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.

May 21, 2012

Representative Marlene Anielski
77 S. High St
12th Floor
Columbus, OH 43215-6111

Re: House Bill 414 - Opposed

Dear Representative Anielski,

The members of Media Coalition believe that changes to Section 2917 (A)(1) and to Section 2903.211 (A)(1) may violate the First Amendment. The trade associations that comprise Media Coalition have many members throughout the country, including Ohio: publishers, booksellers and librarians, makers and retailers of recordings, films, videos and video games.

The existing section 2903.211 (A)(1) criminalizes using a computer to post a message that causes another person "mental distress" which is defined as rising to the level of mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services. H.B. 414 would broaden the existing law to make it a crime to use any form of written communication. It lowers the standard of harm to causing "emotional distress" which is defined as significant mental suffering or distress that does not necessarily require professional counseling. Finally, it broadens the party who may be injured to include a person's immediate family.

Government may criminalize speech that rises to the level of harassment, but this legislation substantially lowers the bar as to what can be deemed an injury and the definition of the injury is more amorphous. The injury can be sustained by a person to whom the communication was not directed. There is no requirement that the recipient or subject of the speech actually feel offended, annoyed or scared.

Speech protected by the First Amendment often causes emotional distress to the subject or his or her family. Rush Limbaugh's recent comments about a Georgetown law student may have caused her emotional distress. He could be prosecuted if a purpose of his comments were to cause such distress. Similarly, a news story revealing a politician's philandering will very likely cause emotional distress to his or her spouse or children. A story exposing a public figure's sexual orientation may cause emotional distress for the celebrity's immediate family. .

19 Fulton Street, Suite 407 | New York, NY 10038 | 212.587.4025 | mediacoalition.org

While protecting people from harassment is a worthy goal, legislators cannot do so by criminalizing speech protected by the Constitution. All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V.,* 505 U.S. 377, 382; *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991). 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.*, 505 U.S. at 382-83; *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 245-46 (2002).

There is no historic exception to First Amendment protection for speech simply because it annoys, offends or even causes emotional distress. As the Court said in *Texas v. Johnson*, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414. *See also Street* v. *New York,* 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (struck down a statute which limited speech which "arouses anger, alarm or resentment in others"); *Free Speech Coalition v. Ashcroft*, 535 U.S. at 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *FCC* v. *Pacifica Foundation,* 438 U. S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Carey* v. *Population Services Int'l,* 431 U. S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

In three recent First Amendment cases, the Court has emphasized that it is reluctant, if not unwilling, to expand the categories of unprotected speech to include different kinds of offensive or distasteful communication beyond the historic exceptions. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court declined to create an exception for outrageous and upsetting speech in the vicinity of a private military funeral. In *United States v. Stevens*, the Court declined to fashion a new First Amendment exception for depictions of actual animal cruelty. 130 S. Ct. 1577. In *Brown v. Entertainment Merchs. Ass'n,* 131 S. Ct. 2729 (2011), the Court declined to craft an exception for the sale of patently offensive violent video games to minors.

To the extent that harassment can be considered an existing category of unprotected speech, the bill is still unconstitutionally vague. In certain narrow, well-defined instances, speech may rise to the level of coercion, threats, intimidation, or persistent harassment and amount to a crime. H.B. 414 does not emotional distress adequately to distinguish between protected speech and the traditional narrow crime of harassment. This vagueness in the legislation will have a significant chilling effect on protected. As noted above, a substantial amount of speech in the media could be subject to this legislation, but speakers have little guidance to determine what speech is protected and what is subject to prosecution and must

either risk a criminal prosecution or self-censor their speech. This vagueness is impermissible in a law limiting First Amendment guarantees. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

It may be that H.B. 414 is not intended to criminalize speech in the media but only what legitimately rises to the level of harassment; however, an unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. As Chief Justice Roberts wrote in *United States v. Stevens*, "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 130 S.Ct. at 1591 (2010).

Passage of this unconstitutionally overbroad and vague bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In a previous case brought by members of Media Coalition the state agreed to pay fees of $245,000.

If you would like to discuss our concerns further, I would appreciate that opportunity and can be contacted at 212-587-4025 #3 or horowitz@mediacoalition.org.

Again, we ask you to protect the First Amendment rights of all the people of Ohio and amend H.B. 414.

Respectfully submitted,

David Horowitz
Executive Director
Media Coalition, Inc.