



Memo in Opposition to Missouri House Bill 1665

The members of Media Coalition believe that House Bill 1665 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 Missouri: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 1665 would require anyone who has posted an arrest booking photo on a website to remove it upon written request by the person in the image if that person was acquitted of the charge, the charge was dismissed, access to the information about the case was restricted or law enforcement has elected not to pursue criminal charges against the person. A violation would be subject to criminal prosecution. It would also allow any “consumer” can recover actual and punitive damages, legal fees and other legal remedies if he or she suffers harm due to website failing to comply with a request to remove an arrest photo.

This legislation would allow O.J. Simpson to force any website to take down his arrest photo since he was acquitted in the death of his wife. Images of Simpson could be published in a book or be included in a documentary movie but would have to be removed from an Internet website about the book or movie. It would also force online news sites to erase history. A website can publish arrest photos from Justin Beiber’s recent charge for driving while impaired but would have to erase it from the site, as if it did not happen, if he enters a diversionary program, the charges are dropped or he is acquitted.

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; *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). The compelled removal of arrest photos is immediately constitutionally suspect because it is a content based restriction that does not fit one of these historic exceptions to the First Amendment. The Supreme Court has repeatedly held that a content-based restriction on speech is presumptively invalid. *See, e.g. R.A.V.* 505 U.S. at 382 (1992).

A content based regulation that does not fit into a historic exception to the First Amendment 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 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 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 US 539 (1976).

Nor would this law serve the stated interest in protecting the privacy of the person in the arrest photo but not convicted of a crime. The same information can still be published in any other medium despite the limitation to publication on the Internet of a person’s name, personal information or images would allow. 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. 1665 to be found 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. The Supreme Court 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. 803, 812 (2000) (striking down a regulation that targeted “adult” cable channels, but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 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 likely also violates the Commerce Clause of the Constitution which reserves to Congress the power to regulate interstate commerce. Since websites have no ability to prevent Missourians from accessing their website, this law would, in effect, apply nationally. 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).

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.

We ask you to protect the First Amendment rights of all the people of Missouri and defeat or amend H.B. 1665.

Respectfully submitted,

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

David Horowitz
Executive Director
Media Coalition, Inc.