

THE MEDIA COALITION INC

April 19, 2010

Representative Roy Burrell
State Capitol
P.O. Box 44486
Baton Rouge, Louisiana 70804-4486

Memo in Opposition House Bill 1259

The members of Media Coalition believe that House Bill 1259 has several serious and significant constitutional infirmities. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Louisiana: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

H.B. 1259 would make it a crime to transmit any electronic communication with the intent to “coerce”, “abuse”, “intimidate,” “harass”, “frighten”, “embarrass”, or “cause emotional distress to another person.” A violation would be punishable by up to six months in prison, a \$500 fine, or both. The law offers no definitions for coerce, abuse, intimidate, harass, frighten, embarrass, or cause emotional distress. It is not limited to speech between minors and their peers. Nor is the law limited to one on one communications among minors.

This bill is almost certainly unconstitutionally overbroad and vague. While protecting people from cyberbullying is an admirable goal, such a law cannot ignore First Amendment protection of speech. Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow categories. As the Supreme Court stated 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.1382, 1389 (2002). Content-based restrictions on speech are presumed to be invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

H.B. 1259 is clearly overbroad. It would create criminal liability for a significant amount of protected speech. Communication that embarrasses or frightens is generally protected by the First Amendment. Stephen King novels and the *Halloween* movie franchise are intended to frighten their readers and viewers. Political commercials are often intended to scare the viewer into voting for a particular candidate. Many newspaper editorials, books and documentaries are created specifically to embarrass politicians and

the powerful. Even speech intended to inflict emotional distress is protected by the First Amendment. Louisiana recognizes a tort for intentional infliction of emotional distress but it is limited to the most egregious speech that meets a three part test. *White v. Monsanto*, 585 So. 2d 1205 (La. 1991). The Louisiana Supreme Court emphasized that, “Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” 585 So. 2d 1205, 1209.

The bill is also unconstitutionally vague. In certain narrow, well-defined instances, speech that rises to the level of coercion, abuse, intimidation, or harassment can amount to a crime. Typically, statutes that punish such speech include specific criteria that transform the speech from protected communication to a crime. Such statutes usually use objective and subjective criteria for making the distinction between reporters covering a story and harassment or competitive banter between video game rivals and intimidation or abuse. H.B. 1259 offers no criteria to limit the definition of these terms either in the bill or by reference nor does it require that the subject of the speech even be aware of it.

Finally, the vagueness of the legislation will have a significant chilling effect on protected speech. Speakers have little guidance to determine what speech is protected and what is subject to prosecution and must either risk a criminal prosecution or self-censor their speech. See *Baggett v. Bullitt*, 370 U.S. 360 (1964).

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs’ attorneys’ fees.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

We ask you to protect the First Amendment rights of all the people of Louisiana and reconsider H.B. 1259.

cc: Representative Wooten, Chair
Representative Baldone, Vice Chair
Representative Hazel
Representative Howard
Representative Guillory
Representative Leger
Representative Lopinto
Representative Perry
Representative Barbara M. Norton
Representative Smith
Representative Merchand Stiaes
Representative Templet
Representative Thierry
Representative White