New England
First Amendment Coalition

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SUBMITTED ONLINE VIA MAINELEGISLATURE.ORG/TESTIMONY

Maine State Committee on the Judiciary
c/o Chairwoman Anne Carney
Chairman Thom Harnett

RE: LD 923: AN ACT TO ENACT THE STOP GUILT BY ASSOCIATION ACT

April 23, 2021

Dear Chairwoman Carney and Chairman Harnett,

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 LD 923. This bill is part of a nationwide effort to unconstitutionally dictate news coverage within our communities.[2] Similarly worded bills have already failed in several other states, including New Hampshire and Rhode Island.[3] As we explained in those latter cases, this type of legislation is not only unconstitutional, it's also unwise and undemocratic.

LD 923 is a violation of the right to freedom of the press guaranteed by the U.S. Constitution. It fails to consider the strict protections afforded by the First Amendment and undermines the editorial judgment of news publishers throughout the state. The legislation also concerns matters of newsroom ethics and discretion that an increasing number of publishers throughout the country — and here in Maine — are already addressing.

Like its predecessors that failed in other states, this bill 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.[4] 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)

Legislation like LD 923 turns news organizations into an arm of the court system, forcing coverage newsrooms may not want — or need — to provide. This is antithetical to the First Amendment and curtails our freedom of the press to an unconscionable and unconstitutional degree. Forcing news organizations to update stories in fear of civil liability may also 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. 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, LD 923 would be a strong disincentive to report on crime and the Maine 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.[5] 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.

Despite having the First Amendment freedom to publish criminal records as they alone deem appropriate, publishers across the country are nevertheless reconsidering their coverage. An increasing number of newsrooms are providing — on their own and without government mandate — opportunities for citizens to request stories about them to be updated or deindexed from Internet search engines.[6]

The Bangor Daily News, for example, recently changed its policy on crime stories in response to the very concerns legislation such as LD 923 purports to address.[7] According to the newspaper:

> "[T]he Bangor Daily News will be taking requests to remove old crime stories from Google, which is responsible for 97 percent of our search traffic. … Wherever possible, we will remove the original social media posts promoting the stories. In other words, the average person doing a Google search will not find out you were arrested for marijuana possession at a gravel pit party in 2004."

While the inclination for government to require a "responsible press" is understandable, such aspiration cannot align with the First Amendment's protection of editorial judgment and truth. And with newsrooms now reconsidering their own news coverage and offering solutions to unjust reputational harm, the path toward a responsible press is rightfully being determined by the publishers themselves.

Thank you for allowing us to share our concerns about LD 923. 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

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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 Judith Meyer, executive editor at Sun Media Group, and Sigmund Schutz, attorney at Preti Flaherty in Portland. Please visit nefac.org to learn more about us and our leadership.

2 See https://www.sunjournal.com/2021/03/05/new-bill-that-targets-press-is-part-of-a-nationwide-push/.

3 See https://www.nefac.org/news/nefac-new-hampshire-bill-dictating-news-coverage-blatantly-unconstitutional/.

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

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

6 See "Reconsidering Newsworthiness: Balancing the Reputational Harm Caused By Crime Coverage;" https://youtu.be/kgLdgUf-9rM. This recorded discussion examines newsroom trends across the country to reassess crime coverage. It includes commentary by Dan MacLeod, editor at the Bangor Daily News, and Jason Tuohey at The Boston Globe about their respective programs to update or deindex existing crime stories.

7 See https://bangordailynews.com/2021/01/25/news/were-changing-our-policy-on-old-crime-stories/.