



Memo in Opposition House Bill 1259 as Passed by the House

The members of Media Coalition believe that House Bill 1259 as passed by the House 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 as passed would make it a crime to transmit any electronic communication to anyone under 17 with the intent to “coerce”, “abuse”, “intimidate”, “harass”, “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, embarrass, or cause emotional distress. The communication must be accessed by a person less than 17 years old but it is unclear if the communication must be intended to embarrass or cause emotional distress to the recipient or if it can be intended to do so to a third person who may or may not be under 17. There is no requirement that the recipient or subject of the speech actually feel coerced, abused, intimidated, harassed, embarrassed or suffer emotional distress. Nor does the bill limit the crime to one to one communications among minors about a peer.

While protecting people from cyber bullying 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).

The bill is 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 does not define any of these terms explicitly or by reference. It does not offer any objective or subjective criteria that the subject of the speech is made to feel embarrassed, emotionally distressed. It does not require that the subject of the speech even be aware of it.

H.B. 1259 is also unconstitutionally overbroad. It would create criminal liability for a significant amount of protected speech. Communication that embarrasses another person is fully protected by the First Amendment. Many newspaper editorials, books and documentaries are created specifically to embarrass politicians and the powerful. Even if the law were limited to speech about minors, speech does not shed its Constitutional protection. Speech intended to inflict emotional distress is protected by the First Amendment too. 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.

Finally, the vagueness of the legislation will have a significant chilling effect on protected speech. This bill does not call for mere expulsion from school or even allow for civil damages against the speaker. It provides criminal sanctions of up to six months in jail for a single violation and mandatory year in prison for a third. 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).

It may be that H.B. 1259 is not intended to include a newspaper editorial accessed on the Internet, or a Jon Stewart skit watched online on Youtube or Hulu if meant to embarrass the subject and accessed by a 16 year old. However an unconstitutional statute is not cured by narrower intent. In *U.S. v. Stevens*, Chief Justice Roberts wrote, “We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. 559 U.S. ___, ___ (2010) (slip op. at 18).

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 reject H.B. 1259 as passed by the House.