

**Testimony for the House Judiciary Committee**

**March 27, 2018**

### SB 726 - Criminal Law - Electronic Harassment and Bullying (Grace's Law 2.0)

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**OPPOSE**

The American Civil Liberties Union of Maryland (ACLU) opposes SB 726, which, as revised in the Senate, amends the electronic harassment statute, Md. Code, Crim. L. § 3-805, in ways that are clearly unconstitutional. The question posed by this bill is not whether harassment of children is a problem, but whether the means chosen in this bill, namely making a broad swath of online speech a crime, are a constitutional way of addressing it. They are not.

The current electronic harassment statute has two components, one that applies to harassment of all victims, in Crim. L. § 3-805(b)(1) (the “general electronic harassment statute”), and a second that applies to harassment of minors, in Crim. L. § 3-805(b)(2). As amended in the Senate, this bill rewrites the second of these provisions, creating two new general prohibitions in subsections (b)(2) and (b)(3), and creating two sets of more particularized prohibitions, in subsections in (b)(4) and (b)(5).

**The general prohibitions in sections (b)(2) and (b)(3)**

To understand why the amended bill is unconstitutional, it is important to understand why courts have upheld more general anti-harassment statutes. The current general electronic harassment statute was amended in 2012 to broaden the scope of electronic communications that could potentially be harassing (the earlier statute had applied only to email communications). In response to constitutional concerns raised by the ACLU regarding the initial version of that bill, the 2012 amendment was changed to mirror the elements in Maryland’s general harassment statute, Crim. L. § 3-803, which requires proof of a course of harassing conduct, a specific intent to harass, a warning to stop the conduct, and absence of a legal purpose, and which exempts “peaceable activity intended to express a political view or provide information to others.” As we pointed out at the time, and as the Maryland Court of Appeals stated in 2001 when affirming the constitutionality of § 3-803, these provisions are critical to ensuring that the statute criminalizes *conduct*, and does not impermissibly criminalize protected speech. *Galloway v. State*, 365 Md. 599 (2001). The current general e-mail harassment statute, Crim. L. § 3-805(b)(1), thus contains each of those elements (the last is contained in § 3-805(d).

This bill rewrites the harassment of a minor provision in multiple ways. First, it makes it a crime, in § 3-805(b)(2), p.3, lines 9-16, to maliciously engage in a series of communications, even ones not directed at a particular person, and even ones that are completely true, with an intent to harass, intimidate, or torment a minor, if they have the effect of harassing, intimidating, or tormenting a minor. None of these terms are defined, and this provision drops the requirement that the defendant receive a warning to stop, and drops the requirement that the defendant act without a legal purpose. The fundamental problem with this is that there are times when a person will lawfully intend to “intimidate” or “torment” another, such as when they are revealing misconduct by that other person, or even simply strongly and repeatedly disagreeing with something that they did, all of which will be made criminal by this bill, as long as the victim, or a school official, or a police officer, or a prosecutor, think they are acting with impermissible intent.

Even worse, however, the proposed § 3-805(b)(3), p. 3, line 17 – p. 4, line 2, makes it a crime to engage in a single communication, even one not directed at a particular person, that has the effect of causing a person substantial emotional distress, regardless of the truth of the statement at issue. This is clearly unconstitutional.

The U.S. District Court in Maryland considered almost identical language contained in the 2006 amendments to the federal cyberstalking law, 18 U.S.C. § 2261A(2)(B). *U.S. v. Cassidy*, 814 F.Supp.2d 574 (D. Md. 2011). The amended federal law made it a crime to, with intent to harass or cause substantial emotional distress, engage in a course of conduct that causes such distress using an interactive computer service. *Id.* at 580-81. In other words, the federal statute at issue in that case contained the same elements as the proposed § 3-805(b)(3), except it required a course of conduct, while § 3-805(b)(3) makes even a single communication a crime.

The court held the federal statute unconstitutional as applied to thousands of allegedly harassing posts on Twitter, written by a former member and employee of a Buddhist sect who had been confronted about falsifying his background, all of which disparaged the leader of that sect, and the sect itself. The court accepted that the posts had caused substantial emotional distress, but held that even emotionally distressing speech is fully protected by the First Amendment.

[T]he Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious or public concern. This is because “in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate ‘breathing space’ to the freedoms protected by the First Amendment.'” See Boos v. Barry, 485 U.S. 312, 322 (1988) (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)); See also New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Snyder v. Phelps, ––– U.S. ––––, 131 S.Ct. 1207, 1219, 179 L.Ed.2d 172 (2011) (Because the emotionally distressing “speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt”).

*Cassidy*, 814 F.Supp.2d at 582.

The district court also held that a ban on emotionally distressing or annoying speech is inherently a content based regulation of speech, because it regulates speech based on the effect that speech has on the audience. *Id.* at 584; *see also, e.g.,* *Boos v. Barry*, 485 U.S. 312, 321 (1988) (D.C. regulation making it unlawful to display a sign within 500’ of a foreign embassy if the sign tends to bring the foreign government into “public odium” or “public disrepute” is unconstitutional content based regulation of speech because it focuses on the impact of the speech on a foreign government); *Reno v. Amer. Civil Liberties Union*, 521 U.S. 844, 877 (1997) (provisions in the Communications Decency Act that make it a crime to transmit indecent, or patently offensive communications by means of a telecommunications device to persons under 18 is an unconstitutional content-based restriction on speech as it focuses on the impact of that speech on the recipient); *Matal v. Tam*, 137 S.Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (government’s attempt to burden speech “based on audience reactions” is simply viewpoint discrimination “in a different guise.”). The Supreme Court has made crystal clear that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth Co., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

*Cassidy* also held that speech posted on the internet is very different from speech targeting only a single listener, like an email or a text message, which the court concluded meant that the broad restriction on speech like that in the present bill could not be held to be narrowly tailored to a compelling governmental interest. *Cassidy*, 814 F.Supp.2d at 584-87.

Finally, the district court’s decision was based on the fact that the Supreme Court has made clear that there are very limited and carefully defined categories of speech that may be criminally prohibited consistent with the First Amendment. *Id.* at 582-83. Those include obscenity, *Roth v. U.S.,* 354 U.S. 476 (1957); defamation, *Beauharnais v. Illinois*, 343 U.S. 250 (1952); fraud, *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976); incitement to imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969 (*per* curiam); true threats, *Watts v. United States*, 394 U.S. 705 (1969); and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490 (1949). And the court noted that the Supreme Court has made clear that legislatures are not free to define new categories of unprotected speech, including annoying or distressing speech. *See U.S. v. Stevens*, 559 U.S. 460 (statute criminalizing “depictions of animal cruelty” violates First Amendment because there is no “freewheeling authority to declare new categories of speech outside the scope of the First Amendment”).

All of these holdings apply to proposed § 3-805(b)(3) (as well as the more specific prohibitions in (b)(4) and (b)(5)). The language is simply far too broad, and sweeps up far too much protected speech to be constitutional.

We are unclear what proposed § 3-805(b)(3)(iii), p.3, lines 25-26, is intended to prohibit, since it is not clear how electronic communications could damage property.

Proposed § 3-805(b)(3)(iv), p.3, makes it a crime to place another in fear of harm. As long as this section is interpreted to encompass only true threats of physical harm, *Watts*, 394 U.S. 705; *Elonis v. U.S.,* 575 U.S. \_\_\_, 135 S. Ct. 2001 (2015), it would not violate the 1st Amendment, but such threats are already a crime, so the section adds nothing to existing law.

**The specific prohibitions in subsections (b)(4) and (b)(5)**

The more specific prohibitions in these sections are explicit content-based prohibitions on speech. But the Supreme Court has made clear that “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). However compelling the interest may be with respect to these provisions (and since none of them require that any harm actually occur, the government’s interest is non-existent as currently drafted), they are, as detailed below, either overbroad, prohibiting a wide amount of clearly protected speech, or unconstitutionally vague.

The proposed § 3-805(b)(4)(i), p. 4, line 6, makes it a crime to build a fake social media profile, regardless of whether that profile causes any harm to anyone at all. Under this provision, a fake social media profile criticizing a racist classmate would be a crime. Since this speech is not within any of the categories of speech the Court has said may be made a crime, the provision violates the First Amendment.

Proposed § 3-805(b)(4)(ii), p.4, lines 7-8, makes it a crime to pose as another in an electronic communication, regardless of whether that communication causes any harm to anyone at all. This provision prohibits all anonymous internet postings made with the requisite intent, even though the First Amendment protects the right to speak anonymously. *E.g. Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150, 162* (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n. 6 (1995); *Talley v. California*, 362 U.S. 60, 65 (1960).

Proposed § 3-805(b)(4)(iii), p.4, lines 9-10, makes it a crime to “follow” a minor online or with an instant messaging service, regardless of whether doing so causes any harm to anyone. This is both unconstitutionally vague, because “follow” is not defined, and it is unclear how someone “follows” another person with an instant messaging service, and ridiculously overbroad, because it would make it a crime to simply read what a minor posts online.

Proposed § 3-805(b)(4)(iv), p.4, lines 11-13, makes it a crime to disseminate true “sexual” information about a minor, or “encourage” others to do the same, regardless of whether such dissemination causes any harm to anyone. This is clearly unconstitutional, because the state cannot make a crime to say true things about another person, and because “encouraging” people to do things, even things that are illegal, cannot be made a crime unless it is likely to incite imminent lawless action. *See, e.g., Brandenburg,* 395 U.S. 444. This language would make it a crime for a victim of a rape by a classmate to publicly say that the classmate had raped her.

Proposed § 3-805(b)(5)(i), p.4, line 17, makes it a crime to disseminate a real or doctored image of a minor, regardless of whether doing so causes any harm to anyone. Such a prohibition violates the First Amendment, and would prohibit, for example, posting photographs of classmate at a Nazi rally, or making caricatures of an opposing candidate for student government.

Proposed § 3-805(b)(5)(iii), p.4, lines 21-23, prohibits “encouraging” others to engage in illegal harassment. As noted above, encouraging others to engage in even illegal conduct cannot itself be made a crime unless it is likely to incite imminent lawless action, which would seem impossible for the repeated course of conduct that must take place over time to constitute harassment.

Proposed § 3-805(b)(5)(iv), p.4, lines 24-26, prohibits true or false statements that are “likely” to “immediately provoke” stalking or harassment by third parties. It is not clear how anyone could be “immediately” provoked to stalk or harass, since both of those things (as lawfully defined) take place over time. And this overbroad language would make it a crime, for example, for someone to publicly and accurately out a classmate as a white supremacist, since doing so could likely provoke other third parties to harass that person.

Proposed § 3-805(b)(5)(v), p.4, lines 27-29, makes it a crime to engage in the “unauthorized copying and dissemination of any image, data, or information” about a minor, whether true or false, and whether doing so causes any harm to anyone. This is a ridiculously broad prohibition on speech, and clearly unconstitutional. It prohibits saying anything about anyone, posting a picture of a classmate at a KKK rally, etc. The requirement that “unauthorized copying” be involved does not save or substantially narrow the provision, because “unauthorized” is not defined. Authorized by whom and how? To the extent the bill is limited to the dissemination of information that is illegally obtained by the disseminator, the bill is unnecessary, because by definition the disseminator can be punished for illegally obtaining the information, whether it is disseminated or not. But “unauthorized” is not the same as “illegally obtained,” and could be interpreted to mean simply not authorized by the subject.

Proposed § 3-805(b)(5)(vi), p.4, line 30, prohibits subscribing a minor to a “pornographic” website. While it is not clear how one “subscribes” to a website, the larger problem with this provision is that “pornographic” is not defined, and has no legal meaning, making the provision unconstitutionally vague.

Some of the conduct described above could, in some circumstances, certainly constitute harassment if done repeatedly, with an intent to harass, and without any lawful purpose, etc., but of course no new statute is needed for such conduct to be prosecuted.

We do not object to the provision in § 3-805(b)(5)(ii) making it a crime to hack into or alter a minor’s computer without authorization, but that is already a crime, so is completely superfluous.

We urge an unfavorable report.