THE MEDIA COALITION
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American Booksellers Association Association of American Publishers, Inc. Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memo in Opposition to Rhode Island House Bill 5304

We believe that House Bill 5304 violates the First Amendment protections for free speech and we respectfully urge the committee to amend the bill. We appreciate your concern about the distribution of these images, but we caution that any legislation to restrict them must be carefully drawn to focus on the malicious invasion of privacy without infringing on constitutionally protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including Rhode Island: authors, publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 5304 bars the dissemination of an image of another person that contain nudity or sexual activity or sado-masochistic abuse, without the affirmative consent of the person depicted in the image, if the person received the image under circumstances in which a reasonable person would know or understand the image was to remain private. There is a second crime that bars a "third-party recipient" from distributing such an image if the person has actual knowledge of image violating the previous elements. There is an exception to the legislation for the dissemination of such an image if it "serves a lawful purpose" or the image "constitutes a matter of public concern." A violation is subject to up one year in prison.

In July 2015, we successfully concluded a challenge to an Arizona law very similar to H.B. 5304 that criminalized the distribution of nude images without the consent of the person so depicted. This was the first facial challenge to such a law. The state of Arizona agreed to a permanent bar on enforcing the law, without submitting any documents to the court defending the law: *Antigone Books v. Brnovich*. The plaintiff group consisted of trade associations that are our members and their constituents. The plaintiffs in the case were four national trade associations representing publishers, news photographers, booksellers and librarians; five Arizona booksellers; and the publisher of a Phoenix newspaper. They challenged the law because it was not limited to the publication of images that were a malicious invasion of privacy. Rather, it applied to important newsworthy, historical, educational and artistic images.

Last March, Arizona enacted a new law H.B. 2001 to replace the one that was enjoined in *Antigone Books*. The key elements in the Arizona law are: (1) display or distribution of an image of another person in a state of nudity or engaged in sexual conduct; (2) with knowledge that the person in the image has not consented to the display or distribution; (3) with the intent to harass, coerce, threaten, intimidate or cause financial harm to the person in the image; (4) the person in the image is recognizable either from the picture itself or information provided by the person who has displayed or distributed it (or a third party but only if acting in concert with the person who initially displayed or distributed it); and, (5) where the person depicted in the image had a reasonable expectation of privacy and an understanding that such image would remain private. These elements are necessary to overcome the strong presumption that any content-based

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regulation violates the First Amendment. Other states that enacted legislation last year agreed. Six states passed laws barring the non-consensual distribution of certain images and five of them included a malicious intent element similar to the Arizona law.

Like the Arizona law, H.B. 5304 is very likely unconstitutional under the Supreme Court's First Amendment doctrine because it is a content-based criminal restriction on speech that does not fit an existing exception to the First Amendment and cannot survive strict scrutiny analysis. Below is the legal analysis that explains why.

Content-based Regulation of Speech

There can be no doubt that H.B. 5304 is a content-based regulation of speech. It would criminalize images based on their content. *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."). The Court went even further recently to hold that a law that may not be content based on its face is treated as such if it "cannot be justified without reference to the content" or was enacted "because of disagreement with the message [the speech] conveys[.]" *Reed v. Town of Gilbert, Arizona*, 576 U.S. __, ___ (2015). It is irrelevant to this determination that there was no consent to the publication of the images.

Content-based Regulation of Speech is Presumed Unconstitutional

A content-based restriction on speech is presumed to be unconstitutional unless it fits in one of the few historic exceptions to the First Amendment. "[T]he Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *United States v. Playboy Entertainment Group, Inc*., 529 U. S. 803, 817 (2000)." *Ashcroft v. ACLU,* 542 U.S. 656, 660 (2004). This is a very high bar to overcome, and it is very rare that any content-based restriction on speech survives this legal framework. This may be unsatisfying for those to seeking regulate disfavored speech, but as the Court said, it is a "demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted).

Since this legislation is a content-based restriction on speech, the next step of the analysis is to determine whether it falls into a historic exception to the First Amendment. 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."

U.S. v. Stevens, 559 U.S. 460, 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). While a small subset of such images may be obscene, there is no historic exception to the First Amendment for a criminal law that punishes publication of truthful private speech, even if there may be tort remedies available for the publication of the speech.

Strict Scrutiny Analysis

If a content-based law does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. *See, Playboy*, 529 U.S. at 813. 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 the least restrictive means to achieve that interest. *See id.; 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.

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as "a government objective of surpassing importance." 458 U.S. 747, 757 (1982). Protecting individuals from criminal behavior such as being harassed, threatened or intimidated meets this high threshold. However the Court has not found that shielding the privacy of the subject of speech or protecting them from emotional pain is sufficient to overcome the First Amendment against a generally applied criminal law that limits speech based on its content.

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 (1975). The Court has also overturned laws and vacated court orders that barred speech about a criminal proceeding intended to protect a defendant's privacy. *See Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979); *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 *Simon & Schuster*, the Supreme Court considered whether New York's "Son of Sam" law was constitutional. Justice O'Connor dismissed the notion that there was a compelling interest in barring the speech to avoid the mental suffering inflicted on crime victims and their families by a memoir of a member of organized crime retelling stories of their suffering. In her majority opinion, she wrote, "The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers…. The Board thus does not assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization." 502 at 118.

Even if the legislation is found to address a compelling state interest, it must still be narrowly drawn to meet that interest. *See*, *Sable Communications of Cal., Inc. v. FCC*, 492 US 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). H.B. 5304 is not narrowly drawn if it would criminalize the distribution without any harmful intent or resulting injury does not rise to the

level of a compelling interest. Limiting the legislation to distribution with an intent to harass, stalk, threaten or cause similar serious harm would target malicious acts without burdening protected speech. Also, the bill is not narrowly tailored to protect the privacy of the person in the image since it is not limited to images of a recognizable person.

Some cite the Supreme Court ruling in *Snyder v. Phelps*, 562 US 443 (2011), to claim that speech about private matters alone is enough to either avoid strict scrutiny analysis or satisfy it without needing a malicious intent element. However, this case does not support this argument. In *Snyder*, the plaintiff was suing for intentional infliction of emotional distress, a tort that the Supreme Court has allowed as a narrow band of speech that is sufficiently injurious that a victim may recover civil damages. The Supreme Court heard the case after the jury found that the Phelps family acted with a malicious intent to harm the plaintiff. After Mr. Snyder proved this in the trial court, the Supreme Court held that because this was speech on a matter of public concern, the First Amendment barred liability despite the malicious intent. There is no basis for citing the private matter/public concern distinction without first proving there was a malicious intent to harm.

Exception for "Public Concern" or "Lawful Purpose" Compounds First Amendment Deficiency

The exceptions from liability for dissemination of images that "constitute a matter of public concern" or for publication that serves a "lawful purpose" (whatever these vague terms mean) cannot cure an otherwise unconstitutional law; rather it makes it more likely H.B. 5304 is unconstitutional. As noted above, this legislation is a content-based restriction on speech. An exception for a matter of "public concern" is creating a content-based exception to a content-based law. Thus, it compounds the constitutional flaw of the ban on certain images.

In *Regan v. Time, Inc.*, the Supreme Court specifically considered whether a federal law banning the printing of images of currency that had an exception for publication "for philatelic, numismatic, educational, historical, or newsworthy purposes." 468 US 641, 644 (1984). The Court held that:

> "A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not…. Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment. The purpose requirement of § 504 is therefore constitutionally infirm."

Id., 648-649 (internal citations omitted).

Similarly, in *U.S. v. Stevens*, the Court emphasized that a substantial amount of speech that is protected by the First Amendment is not newsworthy or otherwise noteworthy: "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the protection of free speech as

fully as do Keats' poems or Donne's sermons.'" 559 U.S. 460, 478 (internal citations omitted)(emphasis in the original).

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. Again, in *Stevens,* the Supreme Court dismissed the notion that speech may 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. The law in *Stevens* included an exception for images that had "serious value," borrowed from the standard for obscenity. The Court specifically rejected the notion that a safe harbor for speech with value could save an unconstitutional law: "[w]e did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place." *Id*., at 477.

It is unclear if the exception for publishing images that serve a "lawful purpose" is meant to protect the news media, but it would offer little protection. The term has no real meaning. If speech is protected by the First Amendment, it is lawful and does not need a special purpose. It gives speakers no guidance to determine what speech may be published and what is subject to prosecution. This vagueness is impermissible in a law limiting First Amendment guarantees. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

We respectfully ask you to protect the First Amendment rights of all the people of Rhode Island and amend or defeat H.B. 5304. We would welcome the opportunity to work with the legislature to address the issues raised in our memo. If you would like to discuss these concerns, please contact David Horowitz, executive director, at 212-587-4025 #3 or horowitz@mediacoalition.org.