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 Recording Industry Association of America

Memo in Opposition to North Dakota House Bill 1144

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we firmly believe that H.B. 1144 violates the protections for free speech and due process provided by the Constitution for numerous reasons. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including North Dakota: authors, publishers, booksellers and librarians, producers and retailers of films, home video and video games. They have asked me to explain their concerns.

Summary of the bill:
H.B. 1144 creates a cause of action against a website if that site allows users to post content that it then "restricts, censors, or suppresses" The cause of action can be brought by the person who posted the content or any person who would have "reasonably" received the speech. However, the section only applies if the site is immune from civil liability under federal law; is not considered a publisher; has over a million users; and is a "provider of a social media site."

The plaintiff who wins in court is entitled to treble damages for compensatory, consequential and incidental damages and may be awarded punitive damages at the court's discretion.

The site is not liable if it made a good faith effort to restrict censor or suppress content that the provider or a user considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable subject matter." However, none of these terms is defined.

H.B.1144 attempts to limit the cause of action to editorial decisions that are not within the ambit of the protections of Section 230 of the Communication Decency Act. However, courts have read the term "otherwise objectionable subject matter in 47 U.S. Code §230 (c)(2)(A) very broadly so that almost any decision by a website to remove content would be covered by this safe harbor.

Even if H.B. 1144 is limited to editorial decisions not covered by §230, the cause of action is likely unconstitutional because the government cannot allow damages on websites for their editorial decisions. The First Amendment bars the state from interfering with decisions about what to print or not to print, including by websites and internet platforms. In Miami Herald Publ'g Co. v. Tornillo, the U.S. Supreme Court 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). 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

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> 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.").

The bill is also likely unconstitutional as compelled speech. The state cannot force a publisher to deliver speech or face financial penalties. It cannot tell bookstores what books it must carry or tell publishers what books it must publish. 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 individuals or companies 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). See also, Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists' inserts in its monthly bills).

H.B. 1144 may also be unconstitutional because it allows civil liability against publishers of some websites but not others. In this case, sites with more than a million users can be sued but smaller sites can keep or remove the same posting by a user without any consequences. The Supreme Court has condemned the selective imposition of a punishment on one medium but not others. Minneapolis Star v. Minnesota Commission of Revenue, 460 U.S. 575 (1983) (Singling out newspapers but not magazines for a special tax was unconstitutional). See also, Playboy v. Entertainment Group, 529 U.S. 803, 812 (striking down a regulation that targeted "adult" cable channels but permitted similar expression by other speakers); Turner Broad. Sys. 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.").

Finally, 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. 1144 does not does not define "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable subject matter." While "obscene" can be defined by reference to North Dakota code section 12.1-27.1-01 subsection 5, the other terms are not defined by reference in the North Dakota code. The dictionary definitions of these terms allow too much leeway for a jury to second guess the editorial decisions of a website. Sites have little guidance to determine what speech is subject to a lawsuit and must either risk treble damages and possible punitive based on speech they make available or remove for their users. See Baggett v. Bullitt, 370 U.S. 360 (1964). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting NAACP v. Button, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow

 specificity.'"). This lack of clarity would likely be resolved through costly litigation which creates a financial burden on the editorial prerogatives of websites.

If you would like to discuss our concerns further, we would welcome the opportunity to do so. Please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025 x3 . We ask you to protect the First Amendment rights of all the people of North Dakota and amend or defeat H.B. 1144.