



Memo re: Ohio House Bill 74

The members of Media Coalition believe that the Senate Judiciary Committee should hold this legislation for further consideration pending a decision in [*US v. Elonis*](#), which will be decided by the Supreme Court this term. We are concerned that H.B. 74 may violate the First Amendment and believe that the decision in *Elonis* may give the legislature guidance in distinguishing between genuine threats and protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including Ohio: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

The existing section 2903.211 (A) is a stalking statute that criminalizes using a computer to post a message that urges or incites anyone to engage in a course of conduct to cause another person “mental distress.” “Mental distress” is defined to include a condition that would normally require mental health services. H.B. 74 makes two important changes to the existing law. First, (A)(2) would make it illegal to engage in speech with the purpose of causing emotional distress without any element of conduct as part of the crime. Second, (A)(1) is amended to broaden the definition of “course of conduct” to include written communication. This change appears to criminalize speech if it causes emotional distress regardless of the purpose of the speaker since this section does not include an element of purpose. The bill also broadens the class of people who can suffer mental injury to include a person’s immediate family. A violation of the law is deemed a crime of menacing by stalking.

Government may criminalize speech that rises to the level of harassment, stalking or a genuine threat, but the crime must be defined narrowly and precisely so it does not criminalize speech protected by the First Amendment. This legislation fails to adequately distinguish between constitutionally protected speech, whether it is intended to cause emotional distress or it is merely a result, and bullying that amounts to harassment or a threat. Speech that causes emotional distress is common in discussion of important matters and everyday communication. The woman who released the risqué pictures of Anthony Weiner admitted she did it to damage his campaign for mayor of New York City. The publication of pictures of Muhammad by a Danish news website was done intentionally to provoke Muslims. During the debate over the Affordable Health Care Act, Rush Limbaugh made comments about a Georgetown law student that were very critical of her looks and her personal ethics.

Speech is generally protected by the Constitution even if the speaker intended to cause the subject or his or her family emotional distress. The Supreme Court has rejected attempts to punish speech because it caused an emotional or mental impact on the listener or viewer. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court rejected a civil ruling imposing liability for

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intentional infliction of emotional distress. A Maryland trial court had found the defendant liable for damages to the father of a deceased serviceman for outrageous and upsetting speech in the vicinity of the private military funeral. The Supreme Court found that First Amendment barred the imposition of tort damages because the speech at issue was on a matter of public interest. The Court noted, "To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." *Id.*, at 1215. The standard for harm in the Maryland law is similar or greater than that imposed by O.H. 74.

Snyder was a civil tort case. The Court is likely to be more skeptical of a criminal law that would impose a prison sentence for similar speech. In *R.A.V. v. St. Paul*, the Court struck down a hate crime ordinance that limited speech that "arouses anger, alarm or resentment in others." 505 U.S. 377 (1992). The case came before the Court in a prosecution of several minors who burned a cross in across the street from a house of an African American family. The Court dismissed the notion that the "emotive impact of speech on its audience" is a sufficient basis to uphold the ordinance. 505 U.S. at 394. In *Brown v. Entertainment Merchs. Ass'n*, it declined to craft an exception to the First Amendment for the sale of "patently offensive" violent video games to minors despite claims by California that the games caused minors to suffer mental injury from viewing them. Again, the causing of mental injury was not sufficient to overcome First Amendment protection for speech. 131 S. Ct. 2729 (2011).

More generally, the Court has been skeptical of restrictions on speech that people find offensive or disturbing. 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"); *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").

Beyond these rulings, the legislature should be aware that this term the Supreme Court will decide [*Elonis v. United States*](#), which will be argued in December. The case is expected to give further guidance on the distinctions between protected communication and speech that rises to the level of threat or harassment and is unprotected by the First Amendment. It involves a challenge to a law barring online threats brought by a man a man of convicted of threatening his ex-wife in postings he made on Facebook. The question before the Court is what the government must prove to establish that a communication is an illegal threat.

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Finally, it may be that H.B. 74 is not intended to criminalize speech in the media but only what legitimately rises to the level of stalking or 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).

Again, we ask that you hold the bill for further consideration pending a decision in *Elonis*. Alternatively, we urge you to protect the First Amendment rights of the citizens of Ohio and amend or defeat this bill.

If you would like to discuss our concerns further, please contact me at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,

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

David Horowitz,
Executive Director