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**TESTIMONY IN SUPPORT OF 19-H 5158,
RELATING TO SALES AND USE TAX
May 8, 2019**

The ACLU of Rhode Island supports this legislation, which would clarify that the current tax exemption that exists for the sales of books by their authors applies to both works of fiction and non-fiction. This bill was generated last year because the Division of Taxation and the state Council for the Arts, the agencies responsible for implementing the law, have advised authors on numerous occasions that only the former types of books qualify for an exemption. Such an interpretation, we submit, is contrary to the statute and raises serious constitutional concerns.

In a statement released yesterday, the Division appears to deny that claim, but it is unclear from that statement exactly what books they **do** believe qualify for an exemption. The statement references “one of a kind, limited edition” books as the only ones that qualify, but the fiction books routinely granted exemptions by the state would not appear to fit this very narrow criterion. The agencies were just as cryptic when we asked them to explain their position last year. I have attached our correspondence so members can judge for yourselves.

As for the statute itself, it clearly exempts “a book or other writing.” There is no ambiguity in that. If Division officials are making distinctions based on a view that non-fiction writing is generally not “original and creative,” that is a judgment wholly unsupported by any meaningful understanding of the writing process, whatever the genre. Indeed, there exists a whole field of writing that doesn’t fit neatly into either category, and the Division of Taxation has no business making professional judgments about the “originality” or “creativity” of a book.

Indeed, making content-based distinctions like these raises serious First Amendment problems. For example, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987), the U.S. Supreme Court struck down an Arkansas sales-tax scheme that provided an exemption for newspapers and religious, professional, trade, and sports journals, but taxed the sale of general-interest magazines. As the Court noted, "Such 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." The R.I. Supreme Court reached a similar conclusion many years ago in striking down a special sales tax exemption for Bibles, but not other literature, in our state's sales tax law. *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999).

Yesterday, the ACLU of Rhode Island filed a federal lawsuit on behalf of the Association of Rhode Island Authors to challenge this current state of affairs. In the interim, and as an alternative to continuing with litigation that may cost the taxpayers tens of thousands of dollars, we support the bill's passage in order to clarify what we believe is already a clear statute and to promote basic First Amendment principles.



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October 2, 2018

Neena Savage, Tax Administrator
R.I. Division of Taxation
One Capitol Hill
Providence, RI 02908

Dear Ms. Savage:

I am writing in the hope that you can clear up a tax dispute that has been brought to our attention by the Association of Rhode Island Authors (ARIA). The dispute involves your Division's implementation of R.I.G.L. §44-18-30B, which provides a sales tax exemption for writers, composers and artists residing in Rhode Island who sell their own works. The statute further calls upon the Division to consult with the Rhode Island State Council on the Arts (RISCA) for help in determining whether a particular work submitted by an author, artist or composer constitutes a "work" that falls within the statute's designated categories for exemption.

The particular section at issue that has caused some confusion is §44-18-30B(b)(1), which exempts from the sales tax "an original and creative work," one of whose categories includes, without any specified limitation, a "book or other writing." However, according to ARIA, the Division has, apparently in consultation with RISCA, made a determination that non-fiction books are not "original and creative" works, the sales of which therefore do not qualify for a tax exemption under this statute. Instead, only sold works that are considered fiction (including poetry) are deemed to qualify for the exemption. We hope that the Division's purported differentiation between fiction and non-fiction works is a misunderstanding on ARIA's part; if not, however, it is incumbent upon the Division to reverse its position.

The Division's regulations governing this statutory exemption do not in any way reflect such a distinction, nor has ARIA been able to point us to any formal written guidance from your agency to that effect. ARIA members nonetheless claim to have verbally received confirmation of this distinction on multiple occasions from Division officials. Writers of non-fiction have therefore reluctantly not sought to make use of the statute's tax exemption.

Assuming that the Division makes a distinction between fiction and non-fiction books for purposes of the statute, this interpretation is, we submit, contrary to any fair reading of R.I.G.L. §44-18-30B and, in any event, raises serious and significant constitutional concerns.

As for the statute itself, it clearly exempts "a book or other writing" along with seven other types of artistic work. There is no ambiguity in that. To the extent that Division officials are deciding that non-fiction writing is not "original and creative," there is no justification in the statute's language for such a reading. It is also a judgment wholly unsupported by any meaningful understanding of the writing process, whatever the genre, and places the Division in the dubious role of making wholly subjective, and ultimately arbitrary, determinations about works of art.

There exist whole fields of writing that don't fit neatly into either category. The Division of Taxation has no business deciding whether "non-fiction novels" like Norman Mailer's *The Executioner's Song* or Truman Capote's *In Cold Blood* are entitled to a sales tax exemption for the author based on a person's determination as to whether they are novels or works of non-fiction. Why is a roman a clef more "original and creative" than a juicy memoir, entitling it, but not the memoir, to a tax exemption merely because the former uses pseudonyms? How would the Division treat an award-winning book like *Persepolis*, which is a graphic autobiography – non-fiction told in drawings? Why is a dull and wholly derivative piece of fiction automatically deemed "original and creative" where Charles Darwin's revolutionary evolutionary theory in *On the Origins of Species* would never be?

Hopefully, these few examples make the point. Nothing in the statute suggests such absurd results. Any reputable biographer or history writer would take great offense at the idea that their end product of often thousands of hours of work is not "original and creative." Indeed, since copyright law requires some element of creativity in the work, the Division's position would appear to support the view that non-fiction books should not be entitled to copyright protection.

Making content-based distinctions among books for tax-exempt purposes is just as problematic from a constitutional perspective, as it raises serious First Amendment problems. For example, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987), the U.S. Supreme Court struck down an Arkansas sales-tax scheme that provided an exemption for newspapers and religious, professional, trade, and sports journals, but taxed the sale of general-interest magazines. As the Court noted, "Such 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." The R.I. Supreme Court reached a similar conclusion in striking down a special sales tax exemption for Bibles, but not other literature, in our state's sales tax law. *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999).

I am hopeful that this dispute is merely the result of miscommunication between your Division and ARIA. However, if the Division has in fact issued any advisory, opinion or regulation that codifies a distinction between fiction and non-fiction works under this statute, I would appreciate being provided a copy. I would also ask that it be promptly reconsidered and rescinded.

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Neena Savage
October 2, 2018

If, instead, this has all been a misunderstanding between the Division and the authors who have been in touch with your office, and the Division makes no such distinction in determining tax exemption eligibility under this statute, I would appreciate being formally apprised of that. I will pass that information along to ARIA so that its non-fiction writers can begin taking advantage of the sales tax exemption and the statute's laudable goal of promoting the arts in Rhode Island.

Thank you in advance for your prompt attention to this matter, and I look forward to hearing back from you about it.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Brown". The signature is fluid and cursive, with a prominent initial "S" and a long, sweeping underline.

Steven Brown
Executive Director

cc: Mark Furcolo, Department of Revenue
Randall Rosenbaum, RISCA
Steve Porter and Paul Caranci, ARIA



Rhode Island Department of Revenue
Division of Taxation

November 15, 2018

Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island
128 Dorrance Street, Suite 400
Providence, RI 02903

Dear Mr. Brown:

Thank you for your letters dated October 2, 2018 and October 26, 2018 regarding the Rhode Island sales and use tax exemption for writers, composers, and artists. The Division and RISCA have conferred about the issue in your letters and will work together to assure that all procedures comply with the laws set forth in R.I. Gen. Laws § 44-18-30B, as amended, and Regulation 280-RICR-20-70-11 (Exemption of Sales by Writers, Composers and Artists) requiring a qualifying work to be an “original and creative work, whether written, composed, or executed for ‘one-of-a-kind, limited production’”. If you are aware of any particular applicants whose works require review for the exemption, please let me know.

Please feel free to contact me with any questions related to this matter.

Sincerely,

Neena S. Savage
Tax Administrator

Randall Rosenbaum
Executive Director, RISCA

cc: Mark Furcolo, Department of Revenue