



New England First Amendment Coalition

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New Hampshire State House
c/o Judiciary Committee
Chairwoman Marjorie Smith
Chairwoman Martha Hennessey

Dear Chairwomen Smith and Hennessey,

I'm writing on behalf of the New England First Amendment Coalition, the region's leading advocate for press freedom and open government.¹

NEFAC strongly opposes House Bill 1157. The legislation is unwise, undemocratic and unconstitutional. The bill is a violation of the right to freedom of the press guaranteed by the New Hampshire and United States constitutions. It fails to consider the strict protections afforded by the First Amendment and undermines the editorial judgment of news publishers throughout the state. The bill is such an outlier that there appears to be no similar legislation proposed anywhere in the country during the last two years.²

House Bill 1157 is an iteration of "right to reply" statutes that the U.S. Supreme Court found unconstitutional as applied to newspapers. In *Miami Herald Pub. Co. v. Tornillo*, the court considered a Florida statute that required newspapers to print a response from any political candidate who believed his or her character or record had been attacked.³ Forcing news organizations to publish information, the court found, is an unconstitutional "intrusion into the function of editors." This holds true even if there is only a minimal administrative burden required to comply with the statute, the court added.

Chief Justice Berger explained:

A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. ... Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and *treatment of public issues* and public official — whether fair or unfair — constitute the exercise of editorial control and judgment. (emphasis added)

Forcing news organizations to update stories in fear of civil liability may ultimately discourage certain reporting altogether, Justice Berger warned:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy.

MAJOR SUPPORTERS INCLUDE



Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably “dampens the vigor and limits the variety of public debate.”

The same concerns apply here. Like the Florida statute and political reporting, House Bill 1157 would be a strong disincentive to report on crime and the New Hampshire court system. The reporting will become, as Berger said of political coverage in Florida, “blunted or reduced.” This consequence is both literally and figuratively chilling.

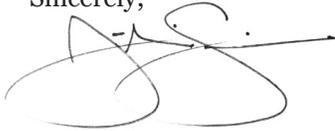
It’s also unnecessary. In a more recent case before the U.S. Court of Appeals for the Second Circuit, a woman sued Hearst Corporation, publisher of several newspapers in Connecticut, for libel after the publications refused to remove an online article about her arrest.⁴ A Connecticut statute allows certain criminal records related to an arrest be destroyed if the defendant in a case is found not guilty, pardoned or if the charges are nolle or dismissed. While determining that the newspapers could continue to publish truthful information about the woman, Judge Richard C. Wesley noted that:

Reasonable readers understand that some people who are arrested are guilty and that others are not. Reasonable readers also know that in some cases individuals who are arrested will eventually have charges against them dropped. Reporting [the woman’s] arrest without an update may not be as complete a story as [she] would like, but it implies nothing false about her.

While the inclination to mandate a “responsible press” is understandable, such aspiration cannot align with the First Amendment’s protection of editorial judgment and truth. House Bill 1157 would turn news organizations into an arm of the court system, forcing coverage newsrooms may not want — or need — to provide. This is not only antithetical to the First Amendment but also an affront to Part 1, Article 22 of the New Hampshire Constitution that describes “liberty of the press” as “essential to the security of freedom” in the state. House Bill 1157 curtails that liberty to an unconscionable and unconstitutional degree.

Thank you for allowing us to share our concerns about House Bill 1157. On behalf of the New England First Amendment Coalition, I welcome the opportunity to provide additional guidance on this legislation and any other bill implicating the First Amendment or the public’s right to know about government.

Sincerely,



Justin Silverman
Executive Director

1 The New England First Amendment Coalition, a non-partisan non-profit organization, is led by some of the most esteemed attorneys, journalists and publishers in the region. Our Board of Directors includes Gregory V. Sullivan, General Counsel for Union Leader Corporation; Richard Gagliuso, partner at Bernstein Shur in Manchester; George Geers, former managing editor at Foster’s Daily Democrat and former editor at The Telegraph; and Todd Smith, publisher of the Caledonian-Record which covers western New Hampshire. Please visit nefac.org to learn more about us and our leadership.

2 Searches for similar legislation in other states were conducted using a variety of search terms through TrackBill, a legislation tracking service. More information on the service can be found at trackbill.com.

3 See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

4 See *Martin v. Hearst Corporation*, 777 F.3d 546 (2nd Cir. 2015).

