



**VIA EMAIL**

March 29, 2021

Governor Ralph Northam  
Office of the Governor  
Patrick Henry Building, 3d Floor  
Richmond, Virginia

**Re: SB 1339-Return to Legislature**

Dear Governor Northam:

I am writing on behalf of the Software and Information Industry Association, a trade association located in Washington, D.C., to convey our First Amendment concerns with SB 1339's treatment of publicly available information. SIIA has no position on re-entry issues, nor do we represent the employment background screening industry. We appreciate the complexity of the policy challenges and historical inequities that have affected the criminal justice system. With that said, the First Amendment requires that the transmission of information be burdened as a last resort. As written, this law is facially unconstitutional.

SIIA is the principal trade association of the software and information industries and represents over 600 companies that develop and market software and digital content for business, education, consumers, the Internet, and entertainment. SIIA's members range from start-up firms to some of the largest and most recognizable corporations in the world. They include software publishers, financial trading and investment services, and educational, specialized and business-to-business publishers. They also include a number of firms who use public domain information to track down witnesses, enforce child support payments, and prevent a variety of financial crimes. Many of our members are located in or do business in Virginia.

SB 1339 regulates the publication of criminal history information. Section 19.2-392.16 defines a “business screening service” as any person who is engaged in the business of disseminating Virginia criminal records information, excluding the “news media” and government entities. “Criminal history record,” in turn, is defined as “any information collected by a business screening service on individuals containing any personal identifying information ... or other identifiable descriptions pertaining to an individual and any information regarding arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release.” *Id.*<sup>1</sup> Business screening services must adopt “reasonable standards of care” to ensure that the covered information is neither incomplete nor inaccurate and requires disclosure of any covered information held by a screening service. SB 1339, § 19.2-392.15. Failure to comply with the statute is grounds for either a private right of action or a civil suit by the Attorney General. *Id.* § 19.2-392.16 (G), (H).

Our members’ lifeblood is the creation, analysis and dissemination of public domain information, which comes from two general categories. The first is that which the government voluntarily releases, such as through publication on its web sites, through reports, or through the release of information pursuant to open records laws. The second category of information is far broader, encompassing information that is widely available in private hands. That category includes, for example, not just scientific and newspaper articles (or databases of them), but more mundane categories of information like published financial prices, business credit information, professional information and directories, and other kinds of information that is generally available to the public. So long as this information relates to an individual’s

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<sup>1</sup> The legislation also covers “Traffic history record” information. For the purposes of the First Amendment concerns raised in this letter, the two are functionally the same. *See id.* (defining traffic history record as “any information collected by a business screening service on individuals containing any personal identifying information, photograph, or other identifiable descriptions pertaining to an individual and any information regarding arrests, detentions, indictments, or other formal traffic infraction charges, and any disposition arising therefrom.”).

involvement with the criminal justice system, the legislation targets all of it.

## **I. The First Amendment Applies to Information**

SB 1339 is a regulation of speech. The First Amendment protects the creation and dissemination of information. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“the creation and dissemination of information are speech within the meaning of the First Amendment”), citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“[i]f the acts of disclosing and publishing information do not constitute speech, it is hard to image what does fall within that category, as distinct from the category of express conduct.”) (other citations omitted). Our members engage in protected First Amendment activity when they publish news reports, disseminate information about financial transactions, share data from scientific experiments, or transmit real estate records. The Supreme Court has repeatedly rejected invitations to create new classes of speech immune from scrutiny. *See, e.g., IMS Health*, 564 U.S. at 570 (rejecting invitation for prescriber data); *United States v. Stevens*, 559 U.S. 460, 470 (2010) (rejecting ad hoc balancing test to determine the existence of First Amendment protection).

Here, the legislation of “criminal record information” encompasses “any personal identifying information ... or other identifiable descriptions pertaining to an individual and any information regarding arrests” (emphasis supplied) and other interactions with the criminal justice system. The statute’s treatment of public domain information runs far broader than factual data analogous to the prescriber information in *IMS Health*: it sweeps in a whole variety of information that is widely available in private hands: the New York Times is not subject to the act, but the provider of a database of news articles is. The statute therefore commits at least two cardinal First Amendment sins: (1) it discriminates among content; and (2) it discriminates among speakers.<sup>2</sup>

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<sup>2</sup> We also believe the statute is void for additional reasons: vagueness and overbreadth. While these doctrines represent additional

## II. SB 1339 is Facially Unconstitutional

SB 1339 is designed to “target speech based on its communicative content,” and as such is “presumptively unconstitutional.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”). By directly targeting certain businesses involved in the dissemination of “criminal record information,” SB 1339 directly “imposes a burden based on the content of speech and the identity of the speaker.” *Sorrell*, 564 U.S. at 567. Indeed, under the Act, “the government is prohibiting a speaker from conveying information that the speaker already possesses,” *id.* at 568 (cleaned up), and irrespective of whether the consumer is cognizably harmed by its publication. *Cf.* SB 1339 § 19.2.392.16(G) (statutory damages available without showing of harm).

As a content-based speech restriction, SB 1339 “can stand only if it satisfies strict scrutiny.” *Playboy Entm’t Grp., Inc.*, 529 U.S. at 813. This is a test that the legislation cannot pass. The harms that the bill is intended to ameliorate can be inflicted from any number of sources, including the news media. Almost any reference to a criminal trial is swept into the legislation’s scope. The fact that this information is sold for profit does not diminish its First Amendment protection. *Smith v. California*, 361 U.S. 147, 150 (1959) (“It is of course no matter that the dissemination [of speech by the claimant] takes place under commercial auspices.”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”).

Similarly, it is well established that the news media does not receive any “special” First Amendment rights. *See generally Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (collecting

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grounds for invalidation, in the interests of brevity we have confined this analysis to the two grounds listed above.

cases). Although we appreciate the intent behind it, the exemption of the news media from the definition of “business screening service” does nothing to cure SB 1339’s constitutional infirmities.

### **III. Conclusion**

We understand that what may be motivating the passage of this legislation is the desire to protect the public from harmful uses of the information. But there are several less restrictive means available to the state. For example, it can prohibit the use of criminal record information of a certain age in employment decisions. Similarly, the state could place contractual conditions on the receipt of criminal record information that it controls. What the government cannot do, however, is what it has done here: to regulate a specific class of publishers of a specific kind of public domain information. Either one of these kinds of discrimination would imperil the enforcement of such a statute. Together, they guarantee its invalidation.

SIIA urges you to send this legislation back to the General Assembly with amendments that remove its constitutional infirmities. We would be happy to discuss this letter and potential approaches to this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher A. Mohr". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher A. Mohr

VP For Intellectual Property  
and General Counsel