

## Memo to Commerce and Consumer Affairs Committee in Opposition to House Bill 1144

The members of Media Coalition believe that House Bill 1144 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 New Hampshire: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

H.B. 1144 would require any website to remove the name and personal information, including any images, of any person who has been charged with a crime of a person charged, within 15 days after receiving written notification from the person or the person's designee that the person has been acquitted of the crime, the charge has been dismissed, or law enforcement has elected not to pursue criminal charges against the person. The legislation would not require that the person asking for the information to be removed live in New Hampshire 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. Personal information and images of Simpson or Oswald 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 create the situation where a website can publish personal information and images related to Justin Bieber's recent arrest for driving while impaired but could have to erase it from the Internet if he enters a diversionary program.

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. 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). This bill does not fit one of these historic exceptions to the First Amendment. Since it 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 H.B. 1144 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).

Nor would this law serve the stated interest in the privacy of the person not convicted of a crime. The limitation to publication on the Internet of a person's name, personal information or images would allow the same information to be published in numerous other medium. 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. 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 is likely 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). H.B. 1144 does not define what is personal information. Is it merely a person's name and address or it includes additional information? Nor does the legislation clarify in what context this information must be removed. Does a publisher have to remove personal information and images in any context or is it limited to the crime for which the person was not convicted? This lack of specificity can only be resolved through litigation which creates a burden on speakers and causes 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](mailto:horowitz@mediacoalition.org).

Again, we ask you to protect the First Amendment rights of all the people of New Hampshire and defeat or amend H.B. 1144.

Respectfully submitted,



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January 28, 2014