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TESTIMONY SUBMITTED BY
ANDY HOOVER, LEGISLATIVE DIRECTOR, ACLU OF PENNSYLVANIA
TO
HOUSE JUDICIARY COMMITTEE
RE: HOUSE BILL 1163
BISHOP MCDEVITT HIGH SCHOOL, HARRISBURG
SEPTEMBER 12, 2013

Chairman Marsico, Chairman Caltagirone, and members of the committee, thank you for the opportunity to offer testimony today on House Bill 1163. I am here today on behalf of the 19,000 members of the American Civil Liberties Union of Pennsylvania. Founded in 1920, the ACLU is one of the nation's oldest civil rights organizations.

As you know, HB 1163 creates the crime of "cyber harassment of a child." This crime occurs when a person communicates a statement or opinion about a child's sexuality or sexual activity, physical characteristics, physical or mental condition, or a threat of unlawful harm and does so by electronic means. The bill provides exceptions for communications by adults for medical, educational, or "other legitimate purposes."

To be clear, the intent of the primary sponsor is noble. The language that is being targeted with this legislation is often insulting, hurtful, and damaging. As a father and an uncle of minor children, I appreciate the sponsor's intent.

The language of HB 1163 is so broad, however, that it would give virtually unlimited discretion to prosecutors to file criminal charges against people for mere insults. Speech that is insulting or offensive is entitled to First Amendment protection.[1] As Justice Alito explained when he was a member of the U.S. Court of Appeals for the Third Circuit, "the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."[2] Accordingly, "[w]hen laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[3]

There is no question that HB 1163 would criminalize speech that is protected by the First Amendment. As currently written, HB1163 would subject teenagers to prosecution simply for posting a single negative comment about another teenager on a social media site– even if the subject of the post never learns about it. While such comments may not be nice, the First Amendment does not allow the government to criminalize speech that is impolite.

The fact that the speaker must possess "an intent to harass" does not change the constitutional analysis. "There is no categorical 'harassment exception' to the First Amendment's free speech

[1] *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).
[2] *Saxe v. State College Area School Dist.*, 240 F.3d 200, 206 (3d Cir. 2001).
[3] *Id.*

clause."[4] Statutes prohibiting verbal harassment must be written or at least construed to prohibit only that speech devoid of First Amendment protection and subject to countervailing, compelling interests.[5]

Accordingly, the Pennsylvania Superior Court has held that the repeated wearing of a T-shirt with an expletive in an office open to the public, in spite of a district justice's requests not to do so, was protected speech under the First Amendment and could not form the basis of a charge of harassment.[6] "Only very narrow exceptions, such as obscenity, defamation, and 'fighting words,' have been carved out of this general guarantee of freedom. Any speech which does not fit into one of these narrow exceptions is constitutionally protected regardless of how vulgar or lacking in taste or social, political or artistic content."[7] Thus, the court rejected the argument that the T-shirt was unprotected because it did not express a social or political belief, explaining that "the right to free speech encompasses 'the freedom to speak foolishly and without moderation.'"[8]

Because it targets constitutionally protected speech, HB 1163 would be subject to strict scrutiny. Although courts have recognized a compelling interest in protecting the physical and psychological well-being of minors, the government's chosen means "must be carefully tailored to achieve those ends."[9] The United States Supreme Court has repeatedly struck down laws designed to protect minors from harmful material.[10] "[A] State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed."[11]

It is not at all clear that the Commonwealth of Pennsylvania has a compelling interest in protecting minors from statements or opinions about their sexuality or sexual activity or from disparaging statements or opinions about the minor's physical characteristics, mental or physical health or condition. But even if the Commonwealth has a compelling interest in prohibiting certain statements about minors from being posted to social media or "repeatedly communicated" via electronic communication, the sweeping restrictions of HB 1163 are not narrowly tailored to that interest because the categories of proscribed speech are so broad and the proscription applies whether or not the minor who is the subject of the speech is even aware of it. The First Amendment does not permit the government to censor speech merely because it is mean-spirited, even if it concerns a minor.

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[4] *Saxe*, 240 F.3d at 204.
[5] *See Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) ("Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment."); *United States v. Sturgill*, 563 F.2d 307, 310 (6th Cir. 1977) (striking down harassment statute that punished only spoken words); *Vives v. City of New York*, 305 F. Supp. 2d 289, 301 -302 (S.D.N.Y. 2003), *rev'd in part on other grounds*, 405 F.3d 115 (2nd Cir. 2005) (holding harassment statute unconstitutional to extent it prohibits communications, made with the intent to annoy or alarm, by mechanical or electronic means or otherwise, with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm).
[6] *Commonwealth v. Zullinger*, 450 Pa.Super. 533, 537, 676 A.2d 687, 689 (Pa. Super. 1996).
[7] *Id.* (internal citations and quotations omitted).
[8] *Id.* (quoting *Baumgartner v. United States*, 322 U.S. 665, 674, 64 S. Ct. 1240, 1245 (1944)).
[9] *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).
[10] *See, e.g.*, *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2736 (2011); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 670 (2004); Erznoznik v. Jacksonville, 422 U.S. 205, 212–213 (1975).
[11] *Brown*, 131 S. Ct. at 2736.

In conclusion, the ACLU of Pennsylvania appreciates the opportunity to wade through the nuances of speech law and believes that it benefits the committee to vet these issues thoroughly. We are grateful for Chairman Marsico's passion for protecting the commonwealth's children and look forward to working with the committee to explore how to do that in a way that is constitutionally sound. Thank you for the opportunity to be here today.