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 Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

March 26, 2014

Senator Ron Latz, Chairman
Senate Judiciary Committee
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

RE: SF 1863 (Eaton) – Oppose

Dear Chairman Latz,

The members of Media Coalition believe that Senate Bill 1863 violates 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 Minnesota: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.F. 1863 would require any publisher to remove an arrest photo upon request if the person in the photo was not convicted. If the person in the photo was convicted, the publisher must limit the information about the picture to the person's first name, last initial and crime of conviction. The legislation also requires any publisher who seeks access to an arrest photo to explain how the image will be used and every location it will appear. Any re-publisher who receives the image from a publisher who obtained the picture from the state must also file this information. S.F. 1863 would not require that the person requesting that the information be removed live in Minnesota nor does the website subject to the request to take down the information need to be located in the state.

This legislation would allow O.J. Simpson to request any website to take down any personal information or images published about him since he was acquitted in the death of his wife. Similarly, Lee Harvey Oswald's estate could ask that such information about him be removed from websites since law enforcement did not pursue his prosecution after he was killed in police custody. It would allow a notorious criminal like Charles Manson to demand a website limit the information associated with his arrest photo to his first name, last initial and crime of conviction.

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

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> 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. at 382-83; *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 245-46 (2002); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991). H.F 1863 would apply to material based on its content, it is immediately constitutionally-suspect. The Supreme Court has repeatedly held that a content-based restriction on speech is presumptively invalid. *See, e.g*. *R.A.V.* at 382 (1992). Speech is protected unless the Supreme Court tells us otherwise.

Since S.F. 1863 does not fit into a historic exception to the First Amendment, the restriction on speech must satisfy strict constitutional scrutiny. *See, U.S. 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. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). It must also show that the legislation is not unconstitutionally overbroad. It is very unlikely that this legislation could satisfy the strict scrutiny test.

Privacy is an important right but the Supreme Court has ruled that it is not a sufficiently compelling interest to overcome the right of free speech. 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 the 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). In *Daily Mail*, the Court added that this line of cases was not limited to information provided by the government:

> These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information. If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.

443 U.S. at 104 (1979) (internal citations omitted).

In addition to the requirement that certain arrest photos be removed by a publisher, this line of cases also makes it likely the other parts of the bill are unconstitutional. There is a much less important state interest in the privacy of a person who has been convicted. Also, the state cannot impose control over the editorial content associated with an arrest photo by limiting it to first name, last name and the crime charged. The state is also barred from maintaining control over how a publisher uses an image how it is distributed. Once the arrest photo is legally obtained, the state loses control of the image.

Since an arrest photo cannot be removed from a book or documentary film, this legislation is intended to apply only to online publication. However, it would also likely be unconstitutional because it would fail to accomplish the state interest in preserving privacy. The same information could still be published in other medium or it could be published with another picture. 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." *Id*., at 105.

This legislation likely also violates the Commerce Clause of the Constitution which reserves to Congress the power to regulate interstate commerce. S.F. 1863 would require any publisher in the country to submit a written disclosure of how and where the image will be published if the photo was received from a publisher who obtained it from the state. This could apply to pictures obtained from a wire service or a search engine. 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 v. Engler,* 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson,* 194 F. 3d 1149 (10th Cir. 1999).

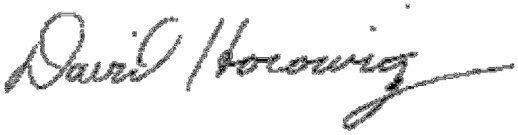
Finally, the bill may be unconstitutionally vague. It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Winters v. New York*, 333 U.S. 507, 509 (1948). S.F. 1863 leaves unclear the extent of the prohibition of using more than a first name and first initial of the last name to identify a person convicted of a crime. Is an author barred from using

the full name of someone convicted of a crime throughout a book? Can someone convicted of a crime demand that his or her name be removed from a film if an arrest photo is used? This lack of specificity can only be resolved through litigation which creates a burden on speakers. This burden will cause a significant chilling effect on protected speech.

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.

Again, we ask you to protect the First Amendment rights of all the people of Minnesota and defeat or amend S.F. 1863.

Respectfully submitted,



David Horowitz
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cc: Members, Minnesota Senate Judiciary Committee
cc: Senator Chris Eaton