MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

March 21, 2011

Committee on Tourism
In the Hawaii State Senate

Memo in Op. to H. B. 548 HD3

The members of Media Coalition believe that House Bill 548 HD 3 (H.B. 548) is clearly unconstitutional. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Hawaii: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. They have asked me to explain their concerns.

H.B. 548 would impose third party liability on the author or publisher of a guide book that describes activities or attractions on privately owned land or publicly owned land from which the public is excluded if a person suffers an injury or dies on such property. The bill also imposes a duty to warn of any dangerous conditions on any writer and publisher of such a guide book or website. A "Visitor guide publication" is defined as any book, magazine, pamphlet, mailer, handout or advertisement that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii. A "Visitor guide website" is any website, blog, Twitter account, forum, or other wireless communication that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii.

This legislation presents serious Constitutional problems. Travel guides are fully protected by the First Amendment. Speech is protected unless the Supreme Court tells us otherwise. As the Supreme Court said in *Free Speech Coalition v. Ashcroft*, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.234, 241 (2002). H.B. 548 singles out a certain type of fully protected speech for regulation; such a content-based regulation of speech is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "If a less restrictive alternative would serve the government's purpose, the government must use that alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

Any constitutional infirmities of H.B. 548 are not cured by the fact that the legislation would create a private civil tort action rather than impose a direct government sanction on the speaker. It is well established that the First Amendment does not allow application of state tort law in a way that violates free speech. *See*, *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have

applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute.")

Civil liability creates a substantial chilling effect on the producers and distributors of First Amendment protected speech. The prospect of being responsible for the behavior of each viewer, reader or listener is likely to frighten producers and distributors to the point where it will severely chill the dissemination of constitutionally protected works. Due to this chilling effect, courts have repeatedly held that absent actual incitement to imminent lawless action, those who produce or sell First Amendment-protected material may not be subjected to financial liability for the unlawful or violent acts of third parties, even if they were influenced by specific media. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In third-party liability cases where the perpetrator or victim had copied what he or she read or saw, courts have barred or thrown out suits seeking civil damages. *See*, *DeFilippo v. NBC* 446 A.2d 1036 (R.I. 1982) (parents of deceased minor brought wrongful death action after their son hanged himself copying a stunt he saw on the Tonight Show); *Herceg v. Hustler Magazine*, Inc. 814 F.2d 1017 (5th Cir. 1987) (court reversed jury verdict in wrongful death action brought by parents against publisher for adolescent's death allegedly caused by article that described autoerotic asphyxia); *Yakubowicz v. Paramount Picutres Corp.*, 404 Mass. 624 (1989) (wrongful death action brought by father of person killed by perpetrator who had just seen the movie *The Warriors* even though the he quoted lines from the movie while committing the crime); *Zamora v. CBS, Inc.*, 480 F.Supp. 199 (S.D. Fla. 1979) (teenager sued the television network for violent programming that he alleged caused him to commit criminal acts).

The members of Media Coalition consider third party liability so deadly to free speech they challenged an Indianapolis ordinance in 1984 that sought to give victims of sex crimes a cause of action against producers and distributors of the material that allegedly caused the crime. The ordinance was struck down. The decision was upheld unanimously by a three-judge panel of the appeals court and summarily affirmed by the U.S. Supreme Court. *American Booksellers Assn. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The members challenged a virtually identical ordinance in Bellingham, Washington which was also struck down. *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb 9, 1989).

Writers and publishers do not have a duty of care to readers, and the state cannot impose such an obligation on them. Guide books or travel websites are not a product like aspirin or laundry detergent. Books and websites are protected by the First Amendment and the state cannot impose this obligation on authors or publishers. In *Birmingham v. Fodor's Travel Publications, Inc.,* the plaintiff was a tourist injured swimming at a beach discussed in the defendant's travel book. 73 Haw. 359 (1992). The Supreme Court of Hawaii ruled that the defendant/publisher had no duty of care to the plaintiff and could not be held liable for failing to warn the plaintiff of dangerous conditions at the beach. Courts have declined to impose liability on publishers even where a reader has relied on the content of a book that turned out to be incorrect. *Winter v. G.P. Putnam & Sons*, 938 F.2d 1033, 1036-38 (9th Cir. 1991) (affirming on First Amendment grounds the grant of summary judgment to publishers of a mushroom

encyclopedia who had been sued by mushroom enthusiasts who were sickened after eating mushrooms that the book said were safe).

Finally, the imposition on publishers and authors of guidebooks of a duty to warn readers of potential dangers is also likely unconstitutional as compelled speech. The state cannot require an author tell an author how he or she must describe an attraction or activity. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists' inserts in its monthly bills), *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials). In 2005, laws were enacted in California and Illinois that required video games with "graphic violence" or sexually explicit content to carry a warning label reading "18" to advise parents of potential danger to kids if they played such games. Both laws were struck down as unconstitutional as compelled speech. *Video Software Dealers Ass'n v. Schwarzenegger,* 556 F. 3d 950 (9th Cir. 2009), *Entertainment Software Association v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006).

We agree that it is important to identify ways to prevent visitors from trespassing on private property and getting injured or dying. A task force is reasonable approach to resolving the problem, but the answer is not to impose liability for these injuries on writers and publishers of First Amendment protected material. Imposing liability is questionable policy for three reasons: first, it makes innocent third parties responsible for the acts of those who trespass; second, it diminishes the responsibility of the trespasser, since he or she can claim that something he saw or heard "made me do it;" and, it absolves property owners of responsibility for injury or death of the trespasser even if the property owner is at fault.

Again, if enacted, H.B. 548 will suppress speech protected by the First Amendment. Please protect free speech and oppose this legislation.

Respectfully submitted,

/s/ David Horowitz

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