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Lucy A. Dalglish
Executive Director

February 7, 2012

The Hon. Cynthia Stone Creem
Senate Chair, Joint Committee on the Judiciary
Room 405
State House
Boston, MA 02133
VIA E-MAIL (Cynthia.Creem@masenate.gov)

The Hon. Eugene L. O'Flaherty
House Chair, Joint Committee on the Judiciary
Room 136
State House
Boston, MA 02133
VIA E-MAIL (Gene.OFlaherty@mahouse.gov)

Re: Senate Bill No. 785, An Act relative to the protection of child witnesses

Dear Chairwoman Creem and Chairman O'Flaherty:

The news media coalition ("coalition") comprised of the below-listed news organizations, nonprofit associations representing newsgatherers, and trade groups submits the following written testimony to be made part of the record for today's Joint Committee on the Judiciary hearing during which Senate Bill No. 785 ("S. 785") is slated for consideration. The coalition opposes S. 785 and urges the committee to take no further action on the bill.

As advocates for the rights of the news media and others who seek to provide information on important issues that affect the public, the coalition has a strong interest in upholding the public's constitutional right to monitor and report on the proceedings of this nation's court system. While the proposed law is undoubtedly well intentioned, it raises significant threats to the well-established procedure courts must undertake before restricting public access to court proceedings, as well as the related records, to which the First Amendment right of access attaches.

S. 785 proposes to impose criminal contempt charges against members of the media and others who, in connection with any criminal proceeding, "disclose or release documents, which divulge the name or any other information, concerning a child or the information in them that concerns a child except to persons who, by reason of their participation in the proceeding, have reason to know such information" or disclose or release a picture of the child, except to persons who, by reason of their participation in the proceeding, have reason to possess such a picture, regardless of the source of such documents or information. The bill requires all documents

that include such information to be filed under seal, without court order, with a redacted version made publicly available.

The state of Massachusetts clearly has an interest in protecting child witnesses in some circumstances. Some states routinely restrict public access to certain proceedings in juvenile and family court proceedings and records, particularly where children are the victims of child abuse. Yet this bill goes too far by seemingly prohibiting the publication of ALL information about ALL child witnesses in ALL criminal proceedings.

The discussion below discusses how the bill raises constitutional concerns in two general ways: It violates the public's right to receive information about a vital public institution, and it prohibits the dissemination of all information about court proceedings involving child witnesses, even when the published information did not originate in the criminal justice system.

I. S. 785 violates well-established U.S. Supreme Court jurisprudence concerning the procedural steps required to restrict public access to judicial proceedings and records.

The U.S. Supreme Court has made clear that the justice system in this country is presumptively administered in the open. Public access to court proceedings and records reassures the public that its government systems are working properly and correctly and enhances public knowledge and understanding of the court system. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570–71 (1980) (plurality opinion) (discussing openness in criminal trials). Allowing such access "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*") (citing *Richmond Newspapers*, 448 U.S. at 569–71). As former Chief Justice Burger wrote, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. Courts in this state likewise have recognized that a right of access under the First Amendment attaches to documents in criminal proceedings. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989).

This understanding of the value of the open administration of justice is reflected in the high Court's pronouncements on the procedural steps necessary to shield judicial proceedings and records from public view. Parties attempting to block public access must justify the closing or sealing. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). In criminal cases, "it must be shown that the [closure or sealing] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Courts must then articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510. Moreover, these findings must be "specific" and "on the record." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*"). Such an analysis is

necessary because it is the only means to satisfy both the government's interest in privacy and the public's interest in access.

The Supreme Court noted that the interest in "safeguarding the physical and psychological well-being of a minor" is a compelling one that *may* justify closure. *Globe Newspaper*, 457 U.S. at 607. The Court ruled, however, that a trial court must determine "*on a case-by-case basis* whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608 (emphasis added) (footnotes omitted).

It is hard to fathom that *all* information in documents concerning a child witness is of such a private nature that no part of them can be publicly disclosed. Indeed, it is not difficult to imagine a number of scenarios in which public disclosure of the information would not harm the child, including, for example, information the release of which the child and parents do not oppose or that is already publicly known. Yet, without specific, on-the-record findings about those documents that are "actually sensitive and deserving of privacy protection," *see Press-Enterprise I*, 464 U.S. at 513, and the ability to protect those interests by disclosing only part of the information contained therein, the privacy interest is protected at the expense of the public interest. Because S. 785 lacks this procedural requirement that safeguards the public's First Amendment right of access, the measure is of questionable constitutionality.

II. S. 785 violates well-established Supreme Court jurisprudence concerning the publication of lawfully obtained truthful information.

One of the chief purposes of the First Amendment was "'to prevent all such previous restraints upon publications as had been practised [sic] by other governments.'" *See Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (quoting *Commonwealth v. Blanding*, 20 Mass. 304, 313–14 (1825)). This "distaste for censorship — reflecting the natural distaste of a free people — is deep-written in our law." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

Even in those cases where the First Amendment does not mandate that the government release information to the press and others, it holds inviolate their independent efforts to obtain that information for themselves and their right to publish the information once they have it. As Justice Stewart has explained, "[s]o far as the Constitution goes, the autonomous press may publish what it knows, and it may seek to learn what it can." Potter Stewart, "*Or of the Press*," 26 Hastings L.J. 631, 636 (1975). To the extent S. 785 seeks to bar members of the news media from publishing information regardless of its source, the measure is a presumptively unconstitutional prior restraint on publication — a restriction viewed by the Supreme Court as "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 539 (1976).

Consistent with this robust free-press guarantee envisioned by the Constitution's Framers, the Supreme Court has consistently struck down statutes that punish the publication of lawfully obtained truthful information, even where it relates to minors. In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 308 (1977), the Court reversed an order that "enjoined members of the news media from 'publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child' in connection with a juvenile proceeding involving that child then pending in that court." Two years later, the Court made clear that even where juvenile proceedings are closed, a court may not "punish the truthful pu blication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105–06 (1979).

Moreover, a pair of cases involving the news media's publication of a rape victim's name in violation of two separate statutes extends this jurisprudence beyond cases involving juvenile delinquency proceedings. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975), the high Court held that a state may not punish the accurate publication of information obtained from public records, specifically judicial records that are maintained in connection with a public prosecution and which themselves are open to public inspection. The Court noted that privacy interests fade when the information already appears on the public record and reiterated the strong public interest in the disclosure of that information:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

See id. at 495.[1] In *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989), the Supreme Court slightly narrowed its holding in *Cox*, ruling that punishment for the publication of

[1] Historical evidence shows that attendance at trial was "virtually compulsory" for free members of the community because it was these members of the public who "render[ed] judgment." *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("*Press-Enterprise I*"). Although it is now a six- to twelve-member jury — or a judge — that decides cases, the public at large has a valid interest in "learn[ing] whether the seated jurors are suitable decision-makers." *See United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010). Today, however, when "attendance at court is no longer a widespread pastime," members of the news media are considered "surrogates for the public," which relies on journalists for firsthand accounts of the justice system at work. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (plurality opinion). As such, the nondisclosure requirements of S. 785 defy common sense and logic, for they grant to those few members of the public who attend a trial knowledge of the witnesses who testify there, while denying that same information to the overwhelming majority of the

lawfully obtained truthful information may be imposed only where the sanctions are narrowly tailored to serve a state interest of the highest order. As such, the Court clarified that it "do[es] not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press . . . ." but that no such interest was satisfactorily served by imposing liability under the relevant law. *Id.* Like the statutes at issue in the above cases, S. 785, namely its imposition of liability for the publication of documents or information "regardless of the source of such documents or information," seeks to punish the news media for the publication of truthful information that they may very well have obtained lawfully. To be sure, *B.J.F.* indicates that the state may prohibit such disclosure of information about a child witness if it is able to establish a state interest of the highest order that is adequately served by a narrowly tailored regulation. Absent such narrow tailoring in S. 785, it is doubtful the measure can withstand constitutional scrutiny.

Thank you for considering the coalition's views on this matter of great importance to the citizens of Massachusetts and to the journalists who provide them with vital information about their government. For the foregoing reasons, the media coalition respectfully urges the committee to reject S. 785. If we can be of further assistance to you or the committee, please feel free to contact us.

Sincerely,

/s/ Lucy A. Dalglish
Executive Director
The Reporters Committee for Freedom of the Press

On behalf of the following:

Digital Media Law Project, hosted at Harvard University's Berkman Center for Internet & Society
Dow Jones Local Media Group, Inc., the publisher of the *Cape Cod Times* and *The New Bedford Standard-Times*
New England First Amendment Coalition

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public, which — though equally interested in monitoring and evaluating the judicial process — does so through news accounts of the proceeding.

cc: Senate Vice Chair Gale D. Candaras
(via e-mail) House Vice Chair John V. Fernandes
Sen. Patricia D. Jehlen
Sen. John F. Keenan
Sen. Thomas M. McGee
Sen. Richard J. Ross
Rep. Sean Curran
Rep. Colleen M. Garry
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Rep. Carlos Henriquez
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