



## Memo in Opposition to Vermont House Bill 105

Media Coalition believes that House Bill 105 violates the First Amendment. We appreciate the legislature's concern with the malicious invasion of privacy but believe any legislation must be narrowly tailored to address that problem without infringing on First Amendment rights. We respectfully ask you to amend this legislation so that it addresses the concerns of the legislature without infringing on the right of free speech. The trade associations that comprise Media Coalition have many members throughout the country, including Vermont: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 105 makes it a crime to disseminate or copy an image of another person nude or engaging in sexual conduct if one knows or should have known that the person in the image did not consent. A violation is subject to up to 6 months in prison, a fine of up to \$1,000, or both.

Several members of Media Coalition challenged a very similar law enacted last year in Arizona. In that case, *Antigone Books v. Horne* (<http://mediacoalition.org/antigone-books-v-horne/>), U.S. District Court Judge Bolton granted a joint motion by the parties to stay the litigation and stay enforcement of the law 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 local booksellers; and the publisher of a local newspaper. They brought the challenge because they fear that they could be prosecuted for the publication of important newsworthy, historic and educational images. The photos from Abu Ghraib, the pictures Anthony Weiner sent of himself to women he met online and the documentary *Woodstock* all include images of nudity that were distributed without the consent of the people in the images.

This bill may be well-intentioned but it is clearly unconstitutional. Speech cannot be criminalized because we believe it is low value and offensive, embarrassing or hurtful. In *U.S. v. Stevens*, the Supreme Court dismissed the government's 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. at 468 (2010).

H.B. 105 is a content-based regulation of speech. *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 Amendment against content-based regulation, subject only to specific historic exceptions. As the Court recently explained:

From 1791 to the present, . . . [the First Amendment has] “permitted restrictions upon the content of speech in a few limited areas.” [These] “historic and traditional categories long familiar to the bar[ ]”[ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

*Stevens*, 559 U.S. 460, 468 (2010). *See also*, *R.A.V.*, 505 U.S. 377, 382-83; *Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The historic exception for obscenity does include some nude and sexual images but this legislation goes far beyond the definition of such material. Obscenity is limited to speech that meets a specific definition enunciated by the Court in *Miller v. California*. 413 U.S. 15 (1973). In *Miller*, the Supreme Court created a three-part test that defined obscene material as descriptions or depictions of sexual conduct or lascivious nudity when, taken as a whole:

- i. Predominantly appeals to the prurient, shameful or morbid interest in sex;
- ii. Is patently offensive by prevailing community standards; and
- iii. Lacks serious literary, artistic, political or scientific value.

This legislation is not limited to material that is obscene because it does not include any part of the *Miller* test. Images of nudity or sexual content depicting adults that do not satisfy all parts of the *Miller* test are fully protected by the Constitution.

Nor has the Supreme Court indicated any willingness to create new categories of unprotected speech even for speech that many find offensive or upsetting. In three recent cases the Court has struck down attempts to do so. In *Brown v. Entertainment Merchs. Ass’n*, 131 S. Ct. 2729 (2011), the Court found that there is not an exception for the sale of “patently offensive” violent video games to minors. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court declined to create an exception for outrageous and upsetting speech in the vicinity of a private military funeral. And in *Stevens*, the Court ruled that there is not a new First Amendment exception for depictions of actual animal cruelty. 559 U.S. 460.

Since H.B. 105 does not fit into a historic exception, the speech must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. 803, 826-7 (2000). 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. 105, 118 (1991). It is very

unlikely that this legislation could satisfy any part of the strict scrutiny test, let alone each part of the test.

Privacy is an important right but the Supreme Court has held that it by itself is not a sufficiently compelling interest to overcome the First Amendment right to free speech. The Court has often struck down laws and vacated court orders that barred speech about a criminal proceeding in order to protect a defendant's privacy. The Court found that the First Amendment right to publish outweighed privacy interests when it struck down a West Virginia law that barred publishing the name of a minor being adjudicated in juvenile court. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). *See also*, *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a statute allowing a rape victim to seek damages for the publishing of his or her name. Justice White wrote, "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S. 469, 496.

Nor is the fact that speech is offensive or embarrassing to a group or individual sufficient to overcome the First Amendment, even if the speech is a photograph. The Supreme Court has often held that the First Amendment protects speech even if it is intended to offend, annoy or embarrass. The Court in *Texas v. Johnson* said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414. *See also*, *Street v. New York*, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *R.A.V.*, 505 U.S. 377 (1992) (struck down a statute which limited speech which "arouses anger, alarm or resentment in others"); *Free Speech Coalition*, 535 U.S. at 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *FCC v. Pacifica Foundation*, 438 U. S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); *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").

H.B. 105 is also not narrowly tailored to meet a compelling interest. It would apply 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 torture at Abu Ghraib prison. The legislation sweeps in not just malicious invaders of privacy, but also countless Internet users who innocently repost online images.

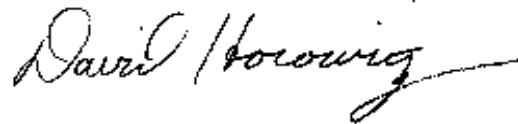
Finally, while the legislature may intend H.B. 105 to apply to a narrower range of speech than the plain language of the bill; however, an unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. Again as Chief Justice Roberts wrote for the Court 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.

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs’ attorneys’ fees. In *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003), a case brought by Media Coalition members, plaintiffs received \$175,000 in legal fees and costs.

We ask you to protect the First Amendment rights of all the people of Vermont and defeat or amend H.B. 105. If you would like to discuss our concerns further, I can be reached at 212-587-4025 #3 or [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

Respectfully submitted,

A handwritten signature in black ink, reading "David Horowitz". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

David Horowitz  
Executive Director