



National Press Photographers Association

The Society of Visual Journalists

1100 M&T Center • 3 Fountain Plaza
Buffalo, NY 14202
Phone: 716.566.1484 • Fax: 716.608.1509
lawyer@nppa.org

VIA EMAIL & FACSIMILE

February 6, 2013

Hon. Kalani English
Hawaii State Capitol
Room 205
415 S. Beretania Street
Honolulu, HI 96813

Re: SB 465

Dear Senator English,

As general counsel for the National Press Photographers Association (NPPA) I write to you on behalf of the organizations listed below to voice our strong opposition to your proposed bill, SB 465, the “Steven Tyler Act.” While you have expressed the opinion that this bill will help your state’s tourism and film industries by encouraging famous people to come to Hawaii without fear of being stalked by paparazzi, we are concerned that the bill as drafted tramples upon the First Amendment rights of citizens and journalists.

We believe the creation of a civil cause of action for “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 are already properly addressed by current Hawaiian statutes and that special and punitive treble damages will further chill free speech. Additionally, the definition of “commercial purposes” fails to recognize acts of valid newsgathering and in fact penalizes publishers and broadcasters along with visual journalists and innocent tourists.

In another well-meaning but ill-conceived case involving similar language, 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.

To paraphrase the Court in *Stevens*, depictions of persons engaging in a personal or familial activity are not, as a class, categorically unprotected by the First Amendment. Because SB 465 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 SB 465 not only makes no such distinction but specifically seeks to lessen the protections traditionally afforded to journalistic activities.

SB 465 imposes civil penalties of alarming breadth and burdens 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.

It is for these reasons that we respectfully ask you to withdraw this measure. Thank you for your attention in this matter.

Very truly yours,

Mickey H. Osterreicher

Mickey H. Osterreicher
General Counsel

On behalf of:

Reporters Committee for Freedom of the Press (RCFP)
American Society of Media Photographers (ASMP)
American Society of News Editors (ASNE)
Associated Press Media Editors (APME)
Society of Professional Journalists (SPJ)
Bay Area News Group

cc: Hon. Clayton Hee (via email)
Hon. Maile Shimabukuro (via email)
Hon. David M. Louie, Attorney General (via email)