



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America

January 30, 2020

The Honorable Marjorie Smith
Chair, House Judiciary Committee

By Hand Delivery

RE: Oppose H.B. 1157

Dear Chairwoman Smith,

The members of Media Coalition believe that House Bill 1157 violates the First Amendment of the U.S. Constitution for multiple reasons. 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: authors, publishers, booksellers, librarians, and producers and distributors of recordings, films, home video and video games.

H.B. 1157 would require any “New Hampshire news media organization” to update, retract or correct any story published to the internet concerning a criminal proceeding brought against a specific person if the person was subsequently found not guilty, acquitted, or the charges were dismissed. The news organization must act immediately after being notified by the person who is the subject of the story. The failure to do so would make the “New Hampshire news media organization” liable for any damages incurred by the person caused by such failure. “New Hampshire news media organization” is not defined in the bill.

This legislation would allow O.J. Simpson to demand that newspapers “correct” or remove stories in their archives about his arrest or trial since he was acquitted in the death of his wife. Similarly, Lee Harvey Oswald’s estate could make the same request about stories about his assassination of President Kennedy since the charges were dismissed when he was killed in police custody. The reporting on the cases of Simpson or Oswald would have to be in the Concord Monitor or New Hampshire Union Leader would have to correct such stories, but if the same story appeared in The Boston Globe and The Portland Press Herald it presumably not have to be corrected even though both papers have circulation in New Hampshire. Stories about either event would also not have to be corrected if they were published in a book, magazine or discussed in a documentary movie, unless the story was accessed online.

The bill is an unconstitutional invasion of the editorial process. The First Amendment bars the state from interfering with editorial decisions about what to print and whether to remove or edit previously published stories. In *Miami Herald Publ’g Co. v. Tornillo*, the U.S. Supreme Court

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Immediate Past Chair: James LaRue, Freedom to Read Foundation
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

struck down a Florida law that required newspapers to provide candidates for elected office the opportunity to clarify or respond to reporting they believe to be critical of them. 418 U.S. 241 (1974). The Court was adamant that the news media must retain full editorial control over what it chooses to publish or not publish. Chief Justice Burger, writing for the Court, made plain:

“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”

Id., at 258. See also, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 653(1994) (“The First Amendment protects the editorial independence of the press.”).

H.B. 1157 is also likely unconstitutional as compelled speech. The state cannot force a publisher to deliver a required message or face financial penalties. Generally, “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right “to refrain from speaking at all,” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

The legislation may also be unconstitutional for treating online media differently than traditional media. The Supreme Court has condemned the selective imposition of a punishment on one medium but not others. In 1983, the Court held that the power to single out the press with special taxes, but not other media, could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575. See also, *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812 (2000) (striking down a regulation that targeted “adult” cable channels but permitted similar expression by other speakers); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. at 659 (“Regulations that discriminate among media ... often present serious First Amendment concerns.”); *Arkansas Writers’ Project*, 481 U.S. 221, 228 (1983). (“Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State.”); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (Law that barred newspapers from publishing the names of juveniles but did not apply to electronic communication or other publication failed strict scrutiny).

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) (citations omitted). H.B. 1157 does not define what is a New Hampshire news organization so it is not clear whether the news organization must be located in New Hampshire, regularly covers news in the state or only that it be available in the state. This lack of clarity can only be resolved through litigation which creates a burden on speakers and causes a significant chilling effect on protected speech.

If “New Hampshire news organization” applies to news organizations physically located outside of the state but that can be accessed online in the state, the bill probably 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).

Again, we ask you to protect the First Amendment rights of all the people of New Hampshire and defeat or amend H.B. 1157. If you would like to discuss our concerns further, I would welcome that opportunity to do so. I can be reached at 212-587-4025 #3 or horowitz@mediacoalition.org.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

David Horowitz
Executive Director
Media Coalition, Inc.