Memo in Opposition to North Carolina Senate Bill 744 section 18B.10.(c)

The members of Media Coalition believe that Senate Bill 744 violates the First Amendment to 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 North Carolina: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 744 would require any publisher or website operator to remove "criminal record information" within 15 days of a request by the person who is the subject of the information if that person had not been convicted of the crime. If removal of the information is not possible, the publisher or website must print a "retraction." Failure to remove the information is subject to a fine of $100 per week per incident. If the information has not been removed within 45 days of the request, it creates the presumption of defamation of character. The legislation is vague as to whether the fine would not be imposed if a retraction is published. "Criminal record information" is defined as: (1) "Descriptions or notations of any arrests, any formal criminal charges, and the disposition of those criminal charges. (2) Photographs of the person taken pursuant to an arrest or other involvement in the criminal justice system. (3) Personal identifying information, including a person's name, address, date of birth, photograph" or certain other data. There is no jurisdictional limitation in the bill. S.B. 744 would not require that either the person requesting that the information be removed or the website subject to the request be a resident of North Carolina.

This legislation gives control of the editorial decisions of newspapers, book publishers, websites and other media to people who have been arrested but not convicted. So, it would allow O.J. Simpson, or his agent, to request any website to take down descriptions of the long police chase of him in his white Bronco that led to his arrest, since he was acquitted in the death of his wife. Similarly, Lee Harvey Oswald's estate could ask that information about him be removed from websites since law enforcement did not pursue his prosecution after he was killed in police custody.

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). S.B 744 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.B. 744 does not fit into any 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).

The Court also expressed skepticism about a law that limits information related to the criminal justice process in one medium but not in others. 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. Since S.B. 744 only applies to certain media, it is likely unconstitutional because the information can still be disseminated in other media. This would undermine the state interest in preserving privacy. The same information could still be disseminated in other medium.

This line of cases demonstrates that S.B. 744 is unconstitutional for failing to articulate a compelling state of great enough importance to overcome the First Amendment protection for speech. It is unlikely that this legislation could satisfy the other prongs of the strict scrutiny test. There is no record establishing a material harm, nor is the harm likely to be alleviated by a law that applies only to certain media. Finally, there is substantial evidence that this legislation is not narrowly tailored. In the cases above, the Supreme Court struck down restrictions on the use of names and arrest photos. S.B. 744 goes far beyond these limits to apply to descriptions of the arrest, charges filed and the disposition of those charges. These are core reporting and editing activities reserved to the publisher. This line of cases makes clear that the state cannot instruct a publisher to remove or retract this information.

This legislation likely also violates the Commerce Clause of the Constitution, which reserves to Congress the power to regulate interstate commerce. The only limitation on the application of this law would be whether the state of North Carolina has jurisdiction over a publisher. It would apply to any publisher of a website and to any publisher or author whose books are available in the state. Since the Internet cannot be stopped at the borders of North Carolina, the lack of jurisdictional limits means that this law would apply to every website on the Internet. 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).

Most notably, S.B. 744 does not explain how a publisher should retract truthful information. It may be appropriate to publish a clarification or a follow-up story but it is not evident how to retract information that does not need a correction. It also leaves uncertain whether a retraction is sufficient to avoid the fine and the presumption of defamation. It does not define "descriptions and notations" about an arrest. This could mean that an author must remove or retract all discussion or description of a crime scene in a book about a newsworthy subject. The legislation also does not make clear when the person arrested for a crime may ask for material to be taken down or retracted. Is it 15 days from his or her arrest or 15 days from the completion of the legal process? If it is the former, anyone charged with a crime can limit the coverage of the crime and the trial after 15 days pass from the time of arrest. 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 North Carolina and defeat or amend S.B. 744.

Respectfully submitted,

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