 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. 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. 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.”).

Unconstitutional delegation of power to voluntary rating system:

Voluntary ratings exist to help parents determine what content is appropriate for *their* children, but a government body cannot give them the force of law. H.B. 1154 allows the motion picture rating system to determine if the filtering software is barred from blocking websites based on the ratings the content on the site receive. In *Entertainment Software Ass’n v. Hatch*, the district court struck down a Minnesota law that barred anyone less than 17 years old from buying or renting a video game carrying a “Mature” or “Adults Only” rating under the video game industry’s voluntary rating system. 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff’d sub nom. Entertainment Software Ass’n v. Swanson*, 519 F.3d 768 (8th Cir. 2008). Similarly, courts in many states have held it unconstitutional for the government to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. In *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970), the court threw out a Kenosha ordinance that used MPAA ratings to bar minors from accessing certain films. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E.2d 373 (S.C. 1984), the court ruled that a tax of 20 percent on all admissions to view movies rated either “X” or unrated was an unconstitutional delegation of legislative power to a private trade association. See also *Swope v. Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) (use of motion picture rating system was improper as a basis for determination of constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

H.B. 1154 is unconstitutionally vague:

“It is settled 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). H.B. 1154 is internally inconsistent and leaves key terms undefined. As noted in the description of the bill, section 2 requires that the filters block some, but not all, of the prohibited content by default. In section 15, it requires that all of the prohibited content be blocked by default. In Section 2 it refers to blocking “nonconsensual pornography,” which is defined in section 1. In section 15 it refers to “revenge pornography,” which is not defined in the bill. The bill also does not define what the parameters are to make a website qualify as “known” for facilitating prostitution. It also does limit the term prostitution to illegal prostitution.

This lack of clarity will prompt distributors to overblock content rather than risk being prosecuted or sued by the attorney general. 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. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

Nor can this legislation be saved by the promise of legislators or prosecutors that the statute will be construed only narrowly. In *U.S. v. Stevens* the Court said, “[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. 460, 480 (2010).

Finally, enactment of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very good possibility that the state will be ordered to pay the plaintiffs’ attorney’s fees. In the challenge to the Arizona law mentioned above, the state agreed to pay the plaintiffs \$200,000 in legal fees, even though the case was resolved by a joint motion of the parties requesting that the judge issue an order barring the state from enforcing the law.

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 South Dakota and amend or defeat H.B. 1154.