

March 16, 2004

Assemblyman Wilfredo Caraballo
371 Bloomfield Avenue, 2nd Floor
Newark, NJ 07107

Re: Letter in Opposition to New Jersey Assembly Bill 2029

Dear Assemblyman Caraballo,

The members of The Media Coalition believe that New Jersey Assembly Bill 2029 has several serious and significant constitutional infirmities. Media Coalition members represent most of the publishers, booksellers, librarians, periodical wholesalers and distributors, recording, movie and video game manufacturers, and recording and video retailers in New Jersey and the rest of the United States.

A.B. 2029 requires Internet Service Providers (ISPs) to remove materials identified by a user of their service as “defamatory and offensive” and to disclose to the complaining party the “relevant account information” of the person who posted the material at issue. In other words, were Ken Lay an AoL customer, he could claim any reporting on his involvement in the Enron scandal is “defamatory and offensive” and must be taken down. Further, if Lay became a customer of several large ISPs, he could block access to reporting on his running of Enron for most Internet users nationwide.

A.B. 2029 has significant constitutional defects. Speech is presumed to be protected by the First Amendment unless it falls into one of a few very narrow classes. As the Supreme Court said in *Free Speech Coalition v. Ashcroft*, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S. 255 (2002).

It is true that defamatory speech is not accorded the full protection of the First Amendment. However, the determination that material is defamatory may only be made through the judicial process. The process must allow the publisher and author of the

material the opportunity to defend it as not defamatory. A.B. 2029 makes no mention of any judicial process for determining that the “defamatory and offensive” speech is legally defamatory. Certainly, a customer of an ISP simply notifying the ISP that material is “defamatory and offensive” is not a sufficient legal basis.

Absent a judicial proceeding affording full due process to the publisher and author of the speech at issue, preventing the publication on the Internet would be an unconstitutional prior restraint. Courts have been exceptionally reluctant to allow the government to restrain speech prior to a judicial determination. (Even with a judicial determination that material is defamatory, the usual remedy is damages, rather than censorship.) As the Supreme Court said in the Pentagon Papers case, “Any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

In addition to First Amendment deficiencies, A.B. 2029 violates the Commerce Clause of the U.S. Constitution, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially. Due to the nature of the Internet, virtually any ISP or “Operator” that offers access from a phone line would be subject to this law. This would allow a resident of New Jersey to force an ISP located outside the state to take down or discontinue publishing content for the entire country. Numerous courts have found state laws restricting content on the Internet as contrary to the Commerce Clause, *see American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003), *ACLU v. Napolitano*, No. Civ 00-0505TUC AM (D. Ariz. 2002), *Cyberspace v. Engler*, 238 F.3d 420 (6th Cir. 2000), *PSINet v. Chapman*, 108 F. Supp. 2d 611 (W.D. VA 2000), *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999), *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

Passage of the existing version of A.B. 2029 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. The members of Media Coalition strongly urge you to defend the First Amendment rights of all the citizens of New Jersey and withdraw A.B. 2029.

Sincerely,

David Horowitz,
Executive Director