



MEDIA COALITION, INC.

DEFENDING THE FIRST AMENDMENT SINCE 1973

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

## Memo in Opposition to Maryland House Bill 744

The members of Media Coalition believe that House Bill 744 may violate the Constitution. They have asked me to explain their concerns. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Maryland: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 744 would require anyone who has published online an arrest booking photo for a criminal or traffic charge or suspected violation of a criminal or traffic law to remove it within 30 days upon written request by the person in the image if the offense can be expunged under Maryland law. A violation is deemed an unfair trade practice.

This legislation would force online publishers to edit or re-write news stories. The First Amendment bars the government from meddling in the editorial decisions of publishers or any speakers in this way.

All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. As the Court recently explained:

From 1791 to the present, . . . [the First Amendment has] “permitted restrictions upon the content of speech in a few limited areas.” [These] “historic and traditional categories long familiar to the bar[ ]”[ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

*United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010). See also, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The compelled removal of arrest photos is likely unconstitutional because it is a content-based restriction that does not fit one of these historic exceptions to the First Amendment.

Any content-based regulation that does not fit into a historic exception to the First Amendment must satisfy strict constitutional scrutiny. See, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826-7 (2000). To meet the test for strict scrutiny the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is narrowly tailored to achieve that interest. See, *R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118 (1991). It must also show that the legislation is not unconstitutionally overbroad. It is very unlikely that this legislation could satisfy the strict

Executive Director: David Horowitz Chair: Barbara Jones, Freedom to Read Foundation  
Immediate Past Chair: Tom Foulkes, Entertainment Software Association Treasurer: Sean Bersell, Entertainment Merchants Association  
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

scrutiny test.

Privacy is an important right but the Supreme Court has held that it is not a sufficiently compelling interest to overcome the First Amendment right to free speech. The Court has often struck down laws and vacated court orders that barred speech about a criminal proceeding in order to protect a defendant's privacy. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a statute allowing a rape victim to seek damages for the publishing of his or her name. Justice White wrote, "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S. 469, 496. The Court again found the First Amendment right to publish outweighed privacy interests when it struck down a West Virginia law that barred publishing the name of a minor being adjudicated in juvenile court. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). See also, *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

Nor would this legislation serve the stated interest in protecting the privacy of the person entitled to ask for his or her arrest photo to be removed. The image can still be published in other media despite the limitation on its publication on the Internet, and the details of the arrest can still be published online. In *Daily Mail*, Chief Justice Burger, writing for the Court, noted that the law barred newspapers from publishing the names of juveniles but did not apply to electronic communication or other publication. He then wrote, "Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose." 443 U.S. at 105.

The differential treatment of online publishers by itself may cause H.B. 744 to be unconstitutional. The Supreme Court has allowed media to be treated differently in some contexts but not where the different treatment is based on the content of the speech. It has condemned the selective imposition of a penalty imposed on one medium but not others or specific portions of a media but not others. See, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. at 812 (2000) (striking down a regulation that targeted "adult" cable channels, but permitted similar expression by other speakers); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. at 659 (1994) ("Regulations that discriminate among media ... often present serious First Amendment concerns.") "Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 228 (1987).

Finally, this legislation also likely violates the Commerce Clause of the Constitution which reserves to Congress the power to regulate interstate commerce. In effect, this bill would apply Maryland's law to the entire Internet. The only contact an online publisher would have with Maryland is to publish an arrest photo associated with a violation of some Maryland laws. So a California website could be deemed to violate the Maryland unfair trade practices law simply for publishing an AP story about an arrest in Maryland. Courts across the country have repeatedly struck down state laws that seek to regulate online content as unconstitutional burdens on interstate commerce. As a leading case applying the Commerce Clause to the Internet explained:

The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.

*American Library Association v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997); *See also*, *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003); *Cyberspace Communications v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999).

If you would like to discuss our concerns further, I would welcome that opportunity. I can be reached at 212-587-4025 #3 or [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

We ask you to protect the First Amendment rights of all the people of Maryland and defeat or amend H.B. 744.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

David Horowitz  
Executive Director  
Media Coalition, Inc.