



HB 4474 (HATE SPEECH BILL) CRIMINALIZES EVERYONE'S PROTECTED SPEECH

The Michigan Senate is voting soon on proposed legislation, recently passed by the House of Representatives, that will potentially be used to prosecute anyone speaking out on the cultural issues facing our country. If you speak for or against transgender issues, religious beliefs, or require or refuse to use someone's preferred pronouns, you can potentially be charged with a felony and face up to 5 years in prison and a \$10,000.00 fine. The "hate crime" bill (HB 4474) continues to unconstitutionally criminalize speech and will have a chilling effect on anyone daring to speak. Unless the category "intimidates another individual" is removed from Sections (1) and (8) of this statute, anyone at any point on the political spectrum will be fair game to be prosecuted using that unconstitutional language.

Under the current Ethnic Intimidation statute, MCL 750.147b, the only type of speech it prohibits are threats, "by word or deed," to "cause physical contact or damage property." Thus, the only type of speech that could be prosecuted under the existing law is actual "threats." These limited and specific types of "true threats" have long been an exception to First Amendment protection. "True threats are 'serious expressions' conveying that a speaker means to 'commit an act of unlawful violence.'" ¹ Such threats are not protected speech.

Under the proposed law, a person will be "guilty of a hate crime" if they merely "intimidate another individual." This is vastly broader than the current Ethnic Intimidation statute and encompasses an enormous amount of speech protected by the First Amendment. "Intimidate" is defined by the bill as "a willful course of conduct involving repeated or continuing **harassment** of another individual that would cause a reasonable individual to feel terrorized, frightened, or threatened, and that actually causes

the victim to feel terrorized, frightened, or threatened." (emphasis added). Therefore, harassment of a person, whatever that may mean, was not removed from the statute; it was just included under the definition of intimidation. Moreover, there is no statutory definition of what constitutes "harassment."

Unlike "true threats," there is no exception to the First Amendment for words that "harass," "intimidate," or "frighten" other persons. Such broad terms can be manipulated to mean whatever an alleged victim or prosecutor wants them to mean. For example, consider a transgender parent who organizes a monthly pride march to specifically pass in front of a few specific churches who oppose LGBT issues. Under HB 4474, a prosecutor could charge that transgender parent for specifically intending to "harass," "intimidate," or "frighten" certain individuals at the church because of their religion. As another example, consider a Christian parent who speaks out at public comment of every school board meeting regarding allowing a specific transgender student (who is biologically male) to be a part of the girls varsity swim team. A prosecutor could charge that Christian parent with specifically intending to "harass," "intimidate," or "frighten" that transgender student.

COUNTERMAN V. COLORADO ²

The United States Supreme Court ruled, in an opinion authored by Justice Kagan, that it violates the First Amendment to prosecute an individual based upon the effect of his words on the hearer. Rather, a speaker can only be prosecuted if "the [speaker] had some subjective understanding of the threatening nature of his statements. ... The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." Pursuant to *Counterman*, if

¹ *Virginia v Black*, 538 U. S. 343, 359 (2003).

² 600 U. S. _____ (2023)(decided June 27, 2023).

Michigan's hate speech bill is passed as currently written, it will violate the First Amendment. To "frighten" or "intimidate" or "harass" a person does not equal "unlawful violence" and is, therefore, protected speech.

The Supreme Court further stated:

*[T]he First Amendment may still demand a subjective mental state requirement shielding some true threats from liability. That is because bans on speech have the potential to chill, or deter, speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State's showing of a culpable mental state.*³

Michigan's proposed law has no such *mens rea* requirement for the speaker. A prosecution of a speaker based upon the mental state of the listener is unconstitutional. Such an improper standard will cause "a speaker to swallow words that are in fact not true threats."⁴ This chilling effect on protected speech is not permissible.

The prosecutor must show an awareness on the part of the speaker that his statements threatened unlawful violence. Michigan's proposed law fails to meet this standard and, therefore, violates the First Amendment.

DUE PROCESS VIOLATIONS

The Substitute Bill is unconstitutionally vague and overbroad. It clearly violates the Due Process Clauses contained in the 5th and 14th Amendments. The law criminalizes speech and conduct after the words are uttered, and not before. **A criminal statute must have sufficient definiteness that ordinary people can understand what conduct is prohibited.** It cannot encourage arbitrary and discriminatory enforcement. Here, **a reasonable person will have no idea what conduct or speech is prohibited until after they speak and are subsequently prosecuted.**

What words can cause another person to feel frightened? No one knows. What words can cause

another person to feel harassed? No one knows. What words can cause another person to feel intimidated? No one knows. It will be impossible to know ahead of time because the crime is based on the subjective feelings of the alleged victim.

A person can give the same speech, word for word, to two different groups of people and it will result in two different outcomes. You can be prosecuted for the first speech and not prosecuted for the second speech, even though the speeches are identical.

For example, if a speech is delivered to a group of transgender supporters affirming their beliefs, no criminal offense occurs because the hearers of the message agree with the speaker and no one is offended. However, if the identical speech is delivered to a group opposed to transgender issues, a criminal offense could be charged because the hearers of the message "feel" frightened, threatened, or harassed by the speaker. A hate speech law permitting such arbitrary and inconsistent outcomes violates due process, as well as the First Amendment.

The statutory language in HB 4474 is intentionally vague, and the scope of its application is unknowable. The effect of this proposed law is to silence all opposition. **This law will not act as a shield to stop hate crimes, rather, it will be used as a sword to destroy any debate in the public sphere over critical cultural issues facing our country.**

FIRST AMENDMENT VIOLATIONS

Under the First Amendment, everyone's speech must be protected, regardless of whether a majority of the community may disagree with them. This hate speech law will be abused to force people into silence. The proposed law must be limited to "true threats" to satisfy the First Amendment and cannot be broadened to include any speech that may be considered to be "harassment," "intimidation," or "frightening" to others. This bill criminalizes pure speech. This is strictly forbidden by both the United States and Michigan Constitutions.

Speech will be prosecuted depending on the feelings of the alleged victim. If a person,

³ *Id.*; *Speiser v Randall*, 357 U. S. 513, 526 (1958).

⁴ *Id.*

“regardless of the existence of any other motivating factors,” intentionally targets a victim based “on the actual or perceived characteristics” of another individual from a list of protected categories, including race, religion, sexual orientation, and gender identity or expression, they may be prosecuted.

Moreover, there are many people advocating for this hate speech law who also believe words and speech are violence. They will enforce this law accordingly. The law should be clarified to explain that the phrase “uses force or violence” does not include mere disagreeable speech and must involve a “true threat.”

Additionally, the phrase “regardless of the existence of any other motivating factors” (in Section (1)) means that if, based upon your religious faith and conscience, you are peacefully speaking against a policy or a person advocating a position with which you disagree, that will be no defense. Even if your motivating factor is protected speech under the First Amendment, you may still be prosecuted. This is unconstitutional on its face, and clearly violates the First Amendment’s Free Speech and Free Exercise of Religion clauses. This clause conflicts with the later statutory language (inserted in the paragraph defining “intimidate” in Section 8(b)) ostensibly protecting First Amendment rights. Which clause controls? Either a person’s motivating factor (free speech/free exercise of religious conscience) protects the speaker, or it does not. The statute is unclear.

What does it mean to “intimidate” another individual? While the statute includes an objective, “reasonable person” standard, it ultimately depends on the victim’s subjective feelings. The statutory definition makes it clear that **the words mean whatever the victim wants them to mean**. The statute focuses on the victim and his or her response, not on an actual criminal act. If the victim “feels” threatened, frightened, intimidated, etc., a person will be guilty of the crime because the victim merely felt “harassed.” This is **a ridiculously subjective standard**

(applied to the listener and not the speaker) by which to hold someone criminally responsible.

Who is in favor of hate speech? No one. However, in our constitutional republic we must allow disagreeable viewpoints to be expressed if we are to maintain a free society. The way to overcome true hate speech is to expose it to the light of day so reasonable people can refute the hateful message. Speech with which you disagree does not make it hateful.

Who decides what constitutes hate speech sufficient to invoke this new criminal statute? One person’s hate speech is another person’s legitimate and constitutionally protected viewpoint. Under HB 4474, a person can be prosecuted simply by causing a person to become “frightened” through the use of speech alone. This runs afoul of decades of Court precedent and free speech principles. Just because the State of Michigan may disagree with someone’s point of view, no matter how distasteful to one side or the other, it does not give it the authority to criminalize the speaker and throw that person in prison. Disagreement is not oppression. Advocacy is not an arrestable offense.

While the final version of HB 4474 passed by the House did make improvements addressing some of the concerns we raised about the earlier version of the bill, it is still constitutionally infirm. This is primarily because of the “intimidation” category that remains in the bill. Courts have repeatedly held that a heckler’s veto (prohibiting speech based on disagreement with its content) is never permissible.⁵

The 6th Circuit decision in the *Bible Believers* case stands for the principle that **the First Amendment protects unpopular speech and government officials should not endorse a heckler’s veto**. The answer to speech with which you disagree is never to criminalize or censor the speech. The answer is always more speech to allow all points of view to be heard and considered. Supreme Court Justice Louis Brandeis articulated this counter speech doctrine almost 100 years ago when he wrote that the First

⁵ *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015).

Amendment's answer is "more speech, not enforced silence."⁶

In *Bible Believers* the Court stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁷ If the Constitution were to allow for the suppression of minority or disfavored views, the democratic process would become imperiled through the corrosion of our individual freedom. The First Amendment protects speech, even speech that may cause other people to become "frightened."

Because "[t]he right to speak freely and to promote diversity of ideas ... is ... one of the chief distinctions that sets us apart from totalitarian regimes,⁸ dissent is an essential ingredient of our political process." The 6th Circuit also held:

*[W]e reaffirm the comprehensive boundaries of the First Amendment's free speech protection, which envelopes all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation. ... [I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.*⁹

Religious views are no different. "After all, much political and religious speech might be perceived as offensive to some."¹⁰ Accordingly, "[t]he right to free speech ... includes the right to attempt to persuade others to change their views and may not be curtailed simply because the speaker's message may be offensive to his audience."¹¹ Any other rule "would effectively

empower a majority to silence dissidents simply as a matter of personal predilections,"¹² and the government might be inclined to "regulate" offensive speech as "a convenient guise for banning the expression of unpopular views."¹³ We tolerate the speech with which we disagree. When confronted by offensive, thoughtless, or baseless speech that we believe to be untrue, the "answer is [always] more speech."¹⁴

The Supreme Court further emphasized the high protection given to unpopular speech in the case of *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977). *Skokie* was one of the first hate speech decisions in what would become an ongoing debate over the constitutionality of limiting hate speech. The issue arose when the Nazi Party requested permission to hold a demonstration in the community of Skokie, Illinois.

An article is posted on the ACLU's website by ACLU attorney David Goldberger, one of the attorneys defending the Nazi Party.¹⁵ He said "the Nazis' decision to go to Skokie provoked a storm of outrage, because Skokie was a village that was nearly half Jewish and home to hundreds of Holocaust survivors. Skokie officials and their allies tried every possible legal device to block the demonstration, and their efforts triggered a barrage of lawsuits that quickly became known as "the Skokie case." The village's determination to block the Nazi demonstration was so intense that it had the effect of turning the *Skokie* case into a landmark example of the vitality of the First Amendment, as well as the ACLU's fierce commitment to the principle that freedom of speech is a universal right no matter how offensive the message or the speaker."

Attorney Goldberger further stated: "The First Amendment principles that apply to prior restraints are straightforward. **While any effort**

⁶ *Whitney v. California*, 274 U.S. 357 (1927).

⁷ *Snyder v. Phelps*, 562 U.S. 443 (2011).

⁸ *Terminiello v. City of Chicago* (1949).

⁹ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

¹⁰ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹¹ *Hill v. Colorado*, 530 U.S. 703 (2000).

¹² *Cohen v. California*, 403 U.S. 15 (1971).

¹³ *Id.* at 26.

¹⁴ *Williams-Yulee v. Fla. Bar*, 575 U.S. ____, (2015). See also *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁵ <https://www.aclu.org/issues/free-speech/rights-protesters/skokie-case-how-i-came-represent-free-speech-rights-nazis>.

to censor by punishing a speaker after the fact is likely to violate the First Amendment, preventing the speech ahead of time is even more likely to violate the Constitution, even where the anticipated speech is profoundly offensive and hateful. Central to the ACLU's mission is the understanding that **if the government can prevent lawful speech because it is offensive and hateful, then it can prevent any speech that it dislikes.**"¹⁶ He went on, "To this day, the case still brings up difficult feelings about representing a client whose constitutional rights were being violated but who represented the hatred and bigotry that continues to erupt into America's consciousness. I remember being attacked repeatedly as a traitorous Jew. And I remember the anxiety that I would be attacked physically." Yet he fought to preserve the free speech rights of that hate group.

Further, the US Supreme Court ruled that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁷ **It is unconstitutional to force a citizen to violate their conscience or face punishment.**

The House bill also added a clause apparently attempting to provide some protection from potential constitutional violations under a claim of alleged intimidation. The new definition of intimidate also includes the following statement: "Intimidate does not include constitutionally protected activity or conduct that that serves a legitimate purpose." This was likely inserted to attempt to address the obvious constitutional infirmities we previously raised to the initial bill. However, this additional language is merely a truism and is no real improvement. **Every statute passed by the Legislature cannot improperly regulate "constitutionally protected activity."**

This additional language in the bill offers little constitutional protection because it uses the wrong standard of review. "... [a]ctivity or conduct that serves a legitimate purpose" **violates the constitutional standard of review required by the Supreme Court.** The legitimate purpose (also referred to as a rational basis) standard of review of First Amendment issues has repeatedly been rejected by the Supreme Court in free speech cases. If the rational basis test is used, the government almost always prevails in Court. **The proper review of First Amendment speech issues is called "strict scrutiny"** and requires that the government have a compelling interest to regulate the speech and that the government use the least restrictive manner to regulate that speech.¹⁸ **Strict scrutiny is the highest level of constitutional review used by courts when looking at the propriety of government action regulating speech.** When the strict scrutiny standard is used, speech is usually protected and the statute is often struck down.

Both content- and viewpoint- based discrimination are subject to strict scrutiny.¹⁹ No state action that limits protected speech will survive strict scrutiny unless the restriction is serving a compelling governmental interest and is narrowly tailored to use the least-restrictive means available to enforce that compelling interest.²⁰ Punishing, removing, or by other means silencing a speaker due to crowd hostility will seldom, if ever, constitute the least restrictive means available to serve a legitimate government purpose.²¹

¹⁶ Emphasis added.

¹⁷ *West Virginia v. Barnette*, 319 U.S. 624 (1943)

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993)

¹⁹ *McCullen v. Coakley*, 573 U.S. ____ (2014)

²⁰ *United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000)

²¹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Terminiello* (1949); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

CONCLUSION

Legislators need to understand that this law can be turned on anyone. This bill would enable the government to unconstitutionally trample on the individual First Amendment rights of all citizens, no matter which side is exercising its prosecutorial authority. Consider what recently occurred in Los Angeles at the Dodgers game when the team honored the transgender group, the Sisters of Perpetual Indulgence. If the Sisters of Perpetual Indulgence were to put on a demonstration at Comerica Park that is full of anti-Catholic rhetoric, imagery, and speech that would arguably intimidate, frighten, or harass Catholics and make them feel unwelcome at the stadium, they could be charged with a felony

under this statute. If a Catholic filed a complaint with a prosecutor that alleged they felt intimidated, threatened, or frightened by the group's performance, then criminal charges could be filed against members of that transgender group. However, the First Amendment protects all speech, whether that person is transgender, religious, agnostic, or anything else.

Conformity with state-approved speech will now be enforced through government coercion and imposition of criminal penalties, including the loss of your freedom. If "intimidation" remains in this statute, the law will infringe on constitutionally protected speech and will likely be overturned by the Courts for all the above-stated reasons.

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