



National Press Photographers Association

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April 22, 2013

The Honorable Richard Bloom
State Capitol, Room 3132
Sacramento CA 95814

RE: AB-1256 & AB-1356 — Oppose

Dear Assembly Member Bloom:

As general counsel for the National Press Photographers Association (NPPA) I write to you on behalf of the twenty-five (25) organizations listed below to express our strong opposition to your proposed bill, AB-1256, “An act to amend Section 1708.8 of, and to add Section 1708.9 to, the Civil Code, relating to civil law.” This bill would expand California’s law on constructive invasion of privacy and create a new cause of action for obstruction. We also strongly object to AB-1356, “An act to amend Section 1708.7 of the Civil Code, relating to stalking.” Our concerns are that the bills as drafted trample upon the First Amendment rights of citizens and journalists.

We believe the creation of a civil cause of action for the “constructive invasion of privacy” is overly broad and vague and imposes greater civil penalties upon otherwise protected forms of speech and expression. We are also concerned that remedies for invasion of privacy and trespass are already properly addressed by current California statutes and that statutory and punitive damages will further chill free speech and create uncertainty about liability. Additionally, the definition of “commercial purposes” fails to distinguish those acts done for valid newsgathering purposes and in fact penalizes publishers and broadcasters along with visual journalists and members of the public with a camera.

Expanding the tort of stalking to include “follows” as defined to mean “to move in relative proximity to a person as that person moves from place to place or to remain in relative proximity to a person who is stationary or whose movements are confined to a small area . . .” and “place under surveillance” as defined to mean “remaining present outside of the plaintiff’s school, place of employment, vehicle, residence, other than the residence of the defendant, or other place occupied by the plaintiff” creates civil liability for protected First Amendment activities. In fact this section blatantly impairs such constitutionally protected press and speech activity and far exceeds “the police power of the state for the protection of the health, safety, and welfare of the people of the State of California.”

In another case regarding a well-meaning but ill-conceived law, the U.S. Supreme Court ruled in *U.S. v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010), that the Animal Crush Video Prohibition Act of 2010 was an unconstitutional abridgment of the First Amendment right to freedom of speech.

Analogous to the Court in *Stevens* as related to these bills, depictions of persons engaging in a personal or familial activity are not, as a class, categorically unprotected by the First Amendment. Because AB-1256

explicitly regulates expression based on content, it is “presumptively invalid” Accordingly, the First Amendment has permitted restrictions on a few historic categories of speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. Visual images, sound recordings, or other physical impressions of another person who is out in public where there is no reasonable expectation of privacy should not be added to that list.

Depictions of animal cruelty are most likely offensive to a reasonable person, but the *Stevens* Court found that in the balance of relative social costs and benefits, even such images could not justify the restrictions sought to be imposed when weighed against the benefits derived under the First Amendment. What is even more telling is that Act was struck down by the Court even though it contained a subsection that stated it did “not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value;” whereas AB-1256 and AB-1356 not only make no such distinction but specifically seek to lessen the protections traditionally afforded to journalistic activities.

AB-1256 and AB-1356 impose civil penalties of alarming breadth and burden substantially more speech than is necessary to advance a compelling government interest. While we recognize the right of privacy, we oppose a broadening of those protections by abridging the clearly established tenets of First Amendment jurisprudence found in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Heavy presumption against prior restraint of free speech which can only be overcome by significant governmental justification), *Bartnicki et al. v. Vopper, et al.*, 532 U.S. 514 (2001)(First Amendment provides protection to speech that discloses the contents of an illegally intercepted communication).

In a related case a trial court recently found unconstitutional a provision of California law ostensibly enacted to curb “paparazzi,” and which is under review by the California Supreme Court. In *California v. Superior Court of California (Raef)*, Case No. BS140861 the Los Angeles City Attorney brought suit against photographer Paul Raef for driving recklessly, in violation of Vehicle Code section 40008, while attempting to photograph Justin Bieber. The trial court found the law, enacted as AB-2479 in 2010, violates the First Amendment. That matter is now being reviewed on appeal by prosecutors. The NPPA and the Reporters Committee for Freedom of the Press filed a letter brief on behalf of six (6) additional *amici*, urging “the court to recognize Section 40008 for what it is: a duplicative law which establishes heightened penalties to photographers with the intent of capturing images for commercial gain for the exact same conduct proscribed by other portions of the state’s vehicle code.” Similarly, AB-1256 and AB-1356 impermissibly infringe on constitutionally protected activity by creating enhanced penalties for existing tort liability under the civil code.

Finally, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the U.S. Supreme Court made clear that the guarantee of press freedom is meaningless if “without some protection for seeking out the news, freedom of the press could be eviscerated.” It is for these reasons that we oppose the proposed unwarranted and unconstitutional measures.

Thank you for your attention in this matter.

Very truly yours,

Mickey H. Osterreicher

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Letter of the NPPA

April 22, 2013

Page 3

General Counsel

On behalf of:

Associated Press Media Editors

Digital Media Law Project at Harvard University's Berkman Center for Internet & Society

Bloomberg News

North Jersey Media Group Inc.

The New Yorker

E.W. Scripps Company

The New York Times

The Los Angeles Times

Society of Professional Journalists

Radio Television Digital News Association

The Associated Press

National Public Radio, Inc.

Reuters News

Time Inc.

The McClatchy Company

Reporters Committee for Freedom of the Press

The Washington Post

Picture Archive Council of America

Cox Media Group

American Society of News Editors

California Newspapers Partnership

The First Amendment Coalition

Courthouse News Service

The Newspaper Guild, Communications Workers of America

Association of Alternative Newsmedia

San Francisco Bay Media Associates

cc: Bob Wieckowski, Chair of the Judiciary Committee (via facsimile)
Tom Clark, counsel to the Assembly Judiciary Committee (via email)