

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA,)	
)	
v.)	<u>From Alamance County</u>
)	
ROBERT BISHOP)	

BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION
AS AMICUS CURIAE

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Pursuant to N.C. R. App. P. Rule 28(i), the Electronic Frontier Foundation submits this brief as amicus curiae in support of Defendant Robert Bishop.

INTEREST OF AMICUS CURIAE

The Electronic Frontier Foundation (EFF) is a nonprofit public advocacy organization devoted to preserving civil liberties in the digital realm. With roughly 23,000 active donors and dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. EFF views the protections provided by the First Amendment as vital to the promotion of a robustly democratic society. This case is of special interest to EFF because it believes that broad “cyber-bullying” laws improperly restrict online speech that should receive full First Amendment protections.

SUMMARY OF ARGUMENT

1. N.C. Gen. Stat. § 14-458.1(a)(1)(d) bans the posting of “private, personal, or sexual information pertaining to a minor” with “the intent to intimidate or torment a minor.” It restricts speech—the publication of information—and not just conduct. And contrary to the Court of Appeals’ holding, § 14-458.1(a)(1)(d) is a content-based speech restriction, because it restricts communication of particular kinds of facts.

Even if the statute was, as the Court of Appeals concluded, “motivated by a permissible content-neutral purpose,” *State v. Bishop*, 774 S.E.2d 337, 343 (N.C. Ct. App. 2015), the U.S. Supreme Court’s recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), makes clear that such a motivation cannot turn a facially content-based statute into a content-neutral one. The Court of Appeals’ holding that the statute is content-neutral is therefore erroneous. And the statute’s “intent” element does not immunize the statute from the First Amendment scrutiny necessary for content-based restrictions.

2. Section 14-458.1(a)(1)(d) also potentially criminalizes—and risks chilling—a wide range of everyday speech by and about teenagers. The outlawed posting of “private, personal, or sexual information” can include something as simple as a girl telling her friends online that she broke up with her boyfriend because he cheated on her (which would be “personal or sexual information” about the boyfriend).

It can include someone accurately talking about a sexual relationship between a student and a teacher. It can include someone accurately alleging that she was sexually assaulted by a teenager (so long as the teenager is under 18). And it can include someone accurately stating that a candidate for student government is, for instance, secretly an adherent of a racist or otherwise repugnant political group (“personal . . . information”).

Moreover, Court of Appeals decisions have read “intent to . . . torment” as being satisfied by, among other things, an intent to “annoy.” Thus, in any of these examples, so long as a prosecutor and judge believe that the speaker was motivated at least in part by a desire to annoy or embarrass the teenager, the speaker could be prosecuted and convicted. This sort of content-based restriction on constitutionally protected self-expression must be judged under the “strict scrutiny” test; § 14-458.1(a)(1)(d) cannot pass that test, and therefore violates the First Amendment.

This Court should therefore overturn the Court of Appeals’ decision and conclude that the statute is an unconstitutional content-based speech restriction.

ARGUMENT

I. Section 14-458.1(a)(1)(d) Is a Content-Based Speech Restriction

“Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 135 S. Ct. at 2227. To determine whether a speech restriction is content-based, a court must “consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.” *Id.* A law is “content[-]based if it require[s] ‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014). Content-based restrictions “are presumptively un-

constitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226.

Section 14-458.1(a)(1)(d), which bans the posting of “private, personal, or sexual information pertaining to a minor” with “the intent to intimidate or torment a minor,” applies to particular speech because of the topic discussed (the minor’s private, personal, or sexual life). The statute thus “‘on its face’ draws distinctions” among speech based on the message that the speech conveys. *See id.* at 2227. And “enforcement authorities” must “examine the content of the message” to determine whether the statute is violated. *See McCullen*, 134 S. Ct. at 2531.

Indeed, the U.S. Supreme Court has expressly held that laws limiting the communication of particular personal, private, and sexual facts about people are content-based speech restrictions. For example, in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), the Court applied strict scrutiny—the test applicable to content-based speech restrictions—to strike down a statute restricting the publication of the names of rape victims. Similarly, in *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102-03 (1979), the Court applied strict scrutiny to strike down a restriction on publishing the names of juvenile offenders. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court noted that the *Florida Star* and *Daily Mail* holdings rested on a conclusion that those statutes were content-based: “the State itself defined the

content of publications that would trigger liability,” 501 U.S. at 670. And in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975), the Court held unconstitutional an invasion of privacy verdict based on the disclosure of a rape-murder victim’s name. The liability in that case, the Court stressed, was based on “the content of [the] publication.” *Id.* at 495. Just as in *Florida Star*, *Daily Mail*, and *Cox Broadcasting*, Section 14-458.1(a)(1)(d)’s criminalization of speech containing private, personal, or sexual information about a minor is a content-based speech restriction.

The Court of Appeals concluded that § 14-458.1(a)(1)(d) should “be deemed content-neutral,” because it was “motivated by a permissible content-neutral purpose.” *Bishop*, 774 S.E.2d at 343. That reasoning is unsound. *Florida Star*, *Daily Mail*, and *Cox Broadcasting* treated restrictions on publishing particular facts as content-based even though those restrictions were comparably well-motivated. A well-intentioned end does not turn content-based means into content-neutral ones. “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Reno v. ACLU*, 521 U.S. 844, 867 (1997) (holding that a restriction on “indecent” and “patently offensive” speech online was content-based, because it was aimed at “protect[ing] children” from the psychological effects of the speech) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992)).

And even if the law was not clear when the Court of Appeals issued its opinion in this case, the U.S. Supreme Court has since specifically held that, “a law that is content-based on its face is subject to strict scrutiny regardless of the government’s benign motive[or] content-neutral justification.” *Reed*, 135 S. Ct. at 2228. Especially given *Reed*, the Court of Appeals’ rationale for holding § 14-458.1(a)(1)(d) to be content-neutral is mistaken.

Nor can § 14-458.1(a)(1)(d) be defended on the ground that it “punishes the *act* of posting or encouraging another to post on the Internet *with the intent* to intimidate or torment.” *Bishop*, 774 S.E.2d at 343. Posting something online is an “act” only in the sense that all speech involves acts: putting ink on paper, opening one’s mouth, carrying a sign. Likewise, most speech is said with some intention.

A speech restriction targeting speech of a certain content, when the speaker intends to produce some emotional effect using that content, remains a content-based speech restriction despite the “act[s]” and “intent” that are inevitably present. For instance, in *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964), the Court recognized that a criminal libel law outlawing accurate allegations spoken “with [bad] motives” was a speech restriction—even though such a law could have been described as “punish[ing] the *act* of [publishing derogatory allegations] *with the intent* to [damage reputation].” Just as in *Garrison*, § 14-458.1(a)(1)(d) is a speech

restriction, regardless of its intent requirement and regardless of whether posting “information” online is relabeled as an “act.”

II. Section 14-458.1(a)(1)(d) Unconstitutionally Bans a Wide Range of Speech

Section 14-458.1(a)(1)(d) is not only a content-based speech restriction. It is a restriction that suppresses a wide range of constitutionally valuable speech.

A. Speech *About* People Is Generally Constitutionally Protected, Even When Speech *To* Them May Be Restricted

The Court of Appeals erred in analogizing § 14-458.1(a)(1)(d) to telephone harassment laws. Courts have upheld telephone harassment laws, even when they are content-based, on the grounds that speech said to a person who obviously does not want to hear it lacks constitutional value. “[N]o one has a right to press even ‘good’ ideas on an unwilling recipient.” *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (upholding a law allowing a person to forbid further unwanted mailings).

But § 14-458.1(a)(1)(d) bans speech *about* a person, including speech said to willing listeners and readers. See Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 Nw. U. L. Rev. 731, 740-51 (2013). Such speech has much greater First Amendment value than speech directed *to* only a single unwilling listener. Restrictions on such public

speech therefore cannot be judged under the standards applied to telephone harassment laws.

As the Supreme Court held in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)—while upholding people’s rights to publicly criticize a small businessman—there is a difference between “attempting to stop the flow of information into [one’s] own household” and trying to block the flow of information about oneself “to the public.” *Id.* at 420. Restrictions on unwanted speech to a household are constitutional. Restrictions on unwanted speech about a person are not (setting aside the existing narrow First Amendment exceptions, such as for some false defamatory statements).

B. Section 14-458.1(a)(1)(d) Is Unconstitutionally Overbroad Because It Suppresses a Great Deal of Constitutionally Protected Speech

Section 14-458.1(a)(1)(d) suppresses a broad range of constitutionally protected speech, including everyday speech that people must remain free to engage in. The breadth of § 14-458.1(a)(1)(d) keeps it from being narrowly tailored to any compelling government interest, the demanding strict scrutiny requirement applicable to content-based speech restrictions. *Reed*, 135 S. Ct. at 2226. And because § 14-458.1(a)(1)(d) is a content-based restriction that restricts a broad range of constitutionally protected speech, it is unconstitutional on its face. *See United States v. Stevens*, 559 U.S. 460, 481-82 (2010).

In banning speech about minors, § 14-458.1(a)(1)(d) bans a great deal of protected speech, mostly speech by those other minors' acquaintances, ex-girlfriends, and ex-boyfriends. Say, for instance, that a 17-year-old girl breaks up with her 17-year-old boyfriend because he cheated on her, and she posts about this on her Facebook page. That would constitute posting "private, personal, or sexual information pertaining to a minor"—the fact that the ex-boyfriend had sex with someone else.

And such speech might well be found to satisfy the "intent to . . . torment" requirement. The term "torment" is not defined in the statute, but the Court of Appeals has defined torment in the closely related stalking statute, N.C. Gen. Stat. § 14-277.3A, as "annoy, pester, or harass." *Tyll v. Willets*, 748 S.E.2d 329, 332 n.2 (N.C. Ct. App. 2013); *State v. Watson*, 169 N.C. App. 331, 337, 610 S.E.2d 472, 477 (2005). A prosecutor or judge might thus easily conclude that the girl posted her Facebook message with "the intent to . . . torment" the ex-boyfriend (by making him feel annoyed or publicly embarrassed, or by persuading her friends to stop being friends with him). Talking to her friends online about her life—explaining why she left a relationship and why she is heartbroken, and warning them away from someone she found untrustworthy—would thus potentially be a crime.

Section 14-458.1(a)(1)(d) could also be applied to speech on matters of public concern, such as discussions of an accurate statement that a teacher was having a sexual or romantic relationship with an underage student, or accurate allegations that an underage classmate had sexually assaulted someone. Likewise, speech about a student government candidate's repugnant political beliefs (*e.g.*, support for racist groups) could potentially qualify as posting "personal . . . information pertaining to a minor," and thus be criminal.

In all these cases, a prosecutor or a judge could conclude that the speaker was intending to "torment," in the sense of annoying or embarrassing, the subject of the speech. As a result, speakers may well be reluctant to post such constitutionally protected speech, for fear of criminal liability. No government interest can justify a law that so broadly restricts people's speech about their lives and the lives of people in their social circle.

C. Section 14-458.1(a)(1)(d)'s Overbreadth Is Exacerbated by Its Focus on the Speaker's Motivation

Section 14-458.1(a)(1)(d) punishes a wide range of speech that may be said to be in part motivated by an intent to annoy and thus to "torment." But it also threatens to chill speech even by people who are confident that their intentions are pure, and in no way include any intent to annoy.

As the Court noted in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), a case dealing with a statute that similarly punished speech based on the speaker's supposed intentions, "[n]o reasonable speaker would choose to [engage in speech potentially covered by the statute] if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'" *Id.* at 468 (Roberts, C.J., lead op.); *id.* at 492 (Scalia, J., concurring in part and in the judgment) (similarly concluding that "test[s] that [are] tied to . . . a court's perception[] of . . . intent" are "ineffective to vindicate the fundamental First Amendment rights" of those against whom the intent-based law is applied).

Like the law in *Wisconsin Right to Life*, § 14-458.1(a)(1)(d) will often chill reasonable speakers from publishing accurate information even with good intentions. Faced with the risk of criminal punishment for publishing accurate information with the "intent to torment," people would often not speak for fear that their motives would be found (even wrongly) to be impure. And that is especially so because the intent to annoy often goes hand in hand with the intent to criticize or condemn someone who you think has wronged you, or has otherwise done something bad. Judges and prosecutors might thus assume that speakers who are complaining about people who mistreated them are acting out of a desire to annoy,

even if the speakers' true goals are simply to inform friends about how the speakers are feeling. And speakers, knowing this difficulty in untangling motives, might keep silent for fear of being misjudged and thus facing criminal prosecution.

Moreover, human judgment about others' unstated motives often subconsciously turns on personal feelings about the people involved. When someone harshly criticizes someone we like, it is human nature to infer that the critic is deliberately trying to torment. Speakers know this, and will often be deterred by the reasonable concern that prosecutors or judges might assume the worst about them. Say the cheating ex-boyfriend is a popular high school football star from a politically well-connected family in a small town, and the ex-girlfriend who publicly berates him is not particularly well-liked (perhaps because she is from a lower-class background, or because of her own sexual history, or even because of her religion). She might well worry that a prosecutor and the judge will assume that she must have had the "intent . . . to torment"—even if they would assume better motives if the same statements were made by a girl who belonged to their own social circle.

This is why, in cases such as *Wisconsin Right to Life*, the Supreme Court refused to uphold laws that punished accurate statements (or expressions of opinion) that were said with a supposedly improper purpose. *See supra*, p. 13. And just last year, Texas's highest criminal court similarly rejected the view that speech could

lose First Amendment protection because of its supposedly malign intent. *Ex parte Thompson*, 442 S.W.3d 325, 338 (Tex. Ct. Crim. App. 2014).

In that case, a Texas statute banned photographing people without their consent in public places—even when the photograph only captured what was normally visible to the public—when the photograph was taken with the intent to arouse or gratify sexual desire. The Texas court held that the statute violated the First Amendment, because bad intentions (so long as they are not intentions “to do something that . . . would be unlawful and outside First Amendment protection, such as the intent to threaten or intimidate”) “cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression.” *Id.* Likewise, here, otherwise protected speech about one’s life, one’s exes, and one’s acquaintances cannot lose First Amendment protection simply because a prosecutor and a judge view it as intended to annoy and thus to “torment.”

The Supreme Court has recognized that whether a speech restriction is “narrowly tailored” to a compelling interest must be evaluated by considering not just what speech the restriction is meant to cover, but also by considering the “threat of censoring speech that, in fact, falls outside the statute’s scope.” *Reno v. ACLU*, 521 U.S. at 867, 879. Such a chilling effect tends to “silence[] some speakers whose messages would be entitled to constitutional protection,” which “provides further

reason for insisting that the statute not be overly broad.” *Id.* And for the reasons given above, this statute is indeed too broad to be narrowly tailored to any compelling government interest.

CONCLUSION

For the reasons given above, § 14-458.1(a)(1)(d) is a content-based law, not a content-neutral one. It is a restriction on speech, not just on conduct. The fact that the statute requires a particular intent on the speaker’s part does not keep it from being a content-based speech restrictions. And because it covers a broad range of constitutionally protected speech, it is not narrowly tailored to achieve any governmental interest. It thus, on its face, fails strict scrutiny and violates the First Amendment.

This the 21st day of September, 2015.

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CERTIFICATE OF COMPLIANCE

Counsel for EFF hereby certifies that this Brief is in compliance with N.C. R. App. P. 28(j) in that it is printed in 14-point proportional type Times New Roman and contains fewer than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendixes), as reported by counsel's word-processing software.

This the 21st day of September, 2015.

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CERTIFICATE OF FILING AND SERVICE

I certify that today, a copy of the foregoing has been duly filed pursuant to Rule 26(a)(2) of the North Carolina Rules of Appellate Procedure. I further certify that I have served all counsel by depositing a copy thereof in the United States mail, first class, addressed as follows:

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