



# THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Authors Guild Comic Book Legal Defense Fund Entertainment Software Association  
Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

## Memo in Opposition to Illinois Senate Bill 2560

The members of Media Coalition believe that Senate Bill 2560 violates the First Amendment. 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 Illinois: authors, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

S.B. 2560 would require a person who has published a “criminal record” either online or wherever the information is published, to remove the information within 30 days upon written request by the subject of the “criminal record.” “Criminal record” is defined as descriptions or notations of an arrest, criminal charges, the disposition of those criminal charges; photos or video of the person taken pursuant to an arrest or other involvement in the criminal justice system; and personal identifying information, including a person's name and address. The bill deems anyone who publishes such information in any forum “for the purposes of commerce” to be subject to this law.

This legislation would require publishers to erase or alter truthful historic information by scrubbing their stories about arrests, trials and appeals. Important current and historical events would have to be rewritten. O.J. Simpson and John Hinckley could both force a publisher to remove their “criminal records” since neither one was found guilty. The estate of Lee Harvey Oswald could demand that a news publisher erase his “criminal records” since he was killed before he could be convicted of his crimes, which resulted in the charges against them being dropped. John Dillinger was shot by the police as they were trying to arrest him. His estate could ask that any “criminal records” related to crimes he was accused of be removed since he was never charged. Also, since the definition of a “criminal record” is so broad, iconic images such as Jack Ruby’s murder of Oswald while in police custody could be subject to a request for removal, as could footage of the police chase of O.J. Simpson in the white Bronco. It is not just these noteworthy cases. The legislation would force publishers to rewrite or remove articles that reported on everyday arrests or common activity in criminal court if a person in the article was not eventually convicted.

The state cannot force a publisher to scrub information from their website or other print forms or to amend a previously published story. Nor can it grant that power to a person arrested for a crime who was not convicted. 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,

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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 (1992); *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). This analysis does not change regardless of whether the material was published for the purpose of commerce. Speech gets the same protection whether it is a book for sale or a book borrowed from a library. See generally, *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976).

Removal of “criminal records” from published stories is content-based censorship of speech that does not fit one of these historic exceptions to the First Amendment. Any content-based regulation that does not fit into a historic exception to the First Amendment must satisfy strict constitutional scrutiny. See, *United States 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.

While protecting the privacy of a person who has been arrested but is not convicted is an important right, the Supreme Court has held that it is not a sufficiently compelling interest to overcome the First Amendment right to free speech. The Supreme Court has also held that privacy by itself it is not sufficiently compelling to overcome First Amendment protections against a generally applied criminal law that limits speech based on its content. In a line of cases, the Court has struck down laws that impede reporting about the criminal justice system. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a statute allowing a rape victim to seek damages from anyone who published 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 (1975). 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 U.S. 539 (1976). In *Smith v. Daily Mail Publ’g Co.*, the Supreme Court emphasized that this line of cases was not limited to information obtained from the government, but applied to information gathered from “routine newspaper reporting techniques.” 443 U.S. 97, 103 (1979).

In addition to violating the First Amendment, it likely also violates the Commerce Clause of the Constitution which reserves to Congress the power to regulate interstate commerce. There is no limit on jurisdiction in the bill. It applies to anyone using a computer or computer network who publishes a “criminal record” on their own website or by print for

the purposes of commerce. There is no requirement that the publisher or person arrested be a resident of Illinois; or even that the printed material be accessible in Illinois. This bill creates a national prohibition on any one who uses a computer or computer network and publishes a “criminal record” even he or she has no contacts with the state. 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 Communication v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999).

Finally, while the legislature may intend this legislation to be narrower in scope, the clear language of the bill applies to a wide range of speech pertaining to the criminal justice system. An unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in a limited fashion. As the Supreme Court held in *U.S. v. Stevens*, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” 559 U.S. 460, 472.

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). We ask you to protect the First Amendment rights of all the people of Illinois and amend or defeat S.B. 2560.